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Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard

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DEFINING INTELLECTUAL DISABILITY AND ESTABLISHING A STANDARD OF PROOF: SUGGESTIONS FOR A NATIONAL MODEL STANDARD

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INTRODUCTION

In 2002, an intellectually disabled man, Daryl Renard Atkins, sat on death row after a capital murder conviction.[1] Mr. Atkins was diagnosed as "mildly mentally retarded" after a forensic psychologist reviewed his school and court records and interviewed people who knew him.[2] As further proof of intellectual disability, Mr. Atkins scored fifty-nine on an IQ test.[3] After reviewing Mr. Atkins' records, the US Supreme Court made a precedent-changing decision[4] in which it held that the execution of intellectually disabled persons[5] is unconstitutional as a violation of the Eighth Amendment's[6] restriction on "cruel and unusual punishments."[7]

The *Atkins* Court held that the nation's "evolving standards of decency" precluded states from taking the life of an intellectually disabled offender.[8] The Supreme Court cited, in part, two reasons for its decision: (1) retribution, the justification typically accepted as a basis for the death penalty, may not apply to intellectually disabled offenders;[9]

1. Atkins v. Virginia, 536 U.S. 304, 307 (2002).
2. *Id.* at 308.
3. *Id.* at 309.
4. The *Atkins* Court overruled *Penry v. Lynaugh*, which held that executing intellectually disabled persons is constitutional and not a violation of the Eighth Amendment. 492 US. 302, 340 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).
5. Although the *Atkins* Court used the term "mentally retarded," "the currently preferred term for the disability historically referred to as mental retardation is "intellectual disability," and I will refer to the disorder in this Note by its currently recognized name. Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 120 (2007).
6. U.S. CONST. amend. VIII.
7. *Atkins*, 536 U.S. at 320.
8. *Atkins*, 536 U.S. at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
9. *Id.* at 319.

and (2) intellectually disabled defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[10] Because intellectually disabled defendants are not capable of controlling their impulses or engaging in logical reasoning, they are unable to understand the reason for their punishment.[11] Thus, executing these individuals "is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."[12]

The Court left to the states the task of developing appropriate ways to enforce this constitutional restriction.[13] However, the Court provided guidelines to the states by quoting intellectual disability definitions promulgated by the American Psychiatric Association (APA) in its Diagnostic and Statistical Manual IV (DSM-IV) and the American Association of Mental Retardation (now known as the American Association on Intellectual and Developmental Disabilities (AAIDD)).[14] Though the definitions of intellectual disability endorsed by the APA and the AAIDD are similar, they are not identical. This difference created confusion among the states concerning which definition to follow. Ultimately, some states applied the APA's definition while others applied the definition from the AAIDD. Additionally, the two definitions only address what constitutes intellectual disability and not the legal requirements for proving the disorder. Thus, the Court left states no guidance on the procedural aspects of adjudicating these types of cases. Consequently, the states have varying definitions of intellectual disability and diverse procedures for proving a defendant's mental capacity. This variation creates disparity amongst the states whereby a defendant executed in one state could have been considered intellectually disabled and thus ineligible for execution in another.

It is unknown whether the Court failed to foresee the problems that would arise in applying *Atkins* or purposefully neglected to address them. After ten years of nationwide confusion regarding application of the *Atkins* decision, states have created multiple standards for what evidence is necessary to prove intellectual disability, the standard of

10. *Id.* at 320-21.

11. *Id.* at 318.

12. *Id.* at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

13. *Id.* at 317.

14. *See id.* at 309. The American Association of Mental Retardation changed its name to the AAIDD in 2007, and I will refer to this organization with its current name. *World's Oldest Organization on Intellectual Disability Has a Progressive New Name*, AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (AAIDD), http://www.aaidd.org/content_1314.cfm (last visited Feb. 16, 2013); *see also* Schalock et al., *supra* note 5, at 120.

proof necessary, what type of qualifications are needed to testify as an expert, and whether the determination of a defendant's mental capacity should be made by a judge or jury.[15] The *Atkins* Court set out to protect all individuals with intellectual disabilities,[16] but some states have enacted statutes or upheld case law that is inadequate to protect intellectually disabled persons. Thus, the time has come for states to adopt a new test for the purpose of proving intellectual disability and protecting all intellectually disabled individuals.

In this Note, I suggest a new model definition and standard of proof that all states should apply for determining intellectual disability. In doing so, I analyze the varying standards currently in force in several states and identify those that fail to adequately protect the intellectually disabled and those that best promote the underlying goal of *Atkins*. In demonstrating why a new standard for defining and establishing a defendant's intellectual disability is needed, I use cases from various jurisdictions to show how a defendant's outcome would be different in one state compared to another with different standards. Part I discusses the varying definitions of intellectual disability and the symptoms and characteristics associated with the disorder. It also considers the proposed changes the APA and the AAIDD are making to their definitions of intellectual disability and the impact of these changes. Part II describes several states' varying standards for defining and establishing intellectual disability. Part II also analyzes statutes and cases that apply various Intelligence Quotient (IQ) cutoff scores, differing standards for demonstrating adaptive functioning, and fluctuations regarding the age-of-onset requirement, including evidentiary differences. Part III examines the procedural and burden of proof variations between the states. This includes differences in whether a judge or a jury makes the determination of a defendant's mental capacity, the varying qualifications for testifying experts, and the divergent standards for the burden of proof. Part IV explains the urgent need for change in several states' current intellectual disability laws. Part V proposes a new optimal standard for defining intellectual disability, including evidentiary and procedural standards that all states should adopt.

15. *State Statutes Prohibiting the Death Penalty for People with Mental Retardation*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited Feb. 16, 2013).

16. The Court emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

I. DEFINING INTELLECTUAL DISABILITY

A. Professional Organizations' Diverging Definitions

Since 1876, the AAIDD has been one of the leading organizations dedicated to helping individuals with mental disabilities in the United States.[17] Its mission is to "promote progressive policies, sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities."[18] The AAIDD publishes two journals, the *American Journal on Intellectual and Developmental Disabilities* and *Intellectual and Development Disabilities*.[19] For these reasons, the AAIDD was one of the primary resources for the Supreme Court in *Atkins* and remains a principal guide for many state courts and legislatures attempting to understand and define intellectual disability today.[20]

Another association recognized for its contributions to mental health is the APA. Established in 1844,[21] the APA is the "world's largest psychiatric organization . . . [representing] more than 36,000 psychiatric physicians from the United States and around the world."[22] Part of the organization's mission is to "work together to ensure humane care and effective treatment for all persons with mental disorders, including intellectual developmental disorders and substance use disorders."[23] The APA publishes one of the most widely utilized manuals on mental disorders, known as the Diagnostic and Statistical Manual (DSM).[24] The DSM describes and classifies mental disorders and is used by "health and mental health professionals, including psychiatrists and other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, and counselors."[25]

17. *About Us*, AAIDD, http://www.aaidd.org/content_2383.cfm?navID=2 (last visited Feb. 15, 2013).

18. *Mission*, AAIDD, http://www.aaidd.org/content_443.cfm?navID=129 (last visited Feb. 15, 2013).

19. *Journals*, AAIDD, http://www.aaidd.org/content_577.cfm?navID=154 (last visited Feb. 15, 2013).

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

21. *About APA*, AMERICAN PSYCHIATRIC ASSOCIATION (APA), http://www.psychiatry.org/about-apa--psychiatry (last visited Feb. 16, 2013).

22. *Id.*

23. *Id.*

24. *DSM*, APA, http://www.psychiatry.org/practice/dsm (last visited Feb. 15, 2013).

25. *Id.*

The *Atkins* Court quoted the definition of intellectual disability the AAIDD set forth in 1992.[26] Ten years later, the AAIDD revised that definition,[27] though there were no significant changes to the substantive characteristics of the disorder.[28] The AAIDD further updated its definition of intellectual disability in 2010 by changing the terminology from "mental retardation" to "intellectual disability."[29] The 2010 definition is the most current and is substantively the same as the 2002 definition.[30] Today, the AAIDD states that "[i]ntellectual disability is . . . characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills . . . [and this] disability originates before the age of 18."[31] The AAIDD explained that "the term intellectual disability covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type and duration."[32] The change in terminology from mental retardation to intellectual disability

26. *Atkins*, 536 U.S. at 308 n.3. In 1992, the AAIDD defined intellectual disability as "substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992).

27. *FAQ on Intellectual Disability*, AAIDD, http://www.aaidd.org/content_104.cfm?navID=22 (last visited Feb. 15, 2013). The AAIDD's 2002 definition was "[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills[,] . . . [and this] disability originates before age 18." AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002).

28. Despite various changes to the definitions of intellectual disability "an analysis of the definitions used over the last 50+ years shows that the three essential elements of intellectual disability/mental retardation . . . have not changed substantially." Schalock et al., *supra* note 5, at 119.

29. AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (11th ed. 2010) [hereinafter AAIDD MANUAL]; *see also FAQ on Intellectual Disability*, AAIDD, http://www.aaidd.org/content_104.cfm?navID=22 (last visited Feb. 15, 2013).

30. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013).

31. *Id.*

32. Schalock et al., *supra* note 5.

was motivated by a desire to be less offensive to persons with disabilities.[33]

The AAIDD's most current definition of intellectual disability has three prongs: (1) a limitation in intellectual functioning, (2) limitations in adaptive behavior, and (3) an age of onset before age eighteen.[34] The first prong, "intellectual functioning," relates to a person's overall mental capacity, "such as learning, reasoning, problem solving, and so on."[35] IQ tests are typically used to measure intellectual functioning, and almost all state statutes and state courts utilize IQ tests to determine whether a capital defendant has limited intellectual functioning.[36]

The second prong of the intellectual disability definition is limited adaptive behavior, which the AAIDD characterizes as comprised of three skill sets: conceptual skills, social skills, and practice skills.[37] Conceptual abilities include "language and literacy; money, time, and number concepts; and self-direction."[38] Social capabilities include "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized."[39] Finally, adaptive behavior is also measured by practical skills, which the AAIDD defines as "activities of daily living [such as] (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, [and] use of the telephone."[40] The third prong of the intellectual disability definition is age of onset, which requires characteristics of limited intellectual functioning and adaptive behavior skills to originate before age eighteen.

B. Current APA Definition and the Revised DSM-V

The APA's most recent publication of the DSM is the Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR),

33. *World's Oldest Organization on Intellectual Disability Has a Progressive New Name*, AAIDD, http://www.aaidd.org/content_1314.cfm (last visited Feb. 16, 2013).

34. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013). Almost all State statutes and court decisions require satisfaction of these three prongs or a variation of these three prongs. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 15.

35. *Definition of Intellectual Disability*, AAIDD, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Feb. 16, 2013).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

which was published in 2000.[41] The DSM-IV-TR's current definition of intellectual disability is similar to the AAIDD's definition, and the *Atkins* Court also quoted the DSM-IV-TR's definition while considering how to define intellectual disability.[42] The APA defines the disorder as:

> [Significant] 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 age 18 years (Criterion C).[43]

The DSM-IV-TR's definition breaks down intellectual disability into four categories: (1) mild intellectual disability, which is demonstrated by an IQ level of 50–55 to approximately 70; (2) moderate intellectual disability, which is shown by an IQ of 35–40 to 50–55; (3) severe intellectual disability, which is evidenced by an IQ of 20–25 to 35–40; and (4) profound intellectual disability, which is illustrated by an IQ below 20 or 25.[44] Because the APA and AAIDD definitions of intellectual disability are so similar, it may be difficult for laypersons, attorneys, and judges to differentiate between them. Some practitioners have said that the "DSM-IV-TR definition differs from the [AAIDD] definition in that it retains the concept of 'levels' of [intellectual disability]".[45] This is evidenced by the APA's breakdown of IQ scores into four categories. Because some states have adopted the AAIDD's definition while others have adopted the APA's definition through statute or case law,[46] it is essential to recognize the variations between the definitions to

41. The DSM is updated and revised routinely to illustrate the most up-to-date diagnoses and symptoms of particular diseases. *See DSM-IV-TR*, APA, http://www.psychiatry.org/practice/dsm/dsm-iv-tr (last visited Feb. 15, 2013). The DSM remains current throughout several years without any revisions because many diagnoses and symptoms have a settled definition amongst mental healthcare practitioners. *Id.* This is evidenced by a six-year gap between publication of the DSM-IV in 1994 and the revision in the DSM-IV-TR in 2000. *See id.*

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

43. *Id* at 308 n.3; *see also* APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) [hereinafter DSM-IV-TR]. The definition set forth in the DSM-IV-TR retains the term "mental retardation," because the manual was published before the term intellectual disability took hold in 2007. *See id.*

44. DSM-IV-TR, *supra* note 43, at 42.

45. PATRICIA AINSWORTH & PAMELA BAKER, UNDERSTANDING MENTAL RETARDATION 68 (2004).

46. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 15.

understand the challenges intellectually disabled capital defendants face in different jurisdictions.

The APA is currently working on an updated version of the DSM, the DSM-V, which will be released in May 2013.[47] In developing the DSM-V and revising the definition of intellectual disability, the APA sought feedback from the AAIDD to determine what changes should be made to its definition of intellectual disability.[48] The APA is committed to changing its terminology from "mental retardation" to "intellectual disability" as did the AAIDD in 2007.[49] One of the APA's rationales for changing the term to intellectual disability is "consistency with AAIDD" practices.[50] This move is significant because it demonstrates that the two largest mental health organizations in the United States are working together to unify their definitions of intellectual disability. States should do the same.

The DSM-V will rename intellectual disability "Intellectual Developmental Disorder."[51] Like the AAIID, the DSM-V will characterize the disorder as having three criteria.[52] The first two are

47. *DSM-V Development Timeline*, APA, http://www.dsm5.org/about/Pages/Timeline.aspx (last visited Feb. 15, 2013). The DSM-V will be released at the APA annual convention which is scheduled for May 18-22, 2013 in San Francisco, California. *Id.*

48. *See* Letter from AAIDD 11th Edition Implementation Committee to DSM-V ASD and Developmental Disorders Subgroup, ID Subcommittee, *Public Comments Regarding Draft Definition of Intellectual Disability* (Feb. 22, 2010), *available at* http://www.aaidd.org/media/PDFs/DSMV.pdf.

49. Schalock et al., *supra* note 5. As evidence of its commitment, the APA announced in a 2009 report of the DSM-V work group that the DSM-IV's use of the term "[m]ental retardation to describe cognitive deficits . . . is outdated and considered pejorative by many . . ., [thus] the work group is considering a change to the term '[i]ntellectual disabilities.'" SUSAN SWEDO, REPORT OF THE DSM-V NEURODEVELOPMENTAL DISORDERS WORK GROUP (Apr. 2009), http://www.dsm5.org/progressreports/pages/0904reportofthedsmvneurodevelopmentaldisordersworkgroup.aspx.

50. *Intellectual Developmental Disorder Rationale*, APA, http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=384# (last visited Feb. 15, 2013).

51. *Id.*

52. The three criteria are: deficits in general mental abilities, limitations and significant impairment in adaptive functioning, and onset during the developmental period. *Intellectual Developmental Disorder Proposed Revision*, APA, http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=384# (last visited Feb. 15, 2012). The AAIDD urged the APA to "not specify a hard and fast cutoff point/score for meeting the significant limitations criteria for both intelligence and adaptive behavior scores. Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement." *See* Letter from AAIDD, *supra* note 48.

substantially similar to the AAIDD; however, the DSM-V's third criterion is a substantial change from prior definitions that required an age of onset before age eighteen.[53] The APA's proposed age-of-onset requirement is "onset during the developmental period."[54] This is a broader standard than a strict age-of-onset requirement of eighteen years because a person who has not shown any symptoms before his eighteenth birthday but shows symptoms beginning at the age of nineteen and through the early adult years may still be in a developmental period in his life. Without providing a more detailed definition for what constitutes one's "developmental period" or providing any reasoning for eliminating the strict age-of-onset requirement, the APA could be opening up floodgates for future litigation in *Atkins* claims regarding whether the language refers to an age of onset prior to eighteen or whether it is now a broader standard. If the APA is in fact promulgating a broader standard for determining who qualifies as intellectually disabled, this could significantly help intellectually disabled defendants making an *Atkins* claim who did not show symptoms prior to the age of eighteen. However, because the term "developmental period" is ambiguous, it may cause the legal community more confusion when courts attempt to apply this vague standard. Judges and juries are not equipped to ascertain what "developmental period" means without guidance from the APA, and this imprecise language may result in courts deferring to the traditional standard of an age of onset prior to age eighteen.

II. SUBSTANTIVE DIFFERENCES BETWEEN VARIOUS STATE STATUTES AND CASE LAW

The principal problem with the *Atkins* decision is the Court's failure to establish a bright-line test for determining when a defendant is intellectually disabled and thus qualifies for the death penalty exception. Although many states generally follow the definitions set forth by the AAIDD and the APA, several states have different standards for what constitutes intellectual disability. Whether defined by statute or case law, states differ on how to satisfy the fundamental three-pronged test promulgated by both the AAIDD and the APA.[55]

53. DSM-IV-TR, *supra* note 43, at 41. *See also Definition of Intellectual Disability*, AAIDD, http://www.aaidd.org/content_100.cfm?navID=21 (last visited Feb. 16, 2013).

54. *Intellectual Developmental Disorder*, APA, http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=384# (last visited Feb. 15, 2013).

55. *See supra* Parts I.A–B for a discussion of the three-pronged tests established by the AAIDD and APA. Most state statutes and court decisions require satisfaction of these three prongs or a variation of these

A. Varying IQ Cutoff Scores and Presumptions of Intellectual Disability

A generally accepted way to determine a limitation in intellectual functioning is testing a defendant's IQ. There are different types of IQ tests, but it is typically accepted that an intellectual disability is demonstrated by an IQ of 50–55 to approximately 70.[56] Because of this definition, several states have varying IQ cutoff scores for determining whether an individual suffers from an intellectual disability.

