

A Different Path Taken: Texas Capital Offenders' Post-*Atkins* Claims of Mental Retardation

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Introduction

Texas has played and continues to play a major role in the evolution of capital punishment in this country.¹ Capital offenders convicted in Texas represent approximately ten percent of the total current state death row population.² Texas has executed approximately thirty-eight percent of the state capital offenders executed since the United States Supreme Court (“Supreme Court” or the “Court”) “reauthorized” capital punishment in 1976.³ Cases

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1. Texas has utilized capital punishment since it was a republic. *See generally* Peggy M. Tobolowsky, *Texas and the Mentally Retarded Capital Offender*, 30 T. MARSHALL L. REV. 39, 41 (2004) [hereinafter *Tobolowsky, Texas*]; Peggy M. Tobolowsky, *What Hath Penry Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 348 & nn.23–24 (1992) [hereinafter *Tobolowsky, Penry*]. The relative frequency of the state’s imposition and carrying out of capital sentences has been accompanied by substantial litigation in the applicable state and federal courts resulting from such sentences. *See infra* notes 2–4 and accompanying text.

2. *See Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Sept. 23, 2011) (reflecting 321 Texas death row inmates and 3,184 total state death row inmates as of January 1, 2011).

3. *See id.* (reflecting 475 Texas executions out of 1,267 executions of state offenders since 1976, as of September 23, 2011). In 1972, the Court’s judgment reversing the death sentences in the cases before it included conclusions by a majority of Justices that the death penalty, either *per se* or as it was then being applied, was an unconstitutionally cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*); *see infra* notes 37–39 and accompanying text (describing the *Furman* decision and its results). In 1976, the Court rejected the claim that the death penalty itself is an unconstitutionally cruel and unusual punishment and addressed the constitutionality of five state capital punishment systems. The lead case in this group was *Gregg v. Georgia*, 428 U.S. 153 (1976), in which the Court upheld the constitutionality of capital punishment *per se* and the “guided discretion” capital procedures enacted by Georgia. *See also* *Proffitt v.*

originating in Texas have played a significant role in the development of the capital punishment jurisprudence shaping the scope and implementation of the death penalty in the United States.⁴

Texas's significant role has also been reflected in its treatment of capital cases involving mentally retarded offenders and those with related mental impairments.⁵ However, the "Texas approach"

Florida, 428 U.S. 242 (1976) (upholding the Florida guided discretion procedure); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding the Texas guided discretion procedure). *But see* *Woodson v. North Carolina*, 428 U.S. 280 (1976) (rejecting North Carolina's mandatory capital provisions); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (rejecting Louisiana's mandatory capital provisions).

4. Texas litigants have been petitioners in some of the Court's most significant capital punishment cases. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390 (1993) (addressing claims of actual innocence on collateral review); *Estelle v. Smith*, 451 U.S. 454 (1981) (addressing the right to counsel before a psychiatric examination regarding a capital sentencing issue); *Jurek*, 428 U.S. at 262 (upholding the Texas post-*Furman* capital sentencing procedure); *Furman*, 408 at 238 (including a judgment that the death penalty was unconstitutional as applied to a Texas petitioner).

5. *See generally* Tobolowsky, *Texas, supra* note 1, at 39 (describing the evolution of Texas law regarding mentally retarded capital offenders). Although there has been a recent trend to use the terms intellectually disabled and intellectual disability rather than mentally retarded and mental retardation, the definitions of these new terms remain the same as the previous terms. *See* AAIDD AD HOC COMMITTEE ON TERMINOLOGY AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 6 (11th ed. 2010) [hereinafter AAIDD]; Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELLECTUAL & DEVELOPMENTAL DISABILITIES 116 (2007); *Disability Label Will Change: Measure Will Remove "Retardation" from Law*, DALLAS MORNING NEWS, Sept. 25, 2010, at 14A. Because capital punishment jurisprudence still uses the mentally retarded and mental retardation terminology, it will be used in this Article. *See, e.g.*, *Bobby v. Bies*, 129 S. Ct. 2145 (2009); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Penry v. Lynaugh*, 492 U.S. 302 (1989). *But cf.* Rosa's Law, Pub. L. No. 111-256 (2010) (substituting the term intellectual disability for mental retardation in specified federal enactments and regulations without change in the meaning of the term). Similarly, the principal professional organization that addresses mental retardation will be referred to in this Article as the American Association on Mental Retardation rather than its current re-designation as the American Association on Intellectual and Developmental Disabilities.

Although the definition has evolved slightly over time, the major national professional organizations that offer a diagnostic definition of mental retardation have generally utilized a three-part definition that includes an individual's significantly subaverage intellectual functioning that is concurrent with impairments in adaptive behavior and originates during the developmental period (age eighteen or below). *See* AAIDD, *supra* at 6-11 (describing evolving definitions); AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 21-23 (10th ed. 2002) (describing evolving definitions); *see also* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-49 (4th ed., text rev. 2000). These organizations have also used a classification system within mental retardation based on the severity of the condition, using intelligence quotient ("IQ") scores to differentiate between the severity levels: "mild" (scores between fifty to fifty-five and approximately seventy), "moderate" (scores between thirty-five to

regarding these offenders has not always been well-received by the Supreme Court.⁶ In 1989, the Court held that the Texas capital punishment system did not provide a constitutionally adequate vehicle for a sentencing jury to “consider and give effect to” a capital offender’s mitigating evidence of mental retardation in *Penry v. Lynaugh*.⁷ For fifteen years, the Texas Court of Criminal Appeals (“Texas Court”), the state’s highest appellate court for criminal cases, and the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”), the court that handles federal appeals in Texas cases, addressed *Penry* claims dealing with mental retardation and other mitigating evidence.⁸ However, in several cases beginning in 2004, the Supreme Court again rejected the “Texas approach” and concluded that these courts had adopted substantive review standards for Texas post-*Penry* mitigating evidence claims that were incorrect and too restrictive under the Constitution.⁹ The Supreme Court’s rulings in *Penry* and these post-*Penry* cases have resulted in substantial litigation and relitigation of scores of Texas capital cases involving

forty and fifty to fifty-five), “severe” (scores between twenty to twenty-five and thirty-five to forty), and “profound” (scores below twenty or twenty-five). AM. ASS’N ON MENTAL DEFICIENCY (subsequently Retardation), CLASSIFICATION IN MENTAL RETARDATION 13 (8th ed. 1983); AM. PSYCHIATRIC ASS’N, *supra* at 42, 49. As of the 1992 revision of its diagnostic and classification manual, the American Association on Mental Retardation eliminated the classification system within mental retardation based on IQ scores because, inter alia, it was based only on the intellectual functioning component of the definition, it understated the significant disadvantages experienced by those labeled as “mildly” mentally retarded (the largest category of mentally retarded individuals), and it was susceptible to incorrect application and misuse by educational and service providers and decision makers in the criminal justice system. See AM. ASS’N ON MENTAL RETARDATION, *supra* at 22–23, 25–26, 30–37, 207–08. See generally Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 86–99 (2003) (describing the evolution of the diagnostic definition of mental retardation, legislative definitions for criminal justice purposes, and related issues).

6. See *infra* notes 7–9 and accompanying text.

7. See *Penry*, 492 U.S. at 302, 328; *cf. id.* (reaching the same conclusion regarding the offender’s mitigating evidence of his abused background).

8. See *infra* notes 84–109 and accompanying text.

9. See *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam); *Tennard v. Dretke*, 542 U.S. 274 (2004); see also *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *cf. Johnson v. Texas* 509 U.S. 350 (1993); *Graham v. Collins*, 506 U.S. 461 (1993). The Court also found that the supplemental “nullification” jury instruction that the Texas Court and Fifth Circuit had concluded satisfied the concerns identified in *Penry* regarding the consideration of mitigating evidence was a constitutionally inadequate means to achieve this requirement. See *Penry v. Johnson*, 532 U.S. 782 (2001).

mitigating evidence, including mitigating evidence of mental retardation.¹⁰

In 2002, in *Atkins v. Virginia*,¹¹ the Supreme Court announced a ruling with an even greater impact on mentally retarded capital offenders. Although it had previously rejected the claim in *Penry*,¹² the Supreme Court, in *Atkins*, held that the execution of mentally retarded offenders is unconstitutional, and entrusted the enforcement of this constitutional ban to the states.¹³ At the time of the *Atkins* ruling, almost half of the states authorizing capital punishment had already legislatively prohibited the execution of mentally retarded offenders.¹⁴ Texas had no such prohibition.¹⁵ Since the *Atkins* ruling, and in the absence of legislative action,¹⁶ the Texas Court and Fifth Circuit have adopted substantive and procedural standards to resolve *Atkins* post-conviction claims of mental retardation.¹⁷ The Texas Court has also prescribed most of the standards to resolve *Atkins* claims at the trial court level¹⁸ and on direct appeal.¹⁹ Since the *Atkins* ruling, ninety Texas capital offenders have had their *Atkins* claims resolved at the trial, appellate, or post-conviction levels.²⁰

10. See, e.g., *Rivers v. Quarterman*, 661 F. Supp. 2d 675, 685–88 (S.D. Tex. 2009), *aff'd sub nom. Rivers v. Thaler*, 389 F. App'x 360 (5th Cir. 2010); *Ex parte Briseno*, No. AP-76,132, 2010 Tex. Crim. App. Unpub. LEXIS 338 (Tex. Crim. App. June 9, 2010); *Ex parte Davis*, No. AP-76,263, 2009 Tex. Crim. App. Unpub. LEXIS 750 (Tex. Crim. App. Nov. 18, 2009) (per curiam); Tobolowsky, *Texas*, *supra* note 1, at 103 & nn.285–86 (describing the scope of Texas *Penry* litigation issues).

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

12. See *Penry*, 492 U.S. at 328–35; *id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part); *cf. id.* at 335–40 (opinion of O'Connor, J.). *Contra id.* at 342–49 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

13. See *Atkins*, 536 U.S. at 317, 321. *Contra id.* at 321–28 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting); *id.* at 337–54 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

14. See Tobolowsky, *supra* note 5, at 77–78 & nn.6–7 (representing eighteen of the thirty-eight capital punishment states at that time).

15. See *infra* notes 122–28 and accompanying text; see also *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) (establishing interim procedures to implement *Atkins* in the absence of legislation).

16. See *infra* notes 170–89, 945 and accompanying text.

17. See *infra* notes 217–80, 295–350 and accompanying text.

18. See *infra* notes 620–22, 629–65 and accompanying text.

19. See *infra* notes 614–28 and accompanying text.

20. See *infra* notes 351–611, 666–701 and accompanying text. This Article describes Texas *Atkins* claims as of January 1, 2011. See *infra* Tables 1, 2 (describing the resolution of these cases). Additional *Atkins* claimants obtained relief on other grounds prior to the

Some have questioned whether the mental retardation definition and procedures adopted by the Texas Court and Fifth Circuit for *Atkins* purposes are consistent with the constitutional ban the Court articulated in *Atkins*.²¹ These concerns, of course, are not merely academic ones. If the state and federal courts reviewing Texas *Atkins* claims have implemented *Atkins* in an unconstitutional manner, Texas mentally retarded capital offenders are at greater risk of execution than similar capital offenders in other states.

This Article examines these important issues. The Article first reviews the treatment of mentally retarded capital offenders under Texas law prior to *Atkins*.²² It then examines the substantive and procedural standards adopted by the Texas Court²³ and Fifth Circuit²⁴ in order to implement *Atkins*. Critical to this examination is an analysis of how these courts have applied these standards to the ninety Texas *Atkins* claimants they have addressed since 2002,²⁵ a number that far exceeds the *Atkins* claimants of any other capital punishment state.²⁶ The Article then compares the implementation of *Atkins* in Texas to its implementation in other states, an analysis that illuminates the issue of Texas's compliance with the *Atkins* mandate to identify mentally retarded offenders and exclude them from execution. This Article concludes with a discussion of potential responsive action by the Supreme Court.²⁷

resolution of their *Atkins* claims. See, e.g., *Ex parte* Dixon, No. WR-56,822-01, 2005 Tex. Crim. App. Unpub. LEXIS 281 (Tex. Crim. App. Dec. 14, 2005) (per curiam) (finding *Atkins* claim moot due to sentence commutation based on age). Other claims are pending resolution. See, e.g., *Ex parte* Cathey, No. WR-55,161-02, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam).

21. See, e.g., John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 710-14, 725-27 (2009); Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 253-56, 269-70 (2009); Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 727-28 (2008).

22. See *infra* notes 28-137 and accompanying text.

23. See *infra* notes 217-80, 614-65 and accompanying text.

24. See *infra* notes 295-350 and accompanying text.

25. See *infra* Tables 1, 2; *infra* notes 351-611, 666-701 and accompanying text.

26. In a review of 234 *Atkins* claims addressed as of May 2008, Texas *Atkins* claims represented approximately twenty percent of the total. There were forty-six Texas claims compared to the next highest state that had twenty-six claims. John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 628, 637 (2009).

27. See *infra* notes 702-943 and accompanying text.

I. Mentally Retarded Capital Offenders in Texas Prior to *Atkins*

A. Overview of the Pre-*Atkins* Period

The treatment of mentally retarded capital offenders in Texas prior to *Atkins* is best described by reviewing this treatment prior to *Penry*,²⁸ and then between *Penry* and *Atkins*.²⁹ Prior to *Penry*, the Texas Court and the Fifth Circuit had concluded that a capital offender's mental retardation could be adequately considered within the existing Texas capital sentencing procedure.³⁰ These courts also rejected claims that the execution of mentally retarded offenders was unconstitutional.³¹ Following *Penry*, the Texas capital sentencing procedure was modified to better incorporate into the sentencing process the consideration of mitigating circumstances, including mental retardation.³² The Texas Court and Fifth Circuit also addressed many claims alleging *Penry* error in the pre-*Penry* treatment of mental retardation as a mitigating circumstance.³³ Prior to *Atkins*, however, these courts continued to reject claims that the execution of mentally retarded offenders was unconstitutional.³⁴ In addition, following several years of legislative proposals, the Texas Governor vetoed a legislatively enacted ban on the execution of mentally retarded offenders in 2001.³⁵

B. Pre-*Penry* Treatment of Mentally Retarded Capital Offenders in Texas

For most of the State's history, capital sentencing juries in Texas were given unrestricted discretion to choose between a death sentence and alternative periods of confinement for convicted capital offenders.³⁶ This was the case in 1972, when the Supreme Court held, in *Furman v. Georgia*,³⁷ that the "imposition and carrying out" of the death sentences of two Georgia offenders and one Texas offender

28. See *infra* notes 36–63 and accompanying text.

29. See *infra* notes 84–137 and accompanying text.

30. See *infra* notes 58–61 and accompanying text.

31. See *infra* notes 62–63 and accompanying text.

32. See *infra* notes 85–89 and accompanying text.

33. See *infra* notes 91–109 and accompanying text.

34. See *infra* notes 118–21 and accompanying text.

35. See *infra* notes 122–28 and accompanying text.

36. See Tobolowsky, *Penry*, *supra* note 1, at 348–49 nn.23–25.

37. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.³⁸ The Court's judgment in *Furman* not only invalidated the death sentences of the actual litigants in the case, but also the death sentences of all offenders awaiting execution in Texas and throughout the country.³⁹

Although none of the *Furman* litigants specifically raised issues regarding mentally retarded offenders, the Texas Legislature had to address the Court's concerns about Texas's discretionary capital sentencing system if it desired to constitutionally impose a death sentence on *any* capital offender in the future. In 1973, the Texas Legislature enacted a new capital murder statute, designed to narrow the class of capital offenders to those who committed intentional or knowing murders in the context of one of several identified categories of aggravated circumstances, such as murder in the course of the commission of specified felonies.⁴⁰ The Texas Legislature also replaced the largely discretionary capital sentencing system with new sentencing procedures, designed to guide jurors' discretion in capital sentencing.⁴¹

Under the new sentencing provisions, a separate evidentiary sentencing proceeding followed an offender's conviction for capital murder. The sentencing jury's responses to a three-issue inquiry determined whether the offender received a sentence of death or life imprisonment. These issues concerned the deliberateness of the offender's conduct, the unreasonableness of the offender's act in

38. The *Furman* case was decided by a five-Justice majority. *Id.* Two Justices determined that capital punishment itself constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 257–306 (Brennan, J., concurring in judgment); *id.* at 314–74 (Marshall, J., concurring in judgment). Three additional Justices found that the discretionary Georgia and Texas procedures, as then applied, violated these constitutional provisions. *Id.* at 240–57 (Douglas, J., concurring in judgment); *id.* at 306–10 (Stewart, J., concurring in judgment); *id.* at 310–14 (White, J., concurring in judgment). *Contra id.* at 375–405 (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting); *id.* at 405–14 (Blackmun, J., dissenting); *id.* at 414–65 (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting); *id.* at 465–70 (Rehnquist, J., joined by Burger, C.J., and Blackmun and Powell, JJ., dissenting).

39. *Id.* at 417 (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting); see *Hall v. State*, 488 S.W.2d 94, 96–97 (Tex. Crim. App. 1972) (indicating that Texas capital offenders would have their death sentences commuted or reformed to life imprisonment after *Furman*).

40. See Act of May 28, 1973, 63d Leg., Reg. Sess., ch. 426, art. 2, § 1, 1973 Tex. Gen. Laws 1122, 1123 (subsequently codified at TEX. PENAL CODE ANN. § 19.03 (West Supp. 1974)). In this session, the Texas Legislature also repealed the capital provisions regarding treason, rape, and armed robbery. Tobolowsky, *Penry*, *supra* note 1, at 351 n.42.

41. See Act of May 28, 1973, 63d Leg., Reg. Sess., ch. 426, art. 3, § 1, 1973 Tex. Gen. Laws 1122, 1125–26 (codified at TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1974)).

response to any provocation by the deceased, and the probability that the offender would commit future violent criminal acts that would pose a continuing threat to society.⁴² The State was required to prove each issue beyond a reasonable doubt. A unanimous affirmative jury finding on each issue presented resulted in a death sentence. A negative response by ten or more jurors as to any of the issues resulted in a sentence of life imprisonment. Capital murder cases in which the death penalty was imposed were subject to automatic review by the Texas Court.⁴³

Both the Texas Court and the Supreme Court upheld the constitutionality of these post-*Furman* sentencing procedures.⁴⁴ In 1975, in *Jurek v. State*,⁴⁵ the Texas Court determined that the new sentencing procedures satisfied the Court's concerns in *Furman* regarding the previous discretionary sentencing provisions, by sufficiently guiding jurors' discretion in reaching the ultimate punishment determination between death and life imprisonment.⁴⁶ In rejecting vagueness challenges to the three-issue sentencing procedure based on its failure to enumerate a more exhaustive and precise list of factors for consideration, the Texas Court indicated that this procedure contemplated consideration of a broad range of aggravating and mitigating factors.⁴⁷ Moreover, the Texas Court stated that the controlled discretionary sentencing system retained appropriate "individualization based on consideration of all extenuating circumstances" and the element of mercy.⁴⁸

42. *Id.*

43. *Id.* See generally Tobolowsky, *Penry*, *supra* note 1, at 348–49, 351–53 (describing Texas capital sentencing provisions before and after *Furman*).

44. See *Jurek v. Texas*, 428 U.S. 262 (1976), *aff'g* *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975).

45. *Jurek*, 522 S.W.2d at 934.

46. *Id.* at 938–40. *Contra id.* at 944–46 (Odom, J., concurring in part and dissenting in part) (raising concerns about the mandatory nature of the provisions, the vagueness of the sentencing provisions, and the use of a probability finding in the issue concerning future acts of violence); *id.* at 946–50 (Roberts, J., dissenting) (criticizing the use of a probability finding in the sentencing procedure and raising vagueness concerns). See generally Tobolowsky, *Penry*, *supra* note 1, at 354 n.56 (identifying sources addressing the constitutional sufficiency of the capital provisions).

47. *Jurek*, 522 S.W.2d at 939–40. The Texas Court identified several illustrative factors that could be considered concerning the continuing threat of future violent acts inquiry, including "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." *Id.*

48. *Id.* at 940.

In 1976, the Supreme Court decided the *Jurek* appeal along with appeals in four other death penalty cases in which sentences had been imposed pursuant to revised post-*Furman* sentencing procedures.⁴⁹ The Justices authoring the lead opinions in these cases⁵⁰ stressed the constitutional necessity of capital procedures that “focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.”⁵¹ In order to provide the individualized sentencing constitutionally required in capital cases, these Justices concluded that a capital sentencing system must allow the sentencer to consider mitigating as well as aggravating circumstances.⁵² Because the three-question inquiry in the Texas sentencing procedures did not expressly address consideration of mitigating circumstances, these Justices determined that its constitutionality depended on whether these questions allowed consideration of “particularized” mitigating factors.⁵³ Relying almost exclusively on the Texas Court’s interpretive language in the underlying case regarding the wide range of factors that could be considered in answering the continuing threat of future violent acts question,⁵⁴ these Justices concluded that the Texas Court had “indicated that it will interpret this second question so as to allow a defendant to bring to the jury’s attention whatever mitigating circumstances he may be able to show.”⁵⁵ As a result, it was

49. In these cases, 1) the Court upheld the constitutionality of capital punishment *per se*, *Gregg v. Georgia*, 428 U.S. 153 (1976); 2) upheld the “guided discretion” capital procedures enacted by Georgia, as well as Florida and Texas, *id.*; *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek*, 428 U.S. at 262; and 3) rejected the mandatory capital provisions enacted by North Carolina and Louisiana, *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

50. Due to shifting majorities in these five cases, joint opinions were offered by Justices Stewart, Powell, and Stevens in support of the judgment in each case. *See, e.g., Gregg*, 428 U.S. at 153 (opinion of Stewart, Powell, and Stevens, JJ.).

51. *Id.* at 206. These Justices determined that the revised definitional requirements of the Texas capital murder statute satisfied the requirement that the capital sentencer focus on the particularized nature of the crime. *Jurek*, 428 U.S. at 270–71.

52. *Jurek*, 428 U.S. at 271.

53. *Id.* at 272.

54. *See Jurek v. State*, 522 S.W.2d 934, 939–40 (Tex. Crim. App. 1975).

55. *Jurek*, 428 U.S. at 272; *see also id.* at 273 (noting that the Texas Court’s sufficiency of the evidence review concerning the continuing threat sentencing issue in *Smith v. State*, 540 S.W.2d 693 (Tex. Crim. App. 1976), the only other Texas Court case decided at that time, included a focus on the existence or absence of mitigating factors); *cf. id.* at 272 n.7 (noting that the Texas Court had not construed the deliberate conduct and response to provocation sentencing issues, and thus it was not yet determined whether juror consideration of these issues would include consideration of mitigating circumstances).

determined that the Texas system provided constitutionally adequate individualized sentencing.⁵⁶

Two years after the decisions in *Jurek* and its companion cases, a Court plurality—and thereafter a Court majority—adopted the constitutional requirement that a capital sentencer be allowed to consider mitigating evidence regarding the circumstances of the crime and the offender’s character and record.⁵⁷ Nevertheless, in the period prior to *Penry*, the Texas Court and Fifth Circuit provided no relief to offenders claiming that their mental retardation evidence had received inadequate consideration as a mitigating factor under the Texas sentencing procedure.⁵⁸ The Texas Court determined, in each case it considered, that the mental retardation evidence did not render legally insufficient the evidence in support of the jury’s affirmative answers to the punishment issues.⁵⁹ The Texas Court also summarily rejected one offender’s claim that the sentencing procedures applied at his trial did not provide individualized consideration of his mental retardation, in violation of *Furman* and *Jurek*.⁶⁰ The Fifth Circuit similarly concluded that the Texas

56. *Id.* at 273–74, 276; *see id.* at 277 (Burger, C.J., concurring in judgment); *id.* at 277–79 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment); *id.* at 279 (Blackmun, J., concurring in judgment). *But see* *Woodson v. North Carolina*, 428 U.S. 280, 315–16 (1976) (Rehnquist, J., dissenting) (questioning the lead opinion Justices’ interpretation of the allowance of consideration of mitigating circumstances under the Texas procedure); *Roberts v. Louisiana*, 428 U.S. 325, 359 (1976) (White, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., dissenting) (finding the Texas procedure constitutionally indistinguishable from the Louisiana mandatory procedure).

57. *See* *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982); *id.* at 117 (Brennan, J., concurring); *id.* (O’Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (plurality opinion); *see also* *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (applying this principle in individual cases).

58. *See infra* notes 59–61 and accompanying text.

59. *See, e.g.,* *Williams v. State*, 773 S.W.2d 525, 537–38 (Tex. Crim. App. 1988) (noting that a conclusive finding of mental retardation would not preclude affirmative findings on the punishment issues and finding sufficient evidence here in a case involving conflicting evidence of mental retardation); *Goodman v. State*, 701 S.W.2d 850, 864–67 (Tex. Crim. App. 1985) (finding sufficient evidence to support affirmative punishment findings despite agreement of the experts that the offender was within the “mild” range of mental retardation); *Penry v. State*, 691 S.W.2d 636, 650–55 (Tex. Crim. App. 1985) (finding sufficient evidence to support affirmative punishment findings despite contested evidence of mental retardation and finding no error in the trial court’s rejection of proposed instructions prescribing how the jury should consider mitigating evidence).

60. *See* *Bell v. State*, 582 S.W.2d 800, 809–10 (Tex. Crim. App. 1979); *cf. Jurek*, 428 U.S. at 262; *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). *See generally* Peggy M. Tobolowsky, *The Road to Atkins and Beyond in Texas—The Tale of One Mentally Retarded Capital Offender*, 59 BAYLOR L. REV. 735 (2007) (describing the offender’s

sentencing procedure did not impermissibly restrict consideration of mitigating evidence of mental retardation in the cases before it.⁶¹

In some of these cases, offenders also claimed that, due to their mental retardation, their executions were constitutionally barred as cruel and unusual punishment.⁶² Both the Texas Court and Fifth Circuit summarily rejected these claims.⁶³

C. *Penry* and the Consideration of Mental Retardation in Capital Cases

In *Penry v. Lynaugh*,⁶⁴ the offender had been found competent to stand trial, convicted of capital murder, and sentenced to death based on the jury's affirmative responses to the Texas capital sentencing issues.⁶⁵ The trial court, Texas Court, and Fifth Circuit had rejected Penry's claims that the Texas capital procedure provided inadequate consideration of his mitigating evidence of mental retardation and that the execution of a mentally retarded individual violated the Constitution.⁶⁶

The Supreme Court first addressed whether Penry had been unconstitutionally sentenced to death because the jury had not been instructed that it could "consider and give effect to" his mitigating

presentation of his mental retardation evidence and related claims during thirty years of trial, appellate, and collateral review proceedings).

61. See *Bell v. Lynaugh*, 858 F.2d 978, 984–85 (5th Cir. 1988) (determining that the offender had not been prevented from presenting his mental retardation evidence as a mitigating factor in the sentencing determination, noting that the offender's "two-edged" (i.e., aggravating and mitigating) evidence of mental retardation could not have been perceived as mitigating here, and acknowledging a hypothetical situation in which the Texas sentencing procedure would not fully accommodate mental retardation mitigating evidence); *Penry v. Lynaugh*, 832 F.2d 915, 924–26 (5th Cir. 1987) (questioning whether the Texas procedure adequately permitted consideration of the offender's evidence, including that of mental retardation, as mitigating evidence, but determining that Fifth Circuit precedent precluded resolution of the issue in the offender's favor), *aff'd in part and rev'd in part*, 492 U.S. 302 (1989).

62. See *infra* note 63 and accompanying text.

63. See *Bell*, 858 F.2d at 984; *Penry*, 832 F.2d at 918; *Goodman*, 701 S.W.2d at 867; *Penry*, 691 S.W.2d at 654–55; see also Tobolowsky, *supra* note 60, at 768 n.240, 776–77 (describing an offender's unsuccessful attempts to raise the constitutional claim in state court proceedings).

64. *Penry*, 492 U.S. at 302.

65. See *id.* at 307–11; see also *supra* note 42 and accompanying text (describing these sentencing issues).

66. See *Penry*, 492 U.S. at 310–13; *Penry*, 832 F.2d at 915; *Penry*, 691 S.W.2d at 636. Penry's mental retardation evidence included IQ scores ranging between fifty and sixty-three and evidence that his ability to function in the world was that of a nine- or ten-year old. State experts contested the diagnosis and extent of Penry's mental retardation. See *Penry*, 492 U.S. at 307–10.

evidence of mental retardation in determining his sentence under the Texas procedure.⁶⁷ The Court had recently determined that mitigating evidence of good prison behavior could be adequately addressed by the Texas sentencing procedure in *Franklin v. Lynaugh*.⁶⁸ However, in *Penry*, the five-Justice majority rejected the State's argument that the jury could consider and give effect to Penry's mitigating evidence of mental retardation through the prescribed sentencing issues without any additional instructions regarding mitigating evidence.⁶⁹ Although Penry's mental retardation was relevant to the special issue regarding deliberate conduct, it was also relevant to his moral culpability in a manner beyond the scope of this sentencing issue. Similarly, the Court determined that the sentencing issue concerning the reasonableness of the offender's response to provocation did not provide a sufficient vehicle for the jury to express its determination of Penry's reduced moral culpability due to his mental retardation. With regard to the sentencing issue concerning Penry's continuing threat of future violent acts, the Court determined that Penry's mental retardation, including his inability to learn from his mistakes, was relevant only as an *aggravating* factor. Accordingly, the Court characterized the evidence in this context as a "two-edged sword," in that it might reduce the defendant's blameworthiness for the crime as it simultaneously indicated a probability he would be a continuing threat to society. As such, the Court determined, the "continuing threat" issue did not allow the jury to give mitigating effect to Penry's mental retardation evidence.⁷⁰

These inadequacies in the sentencing issues were not overcome by the defendant's ability to argue the significance of this mitigating evidence in the absence of appropriate jury instructions that provided jurors a vehicle to give effect to the evidence.⁷¹ The Court explained that, to ensure reliability in capital sentencing and to ensure that the punishment imposed is directly related to a defendant's "personal

67. *Penry*, 492 U.S. at 307, 313.

68. *Franklin v. Lynaugh*, 487 U.S. 164 (1987) (determining that the Texas capital sentencing procedure adequately permitted consideration of this offender's mitigating evidence); *cf. id.* at 183–88 (O'Connor, J., joined by Blackmun, J., concurring in judgment) (raising the possibility that the Texas procedure might not adequately permit jurors to consider and give effect to all types of mitigating evidence). *Contra id.* at 189–200 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting) (finding that the offender's mitigating evidence could not adequately be addressed by the Texas procedure).

69. *Penry*, 492 U.S. at 319–22.

70. *Id.* at 322–25.

71. *Id.* at 325–26.

culpability,” juries must be able to both consider and give effect to any mitigating evidence that is relevant to a defendant’s background or character or the circumstances of the crime.⁷² In Penry’s case, the Court concluded that, in the absence of instructions indicating the jury could consider *and* give effect to Penry’s mitigating evidence of mental retardation by declining to impose the death penalty, the jury had not been provided a mechanism by which it could express its “reasoned moral response” to this mitigating evidence. As a result of this unconstitutional application of the Texas capital sentencing procedure, the Court overturned Penry’s death sentence.⁷³

The Court next addressed Penry’s claim that the execution of a mentally retarded individual like himself constituted cruel and unusual punishment under the Eighth Amendment.⁷⁴ A five-Justice majority disagreed, determining that the execution of mentally retarded offenders was not constitutionally prohibited.⁷⁵ The Court noted that the Eighth Amendment prohibited punishments considered cruel and unusual as of the adoption of the Bill of Rights, as well as those punishments currently considered cruel and unusual under the concept of the “evolving standards of decency that mark the progress of a maturing society” utilized by the Court in its Eighth Amendment jurisprudence.⁷⁶ The Court had previously considered objective evidence to determine these evolving standards of decency—the “clearest and most reliable” of which was the legislation enacted by American legislatures, as well as data regarding the action of sentencing juries.⁷⁷

72. *Id.* at 326–28.

73. *Id.* at 328; *see id.* at 341–42 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *id.* at 349–50 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part); *cf. id.* at 308–10, 312–13 (addressing this issue also regarding Penry’s mitigating evidence of childhood abuse). The four Justices who dissented to this portion of the *Penry* opinion maintained their position that the Texas procedure had been upheld in *Jurek* with the understanding that it would allow broad consideration of mitigating evidence, the *use* of which evidence would be limited to answering the three-part sentencing inquiry. Because Penry’s mental retardation evidence was relevant to at least the deliberate conduct issue, the Texas procedure adequately allowed his sentencing jury to consider and give effect to his mitigating evidence. *Id.* at 353–58 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part).