1. Different IQ Cutoff Scores

Imagine a man on trial whose life or death hinges on the definition of intellectual disability. He has taken an IQ test and scored a seventy-one. He has psychologists testify that he is intellectually disabled even though his IQ test score is higher than what is typically recognized as intellectually disabled by the DSM-IV-TR. If this man were tried in California, he would likely be found intellectually disabled despite his higher IQ test score. California is one of the most lenient states regarding IQ cutoff scores because the California Penal Code defines "intellectually disabled" as "the condition of significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."[57] This definition conforms to the definitions promulgated by the AAIDD and the APA, except that it does not mention an IQ cutoff score. Because of this, the Supreme Court of California declined to adopt an "IQ of 70 as the upper limit for making a prima facie showing [of intellectual disability]."[58] Instead, the court held that "a fixed cutoff is inconsistent with established clinical definitions and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing."[59] The court also stated that "IQ test scores are insufficiently precise to utilize a fixed cutoff in this context."[60] Thus, the man who scores a seventy or above on an IQ test in California would be able to present more evidence to prove his intellectual disability and have a better chance of avoiding execution.

Now picture the same man on trial in Kentucky. The Kentucky Penal Code requires an individual to have an IQ score of 70 or below to be considered intellectually disabled.[61] If this man, who has an IQ test

three prongs. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 15.

56. *See* DSM-IV-TR, *supra* note 43.

57. CAL. PENAL CODE § 1376(a) (West 2012).

58. *In re* Hawthorne, 105 P.3d 552, 557 (Cal. 2005).

59. *Id.*

60. *Id.*

61. KY. REV. STAT. ANN. § 532.130(2) (West 2012).

score of 71, were tried in Kentucky, he would not be found intellectually disabled and could be sentenced to death. This is a drastic difference from California's lenient policy of not requiring a strict IQ cutoff score. Kentucky's strict statute allows for the potential execution of this man because of one meager point on an IQ test, whereas the same man would likely live in California.

2. IQ Scores as Rebuttable Presumptions

Some states treat IQ scores as presumptive evidence of intellectual disability or the lack thereof. Imagine that the same man above, who scored a 71 on an IQ test, is on trial in Illinois. The Illinois statute defining intellectual disability states that "[a]n intelligence quotient of 75 or below is presumptive evidence of an intellectual disability."[62] Thus, this same man would benefit from a presumption of intellectual disability in Illinois and would likely not be sentenced to death. Although the Illinois statute is one of the more lenient statutes in the United States, it is not as lenient as the California statute which does not specify an IQ cutoff score.

Now envision the same man on trial in Ohio. In *State v. Lott*, the Supreme Court of Ohio held that "there is a rebuttable presumption that a defendant is *not* [intellectually disabled] if his or her IQ is above 70."[63] The difference between the California and Illinois statutes and Ohio case law is that the same man who scores a 71 on an IQ test in Ohio has a greater burden than he would have in California and Illinois for proving the existence of an intellectual disability because Ohio presumes *no* intellectual disability when a defendant's IQ scores are above 70. Ohio case law also differs from the Kentucky statute because Kentucky does not provide for a rebuttable presumption at all, but instead has a strict IQ cutoff score of seventy for finding the existence of an intellectual disability.

To rebut Ohio's presumption of no intellectual disability, this same man would have to rely more heavily on proving the other two prongs of the intellectual disability definition: (1) age of onset before eighteen years old and (2) significant limitations in adaptive functioning.[64] For example, in *Lott*, the Supreme Court of Ohio accepted affidavits from the defendant's "family and friends showing personality problems and behavioral indicators of early-life trauma"[65] to prove limitations in adaptive behavior prior to age eighteen. In Kentucky, however, no evidence of adaptive behavior is accepted if the defendant's IQ test score

62. 725 ILL. COMP. STAT. ANN. § 5/114-15(d) (2012).

63. State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (emphasis added).

64. *Id.* The Supreme Court of Ohio held that "[t]he trial court should rely on professional evaluations of . . . mental status, and consider expert testimony . . . ." *Id.* at 1015.

65. *Id.* at 1013.

is above 70.[66] California, on the other hand, recognizes the importance of not having a fixed IQ cutoff score and thus eases the burden on defendants attempting to prove an intellectual disability.[67]

Now envision a different man with an IQ test score of 66. This man would most likely be sentenced to death in Arkansas because of different state standards. The statute in Arkansas defining intellectual disability states that "there is a rebuttable presumption of [intellectual disability] when a defendant has an intelligence quotient of sixty-five or below."[68] Arkansas places a higher burden on the defendant to prove intellectual disability through age of onset and adaptive behavior requirements if the defendant's IQ score is above 65, as opposed to the Ohio standard of 70 or below and the Illinois standard of 75 or below. This statute is one of the strictest statutes in the United States.[69] Despite the APA recommendation that intellectual disability is demonstrated by an IQ level of 50–55 to approximately 70,[70] Arkansas allows individuals who would be considered intellectually disabled in a majority of states to be sentenced to death.[71]

B. Differences in Defining Limitations in Adaptive Behavior

Although both the AAIDD and the APA have defined adaptive behavior and what constitutes a limitation in adaptive functioning,[72] several states have varying definitions of what adaptive functioning actually is. This in turn causes drastic variations in what evidence defendants are required to present to prove this element of intellectual disability. According to the Supreme Court of Tennessee in *Coleman v. State*, limitations in adaptive behavior means an individual is unable to adapt to surrounding circumstances.[73] Although this definition is similar

66. *See* Bowling v. Kentucky, 163 S.W.3d 361, 373 (Ky. 2005).

67. *In re* Hawthorne, 105 P.3d 552, 557 (Cal. 2005).

68. ARK. CODE ANN. § 5-4-618 (2012).

69. *See* DEATH PENALTY INFORMATION CENTER, *supra* note 15. Another state that imposes strict IQ cutoff scores is Arizona. The Supreme Court of Arizona held that "an IQ of sixty-five or below establishes a rebuttable presumption of [intellectual disability]." State v. Arellano, 143 P.3d 1015, 1018 (Ariz. 2006).

70. *See* DSM-IV-TR, *supra* note 43.

71. For example, the Supreme Court of New Jersey held that "[b]ecause the DSM-IV definition recognizes a measurement error of five points in assessing I.Q., persons with I.Q.s between 70 and 75 who exhibit significant deficits in adaptive behavior may be [intellectually disabled]." State v. Jimenez, 908 A.2d 181, 184 n.3 (N.J. 2006).

72. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013). *See also* DSM-IV-TR, *supra* note 43.

73. Coleman v. State, 341 S.W.3d 221, 248 (Tenn. 2011) (quoting State v. Smith, 893 S.W.2d 908, 918 (Tenn. 2003)).

to the AAIDD's, it is not identical. The Supreme Court of Tennessee narrows its definition of adaptive behavior by noting that "[an intellectually disabled] person will have significant limitations in *at least two* of the following basic skills: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[74] The court noted that it drew its definition of adaptive behavior from the APA's DSM-IV because mental health practitioners rely on the DSM-IV in diagnosing mental disorders.[75] However, the AAIDD is also relied upon in the mental health field, leading the states that rely on its definition to follow a slightly different standard.[76]

In *Ex Parte Briseno*, the Texas Court of Criminal Appeals adopted the AAIDD's definition and noted that impairments in adaptive behavior consist of substantial impairments in a person's ability to meet the expected cultural and age-appropriate "standards of maturation, learning, personal independence, and/or social responsibility."[77] This definition may be a stricter standard to meet than the Supreme Court of Tennessee's definition, which narrows the requirement of limited adaptive behavior. The Supreme Court of Tennessee, adopting the APA, only requires deficits in at least two basic adaptive behavior skills whereas the Texas Court of Criminal Appeals does not specify a particular number of skills that should be impaired.[78] Instead, the Texas court's definition, following the AAIDD, is categorically broad and thus strict because it could be argued that the Texas court's definition of limited adaptive behavior requires an intellectually disabled defendant to show impairments in *all* areas of adaptive behavior skills,[79] as opposed to

74. *Id.* (quoting Van Tran v. State, 66 S.W.3d 790, 785 (Tenn. 2001)) (emphasis added).

75. *Id.*

76. For example, the Texas Court of Criminal Appeals held that "[u]ntil the Texas Legislature provides an alternate statutory definition of '[intellectual disability]' for use in capital sentencing, we will follow the [AAIDD]." *Ex Parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

77. *Id.* at 7 n.25; *see also* TEX. HEALTH & SAFETY CODE ANN. § 591.003 (1) (2012).

78. Basic adaptive behavior skills include: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Coleman v. State, 341 S.W.3d 221, 248 (Tenn. 2011) (quoting Van Tran v. State, 66 S.W.3d 790, 785 (Tenn. 2001)); *see also* DSM-IV-TR, *supra* note 43.

79. *Briseno*, 135 S.W.3d at 7. The AAIDD specifies that adaptive behavior is multi-dimensional made up of conceptual, social, and practical skills. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013). Examples of conceptual skills include "receptive and expressive language, reading and writing, money concepts [and] self-directions." *Id.* Examples of social skills include "interpersonal,

the Supreme Court of Tennessee's requirement of demonstrating only two impairments.[80] This is a significant difference because some states adopt the AAIDD's definition of limited adaptive behavior, like Texas, while others adopt the APA's definition, like Tennessee. Ultimately, the difference between the two definitions may drastically vary regarding what evidence defendants are required to present to prove limited adaptive functioning skills.

C. Varying Age-of-Onset Requirements

Because both the AAIDD and the APA definitions of intellectual disability describe the disability as originating before age eighteen,[81] the majority of states have adopted this requirement through legislation or case law.[82] However, some states have instituted a lower standard for the defendant by liberalizing the age-of-onset requirement. In Maryland, "a defendant is [intellectually disabled] if . . . the [intellectual disability] was manifested before the age of 22 years."[83] By increasing the age of onset to twenty-two, defendants facing the death penalty have an additional four years of evidence to present to the court and jury regarding onset of intellectual disability compared to states with a strict age eighteen cutoff. Like Maryland, an Indiana statute also states that an intellectual disability must manifest before age twenty-two.[84] In *Witt v. State*, the Indiana Court of Appeals held that when evaluating whether a defendant has an intellectual disability, "[s]ubsequent tests may be of less significance, but the overall evaluation including behavior and tests after age twenty-two may be relevant."[85] These two states represent the most relaxed standard for the age-of-onset requirement.[86]

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responsibility, self-esteem, gullibility, . . . naiveté, follows rules, obeys laws, [and] avoids victimization." *Id.* Examples of practical skills include: "personal activities of daily living such as eating, dressing, mobility and toileting[;] [i]nstrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation, and doing housekeeping activities [and] occupational skills." *Id.*

80. *See* Coleman v. State, 341 S.W.3d 221, 248 (Tenn. 2011); *see* DSM-IV-TR, *supra* note 43.

81. DSM-IV-TR, *supra* note 43. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013).

82. DEATH PENALTY INFORMATION CENTER, *supra* note 15.

83. MD. CODE ANN. CRIM. LAW § 2-202(b)(1)(ii) (LexisNexis 2012).

84. IND. CODE ANN. § 35-36-9-2 (West 2012).

85. Witt v. State, 938 N.E.2d 1193, 1199 (Ind. Ct. App. 2010) (citing Pruitt v. State, 834 N.E.2d 90, 106 (Ind. 2005)).

86. Although there are individuals with traumatic brain injuries occurring later in life that exhibit symptoms identical to those diagnosed with an

III. PROCEDURAL DIFFERENCES AND VARIATIONS IN BURDEN OF PROOF

A. A Judge or Jury Decision?

Another issue that the Supreme Court failed to address in *Atkins* is whether the determination of a defendant's intellectual disability—in essence, the determination of life or death—should be in the hands of a judge or jury. Because of the failure of the *Atkins* Court to address and standardize this issue, some states allow the determination of a capital defendant's intellectual disability to be made by the judge in a pre-trial hearing.[87] However, several cases since *Atkins* consist of a capital defendant arguing that there is a Sixth Amendment[88] "right to a speedy and public trial by an impartial jury" regarding whether the defendant is intellectually disabled. In *Ex Parte Briseno*, Mr. Briseno claimed that he was entitled to a jury determination regarding his intellectual disability based on *Atkins*.[89] However, the Texas court held that "*Atkins* [does] not require a post-conviction jury determination of [an] applicant's claim of [intellectual disability]."[90]

Like the Texas court, the Supreme Court of California has held that there is no constitutional right to a jury trial for post-conviction claims.[91] The California Supreme Court distinguished between pre-conviction and post-conviction defendants by allowing pre-convicted defendants the option of an evidentiary hearing with a judge as the sole fact finder or a jury trial, while post-conviction defendants do not have the option for a jury trial after conviction.[92] Pre-conviction and post-conviction defendants are treated differently because there is no constitutional or statutory imperative to treat them the same in this context.[93]

In New Jersey, a capital defendant has four opportunities to present evidence regarding a claim of intellectual disability: [1] "at pretrial before the trial court; [2] before a jury during the guilt phase [of] trial; [3] at a separate hearing before a jury after the guilt phase [of] trial; and,

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intellectual disability, the scope of this Note does not include whether individuals with traumatic brain injuries should be considered intellectually disabled within the definitions set out by the AAIDD and the APA.

87. *See* Bowling v. Kentucky, 163 S.W.3d 361, 369 (Ky. 2005); *see* KY. REV. STAT. ANN. § 532.135 (West 2012); People v. Vasquez, 84 P.3d 1019, 1023 (Colo. 2004) (holding that a defendant must prove intellectual disability by clear and convincing evidence in a pre-trial hearing).

88. *See* U.S. CONST. amend. VI.

89. *Ex Parte* Briseno, 135 S.W.3d 1, 4 (Tex. Crim. App. 2004).

90. *Id.* at 9.

91. *See In re* Hawthorne, 105 P.3d 552, 558 (Cal. 2005).

92. *Id.*

93. *Id.*

finally, [4] before a jury at the penalty-phase [of] trial as mitigation."[94] Similarly, the Arizona legislature "requires a pretrial hearing at which a defendant may attempt to show . . . that he has [an intellectual disability]; if he fails to make that showing, the defendant may still present evidence [of an intellectual disability] to the jury in mitigation of his sentence."[95]

In Ohio, courts are allowed to conduct de novo reviews of the evidence to determine whether a defendant is intellectually disabled.[96] The Supreme Court of Ohio held that a judge, not a jury, should make the determination of whether a capital defendant is intellectually disabled.[97] Thus, "a trial court's ruling on [intellectual disability] should be conducted in a manner comparable to a ruling on competency (i.e., the judge, not the jury decides the issue.)"[98] These state variations regarding judge or jury determinations result in a greater burden on some defendants.[99] Those defendants living in states that allow pre-trial hearings must convince only one person—the judge—of an intellectual disability, whereas defendants in other states must convince an entire jury. Although convincing a judge is not an easy burden, it may be less of a burden on the defendant than having to convince a group of laymen who may be more prejudiced than a judge.

B. Varying Qualifications for Testifying Experts

The criteria for who is qualified to testify as an expert regarding a capital defendant's intellectual disability are not addressed in either the AAIDD or APA definitions of intellectual disability.[100] Also, because the *Atkins* Court failed to set any standards regarding what qualifications are required for experts to testify on behalf of defendants, some states do not have any required qualifications.[101] All states should have a standard

94. State v. Jimenez, 908 A.2d 181, 192 (N.J. 2006).

95. State v. Grell, 135 P.3d 696, 703 (Ariz. 2006). Additionally, the court pointed out that "[a]ll defendants who do not prove mental retardation at the pretrial hearing retain the ability to present mental retardation evidence to the jury." *Id.* at 704.

96. State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002).

97. *Id.*

98. *Id.*

99. *See Jimenez*, 908 A.2d at 189.

100. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013); *see also* DSM-IV-TR, *supra* note 43; *In re* Hearn, 418 F.3d 444, 446 (5th Cir. 2005).

101. For example, California's statute states that "[if] the prosecution seeks the death penalty, the defendant may . . . apply for . . . an [intellectual disability] hearing [to] be conducted [and] upon the submission of a declaration by a *qualified expert* stating his . . . opinion . . .[,] the court

for qualifications required of testifying experts because not all psychologists and psychiatrists are accustomed to working with patients with intellectual disabilities. By not implementing a standard for testifying experts, some states risk executing an intellectually disabled individual due to reliance on the testimony of inexperienced "experts." The AAIDD recommends that a defendant's intellectual disability assessment be done by a specialized professional.[102] Specifically, the AAIDD states that "[a]ssessment data should be reported by an examiner experienced with people who have [intellectual disabilities]; who is qualified in terms of professional and state regulations; and who has met . . . guidelines for conducting a thorough, valid psychological evaluation of the individual's intellectual functioning."[103]

Mr. Jose Garcia Briseno suffered due to his state's failure to implement standards for testifying experts.[104] In *Ex Parte Briseno*, a Texas court stated that "what constitutes [intellectual disability] in a particular case varies sharply depending upon who performs the analysis and the methodology used."[105] The defense expert specialized in the treatment of intellectual disability and mental illness, whereas the state's expert specialized in statistical methodology and forensic diagnosis.[106] The defense's expert focused on looking for "the person's adaptive deficits and limitations [while] putting aside his positive adaptive skills . . . [and concentrating on] socially acceptable and successful skills."[107] However, the state's expert emphasized "the person's positive adaptive abilities and coping skills . . . [and focused on] whether the person has rational responses to external situations."[108]

Because of the differences in expertise, backgrounds, and experience, the defense's expert diagnosed Mr. Briseno with an intellectual disability whereas the state's expert found no intellectual disability but rather an antisocial personality disorder, which is not a defense against the death penalty.[109] Ultimately, Mr. Briseno did not prove that he had impairments in adaptive behavior. His IQ score of 72 was too high, and the Texas court held that he did not have an intellectual disability[110]. It

shall order a hearing." CAL. PENAL CODE § 1376 (b)(1) (West 2012) (emphasis added). Although the statute refers to a "qualified expert," it does not define what qualifications a "qualified expert" must have.