74. *Id.* at 328.

75. *Id.* at 328–35; *id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part).

76. *Id.* at 330–31 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *see id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part).

77. *Id.* at 331.

The Court determined that, although “idiots” and “lunatics” were not subject to punishment for their criminal acts at common law, neither of these terms encompassed mentally retarded offenders comparable to Penry.⁷⁸ In contemporary practice, the circumstances of persons comparable to those protected from punishment at common law were addressed through the requirement of criminal competency and the availability of the insanity defense, as well as the previously recognized constitutional prohibition of the execution of insane offenders.⁷⁹ Moreover, as the Court explained, these common law terms would only arguably apply to a person within the “severe” or “profound” modern categories of mental retardation, rather than the “mild” or “moderate” categories.⁸⁰ Given Penry’s less extreme level of mental retardation, taken together with the jury’s finding of his criminal competency and rejection of his insanity defense, he (and presumably other offenders like him) would not fall within the common law prohibition of criminal punishment for “idiots” and “lunatics.”⁸¹

The Court then assessed the proffered “objective” evidence of an emerging national consensus against the execution of mentally retarded offenders reflective of the evolving standards of American society. The Court found that the statutory prohibition of the execution of mentally retarded offenders enacted by Congress and two states, even when added to the fourteen states that prohibited capital punishment entirely, fell short of the evidence of national consensus presented in support of the categorical exclusions from execution previously recognized by the Court.⁸² Penry failed to offer evidence as to relevant responses of sentencing juries and prosecutors regarding the execution of mentally retarded offenders. The Court found the proffered results of public opinion polls and resolutions of professional organizations insufficient evidence of a national

78. *Id.* at 331–32. The term “idiot” referred to persons manifesting, from birth, a total absence of reason or understanding, or an inability to distinguish between good and evil. *Id.* The term “lunatic” referred to individuals with a partial derangement of intellectual capabilities with a restoration of capabilities at uncertain intervals. *Id.*

79. *Id.* at 332–33; *see generally* Ford v. Wainwright, 477 U.S. 399 (1986) (prohibiting the execution of insane offenders who lack the competency to be executed).

80. *Penry*, 492 U.S. at 332–33; *see id.* at 308 n.1 (referring to classifications of mental retardation based on IQ scores, as described *supra* note 5).

81. *Id.* at 333.

82. *Id.* at 333–34; *see, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 826–33 (1988) (plurality opinion) (addressing young offenders); *Ford*, 477 U.S. at 408–10 (regarding insane offenders).

consensus. Thus, although mental retardation was clearly a factor that could reduce or mitigate an offender's culpability for a capital offense, the Court concluded that Penry had failed to establish the existence of a national consensus against the execution of mentally retarded offenders warranting the requested categorical exclusion from capital punishment.⁸³

D. The Texas Response to *Penry* Regarding Mental Retardation as a Mitigating Circumstance

In the wake of the *Penry* decision, the Texas Legislature, Texas Court, and Fifth Circuit addressed the deficiency that the Supreme Court identified in the Texas capital procedure regarding the consideration of mitigating evidence of mental retardation.⁸⁴ In 1991, at its next legislative session following *Penry*, the Texas Legislature revised the State's capital sentencing procedure to expressly incorporate consideration of mitigating circumstances.⁸⁵ More

83. *Penry*, 492 U.S. at 334–35; *see id.* at 340 (opinion of O'Connor, J.). In a portion of the opinion reflecting only her views, Justice O'Connor also evaluated Penry's claim under the proportionality and punishment purpose standards used by the Court in previous cases considering categorical exclusions from the death penalty. Based on the evidence presented, however, she was unable to conclude that mentally retarded offenders comparable to Penry, *as a class*, and without individualized consideration of their particular circumstances, lacked sufficient culpability to make a death sentence a proportionate punishment or to serve the punishment goal of retribution. *Id.* at 335–40 (opinion of O'Connor, J.). *Contra id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part) (rejecting Justice O'Connor's proportionality and punishment purpose analysis and concluding that this analysis had "no place" in the Court's Eighth Amendment jurisprudence).

Although they agreed with the conceptual framework of Justice O'Connor's proportionality and punishment purpose analysis, the dissenting Justices disagreed with the result of her analysis. Justice Brennan, joined by Justice Marshall, concluded that *all* mentally retarded offenders had insufficient intelligence and adaptive behavior skills to provide a level of culpability proportionate to a death sentence or to further the punishment goals of retribution or deterrence. They further concluded that the individualized sentencing mechanisms designed to consider mitigating evidence during capital punishment proceedings were inadequate to prevent mentally retarded offenders with limited culpability from nevertheless being sentenced to death. *Id.* at 342–49 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *cf. id.* at 350 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part) (agreeing with Justice O'Connor's presentation of the competing arguments regarding the issue, but concluding that the execution of mentally retarded offenders was unconstitutional).

84. *See supra* notes 67–73 and accompanying text (describing *Penry*); *see infra* notes 85–109 and accompanying text (describing the Texas response to *Penry*).

85. *See* Act of May 17, 1991, 72d Leg., Reg. Sess., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2898–900 (codified at TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 1992)). The Texas Legislature also made other changes to the capital punishment provisions. While retaining the continuing threat of future violent acts punishment issue, the

specifically, the Texas Legislature expressly included mitigating evidence as a category of evidence that is relevant to and must be considered in the determination of punishment.⁸⁶ The Texas Legislature also added a new mitigating circumstances sentencing issue that a capital jury must answer if it has unanimously answered the “aggravating circumstances” punishment issues (e.g., the continuing threat of future violent acts issue) affirmatively:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.⁸⁷

Under this analysis, “mitigating” evidence is evidence that a juror “might regard as reducing the defendant’s moral blameworthiness.”⁸⁸ In order to answer the issue affirmatively, ten or more jurors must agree that a sufficient mitigating circumstance or circumstances exist, although the jurors need not agree on what particular evidence supports an affirmative response to this issue. A negative response, on the other hand, requires unanimous agreement. Under the revised sentencing procedure, a sentencing jury’s unanimous affirmative findings regarding the aggravating circumstances punishment issues and unanimous negative finding concerning the mitigating circumstances issue result in a death sentence. However, a negative finding by ten or more jurors regarding one of the aggravating circumstances issues, an affirmative finding by ten or more jurors regarding the mitigating circumstances issue, or an inability by the jury to answer any sentencing issue submitted, results in a sentence of life imprisonment⁸⁹ (and now life imprisonment without parole).⁹⁰

Legislature eliminated the deliberate conduct and response to provocation issues and added a new punishment issue requiring the finding of a specified degree of intent or causation in instances in which an offender was charged under the broad “party” definition. *Id.* at ch. 838, § 1, 1991 Tex. Gen. Laws at 2899.

86. *Id.* at ch. 838, § 1, 1991 Tex. Gen. Laws at 2898–99 (defining this evidence as “evidence of the defendant’s background or character or the circumstances of the offense that mitigates against the imposition of the death penalty”).

87. *Id.* at ch. 838, § 1, 1991 Tex. Gen. Laws at 2899.

88. *Id.*

89. *Id.* at ch. 838, § 1, 1991 Tex. Gen. Laws at 2899–900.

90. In 2005, the Texas Legislature changed the alternative punishment in capital felony cases from life imprisonment to life imprisonment without parole. *See* Acts 2005,

Almost two years after the *Penry* decision was announced and shortly after the Texas Legislature adopted its revisions to the capital sentencing procedure, the Texas Court articulated its most comprehensive response to *Penry* and to those who might raise similar claims concerning the inadequate consideration of mitigating evidence under the previous Texas sentencing procedure (“*Penry* claims”).⁹¹ The Texas Court restrictively interpreted the scope of *Penry* in its initial substantive rulings on *Penry* claims.⁹² The Texas Court acknowledged that, contrary to its prior rulings,⁹³ *Penry* required an additional instruction to jurors to permit them to consider and give effect to presented mitigating evidence that had mitigating

79th Leg., Reg. Sess., ch. 787, § 1, 2005 Tex. Gen. Laws 2705 (currently codified at TEX. PENAL CODE ANN. § 12.31 (West Supp. 2010)).

91. Although the Texas Court had responded to some *Penry*-related claims previously, it articulated its most comprehensive response in a series of decisions announced on May 29, 1991. *Boggett v. State*, 855 S.W.2d 645 (Tex. Crim. App. 1991); *Ex parte* Herrera, 819 S.W.2d 528 (Tex. Crim. App. 1991); *Lackey v. State*, 819 S.W.2d 111 (Tex. Crim. App. 1991 (rehearing opinion)); *Selvage v. Collins*, 816 S.W.2d 390 (Tex. Crim. App. 1991); *Ex parte* Goodman, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte* Earvin, 816 S.W.2d 379 (Tex. Crim. App. 1991); *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991); *Ex parte* Baldree, 810 S.W.2d 213 (Tex. Crim. App. 1991); *Ex parte* Ellis, 810 S.W.2d 208 (Tex. Crim. App. 1991). In addition to its substantive response to *Penry*, the Texas Court waived the procedural default of *Penry* claims on direct appeal by capital defendants who had not objected to the punishment instructions at trial and in the collateral review process by those who had not raised the claim on direct review or at trial. *See generally* Tobolowsky, *Penry*, *supra* note 1, at 366–69 (describing the Texas Court’s procedural default approach regarding *Penry* claims). The Texas Court’s expansive approach regarding procedural default potentially authorized re-examination of every death sentence imposed under the three-question sentencing inquiry prior to *Penry*.

92. *See generally* Tobolowsky, *Penry*, *supra* note 1, at 369–79 (describing initial Texas Court rulings addressing *Penry* claims).

93. Prior to *Penry*, the Texas Court had consistently rejected claims that the Texas capital punishment procedure did not adequately incorporate consideration of mitigating evidence. *See generally* Tobolowsky, *Penry*, *supra* note 1, at 364–65 (describing the Texas Court’s pre-*Penry* approach regarding mitigating evidence). Instead, the Texas Court often observed that the Texas procedure permitted broad consideration of mitigating evidence, the use of which was limited to answering the prescribed punishment questions. *See, e.g.*, *Penry v. State*, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985) (noting that a capital defendant could present a wide range of relevant mitigating evidence to aid the jury in answering the punishment issues); *cf.* *Hovila v. State*, 562 S.W.2d 243, 249 (Tex. Crim. App. 1978) (finding the exclusion of the defendant’s mitigating evidence proper or harmless error because it was irrelevant to the continuing threat issue). The Texas Court had also repeatedly rejected claims that additional instructions beyond the three-question sentencing inquiry were required to tell jurors to consider or how to consider mitigating evidence in answering the punishment issues. *See, e.g.*, *Cordova v. State*, 733 S.W.2d 175, 189–90 (Tex. Crim. App. 1987) (finding that no additional instruction was required regarding the mitigating effect of proffered evidence). This interpretation of the Texas punishment procedure obviously affected how capital defendants presented and used mitigating evidence at their trials and punishment proceedings.

value different from or beyond its tendency to prompt a negative response to one of the punishment issues.⁹⁴ However, the Texas Court consistently reiterated that the Supreme Court in *Penry* had not declared the Texas capital sentencing system *itself* unconstitutional and accordingly rejected *Penry* claims that directly or indirectly challenged the facial constitutionality of the capital punishment procedure.⁹⁵

More importantly, in reviewing dozens of initial *Penry* claims, the Texas Court adopted restrictive evidentiary standards to evaluate whether proffered mitigating evidence qualified as “*Penry* evidence,” which was necessary to support a *Penry* claim. In this connection, the Texas Court required not only that the evidence be mitigating in nature, but also that it be relevant to a defendant’s “moral culpability” or “deathworthiness.”⁹⁶ In addition, the evidence had to be of the “same or similar character and quality” as the mitigating evidence of mental retardation (and childhood abuse) considered in *Penry*—it should not simply provide jurors an opportunity to express sympathy or emotion toward a defendant.⁹⁷ Finally, to be eligible for consideration as *Penry* evidence, the mitigating evidence must have actually been presented during the trial proceedings.⁹⁸ On these bases, the Texas Court rejected many *Penry* claims due to their failure to present sufficient “*Penry* evidence.”⁹⁹

The Texas Court rejected the greatest number of *Penry* claims, however, based on its own broad interpretation of the Court’s decision in *Franklin v. Lynaugh*,¹⁰⁰ and its narrow interpretation of *Penry*, in determining whether presented mitigating evidence could adequately be considered and given effect by the previous three-question sentencing procedure. The Texas Court denied relief in

94. See, e.g., *James v. State*, 805 S.W.2d 415, 417 n.3 (Tex. Crim. App. 1990).

95. See, e.g., *Ellis*, 810 S.W.2d at 212–13.

96. See, e.g., *Lackey*, 819 S.W.2d at 130–34.

97. See, e.g., *Trevino v. State*, 815 S.W.2d 592, 622 (Tex. Crim. App. 1991), *rev’d on other grounds*, 503 U.S. 562 (1992).

98. *Ex parte Goodman*, 816 S.W.2d 383, 385 n.6 (Tex. Crim. App. 1991) (refusing to consider evidence submitted in collateral review proceedings that was not presented at the defendant’s punishment proceedings for tactical reasons reflecting the concerns raised in *Penry*).

99. See, e.g., *Trevino*, 815 S.W.2d at 621–22; see also *Lackey*, 819 S.W.2d at 134 (finding evidence that only had mitigating value rather than the “two-edged” characteristics of *Penry*’s mitigating evidence of mental retardation was not comparable to *Penry*’s mitigating evidence).

100. *Franklin v. Lynaugh*, 487 U.S. 164 (1988); see *supra* note 68 and accompanying text (describing this decision).

virtually all of its initial post-*Penry* cases based on its determination that the presented mitigating evidence (e.g., defendant's youthful age, religious devotion, kindness and service to family or others, military service, and employment) had been adequately considered within the context of the pre-*Penry* punishment issues.¹⁰¹ The one exception to this response concerned *Penry* claims regarding significant evidence of mental retardation or childhood abuse comparable to that presented in *Penry*. In these initial cases alone did the Texas Court generally determine that there was "*Penry* error" due to the absence of an instruction indicating that jurors could consider and give effect to the presented mitigating evidence.¹⁰²

In its initial post-*Penry* cases, the Fifth Circuit took a similar substantive approach to that of the Texas Court, i.e., finding that mitigating evidence—other than that of the same nature as that presented in *Penry*—could be adequately considered by the previous

101. See, e.g., *Ex parte McGee*, 817 S.W.2d 77, 80–81 (Tex. Crim. App. 1991) (finding that the defendant's youthful age (nineteen) could be considered regarding the continuing threat issue and did not independently establish that he was less morally culpable than others, with similar findings regarding evidence of the defendant's family and religious devotion and the aberrational nature of the crime given his otherwise non-violent character); *Black v. State*, 816 S.W.2d 350, 364–65 (Tex. Crim. App. 1991) (finding that evidence of the defendant's military service and employment were relevant to the continuing threat issue); see also *Richardson v. State* 886 S.W.2d 769, 773 (Tex. Crim. App. 1991) (indicating that a broad application of *Penry* would create an "automatic reversal" rule).

102. See, e.g., *Richard v. State*, 842 S.W.2d 279, 281–83 (Tex. Crim. App. 1992) (including testimony as to the defendant's IQ of sixty-two, status in the "upper limits" of the mentally defective range, and characterization as "slow," but not retarded that supported a finding of *Penry* error); *Ex parte Williams*, 833 S.W.2d 150, 151–52 (Tex. Crim. App. 1992) (finding that evidence of IQ scores of fifty-three and sixty-seven (despite conflicting diagnoses regarding the defendant's mental retardation) raised a fact issue of mental retardation); *McGee*, 817 S.W.2d at 79–80 (regarding evidence of mental retardation, including a recent IQ score of sixty-six, and childhood abuse); *Ex parte Goodman*, 816 S.W.2d 383, 385–86 (Tex. Crim. App. 1991) (regarding evidence of mild to moderate mental retardation, including an IQ score of fifty-six); *Ramirez v. State*, 815 S.W.2d 636, 655–56 (Tex. Crim. App. 1991) (regarding evidence of mental deficiencies, including an IQ score of fifty-seven, and childhood abuse); *Gribble v. State*, 808 S.W.2d 65, 75–76 (Tex. Crim. App. 1990) (regarding evidence of childhood abuse and mental impairments); see also *Ex parte Sterling*, No. 71,385 (Tex. Crim. App. Apr. 29, 1992) (including evidence of the defendant's IQ of sixty-nine and poor school record); *Ex parte Modden*, No. 71,312 (Tex. Crim. App. Feb. 12, 1992) (including evidence of the defendant's IQ of sixty-four); *Ex parte Bell*, No. 70,946 (Tex. Crim. App. Nov. 6, 1991) (including evidence of the defendant's IQ of fifty-four). *Contra Lackey*, 819 S.W.2d at 129–36 (finding that the defendant's evidence of mental limitations, including IQ scores between sixty-seven and eighty, could be adequately considered through the continuing threat punishment issue).

sentencing questions.¹⁰³ The Fifth Circuit subsequently adopted its own analytical approach for determining *Penry* claims. In its view, *Penry* evidence (and hence *Penry* error) was limited to that regarding a defendant's "uniquely severe permanent handicaps" which had a nexus to the crime and had a "major mitigating thrust" substantially beyond the scope of all of the punishment issues.¹⁰⁴ The Fifth Circuit applied this restrictive analytical approach to reject most *Penry* claims based on mitigating evidence of mental retardation (as well as other evidence). In these cases, the Fifth Circuit concluded that the offenders' mental retardation evidence either did not establish a "uniquely severe permanent handicap" or a nexus to the crime, or both.¹⁰⁵

The Texas Court also added a "nexus to the crime" requirement in its *Penry* claim analysis regarding other types of mitigating evidence, but it initially expressly refused to apply such a requirement to *Penry* claims based on mental retardation.¹⁰⁶ Subsequently, a plurality of the Texas Court appeared to adopt a nexus requirement between mitigating evidence and the crime in a case involving an

103. Compare *Mayo v. Collins*, 920 F.2d 251, 251 (5th Cir. 1990), and *Mayo v. Lynaugh*, 893 F.2d 683, 688 (5th Cir. 1990) (granting collateral relief regarding a *Penry* claim based on childhood abuse), with *Russell v. Lynaugh*, 892 F.2d 1205, 1214 (5th Cir. 1989) (finding that evidence of the defendant's lengthy crime-free period could be considered through the continuing threat punishment issue), and *DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir. 1989) (finding that the defendant's youthful age (twenty-one) and "borderline" mental capacity were not of the type of mitigating evidence requiring application of *Penry*).

104. *Graham v. Collins*, 950 F.2d 1009, 1027, 1029, 1033 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993). *Contra id.* at 1034-35 (Reavley, J., joined by Politz, King, Davis, and Weiner, JJ., dissenting) (criticizing the majority for its narrow interpretation of *Penry*).

105. See, e.g., *Smith v. Cockrell*, 311 F.3d 661, 671-74, 677-83 (5th Cir. 2002); *Tennard v. Cockrell*, 284 F.3d 591, 593, 595-97 (5th Cir. 2002), *rev'd sub nom.* *Tennard v. Dretke*, 542 U.S. 274 (2004); *Jones v. Johnson*, 171 F.3d 270, 275-76 (5th Cir. 1999); *Boyd v. Johnson*, 167 F.3d 907, 911-12 (5th Cir. 1999); *Harris v. Johnson*, 81 F.3d 535, 538-39 (5th Cir. 1996); *Lackey v. Scott*, 28 F.3d 486, 488-90 (5th Cir. 1994); *Andrews v. Scott*, 21 F.3d 612, 624, 629-30 (5th Cir. 1994); *cf.* *Cuevas v. Collins*, 932 F.2d 1078, 1083 (5th Cir. 1991) (reaching the same result in a pre-*Graham Penry* case). *But see* *Blue v. Cockrell*, 298 F.3d 318, 319-22 (5th Cir. 2002) (finding that the offender's categorization as "mild to borderline" mentally retarded, with IQ scores between sixty-four and ninety and participation in special education classes, constituted adequate *Penry* evidence).

106. See *Earhart v. State*, 877 S.W.2d 759, 766 n.9 (Tex. Crim. App. 1994). Compare *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1992) (reflecting the adoption of the nexus requirement by a majority of the Texas Court), with *Richard*, 842 S.W.2d at 283 (noting that the Texas Court had not required an express showing of a nexus between evidence of "mental defectiveness" and the crime in *Penry* claims, even after its decision in *Nobles*, *supra*).

offender's intelligence quotient ("IQ") score that was within the range of mental retardation.¹⁰⁷ In a post-*Atkins* case rejecting a *Penry* claim based on evidence of an offender's mental impairment, if not mental retardation, the Texas Court more fully adopted and applied the Fifth Circuit's analysis requiring *Penry* evidence that established a severe, permanent handicap with a nexus to the crime.¹⁰⁸ Finally, the Texas Court changed its characterization of *Penry* evidence of mental retardation. It moved from a determination based primarily on IQ scores alone to a requirement that an offender must also present evidence of adaptive behavior deficits and developmental period onset as generally required in clinical definitions of the term.¹⁰⁹

Ultimately, the Supreme Court rejected the Fifth Circuit's restrictive analysis of *Penry* claims in *Tennard v. Dretke*,¹¹⁰ a post-*Atkins* case. The *Tennard* Court criticized the Fifth Circuit's adoption of "its own restrictive gloss" on *Penry* and stated that the Fifth Circuit's analysis was an "improper legal standard" and had "no foundation" in the Court's decisions.¹¹¹ The Court specifically held that the Fifth Circuit's "uniquely severe permanent handicap" and nexus tests for ascertaining *Penry* evidence were "incorrect" and explicitly rejected them.¹¹² Instead, the Court contemplated an "expansive" concept of relevant mitigating evidence subject to its *Penry* holding that would include the mitigating evidence of the

107. See *Ex parte Tennard*, 960 S.W.2d 57, 61–63 (Tex. Crim. App. 1997) (plurality opinion); *cf. id.* at 67 n.9 (Meyers, J., joined by Price, J., concurring in judgment) (indicating no clear disagreement with the plurality's reasoning, but noting that this portion of the opinion was dicta, unnecessary to support the resolution of the appellate claim, and overruled prior Texas Court precedent without acknowledgment). *But see id.* at 72 (Baird, J., dissenting) (criticizing the plurality for ignoring consistent precedent that did not require a nexus between mitigating evidence of mental retardation and the crime in *Penry* claims).

108. See *Ex parte Smith*, 132 S.W.3d 407, 409–17 (Tex. Crim. App.), *rev'd sub nom. Smith v. Texas*, 543 U.S. 37 (2004) (addressing an offender who had been in special education and had an IQ of seventy-eight and possible organic learning disabilities, as well as other mitigating circumstances).

109. See *Tennard*, 960 S.W.2d at 60–61 (plurality opinion) (referring to the three-part definition adopted by professional organizations, referenced by the Court in *Penry*, and included in the state mental retardation law); *id.* at 63–67 (Meyers, J., joined by Price, J., concurring in judgment); *cf. supra* note 5; *infra* notes 159, 177 (containing the referenced three-part definition of mental retardation).

110. *Tennard*, 542 U.S. at 274.

111. *Id.* at 283–87.

112. *Id.* at 289.

offender's low IQ presented in this case.¹¹³ The following term, the Court rejected the Texas Court's adoption of the Fifth Circuit's *Penry* evidence standards in *Smith v. Texas*,¹¹⁴ another case involving an offender with mental disabilities.¹¹⁵ The *Smith* Court found that the Texas Court had "erroneously relied on a [*Penry* evidence] test we never countenanced and now have unequivocally rejected."¹¹⁶ The *Tennard* and *Smith* Court rulings have permitted the reconsideration of scores of *Penry* claims resolved by the Texas Court or Fifth Circuit on the basis of insufficient *Penry* evidence, including claims involving mental retardation and low IQ evidence.¹¹⁷

E. The Texas Post-*Penry* Response Regarding Mental Retardation as a Categorical Exception to the Death Penalty

In the period between *Penry* and *Atkins*, several offenders raised the claim that, due to their mental retardation, their executions were barred as cruel and unusual punishment under the Eighth and Fourteenth Amendments.¹¹⁸ As in the cases decided prior to *Penry*, both the Texas Court¹¹⁹ and Fifth Circuit¹²⁰ summarily rejected these

113. *Id.* at 288–89. *Contra id.* at 289–93 (Rehnquist, C.J., dissenting); *id.* at 293–94 (Scalia, J., dissenting); *id.* at 294–95 (Thomas, J. dissenting).

114. *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam).

115. *See id.* at 41 (involving the mitigating evidence described *supra* note 108).

116. *Id.* at 45; *see also id.* at 45–49 (finding that the jury nullification instruction given did not cure the *Penry* error). *Contra id.* at 49 (Scalia, J., joined by Thomas, J., dissenting).

117. *See Tobolowsky, Texas, supra* note 1, at 103–04 & nn.285–86 (citing sources estimating that between fifty and one hundred cases could be affected by these rulings). After *Tennard* and *Smith*, the Court further found fault with the Texas Court's and Fifth Circuit's application of *Penry* principles in *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). The Court specifically found that the Fifth Circuit had "mischaracterized the law" by adopting a "sufficient" mitigating effect standard in its review of *Penry* claims and that, once again, the "sufficient effect" standard had "no foundation" in the Court's decisions. *Brewer*, 550 U.S. at 295–96 (quoting *Tennard*, 542 U.S. at 284). *Contra Abdul-Kabir*, 550 U.S. at 265–80 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting); *id.* at 280–85 (Scalia, J., joined by Thomas and Alito, JJ., dissenting).

Prior to *Atkins*, the Court also found that the supplemental "nullification" jury instruction that the Texas Court and Fifth Circuit had concluded satisfied the concerns identified in *Penry* regarding the consideration of mitigating evidence was a constitutionally inadequate means to achieve this requirement. *See Penry v. Johnson*, 532 U.S. 782 (2001). This Court ruling also permitted the reconsideration of prior cases in which such a nullification instruction was utilized. *See Tobolowsky, Texas, supra* note 1, at 103–04 & nn.285–86 (describing such cases).

118. *See infra* notes 119–20 and accompanying text (describing these cases).

119. *See, e.g., Hall v. State*, 67 S.W.3d 870, 877–79 (Tex. Crim. App.), *vacated*, 537 U.S. 802 (2002), *aff'd*, 160 S.W.3d 24 (Tex. Crim. App. 2004); *Bell v. State*, 938 S.W.2d 35, 41,

claims based on their own precedent and Supreme Court precedent, which then included the *Penry* Court's rejection of this claim.¹²¹

In most of the biennial legislative sessions in the period between *Penry* and *Atkins*, the Texas Legislature considered proposed bans on the execution of mentally retarded offenders.¹²² In the sessions between 1989 and 1995, these legislative proposals included both pretrial judicial determinations of mental retardation and sentencing determinations by the jury.¹²³ None of these proposals proceeded past committee review.¹²⁴ In the 1999 session, a proposal prescribing a pretrial judicial determination of mental retardation was adopted by the Texas Senate and a committee of the Texas House of Representatives; however, it did not receive final consideration by the entire House of Representatives.¹²⁵ In 2001, the Texas Senate adopted a pretrial judicial mental retardation determination procedure and the Texas House of Representatives adopted a procedure permitting a jury determination during capital punishment proceedings. Both legislative chambers agreed to a compromise, hybrid system permitting a jury determination of mental retardation during punishment proceedings, with a defendant option for a post-trial judicial proceeding and determination of mental retardation if

55 (Tex. Crim. App. 1996); *Penry v. State*, 903 S.W.2d 715, 726 n.2, 766–67 (Tex. Crim. App. 1995); *Ramirez v. State*, 815 S.W.2d 636, 654–56 (Tex. Crim. App. 1991).

120. See, e.g., *Bell v. Cockrell*, 31 F. App'x 156 (5th Cir. 2001); *Penry v. Johnson*, 215 F.3d 504, 512 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782, *vacated by* 261 F.3d 541 (5th Cir. 2001); *United States v. Webster*, 162 F.3d 308, 351 n.61 (5th Cir. 1998); *Andrews v. Scott*, 21 F.3d 612, 632 (5th Cir. 1994).

121. See *Penry v. Lynaugh*, 492 U.S. 302, 328–35 (1989).

122. See *infra* notes 123–28 and accompanying text. All of these proposals that defined mental retardation used the three-part definition of mental retardation involving significantly subaverage intellectual functioning, adaptive behavior deficits, and developmental period onset contained in the state mental retardation law. See TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2010). Some proposals included a presumption of mental retardation based on a stated IQ score of sixty-five or seventy or less. See generally Tobolowsky, *Texas, supra* note 1, at 83–86 (describing these legislative proposals).

123. Compare H.R. 573, 74th Leg., Reg. Sess. (Tex. 1995), and H.R. 527, 74th Leg., Reg. Sess. (Tex. 1995) (including a pretrial determination in which the defendant had the burden of proof to establish mental retardation by a preponderance of the evidence), with H.R. 1784, 73d Leg., Reg. Sess. (Tex. 1993), and H.R. 55, 71st Leg., Reg. Sess. (Tex. 1989) (including a sentencing determination).

124. See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 3, 2010) (describing the legislation and legislative action).

125. See S. 326, 76th Leg., Reg. Sess. (Tex. 1999); see also H.R. 3069, 76th Leg., Reg. Sess. (Tex. 1999); cf. H.R. 2121, 76th Leg., Reg. Sess. (Tex. 1999) (describing additional legislation introduced during the session that did not proceed past committee review).

the issue was determined adversely by the sentencing jury.¹²⁶ The Texas Governor, however, vetoed this legislation, stating his concern about its potential use of two different decision makers to make the mental retardation determination based on different evidence and its potential to undermine confidence in the jury process.¹²⁷ Thus, as of the *Atkins* decision, Texas had no legislative ban on the execution of mentally retarded offenders.¹²⁸

F. Conclusion Regarding Texas Mentally Retarded Capital Offenders in the Pre-*Atkins* Period

In the period prior to *Atkins*, there was significant legislative and judicial action concerning the consideration of mental retardation as a mitigating factor in Texas capital proceedings.¹²⁹ Following the Court's decision in *Penry*,¹³⁰ the Texas Legislature modified its capital punishment procedure to expressly incorporate the consideration of mitigating evidence, including that of mental retardation.¹³¹ In the process of addressing many claims of *Penry* error for more than a decade, the Fifth Circuit adopted a restrictive analytical interpretation of *Penry* that it applied to mitigating evidence of mental retardation (and other mitigating evidence).¹³² Although the Texas Court initially found that mitigating evidence of mental

126. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001); Sarah Gail Tuthill, Comment, *The Texas-Size Struggle to Implement Atkins v. Virginia*, 14 TEX. WESLEYAN L. REV. 145, 149–52 (2007). This legislation used the state mental retardation law definition of mental retardation. In the post-sentencing proceeding, mental retardation had to be established by a preponderance of the evidence, but the legislation did not expressly place the burden of proof on either party. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001).

127. See Gaiutra Bahadur, *Governor Vetoes Execution Ban, Mental Retardation Sentencing Bill Would Undercut Juries, Perry Says*, AUSTIN AMERICAN-STATESMAN, June 18, 2001, at A1; Rick Perry, *Statement of Gov. Rick Perry on U.S. Supreme Court Decision*, <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2002-06-20> (last visited June 18, 2003) (discussing the veto rationale); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 3, 2010) (describing the veto action).

128. See S. 686, 77th Leg., Reg. Sess. (Tex. 2001); H.R. 1247, 77th Leg., Reg. Sess. (Tex. 2001); H.R. 242, 77th Leg., Reg. Sess. (Tex. 2001) (describing additional legislation proposed in the 2001 session that did not proceed past committee review). See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 3, 2010) (describing the legislation and legislative action during the session).