102. AAIDD MANUAL, *supra* note 29, at 40.

103. *Id.* at 40-41.

104. *See Ex Parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).

105. *Id.* at 13.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 14, 18.

is possible that the court would have come to a different conclusion if both experts had expertise in the area of intellectual disabilities. This expertise could have instead inspired similar expert conclusions about limitations in adaptive behavior.

C. Divergent Standards for Defendants' Burden of Proof

After the *Atkins* decision, many states implemented their own procedures for determining whether a capital defendant is intellectually disabled. In doing so, "every state that has addressed the issue has found that the defendant should bear the burden of proof on an *Atkins* claim."[111] However, the critical issue became what burden of proof to apply in *Atkins* situations: by a preponderance of the evidence, clear and convincing evidence,[112] or beyond a reasonable doubt. States place varying burdens on defendants attempting to prove intellectual disabilities, and that may be detrimental to capital defendants in jurisdictions with higher burdens.

The Indiana Supreme Court has refused to impose a clear and convincing evidence standard and has instead adopted a preponderance of the evidence standard. The court explained that such a high burden of proof for the defendant "'would result in execution of some persons who are [intellectually disabled]' and that 'the defendant's right not to be executed if [intellectually disabled] outweighs the state's interest' in imposing the death penalty."[113] However, other states require a clear and convincing evidence standard. In *Arizona v. Grell*, the Arizona Supreme Court held that "a defendant may attempt to show, by clear and convincing evidence, that he has an [intellectual disability]."[114] Although some states require a clear and convincing evidence standard, those opting to reject this high burden of proof argue that "the definitive inquiry is the assessment of the relative risks faced by the parties: the defendant's risk of death compared to the state's minimal interest in executing a defendant who will otherwise go to prison for life."[115]

In *Hill v. Schofield*, the Eleventh Circuit Court of Appeals, applying Georgia law, determined that a beyond a reasonable doubt standard

111. State v. Jimenez, 908 A.2d 181, 188 (N.J. 2006).

112. Clear and convincing evidence is defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain . . . this is a greater burden than preponderance of the evidence . . . but less than evidence beyond a reasonable doubt." BLACK'S LAW DICTIONARY 256 (3d ed. 2006).

113. *Jimenez*, 908 A.2d at 188 (quoting Pruitt v. State, 834 N.E.2d 90, 103 (Ind. 2005), *aff'd*, 903 N.E.2d 899 (Ind. 2009)).

114. State v. Grell, 135 P.3d 696, 703 (Ariz. 2006).

115. *Id.* at 704.

places too high a burden on intellectually disabled defendants.[116] The court reiterated the concerns of the Supreme Court in *Atkins* and stated that intellectually disabled "defendants are unable to contribute fully to their defenses . . . [because] of a lack of knowledge of basic facts, and an increased susceptibility to the influence of authority figures."[117] Additionally, because of the subjective nature of determining whether a defendant has an intellectual disability, "the reasonable doubt standard unquestionably will result in the execution of those offenders that *Atkins* protects."[118] On appeal, the court upheld a beyond a reasonable doubt standard for individuals claiming intellectual disability.[119] The decision elicited strong dissents, arguing that "[r]equiring proof beyond a reasonable doubt, when applied to the highly subjective determination of [intellectual disability], eviscerates the Eighth Amendment constitutional right of all [intellectually disabled] offenders not to be executed, contrary to *Atkins v. Virginia*."[120] Most states, however, apply a preponderance of the evidence standard, because these states recognize that intellectually disabled defendants make poor witnesses.[121]

IV. THE NEED FOR A NEW INTELLECTUAL DISABILITY STANDARD

A. Why a Change in the Law Is Needed

Several years ago, people with intellectual disabilities were ostracized and faced harsh discrimination, including being labeled "imbeciles."[122] The early prejudices against people with mental disabilities resulted in

116. Hill v. Schofield, 608 F.3d 1272, 1281 (11th Cir. 2010), *vacated*, 625 F.3d 1335 (11th Cir.), *and aff'd en banc sub nom*, Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2727 (2012), *reh'g denied*, 2012 WL 3761964 (Aug. 31, 2012) (holding that a beyond a reasonable doubt standard for individuals claiming intellectual disability is not unconstitutional).

117. *Schofield*, 608 F.3d at 1281 (citing Atkins v. Virginia, 536 U.S. 304, 318 (2002)).

118. *Id.*

119. Hill v. Humphrey, 662 F.3d 1335, 1360 (11th Cir. 2011).

120. *Id.* at 1365 (Barkett, J., dissenting).

121. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002). In *State v. Lott*, the Supreme Court of Ohio held that the defendant "bears the burden of establishing that he is [intellectually disabled] by a preponderance of the evidence." 779 N.E.2d 1011, 1015 (Ohio 2002). Similarly, the Texas Court of Criminal Appeals also held that a capital defendant "bears the burden of proof, by a preponderance of the evidence." *Ex Parte* Briseno, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).

122. *See* Robert Perske, *Coming Out of the Darkness: America's Criminal Justice System and Persons with Intellectual Disabilities in the 20th Century*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 216, 216 (2007).

many living out their lives in isolated institutions.[123] However, starting in the 1950's, the nation's view of people with intellectual disabilities began to change.[124] By the time *Atkins* was decided, there had been a transformative shift in society's opinions and views regarding persons with intellectual disabilities.[125] This evolution played a critical role in the Supreme Court's decision in *Atkins*.[126] The *Atkins* Court overruled *Penry v. Lynaugh*, a 1989 decision where the Court held that the Eighth Amendment did not prohibit the death sentence for intellectually disabled defendants.[127] The *Atkins* Court relied on evidence of the nation's "evolving standards of decency that mark the progress of a maturing society."[128] This evidence was based on the Court's finding that a number of states had outlawed the death penalty for intellectually disabled persons. The Court emphasized the "consistency in the direction of change"[129] and noted that "today our society views [intellectually disabled] offenders as categorically less culpable than the average criminal"[130] because their intellectual disabilities impair their "[capacity] to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[131]

Because the goal of the *Atkins* decision was to ensure that all intellectually disabled persons are constitutionally protected from the death penalty,[132] this goal is undermined when some states incorporate inadequate protective standards that lead to death for some intellectually disabled persons. Although the *Atkins* Court allowed states to develop their own ways of enforcing its holding,[133] there may be a better way to apply *Atkins*' constitutional restriction through a new model standard for determining intellectual disability.

123. *See id.* at 217.

124. *Id.*

125. *See Atkins*, 536 U.S. at 311-12 (2002).

126. *See id.* at 320.

127. Penry v. Lynaugh 492 US. 302, 340 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

128. *Atkins*, 536 U.S. at 312.

129. *Id.* at 315.

130. *Id.* at 316.

131. *Id.* at 318.

132. *See id.*

133. *Id.* at 317.

B. Substantive Differences

1. The Effect of Varying IQ Cutoff Scores

Although IQ tests are objective and easy to administer,[134] there are limits to their reliability.[135] Psychologists have stated that "[a] major issue confronting the courts in *Atkins* cases resides in their understanding (or misunderstanding) of what intelligence tests measure and how well they measure the construct of intelligence."[136] Generally, courts have a difficult time understanding that intellectually disabled individuals can have more than one true IQ score.[137] This is due to the IQ test scores' standard error of measurement, which is clear to psychologists but not to judges or juries responsible for deciding *Atkins* cases. The standard error of measurement accounts for a "band of error concept" that is plus or minus five points from the test taker's score.[138] For example, an individual who scores a 70 on an IQ test actually has a score anywhere between 65 and 75. However, because courts do not understand the standard error of measurement, courts have held that "use of the standard error of measurement to lower an IQ score could just as likely be used to raise an IQ score, and that the use of such a statistic is inherently 'speculative.'"[139]

Another problem with IQ tests is the phenomenon known as the Flynn Effect. This phenomenon is the "general upward trend in IQ scores" over several years.[140] An upward trend in test scores occurs because "IQ test norms become obsolete . . . [and] intelligence test norms have to periodically be recalibrated to maintain their accuracy in reflecting an individual's level of intelligence."[141] This is a critical issue,

134. William Lichten & Elliott W. Simon, *Defining Mental Retardation: A Matter of Life or Death*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 335, 337 (2007).

135. *Id.* at 338.

136. Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 APPLIED NEUROPSYCHOLOGY 91, 92-93 (2009).

137. *Id.* at 93.

138. *Id.* at 94.

139. *Id.*

140. *Id.* at 93.