129. See *supra* notes 84–109 and accompanying text.

130. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

131. See *supra* notes 85–90 and accompanying text.

132. See *supra* notes 103–05 and accompanying text.

retardation generally survived its own restrictive *Penry* analysis,¹³³ it ultimately adopted the Fifth Circuit's even narrower *Penry* interpretation and applied it to cases of mental retardation and other mental impairments.¹³⁴ In post-*Atkins* rulings, the Supreme Court ultimately rejected these narrow *Penry* interpretations as incorrect,¹³⁵ opening the way for renewed *Penry*-related litigation by Texas mentally retarded (and other) capital offenders.¹³⁶ As of the Supreme Court's decision in *Atkins*, however, neither the Supreme Court, the Fifth Circuit, the Texas Court, nor Texas law generally prohibited the execution of mentally retarded offenders.¹³⁷

II. The Supreme Court Prohibits the Execution of Mentally Retarded Offenders in *Atkins*

In *Atkins v. Virginia*,¹³⁸ the Supreme Court revisited its *Penry* decision rejecting a categorical ban on the execution of mentally retarded offenders.¹³⁹ Most of the legal issues raised in *Atkins* were similar to those presented in *Penry*.¹⁴⁰ Arguments in support of a ban on the execution of mentally retarded offenders focused on the

133. See *supra* notes 91–102, 106 and accompanying text.

134. See *supra* notes 107–09 and accompanying text.

135. See *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); see *supra* notes 110–16 and accompanying text.

136. See *supra* note 117 and accompanying text.

137. See *supra* notes 118–28 and accompanying text.

138. *Atkins v. Virginia*, 536 U.S. 304 (2002). The *Atkins* case involved a murder committed by an offender who, according to defense evidence, had an IQ of fifty-nine, a “mental age” between nine and twelve, and a limited capacity for adaptive behavior—all of which placed him in the “mild” range of mental retardation. *Id.* at 307–09; *Atkins v. Commonwealth*, 534 S.E.2d 312, 318–21 (Va. 2000), *rev'd*, 536 U.S. 304 (2002); *id.* at 321–24 (Hassell, J., joined by Koontz, J., concurring in part and dissenting in part). The government presented evidence that *Atkins* had at least “average intelligence.” *Atkins*, 536 U.S. at 309; *Atkins*, 534 S.E.2d at 319. The Court granted *Atkins*' certiorari petition on the question regarding “[w]hether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment.” *Atkins v. Virginia*, 534 U.S. 809 (2001); *Atkins v. Virginia*, 533 U.S. 976 (2001); see *McCarver v. North Carolina*, 533 U.S. 975 (2001) (dismissing a petition previously granted on this issue as moot after the state legislature enacted a ban on the execution of mentally retarded offenders).

139. *Penry v. Lynaugh*, 492 U.S. 302, 328–35 (1989); *id.* at 351 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part); see *supra* notes 74–83 and accompanying text (describing this decision). *Contra Penry*, 492 U.S. at 342–49 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

140. See *Atkins*, 536 U.S. at 311–21. *But see id.* at 348–54 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

impact of the limited intellectual and behavioral functioning of mentally retarded offenders *as a class*. For example, concerns were raised that an offender's mental retardation decreased the reliability of the outcome in the proceedings and increased the risk of error to a level unacceptable in a capital case. It was argued that the available consideration of mental retardation as a mitigating circumstance in capital sentencing had proven an inadequate vehicle for the consideration of this condition. Finally, the contention was expressed that mental retardation limited these offenders' culpability to a degree that rendered the death penalty a disproportionate and excessive punishment that served no valid penological purpose.¹⁴¹ Arguments in opposition to the ban expressed support for the current consideration of mental retardation through criminal competency and criminal insanity proceedings, as well as through individualized capital sentencing in which the issue of mental retardation was already considered as a mitigating circumstance. In addition, concerns were raised about the unnecessary interference and disruption that a constitutional ban would have on states' administration of the death penalty.¹⁴²

The most critical difference between the *Penry* and *Atkins* arguments involved the significance attributed to the dramatic increase in the number of states that had enacted bans on the execution of mentally retarded offenders in the intervening years. The parties vigorously debated whether the prohibitions by the federal government and now eighteen states—in addition to the twelve states that totally prohibited capital punishment—represented the national consensus against the execution of mentally retarded offenders deemed lacking in *Penry*. The resolution of this debate, in turn, would inform the Court's determination whether the execution of mentally retarded offenders was constitutionally prohibited as cruel and unusual punishment under the "evolving standards of decency" concept embodied in the Court's Eighth Amendment jurisprudence.¹⁴³ In an opinion utilizing a decisional framework reminiscent of several prior categorical exception capital cases,¹⁴⁴ a

141. *See id.* at 311–21.

142. *See id.* at 348–54 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

143. *Compare id.* at 313–16, *with id.* at 341–46 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

144. *See Thompson v. Oklahoma*, 487 U.S. 815, 826–38 (1988) (plurality opinion); *Ford v. Wainwright*, 477 U.S. 399, 405–10 (1986); *Enmund v. Florida*, 458 U.S. 782, 797–801 (1982); *Coker v. Georgia*, 433 U.S. 584, 592–600 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 182–87 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

six-Justice Court majority concluded that the Eighth Amendment *does* constitutionally prohibit the execution of mentally retarded offenders.¹⁴⁵

At the outset, the Supreme Court reaffirmed its interpretation, articulated in prior cases, that the Eighth Amendment prohibits “all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive” and requires that punishments be “graduated and proportioned” to the offense.¹⁴⁶ Moreover, the excessive nature of a punishment is judged under the “evolving standards of decency” that currently prevail rather than those prevalent at common law or the adoption of the Bill of Rights. Proportionality review under these evolving standards is informed by objective factors, the “clearest and most reliable” of which is enacted legislation; however, such objective evidence does not wholly determine the constitutional analysis.¹⁴⁷ Rather, the “Constitution contemplates that in the end, [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”¹⁴⁸ The Court, therefore, began its *Atkins* analysis with a review of the legislative treatment of the death penalty for mentally retarded offenders before considering whether there were reasons to agree or disagree with the “judgment reached by the citizenry and its legislators.”¹⁴⁹

In reviewing the legislative changes during the years since the *Penry* decision, the Supreme Court noted not only the number of states that had enacted bans on the execution of mentally retarded offenders, but also the “consistency of the direction” of the legislative changes and the high levels of support for the enactment of the individual statutory prohibitions. Even among capital punishment states without legislative bans, only five such states had executed offenders with known IQs in the mentally retarded range since the *Penry* decision. The Court thus concluded that the practice of executing mentally retarded offenders had become “truly unusual, and it is fair to say that a national consensus has developed against it.”¹⁵⁰ The Court further noted that additional evidence, supplied by national professional and religious organizations, polling data, and

145. *Atkins*, 536 U.S. at 305, 321.

146. *Id.* at 311 & n.7 (citation omitted).

147. *Id.* at 311–12 (citations omitted).

148. *Id.* at 312 (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).

149. *Id.* at 313.

150. *Id.* at 316; *see id.* at 313–16.

international authorities, “makes it clear that this legislative judgment [to bar the execution of mentally retarded offenders] reflects a much broader social and professional consensus.”¹⁵¹

The Court determined that the national consensus it had found against the execution of mentally retarded offenders reflected a judgment about the relative culpability of these offenders and the relationship between mental retardation and the punishment purposes served by the death penalty. It also reflected a concern about the potential for the characteristics of mental retardation to undermine the strength of procedural protections required in capital cases.¹⁵² Accordingly, though many of the limitations associated with mental retardation would not by themselves warrant a total exemption from criminal responsibility and punishment, the Court concluded that the impairments inherent in mental retardation nevertheless had the effect of diminishing the personal culpability of *all* mentally retarded offenders. In turn, this reduced personal culpability rendered mentally retarded offenders inappropriate subjects to serve the retributive punishment goals of capital punishment. In addition, the cognitive and behavioral impairments associated with mental retardation prevented the execution of such offenders from significantly serving the capital punishment goal of deterrence.¹⁵³ Finally, these same impairments tended to limit the effectiveness of mentally retarded offenders’ defenses against the imposition of the death penalty and to increase the risk of wrongful execution.¹⁵⁴

Thus, the Court’s independent evaluation revealed no reason to disagree with the post-*Penry* legislative judgment that the death penalty is not a “suitable” punishment for mentally retarded offenders. The Court therefore concluded that the execution of mentally retarded offenders is a constitutionally “excessive” punishment barred by the Eighth Amendment.¹⁵⁵

151. *Id.* at 316 n.21.

152. *Id.* at 317.

153. *Id.* at 318–20.

154. *Id.* at 320–21.

155. *Id.* at 321. The dissenting Justices attacked the jurisprudential and factual bases for the majority’s holding. In these Justices’ view, the determination regarding whether a punishment is constitutionally cruel and unusual is limited to those punishments considered so at the time of the Bill of Rights and those deemed so by contemporary standards as reflected solely by enacted legislation and sentencing jury determinations. Restricting their analysis to these factors only and further restricting it to the actions of capital punishment states only, the dissenting Justices concluded that the execution of

As it had done previously regarding the prohibition of the execution of insane offenders,¹⁵⁶ the Court entrusted the states with the “task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”¹⁵⁷ The Court, however, did not leave the states without guidance in their task of identifying mentally retarded capital offenders in order to enforce the constitutional ban on their execution. Indeed, the Court recognized that

[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that *Atkins* suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.¹⁵⁸

As it had done in *Penry*,¹⁵⁹ the *Atkins* Court referred to the definition of mental retardation adopted by the American Association on

“mildly” mentally retarded persons, such as *Atkins*, was not unconstitutionally cruel and unusual. The dissenting Justices also rejected the constitutional relevance of the majority’s excessive punishment determination and the factual conclusions that the majority had reached pursuant to it. *Id.* at 321–28 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting); *id.* at 337–54 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

156. See *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (plurality opinion).

157. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416–17).

158. *Id.*

159. Although the *Penry* Court members divided five-to-four in declining to recognize a constitutional exclusion from capital punishment for mentally retarded offenders, the Justices unanimously adopted the portion of the majority opinion in which they defined mental retardation by reference to the American Association on Mental Retardation (now American Association on Intellectual and Developmental Disabilities) classification text:

Persons who are mentally retarded are described as having “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” American Association on Mental Deficiency (now Retardation) (AAMR), *Classification in Mental Retardation 1* (H. Grossman ed. 1983). To be classified as mentally retarded, a person generally must have an IQ of 70 or below. *Id.*, at 11. Under the AAMR classification system, individuals with IQ scores between 50–55 and 70 have “mild” retardation. Individuals with scores between 35–40 and 50–55 have “moderate” retardation. “Severely” retarded people have IQ scores between 20–25 and 35–40, and “profoundly” retarded people have scores below 20 or 25. *Id.*, at 13.

Mental Retardation (“AAMR,” now American Association on Intellectual and Developmental Disabilities), as well as that of the American Psychiatric Association (“APA”), in describing the category of capital offenders it was addressing in its constitutional ruling.¹⁶⁰

For example, in explaining defense evidence that Atkins was “mildly mentally retarded,”¹⁶¹ the Court provided the AAMR’s definition of mental retardation, which had been further refined since the *Penry* decision. Although this definition had eliminated the classification system based on IQ score, the Court also provided the similar mental retardation definition adopted by the APA, which still retained the IQ score classifications:

The American Association of Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is 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.” *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

The American Psychiatric Association’s definition is similar: “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning

Penry v. Lynaugh, 492 U.S. 302, 308 n.1 (1989) (quoting AM. ASS’N ON MENTAL DEFICIENCY, *supra* note 5, at 1, 11, 13). The *Penry* Court characterized the American Association on Mental Retardation as the “country’s oldest and largest organization of professionals working with the mentally retarded.” *Id.* at 335. In addition, several references were made in the majority opinion, Justice O’Connor’s separate portion of the opinion, and the dissenting opinions to this professional organization’s definition of mental retardation and to the arguments made and positions taken in its amicus curiae brief submitted to the Court in the case. *See id.* at 333, 335; *id.* at 336, 337, 338, 339 (opinion of O’Connor, J.); *id.* at 344–46, 348–49 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part). In fact, Justice Stevens’ dissent, joined by Justice Blackmun, on the merits of the execution prohibition issue was virtually limited to the statement: “In my judgment, . . . that explication—particularly the summary of the arguments advanced in the Brief for American Association on Mental Retardation et al. as *Amici Curiae*—compels the conclusion that such executions are unconstitutional.” *Id.* at 350 (citation omitted).

160. *See infra* notes 161–66 and accompanying text.

161. *See Atkins*, 536 U.S. at 308.

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). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.” Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). “Mild” mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.¹⁶²

Later in the majority opinion, the Court summarized these definitions of mental retardation: “clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.”¹⁶³ Significantly, after noting that not all offenders with mental retardation claims will fall “within the range of mentally retarded offenders about whom there is a national consensus,”¹⁶⁴ which consensus the Court had found based largely on the action of state-enacted bans, the Court further noted that the states’ “statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in [the quoted definitional material above].”¹⁶⁵ Finally, the Court noted that an IQ “between 70 and 75 or lower” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.”¹⁶⁶

Thus, the *Atkins* Court imposed its constitutional ban on the execution of mentally retarded offenders with express reference to the parallel clinical definitions of mental retardation provided by the

162. *Id.* at 308 n.3 (quoting AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); APA, *supra* note 5, at 41, 42–43); *see supra* note 5 (describing subsequent modification of the AAMR definition). The referenced AAMR and APA adaptive skill areas are essentially the same. However, the APA divided the AAMR’s health and safety area into separate skill areas regarding health and safety. This subdivision accounts for ten skill areas in the AAMR definition and eleven skill areas in the APA definition.

163. *Id.* at 318.

164. *Id.* at 317.

165. *Id.* at 317, n.22.

166. *Id.* at 309 n.5; *cf. id.* at 316 (referring to infrequent executions of offenders with known IQs less than seventy since *Penry*).

AAMR and the APA.¹⁶⁷ Mentally retarded offenders who meet these criteria certainly appear to be the offenders about whom the Court determined there exists a national consensus against their execution.¹⁶⁸ While entrusting enforcement of the constitutional ban to the states, the *Atkins* Court provided clear guidance that definitional provisions in a state's capital punishment exclusion provisions should be at least as comprehensive as the clinical definitions referenced by the *Atkins* Court.¹⁶⁹

III. The Texas Legislature Fails to Respond to *Atkins*

During its 2001 session, the Texas Legislature had reached consensus on a procedure to identify mentally retarded offenders and exclude them from execution; but, as discussed above, the Governor subsequently vetoed this legislation.¹⁷⁰ One might think that, with the impetus of the Supreme Court's constitutional ban on such executions in *Atkins* in 2002, the Texas Legislature would have finalized a legislative ban in one of its biennial sessions since the *Atkins* decision. However, the Texas Legislature has failed to do so.¹⁷¹

The post-*Atkins* bill progressing the farthest in the Texas Legislature was passed by the Texas House of Representatives in

167. See *id.* at 308 n.3; see also *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989) (using the AAMR mental retardation definition in rejecting a constitutional ban); *cf.* *Heller v. Doe*, 509 U.S. 312, 321–22 (1993) (referring to the AAMR and APA definitional materials in discussing the nature of mental retardation); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 n.9 (1985) (referring to the AAMR definition of mental retardation).

168. See *Atkins*, 536 U.S. at 317; see also *id.* at 339, 353 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (criticizing the Court's application of the execution ban to all capital offenders who are "even slightly mentally retarded" and warning of offenders feigning the symptoms identified in the AAMR and APA mental retardation definitions quoted by the majority); *id.* at 328 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) (referring to the Court's finding of a national consensus against executing "all mentally retarded offenders").

169. See, e.g., Blume et al., *supra* note 21, at 693–94; Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Rich. L. Rev. 811, 818–19, 822–23 (2007); *infra* note 712 and accompanying text.

170. See *supra* notes 126–27 and accompanying text.

171. See Graham Baker, Note, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature*, 9 SCHOLAR 237, 267–69 (2007); Tuthill, *supra* note 126, at 152–55. See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing post-*Atkins* legislative proposals).

2003, the first legislative session following *Atkins*.¹⁷² This 2003 bill differed from the 2001 hybrid compromise in some important respects.¹⁷³ Under the 2001 legislation, the sentencing jury determined mental retardation with the opportunity for a post-trial judicial proceeding and “re-determination” in the event of an adverse jury finding.¹⁷⁴ The 2003 House of Representatives bill, however, only provided for a jury determination of mental retardation during the punishment proceeding, if the issue had been properly requested and actually raised by the evidence.¹⁷⁵ In this sentencing proceeding, the defendant had the burden to prove his mental retardation by a preponderance of the evidence.¹⁷⁶ In addition, the proposed statutory definitions concerning mental retardation were somewhat more restrictive than those in the state mental retardation statute that had been utilized in the 2001 legislation.¹⁷⁷

172. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001).

173. Compare H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003), with H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001).

174. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001).

175. See H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003). The jury would respond to this issue only after answering the aggravating factor punishment issues affirmatively and before it addressed the mitigating circumstances punishment issue. A unanimous jury finding was required to reject the mental retardation issue. An affirmative vote by ten jurors or an inability to agree on the issue resulted in a sentence of life imprisonment. *Id.*

176. *Id.* In the 2001 hybrid procedure, neither the burden nor standard of proof was designated regarding the sentencing jury determination of mental retardation. In the post-sentencing judicial proceeding, the standard of proof was preponderance of the evidence, but the burden of proof was not expressly placed on either party. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001).

177. As in previously proposed legislation, the 2001 compromise legislation defined mental retardation by reference to the state mental retardation law definition of the term. See H.R. 236, 77th Leg., Reg. Sess. (Tex. 2001); Tobolowsky, *Texas*, *supra* note 1, at 83–86. The state mental retardation law used the three-part clinical definition of mental retardation: “significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.” TEX. HEALTH & SAFETY CODE ANN. § 591.003 (Vernon 2010). The mental retardation statute further defined “subaverage general intellectual functioning” as “measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used.” *Id.* It also defined “adaptive behavior” as “the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person’s age and cultural group.” *Id.*

The 2003 proposed legislation required the adaptive behavioral deficits to be “significant” and they were not “normed” to the person’s age and cultural group. See H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003). The legislative proposal also expressly stated that “[e]vidence regarding mental retardation may include evidence of the circumstances of the offense or other crimes, wrongs, or acts.” *Id.*

Although adopted by the House of Representatives, this bill was not considered by the Texas Senate during the session.¹⁷⁸ In the 2003 session, additional proposed legislation did not proceed past committee review.¹⁷⁹ This included a House of Representatives bill that was substantially the same as the 2001 compromise legislation.¹⁸⁰ It also included a Senate bill proposing a pretrial jury or court resolution of mental retardation at a proceeding at which the defendant had the burden to prove his mental retardation by a preponderance of the evidence.¹⁸¹ In the 2005 legislative session, both procedures—the pretrial jury or judicial procedure and the jury punishment issue procedure—were re-introduced, but neither procedure proceeded past committee review.¹⁸² In the 2007 session, only the pretrial jury or judicial procedure was introduced, but again it did not proceed past committee review.¹⁸³

In 2009, the legislation proposing a pretrial jury or judicial procedure was re-introduced in both the Texas House of Representatives and Senate.¹⁸⁴ However, during the committee review process in the House of Representatives, the proposal was

178. See TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing action on the legislation). A companion bill to this legislation did not proceed past committee review in the Senate. See S. 332, 78th Leg., Reg. Sess. (Tex. 2003).

179. See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislation and legislative action).

180. See H.R. 664, 78th Leg., Reg. Sess. (Tex. 2003).

181. See S. 163, 78th Leg., Reg. Sess. (Tex. 2003) (including provisions regarding previously convicted offenders as well). This proposal used the state law's definition of mental retardation and contained a presumption of mental retardation if the offender's IQ was seventy or less. *Id.*; cf. S. 389, 78th Leg., Reg. Sess. (Tex. 2003) (proposing a procedure to raise mental retardation issues by previously convicted capital offenders). Almost all the proposals introduced during the 2003 regular legislative session were introduced again during a specially called legislative session in 2003, but none proceeded past committee review. See S. 57, 78th Leg., 1st Spec. Sess. (Tex. 2003); S. 14, 78th Leg., 1st Spec. Sess. (Tex. 2003); S. 13, 78th Leg., 1st Spec. Sess. (Tex. 2003); H.R. 18, 78th Leg., 1st Spec. Sess. (Tex. 2003).

182. Compare S. 85, 79th Leg., Reg. Sess. (Tex. 2005) (pretrial procedure), with S. 65, 79th Leg., Reg. Sess. (Tex. 2005), and H.R. 419, 79th Leg., Reg. Sess. (Tex. 2005) (punishment proceeding procedure); cf. S. 231, 79th Leg., Reg. Sess. (Tex. 2005) (re-introducing the post-conviction procedure). See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislation and legislative action).

183. See S. 249, 80th Leg., Reg. Sess. (Tex. 2007). See generally TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislation and legislative action).

184. See S. 167, 81st Leg., Reg. Sess. (Tex. 2009); H.R. 1152, 81st Leg., Reg. Sess. (Tex. 2009).

modified to permit a defendant to request a pretrial judicial determination of mental retardation as well as a jury determination during the punishment proceeding. This proposal used the state mental retardation law definition of mental retardation. The defendant had the burden to establish mental retardation in the pretrial proceeding by a preponderance of the evidence. The punishment proceeding determination also required a finding of mental retardation by a preponderance of the evidence.¹⁸⁵ The reviewing committee unanimously approved the proposal, as modified, but the proposal was not further considered by the House of Representatives in its entirety.¹⁸⁶ The original pretrial jury or judicial procedure proposed in the Senate did not proceed past committee review.¹⁸⁷ Proposals re-introducing the 2001 compromise sentencing jury/post-sentencing judicial procedure and a pretrial judicial procedure also did not proceed past committee review.¹⁸⁸ Thus, as of the writing of this Article, the Texas Legislature has not enacted a statutory procedure to address *Atkins* claims.¹⁸⁹

IV. The Texas State and Federal Courts Address *Atkins* Claims on Collateral Review

A. Overview

In the absence of legislative action prescribing procedures for the review of *Atkins* claims, the Texas state and federal courts have adopted standards and procedures to address these claims.¹⁹⁰ Once

185. See H.R. 1152, 81st Leg., Reg. Sess. (Tex. 2009); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislation and legislative action).

186. See TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislative action).

187. See *id.*; see also S. 167, 81st Leg., Reg. Sess. (Tex. 2009).

188. See S. 1139, 81st Leg., Reg. Sess. (Tex. 2009) (pretrial proposal); H.R. 4466, 81st Leg., Reg. Sess. (Tex. 2009) (compromise proposal); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Oct. 18, 2010) (describing the legislative action).

189. In addition to its failure to enact a statutory procedure to address *Atkins* claims during the trial process, the Texas Legislature has not enacted a specific statutory process for *Atkins* claims raised on collateral review. See, e.g., S. 231, 79th Leg., Reg. Sess. (Tex. 2005); see also *infra* note 945 (describing proposed legislation in the 2011 Texas legislative session). See generally Brief of Texas State Senator Rodney Ellis et al., as Amici Curiae in Support of Petitioner at 5–10, *Hall v. Thaler*, No. 10-37 (U.S. Sept. 13, 2010) (describing unsuccessful attempts to enact *Atkins* legislation).

190. See *infra* notes 217–80, 295–350 and accompanying text. The Texas Court opinions described in this Article include authored and per curiam opinions, as well as published and unpublished opinions. Those Texas Court opinions cited to electronic

the Supreme Court established the constitutional ban on the execution of mentally retarded offenders in *Atkins*,¹⁹¹ Texas capital offenders could raise the claim during future state trial proceedings¹⁹² and challenge any adverse findings on direct appeal in the Texas Court.¹⁹³ Moreover, in a unanimous finding when the Court first addressed the issue in *Penry* on collateral review, the Court had concluded that this constitutional ban would constitute the type of “new rule” of law that could be considered, announced, and applied retroactively to a case on collateral review.¹⁹⁴ Following *Atkins*, both the Texas Court and Fifth Circuit expressly recognized that *Atkins* would apply retroactively to offenders on collateral review.¹⁹⁵

In the years since *Atkins*, most Texas *Atkins* claims have been litigated by convicted capital offenders on collateral review in the Texas state and federal courts.¹⁹⁶ In this connection, as of the writing of this Article, over eighty-five Texas capital offenders have initiated collateral review proceedings raising *Atkins* claims in the Texas state

databases only or not appearing in any external database have generally been designated by a majority of the Texas Court Judges as unpublished opinions, without precedential authority. See TEX. R. APP. P. 77.2, 77.3; cf. *infra* note 296 (regarding federal unpublished opinions). These unpublished opinions nevertheless are an important resource because they have resolved *Atkins* issues in individual cases and articulated aspects of the Texas Court’s implementation of the *Atkins* mandate.

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

192. See *infra* notes 626–27, 629 and accompanying text.

193. See *infra* notes 623, 628 and accompanying text.

194. Prior to addressing the constitutional ban on execution claim on the merits, the *Penry* Court first addressed whether this claim sought the announcement or application of a “new rule” of law generally prohibited in a collateral review case—and determined that it did so. However, the Court unanimously concluded that *Penry*’s claim could be considered and applied retroactively to defendants on collateral review because it satisfied one of the exceptions to nonretroactivity established by the Court. *Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989); *id.* at 341–42 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *id.* at 349–50 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part); *id.* at 350–51 (Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., concurring in part and dissenting in part); cf. *Teague v. Lane*, 489 U.S. 288, 299–310 (1989) (plurality opinion) (articulating the retroactivity doctrine). Although the Court did not establish the constitutional ban on execution in *Penry*, the Court had already addressed the retroactivity issue when it subsequently established the ban in *Atkins*, a direct appeal case.

195. See, e.g., *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002); *Ex parte Briseno*, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004); *Ex parte Rivera*, No. 27065-02, 2003 WL 21752841 (Tex. Crim. App. July 25, 2003) (per curiam); *Ex parte Williams*, No. 43907-02, 2003 WL 1787634 (Tex. Crim. App. Feb. 26, 2003) (Cochran, J., joined by Meyers, J., concurring).

196. Compare *infra* Table 1 (describing collateral review litigation), with *infra* Table 2 (describing litigation in the trial courts and on direct appeal).

courts.¹⁹⁷ The Texas Court (or Texas Governor) has resolved the *Atkins* claims of seventy-eight capital offenders on collateral review.¹⁹⁸ The Fifth Circuit or Texas federal trial courts have completed their review of the *Atkins* claims of thirty-eight of these offenders,¹⁹⁹ as well as three offenders who first raised their *Atkins* claims in federal court.²⁰⁰ The volume of these Texas *Atkins* collateral review claims far exceeds that of any other capital punishment state.²⁰¹ Despite the high volume of such Texas *Atkins* claimants, however, relatively few such claimants have been successful in asserting their claims on collateral review. Only fourteen previously convicted Texas capital offenders have thus far been deemed to be mentally retarded for purposes of the *Atkins* ban on their execution.²⁰² This reflects a “success” rate (seventeen percent of resolved collateral review claims)²⁰³ lower than and, in some instances, substantially lower than

197. See *infra* Table 1 (describing the resolution of seventy-eight Texas *Atkins* collateral review claims by the Texas Court or Texas governor). Additional *Atkins* claims are pending at various stages of the collateral review procedure. See, e.g., *Ex parte* Cathey, No. WR-55,161-02, 2008 Tex. Crim. App. Unpub. LEXIS 850 (Tex. Crim. App. Nov. 18, 2008) (per curiam); *Ex parte* Lim, No. WR-56,297-01, 2008 Tex. Crim. App. Unpub. LEXIS 407 (Tex. Crim. App. June 4, 2008) (per curiam); *Ex parte* Martinez, No. WR-58,358-02, 2008 Tex. Crim. App. Unpub. LEXIS 185 (Tex. Crim. App. Mar. 12, 2008) (per curiam). While pending, other *Atkins* claims have been resolved on other grounds. See, e.g., *Ex parte* Dixon, No. WR-56,822-01, 2005 Tex. Crim. App. Unpub. LEXIS 281 (Tex. Crim. App. Dec. 14, 2005) (per curiam) (dismissing the offender’s remanded *Atkins* claim as moot due to the Texas Governor’s commutation of his death sentence because he was seventeen at the time of the crime).

198. See *infra* Table 1 (describing the resolution of *Atkins* claims by the Texas Court and Texas Governor).

199. See *id.* (describing the resolution of *Atkins* claims by the Fifth Circuit and Texas federal trial courts).

200. See *Hernandez v. Thaler*, 398 F. App’x 81, 89–90 (5th Cir. 2010); *Green v. Quarterman*, No. H-07-827, 2008 U.S. Dist. LEXIS 11457 (S.D. Tex. Feb. 15, 2009); *Amador v. Dretke*, No. SA-02-CA-230-XR, 2005 U.S. Dist. LEXIS 6072, at *102–09 (W.D. Tex. Apr. 11, 2005), *aff’d on other grounds*, 458 F.3d 397 (5th Cir. 2006); see also *infra* Table 1.

201. Cf. Blume et al., *supra* note 26, at 637 (identifying forty-six Texas *Atkins* claims versus twenty-six in the next highest state and representing twenty percent of the national total, as of May 2008).

202. These fourteen offenders include ten whose mental retardation was determined by the Texas Court, two whose mental retardation led to death penalty commutations by the Texas Governor, and two whose mental retardation was determined by the Fifth Circuit. See *infra* Table 1.

203. These fourteen cases represent approximately seventeen percent of the eighty-one *Atkins* collateral review claims resolved thus far. Conversely, twenty-five of these *Atkins* claimants (thirty-one percent) have been executed as of January 1, 2011. See *Searchable Execution Database*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions> (last visited Jan. 1, 2011); *infra* Table 1.

other capital punishment states addressing a significant volume of *Atkins* claims.²⁰⁴

The success or failure of these *Atkins* collateral review claims is, of course, a product of both the nature and strength of the mental retardation claim made and the standards by which it is assessed. In addition to the state and federal procedural rules governing collateral review claims generally,²⁰⁵ the Texas Court and Fifth Circuit have adopted specific standards and procedures regarding *Atkins* claims raised on collateral review.²⁰⁶ The following sections examine these standards and procedures and their application to *Atkins* claims in illustrative collateral review cases.²⁰⁷

B. The Texas Collateral Review Process

In 1995, the Texas Legislature added death penalty-specific collateral review procedures to the state's habeas corpus provisions.²⁰⁸ These provisions place certain restrictions on the initial and subsequent filing of these habeas corpus applications. Time limits, relatively close in time to the entry of judgment in the underlying capital case, restrict the filing of initial habeas corpus applications.²⁰⁹ Unless the Texas Court permits an untimely initial habeas corpus filing for good cause shown, all claims available to an offender as of the final expiration date for a timely filing are waived.²¹⁰

204. Based on research reflecting the number of successful *Atkins* claims in various capital punishment states, as of May 2008, state "success" rates in states that had resolved at least ten claims ranged from twelve to eighty percent, and the national average success rate was thirty-eight percent. See Blume et al., *supra* note 26, at 628–29, 637; John Blume, *Sentence Reversals in Intellectual Disability Cases*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/sentence-reversals-intellectual-disability-cases> (last updated May 8, 2008). Although the Texas success rate was twenty-six percent at the time of this research, this was based on the successful resolution of twelve of only forty-six resolved cases at that time. See *id.*

205. See *infra* notes 208–16, 281–94 and accompanying text.

206. See *infra* notes 217–80, 295–350 and accompanying text.

207. See also *infra* Table 1 (describing the resolution of Texas collateral review cases).

208. These provisions are codified as TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010). When reference is made in this Article to the state collateral review provisions, the reference refers to these death penalty-specific provisions.

209. Initial applications for habeas corpus writs must be filed in the convicting trial court within 180 days after the appointment of counsel following the entry of judgment in the underlying capital case or within forty-five days after the state's original brief is filed on direct appeal, whichever is later. One ninety-day extension of the filing date is permitted for good cause shown. See *id.*

210. See *id.*

There are no filing deadlines for subsequent writ applications. However, subsequent applications may not be considered or serve as the basis for a grant of relief unless a subsequent application contains “sufficient specific facts” establishing specified statutory factors.²¹¹ These factors include an allegation that a claim has not been and could not have been pursued in a previous initial or subsequent writ because the factual or legal basis of the claim was not available at the time of a previous application. The unavailability of a legal basis for a claim can be established if it was not recognized by or could not have been reasonably discerned from a decision by the Court or federal or state appellate courts. A claim is factually unavailable if it was not “ascertainable through the exercise of reasonable diligence” at the time of the prior filing.²¹² A second statutory basis for a subsequent writ is that, by clear and convincing evidence, no rational juror would have answered one of the capital sentencing issues adversely to the offender “but for” a violation of the federal Constitution.²¹³ Although subsequent applications are first filed with the convicting trial court, they are transmitted to the Texas Court for a determination as to whether one of the requisite factors permitting their filing has been satisfied. If the Texas Court does not find that such a factor has been satisfied, it dismisses the application as an “abuse of the writ.”²¹⁴

In the case of an initial application or a subsequent application permitted by the Texas Court, the convicting trial court preliminarily determines whether material “controverted, previously unresolved factual issues” exist. In the absence of such factual issues, the convicting trial court can resolve the writ without an evidentiary hearing. If such factual matters exist, the convicting trial court identifies them and determines the manner of their resolution, including through affidavits, depositions, interrogatories, evidentiary hearings, and personal recollection.²¹⁵ Following the conclusion of the proceedings in the convicting trial court, the Texas Court reviews the writ record, including the trial court’s factual findings and legal conclusions, and takes final action on the writ application.²¹⁶

211. *See id.*

212. *See id.*

213. *See id.* The third factor involves a constitutional violation raising doubt about the guilt finding. *See id.*

214. *See id.*

215. *See id.*

216. *See id.* The Texas Court may request additional briefing and permit oral argument as part of its review. *See id.*

C. Texas Court Collateral Review Standards for *Atkins* Claims

In the absence of legislative guidance regarding procedures to implement *Atkins*' constitutional ban on the execution of mentally retarded offenders, the Texas Court ultimately was required to develop interim procedures to address the growing number of *Atkins* claims it was receiving through the collateral review process.²¹⁷ The Texas Court first defined its eligibility screening role regarding *Atkins* claims raised through the subsequent writ application process.²¹⁸ Then, approximately a year and a half after *Atkins*, the Texas Court articulated its interim substantive procedures for *Atkins* claims in *Ex parte Briseno*,²¹⁹ a subsequent writ case, and applied them soon thereafter in *Ex parte Simpson*,²²⁰ an original habeas corpus proceeding.

The Texas Court began remanding to the convicting trial courts subsequent writ applications raising *Atkins* claims soon after the *Atkins* decision was announced on June 20, 2002.²²¹ *Atkins* claims generally appeared to satisfy one of the eligibility criteria for subsequent writ applications, i.e., the legal basis for the claim invoking the ban on executing the mentally retarded was not available prior to the *Atkins* ruling and thus could not have been meaningfully raised in a prior writ application.²²² However, a majority of the Texas Court determined that its eligibility screening role also included an assessment whether a subsequent writ applicant had alleged "sufficient specific facts" that would support the applicant's *Atkins* claim, as required by the writ statute.²²³ The Texas Court equated this factual requirement to the presentation of a prima facie

217. See *infra* notes 227–46 and accompanying text.

218. See *infra* notes 222–25 and accompanying text.

219. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

220. *Ex parte Simpson*, 136 S.W.3d 660 (Tex. Crim. App. 2004).

221. See *Ex parte Williams*, No. 43907–02, 2003 WL 1787634, at *6 (Tex. Crim. App. Feb. 26, 2003) (Price, J., joined by Johnson and Holcomb, JJ., dissenting) (identifying several *Atkins* subsequent writ applications that had been remanded).

222. See *id.* at *1 (Cochran, J., joined by Meyers, J., concurring in application dismissal); *id.* at *3 (Price, J., joined by Johnson and Holcomb, JJ., dissenting). See generally TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010).

223. Compare *Williams*, 2003 WL 1787634, at *1 (Cochran, J., joined by Meyers, J., concurring in application dismissal) (quoting TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010)), with *id.* at *4–6 (Price, J., joined by Johnson and Holcomb, JJ., dissenting) (stating that the writ statute only permits the Texas Court to conduct the legal basis eligibility screening and that all factual determinations should be made by the convicting trial court on remand).

showing of mental retardation.²²⁴ Thus, even if a subsequent writ applicant established the legal basis for his *Atkins* claim, his failure to meet this “threshold factual burden” resulted in a dismissal of his application as an abuse of the writ.²²⁵ Pursuant to this legal and factual eligibility screening process, the Texas Court had remanded thirty-five subsequent writ applications in which applicants had made a prima facie showing of mental retardation when it announced its *Atkins* procedures in *Briseno* in February 2004.²²⁶

In prescribing its interim *Atkins* procedures in *Briseno*,²²⁷ the Texas Court first defined mental retardation for purposes of the constitutional ban. For guidance, the Texas Court noted that the Texas Legislature had used the clinical definition of mental retardation contained in the state mental retardation law in the pre-*Atkins* execution ban legislation it passed in 2001 and the Governor subsequently vetoed.²²⁸ The Texas Court also noted that it had itself used this definition and the AAMR definition in defining mental

224. See *id.* at *2 (Cochran, J., joined by Meyers, J., concurring in application dismissal). These concurring Judges cited the AAMR and APA mental retardation definitions quoted by the Court in *Atkins* and stated that these mental retardation criteria provided “appropriate guidance” in the absence of legislative direction. *Id.* at *3 n.6 (quoting *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002)). To establish a prima facie case, these concurring Judges stated that an applicant, “at a bare minimum,” should supply evidence of at least one IQ test, preferably taken before age eighteen, supporting a mental retardation claim. A “better” showing would include several IQ test results, supporting school and medical records, and appropriate evidence from expert or lay witnesses raising an issue regarding the applicant’s adaptive skill deficits and onset before age eighteen. *Id.* at *2. In a subsequent pre-*Briseno* per curiam opinion, the Texas Court adopted and combined these elements of a prima facie showing of mental retardation, requiring at least one IQ test supporting a mental retardation claim and preferably taken before age eighteen (or equivalent supporting evidence of limited intellectual functioning) “coupled with” the above-described evidence raising an issue regarding the applicant’s adaptive skill deficits and onset before age eighteen. *Ex parte Rivera*, No. 27065–02, 2003 WL 21752841, at *2 (Tex. Crim. App. July 25, 2003) (per curiam); accord *Ex parte Williams*, No. 50,662–02 (Tex. Crim. App. Oct. 8, 2003) (per curiam).

225. See *Williams*, 2003 WL 1787634, at *2, *3 (Cochran, J., joined by Meyers, J., concurring in application dismissal).

226. *Ex parte Briseno*, 135 S.W.3d 1, 5 n.7 (Tex. Crim. App. 2004); see *id.* at 1 (stating that the applicant had made a prima facie showing of mental retardation resulting in a remand of his subsequent writ application).

227. Although the Texas Court expressed reluctance to establish *Atkins* standards rather than await legislative action, it stated that the volume of pending collateral review cases with *Atkins* claims required the establishment of “temporary” judicial standards for the disposition of these collateral review claims. *Id.* at 4–5.

228. See *id.* at 6. The Texas Court also noted the use of a similar definition in ban legislation proposed in the 2003 legislative session. See *id.* at 6–7 & n.22. See generally *supra* notes 122, 177 (containing these definitions).

retardation in capital cases.²²⁹ The Texas Court determined that, until the Texas Legislature provided an alternative statutory definition, it would follow the three-part definition of the AAMR²³⁰ or the Texas mental retardation law²³¹ in addressing *Atkins* claims in the collateral review context. These definitions required an individual's significantly subaverage general intellectual functioning with accompanying adaptive functioning deficits and developmental period onset.²³²

With regard to the intellectual functioning component of the standard, the Texas Court referred to definitions that defined this as an IQ of approximately seventy or below or approximately two standard deviations below the mean. The Texas Court, however, also recognized some flexibility in assessments of mental retardation based on IQ test scores, as well as differences in the content and accuracy of various IQ tests.²³³ Regarding the third prong of the mental retardation definition, the Texas Court stated that the AAMR definition characterized the developmental period onset as occurring before age eighteen.²³⁴

In terms of the adaptive functioning component, the Texas Court referenced a pre-*Atkins* AAMR definition that referred to significant limitations in meeting "maturation, learning, personal independence, and/or social responsibility" standards expected of the person's age level and cultural group, as clinically assessed.²³⁵ The Texas Court

229. *Briseno*, 135 S.W.3d at 7; see *Ex parte Tennard*, 960 S.W.2d 57, 60–61 (Tex. Crim. App. 1997) (plurality opinion); *id.* at 63–67 (Meyers, J., joined by Price, J., concurring in judgment) (adopting a definition of mental retardation for the review of *Penry* claims). The Texas Court also noted that the parties and trial court in the instant collateral review proceedings had used the AAMR definition of mental retardation. *Briseno*, 135 S.W.3d at 8.

230. The Texas Court referenced elements of the definition contained in the AAMR's 1983 and 1992 manuals: "significantly subaverage general intellectual functioning" accompanied by "related limitations in adaptive functioning" with an onset prior to age eighteen. *Briseno*, 135 S.W.3d at 7; see AM. ASS'N ON MENTAL RETARDATION, *supra* note 5, at 22–23 (describing the mental retardation definitions in these and the 2002 manuals).

231. The referenced three-part definition in the Texas mental retardation law is "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Briseno*, 135 S.W.3d at 6 (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003 (13) (West 2010)).

232. See *id.* at 6–8.

233. See *id.* at 7 n.24.

234. See *id.* at 7.

235. See *id.* at 7 n.25 (indicating that the clinical assessment usually included standardized scales); AM. ASS'N ON MENTAL RETARDATION, *supra* note 5, at 22

also referred to the state mental retardation law's definition of the adaptive behavior element regarding the degree to which one meets the "personal independence and social responsibility" standards expected of the person's age and cultural group.²³⁶ Noting that the adaptive behavior criteria are "exceedingly subjective," the Texas Court identified some additional evidentiary factors that *Atkins* fact-finders "might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder":²³⁷

Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and if so, act in accordance with that determination?

Has the person formulated plans and carried them through or is his conduct impulsive?

Does his conduct show leadership or does it show that he is led around by others?

Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

Can the person hide facts or lie effectively in his own or others' interests?

(reflecting that this definition was last used in the AAMR's 1983 manual and was subsequently changed to the adaptive skill area deficit criteria in the AAMR's 1992 manual); *cf.* *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (providing the AAMR and APA mental retardation definitions that identified ten specific adaptive skill areas, such as communication, self-care, and functional academics, and required limitations in at least two of these skill areas for a finding of mental retardation); *supra* note 162 and accompanying text (providing these definitions).

236. *See Briseno*, 135 S.W.3d at 7 n.25.

237. *Id.* at 8.

Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?²³⁸

Thus, while generally adopting recognized clinical definitions of mental retardation for *Atkins* purposes,²³⁹ the Texas Court added a unique component to its definition through these “*Briseno* factors.”²⁴⁰

The Texas Court also resolved a variety of procedural and evidentiary matters concerning the collateral review of *Atkins* claims in *Briseno*.²⁴¹ It assigned the defendant the burden to prove his mental retardation by a preponderance of the evidence.²⁴² Based on the existing statutory framework for collateral review proceedings, the Texas Court determined that there was no mechanism for and no requirement of a jury resolution of the mental retardation issue.²⁴³ The Texas Court characterized the determination of mental retardation for *Atkins* purposes as an issue for the fact-finder in collateral review proceedings, based on the evidence and credibility determinations. Accordingly, the judge of the convicting trial court would determine the factual merit of an *Atkins* claim.²⁴⁴ As under the existing collateral review procedures, the convicting trial court could require affidavits, interrogatories, and evidentiary hearings, and use personal recollection in resolving any controverted, previously

238. *Id.* at 8–9; accord *Ex parte* Modden, 147 S.W.3d 293, 296 n.12 (Tex. Crim. App. 2004).

239. See *Briseno*, 135 S.W.3d at 5–6, 8 (identifying potential questions about the adoption of this definition crafted for a clinical and social services context, but reserving any subsequent alteration of the definition for legislative action).

240. See *infra* notes 805–88 and accompanying text (discussing the *Briseno* factors).

241. See *Briseno*, 135 S.W.3d at 4–13.

242. *Id.* at 12 (noting the use of this burden and standard of proof in *Atkins*-related proposed legislation in Texas and in other state procedures, the traditional offender burden of proof in collateral review proceedings, and its use regarding Texas’s statutory affirmative defenses); see *Escamilla v. State*, 143 S.W.3d 814, 827–28 (Tex. Crim. App. 2004) (finding that the State does not have to affirmatively prove that a capital defendant is not mentally retarded).

243. *Briseno*, 135 S.W.3d at 9–11 (rejecting the contention that a jury resolution of a post-conviction *Atkins* claim was required under the Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002)); see *Schriro v. Summerlin*, 542 U.S. 348 (2004) (concluding that *Ring* is not retroactive). *Contra Briseno*, 135 S.W.3d at 18–22 (Holcomb, J., dissenting) (finding that a jury resolution of an *Atkins* claim is required).

244. *Briseno*, 135 S.W.3d at 9, 11. The Texas Court noted that experts could offer “insightful opinions” regarding the satisfaction of the diagnostic criteria for mental retardation, but the ultimate determination of mental retardation for *Atkins* purposes was for the fact-finder. *Id.* at 9. The Texas Court also noted that mental retardation diagnoses could vary depending on the experts’ academic backgrounds and approach. *Id.* at 13.

unresolved factual issues.²⁴⁵ As with other collateral review applications, the Texas Court would review the convicting trial court's *Atkins*-related findings of fact and conclusions of law, with almost total deference given to the convicting trial court's factual findings if supported by the record, especially those reflecting assessments of credibility and demeanor, and would make a final determination whether to grant or deny collateral relief on any *Atkins* claim.²⁴⁶

The Texas Court applied the *Briseno* procedures for the review of subsequent writ applications regarding *Atkins* claims to original habeas corpus applications raising this claim in *Ex parte Simpson*.²⁴⁷ In this case, the Texas Court reiterated the key role of the convicting trial court in resolving *Atkins* claims, including collecting evidence, deciding the necessity of live testimony, resolving disputed facts and applying the law to those facts, entering factual findings and legal conclusions, and recommending the grant or denial of collateral relief. Reflecting this primary fact-finding role of the convicting trial court, the Texas Court generally declined to consider any evidentiary materials not previously submitted to the convicting trial court, absent compelling and extraordinary circumstances.²⁴⁸ The Texas Court applied an abuse of discretion standard to its review of the factual findings of the convicting trial court regarding mental retardation.²⁴⁹

The Texas Court subsequently authorized another collateral review opportunity for capital offenders who fail to raise an *Atkins* claim in their first post-*Atkins* subsequent writ applications in *Ex parte Blue*.²⁵⁰ As applied in *Briseno*,²⁵¹ most Texas *Atkins* collateral review claims have been raised under the statutory provision that permits subsequent writ applications when the legal basis of the claim was not available at the time an applicant's original writ application was filed.²⁵² However, the Texas collateral review statute also permits

245. *See id.* at 11 n.41 (describing TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010)).

246. *See id.* at 4, 11, 12–13, 18.

247. *Ex parte Simpson*, 136 S.W.3d 660, 666 (Tex. Crim. App. 2004) (noting that the convicting trial court had followed the procedure and legal standards established in *Briseno* in resolving this pre-*Briseno* original writ application).

248. *See id.* at 667–69.

249. *See id.* at 667.

250. *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007).

251. *Briseno*, 135 S.W.3d at 1.

252. *See id.* at 3 (noting the subsequent writ application's filing after *Atkins*). *See generally* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West Supp. 2010).

subsequent writ applications when an applicant can establish, by clear and convincing evidence, that no rational juror would have answered one or more of the capital sentencing issues adversely to the applicant “but for” a federal constitutional violation.²⁵³ The Texas Court construed this provision to incorporate concepts of “fundamental miscarriage of justice” and, more specifically here, “actual innocence of the death penalty” established in federal habeas corpus jurisprudence at the time the Texas Legislature enacted the provision.²⁵⁴ This provision would address constitutional errors affecting eligibility for a death sentence under state statutory law, as well as “absolute” constitutional prohibitions against execution, such as *Atkins* established.²⁵⁵

Despite the absolute nature of the *Atkins* execution prohibition, however, the Texas Court held that the Texas Legislature could require a higher evidentiary showing of mental retardation for offenders who failed to raise their *Atkins* claim in their initial post-*Atkins* writ application.²⁵⁶ Thus, in order to proceed with a subsequent writ application of this nature, an applicant must present to the Texas Court a “*threshold*” showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find

253. TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West Supp. 2010).

254. See *Blue*, 230 S.W.3d at 154–61. The Texas Court referred to several Court decisions that applied these concepts in the context of federal successive or abusive writ petitions. See *id.* at 157–59 (citing *Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Smith v. Murray*, 477 U.S. 527 (1986)). The Court construed the “actual innocence of the death penalty” form of “fundamental miscarriage of justice” to require a showing “by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found [the petitioner] eligible for the death penalty under [applicable] law.” *Sawyer*, 505 U.S. at 348–50; see *Blue*, 230 S.W.3d at 158 n.30. This Court habeas corpus jurisprudence developed prior to Congress’ modification of the federal habeas corpus laws in 1996. See generally 28 U.S.C.A. §§ 2241–2255, 2261–2266 (West 2006 & Supp. 2010) (containing amendments to the federal habeas corpus provisions made by Antiterrorism and Effective Death Penalty Act).

255. The Texas Court construed the statutory language regarding constitutional errors that would render an applicant ineligible for a death sentence pursuant to one or more of the statutory sentencing issues to include factors that would render an applicant constitutionally ineligible for a death sentence (and hence even the submission of the sentencing issues), such as mental retardation or juvenile status. See *Blue*, 230 S.W.3d at 159–62.

256. The Texas Court rejected the argument that the absolute nature of the *Atkins* ban on execution exempts *Atkins* claims from regulation through the collateral review process established by the Texas Legislature, including its standards for subsequent writ applications. See *id.* at 154–59 (citing its own and Court precedent).

mental retardation.”²⁵⁷ To prevail on the merits, proof establishing mental retardation by clear and convincing evidence would actually have to be presented in the collateral review proceedings.²⁵⁸ The Texas Court subsequently interpreted this collateral review provision to be available not only to capital offenders who fail to raise an *Atkins* claim in their initial post-*Atkins* writ applications, but also to applicants who present sufficient *additional* evidence of mental retardation following an initial denial of an *Atkins* claim to satisfy the clear and convincing evidence standards.²⁵⁹

In other cases, the Texas Court has continued to flesh out the substantive and procedural guidelines it established in *Briseno* for the collateral review of *Atkins* claims. The Texas Court has continued to use the three-part clinical definition of mental retardation, embodied in the AAMR and state mental retardation law definitions, plus the additional *Briseno* factors.²⁶⁰ With regard to the “significantly subaverage intellectual functioning” component, the Texas Court continues to define this as an IQ of approximately seventy or below, as determined by standardized IQ tests, and has recognized an assessment measurement error of approximately five points that could vary based on the IQ testing instrument.²⁶¹ Although the Texas Court has permitted clinical assessment evidence to explain why a full scale IQ score is within this measurement error zone, it recently refused to permit clinical assessment to be used as a *replacement* for full scale IQ scores in determining intellectual functioning.²⁶² The

257. *Id.* at 163. The Texas Court found that the offender here failed to satisfy this threshold evidentiary showing and dismissed his application as an abuse of the writ. *See id.* at 167–68.

258. *Id.* at 163.

259. *See Ex parte Woods*, 296 S.W.3d 587, 605–06 (Tex. Crim. App. 2009) (recognizing the potential to pursue such a subsequent writ application, but dismissing the instant application). *But see Ex parte Taylor*, Nos. WR-48,498-02, WR-48,498-04 (Tex. Crim. App. Nov 6, 2008) (per curiam) (finding that Taylor was not in the “same procedural posture” as Woods in his attempt to raise an *Atkins* claim in a subsequent writ application after its rejection in a previous subsequent writ application and declining to reconsider the prior denial of his *Atkins* claim).

260. *See, e.g., Woods*, 296 S.W.3d at 589–90; *Blue*, 230 S.W.3d at 163.

261. *Ex parte Hearn*, 310 S.W.3d 424, 427–28 (Tex. Crim. App. 2010) (citing AAMR, APA, and state mental retardation law definitions). The Texas Court has interpreted “the ‘about 70’ language of the AAMR’s definition of mental retardation to represent a rough ceiling, above which a finding of mental retardation in the capital context is precluded.” *Id.* at 430 (citing several of its *Atkins* cases).

262. *See id.* at 429–31 (rejecting the offender’s attempts to establish this element of the definition based on neuropsychological deficits and a fetal alcohol syndrome diagnosis despite full scale IQ scores between eighty-seven and ninety-three).

Texas Court has not endorsed the scientific validity of the “Flynn effect,” which theorizes that the “norms” of the IQ testing instruments have not adequately addressed the general rise in IQ scores over time and thus an offender’s IQ score may be erroneously inflated based on when in the testing instrument cycle his test was administered.²⁶³

The Texas Court has continued to explore the contours of the adaptive behavior component of the mental retardation definition.²⁶⁴ In describing this element in a recent case, the Texas Court selected several characteristics from the clinical definitions.²⁶⁵ It identified the required showing as one of “significant limitations in adaptive functioning” as reflected in conceptual, social, and practical skill areas, referencing the AAMR’s current consolidated adaptive skill area categories. “Significant” limitations are demonstrated by standardized test scores at least two standard deviations below the mean in one of the three skill areas or an overall score on all three areas, as prescribed by the AAMR.²⁶⁶ The Texas Court has stated that although adaptive functioning standardized test scores are not

263. See *Blue*, 230 S.W.3d at 166 (referring to the Flynn effect as an “unexamined scientific concept” and declining to address its scientific validity). However, in late 2008, the Texas Court remanded an *Atkins* subsequent writ claim with directions to the trial court to receive and evaluate evidence concerning the “scientific validity and reliability” of the Flynn effect, its use by clinical practitioners in diagnosing mental retardation outside the *Atkins* context, its general acceptance in the professional community, and its known or potential “error rate.” *Ex parte* Cathey, No. WR-55,161-02, 2008 Tex. Crim. App. Unpub. LEXIS 850, at *2–3 (Tex. Crim. App. Nov. 18, 2008) (per curiam). But see *Ex parte* Johnson, No. WR-56,947-02, 2009 Tex. Crim. App. Unpub. LEXIS 666, at *2–3 (Tex. Crim. App. Apr. 29, 2009) (Price, J., joined by Womack and Holcomb, JJ., dissenting to the application dismissal) (criticizing the Texas Court’s failure to find prima facie evidence of mental retardation based on the offender’s assertion of the Flynn effect despite its previous remand to examine the Flynn effect in *Cathey*). See Bethany Young et al., *Four Practical and Conceptual Assessment Issues That Evaluators Should Address in Capital Case Mental Retardation Evaluations*, 38 PROF. PSYCHOL.: RES. & PRAC., no. 2, 2007 at 169, 175–76 (describing survey of Texas psychologists and psychiatrists who had evaluated mental retardation in a capital case, regarding their knowledge and use of the Flynn effect). See generally Stephen J. Ceci et al., *The Difficulty of Basing Death Penalty Eligibility on IQ Cutoff Scores for Mental Retardation*, 13 ETHICS & BEHAV., no. 1, 2003 at 11; James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 PSYCHOL. PUB. POL’Y & L., no. 2, 2006 at 170 (describing the Flynn effect).

264. See AAIDD, *supra* note 5, at 43–55.

265. See *Hearn*, 310 S.W.3d at 427–29 (referencing the AAMR, APA, and state mental retardation definitions).

266. *Id.* at 428 (referencing aspects of the AAMR and APA definitions); see AAIDD, *supra* note 5, at 8, 10, 43, 44, 47. Each of these three skill areas includes specific skills such as self-direction, occupational skills, interpersonal relationships, reading and writing, and avoiding victimization. *Hearn*, 310 S.W.3d at 428 n.9; see AAIDD, *supra* note 5, at 44.

the “sole measure” of adaptive functioning, they may be “helpful to the factfinder” in determining mental retardation for *Atkins* purposes.²⁶⁷ Indeed, a wide range of conflicting expert and lay evidence has been presented regarding the adaptive behavior component in *Atkins* claims.²⁶⁸ Finally, the Texas Court has required a linkage between the intellectual and adaptive functioning elements, i.e., “the adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder.”²⁶⁹ In order to “help distinguish the two,” the Texas Court provided the *Briseno* factors for possible use by *Atkins* fact-finders.²⁷⁰ The Texas Court has generally upheld convicting trial courts’ use of the *Briseno* factors, including when their application has been contrary to adaptive functioning assessment test results.²⁷¹

In addition to addressing definitional matters, the Texas Court has also addressed some procedural matters as it has considered post-*Briseno* *Atkins* collateral review claims. In fact, on the same day that *Briseno* was announced, the Texas Court responded to *Atkins* collateral review litigation by revising a long-standing “two forum” rule that it had created to prevent collateral review litigants from pursuing a claim in state court while a parallel claim was pending in federal court, even if the federal proceedings were stayed for the pursuit of the state claim.²⁷² This rule had been impeding *Atkins* subsequent writ claimants from exhausting their claims in state court while complying with the strict time limits for filing an *Atkins* claim in

267. *Hearn*, 310 S.W.3d at 428 & n.10 (identifying several adaptive functioning assessment instruments).

268. See, e.g., *Ex parte* Woods, 296 S.W.3d 587, 598–600 (Tex. Crim. App. 2009); *Ex parte* Van Alstyne, 239 S.W.3d 815, 818–23 (Tex. Crim. App. 2007).

269. *Hearn*, 310 S.W.3d at 428.

270. *Id.* at 428–29 (referencing *Ex parte* *Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004)); see *supra* note 238 and accompanying text (stating the *Briseno* factors).

271. See, e.g., *Matamoros v. Thaler*, Civ. Action H-07-2613, 2010 U.S. Dist. LEXIS 35425, at *31–32 (S.D. Tex. Mar. 31, 2010) (describing state court application of *Briseno* factors and other evidence rather than assessment scores regarding adaptive functioning); *Ex parte* Chester, No. AP-75,037, 2007 Tex. Crim. App. LEXIS 1852, at *10–27 (Tex. Crim. App. Feb. 28, 2007) (finding no error in trial court’s conclusion that the offender failed to establish adaptive functioning deficits based on its application of the *Briseno* factors despite an adaptive functioning assessment reflecting such deficits). *But see infra* notes 826–88 and accompanying text (describing criticism of the *Briseno* factors).

272. See *Ex parte* Soffar, 143 S.W.3d 804 (Tex. Crim. App. 2004) (per curiam); cf. *Ex parte* Powers, 487 S.W.2d 101 (Tex. Crim. App. 1972) (establishing the “two forum” rule).

federal courts.²⁷³ The Texas Court modified the “two forum” rule to permit state court consideration of a subsequent writ claim as long as the federal court stays all proceedings involving any parallel writ while the offender exhausts his state remedies regarding the claim.²⁷⁴

The Texas Court has also addressed issues related to the nature of the *Atkins* proceedings. The collateral review statute does not absolutely require an evidentiary hearing to resolve factual issues.²⁷⁵ Although the Texas Court has stated that it is “advisable” for the trial court to hold an evidentiary hearing if mental retardation claims are raised for the first time in post-*Atkins* collateral review proceedings,²⁷⁶ it has declined to make an evidentiary hearing on *Atkins* claims an absolute requirement.²⁷⁷ On occasion, however, the Texas Court has “re-remanded” an *Atkins* claim for an evidentiary hearing, when it deemed such was necessary to the resolution of the claim.²⁷⁸ In addition, the Texas Court has made clear that the presentation of evidence of mental retardation regarding the mitigating evidence

273. *Soffar*, 143 S.W.3d at 806–07 (noting the one-year limitations period for filing federal petitions under the federal habeas corpus provisions, as revised in 1996, as well as the federal exhaustion requirement).

274. *Id.* at 804, 807; *see id.* at 805–07 (noting that some of the comity and repetitious collateral review considerations underlying the original “two forum” rule had been legislatively addressed at the state and federal levels).

275. *See supra* note 215 and accompanying text (describing TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010)).

276. *See Ex parte Simpson*, 136 S.W.3d 660, 662–63 (Tex. Crim. App. 2004).

277. *Compare Ex parte Briseno*, 135 S.W.3d 1, 4 (Tex. Crim. App. 2004) (involving a five-day evidentiary hearing regarding the applicant’s *Atkins* claim), *with Simpson*, 136 S.W.3d at 662–63 (approving the trial court’s resolution of the mental retardation issue here based on the trial record and the voluminous writ materials submitted in a case where the offender primarily relied on trial testimony and attorneys were consulted), *and Hall v. State*, 160 S.W.3d 24, 27 (Tex. Crim. App. 2004) (noting that the *Atkins* habeas corpus proceeding in the case was conducted via affidavits); *cf. id.* at 40–41 (Price, J., joined by Cochran, J., concurring) (observing that an evidentiary hearing is the “best course” to resolve a contested post-conviction *Atkins* claims); *id.* at 41–44 (Johnson, J., joined by Holcomb, J., dissenting) (criticizing the reliance on affidavit evidence and punishment hearing testimony regarding the mental retardation finding); *Ex parte Modden*, 147 S.W.3d 293, 300–01 (Tex. Crim. App. 2004) (Hervey, J., dissenting) (criticizing the convicting trial court’s entry of agreed factual findings rather than conducting an evidentiary hearing); *Ex parte Hines*, No. WR-40,347-02 (Tex. Crim. App. Nov. 23, 2005) (per curiam) (noting that a “live hearing” is the “better practice” in cases like this, but finding the trial court’s findings and conclusions supported by “extensive” affidavit and trial record evidence).

278. *See, e.g., Ex parte Hernandez*, No. WR-63,282-01 (Tex. Crim. App. May 3, 2006) (per curiam) (finding that the parties heavily relied on affidavit evidence); *Ex parte Taylor*, No. WR-48,498-02, 2005 Tex. Crim. App. Unpub. LEXIS 265, at *1–2 (Tex. Crim. App. Mar. 23, 2005) (per curiam).

sentencing issue and any adverse finding on this issue do not constitute a prior litigation of the issue for *Atkins* purposes.²⁷⁹ Finally, although expressing sympathy for offenders who raise their *Atkins* claims through subsequent writ applications, the Texas Court has stated that the collateral review statute does not provide for the appointment of counsel or investigative or expert assistance for subsequent writs in capital cases, as it does regarding initial writ applications—and only the Texas Legislature can remedy this situation.²⁸⁰

D. The Federal Collateral Review Process Regarding State Court Claims

State offenders' pursuit of *Atkins* collateral relief in federal court is subject to all of the procedural and substantive restrictions concerning federal collateral review established in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").²⁸¹ Absent tolling during the pendency of state post-conviction proceedings or equitable tolling, state offenders must file their federal habeas corpus

279. See *Modden*, 147 S.W.3d at 298.

280. See *Ex parte Blue*, 230 S.W.3d at 166–67 (Tex. Crim. App. 2007). In 2009, the Texas Legislature established an office of capital writs designed to be the primary group to represent offenders in their initial writ proceedings in capital cases instead of the prior system of appointment of individual attorneys. This legislation, however, did not change prior law regarding the appointment of counsel in subsequent writ cases. See TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Nov. 21, 2010) (describing action on S. 1091, 81st Leg., Reg. Sess. (Tex. 2009)). *But cf. infra* note 945 (describing legislation, enacted in the 2011 legislative session, providing appointed counsel regarding eligible subsequent writ applications filed on or after January 1, 2012).

281. Pub. L. No. 104-132, 110 Stat. 1217, 1218, 1220 (codified at 28 U.S.C.A. §§ 2244, 2254 (West 2006)) (containing the primary operational provisions for state offenders). See generally 28 U.S.C.A. §§ 2241–2255 (West 2006 & Supp. 2010) (containing amendments to the federal habeas corpus provisions made by this legislation). This legislation also included specific provisions regarding federal collateral review of claims by state offenders subject to capital sentences. These provisions generally have not yet been applied to Texas capital offenders with *Atkins* claims due to their specified requirements for the provision of counsel during the state collateral proceedings. See 28 U.S.C.A. §§ 2261–2266 (West 2006); Office of the Attorney General; Certification Process for State Capital Counsel Systems; Removal of Final Rule, 75 Fed. Reg. 71,353 (Nov. 23, 2010) (to be codified at 28 C.F.R. pt. 26). This legislation also amended certain provisions specifically regarding federal offenders seeking federal collateral review of their claims. See, e.g., 28 U.S.C.A. § 2255 (West Supp. 2010). As of the writing of this Article, only one Texas federal offender has pursued federal collateral review of his *Atkins* claim. *In re Webster*, 605 F.3d 256 (5th Cir.), *cert. denied sub nom.* Webster v. United States, No. 10-50, 2010 U.S. LEXIS 9507 (U.S. Dec. 6, 2010); United States v. Webster, 421 F.3d 308 (5th Cir. 2005). Discussion of the collateral review standards for federal offenders and their application to *Atkins* claims is beyond the scope of this Article.

applications within one year from the latest of the date the challenged state court judgment became final on direct review, any unlawful state impediment to filing was removed, the Court recognized and made retroactive the right asserted, or the factual predicate for the claim could have been discovered through due diligence.²⁸² Equitable tolling of the limitations period requires the applicant's showing that he has been "diligently" pursuing his rights and "some extraordinary circumstance stood in his way" and prevented the application's timely filing.²⁸³

Federal courts cannot grant collateral relief to a state offender unless he has first exhausted available state remedies or state remedies are unavailable or ineffective.²⁸⁴ In addition, if the state courts have resolved the offender's claim on an "independent" (of the merits of the federal claim) and "adequate" state law procedural ground, federal collateral relief is precluded.²⁸⁵ If a claim was adjudicated on the merits in state court, a federal court cannot grant collateral relief unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by the Court, or was based on an "unreasonable" factual determination of the evidence presented in the state proceedings.²⁸⁶ State court factual determinations have a presumption

282. See 28 U.S.C.A. § 2244 (West 2006); see also *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010) (holding that the AEDPA's statute of limitations is subject to equitable tolling, as had all of the federal courts of appeals).