141. *Id.* Re-calibrating an IQ test requires the test to be normed. When an IQ test is re-calibrated, higher raw scores are assigned to obtain an IQ score of 100 than was previously necessary to achieve the same score. "Thus, over the course of the past century, a higher and higher proportion of questions had to be answered correctly to obtain the identical IQ score of the prior cohort." Stephen J. Ceci et al., *The Difficulty of Basing Death Penalty Eligibility on IQ Cutoff Scores for Mental Retardation*, 13 ETHICS & BEHAVIOR 11, 12 (2003).

because psychologists have determined that "Americans gain an average of approximately 0.3 IQ points per year or 3 points per decade in measured intelligence."[142] If an IQ test has not been recalibrated recently, a capital defendant on death row could possibly score higher on the test than his actual IQ score, which would result in execution.

Because of the gravity of the situation, mental health professionals have pointed out that high-stakes decisions involving life and death should not be made based on a single test score,[143] especially when that single test score is affected by the Flynn Effect which can produce IQ scores that effectively move defendants out of the range of intellectual disability recognized by various states.[144] Thus, states that fail to consider the Flynn Effect could ultimately put intellectually disabled individuals to death because of stricter IQ cutoff scores. Because of the Flynn Effect and the standard error of measurement, states should not apply a fixed IQ cutoff score. Rather, IQ score requirements should incorporate plus or minus five points from the test taker's score. To determine whether individuals have an intellectual disability without considering the Flynn Effect and the standard error of measurement "would cause undue harm and would violate the Constitutional rights of these individuals."[145]

2. Subjective Determination of Adaptive Behavior

Determining a capital defendant's adaptive behavior skills is difficult and potentially problematic. Courts have stated that "[t]he adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases."[146] Because the determination of an individual's adaptive behavior skills could result in that individual's execution, states should incorporate a standardized test to address the problem of subjectivity. The AAIDD states that "a comprehensive standardized measure of adaptive behavior should be used in making the determination of the individual's current adaptive behavior functioning."[147] Similar to IQ tests, standardized adaptive behavior tests also suffer from a standard error of measure.[148] Thus, courts using standardized adaptive behavior

142. Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 INTELL. & DEVELOPMENTAL DISABILITIES 131, 131 (2011).

143. Lichten & Simon, *supra* note 134, at 336.

144. Gresham & Reschly, *supra* note 142, at 135.

145. *Id.* at 138.

146. *Ex Parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

147. AAIDD MANUAL, *supra* note 29, at 49. "The preferred adaptive behavior instrument should have current norms developed on a representative sample of the general population." *Id.*

148. *See id.* at 48.

tests should incorporate the standard error of measurement, and scores should be given a plus or minus one or two standard error of measurements from the individual's actual score.[149]

In addition to a standardized test, the AAIDD advocates that "[a] comprehensive assessment of adaptive behavior will likely include a systematic review of the individual's family history, medical history, school records, employment records (if an adult), other relevant records and information, as well as clinical interviews with a person or persons who know the individual well."[150] Some courts have specifically determined particular questions that should be asked.[151] For example, one question is: "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, [does he] act in accordance with that determination?" Although such questions offer important evidence for establishing an individual's limited adaptive behavior skills, evidence of an individual's past should be considered in conjunction with a standardized test.[152] In this way, the damaging effects of subjectivity can be limited and controlled.

3. The Age-of-Onset Requirement Is Not Ideal

The goal of the *Atkins* decision was to ensure that intellectually disabled persons were protected from the death penalty.[153] Because the Supreme Court quoted the AAIDD and the APA's definitions for intellectual disability and used these definitions in determining that people with intellectual disabilities are less culpable[154], States have since required *Atkins* defendants show signs of subaverage intellectual functioning and limitations in adaptive behavior before age eighteen.[155] Although it seems like the age-of-onset requirement is the easiest element to satisfy, individuals have a hard time proving age of onset if they did not take an IQ test prior to age eighteen. This is a significant problem with the strict age eighteen cutoff requirement. For example, imagine two twenty-one-year-old men facing the death penalty in

149. *See id.* at 49.

150. *Id.* at 45.

151. *Briseno*, 135 S.W.3d at 8. Other questions are: "Has the person formulated plans and carried them through or is his conduct impulsive? Does his conduct show leadership or does it show that is he led around by others? Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" *Id.*

152. *See infra* Part IV.B.3 for a discussion on standardized tests used in determining limitations in adaptive behavior.

153. Atkins v. Virginia, 536 U.S. 304, 318 (2002).

154. *See id.* at 319.

155. *Id.* at 318.

separate trials. Both have limitations in adaptive behavior, and both scored 68 on an IQ test. The only difference is that one man took an IQ test at age seventeen while the other took an IQ test at age nineteen. The man who took his IQ test at age nineteen would not qualify as intellectually disabled and could potentially be sentenced to death. The other man is constitutionally protected and cannot be executed. Is there a valid distinction between the two men besides the age at which they took an IQ test? In *State v. McManus*, the Supreme Court of Indiana held that "IQ tests alone are not necessarily conclusive, and courts may 'consider IQ scores together with other evidence of mental capacity'"[156] to determine whether intellectual disabilities developed prior to age eighteen. Because it is probable that not all individuals on trial have taken an IQ test as minors, it is important for courts to also consider various factors such as "work history, school history, and life functioning."[157]

Like the Indiana Supreme Court, the Supreme Court of Nevada in *Ybarra v. State*, held that IQ testing is not required to prove age of onset of intellectual disability.[158] The court stressed that "[o]ther evidence may be used to demonstrate subaverage intellectual functioning, such as school and other records."[159] In *Ybarra*, the defendant, Mr. Robert Ybarra, claimed that he suffered from an intellectual disability but was twenty-seven years old the first time he was given an IQ test.[160] Because there was no standardized, objective IQ test score from before Mr. Ybarra's eighteenth birthday to determine whether his age of onset was prior to eighteen, the court considered Mr. Ybarra's "school, mental health, and military records."[161] The court reasoned that these records would provide a generalized assessment of Mr. Ybarra's intellectual functioning prior to age eighteen.[162] In fact, psychologists have also established that "particular attention should be given to the defendant's school record, which provides a history of scholastic achievement . . . [and permits] the establishment of [intellectual disability] prior to age 18."[163] Although these cases suggest

156. State v. McManus, 868 N.E.2d 778, 785 (Ind. 2007) (quoting Pruitt v. State, 834 N.E.2d 90, 106 (Ind. 2005)).

157. *Id.*

158. *See* Ybarra v. State, 247 P.3d 269, 274 (Nev. 2011), *cert. denied sub nom*, Ybarra v. Nevada, 132 S. Ct. 1904 (2012).

159. *Id.*

160. *Id.* at 278.

161. *Id.* at 279.

162. *Id.*

163. George S. Baroff, *Establishing Mental Retardation in Capital Cases: An Update*, 41 MENTAL RETARDATION 198, 199 (2003).

that other evidence of intellectual disability is acceptable, other cases suggest that an IQ test score is the most important factor.[164]

The Supreme Court of Pennsylvania, in *Pennsylvania v. Vandivner*, held that "the best evidence would be IQ testing conducted before [the defendant] was eighteen."[165] Mr. Vandivner was not found intellectually disabled because he had not taken an IQ test prior to age eighteen.[166] The court considered Mr. Vandivner's school records and psychological records but concluded that Mr. Vandivner's school records must indicate "that he was placed in special education classes due to [intellectual disabilities]."[167] The court concluded this despite testimony from a school official that at the time Mr. Vandivner was in school, "there was no formalized procedure for placement in special education classes."[168] This case illustrates the difficulty individuals face in proving the age of onset when they did not take an IQ test before age eighteen.

C. Procedural Differences: Determinations Made by Jury versus Judge

Several studies discuss the stereotypes jurors have of people with intellectual disabilities.[169] Most jurors believe that people with intellectual disabilities exhibit severe signs of [intellectual disability] whereas, "[t]he debate in *Atkins* cases has never been about individuals with more severe levels of intellectual disability. It has always been about persons who may be considered to have mild intellectual disability,"[170] such as those individuals who may not exhibit severe symptoms. Researchers have found that "within the universe of all [intellectually disabled] individuals, 89% fall in the mildly [intellectually disabled] range, a fact the Supreme Court recognized many years before *Atkins* was decided."[171] Jurors may mistakenly believe that the defendant is not actually intellectually disabled because of society's preprogrammed

164. *See* Commonwealth v. Vandivner, 962 A.2d 1170, 1185 (Pa. 2009).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See* Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 L. & PSYCHOL. REV. 1 (2010).

170. Gresham & Reschly, *supra* note 142, at 132. Additionally, "mild intellectual disability has no identified or specified biological etiology." *Id.* It is "most often diagnosed only at school entry or shortly thereafter, . . . [but sometimes] misdiagnosed as a learning disability." *Id.* at 133.