283. *Holland*, 130 S. Ct. at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

284. See 28 U.S.C.A. § 2254 (West 2006). Federal courts can *deny* collateral relief on the merits even if a state court claim has not been exhausted. See *id.*

285. See *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Rocha v. Thaler*, 626 F.3d 815, 820-821 (5th Cir. 2010). If a state offender procedurally defaults his federal claim by a failure to exhaust his state remedies or by its resolution on independent and adequate state procedural grounds, the federal courts are prohibited from reviewing the merits of his claim. See *Magwood v. Patterson*, 130 S. Ct. 2788, 2801-02 (2010); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The Court has recognized exceptions to the procedural default bar if the offender can establish "cause" for and "prejudice" from the default or a fundamental miscarriage of justice by the failure to consider the claim, such as establishment of the offender's actual innocence of the crime or the death penalty. See *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Schlup v. Delo*, 513 U.S. 298, 325-27 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). A claim asserting actual innocence of the death penalty requires proof by clear and convincing evidence. *Sawyer*, 505 U.S. at 336.

286. See 28 U.S.C.A. § 2254 (West 2006); see also *Wood v. Allen*, 130 S. Ct. 841, 849 (2010); *Schiro v. Landrigan*, 550 U.S. 465, 473 (2007); *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Wiggins v. Smith*, 539 U.S.

of correctness unless the offender rebuts them by clear and convincing evidence.²⁸⁷ The federal court will not hold an evidentiary hearing if the offender has not developed a factual basis for his claim in state proceedings unless 1) the claim is based on a previously unavailable, retroactive Court rule of constitutional law or the claim's factual predicate could not have reasonably been previously discovered and 2) the facts underlying the claim establish by clear and convincing evidence that "but for constitutional error" the offender would not have been convicted on the underlying crime.²⁸⁸ State offenders challenging their death sentences in federal court are entitled to counsel and also investigative and expert assistance, if reasonably necessary.²⁸⁹

Appeals from federal trial court resolution of collateral proceedings are permitted only if the applicable appellate court grants a certificate of appealability. To obtain such a certificate, the applicant must make a "substantial showing of the denial of a constitutional right."²⁹⁰ On appeal, the court reviews the federal trial court's factual findings with a clearly erroneous standard and its legal conclusions with a *de novo* standard.²⁹¹

If a state offender presents a previously presented claim in a successive federal collateral review application, it will be dismissed.²⁹² Successive habeas corpus applications presenting claims *not* previously presented shall also be dismissed unless 1) the claim is

510, 520–21 (2003); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (interpreting these provisions); *cf.* *St. Aubin v. Quarterman*, 470 F.3d 1096, 1100 (5th Cir. 2006) (holding that the federal court review should address the state court's ultimate decision rather than the written opinion supporting it).

287. *See* 28 U.S.C.A. § 2254 (West 2006); *see also* *Wood*, 130 S. Ct. at 845, 848–49; *Landrigan*, 550 U.S. at 473–74; *Rice v. Collins*, 546 U.S. 333, 338–39 (2006); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *Fields v. Thaler*, 588 F.3d 270, 278–80 (5th Cir. 2009) (interpreting this provision).

288. *See* 28 U.S.C.A. § 2254 (West 2006); *see also* *Landrigan*, 550 U.S. at 473–75; *Pierce v. Thaler*, 355 F. App'x 784, 788 (5th Cir. 2009) (*per curiam*); *Hall v. Quarterman*, 534 F.3d 365, 367–69 (5th Cir. 2008) (*per curiam*) (interpreting this provision).

289. *See* 18 U.S.C.A. § 3599 (West Pamp. 2010) (adding this provision in 2006 and repealing a previous similar provision (21 U.S.C. § 848(q)); *see also* *McFarland v. Scott*, 512 U.S. 849 (1994); *In re Hearn*, 376 F.3d 447 (5th Cir. 2004).

290. *See* 28 U.S.C.A. § 2253 (West 2006); *see also* *Miller-El v. Cockrell*, 537 U.S. 322, 327, 335–38 (2003); *Pierce v. Thaler*, 355 F. App'x 784, 787 (5th Cir. 2009) (*per curiam*) (interpreting this provision).

291. *See* *Moore v. Quarterman*, 342 F. App'x 65, 67 (5th Cir. 2009) (*per curiam*); *Eldridge v. Quarterman*, 325 F. App'x 322, 325 (5th Cir. 2009); *St. Aubin*, 470 F.3d at 1100–11.

292. *See* 28 U.S.C.A. § 2244 (West 2006).

based on a previously unavailable, retroactive Court rule of constitutional law or 2) the claim's factual predicate could not have reasonably been previously discovered and the facts underlying the claim establish by clear and convincing evidence that "but for constitutional error" the offender would not have been convicted on the underlying crime.²⁹³ A state offender seeking to file a successive federal collateral review application must make a prima facie showing, to a three-judge panel of the applicable appellate court, that his application satisfies these requirements. Even if the state offender is granted filing authorization by the appellate court, the assigned federal trial court also must determine if the filing requirements have been satisfied.²⁹⁴

E. Fifth Circuit Collateral Review Standards for *Atkins* Claims by Texas State Offenders

Pursuant to the AEDPA's deferential treatment of state court proceedings,²⁹⁵ the Fifth Circuit has addressed a number of procedural as well as substantive issues in its resolution of *Atkins* claims by Texas state offenders.²⁹⁶ These issues include factors that preclude federal court consideration of the merits of an offender's *Atkins* claim, such as exhaustion and other procedural default, limitations, and successive petition bars.²⁹⁷ They also include matters relevant to the resolution of *Atkins* claims on the merits, such as the opportunity to further investigate and present additional evidence regarding *Atkins* claims in federal court and to have an evidentiary hearing.²⁹⁸ Finally, the Fifth Circuit and Texas federal trial courts have applied Texas

293. *See id.*

294. *See id.*; *see also In re Thomas*, 225 F. App'x 222, 225 (5th Cir. 2007) (per curiam); *In re Morris*, 328 F.3d 739, 740–41 (5th Cir. 2003) (per curiam) (interpreting these provisions).

295. *See, e.g., Wood v. Allen*, 130 S. Ct. 841, 849 (2010); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000).

296. The Fifth Circuit opinions described in this Article include authored and per curiam panel opinions, as well as published and unpublished opinions. Those opinions appearing in the Federal Appendix have been designated by the panel as unpublished opinions, with restricted precedential weight pursuant to 5TH CIR. R. 47.5.3, 47.5.4; *cf. supra* note 190 (regarding Texas Court unpublished opinions). New Fifth Circuit opinions, cited in electronic data bases pending reporter designation, include published and unpublished opinions.

297. *See infra* notes 300–12 and accompanying text.

298. *See infra* notes 313–23 and accompanying text.

Court standards regarding mental retardation as they have reviewed dozens of *Atkins* claims by Texas offenders on the merits.²⁹⁹

The AEDPA clearly precludes the grant of federal habeas corpus relief to a state offender unless he has first exhausted his available, effective state remedies.³⁰⁰ In a case the Court remanded to the Fifth Circuit for reconsideration following *Atkins*, the appellate court made clear that the exhaustion principles were especially pertinent in the *Atkins* context:

[I]nferior federal courts have no useful role to play until and unless following *Atkins*, a death sentence is reaffirmed or again imposed on [the offender] by the state courts. Just how the state courts will implement *Atkins*, we cannot say. Clearly, however, the state must be given the first opportunity to apply the Supreme Court's holding in order to insure consistency among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule.³⁰¹

The Fifth Circuit dismissed this offender's federal suit without prejudice so that he could pursue his *Atkins* claim in state court.³⁰² Although the principles of the exhaustion requirement appear clear, their application to Texas offenders raising *Atkins* claims has been somewhat more challenging.³⁰³ In dismissing a federal application on

299. See *infra* notes 324–50 and accompanying text.

300. See 28 U.S.C.A. § 2254 (West 2006). Of course, the federal court can deny an unexhausted *Atkins* claim on the merits. See *id.*; *Amador v. Dretke*, No. SA-02-CA-230-XR, 2005 U.S. Dist. LEXIS 6072, at *102–09 (W.D. Tex. Apr. 11, 2005) (denying unexhausted *Atkins* claim).

301. *Bell v. Cockrell*, 310 F.3d 330, 332–33 (5th Cir. 2002).

302. See *id.* at 333; see also *Smith v. Cockrell*, 311 F.3d 661, 684–85 (5th Cir. 2002) (declining to consider an unexhausted *Atkins* claim raised for the first time on appeal before Texas has had an opportunity to determine its *Atkins* procedures).

303. See, e.g., *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007) (affirming a finding of mental retardation, but remanding for a determination of equitable tolling of the limitations period); *Chester v. Cockrell*, 62 F. App'x 556 (5th Cir. 2003) (per curiam) (vacating a trial court's grant of habeas corpus relief on an unexhausted *Atkins* claim). To comply with the Texas Court's previous "two forum" rule that prevented pursuit of a state collateral review claim while a federal claim was pending, federal courts typically dismissed unexhausted *Atkins* federal claims without prejudice. This, however, sometimes created limitations issues when exhausted *Atkins* claims were subsequently pursued in federal court. Following the Texas Court's modification of the two forum rule in 2004, federal courts are permitted to stay and abate their proceedings while an offender exhausts his claim in state court. See *Hearn v. Quarterman*, No. 3:04-CV-0450-D, 2008 U.S. Dist. LEXIS 61735, at *19–24 (N.D. Tex. Aug. 12, 2008) (staying and abating federal proceeding for exhaustion purposes); see also *Rhines v. Weber*, 544 U.S. 269, 274–78

exhaustion grounds, a Texas federal trial court found that the absence of an express statutory right to counsel or expert assistance to develop an *Atkins* successive writ claim did not render the Texas remedy automatically “ineffective” and thus exempt from the exhaustion requirement.³⁰⁴ State offenders have sometimes encountered exhaustion challenges when they have obtained appointed counsel and investigative and expert services in their federal collateral proceedings and have developed additional evidence of mental retardation not presented in the state proceedings. Some of these offenders have faced the risk of now having claims that are deemed “fundamentally altered” and thus no longer exhausted versus having exhausted claims in which the state evidence has simply been permissibly “supplemented.”³⁰⁵ Finally, in one case, the Fifth Circuit en banc determined that an offender had established “cause” and “prejudice” that would exempt him from any alleged failure to exhaust his *Atkins* claim in state court. This offender’s *Atkins* claim had initially been filed and rejected as an abuse of the writ in state court before the Texas Court’s articulation of *Atkins* procedures and had been substantially developed in federal collateral proceedings.³⁰⁶

Federal collateral relief is also precluded if an offender’s claim has been resolved on an “adequate” state procedural ground that is “independent” of the merits of the federal claim.³⁰⁷ Because the Texas Court’s abuse of the writ review of *Atkins* subsequent writ applications includes a determination of whether *prima facie* evidence

(2005) (discussing the rationale for stay and abatement actions); *cf. supra* notes 272–74 and accompanying text (describing the two forum rule and its modification).

304. *Bradford v. Cockrell*, No. 3:00-CV-2709-P, 2002 U.S. Dist. LEXIS 21898, at *4–15 (N.D. Tex. Nov. 8, 2002, as adopted at 2003 U.S. Dist. LEXIS 554 (N.D. Tex. Jan. 15, 2003) (acknowledging the offender’s concerns about the lack of appointed counsel and investigative services to develop an *Atkins* claim in the state courts, but dismissing the claim without prejudice on exhaustion grounds with a possible subsequent federal review to determine whether the state courts’ resolution satisfied due process).

305. *Compare* *Lewis v. Quarterman*, 541 F.3d 280, 284–85 (5th Cir. 2008) (describing the distinction between evidence that supplements rather than alters a claim and finding that the affidavit in question supplemented an exhausted claim), *and* *Morris v. Dretke*, 413 F.3d 484, 490–99 (5th Cir. 2005) (finding additional evidence strengthened, but still supplemented rather than altered the offender’s claim presented in state court), *with* *Hearn*, 2008 U.S. Dist. LEXIS 61735, at *9–24 (staying and abating federal proceeding in which evidence concerning mental retardation was developed so that it could first be presented in state proceedings).

306. *See* *Moore v. Quarterman*, 533 F.3d 338 (5th Cir. 2008) (en banc) (per curiam); *supra* note 285 regarding the “cause and prejudice” exception to the procedural default bar due to a failure to exhaust state remedies.

307. *See* *Moore v. Quarterman*, 454 F.3d 484, 489 (5th Cir. 2006) (citing *Emery v. Johnson*, 139 F.3d 191, 194–95 (5th Cir. 1998)).

of mental retardation has been presented, the Fifth Circuit has held that such abuse of the writ dismissals (for lack of such evidence) are not purely procedural and are sufficiently merits-based to permit federal court review.³⁰⁸

The AEDPA generally prescribes a one-year limitations period for the filing of federal collateral review applications by state offenders, triggered, as described above, by a variety of events in state litigation.³⁰⁹ The Fifth Circuit has held that *Atkins* claims are subject to the AEDPA's limitations period.³¹⁰ Unless the limitations period was tolled during the pendency of state collateral proceedings or equitably tolled, pre-*Atkins* claims generally must have been filed in federal court within one year of the *Atkins* decision recognizing this new rule of constitutional law (i.e., by June 20, 2003).³¹¹ In determining whether the limitations period for filing an *Atkins* claim has expired or has been equitably tolled, the Fifth Circuit and Texas federal trial courts have considered factors including the offender's diligence in pursuing his collateral remedies, his representation by

308. Although there was some initial disagreement in the Fifth Circuit regarding whether these *Atkins* subsequent writ dismissals, pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West Supp. 2010), were procedural or merits-based for procedural bar purposes, this issue has been definitively resolved in the Fifth Circuit. See *Rocha v. Thaler*, 626 F.3d 815, 829–33 (5th Cir. 2010) (reviewing the evolution of the Fifth Circuit's treatment of Texas Court abuse of the writ dismissals of *Atkins* claims pursuant to art. 11.071 § 5(a)(1)). Because a Texas Court threshold evidentiary review is also incorporated into the review of *Atkins* subsequent writ claims brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West Supp. 2010), federal court review of these claims should also be permissible. See *Rocha*, 626 F.3d at 826 (stating that an examination of an *Atkins* claim's eligibility under this provision "substantially" overlaps with a determination of the merits of the claim); *Guevara v. Thaler*, No. H-08-1604, 2010 U.S. Dist. LEXIS 14781 (S.D. Tex. Feb. 22, 2010) (examining an asserted procedural bar of an *Atkins* claim under this provision); *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (establishing the review standards for *Atkins* claims under this provision).

309. See 28 U.S.C.A. § 2244 (West 2006); *supra* note 282 and accompanying text.

310. See, e.g., *Henderson v. Thaler*, 626 F.3d 773, 779–81 (5th Cir. 2010) (rejecting an "actual innocence of the death penalty" exception to the AEDPA statute of limitations for *Atkins* claims); *Hernandez v. Thaler*, 398 F. App'x 81, 89 (5th Cir. 2010) (finding *Atkins* claims are subject to the AEDPA limitations period); *Mathis v. Thaler*, 616 F.3d 461–468 (5th Cir. 2010) (finding *Atkins* claims are subject to the AEDPA limitations period); *cf.* *Lee v. Lampert*, 610 F.3d 1125, 1133–36 (9th Cir. 2010) (rejecting an actual innocence regarding guilt exception to the statute of limitations and noting the similar position of other circuits). *But see Henderson*, 626 F.3d at 782–89 (Wiener, J. dissenting) (finding *Atkins* claims, as a categorical exception to the death penalty, are not subject to the AEDPA limitations period under the miscarriage of justice doctrine).

311. See *Henderson*, 626 F.3d at 777.

counsel, and the operation of the previous Texas Court “two forum” rule on the pursuit of his claim.³¹²

With regard to successive writ applications, the applicant must initially make a prima facie showing to a three-judge appellate panel that he satisfies the statutory requisites for filing the application.³¹³ The Fifth Circuit developed a three-part analysis for its prima facie review of a successive writ application based on an *Atkins* claim. The *Atkins* successive writ applicant must make a prima facie showing that 1) his *Atkins* claim has not been presented in a prior federal habeas corpus application; 2) the claim relies on a previously unavailable, retroactive new rule of constitutional law, i.e., the *Atkins* ruling; and 3) the applicant should be “categorized as ‘mentally retarded,’” as defined in *Atkins* and *Penry*.³¹⁴ A prima facie showing of mental retardation is “simply a sufficient showing of possible merit to

312. Compare *In re Wilson*, 442 F.3d 872 (5th Cir. 2006) (per curiam), and *In re Hearn*, 389 F.3d 122 (5th Cir. 2004) (finding equitable tolling), with *Mathis*, 616 F.3d at 473–76, *In re Johnson*, 325 F. App'x 337 (5th Cir. 2009) (per curiam), and *In re Lewis*, 484 F.3d 793 (5th Cir. 2007) (finding no equitable tolling). See *In re Hearn*, 376 F.3d 447, 455–57 (5th Cir. 2004) (identifying factors supporting equitable tolling in the case); see also *supra* note 303 (describing the potential impact of the two forum rule on the federal statute of limitations). The Fifth Circuit reviews the trial court's decision that a collateral application is time-barred de novo and its decision denying equitable tolling for abuse of discretion. See *Mathis*, 616 F.3d at 473–74.

313. See 28 U.S.C.A. § 2244 (West 2006).

314. *In re Morris*, 328 F.3d 739, 740–41 (5th Cir. 2003) (per curiam). Compare *In re Henderson*, 462 F.3d 413 (5th Cir. 2006), and *Morris*, 328 F.3d at 741 (finding prima facie evidence of mental retardation), with *In re Salazar*, 443 F.3d 430 (5th Cir. 2006), and *In re Johnson*, 334 F.3d 403 (5th Cir. 2003) (per curiam) (finding no prima facie evidence of mental retardation). Although most of its prima facie determinations have been based on a finding of prima facie evidence of mental retardation (or not), the Fifth Circuit recently affirmed a Texas federal trial court's dismissal of a successive writ application on the ground that *Atkins* was “available” to the offender when he filed his initial federal writ application and thus he did not meet the eligibility requirements for filing a successive writ under the AEDPA. *Mathis*, 616 F.3d at 467–73. The Fifth Circuit recently declined to permit a successive writ filing based on newly discovered evidence of mental retardation because it found that the second AEDPA ground for filing a successive writ based on newly discovered evidence pertains only to evidence regarding factual guilt rather than evidence establishing innocence of the death penalty, such as an *Atkins* claim. See *In re Webster*, 605 F.3d 256, 257–59 (5th Cir.), cert. denied *sub nom.* Webster v. United States, No. 10-50, 2010 U.S. LEXIS 9507 (U.S. Dec. 6, 2010) (making this decision regarding a federal offender, but noting that the successive writ requirement regarding newly discovered evidence also applies to state offenders); cf. *Rocha v. Thaler*, 626 F.3d 815, 840 (5th Cir. 2010) (stating that actual innocence of the death penalty established by a clear and convincing showing of an *Atkins* claim can overcome a procedural bar regarding an initial federal collateral review application, but a successive application is restricted to the eligibility requirements specified in the AEDPA).

warrant a fuller exploration by the district court.”³¹⁵ The state court findings on the *Atkins* claim are “wholly irrelevant” to this threshold inquiry, and this threshold inquiry is distinct from the offender’s ultimate burden in obtaining federal collateral relief.³¹⁶ Even if the Fifth Circuit panel determines that an applicant has made such a prima facie showing regarding his *Atkins* claim, a Texas federal trial court must conduct its own review to determine the applicant’s satisfaction of this prima facie showing before considering the merits of the successive writ claim.³¹⁷

For Texas state offenders who can overcome all of these AEDPA restrictions and present their *Atkins* claims in federal court, federal statutes provide an entitlement to counsel regarding both initial and successive writ applications, as well as investigative and expert assistance if reasonably necessary.³¹⁸ If an evidentiary hearing is not otherwise precluded by the AEDPA, the grant of an evidentiary hearing on an *Atkins* claim is entrusted to the discretion of the federal trial court.³¹⁹ If the state court failed to provide a “full and fair hearing,” the federal trial court’s failure to hold an

315. *Morris*, 328 F.3d at 740 (quoting *Bennett v. United States*, 119 F.3d 468, 469–70 (7th Cir. 1997)).

316. *In re Wilson*, 442 F.3d 872, 878 (5th Cir. 2006) (per curiam).

317. *See* 28 U.S.C.A. § 2244 (West 2006). The Fifth Circuit has referred to this trial court assessment as the “second gate” for the filing of a successive writ application. *Morris*, 328 F.3d at 741. A trial court’s dismissal is reviewed by the Fifth Circuit de novo. *Mathis*, 616 F. 3d at 466 (affirming the trial court’s subsequent dismissal of the offender’s successive writ application after the appellate court had initially permitted it to be filed).

318. *See* 18 U.S.C.A. § 3599 (West Pamp. 2010) (adding this provision in 2006 and repealing a previous similar provision (21 U.S.C. § 848(q)); *see also* *McFarland v. Scott*, 512 U.S. 849 (1994); *cf. In re Hearn*, 376 F.3d 447 (5th Cir. 2004) (requiring a “colorable claim” of mental retardation for the appointment of counsel to investigate and prepare a successive writ application). A trial court’s denial of investigative and expert assistance is reviewed under an abuse of discretion standard. Additional discovery requires a showing of good cause that is established when an offender has presented prima facie evidence of his *Atkins* claim. *See* *Campbell v. Dretke*, 117 F. App’x 946, 959 (5th Cir. 2004). *Compare* *Sells v. Quarterman*, No. SA-08-CA-465-OG, 2008 U.S. Dist. LEXIS 78172 (W.D. Tex. Aug. 4, 2008), *and* *Williams v. Dretke*, No. H-04-2945, 2005 U.S. Dist. LEXIS 34438 at *17–19 (S.D. Tex. July 15, 2005) (approving expert and investigative assistance), *with* *Campbell*, 117 F. App’x at 959, *and* *Simpson v. Dretke*, No. 1:04cv485, 2006 U.S. Dist. LEXIS 21873 (E.D. Tex. Mar. 27, 2006) (denying expert or investigative assistance).

319. *See* 28 U.S.C.A. § 2254 (West 2006); *Pierce v. Thaler*, 355 F. App’x 784, 788 (5th Cir. 2009) (per curiam); *supra* note 288 and accompany text. If the record contradicts the offender’s factual allegations, the trial court is not required to hold an evidentiary hearing. *Thomas v. Quarterman*, 335 F. App’x 386, 388 (5th Cir. 2009) (per curiam) (citing *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)).

evidentiary hearing on the claim constitutes an abuse of discretion.³²⁰ In resolving an *Atkins* claim, the federal trial court can consider evidence not previously presented in the state court proceedings as long as the evidence merely supplements and does not fundamentally alter the claim presented in state court.³²¹ Even if additional evidence is introduced and an evidentiary hearing is held in federal court, the federal court still reviews the Texas Court judgment on the *Atkins* claim pursuant to the AEDPA's deferential standards.³²² If the federal court, however, determines that the Texas Court's *Atkins* judgment was "contrary to" or involved an "unreasonable" application of clearly established federal law, the AEDPA deferential review standard does not govern the federal review of the claim.³²³

In their substantive review of *Atkins* claims, the Fifth Circuit and Texas federal trial courts have generally endorsed the procedural and definitional mechanisms the Texas Court has adopted to implement *Atkins* on collateral review.³²⁴ The Fifth Circuit has found that the definitions and procedures the Texas Court adopted in *Briseno* are not contrary to clearly established federal law as articulated in Court

320. See *Thomas*, 335 F. App'x at 387–88 (upholding the trial court's denial of a request for an evidentiary hearing); cf. *Simpson v. Quarterman*, 291 F. App'x 622, 623 (5th Cir. 2008) (per curiam) (finding that the trial court erred by failing to conduct an evidentiary hearing on the *Atkins* claim).

321. See *Lewis v. Quarterman*, 541 F.3d 280, 284–86 (5th Cir. 2008).

322. See *Rivera v. Quarterman*, 505 F.3d 349, 355–56 (5th Cir. 2007).

323. See *id.* at 356 (citing 28 U.S.C.A. § 2254 (West 2006) and finding that the Texas Court's subsequent writ dismissal based on a failure to present prima facie evidence of mental retardation was an unreasonable application of clearly established federal law); see also *supra* note 286 and accompanying text (describing the statutory provision); cf. *Bridgers v. Quarterman*, No. 4:07cv479, 2008 U.S. Dist. LEXIS 75652 (E.D. Tex. Sept. 30, 2008) (finding that the offender did not receive a "full and fair" hearing in state court and thus the AEDPA's deferential standard did not apply and he could obtain and present additional evidence of his mental retardation).

324. See, e.g., *Rosales v. Quarterman*, 291 F. App'x 558, 562 (5th Cir. 2008) (per curiam) (noting that the appellate court has "repeatedly" approved *Briseno*'s framework and rejecting the need to use subsequently developed definitions of intellectual disability); *Simpson v. Quarterman*, 593 F. Supp. 2d 922, 931–32 (E.D. Tex. 2009) (noting the Fifth Circuit's citation of *Briseno* in dozens of cases without disapproval and applying its framework in the instant case); *Rodriguez v. Quarterman*, No. SA-05-CA-659-RF, 2006 U.S. Dist. LEXIS 49376, at *37–54 (W.D. Tex. July 11, 2006) (reviewing the challenge of applying a clinical definition of mental retardation in a legal context, and finding the *Briseno* criteria an "objectively reasonable" application of *Atkins*' constitutional standard). See generally *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) (articulating the Texas Court's definitional and procedural implementation of *Atkins* in collateral review proceedings and described *supra* notes 227–246 and accompanying text).

precedent—one of the considerations of federal collateral review.³²⁵ Regarding the Texas Court's *Atkins* collateral review procedure, the Fifth Circuit has approved 1) placing the burden on the offender to prove his mental retardation in collateral review proceedings by a preponderance of the evidence³²⁶ and 2) authorizing the court rather than a jury to serve as the fact-finder regarding mental retardation.³²⁷ Although the Supreme Court referenced the clinical definitions of mental retardation in *Atkins*,³²⁸ the Fifth Circuit has stated that the Court did not adopt "particular criteria" for determining mental retardation for *Atkins* purposes.³²⁹ In reviewing Texas Court mental retardation findings, the Fifth Circuit has generally echoed the definitional aspects articulated by the Texas Court.³³⁰

Regarding the significantly subaverage intellectual functioning component of mental retardation, the Fifth Circuit has stated that this definitional element is typically established by an IQ test score of

325. See, e.g., *Taylor v. Quarterman*, 498 F.3d 306, 308 n.4 (5th Cir. 2007); cf. *Woods v. Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007) (regarding the adaptive behavior aspects).

326. See *Lewis v. Quarterman*, 272 F. App'x 347, 352 (5th Cir. 2008) (per curiam) (denying a certificate of appealability on this issue that had been resolved by the Texas Court, pursuant to *Atkins*' instruction to the states to develop enforcement mechanisms for the ruling); *Woods v. Quarterman*, 493 F.3d 580, 585 n.3 (5th Cir. 2007) (rejecting burden of proof challenge); *In re Johnson*, 334 F.3d 403, 404–05 (5th Cir. 2003) (rejecting the notion that the State must prove the absence of mental retardation beyond a reasonable doubt, as the functional equivalent of an element of a crime).

327. See *Esparza v. Thaler*, 408 F. App'x 787, 795–96 (5th Cir. 2010); *Woods*, 493 F.3d at 585 n.3; *Johnson*, 334 F.3d at 404–05. Supporting the Fifth Circuit's position is the Court's opinion in *Schriro v. Smith*, 546 U.S. 6 (2005), vacating a Ninth Circuit judgment that preemptively required Arizona's resolution of an *Atkins* collateral review claim through use of a jury rather than initially permitting resolution of the claim through procedures adopted by the state in response to *Atkins*. See *In re Woods*, 155 F. App'x 132, 135–36 (5th Cir. 2005) (per curiam) (rejecting a claim based on the jury as fact-finder and citing *Smith*). The Fifth Circuit has also rejected claims for jury resolution of *Atkins* claims premised on *Ring v. Arizona*, 536 U.S. 584 (2002), based on the Court's ruling in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that *Ring* was not retroactive to cases on collateral review. See *Woods*, 155 F. App'x at 136; cf. *Johnson*, 334 F.3d at 404–05.

328. See *Garcia v. Thaler*, No. SA-08-CA-62-XR, 2009 U.S. Dist. LEXIS 116390, at *29–35 (W.D. Tex. Dec. 14, 2009) (noting *Atkins*' provision of clinical rather than legal definitions of mental retardation and resulting definitional challenges).

329. *Moore v. Quarterman*, 454 F.3d 484, 493 (5th Cir. 2006); see *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006).

330. See *supra* notes 228–40, 260–71 and accompanying text (describing the Texas Court's definitional standards); *infra* notes 331–43 and accompanying text (describing the Fifth Circuit's application of these standards).

seventy or below.³³¹ The appellate court has also noted, however, that an IQ score of seventy is an approximate and flexible standard for this definitional element.³³² It has stated that this prong can be established despite an IQ score over seventy or rejected despite an IQ score below seventy³³³ and that evidence of intellectual functioning in addition to IQ scores can be considered.³³⁴ Like the Texas Court, the Fifth Circuit has not adopted the “Flynn effect” regarding IQ score inflation based on when in an IQ test’s norming cycle the test was administered.³³⁵

With regard to the adaptive functioning component, the Fifth Circuit has endorsed review of the ten adaptive skill areas specified by the AAMR and identified in *Atkins*, such as self-care, work,

331. See *Thomas v. Quarterman*, 335 F. App’x 386, 388 (5th Cir. 2009) (per curiam); cf. *Moore v. Quarterman*, 342 F. App’x 65, 79–81 (5th Cir. 2009) (per curiam) (Smith, J. dissenting) (describing a “bright-line cutoff of 70” for this element under Texas law and Fifth Circuit application of it); *Taylor*, 498 F.3d at 308 (referring to a “mild retardation cut off [IQ score] of 70”).

332. See *Moore*, 342 F. App’x at 70 n.5; *Williams v. Quarterman*, 293 F. App’x 298, 308–09 (5th Cir. 2008) (per curiam); *Morris v. Dretke*, 413 F.3d 484, 497–98 (5th Cir. 2005).

333. See *Williams*, 293 F. App’x at 308, 311; *Clark*, 457 F.3d at 444–46. In *Moore*, the Fifth Circuit upheld the Texas federal trial court’s finding of significantly subaverage intellectual functioning based on 1) the offender’s IQ scores that averaged at seventy-two and to which the trial court applied a five-point standard measurement error, 2) expert testimony that characterized mental retardation encompassing IQ scores of seventy-five and below, and 3) governmental expert testimony that agreed, on cross-examination, that this element was satisfied. See *Moore*, 342 F. App’x at 68–71; cf. *Clark*, 457 F.3d at 444–46 (finding that *Atkins* did not mandate an application of the measurement error to the offender’s IQ score above seventy and that the state court’s evaluation of his IQ scores above and below seventy, in addition to related testimony, and its “flexible” determination of his intellectual functioning was not unreasonable).

334. See *Williams*, 293 F. App’x at 308, 310–11 (declining to only consider IQ scores to the exclusion of all other measures of intelligence, such as classroom performance, standardized achievement test scores, writing ability, and lay witness testimony); *Maldonado v. Thaler*, 662 F. Supp. 2d 684, 723–27 (S.D. Tex. 2009) (including lengthy review of varied evidence regarding intellectual functioning), *aff’d*, No. 10-70,003, 2010 U.S. App. LEXIS 22590 (5th Cir. Oct. 29, 2010). The Fifth Circuit has thus far rejected challenges to mental retardation findings that include the assessment of an expert testifying for the State whose assessment methods were rejected by the Texas Court in one case and are the subject of a professional review process. *Maldonado*, 2010 U.S. App. LEXIS 22590, at *39; *Pierce v. Thaler*, 604 F.3d 197, 213–15 (5th Cir. 2010) (finding sufficient other evidence to support the Texas Court’s rejection of mental retardation).

335. See *Maldonado*, 2010 U.S. App. LEXIS 22590, at *20–21; *Thomas*, 335 F. App’x at 390–91; *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007); *supra* note 263 and accompanying text (describing the Flynn effect and the Texas Court’s position regarding it).

functional academics, and social skills,³³⁶ as well as the consolidated grouping of those skill areas subsequently developed by the AAMR and also endorsed by the Texas Court.³³⁷ In determining the required presence of adaptive behavior deficits,³³⁸ the Fifth Circuit has approved the consideration of evidence of an offender's adaptive strengths as well as weaknesses,³³⁹ and evidence beyond standardized test results and expert opinions.³⁴⁰ The Fifth Circuit has also found that the Texas Court's *Briseno* factors are not inconsistent with *Atkins* regarding the evaluation of adaptive behavior³⁴¹ and has approved their use by the Texas state courts in determining adaptive functioning,³⁴² but not required their use.³⁴³

336. See *Williams*, 293 F. App'x at 308, 311; *Thomas*, 335 F. App'x at 389 (citing *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002)); *supra* note 162 and accompanying text (providing these skill areas).

337. See *Moore v. Quarterman*, 342 F. App'x 65, 71–72 (5th Cir. 2009) (per curiam); *supra* notes 264–66 and accompanying text (identifying conceptual, social, and practical skill areas and some illustrative, specific skill areas included in each area); cf. *Matamoros v. Thaler*, No. H-07-2613, 2010 U.S. Dist. LEXIS 35425, at *30–31 (S.D. Tex. Mar. 31, 2010) (rejecting challenge based on state court use of earlier clinical mental retardation definition versus later version).

338. To establish the required deficits in adaptive functioning under the clinical definitions, deficits must be shown in at least two of the ten skill areas identified in *Atkins* or standardized test scores at least two standard deviations below the mean in one of the three subsequently adopted skill areas or an overall score on all three areas. See *supra* notes 162, 266 and accompanying text.

339. See *Williams*, 293 F. App'x at 308, 313–14 (noting that courts are not prohibited from considering adaptive strengths as they assess weaknesses); *Clark v. Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006) (stating that evidence of a strength in an area reflects an absence of a weakness in the area); *Briseno v. Dretke*, No. L-05-08, 2007 U.S. Dist. LEXIS 23603, at *35–51 (S.D. Tex. Mar. 29, 2007) (deferring to the state court's adaptive functioning finding that considered the offender's adaptive strengths and weaknesses), *aff'd sub nom.*, *Briseno v. Quarterman*, 278 F. App'x 340 (5th Cir. 2008) (per curiam).

340. See *Maldonado*, 2010 U.S. App. LEXIS 22590, at *32.

341. See *Woods v. Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007); see also *Simpson v. Quarterman*, 593 F. Supp. 2d 922, 932–33 (E.D. Tex. 2009) (describing how the *Briseno* factors correspond to the AAMR adaptive skill areas); *Chester v. Quarterman*, No. 5:05cv29, 2008 U.S. Dist. LEXIS 34936, *17–18 (E.D. Tex. Apr. 29, 2008) (citing *Woods*); cf. *Maldonado v. Thaler*, 662 F. Supp. 2d 684, 730 (S.D. Tex. 2009) (finding consideration of evidence of adaptive behavior occurring after the developmental period pursuant to the *Briseno* factors is not inconsistent with *Atkins*), *aff'd*, 2010 U.S. App. LEXIS 22590.

342. See *Maldonado*, 2010 U.S. App. LEXIS 22590, at *31–37; *Williams*, 293 F. App'x at 312–14; *Moreno v. Dretke*, 450 F.3d 158, 164–65 (5th Cir. 2006); see also *Chester*, 2008 U.S. Dist. LEXIS 34936, at *20–21 (noting that an affirmative finding regarding the final *Briseno* factor, pertaining to the commission of the capital offense, is sufficient by itself to deny federal collateral relief).

343. See *Moore v. Quarterman*, 342 F. App'x 65, 73 n.7 (5th Cir. 2009) (per curiam) (finding that the Texas federal trial court did not abuse its discretion in not explicitly considering the *Briseno* factors because the Texas Court indicated that the application of

In their substantive rulings on *Atkins* claims, the Fifth Circuit and Texas federal trial courts have applied the deferential AEDPA standard governing federal collateral review of state offender claims.³⁴⁴ This standard precludes the grant of federal habeas corpus relief on an *Atkins* claim adjudicated on the merits in state court unless the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law,” as determined by the Supreme Court, or was based on an “unreasonable” factual determination of the evidence presented in the state proceedings.³⁴⁵ State court factual determinations have a presumption of correctness unless the offender rebuts them by clear and convincing evidence.³⁴⁶ A federal court’s determination that it would have reached a different factual conclusion than the state court or even a determination that the state court’s resolution was incorrect is not sufficient to conclude that the state court’s factual determination was “unreasonable.”³⁴⁷ The Fifth Circuit has deemed the determination of an offender’s mental retardation pursuant to *Atkins* to be a question of fact.³⁴⁸ In these fact-intensive cases, one Texas federal trial court described the role of federal collateral review in *Atkins* cases: “Against the backdrop of dueling expert opinions, it must be remembered that the habeas writ exists only for constitutional violations. Federal habeas review does not make certain that a state court ruling complies perfectly with the standards created by professional organizations—though psychological standards certainly inform the *Atkins* inquiry.”³⁴⁹ As described in the next section of this Article, this limited federal collateral review role

the factors is discretionary); *Simpson*, 593 F. Supp. 2d at 932 (noting Fifth Circuit case law that courts have the “option” to consider the *Briseno* factors).

344. See *Hines v. Thaler*, No. 3:06-CV-0320-G, 2010 U.S. Dist. LEXIS 85564, at *6 (N.D. Tex. Aug. 18, 2010) (citations omitted).

345. See 28 U.S.C.A. § 2254 (West 2006); see also *Wood v. Allen*, 130 S. Ct. 841, 849 (2010); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (interpreting these provisions).

346. See 28 U.S.C.A. § 2254 (West 2006); see also *Wood*, 130 S. Ct. at 845, 848–49; *Landrigan*, 550 U.S. at 473–74; *Rice v. Collins*, 546 U.S. 333, 338–39 (2006); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (interpreting this provision).

347. See *Wood*, 130 S. Ct. at 849; *Landrigan*, 550 U.S. at 473; *Rice*, 546 U.S. at 341–42; cf. *Williams*, 529 U.S. at 410–11.

348. See *Maldonado*, 2010 U.S. App. LEXIS 22590, at *14–15; *Williams*, 293 F. App’x at 308; *Clark v. Quarterman*, 457 F.3d 441, 444–47 (5th Cir. 2006).

349. *Maldonado v. Thaler*, 662 F. Supp. 2d 684, 704–05 (S.D. Tex. 2009) (citation omitted), *aff’d*, 2010 U.S. App. LEXIS 22590.

has led to limited collateral relief on Texas *Atkins* claims by the Fifth Circuit and Texas federal trial courts.³⁵⁰

F. Resolution of *Atkins* Claims on Collateral Review in Texas State and Federal Courts

1. Overview

As of the writing of this Article, the Texas Court (or Texas Governor) has resolved the *Atkins* claims of seventy-eight capital offenders on collateral review.³⁵¹ The Fifth Circuit or Texas federal trial courts have completed their review of the *Atkins* claims of thirty-eight of these offenders³⁵² and three offenders who first raised their *Atkins* claims in federal court.³⁵³ Thus far, the Texas Court has granted collateral relief to ten offenders and reformed their death sentences to life imprisonment on *Atkins* grounds.³⁵⁴ The Texas Governor has granted commutations to two offenders.³⁵⁵ The Fifth Circuit has found two offenders to be mentally retarded for *Atkins* purposes.³⁵⁶ The actions of the Texas Governor and state and federal courts regarding these successful and unsuccessful *Atkins* claimants can be categorized more specifically.³⁵⁷

For capital offenders pursuing *Atkins* claims in their original habeas corpus applications, the Texas courts substantively review these claims on the merits.³⁵⁸ For offenders pursuing *Atkins* claims through subsequent writ applications, the Texas Court has an initial

350. See *infra* Table 1 (describing federal collateral review action on *Atkins* claims).

351. See *infra* Table 1 (describing the resolution of *Atkins* claims by the Texas Court and Texas Governor).

352. See *infra* Table 1 (describing the Texas federal courts' resolution of *Atkins* collateral review claims).

353. See *Hernandez v. Thaler*, 398 F. App'x 81, 89–90 (5th Cir. 2010) (denying relief on statute of limitations grounds); *Green v. Quarterman*, No. H-07-827, 2008 U.S. Dist. LEXIS 11459 (S.D. Tex. Feb. 15, 2008) (denying relief on the merits and on procedural bar grounds); *Amador v. Dretke*, No. SA-02-CA-230-XR, 2005 U.S. Dist. LEXIS 6072, at *102–09 (W.D. Tex. Apr. 11, 2005) (denying relief on the merits), *aff'd on other grounds sub nom.*, *Amador v. Quarterman*, 458 F.3d 397 (5th Cir. 2006); see also *infra* Table 1.

354. See *infra* notes 407–55, 467–500 and accompanying text (describing these cases); see also *infra* Table 1.

355. See *infra* notes 456–66 and accompanying text (describing these cases); see also *infra* Table 1.

356. See *infra* notes 501–17 and accompanying text (describing these cases); see also *infra* Table 1.

357. See *infra* Table 1; *infra* notes 358–72 and accompanying text.

358. See TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010); *supra* notes 209–10, 247–49 and accompanying text (describing this provision and related case).

screening role prior to any substantive review of the *Atkins* claim by the convicting trial court and its own final review.³⁵⁹ Following an evidentiary review in the convicting trial court, the Texas Court has denied collateral relief to nine offenders who asserted *Atkins* claims in their original habeas corpus proceedings.³⁶⁰ In its subsequent writ screening role, the Texas Court has found no prima facie evidence of mental retardation in twenty offenders' cases, and has denied their subsequent applications as an abuse of the writ.³⁶¹ For six offenders who have asserted *Atkins* claims in their second post-*Atkins* writ applications (and two offenders who reasserted their *Atkins* claim after a previous denial of the claim on collateral review), the Texas Court has found insufficient evidence to indicate that the offenders could establish their mental retardation by clear and convincing evidence, the screening standard for these cases, and has dismissed their writ applications as an abuse of the writ.³⁶² For thirty-one offenders whose *Atkins* subsequent writ claims the Texas Court remanded to the convicting trial court for an evidentiary review, the Texas Court has denied collateral relief based on the factual findings and legal conclusions of the convicting trial court.³⁶³ Regarding the

359. See TEX. CODE CRIM. PROC. ANN. art. 11.071 (West Supp. 2010); *Ex parte* Blue, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (establishing the threshold showing and clear and convincing evidence standard regarding second post-*Atkins* writ applications filed pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West Supp. 2010)); *Ex parte* Rivera, No. 27065-02, 2003 WL 21752841, at *2 (Tex. Crim. App. July 25, 2003) (per curiam) (describing the prima facie evidence screening standard regarding *Atkins* successive writ applications filed pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West Supp. 2010)); *supra* notes 222–25, 256–57 and accompanying text (describing these provisions and cases).

360. See, e.g., *Ex parte* Simpson, 136 S.W.3d 660 (Tex. Crim. App. 2004); see also *infra* Table 1.

361. See, e.g., *Ex parte* Hearn, 310 S.W.3d 424 (Tex. Crim. App. 2010); *Ex parte* Johnson, No. WR-56,947-02, 2009 Tex. Crim. App. Unpub. LEXIS 666 (Tex. Crim. App. Apr. 29, 2009) (per curiam); *Ex parte* Johnson, No. WR-57,854-02 (Tex. Crim. App. Feb. 11, 2009) (per curiam); *Ex parte* Salazar, No. WR-49,210-02, 2006 Tex. Crim. App. Unpub. LEXIS 507 (Tex. Crim. App. Mar. 9, 2006) (per curiam); *Rivera*, 2003 WL 21752841; see also *infra* Table 1.

362. See, e.g., *Ex parte* Bustamante, No. WR-58,927-02, 2010 Tex. Crim. App. Unpub. LEXIS 250 (Tex. Crim. App. Apr. 26, 2010) (per curiam); *Ex parte* Sells, No. WR-62,552-02, 2007 Tex. Crim. App. LEXIS 1847 (Tex. Crim. App. May 23, 2007) (per curiam); *Blue*, 230 S.W.3d at 167–68 (describing initial attempt to assert an *Atkins* claim that was available at the time of a previous writ application); see also *Ex parte* Woods, 296 S.W.3d 587 (Tex. Crim. App. 2009); *Ex parte* Taylor, Nos. WR-48,498-02, WR-48,498-04 (Tex. Crim. App. Nov. 6, 2008) (per curiam) (describing attempt to re-assert an *Atkins* claim that was denied in a previous writ proceeding); see also *infra* Table 1.

363. See, e.g., *Ex parte* Jones, No. WR-45,979-02, 2010 WL 653701 (Tex. Crim. App. Feb. 24, 2010) (per curiam); *Ex parte* Matamoros, No. WR-50,791-02, 2007 Tex. Crim.

ten offenders whose *Atkins* subsequent writ claims were successful in the Texas Court, six of the claims followed agreed or stipulated mental retardation findings in the convicting trial courts and the remaining four followed contested proceedings.³⁶⁴ Both of the Texas Governor's *Atkins* commutations followed agreed findings of mental retardation.³⁶⁵

The Fifth Circuit and Texas federal trial courts have resolved Texas state offenders' *Atkins* claims on both procedural and substantive grounds.³⁶⁶ The Fifth Circuit has denied five claims on statute of limitations grounds.³⁶⁷ The appellate court has denied authorization to file five successive writ claims after finding no prima

App. LEXIS 1861 (Tex. Crim. App. June 13, 2007) (per curiam); *Ex parte* Pierce, No. WR-15,859-04, 2007 Tex. Crim. App. LEXIS 1846 (Tex. Crim. App. Apr. 18, 2007); *Ex parte* Lewis, 223 S.W.3d 372 (Tex. Crim. App. 2006); *Ex parte* Rodriguez, 164 S.W.3d 400 (Tex. Crim. App. 2005) (per curiam); see also *infra* Table 1. Some capital offenders who have been unsuccessful in their *Atkins* claims have also raised claims that they should receive new sentencing hearings because their mitigating evidence of mental retardation was not properly considered in their sentencing proceedings pursuant to *Penry* (and subsequent related cases). Some of these unsuccessful *Atkins* claimants have received new sentencing hearings on this basis. See, e.g., *Ex parte* Briseno, No. AP-76,132, 2010 Tex. Crim. App. Unpub. LEXIS 338 (Tex. Crim. App. June 9, 2010); *Ex parte* Davis, No. AP-76,263, 2009 Tex. Crim. App. Unpub. LEXIS 750 (Tex. Crim. App. Nov. 18, 2009) (per curiam).

364. Compare *Ex parte* Carr, No. AP-75,627, 2007 WL 602816 (Tex. Crim. App. Feb. 28, 2007) (per curiam) (involving agreed or stipulated mental retardation findings), with *Ex parte* Bell, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (per curiam) (resolving contested evidence); see *infra* notes 407–55, 467–500 and accompanying text (describing these cases).

365. See *Ex parte* Lane, Nos. WR-67,161-01, WR-67,161-02, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Tex. Crim. App. Feb. 4, 2009) (per curiam); *Ex parte* Smith, No. 40,874-02 (Tex. Crim. App. Apr. 21, 2004) (per curiam) (describing Texas Governor's commutations on *Atkins* grounds and dismissing the writ applications as moot); *infra* notes 456–66 and accompanying text (describing these cases).

366. See *infra* Table 1; *infra* notes 367–72 and accompanying text (describing resolution of these claims).

367. See *Hernandez v. Thaler*, 398 F. App'x 81, 89–90 (5th Cir. 2010) (denying stay); *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. 2010) (denying authorization to file successive federal habeas corpus application based on timeliness and claim's availability when previous federal writ was filed); *In re* Johnson, 325 F. App'x 337 (5th Cir. 2009) (per curiam) (denying stay and authorization to file successive federal habeas corpus application); *In re* Lewis, 484 F.3d 793 (5th Cir. 2007) (per curiam) (denying authorization to file successive federal habeas corpus application); *Nealy v. Quarterman*, 223 F. App'x 366 (5th Cir. 2007) (per curiam) (denying stay on grounds including timeliness); see also *infra* Table 1; cf. *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010) (remanding time-barred *Atkins* claim for a consideration of equitable tolling); *In re* Salazar, 443 F.3d 430, 434 n.2 (5th Cir. 2006) (describing as an "open question" whether authorization to file a successive writ application based on *Atkins* could be denied solely on timeliness grounds).

facie evidence of mental retardation.³⁶⁸ The Fifth Circuit has affirmed or declined a certificate of appealability regarding Texas federal trial courts' denial of collateral relief in twenty *Atkins* cases³⁶⁹ and three additional offenders waived or otherwise did not seek appellate relief from a federal trial court denial of their *Atkins* claims.³⁷⁰ In six cases, subsequent Fifth Circuit action is pending following Texas federal trial courts' denial of collateral relief.³⁷¹ Finally, in two cases, the Fifth Circuit has affirmed the mental retardation findings by Texas federal trial courts conducting de novo reviews of offenders' *Atkins* claims.³⁷²

Texas state and federal actions on *Atkins* claims in individual collateral review cases are described in the table below.

Table 1. Texas State and Federal Actions on *Atkins* Collateral Review Claims

368. See, e.g., *In re Brown*, 457 F.3d 392, 396–97 (5th Cir. 2006); *Salazar*, 443 F.3d at 430; *In re Johnson*, 334 F.3d 403, 404 (5th Cir. 2003) (per curiam); see also *infra* Table 1.

369. See, e.g., *Maldonado v. Thaler*, No. 10-70003, 2010 U.S. App. LEXIS 22590 (5th Cir. Oct. 29, 2010) (affirming denial of collateral relief); *Hall v. Thaler*, 587 F.3d 746 (5th Cir. 2010) (per curiam) (denying certificate of appealability); *Moreno v. Dretke*, 450 F.3d 158 (5th Cir. 2006) (affirming the denial of collateral relief and denying certificate of appealability); see also *Hines v. Thaler*, No. 3:06-CV-0320-G, 2010 U.S. Dist. LEXIS 85564, at *9–12 (N.D. Tex. Aug. 18, 2010) (citing cases in which *Atkins* claims had been denied pursuant to the AEDPA's deferential review standard); see also *infra* Table 1.

370. See *Simpson v. Quarterman*, 341 F. App'x 68 (5th Cir. 2009) (per curiam) (involving waiver of appeal); *Green v. Quarterman*, 312 F. App'x 635 (5th Cir. 2009) (per curiam) (describing appellate action in the case on non-*Atkins* claims); *Rodriguez v. Quarterman*, No. SA-05-CA-659-RF, 2006 U.S. Dist. LEXIS 49376 (W.D. Tex. July 11, 2006) (granting collateral relief on *Penry* claim).

371. See, e.g., *Hines*, 2010 U.S. Dist. LEXIS 85564; *Butler v. Quarterman*, 576 F. Supp. 2d 805 (S.D. Tex. 2008); see also *infra* Table 1.

372. The Fifth Circuit reviews the Texas federal trial courts' factual findings regarding mental retardation for clear error. See *Williams v. Quarterman*, 293 F. App'x 298, 308 (5th Cir. 2008) (per curiam). Neither of the two cases in which the Fifth Circuit has affirmed the mental retardation finding in an *Atkins* claim involved the AEDPA's deferential review standards. Both involved the de novo consideration of evidence by the Texas federal trial court to determine whether the offender had established mental retardation by the preponderance of the evidence and the Fifth Circuit's review of this factual determination for clear error. See *Moore v. Quarterman*, 342 F. App'x 65, 67 (5th Cir. 2009) (per curiam) (citing *Moore v. Quarterman*, 533 F.3d 338, 341–42 (5th Cir. 2008) (per curiam) (en banc) (finding cause and prejudice regarding the offender's failure to exhaust his *Atkins* claim when it was dismissed as an abuse of the writ prior to the Texas Court's development of *Atkins* procedures and thus no application of the deferential review standards)); *Rivera v. Quarterman*, 505 F.3d 349, 356–61 (5th Cir. 2007) (finding that the Texas Court's dismissal of the offender's claim as an abuse of the writ was an "unreasonable" application of "clearly established" federal law and thus not entitled to deferential treatment); cf. *Simpson v. Quarterman*, 593 F. Supp. 2d 922, 926–27, 941–42 (E.D. Tex. 2009) (denying the *Atkins* claim under de novo and deferential review standards). These cases are described *infra* notes 501–17 and accompanying text.

| Last Name | Texas Court Dismissal or Denial | Texas Court/ Governor Relief | Federal Denial | Federal Mental Retardation Finding | Executed |
|-------------------|---------------------------------|------------------------------|----------------|------------------------------------|----------|
| Amador | | | No MR | | * |
| Bell | | Texas Court | | | |
| Blue | No CCE | | | | |
| Bradford | No MR | | | | |
| Bridgers | No MR | | | | |
| Briseno | No MR | | No MR | | |
| Brown | No PF | | No PF | | * |
| Bustamante | No CCE | | | | * |
| Butler | No MR | | No MR* | | |
| Campbell | No PF | | No PF | | |
| Carr | | Texas Court | | | |
| Chester | No MR | | No MR* | | |
| Clark | No MR | | No MR | | * |
| Cockrell | | Texas Court | | | |
| Davis | No MR | | | | |
| DeBlanc | | Texas Court | | | |
| Eldridge | No PF | | No MR | | |
| Elizalde | No PF | | No PF | | * |
| Escobedo | No MR | | | | |
| Esparza | 1st HC | | No MR | | |
| Garcia | 1st HC | | No MR | | |
| Green | | | No MR | | |
| Guevara | No CCE | | | | |
| Hall | 1st HC | | No MR | | |
| Hearn | No PF | | | | |
| Henderson | No MR | | | | |
| Ramiro Hernandez | 1st HC | | | | |
| Rodrigo Hernandez | | | SL | | |
| Hines | No MR | | No MR* | | |
| Hunter | 1st HC | | | | |
| Ibarra | No MR | | | | |
| Jackson | No PF | | | | * |
| D. Johnson | No PF | | SL | | * |
| J. Johnson | No PF | | | | * |
| K. Johnson | No PF | | No PF | | * |

| | | | | | |
|-----------|---------------|----------------|--------|-------------|---|
| Jones | No MR | | | | * |
| Ladd | No PF | | | | |
| Lane | | Texas Governor | | | |
| D. Lewis | No MR | | SL | | |
| R. Lewis | No MR | | No MR* | | |
| Maldonado | No MR | | No MR | | |
| Matamoros | No MR | | No MR* | | |
| Mathis | No MR | | SL | | |
| McCoskey | No MR | | | | |
| Modden | | Texas Court | | | |
| C. Moore | No MR | | No MR | | * |
| E. Moore | No PF | | | 5th Circuit | |
| Moreno | No PF | | No MR | | |
| Morris | No PF | | No MR | | * |
| Nealy | No CCE | | SL | | * |
| Neville | No PF | | | | * |
| Perkins | 1st HC | | No MR | | * |
| Pierce | No MR | | No MR | | |
| Plata | | Texas Court | | | |
| Reese | 1st HC | | No MR | | * |
| Richard | No MR | | | | * |
| Riley | No MR | | | | * |
| Rivera | No PF | | | 5th Circuit | |
| Rivers | No MR | | | | |
| Robinson | No MR | | | | |
| Rodriguez | No MR | | No MR | | |
| Rosales | No PF | | No MR | | * |
| Salazar | No PF | | No PF | | * |
| Sells | No CCE | | | | |
| Simpson | 1st HC | | No MR | | * |
| Simms | | Texas Court | | | |
| Smith | | Texas Governor | | | |
| Stevenson | | Texas Court | | | |
| Tamayo | No CCE | | | | |
| Taylor | No MR; No CCE | | No MR | | * |
| Thomas | No MR | | No MR | | |
| Valdez | | Texas Court | | | |

| | | | | | |
|-------------|---------------|-------------|--------|--|---|
| Van Alstyne | | Texas Court | | | |
| Wesbrook | No MR | | | | |
| Whitaker | No PF | | | | |
| C. Williams | 1st HC | | | | |
| J. Williams | No PF | | No MR | | |
| R. Williams | No PF | | | | * |
| Wilson | No MR | | No MR* | | |
| Woods | No MR; No CCE | | No MR | | * |
| Wooten | No MR | | No MR | | * |

Legend: Texas Court Dismissal or Denial: 1st HC = denial of the offender's original habeas corpus application; No PF = no prima facie evidence of mental retardation in subsequent writ application and dismissal as abuse of writ; No CCE = insufficient indication of clear and convincing evidence of mental retardation in second post-*Atkins* writ application and dismissal as abuse of writ; No MR = subsequent writ denial following remand for evidentiary review.

Federal Denial: SL = denial based on statute of limitations; No PF = no prima facie evidence of mental retardation in successive writ application and denial of filing authorization; No MR = denial of collateral relief by the federal trial court regarding which the Fifth Circuit affirmed the denial or denied a certificate of appealability or the offender waived or otherwise did not pursue an appeal on his *Atkins* claim; No MR* = denial of collateral relief by the Texas federal trial court pending Fifth Circuit action.

Thus, despite the significant volume of *Atkins* collateral review litigation in Texas state and federal courts, only seventeen percent of the Texas *Atkins* claimants have been successful on collateral review.³⁷³ This "success rate" is significantly lower than the "national average" success rate of thirty-eight percent identified in a 2008 study of states that had resolved *Atkins* claims.³⁷⁴ To help distinguish between the successful Texas *Atkins* claims and unsuccessful ones, the following sections present the evidence of mental retardation both in the successful cases and in some illustrative unsuccessful cases in which the issue was vigorously contested.³⁷⁵

Of course, as Texas state and federal courts have addressed *Atkins* claims, they (like courts reviewing *Atkins* claims in other capital punishment states) have confronted the challenges of

373. This percentage reflects fourteen successful *Atkins* claimants of the eighty-one offenders whose collateral review claims have been resolved in Texas state and federal proceedings. See *supra* Table 1.

374. See Blume et al., *supra* note 26, at 628–29, 637; *supra* note 204 (describing this aspect of the study).

375. See *infra* notes 402–597 and accompanying text.

determining the mental retardation of these capital offenders.³⁷⁶ One Texas federal trial court described the general nature of *Atkins* claims:

This case, like most involving *Atkins* claims, requires consideration of testimony from competing experts who disagree about the nature of mental retardation, the means by which it may be identified, the manner in which it manifests in a criminal defendant's life, and the psychological profession's role in making the legal decision of whether mental capacity precludes execution.³⁷⁷

Although the Texas Court has provided a definitional and procedural framework for the resolution of *Atkins* claims, as described previously in this Article,³⁷⁸ challenges in the application of this framework remain.

Application challenges concerning both the intellectual functioning and adaptive behavior components of the mental retardation determination include the selection of the assessment instrument used to measure these aspects of mental retardation. According to the AAMR, the IQ test used should be an "individually administered, standardized instrument that yields a measure of general intellectual functioning" and is selected based on factors such

376. See generally Bonnie & Gustafson, *supra* note 169, at 811; Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 ETHICS & BEHAV., no. 1, 2003 at 3; Julie C. Duvall & Richard J. Morris, *Assessing Mental Retardation in Death Penalty Cases: Critical Issues for Psychology and Psychological Practice*, 37 PROF. PSYCHOL.: RES. AND PRAC. 658 (2006); Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. FORENSIC PSYCHOL. PRAC., no. 1, 2008 at 1; John M. Fabian, *State Supreme Court Responses to Atkins v. Virginia: Adaptive Functioning Assessment in Light of Purposeful Planning, Premeditation, and the Behavioral Context of the Homicide*, 6 J. FORENSIC PSYCHOL. PRAC., no. 4, 2006 at 1 [hereinafter Fabian, *State*]; John M. Fabian, *Life, Death, and IQ: It's Much More Than Just a Score: The Dilemma of the Mentally Retarded on Death Row*, 5 J. FORENSIC PSYCHOL. PRAC., no. 4, 2005 at 1 [hereinafter Fabian, *Life*]; Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255 (2003); James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14 EXCEPTIONALITY 237 (2006); Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. FORENSIC PSYCHOL. PRAC., no. 3, 2006 at 1; Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 HASTINGS L.J. 1203 (2008).

377. *Maldonado v. Thaler*, 662 F. Supp. 2d 684, 704 (S.D. Tex. 2009), *aff'd*, No. 10-70,003, 2010 U.S. App. LEXIS 22590 (5th Cir. Oct. 29, 2010).

378. See *supra* notes 217–80 and accompanying text (describing *Briseno* and subsequent cases).

as the person's "social, linguistic, and cultural background."³⁷⁹ The AAMR states that the "Wechsler and [Stanford-Binet] scales are perhaps the most widely used and accepted measures to assess intelligence."³⁸⁰ These scales include the Wechsler Adult Intelligence Scale (currently in its third edition, "WAIS-III"), the Stanford-Binet Intelligence Scale (currently in its fifth edition, "SB5"), and the Wechsler Intelligence Scales for Children (currently in its fourth edition, "WISC-IV").³⁸¹ According to the AAMR, the current versions of IQ tests that have been most recently normed should be utilized.³⁸² Short-form versions of these tests or other screening tests, such as the Beta test often given in prisons, are not deemed to be as accurate measures of intelligence assessment.³⁸³

Regarding the adaptive behavior assessment instrument, the AAMR recommends an instrument that assesses across all of the domains of adaptive behavior contained in the mental retardation definition (e.g., areas of functional academics and self-care) and also utilizes current norms based on a representative sample of the general population. The AAMR further advises that the instrument be administered to respondents who know the assessed person very well and have had the opportunity to observe the person frequently in a variety of community settings over an extended period of time (e.g., family, friends, teachers, employers, and care providers)—and cautions against the use of self-ratings by the assessed person.³⁸⁴

379. AAIDD, *supra* note 5, at 41; *see id.* at 36 (describing the potential impact of individual characteristics on test results); Bonnie & Gustafson, *supra* note 376, at 828.

380. AAIDD, *supra* note 5, at 41 (noting also that there may be instances when another IQ test is a better match for an individual's personal characteristics); *see Ex parte Hearn*, 310 S.W.3d 424, 428 n.7 (Tex. Crim. App. 2010) (identifying previous versions of the WISC and SB IQ tests and the Kaufman Assessment Battery for Children as "standardized, individually administered" IQ tests and citing APA, *supra* note 5, at 41); Bonnie & Gustafson, *supra* note 376, at 826.

381. *See* Bonnie & Gustafson, *supra* note 376, at 826–27; Everington & Olley, *supra* note 376, at 6, 7; *cf.* Fabian, *Life*, *supra* note 376, at 17–19 (noting variations in these tests); Weithorn, *supra* note 376, at 1212–19 (describing the history of IQ testing and some current criticisms of it).

382. *See* AAIDD, *supra* note 5, at 25, 41.

383. *See* AAIDD, *supra* note 5, at 41; Everington & Olley, *supra* note 376, at 7; Fabian, *Life*, *supra* note 376, at 18; Patton & Keyes, *supra* note 376, at 246–47.

384. *See* AAIDD, *supra* note 5, at 47–54. The AAMR's mental retardation definition includes significant limitations in adaptive behavior, as measured by assessment instruments, and based on the person's "typical" performance. The AAMR recognizes that "adaptive skill limitations often coexist with strengths" and both should be "documented within the context of community and cultural environments typical of the person's age peers." AAIDD, *supra* note 5, at 45, 47; *see* Everington & Olley, *supra* note 376, at 8; Patton & Keyes, *supra* note 376, at 250, 252.