171. Hill v. Humphrey, 662 F.3d 1335, 1367 (11th Cir. 2011) (Barkett, J., dissenting); *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.9 (1985).

notion of how someone with an intellectual disability looks and acts. For example,

> [p]ersons with mild intellectual disability may 'blend' into society after school exit in that many are not officially diagnosed with intellectual disability in the adult years because they appear to function typically in community settings, whereas persons with severe forms of [intellectual disabilities] will always 'stand out' because of their physical anomalies and severe pervasive intellectual and adaptive behavior deficits.[172]

It is understandably difficult for both judges and juries to determine whether an individual actually has an intellectual disability without any psychological training. Because of this lack of experience, "courts may have a preconceived notion of what intellectual disability looks like that is inconsistent with what mild intellectual disability looks like to professionals with training and experience in the field."[173] In fact, studies have confirmed that juries "harbor stereotypical views about [the abilities of intellectually disabled persons] and often expect them to have 'vastly lower abilities' than persons without [intellectual disabilities]."[174] When society envisions people with intellectual disabilities, people typically assume that they are those with physical manifestations of mental disabilities, such as Down Syndrome, but people with severe mental disabilities are not the majority of defendants on trial in *Atkins*-type cases.[175] Thus, juries' preconceived notions may make it harder for an intellectually disabled individual to overcome jury prejudice.

Despite these concerns, should a judge be the sole determiner of an individual's intellectual disability claim? Judges may be less influenced by crime details than juries[176] and are better trained to divorce emotional feelings from factual determinations. However, despite vulnerability and possible preconceived notions of a jury, an individual's life should not be in the hands of a single person. Even though courts have held that claims of intellectual disability do not require a jury determination to satisfy constitutional due process, judges can determine intellectual disability in a pre-trial hearing.[177] Individuals facing execution should have the option of presenting facts and evidence to a jury of their peers.

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172. Gresham & Reschly, *supra* note 142, at 133.

173. *Id.*

174. Boccaccini et al., *supra* note 169, at 17.

175. *See* Gresham & Reschly, *supra* note 142, at 135.

176. Research shows that juries, when determining whether an individual has an intellectual disability, are influenced by details of the crime committed. Boccaccini et al., *supra* note 169, at 9.

177. State v. Were, 890 N.E.2d 263, 294 (Ohio 2008); *see also* Pruitt v. State, 834 N.E.2d 90, 112-13 (Ind. 2005).

V. RECOMMENDED NATIONAL STANDARD: A MODEL FOR ESTABLISHING INTELLECTUAL DISABILITY

The following proposed standard for defining intellectual disability and establishing a standard of proof should be adopted by all states enforcing capital punishment. These states should pass legislation protecting intellectually disabled individuals from execution in accordance with the *Atkins* decision and the Eighth Amendment.[178] Within these statutes, states should also incorporate the following definition of intellectual disability and the standard for proving such disability.

A. Definition of Intellectual Disability and Elimination of Age-Eighteen Onset Requirement

Although the anticipated DSM-V proposes a new definition for intellectual disability, it has not yet been finalized or adopted by the APA.[179] The DSM-V's required onset of intellectual disability symptoms "during the developmental period"[180] is too broad and ambiguous for courts to apply, especially because the APA currently gives no guidance on what constitutes the "developmental period." As evidence of the vagueness of this language, the Social Security Administration (SSA) is attempting to narrow its definition of intellectual disability used for determining disability benefits.[181] The SSA currently requires an individual's intellectual disability to manifest during the developmental period, similar to the proposed definition in the DSM-V.[182] However, the SSA wants to "simplify this language by removing [the] reference to the 'developmental period' and referring only to the period before age 22."[183] The SSA's move to eliminate the ambiguous "developmental period"

178. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* 4, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/documents/MREllisLeg.pdf (last visited Feb. 16, 2013).

179. *See supra* Part I.B.

180. *Intellectual Developmental Disorder Proposed Revision*, APA, http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx (last visited Feb. 15, 2013).

181. *See* Revised Medical Criteria for Evaluating Mental Disorders, 75 Fed. Reg. 51,336, 51,336 (proposed Aug. 19, 2010) (to be codified at 20 C.F.R. pts. 404, 416).

182. 20 C.F.R. § 404 subpart P app. 1 12.05 (2012); *see also* DSM-IV-TR, *supra* note 43.

183. Revised Medical Criteria for Evaluating Mental Disorders, 75 Fed. Reg. 51,336, 51,340 (proposed Aug. 19, 2010) (to be codified at 20 C.F.R. pts. 404, 416). By changing its age-of-onset requirement to twenty-two, the SSA is replicating the requirements of states like Maryland and Indiana. *See supra* Part II.C.

language from its intellectual disability criteria proves that the anticipated DSM-V may not be well-received in the legal community. Thus, the model definition of intellectual disability should not incorporate the "developmental period" language from the DSM-V.

Instead, states should use a combination of the AAIDD and the APA's DSM-IV-TR definitions when defining intellectual disability. With the exception of the anticipated DSM-V, the definitions of intellectual disability promulgated by the two leading mental health organizations have not conceptually changed in the past five decades.[184] Therefore, the standard definition for intellectual disability that states should adopt is as follows:

> Intellectual disability is defined as a mental impairment characterized by (1) significant limitations in intellectual functioning and (2) significant impairments in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. (3) This disability originates prior to the age of twenty-two.
>
> Three assumptions are essential to the application of this definition: (1) limitations in present functioning must be considered within the context of community environments typical of the individual's age, peers, and culture; (2) valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors; and (3) within an individual, limitations often coexist with strengths.[185]

The first two elements of this definition are largely untouched. The critical revision is the third element which extends the age-of-onset requirement from eighteen to twenty-two. This standard is modeled after states like Maryland and Indiana that already incorporate an age of onset of twenty-two.[186] By extending the age of onset, this new standard provides defendants with four additional years from which to produce evidence of limitations in adaptive behavior and intellectual functioning for the court. Although extending the age requirement does not fix the problem that there may still be defendants who have not taken an IQ test prior to age twenty-two, it is impossible not to establish an age cutoff when defining intellectual disability. Without an age cutoff, any standard would be too vague and ambiguous for courts to apply.[187] Thus,

184. *See* Gresham & Reschly, *supra* note 142, at 132.

185. *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AAIDD, http://www.aaidd.org/content_185.cfm (last visited Feb. 15, 2013).

186. *See supra* Part II.C.

187. *See supra* Part I.B for a discussion on establishing a standard using the "developmental period" as the age-of-onset requirement.

the best alternative is to increase the age-of-onset requirement to age twenty-two.

B. Rejecting a Fixed IQ Cutoff Score

States should follow the guidelines established by the AAIDD and the APA and take into account both the Flynn Effect[188] and the standard error of measurement.[189] States should ensure that IQ tests administered to individuals claiming intellectual disability are re-calibrated every year to ensure that there is no IQ inflation. Additionally, states should account for the standard error of measurement and the "band of error concept" by not relying heavily on an individual's IQ scores, but instead focusing on other evidence showing limited intellectual functioning. In doing so, states should follow in California's footsteps and not require a fixed IQ cutoff score at all.[190] The recommended statutory language for incorporating this more relaxed standard is:

> The court, in determining an individual's IQ score, "shall take into account the margin of error for the test administered."[191] The court shall subtract five points from the defendant's IQ score. If the defendant has taken multiple IQ tests, the court shall only use the defendant's lowest IQ score for determining limited intellectual functioning.
>
> If the defendant has not previously taken an IQ test, the court shall ensure that the defendant is administered an IQ test that has been calibrated within one or two calendar years prior to administration. If the defendant has previously taken an IQ test and the defendant's IQ score was above 70 (after subtracting five points from the defendant's IQ score), the court shall not preclude the defendant from claiming an intellectual disability or introducing evidence of the defendant's intellectual disability at trial. The defendant may not automatically be deemed not intellectually disabled, and the court shall consider additional evidence in determining limited intellectual functioning. Additional evidence includes, but is not limited to, consideration of the defendant's school or military records, work history, and life functioning.
>
> The court shall recognize that any defendant with an IQ score of 70 or below (after subtracting five points from the defendant's IQ

188. *See supra* Part IV.B.1 for a discussion on the Flynn Effect.

189. *See supra* Part IV.B.1 for discussion on the standard error of measurement.

190. *See supra* Part II.A.1; *see also In re* Hawthorne, 105 P.3d 552, 557 (Cal. 2005).

191. ARIZ. REV. STAT. ANN. § 13-753(K)(5) (LexisNexis 2012).

> score) automatically satisfies the required showing of limited intellectual functioning.

By disallowing courts to automatically deem an individual not intellectually disabled merely because he has an IQ score of 76 or above, the proposed statutory language effectively eliminates a fixed IQ cutoff score.[192] Instead, the proposed statute requires courts to consider the defendant's additional evidence when determining whether the defendant has limited intellectual functioning. The statute also factors in the Flynn Effect and the standard error of measurement.

C. Guidelines for Adaptive Behavior Evidence

In addition to information regarding the individual's past, limitations in adaptive behavior should be determined by objective tests to avoid subjective interpretations of evidence. The AAIDD is set to release a new adaptive behavior test known as the Diagnostic Adaptive Behavior Scale (DABS) in 2013.[193] Currently, only two tests exist to diagnose limitations in adaptive behavior and functioning[194]: the Woodcock-Johnson Scales of Independent Behavior and the Vineland Adaptive Behavior Scale. The Woodcock-Johnson Scales of Independent Behavior is primarily used to measure adaptive functioning and social skills in children, whereas the Vineland Adaptive Behavior Scale is used to "test the social skills of individuals from birth to nineteen years of age."[195] The AAIDD's new test, DABS, is designed for people between the ages of four and twenty-one.[196] Although the test may not cover those defendants that are older than twenty-one, it provides a useful tool for practitioners to consider while trying to prove limitations in adaptive behavior. Additionally, DABS can potentially be used as a framework for adaptive behavior tests for older individuals with limitations in adaptive behavior.