Frequently used adaptive behavior scales include the Vineland Adaptive Behavior Scales (“VABS”), the AAMR Adaptive Behavior Scale (“ABS”), the Scales of Independent Behavior (current version “SIB-R”), and the Adaptive Behavior Assessment System (current version “ABAS-II”).³⁸⁵

In addition to challenges concerning the selection of appropriate assessment instruments are issues concerning the accurate interpretation of results of these assessment instruments. Assessment instruments in both the intellectual and adaptive functioning areas have standard errors of measurement, generally between three and five points regarding IQ tests, which establish a “statistical confidence interval around the obtained score.”³⁸⁶ The identification and application of the correct measurement error obviously affects the assessment instrument’s results.³⁸⁷ The AAMR also cautions that IQ

385. See *Hearn*, 310 S.W.3d at 428 n.10 (citing APA, *supra* note 5, at 42); Everington & Olley, *supra* note 376, at 12; cf. Bonnie & Gustafson, *supra* note 376, at 848 (expressing a concern about the reliability of these instruments); Brodsky & Galloway, *supra* note 376, at 7 (noting the lack of a uniform instrument that measures all aspects of adaptive functioning); Fabian, *Life*, *supra* note 376, at 10–12 (noting the absence of uniform adaptive behavior assessment tests used by all experts); Patton & Keyes, *supra* note 376, at 249 (noting limitations of assessment instruments); Stevens & Price, *supra* note 376, at 7–14 (comparing aspects of VABS, SIB-R, and ABAS-II). In assessing the adaptive behavior area of functional academics, standardized achievements tests, such as the Wide Range Achievement Test or Woodcock Johnson Psychoeducational Battery are sometimes used. See Everington & Olley, *supra* note 376, at 13; Fabian, *Life*, *supra* note 376, at 14 (noting strengths and weaknesses of these tests). Professionals differ in their views of the Street Survival Skills Questionnaire, a vocational curriculum development instrument that focuses on practical skills, as an effective additional indication of adaptive behavior. See Everington & Olley, *supra* note 376, at 9; Lisa Kan et al., *Presenting Information About Mental Retardation in the Courtroom: A Content Analysis of Pre-Atkins Capital Trial Transcripts from Texas*, 33 L. & PSYCHOL. REV. 1, 15–16, 22 (2009). But see Stevens & Price, *supra* note 376, at 17–18.

386. AAIDD, *supra* note 5, at 36, 48–49 (noting also that the measurement error varies by test, subgroup, and age group); see *Hearn* 310 S.W.3d at 428 (noting an IQ measurement error of approximately five points and citing APA, *supra* note 5, at 41); *Ex parte Briseno*, 135 S.W.3d 1, 7 n.24 (Tex. Crim. App. 2004) (noting that IQ tests differ in accuracy); Bonnie & Gustafson, *supra* note 376, at 834–36; Everington & Olley, *supra* note 376, at 6, 8; Fabian, *Life*, *supra* note 376, at 10; Mossman, *supra* note 376, at 269–70; Patton & Keyes, *supra* note 376, at 246.

387. The AAMR states that “[r]eporting an IQ score with an associated confidence interval is a critical consideration underlying the appropriate use of intelligence tests and best practices; such reporting must be part of any decision concerning the diagnosis of [mental retardation].” AAIDD, *supra* note 5, at 36; see *id.* at 40; see also Bonnie & Gustafson, *supra* note 376, at 835–36 (cautioning against application of the measurement error only to raise and not lower an IQ score or vice versa). Some have asserted the need to deduct 2.34 points from WAIS-III IQ scores due to the use of a substandard normative sample. See Flynn, *supra* note 263, at 178–79; see also Bonnie & Gustafson, *supra* note 376, at 841.

scores can be artificially inflated due to the “practice” effect from multiple administrations of IQ testing instruments relatively close in time (as sometimes occurs in *Atkins* litigation), or inaccurate based on the “Flynn effect” regarding IQ tests with norms that do not reflect the general increase in IQ scores over time.³⁸⁸ Reflecting the above considerations, the AAMR cautions against the use of a fixed cutoff point regarding IQ scores in the determination of mental retardation.³⁸⁹ The AAMR further notes that variability in assessment tests and their administration may result in some variability in assessment test results.³⁹⁰ Finally, the test administrator’s experience with the administration of assessment instruments generally, and for correctional populations specifically, as well as the application of clinical judgment, can significantly affect the reliability and validity of the test results and their interpretation.³⁹¹

In addition to challenges related to the assessment tests, Texas state and federal courts reviewing *Atkins* claims face other challenges in their consideration of the testimonial and other evidence presented

388. See AAIDD, *supra* note 5, at 37, 38; see also Bonnie & Gustafson, *supra* note 376, at 837–40; Duvall & Morris, *supra* note 376, at 662–63; Everington & Olley, *supra* note 376, at 7; Fabian, *Life*, *supra* note 376, at 20–21; Patton & Keyes, *supra* note 376, at 246–47. The Texas Court has not endorsed the application of the Flynn effect in determining an offender’s IQ for *Atkins* purposes. See *supra* note 263 and accompanying text.

389. See AAIDD, *supra* note 5, at 35, 39–40; see also Bonnie & Gustafson, *supra* note 376, at 841–45; Duvall & Morris, *supra* note 376, at 659–61; Mossman, *supra* note 376, at 269. In the 1992 edition of its diagnostic and classification manual, the AAMR adopted an IQ standard score of “approximately 70 to 75 or below.” AAIDD, *supra* note 5, at 10. Beginning with the 2002 edition of its manual, the AAMR eliminated reference to a specific IQ score in its definition of limited intellectual functioning. Instead it defines this criterion as “approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and weaknesses.” AAIDD, *supra* note 5, at 10, 35. The Texas Court has defined the intellectual functioning component of mental retardation as an IQ of “about 70 or below.” *Hearn*, 310 S.W.3d at 428; *Briseno*, 135 S.W.3d at 7 n.24. However, the Texas Court has also noted the standard error of measurement that could reflect an actual score five points higher or lower than that number, see *Hearn*, 310 S.W.3d at 428, and that mental health professionals are “flexible” in their mental retardation assessments. See *Hearn*, 310 S.W.3d 430–31 (describing the relationship between measurement error and the “rough ceiling” of “about 70” IQ for *Atkins* purposes); *Briseno*, 135 S.W.3d at 7 n.24 (noting the approximately two standard deviations below the mean companion standard for mental retardation).

390. See AAIDD, *supra* note 5, at 38–39 (noting that this variability can even include some extreme scores); see also Everington & Olley, *supra* note 376, at 6–7, 8; Fabian, *Life*, *supra* note 376, at 18–19; Patton & Keyes, *supra* note 376, at 246.

391. See AAIDD, *supra* note 5, at 40–41, 85–103; Brodsky & Galloway, *supra* note 376, at 4–5; Everington & Olley, *supra* note 376, at 5; Fabian, *Life*, *supra* note 376, at 29–30; Patton & Keyes, *supra* note 376, at 245.

to them. The reliability of expert testimony is affected not only by the qualifications of the expert, but also by the thoroughness of the expert's examination and evaluation of the offender; assessments and interviews of other persons who know the offender; and review of relevant records concerning the offender, such as school and employment records and other mental retardation evaluations.³⁹² Lay witnesses who are best acquainted with the offender, such as family members and friends, may also have a motive to testify in a manner to help the offender prevail in *Atkins* proceedings.³⁹³ Lay witnesses who only know the offender in connection with his criminal conduct, such as police and correctional personnel, may not have sufficient knowledge of his intellectual and adaptive behavior in a community setting, or may be influenced by their own biases.³⁹⁴ Moreover, as they characterize an offender as mentally retarded, or not, the perception of lay witnesses concerning mental retardation may not be accurate.³⁹⁵

The performance of offenders in post-*Atkins* mental retardation assessment can be subject to both the "cloak of competence," often causing mentally retarded persons to inflate their adaptive behavior abilities,³⁹⁶ and the obvious motive to underperform in assessments conducted for *Atkins* purposes.³⁹⁷ In addition, offenders' intellectual and adaptive behavior abilities may have been affected by their long-term incarceration.³⁹⁸ Moreover, the interpretation of criminal

392. See AAIDD, *supra* note 5, at 47, 85–103; Everington & Olley, *supra* note 376, at 9, 12–13; Fabian, *Life*, *supra* note 376, at 10–11; Stevens & Price, *supra* note 376, at 14–19, 23–26.

393. See Bonnie & Gustafson, *supra* note 376, at 849; Fabian, *Life*, *supra* note 376, at 12–13; Stevens & Price, *supra* note 376, at 16.

394. See Everington & Olley, *supra* note 376, at 9, 12; Fabian, *Life*, *supra* note 376, at 10, 13–14; Patton & Keyes, *supra* note 376, at 249–50; Stevens & Price, *supra* note 376, at 16, 19; Young et al., *supra* note 263, at 174–75.

395. 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); Fabian, *Life*, *supra* note 376, at 13; Patton & Keyes, *supra* note 376, at 239–40.

396. See Everington & Olley, *supra* note 376, at 10; Fabian, *Life*, *supra* note 376, at 31; Patton & Keyes, *supra* note 376, at 249, 252; Stevens & Price, *supra* note 376, at 17.

397. See Brodsky & Galloway, *supra* note 376, at 7–8; Fabian, *Life*, *supra* note 376, at 24–25; Mossman, *supra* note 376, at 276–78; Patton & Keyes, *supra* note 376, at 249; Stevens & Price, *supra* note 376, at 17; *cf.* Everington & Olley, *supra* note 376, at 15–18 (discussing strategies to detect playful underperformance, if any).

398. See Bonnie & Gustafson, *supra* note 376, at 848; Brodsky & Galloway, *supra* note 376, at 6–7; Fabian, *Life*, *supra* note 376, at 19–20, 31; Patton & Keyes, *supra* note 376, at 249–50; Stevens & Price, *supra* note 376, at 19; Young et al., *supra* note 263, at 171.

conduct as reflective of adaptive behavior remains a subject of conflicting opinion in the mental retardation professional and scholarly communities.³⁹⁹ Finally, courts considering *Atkins* claims are often tasked with making a retrospective determination of mental retardation and its developmental period onset with limited or inconsistent educational and other records supporting or controverting the claim.⁴⁰⁰

Despite all of these challenges, Texas state and federal courts reviewing *Atkins* claims must make an assessment of mental retardation that literally determines whether a Texas capital offender can be executed or not.⁴⁰¹ It is with these challenges in mind that the cases of the successful *Atkins* claimants, in conjunction with illustrative unsuccessful, but vigorously contested, *Atkins* claims, are reviewed.

2. *Successful Texas State and Federal Atkins Claims on Collateral Review*

As Table 1 reflects, fourteen of the eighty-one capital offenders whose *Atkins* collateral review claims have been resolved in Texas state or federal processes have successfully established their mental retardation for *Atkins* purposes.⁴⁰² With regard to the ten offenders whose *Atkins* subsequent writ claims were successful in the Texas Court, six of the ten cases followed agreed or stipulated mental retardation findings in the convicting trial courts and the remaining

399. See Everington & Olley, *supra* note 376, at 11; Fabian, *State*, *supra* note 376, at 1; Fabian, *Life*, *supra* note 376, at 8, 24, 31; Kan et al., *supra* note 385, at 7–8, 20–21; Stevens & Price, *supra* note 376, at 18; Young et al., *supra* note 263, at 172–74.

400. See AAIDD, *supra* note 5, at 95–96; Bonnie & Gustafson, *supra* note 376, at 855; Everington & Olley, *supra* note 376, at 8–9, 11–12; Fabian, *Life*, *supra* note 376, at 13, 14–17, 21–22; Patton & Keyes, *supra* note 376, at 248, 250, 251–52; Stevens & Price, *supra* note 376, at 15–16.

401. See Bonnie & Gustafson, *supra* note 376, at 860; Everington & Olley, *supra* note 376, at 19; Fabian, *Life*, *supra* note 376, at 34–35; Mossman, *supra* note 376, at 290–91; see also Kan et al., *supra* note 385, at 1 (describing transcript analysis regarding presentation of mental retardation evidence in nineteen pre-*Atkins* Texas capital cases); Stevens & Price, *supra* note 376, at 19–20 (describing survey of over 300 psychologists regarding adaptive behavior assessment issues in capital cases); Young et al., *supra* note 263, at 169 (describing survey of twenty Texas psychologists and psychiatrists regarding mental retardation assessment issues in capital cases); cf. Weithorn, *supra* note 376, at 1203 (asserting that use of clinical mechanisms to determine mental retardation for *Atkins* excludes too many offenders from execution and suggesting alternative criteria).

402. See *supra* Table 1.

four cases followed contested proceedings.⁴⁰³ Both of the Texas Governor's *Atkins* commutations followed agreed findings of mental retardation.⁴⁰⁴ The findings of mental retardation by the Texas federal courts regarding two offenders followed contested proceedings.⁴⁰⁵ The evidence of mental retardation and its consideration by the reviewing bodies in these cases reflects both similarities and differences.⁴⁰⁶

a. Texas Court *Atkins* Relief Based on Agreed Findings of Mental Retardation

The Texas Court granted relief for two of the *Atkins* claims based on stipulated findings of mental retardation, submitted in conjunction with plea agreements in other cases of the offender and designed to ensure the offender's incarceration for the remainder of his life.⁴⁰⁷ One of these cases, involving Willie Mack Modden, resulted in the first *Atkins* sentence reformation granted by the Texas

403. Compare *Ex parte Carr*, No. AP-75,627, 2007 WL 602816 (Tex. Crim. App. Feb. 28, 2007) (per curiam) (involving agreed or stipulated mental retardation findings), with *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (per curiam) (resolving contested evidence); see *infra* notes 407–55, 467–500 and accompanying text (describing these cases).

404. See *Ex parte Lane*, Nos. WR-67,161-01, WR-67,161-02, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Tex. Crim. App. Feb. 4, 2009) (per curiam); *Ex parte Smith*, No. 40,874-02 (Tex. Crim. App. Apr. 21, 2004) (per curiam) (describing Texas Governor's commutations on *Atkins* grounds and dismissing the writ applications as moot); *infra* notes 456–66 and accompanying text (describing these cases).

405. See *Moore v. Quarterman*, 342 F. App'x 65 (5th Cir. 2009) (per curiam); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007).

406. See *infra* notes 407–517 and accompanying text.

407. See *Ex parte DeBlanc*, No. AP-75,113, 2005 WL 768441 (Tex. Crim. App. Mar. 16, 2005) (per curiam); *Ex parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004). In the *Modden* case, the offender agreed to enter guilty pleas to five felonies for which he would receive consecutive life sentences that would be served consecutively to any life sentence he would receive for capital murder based on his *Atkins* claim. In connection with these guilty pleas, the State agreed to stipulate to a mental retardation finding and present agreed factual findings and legal conclusions with the defense to the trial court. Although the Texas Court acknowledged these arrangements between the parties, it made clear that its determination in the case was based on the trial court's findings of mental retardation and their support by the record. See *Modden*, 147 S.W.3d at 294 n.7, 299; Transcript of Record at 15–17, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing the State's agreement). In the *DeBlanc* case, the offender agreed to enter guilty pleas to three felonies with consecutive life sentences and two felonies with consecutive twenty-year sentences, all to be served consecutively to the life sentence in the capital murder case following the entry of agreed findings on the *Atkins* claim. Transcript of Record at 11–17, *DeBlanc*, 2005 WL 768441 (Nos. 15,386-A; 69,850; AP-7511) (containing Respondent's Original Answer).

Court.⁴⁰⁸ Modden had previously been granted a new trial based on *Penry* error involving his mitigating evidence of mental retardation and had been reconvicted and resentenced to death.⁴⁰⁹ In connection with his two pre-*Atkins* trials, two experts had administered WAIS IQ tests to Modden, approximately seven years apart, and he received full scale IQ scores of sixty-four and fifty-eight on these tests.⁴¹⁰ Accompanying Wide Range Achievement Tests (“WRAT”) placed his reading, math, and spelling levels at or below third grade level.⁴¹¹ These two experts, as well as a third expert, also identified Modden’s adaptive behavior deficits, including significant difficulties with interpersonal relationships, tendencies to misinterpret or distort perceptual input from others, an inability to cope with life’s daily demands or function outside of a structured setting, and absence of cognitive and behavioral controls required to regulate his behavior.⁴¹² These three experts characterized Modden as “mildly” mentally retarded in connection with Modden’s pre-*Atkins* proceedings.⁴¹³ These facts were included in stipulated factual findings and legal conclusions that were adopted by the convicting trial judge in the collateral review proceedings.⁴¹⁴ This judge had also presided over

408. The Texas Court decided the Modden case approximately two months after it announced the *Atkins* collateral review procedures in *Briseno*. See *Modden*, 147 S.W.3d at 293; *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Although the proceedings in the convicting trial court were conducted before the *Briseno* procedures were announced, the Texas Court stated that it was reviewing the record and applying the criteria announced in *Briseno* to Modden’s claim. See *Modden*, 147 S.W.3d at 296–97; see also *infra* note 863 (finding the trial court’s determination of mental retardation supported by the record without the application of the subsequently identified *Briseno* factors).

409. See *Modden*, 147 S.W.3d at 294. In subsequent writ proceedings following his retrial, Modden asserted an *Atkins* claim while that case was pending in the Court. Although the Texas Court initially dismissed the writ application, the Court later vacated that judgment and remanded the writ for reconsideration after the *Atkins* decision was announced. See *id.*

410. See *id.* at 296–97; Transcript of Record at 20–24, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing Findings of Fact and Conclusions of Law).

411. See *Modden*, 147 S.W.3d at 296–97; Transcript of Record at 20–24, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing Findings of Fact and Conclusions of Law); see also *supra* note 385 (describing the WRAT test).

412. See *Modden*, 147 S.W.3d at 296–97; Transcript of Record at 20–24, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing Findings of Fact and Conclusions of Law).

413. See *Modden*, 147 S.W.3d at 294, 296–98; Transcript of Record at 20–24, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing Findings of Fact and Conclusions of Law).

414. See Transcript of Record at 20–24, *Modden*, 147 S.W.3d at 293 (Nos. 12,145; WR-11,364-05; 74,715) (containing Findings of Fact and Conclusions of Law).

both of Modden's pre-*Atkins* trials and had stated that he was mentally retarded in connection with these previous proceedings.⁴¹⁵ Although the Texas Court, on review, acknowledged the existence of some conflicting evidence in the record,⁴¹⁶ it also noted the "significant" evidence of and support in the record for the trial judge's finding of Modden's mental retardation and the "great deference" owed to it. The Texas Court therefore granted relief on Modden's *Atkins* claim and reformed his death sentence to one of life imprisonment.⁴¹⁷

The second case accompanied by a plea agreement involved David DeBlanc. In his case, the agreed factual findings and legal conclusions were based on expert evidence prepared for his pre-*Atkins* trial and documentary evidence and affidavit evidence from family members submitted in the writ proceedings.⁴¹⁸ The defense expert for DeBlanc's pre-*Atkins* trial based her diagnosis of mental retardation on her own examination of the offender and a review of his school records that included 1) a WISC full scale IQ score of fifty-six at approximately age fourteen, 2) at least three classifications of DeBlanc as mentally retarded, and 3) his placement in special education classes.⁴¹⁹ Hospital records reflected an attending doctor's characterization of DeBlanc as mentally retarded based on his evaluation at age fifteen for unrelated injuries.⁴²⁰ Prison records

415. See *Modden*, 147 S.W.3d at 298. The Texas Court had also noted the evidence of Modden's mental retardation in granting him relief on his previous *Penry* claim. See *id.* at 298–99.

416. See *id.* at 298. In a lengthy dissent, two Judges of the Texas Court concluded that a mental retardation finding was not supported by a more complete review of the record, including testimony of a State expert in the previous proceedings that Modden was not mentally retarded and that criticized some of the other experts' findings, prison IQ scores ranging from fifty-seven to eighty-three, evidence indicating that Modden did not satisfy the *Briseno* factors, and Modden's previous testimony about his crimes and otherwise that was inconsistent with the limited abilities of a mentally retarded person. See *id.* at 299–311 (Hervey, J., joined by Keasler, J., dissenting). These dissenting Judges criticized the trial court's acceptance of the parties' agreed factual findings, and criticized the majority for sanctioning the plea agreement in this case through the vehicle of a mental retardation finding. See *id.* at 300–01, 311.

417. See *id.* at 298–99. In addition to the expert reports, the Texas Court noted that evidence from Modden's educational and prison records also reflected his intellectual and adaptive behavior deficits. See *id.* at 297–98.

418. See Transcript of Record at 127–30, 132–39, *Ex parte* DeBlanc, No. AP-75,113, 2005 WL 768441 (Tex. Crim. App. Mar. 16, 2005) (per curiam) (Nos. 15,386-A; 69,850; AP-7511) (containing Findings of Fact and Conclusions of Law); see also *id.* at 130–32 (granting DeBlanc's *Penry* claim based on agreed findings, as well).

419. See *id.* at 133–34.

420. See *id.* at 133.

regarding a prior offense indicated DeBlanc's full scale IQ of sixty based on an unspecified test and educational achievement measured at the second grade level.⁴²¹ Affidavits by family members reflected his difficulties with academic matters and practical skills (such as telling time and counting change), comprehension and memory problems, need for assistance with self-care matters, and tendency to be easily led by peers, even into problematic situations.⁴²² The Texas Court found that the record supported the trial court's finding of mental retardation and granted *Atkins* relief by reforming DeBlanc's sentence to life imprisonment.⁴²³

In four cases (involving Darrell Carr, Demetrius Simms, Exzavier Stevenson, and Alberto Valdez),⁴²⁴ the State initially opposed the offender's *Atkins* claim, but later agreed to a finding of mental retardation after its own expert determined in the course of the *Atkins* proceedings that the offender was mentally retarded.⁴²⁵ In Darrell Carr's initial *Atkins* writ pleadings, he cited two IQ scores of sixty-eight, based on unspecified tests administered when he was approximately fourteen and fifteen; a Shipley scale IQ score of seventy at age fifteen; poor school performance; and an assessment of psychological immaturity.⁴²⁶ In light of the defense's retention of two experts, the State reserved the right to conduct its own investigation to respond to Carr's *Atkins* claim.⁴²⁷ When the State's expert also found Carr mentally retarded, the State proposed factual findings and legal conclusions, based on its expert's assessment, which the trial court adopted.⁴²⁸ The State's expert had administered the WAIS-III, WRAT, and ABAS tests.⁴²⁹ According to this expert, Carr's full scale

421. *See id.*

422. *See id.* at 135–38.

423. *See DeBlanc*, 2005 WL 768441.

424. *Ex parte* Stevenson, No. AP-75639, 2007 Tex. Crim. App. Unpub. LEXIS 868 (Tex. Crim. App. Mar. 21, 2007) (per curiam); *Ex parte* Carr, No. AP-75,627, 2007 WL 602816 (Tex. Crim. App. Feb. 28, 2007) (per curiam); *Ex parte* Simms, No. AP-75,625 (Tex. Crim. App. Feb. 28, 2007) (per curiam); *Ex parte* Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004) (per curiam).

425. *See infra* notes 426–55 and accompanying text.

426. *See* Transcript of Record at 8–10, *Carr*, 2007 WL 602816 (Nos. 644434-B; WR-55,033-02; AP-75,627) (containing Successor Application for Writ of Habeas Corpus).

427. *See id.* at 215–19 (containing Respondent's Original Answer).

428. *See id.* at 298–308 (containing Respondent's Proposed Findings of Fact, Conclusions of Law and Order).

429. *See id.* at 304–05 (identifying additional tests performed to detect malingering (i.e., intentionally performing poorly on the test), anxiety, and depression that could affect test results).

WAIS-III IQ score was fifty-three, though he also noted that Carr's full scale WAIS-III IQ score, as administered by the *Atkins* defense expert, was fifty, and his full scale WISC-Revised IQ score, at age thirteen, was sixty-eight. Carr's reading, spelling, and math WRAT performance was at the second grade level. Carr's composite ABAS score of sixty-four supported the expert's findings of significant deficits in the adaptive behavior areas of community use, functional academics, health and safety, and self-care. Carr's functioning in the leisure, communication, and social skills areas was slightly above the significantly impaired level.⁴³⁰ The Texas Court held that the trial court's findings and conclusions regarding Carr's mental retardation were supported by the record and accordingly granted Carr *Atkins* relief.⁴³¹

In Demetrius Simms' initial *Atkins* writ pleading, he cited full and partial IQ testings administered when he was a juvenile, which included performance scores of sixty-one, seventy-one, and seventy-five, as well as a verbal score of fifty-four. Simms also cited his placement in special education; Woodcock-Johnson achievement test performance between a first and third grade level; juvenile Street Survival Skills Questionnaire ("SSSQ") scores reflecting significant deficits in practical areas of daily living; noted deficits in social and interpersonal skills and impulse control; prior testimony of family members and teachers about limitations in academic performance and other areas of adaptive behavior; and placement in the prison system's Mentally Retarded Offender Program ("MROP") at age eighteen.⁴³² In the State's Answer, it acknowledged prior trial testimony by defense experts that Simms was "mildly" mentally retarded (based in part on a full scale WAIS-Revised IQ score of sixty-eight) and "functionally" retarded; however, the State also highlighted State expert and lay testimony indicating that Simms functioned above the mental retardation level. The State also noted Simms' full scale IQ score of seventy-one on the WAIS-Revised test at age eighteen, and his full scale IQ score of seventy-three on this same test administered in a previous proceeding. At age eighteen, as

430. *See id.* at 298–308. The State's expert found Carr's VABS score of twenty-five, an adaptive behavior level of a profoundly mentally retarded person, based on the administration of this test by a defense *Atkins* expert, was unreliable. *See id.* at 307.

431. *Carr*, 2007 WL 602816.

432. *See* Transcript of Record at 9–15, *Ex parte* Simms, No. AP-75,625 (Tex. Crim. App. Feb. 28, 2007) (per curiam) (Nos. 605233-02; WR-56,811-01; AP-75,625) (containing Successor Application for Writ of Habeas Corpus); *see also supra* note 385 (describing the SSSQ test).

the State also noted, Simms scored a composite fifty-three on the VABS scale and eighty on the SSSQ test, both regarding adaptive behavior. Expert and lay witnesses in Simms' prior trial testified regarding Simms' adaptive behavior abilities, including his holding a part-time job, receiving training, performing many daily living activities, having a girlfriend, communicating with police and correctional personnel, and carrying out aspects of his crime.⁴³³

Despite its detailed initial opposition to Simms' *Atkins* claim, after the State's *Atkins* expert also found Simms mentally retarded, the State submitted proposed findings and conclusions, based on this expert's finding of Simms' mental retardation, that were adopted by the trial court.⁴³⁴ The State's expert administered the WAIS-III, WRAT, and ABAS tests.⁴³⁵ Simms' full scale WAIS-III IQ score was sixty-three. Simms' reading, spelling, and math WRAT performance was at the third grade level. Simms' composite ABAS score of sixty-one supported the expert's findings of significant deficits in the adaptive behavior areas of communication, community use, functional academics, health and safety, and social skills. Simms' functioning in the self-care and self-direction areas was marginal.⁴³⁶ This expert also noted various tests during Simms' formative years, including Simms' full scale WISC-Revised IQ score of sixty-three and VABS score of fifty-three.⁴³⁷ The Texas Court held that the trial court's findings and conclusions regarding Simms' mental retardation were supported by the record and granted Simms *Atkins* relief.⁴³⁸

Exzavier Stevenson's initial *Atkins* claim was supported by his IQ score of sixty-eight on a test administered in connection with his previous trial, his participation in special education classes, and his difficulties with independent living.⁴³⁹ However, the State opposed the claim by noting Stevenson's prison Beta screening IQ score of

433. See Transcript of Record at 64–91, *Ex parte* Simms, No. AP-75,625 (Nos. 605233-02; WR-56,811-01; AP-75,625) (containing Respondent's Original Answer) (noting additionally the intellectual and behavioral impact of Simms' hearing impairment as opposed to mental impairments).

434. See *id.* at 112–24 (containing Respondent's Proposed Findings of Fact, Conclusions of Law and Order).

435. See *id.* at 120–21 (identifying additional tests performed to detect malingering, anxiety, and depression that could affect test results).

436. See *id.* at 120–23.

437. See *id.* at 123.

438. See *Simms*, No. AP-75,625.

439. See *Stevenson v. State*, 73 S.W.3d 914 (Tex. Crim. App. 2002) (rejecting pre-*Atkins* claim of mental retardation and affirming conviction).

eighty-nine, his security guard job of two years, his support for his girlfriend and child, and other adaptive behavior abilities.⁴⁴⁰ After the State's expert found Stevenson mentally retarded, the State and defense jointly proposed factual findings and legal conclusions supporting a mental retardation finding that the trial court adopted.⁴⁴¹ Supporting the intellectual functioning element were Stevenson's Social Security Administration classification as moderately mentally retarded (with an IQ range of forty to fifty-five) at age twenty, a WAIS-III full scale IQ score of fifty-five at age thirty-three, a WAIS-III full scale IQ score of fifty-one at age thirty-five, and a full scale SB5 IQ score of forty-one at age thirty-eight.⁴⁴² Supporting the adaptive behavior element were an ABAS composite score of fifty-one at age thirty-seven reflecting deficits in seven of ten skill areas, and another ABAS composite score of forty-seven (adjusted for lifestyle factors to sixty-one) at age thirty-seven reflecting deficits regarding functional academics, communication, community use, health and safety, leisure, and social areas.⁴⁴³ In the absence of school and juvenile records reflecting Stevenson's abilities in the developmental period, the State's expert confirmed that Stevenson's adult testing was reflective of his intellectual and adaptive behavior in his developmental period.⁴⁴⁴ The Texas Court noted the agreed findings and conclusions of mental retardation adopted by the trial judge and granted Stevenson *Atkins* relief.⁴⁴⁵

In Alberto Valdez's initial *Atkins* writ pleadings, he cited, in support of his *Atkins* claim, his WISC full scale IQ score of sixty-three at age thirteen, a WAIS full scale IQ score of sixty-three at age eighteen, placement in special education before failing most classes and dropping out of school after sixth grade, and expert testimony from prior proceedings regarding his adaptive behavior deficits.⁴⁴⁶

440. See Transcript of Record at 22–30, *Ex parte* Stevenson, No. AP-75,639, 2007 Tex. Crim. App. Unpub. LEXIS 868 (Tex. Crim. App. Mar. 21, 2007) (per curiam) (Nos. 836855-B; WR-57,059-01; AP-75,639) (containing Respondent's Original Answer).

441. See *id.* at 490–504 (containing Applicant's and Respondent's Proposed Findings of Facts, Conclusions of Law and Order).

442. See *id.* at 498–99 (including the test results of State and defense experts, with the State expert noting that his test result of forty-one understated Stevenson's mental ability due to his severe depression at the time of the test).

443. See *id.* at 499–500 (noting also that the Social Security Administration disability determination would include a determination of adaptive behavior deficits).

444. See *id.* at 501–02.

445. See *Stevenson*, 2007 Tex. Crim. App. Unpub. LEXIS 868.

446. See Second Petition for Writ of Habeas Corpus at 4–5, *Ex parte* Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004) (per curiam) (Nos. 87-CR-1459-B; WR-31,184-02; AP-

The State initially opposed the *Atkins* claim by citing Valdez's WAIS full scale IQ score of eighty-one at age sixteen; prison Beta IQ screening test scores from eighty-seven to ninety-six in four tests administered between age eighteen and twenty-seven; likelihood that Valdez's lower IQ scores were artificially depressed by his limited formal education, cultural and language background, testing motivation, and the divergence of the component verbal and performance scores; and the record and forthcoming evidence regarding his adaptive behavior abilities.⁴⁴⁷

During the *Atkins* evidentiary hearing, three defense experts testified that Valdez was mentally retarded.⁴⁴⁸ In addition to their clinical examinations of Valdez and review of past records and family testimony, further tests were performed, including a WAIS-III producing a full scale IQ score of sixty-four; WRAT tests indicating reading, spelling, and math skills at a first or second grade level; and a test measuring brain function and motor behavior that reflected severe dysfunction in an area highly correlated with adaptive behavior functioning.⁴⁴⁹ Evidence was also introduced at the hearing regarding Valdez's adaptive behavior deficits in functional academics, social skills, leisure, and work, including his inability to live independently, hold a regular job, or budget money, as well as his impulsive, unplanned actions as reflected in his past criminal behavior.⁴⁵⁰ Evidence was also introduced regarding his satisfaction

75,039). In pre-*Atkins* collateral proceedings in state and federal court, Valdez had asserted *Atkins* claims and claims of ineffective assistance of counsel, based in part on counsel's failure to present available mental retardation evidence at punishment. Although his claims were denied in state collateral proceedings, *Atkins* was decided during the pendency of the federal proceedings and Valdez's federal writ proceedings were dismissed so that he could exhaust his *Atkins* claim in state court. See Transcript of Record at 353-56, *Valdez*, 158 S.W.3d at 438 (Nos. 87-CR-1459-B; WR-31,184-02; AP-75,039) (containing Findings of Fact and Conclusions of Law).