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192. The recommendation to abolish a fixed IQ cutoff score is supported by the American Bar Association. *See* American Bar Association, *ABA Death Penalty Moratorium Implementation Project: Jurisdictional Assessments Chapters and Recommendations – January 2010*, 16 (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

193. *Diagnostic Adaptive Behavior Scale*, AAIDD, http://www.aaidd.org/content_106.cfm?navID=23 (last visited Feb. 15, 2013).

194. Tammy Reynolds et al., *Intellectual Disabilities: Tests of Adaptive Behavioral Skills*, COMMUNITY COUNSELING SERVICES, INC. http://www.communitycounselingservices.org/poc/view_doc.php?type=doc&id=10347&cn=208 (last visited Feb. 15, 2013).

195. *Id.*

196. *FAQ on AAIDD's New Diagnostic Adaptive Behavior Scale*, AAIDD, http://www.aaidd.org/content_107.cfm?navID=24 (last visited Feb. 15, 2013).

One of the purposes of DABS is to establish a "diagnosis of intellectual disability . . . to determine eligibility for . . . specific treatment within the criminal justice system."[197] With this core purpose, the AAIDD ensured that DABS would take into account "other considerations" in testing for limitations in adaptive behavior. In addition to the activities of daily living, "other considerations" in adaptive functioning include "activities an individual actually performs, rather than the ability to perform activities—what a person does, rather than can do. Adaptive behavior is recognized as being dependent on the expectations of age, culture group, and the demands of particular situations and environments."[198] Also, a DABS test administrator can individually tailor the test to each person, because the test assesses processes from "a pool of over 500 items . . . [that] relate directly to the [test taker's] concepts of gullibility, vulnerability, and social cognition."[199] Because the "tailored testing" enables administrators of the test to give various test items to different people "but still place people on the same scale,"[200] the AAIDD's new adaptive behavior test may provide a suitable and beneficial guideline and standard for assessing limitations in adaptive functioning in individuals facing the death penalty.[201] States should require that a standardized adaptive behavior test be administered to individuals claiming an intellectual disability, and the particular standardized test should be established by either the AAIDD or the APA. Once DABS is released in 2013, states should require experts to use DABS when testing adaptive behaviors of capital defendants that are under age twenty-one. In this way, states can limit and control for the subjective nature of determining limited adaptive behaviors.

D. Judge and Jury Decision

Individuals facing death should have as many opportunities to be evaluated by fact finders as possible. States should follow New Jersey's precedent and allow individuals four opportunities to present evidence regarding a claim of intellectual disability. All individuals claiming intellectual disability should be able to present facts and evidence: "[1]

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. The AAIDD cautions that "[i]n evaluating the role that an adaptive behavior score—as assessed on a standardized measure—plays in making a diagnosis of [intellectual disability], clinicians should a) determine the standard error of measurement . . . for the particular assessment instrument used, . . . and b) assure that within reporting, standard error of measurement is properly addressed." AAIDD MANUAL, *supra* note 29, at 47.

at pretrial before the trial court, [2] before a jury during the guilt phase trial, [3] at a separate hearing before a jury after the guilt phase trial; and, finally, [4] before a jury at the penalty-phase trial as mitigation."[202] Although some courts have held that claims of intellectual disability do not require a jury trial,[203] when the stakes are life or death, individuals should have as many chances as possible to present evidence to judges and juries to avoid execution.

Some may argue that providing defendants with four opportunities to present evidence of an intellectual disability is not cost efficient for states. However, this argument fails to consider that "over two-thirds of all capital convictions and sentences are reversed because of serious error during trial or sentencing."[204] This means that many people who are convicted and sentenced to death are innocent or have an intellectual disability. The efficiency argument cannot override such a substantial margin of error, especially when an individual's life is on the line. By depriving defendants of multiple opportunities to present evidence of their intellectual disability, states risk violating the Constitution by executing an intellectually disabled person. Although providing defendants with four opportunities to present evidence may not be the most efficient method, states should be more concerned with accuracy than efficiency when making life or death decisions. Arguably, capital punishment is a "waste of taxpayers' money and has no public safety benefit."[205] Thus, if states insist on enforcing the death penalty, then they should ensure that the correct people are being executed and not the intellectually disabled.

E. Standard for Testifying Experts

All states should require testifying experts to be specialized in the field of intellectual disabilities. Some psychiatrists are experienced at assessing intellectually disabled individuals; however, many are not. Defendants facing death row deserve an experienced and trained expert who specializes in intellectual disabilities to testify for them.[206] States

202. State v. Jimenez, 908 A.2d 181, 192 (N.J. 2006).

203. State v. Were, 890 N.E.2d 263, 294 (Ohio 2008); *see also* Pruitt v. State, 834 N.E.2d 90, 112-13 (Ind. 2005).

204. American Civil Liberties Union Capital Punishment Project, *Reason #1 to Support a National Moratorium on Executions*, PRISON POLICY INITIATIVE, http://www.prisonpolicy.org/scans/aclu_dp_factsheet1.pdf (last visited Feb. 15, 2013).

205. *The Case Against the Death Penalty*, AMERICAN CIVIL LIBERTIES UNION (Dec. 11, 2012), http://www.aclu.org/capital-punishment/case-against-death-penalty.

206. Ellis, *supra* note 178, at 11. The AAIDD also advocates for experts to have specialized training in the area of intellectual disability. AAIDD MANUAL, *supra* note 29, at 40.

should ensure that the expert appointed by the court or the prosecutor is familiar with the "best practices" standard in the field of intellectual disability.[207] The AAIDD states that

> best practices involve understanding a) the definition of intellectual disability; . . . b) the role of assessment in diagnosis, classification, and developing systems of supports; . . . c) intellectual functioning and adaptive behavior and their assessment; . . . d) the role of etiological factors in the diagnosis of [intellectual disability]; and . . . e) a multidimensional approach to classification.[208]

All states should ensure that testifying experts are truly experts in the field of intellectual disability and have specialized experience working with individuals with intellectual disabilities. In this way, states avoid situations in which experts in different fields come to contrary conclusions concerning an individual's intellectual disability.

F. Standard for Burden of Proof

States should set the burden of proof at a preponderance of the evidence standard. Because of the highly subjective nature of determining intellectual disabilities—"an inquiry that is often rife with doubt—it becomes . . . [clear] that [a high burden of proof] standard unquestionably will result in the execution of those offenders that *Atkins* protects."[209] Additionally, the Supreme Court has warned states against the use of a high burden of proof "when a factual determination involves medical or psychiatric diagnoses."[210] The *Atkins* Court stated that one of its justifications for holding that executing intellectually disabled persons is unconstitutional is the fact that intellectually disabled individuals have a

> lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors . . . [they] are less able to give meaningful assistance to

207. *See* AAIDD MANUAL, *supra* note 29, at 88.

208. *Id.* at 88-89.

209. Hill v. Schofield, 608 F.3d 1272, 1281 (11th Cir. 2010), *vacated*, 625 F.3d 1335 (11th Cir.), *and aff'd en banc sub nom*, Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2727 (2012), *reh'g denied*, 2012 WL 3761964 (Aug. 31, 2012).

210. *Id.* at 1282; *see* Addington v. Texas, 441 U.S. 418, 429-30 (1979) (holding that "there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."). The Supreme Court has also held that "it violated due process for a State to assign the burden of persuasion to the defendant on the issue of competence to stand trial at a level of 'clear and convincing evidence.'" Ellis, *supra* note 178, at 15.

> their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.[211]

It is clear that the goal of the *Atkins* Court was to protect the intellectually disabled, and states can best do so by requiring defendants to prove intellectual disability by a preponderance of the evidence and not a higher standard.

CONCLUSION

In the ten years after *Atkins* permitted states to develop ways of enforcing its holding, national variations in the law have arisen that are detrimental to the protection of intellectually disabled individuals. Some states have adopted standards that entirely fail to protect intellectually disabled individuals from being sentenced to death. Because of *Atkins*' goal of protecting all intellectually disabled people from capital punishment, laws regarding the determination of an individual's intellectual disability should be made with the goal of preventing inaccurate assessments of a defendant's intellectual disabilities.

My recommended model standard for defining intellectual disability and its standard of proof contemplates the inherent subjective nature of determining whether an individual has intellectual disabilities and attempts to merge science and law in an evenhanded and reasonable way. Although states are not required to adopt a new standard, all states should at least consider the benefits of a more flexible test that adequately protects all intellectually disabled individuals from being executed in accordance with *Atkins* and the US Constitution.

211. Atkins v. Virginia, 536 U.S. 304, 320-21 (2002).