447. See Transcript of Record at 165-69, *Valdez*, 158 S.W.3d at 438 (Nos. 87-CR-1459-B; WR-31,184-02; AP-75,039) (containing State's Answer to *Atkins* pleading).

448. See *id.* at 366, 370, 372 (containing Findings of Fact and Conclusions of Law).

449. See *id.* at 365-72. Additional evidence included a school-administered group overall IQ score of sixty-four, previous WRAT scores at the third or fourth grade level in connection with prior litigation, and Valdez's failure of the GED test three times while in prison. See *id.* at 357, 362, 370-71.

450. See *id.* at 356-72. The expert who focused principally on adaptive behavior issues testified that standardized adaptive behavior scales (e.g., VABS) are not necessary or appropriate regarding a retrospective assessment of an adult who has been incarcerated for a lengthy period. These tests are not normed for adults in segregated environments like prisons and it is not appropriate to diagnose mental retardation based on an inmate's behavior in a controlled environment like a prison. See *id.* at 366-67. This expert stated that Valdez's ability to groom himself, form relationships with women, drive a car, adjust

of the *Briseno* factors.⁴⁵¹ In the course of the *Atkins* proceedings, the State's expert announced that he was changing his opinion and joining the defense's three experts in concluding that Valdez was mentally retarded.⁴⁵² The experts' consensus opinion that Valdez was mentally retarded and the facts on which it was based were reflected in the trial judge's factual findings and legal conclusions that Valdez was mentally retarded.⁴⁵³ The State also submitted a factual finding, adopted by the trial judge, that Valdez was in the range of "mild mental retardation."⁴⁵⁴ The Texas Court found that the record supported the trial court's finding of mental retardation and granted *Atkins* relief to Valdez.⁴⁵⁵

b. Texas Governor's *Atkins* Relief Based on Agreed Findings of Mental Retardation

The Texas Governor commuted the death sentences of Robert Smith and Doil Lane to life sentences based on agreed findings of mental retardation.⁴⁵⁶ During the punishment phase of Robert Smith's pre-*Atkins* trial, mitigation evidence had been introduced,

to prison life, and earn small amounts of money in prison did not exclude a mental retardation diagnosis. As stated by the AAMR, strengths can coexist with weaknesses in a mentally retarded person. *See id.* at 369.

451. *See id.* at 369, 376.

452. *See id.* at 353, 372–73. The State's expert changed his opinion after hearing the defense evidence, especially the evidence about the brain function test results. He concluded that Valdez met the criteria for "mild" mental retardation. *See id.* at 372–73.

453. *See id.* at 352–53, 373–77.

454. Although the State had presented testimony from police and correctional officers and Valdez's former defense attorney, after the change of its expert's testimony and the trial judge's subsequent announcement that she was finding Valdez mentally retarded, the State announced that it would not oppose the court's findings and conclusions in light of the testimony at the hearing and submitted its proposed finding. *See id.* at 352–53, 382. The State proposed a legal conclusion that Valdez's execution be barred as long as his mental retardation persisted rather than that his sentence be reformed to life imprisonment. The convicting trial court refused this proposed legal conclusion. *See id.*; *see also* Amicus Curiae Brief by the District Attorney for the 105th Judicial District of Texas, *Ex parte* Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004) (per curiam) (Nos. 10,898-06; AP-75,038) (proposing a permanent or indefinite stay rather than sentence reformation).

455. *See Valdez*, 158 S.W.3d at 438. The State's subsequent attempts to seek rehearing and certiorari review were unsuccessful. *See Texas v. Valdez*, 544 U.S. 1000 (2005); *Ex parte* Valdez, No. AP-75,039, 2005 Tex. Crim. App. LEXIS 49 (Tex. Crim. App. Jan. 12, 2005).

456. *See Ex parte* Lane, Nos. WR-67,161-01, WR-67,161-02, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Tex. Crim. App. Feb. 4, 2009) (per curiam); *Ex parte* Smith, No. 40,874-02 (Tex. Crim. App. Apr. 21, 2004) (per curiam) (describing Texas Governor's commutations on *Atkins* grounds and dismissing the writ applications as moot); *infra* notes 457–66 and accompanying text.

including an IQ score of sixty-four. His expert had characterized Smith as “above the cutoff line for mental retardation . . . but he didn’t—to be honest with you, he doesn’t have a lot left over or a lot extra upstairs.”⁴⁵⁷ During these punishment proceedings, the State located additional records that reflected Smith’s school and juvenile system full scale IQ scores of fifty-two, sixty-three, and sixty-four, classifications as mentally deficient and mildly mentally retarded, and achievement test results at the third to fifth grade level.⁴⁵⁸ In his *Atkins* writ pleading, Smith cited these IQ scores, his inability to pass the General Educational Development Test (“GED”), and adaptive behavior challenges such as difficulties with independent living, work skills, and self-direction.⁴⁵⁹ Defense and State experts evaluated Smith in connection with the *Atkins* proceedings, and both determined he was mentally retarded. Smith’s full scale IQ score on the WAIS-III was sixty-three, and his full scale IQ score on the SB5 was sixty-one. Smith’s VABS scores reflected severe deficiencies regarding communication, daily living, and socialization skills. His ABAS scores reflected deficiencies regarding community use, functional academics, health and safety, leisure, self-direction, and social skills. His WRAT achievement scores had declined from those assessed in his youth.⁴⁶⁰ The convicting trial court adopted the State’s

457. *Smith v. Cockrell*, 311 F.3d 661, 671 (5th Cir. 2002). The Fifth Circuit reviewed this evidence in connection with Smith’s collateral review claims of ineffective assistance of counsel regarding his counsel’s failure to investigate or present punishment evidence regarding his mental retardation and related *Penry* error. *See id.* at 664, 668–74, 675–77, 677–83. In this proceeding, the Fifth Circuit reversed the federal trial court’s grant of habeas corpus relief on both grounds, finding that the Texas state courts had not unreasonably applied federal law in denying these claims. *See id.* at 664, 677, 683, 685. Following the announcement of *Atkins* during the pendency of the federal proceedings, Smith also raised an *Atkins* claim for the first time on appeal. Given the unsettled state of Texas’s application of *Atkins*, the Fifth Circuit declined to consider Smith’s unexhausted *Atkins* claim in this appeal. *See id.* at 664, 684–85. The Court granted certiorari review of the case, but subsequently dismissed it following the commutation of Smith’s death sentence. *See Smith v. Dretke*, 541 U.S. 913 (2004); *Smith v. Dretke*, 539 U.S. 986 (2003) (regarding one issue).

458. *See Smith*, 311 F.3d at 672–73. Smith’s attorney did not refer to these additional records in his punishment case-in-chief. *See id.* at 673.

459. *See* Transcript of Record at 21–26, *Smith*, No. 40,874-02 (Nos. 564448-B; 40,874–02) (containing Second Application for Writ of Habeas Corpus).

460. *See id.* at 116–24, 153–59, 161–64, 166–81, 183–84, 186–87 (containing Respondent’s Original Answer and Respondent’s Proposed Findings of Fact, Conclusions of Law, and Order and related exhibits). Although the State’s expert challenged the reliability of some of Smith’s juvenile IQ scores, he found at least one was sufficiently reliable (reflecting an IQ of sixty-three) in addition to his *Atkins* assessment of Smith’s IQ of sixty-one on the SB5 test. *See id.* at 171, 176, 179. He also stated that the defense *Atkins* expert’s WAIS-III scores and VABS assessment understated Smith’s abilities. *See*

factual findings and conclusions regarding Smith's mental retardation, including the recommendation that Smith's death sentence be commuted to a life sentence through executive clemency.⁴⁶¹ Following the recommendation of the Texas Board of Pardons and Paroles, the Texas Governor commuted Smith's sentence to a life sentence.⁴⁶² Smith's sentence commutation in March 2004 was both the first death sentence commutation for this Texas Governor and the first grant of *Atkins* relief in Texas.⁴⁶³

In Doil Lane's case, the agreed mental retardation findings that led to the Texas Governor's commutation were largely based on records from his developmental period, as introduced or further developed during his prior trial and collateral review proceedings.⁴⁶⁴ As noted in the agreed factual findings and legal conclusions adopted by the convicting trial court during Lane's *Atkins* proceedings, both parties at his trial repeatedly referred to Lane as mentally retarded. During his developmental period, Lane was classified as mentally retarded. His full scale IQ scores were sixty-four at age twelve and sixty-five on the WISC-Revised at age fifteen. He was in special education throughout his academic career (including residential placement), and he was functioning at the third grade level at age eighteen. Based on past testing and additional testing using the SB test, a defense expert diagnosed Lane as mentally retarded during prior collateral review proceedings. Based on his developmental records and performance, Lane was deemed to be deficient in

id. at 167, 172. *But see id.* at 179 (referencing the WAIS-III score as supportive of his own IQ finding). Nevertheless, both *Atkins* experts' reports were included as exhibits to the findings and conclusions document. *See id.* at 155.

461. *See id.* at 153–59 (containing proposed findings and conclusions). The State actually conceded Smith's mental retardation and recommended commutation through executive clemency in its Original Answer to the writ pleading. *See id.* at 116–24. In connection with these proceedings, Smith was convicted of and received a thirty-three year sentence for a related offense. *See* R.G. Ratcliffe & Polly Ross Hughes, *Two Inmates on Death Row Given Reprieves; Governor Commutes Sentence in Case of Mentally Retarded Houston Killer*, HOUS. CHRONICLE, Mar. 13, 2004, at A1.

462. *See* Ratcliffe & Hughes, *supra* note 461; Rick Perry, *Gov. Rick Perry Grants Inmate's Request for Commuted Sentence*, <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2004-03-12.4200/view> (last visited Sept. 16, 2007).

463. *See Smith*, No. 40,874-02; Ratcliffe & Hughes, *supra* note 461; *cf. Ex parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004) (reflecting a decision in April 2004).

464. *See* Agreed Findings of Fact and Conclusions of Law, *Ex parte Lane*, Nos. WR-67,161-01, WR-67,161-02, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Tex. Crim. App. Feb. 4, 2009) (per curiam) (Nos. 93-454-B; 71,835, WR-67,161-02); Subsequent Application for Post-Conviction Writ of Habeas Corpus at 4–6, *Lane*, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Nos. 93-454-B; 71,835, WR-67,161-02).

communication, self-care, social/interpersonal, self-direction, functional academics, and work skills. He was not deemed capable of fully independent living.⁴⁶⁵ Prior to the return of the convicting trial court's findings and commutation recommendation to the Texas Court, the matter was submitted to the Texas Governor. Following the recommendation of the Texas Board of Pardons and Paroles, the Texas Governor commuted Lane's death sentence to one of life imprisonment.⁴⁶⁶

c. Texas Court's *Atkins* Relief Based on Contested Claims of Mental Retardation

The Texas Court granted *Atkins* relief to Walter Bell, Gregory Van Alstyne, Timothy Cockrell, and Daniel Plata following contested *Atkins* proceedings.⁴⁶⁷ In Walter Bell's *Atkins* writ pleading, he cited evidence from past trial and writ proceedings in his case,⁴⁶⁸ including school, prison system, and litigation expert assessments reflecting his full scale IQ scores of fifty-four at age nine, sixty-two at age fourteen, sixty-seven at age twenty, fifty-eight at age thirty-five, and sixty-nine at age forty; evidence from family, friends, military personnel, and past experts as to Bell's adaptive behavior difficulties;⁴⁶⁹ and previous

465. See Agreed Findings of Fact and Conclusions of Law, *Lane*, 2009 Tex. Crim. App. Unpub. LEXIS 102 (Nos. 93-454-B; 71,835, WR-67,161-02).

466. *Lane*, 2009 Tex. Crim. App. Unpub. LEXIS 102; Rick Perry, Proclamation No. 2007-00002 (Mar. 9, 2007) (noting the convicting trial court's findings of Lane's mental retardation and commutation recommendation, the local prosecutor's and police chief's agreement, and the commutation recommendation of the Texas Board of Pardons and Paroles).

467. See *Ex parte* Cockrell, No. AP-76,168, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Tex. Crim. App. June 10, 2009) (per curiam); *Ex parte* Plata, No. AP-75,820, 2008 Tex. Crim. App. LEXIS 1398 (Tex. Crim. App. Jan. 16, 2008) (per curiam); *Ex parte* Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) (per curiam); *Ex parte* Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004) (per curiam).

468. See Transcript of Record at 1-18, *Bell*, 152 S.W.3d at 103 (Nos. 31,678-E; 10,898-06; AP-75,038) (containing Subsequent Application for Writ of Habeas Corpus). During his three previous trials and related appeals and collateral proceedings, Bell had asserted his mental retardation to unsuccessfully challenge the voluntariness of his conviction, successfully claim *Penry* error, and unsuccessfully challenge the constitutionality of his death sentence. Bell filed his *Atkins* subsequent writ following the pre-*Atkins* denial of his constitutionality claim in state and federal court, its subsequent remand following the Court's certiorari review after the *Atkins* decision, and the Fifth Circuit's dismissal of his federal claim to permit post-*Atkins* exhaustion by the Texas courts. See *id.* at 3-5. See generally Tobolowsky, *supra* note 60 (describing the thirty-year litigation history of Bell's case).

469. See Transcript of Record at 7-11, *Bell*, 152 S.W.3d at 103 (Nos. 31,678-E; 10,898-06; AP-75,038).

formal acknowledgements by the State and Texas Court of his mental retardation.⁴⁷⁰ Although the State controverted Bell's *Atkins* claim and requested an evidentiary hearing, it did not present its own witnesses.⁴⁷¹ IQ testing by a defense *Atkins* expert resulted in a full scale IQ score of sixty-five and confirmation of Bell's adaptive behavior deficits. In its factual findings supporting its determination of Bell's mental retardation, the convicting trial court cited Bell's past diagnoses as mentally retarded, his history in special education, and his IQ scores ranging from fifty-four to sixty-nine in full scale IQ tests administered over a forty-year period that consistently placed him in the range of a person with mild mental retardation. Bell's significant deficits in adaptive behavior were established by his lengthy placement in special education and academic ability at the second grade level; his inability to manage his own money, perform other than menial jobs, perform adequately in the military, maintain significant peer relationships, or successfully live independently; and his performance on adaptive behavior assessment instruments. The court also recited how the evidence satisfied the *Briseno* factors.⁴⁷² The Texas Court found that the record supported the convicting trial court's finding of mental retardation and granted Bell *Atkins* relief.⁴⁷³

470. *See id.* at 3–4, 7, 11 (including a statement by the Texas Court in Bell's first appeal that all parties agreed that Bell was "mildly mentally retarded"; a Texas Court statement in habeas corpus proceedings following Bell's second conviction regarding uncontroverted evidence of Bell's mild mental retardation; and a statement in the State's appellate brief following Bell's second conviction that the evidence reflected that he was "mildly mentally retarded").

471. *See id.* at 311; Tobolowsky, *supra* note 60, at 836.

472. *See* Transcript of Record at 314–22, *Bell*, 152 S.W.3d at 103 (Nos. 31,678-E; 10,898-06; AP-75,038) (containing Findings of Fact and Conclusions of Law). The State had challenged the defense expert and witnesses on cross-examination. However, the trial court noted that the State did not present controverting expert testimony regarding Bell's mental retardation at his previous trial or in the instant writ proceeding. It also rejected the State's claim that the mental retardation issue had been decided by the jury's failure to find that Bell's mental retardation constituted sufficient mitigating evidence in his prior trial. *See id.* at 318; *see also* Tobolowsky, *supra* note 60, at 839–42 (describing cross-examination regarding some of the assessment instruments, some conflicting preliminary prison assessment and academic test information, and Bell's satisfaction of the *Briseno* factors).

473. *See Bell*, 152 S.W.3d at 103. Although they agreed that Bell could not be executed, four Judges would have deferred reforming Bell's sentence to life imprisonment until the Texas Court could fully consider the alternative remedy of a permanent execution stay, as proposed in an amicus curiae pleading. *See id.* at 104 (Keller, P.J., joined by Meyers, Keasler, and Hervey, JJ., concurring in part and dissenting in part); *see also Ex parte Bell*, No. AP-75,038, 2005 Tex. Crim. App. LEXIS 51 (Tex. Crim. App. Jan. 12, 2005) (denying amicus curiae's rehearing motion). *See generally* Tobolowsky, *supra* note 60, at 826–29, 835–49 (describing Bell's state *Atkins* collateral review proceedings).

Gregory Van Alstyne's *Atkins* proceeding was complicated by the absence of school or other records regarding his life in the Philippines prior to age eighteen.⁴⁷⁴ Evidence concerning his impaired intellectual and adaptive behavior during his developmental period was supplied by family members and friends.⁴⁷⁵ His full scale WAIS-Revised IQ score of sixty-nine, administered in prison after receiving a sixty on the Beta screening test and failing another assessment test, was followed by scores of sixty-nine and seventy-two on two more limited tests administered by a defense *Atkins* expert and a full scale score of fifty-six on the WAIS-III administered by the State's *Atkins* expert.⁴⁷⁶ The parties contested the implications of Van Alstyne's admission into and subsequent dismissal from the prison system's MROP program, a television interview he had given, and the application of the *Briseno* factors.⁴⁷⁷ In its factual findings that Van Alstyne had significantly subaverage intellectual functioning, the convicting trial court cited the above IQ testing results and the fact that the State and defense experts agreed that the IQ test administered by the prison system was within the mentally retarded range.⁴⁷⁸ The convicting trial court's finding that Van Alstyne had the requisite adaptive behavior deficits primarily focused on the *Briseno* factors. The court cited family members' and friends' description of

474. See Transcript of Record at 1818–20, *Ex parte* Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) (per curiam) (Nos. 30,941-02-B; 33,801-02; AP-75,795) (containing Findings of Fact and Conclusions of Law).

475. See *id.* at 1820–23, 1831, 1833.

476. See *id.* at 1810–17.

477. Van Alstyne was initially admitted into the prison MROP program and then discharged approximately one month later, according to incomplete records, because his adaptive behavior (and perhaps his intellectual functioning) was too high for the program. The State raised the MROP discharge in opposition to an adaptive behavior deficit finding. The defense asserted the program discharge was incorrectly based on Van Alstyne's exaggerated self-reports of his adaptive abilities, reflected only an ability to adjust to structured prison life, and was not reflective of the *Atkins* standard. See *id.* at 1811, 1823–27. State experts indicated that Van Alstyne's performance in a television interview was inconsistent with a mentally retarded person, but defense experts testified that it was consistent with mental retardation. The trial judge stated that before being educated about mental retardation in this case, he would have thought that the television interview was not indicative of a mentally retarded person and that he struggled the most with the experts' disagreement about the implications of Van Alstyne's performance in the interview. See *id.* at 1813–14, 1834–38; see also *id.* at 1817–43 (describing other disputes about the application of the *Briseno* factors).

478. See *id.* at 1810–17. The State experts suggested that Van Alstyne's IQ test results might be a product of malingering and were inconsistent with his performance in his television interview. However, they did not conduct tests regarding malingering and the defense expert's test for malingering did not reflect it. See *id.* at 1813–14.

his school and developmental and post-developmental adaptive behavior difficulties; his prison WRAT achievement scores at or below the third grade level (as well as other prison achievement test results above the third and ninth grade level); and his initial referral to and subsequent discharge from the prison MROP program. The court also cited examples of the lack of planning demonstrated in his personal and criminal life; examples of his tendency to be led by others in his personal and criminal life; examples of his inappropriate responses to external stimuli; limitations in his ability to respond to specific questions rather than providing narrative, and sometimes nonresponsive, replies; his inability to effectively lie or hide facts; and his lack of leadership or planning in the instant offense.⁴⁷⁹

In its opinion, the Texas Court recited in some detail the evidence supporting the convicting trial court's determination of Van Alstyne's mental retardation, as well as conflicting evidence.⁴⁸⁰ It found the record "amply" supported the trial court's intellectual functioning finding.⁴⁸¹ It also recited the "hotly contested" evidence regarding Van Alstyne's adaptive behavior, including the conflicting expert views of his television interview.⁴⁸² In light of its typical deference to the trial court's findings and finding "no compelling reason" to reject the trial court's conclusion regarding Van Alstyne's mental retardation, the Texas Court granted Van Alstyne *Atkins* relief.⁴⁸³

479. *See id.* at 1817–43. *But see id.* at 1826 (describing the State expert's view that Van Alstyne's family and friends had a motive to exaggerate his impairment and that his impairment could be due to lack of education, a learning disability, or anti-social personality disorder rather than mental retardation).

480. *See Van Alstyne*, 239 S.W.3d at 818–23.

481. *Id.* at 818 (noting that the State's expert conceded that the IQ evidence presented was within the mild mental retardation range).

482. *Id.* at 818–23 (including the defense expert's conclusion that Van Alstyne had a "life-long pattern of substandard functioning in all areas of daily living: conceptual, social, and practical" and supporting record evidence as well as the State expert's concession that there was evidence in the record that would support adaptive deficits in the three skill areas and a mild mental retardation diagnosis). The majority rejected the dissenting Judges' view that the Texas Court's personal assessment of Van Alstyne's performance in the television interview was sufficient to reject the trial court's findings. Instead the majority found that the trial court, aided by all of the expert opinions, had adequately assessed this piece of evidence in the "totality of the evidence" in reaching its conclusion. *See id.* at 821–23. *But see id.* at 824–26 (Keller, P.J., joined by Keasler and Hervey, JJ., dissenting) (rejecting the trial court's mental retardation finding in light of the conflicting evidence, especially the television interview).

483. *Id.* at 817, 823–24.

Timothy Cockrell cited, in his *Atkins* pleading (and subsequent hearing), his IQ score of thirty-one at age fifteen (plus partial IQ score results at age nine and fourteen in the low forties and below); placement in special education; poor school performance; and affidavits and testimony from teachers, family members, and friends regarding his adaptive behavior difficulties during his developmental period and afterward.⁴⁸⁴ He also introduced expert testimony regarding recent WAIS III testing in the mentally retarded range; WRAT testing at the second grade level or below; and ABAS testing, examination, and records review revealing “very impaired” functional academics, social skills, vocational skills, and self-direction consistent with mild to moderate mental retardation.⁴⁸⁵ Finally, Cockrell cited a factual finding from prior litigation in his case that he was “mentally retarded.”⁴⁸⁶ During the *Atkins* proceedings, the State introduced evidence reinterpreting Cockrell’s overall IQ scores to be in the mid-eighties at age nine and mid-seventies at age fifteen; prison Beta IQ screening scores of seventy-five, eighty-six, and ninety-three; and its *Atkins* experts’ WAIS III testing score of eighty (as well as Slosson IQ testing in the mildly retarded range).⁴⁸⁷

In its initial factual findings, the convicting trial court found that Cockrell had established significant adaptive behavior deficits, with onset during the developmental period, in communication, self-care, and self-direction skill areas.⁴⁸⁸ However, based on the conflicting evidence concerning Cockrell’s intellectual functioning—including the lack of detail concerning the IQ tests administered in school and prison, the pattern of higher performance and lower verbal component scores (influenced by Cockrell’s poor reading skills)

484. See Transcript of Record at 9–20, 25, 28–29, *Ex parte* Cockrell, AP-76,168, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Tex. Crim. App. June 10, 2009) (per curiam) (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168) (containing writ application); Findings of Fact & Conclusions of Law, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168).

485. See Transcript of Record at 14–15, 19–20, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168); Findings of Fact & Conclusions of Law at 13–16, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168).

486. See Transcript of Record at 15, 25, 28–29, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168).

487. See Findings of Fact & Conclusions of Law at 16–20, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168) (including assessment by the State’s *Atkins* expert and prior assessment by its expert from Cockrell’s punishment hearing). Because his IQ testing of Cockrell did not indicate mental retardation, the State expert did not examine the adaptive behavior factors. See *id.* at 17.

488. See *id.* at 22–23; *cf. id.* at 21 (reciting but not applying the *Briseno* factors).

artificially lowering his overall IQ scores, and testimony from a defense expert that she would have estimated Cockrell's IQ in the eighties based on initial conversation with him and prior to testing—the trial court found that Cockrell had not met his burden regarding this element of his *Atkins* claim.⁴⁸⁹ The Texas Court, however, remanded the *Atkins* writ so that the trial court could enter additional findings and conclusions to address “discrepancies” between its current finding that Cockrell was not mentally retarded and its previous finding that he was mentally retarded in prior litigation regarding the voluntariness of his confession.⁴⁹⁰

In its additional factual findings and legal conclusions, the convicting trial court cited Cockrell's IQ testing in the mentally retarded range at age nine and fourteen, his placement in special education, his achievement testing below the third grade level at age fourteen, the confirmatory testing and diagnosis of Cockrell's *Atkins* expert regarding his mental retardation, and the evidence concerning his adaptive behavior deficits in concluding that the mental retardation finding that the court had made in Cockrell's previous litigation had not changed and should be applied to this *Atkins* proceeding.⁴⁹¹ On review, the Texas Court noted that, in cases where the evidence could support both a finding of mental retardation and the rejection of such a finding, it typically defers to the

489. *See id.* at 22. After review of all of Cockrell's prior IQ testing evidence and her own testing, criticism of the State expert's incomplete record review and practice effect regarding his IQ testing of Cockrell, and expressed concern about the unreliability of Beta testing, the defense expert maintained her diagnosis of mental retardation. She also found no evidence of his malingering in her testing. *See id.* at 14–16. The State's expert attributed Cockrell's low school IQ scores to reporting error, identified the impact of his limited educational background on his IQ scores, noted his “near perfect” score on the picture completion test, and cited the possibility of malingering. Although he acknowledged the potential impact of the practice effect on his administration of the WAIS, his Slosson IQ test result in the mildly mentally retarded range, his non-review of Cockrell's school records, and the inconsistency of Cockrell's picture completion result with his prior special education status, the State's expert testified that Cockrell's higher scores were more likely to be accurate than the conflicting lower scores. Prior testimony from the State's expert at Cockrell's punishment proceeding reinterpreted Cockrell's school IQ test results and provided his prison IQ screening test results. This expert also attributed Cockrell's lower school IQ scores (as opposed to his prison scores) to poor reading ability and low motivation. *See id.* at 16–20.

490. *See Ex parte* Cockrell, No. WR-41,775-02, 2008 Tex. Crim. App. Unpub. LEXIS 725, at *2–3 (Tex. Crim. App. Oct. 1, 2008) (per curiam).

491. *See* Additional Findings of Fact and Conclusions of Law, *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409 (Nos. 1992-CR-6426-W2; WR-41,775-02; AP-76,168) (noting that the prior finding of Cockrell's mental retardation was submitted by the State and signed by the court).

recommendation of the convicting court. The Texas Court did so regarding the convicting court's additional findings and accordingly granted Cockrell *Atkins* relief.⁴⁹²

Daniel Plata's IQ had not been formally tested during the developmental period. However, he supported his claim of limited intellectual functioning with *Atkins* expert IQ test results of sixty-five on the WASI (an abbreviated Wechsler test), sixty-five on the WAIS-III, sixty-nine on the WAIS-III (administered by the State expert and rescored by a defense expert), and testimony of teachers, family, and friends regarding his difficulties in school.⁴⁹³ His adaptive difficulties regarding communication, academics, money, interpersonal relationships, self-esteem, practical and work skills, and independent living were presented by Plata's teachers, family, and friends, as reviewed and analyzed by a defense *Atkins* expert.⁴⁹⁴ The State countered the defense IQ evidence with a prison abbreviated WAIS-Revised test result of eighty-three, a prior defense expert witness estimate of Plata's IQ at eighty-five to ninety, and its expert's WAIS-III test result of seventy that the expert testified understated Plata's IQ.⁴⁹⁵ The State contested Plata's adaptive behavior limitations by challenging the inconsistencies in and bias of Plata's witnesses' testimony, and presenting its expert's adjusted ABAS score of seventy, that the expert testified understated Plata's adaptive behavior. The State also submitted evidence of Plata's adaptive behavior in prison, and Plata's own work and communication skills.⁴⁹⁶ The parties disagreed regarding the application of the *Briseno* factors.⁴⁹⁷ In finding Plata mentally retarded, the convicting trial court

492. See *Cockrell*, 2009 Tex. Crim. App. Unpub. LEXIS 409, at *2-3.

493. See Transcript of Record at 17-18, 31-33, *Ex parte* Plata, No. AP-75,820, 2008 Tex. Crim. App. LEXIS 1398 (Tex. Crim. App. Jan. 16, 2008) (per curiam) (Nos. 693143-B; 72639-A; AP-75,820) (containing writ application citing additional confirmatory test score of seventy-one); see also *id.* at 1266-84 (containing Findings of Fact and Conclusions of Law citing confirmatory test scores of sixty-one and seventy-two).

494. See *id.* at 18-23, 33-35 (containing writ application); see also *id.* at 1284-1312 (containing Findings of Fact and Conclusions of Law citing criticism of State expert's retrospective use of ABAS test).

495. See *id.* at 389-91 (containing Respondent's Original Answer); see also *id.* at 1208-18, 1240-41 (containing Respondent's Proposed Findings of Fact and Conclusions of Law and criticizing aspects of the defense testing).

496. See *id.* at 391-402 (containing Respondent's Original Answer); see also *id.* at 1218-39, 1241-42 (containing Respondent's Proposed Findings of Fact and Conclusions of Law).

497. See *id.* at 394-96, 401-02 (containing Respondent's Original Answer); see also *id.* at 1237-39 (containing Respondent's Proposed Findings of Fact and Conclusions of Law). But see *id.* at 1332-37 (containing Findings of Fact and Conclusions of Law).

accepted the defense experts' IQ testing results and the defense evidence regarding Plata's adaptive behavior deficits and satisfaction of the *Briseno* factors.⁴⁹⁸ The court expressly disregarded the IQ estimate evidence and abbreviated prison IQ score presented by the State. It also disregarded both the State expert's IQ and adaptive behavior assessment results due to errors in their administration and analysis.⁴⁹⁹ Finding support in the record for the convicting trial court's findings, the Texas Court granted Plata *Atkins* relief.⁵⁰⁰

d. Fifth Circuit's Finding of Mental Retardation Following Contested *Atkins* Claims

The Texas federal courts conducted de novo review of the *Atkins* claims of Eric Moore and Jose Rivera following the Texas Court's dismissal of their *Atkins* subsequent writ pleadings as an abuse of the writ.⁵⁰¹ In support of the intellectual functioning element, Eric Moore proffered results of a mental abilities test administered in first grade that resulted in a score of seventy-four, a WAIS-Revised IQ test score of seventy-six administered at age twenty-four (at the time of his

498. See *id.* at 1266–312, 1332–38 (containing Findings of Fact and Conclusions of Law).

499. See *id.* at 1274–83, 1285, 1305–09. The court also found the testimony of correctional officers of limited value. See *id.* at 1310–12.

500. See *Plata*, 2008 Tex. Crim. App. LEXIS 1398.

501. See *Moore v. Quarterman*, 533 F.3d 338, 341–42 (5th Cir. 2008) (per curiam) (en banc) (finding cause and prejudice regarding the offender's failure to exhaust his *Atkins* claim when it was dismissed as an abuse of the writ prior to the Texas Court's development of *Atkins* procedures and thus no application of the deferential review standards); *Rivera v. Quarterman*, 505 F.3d 349, 356–61 (5th Cir. 2007) (finding that the Texas Court's dismissal of the offender's claim as an abuse of the writ was an "unreasonable" application of "clearly established" federal law and thus not entitled to deferential treatment). The Texas Court reviewed both of these *Atkins* claims in the early stages of its *Atkins* jurisprudence and prior to the issuance of its *Briseno* collateral review procedures. See *Ex parte Rivera*, No. 27,065-03 (Tex. Crim. App. Aug. 6, 2003) (per curiam); *Ex parte Rivera*, No. 27,065-02 (Tex. Crim. App. Aug. 5, 2003) (per curiam); *Ex parte Rivera*, No. 27065-02, 2003 WL 21752841 (Tex. Crim. App. July 25, 2003) (per curiam); *Ex parte Moore*, No. 38,670-02 (Tex. Crim. App. Feb. 5, 2003) (per curiam). Accompanying litigation in the Moore case also reflects the Texas federal courts' early attempts to apply concepts of federal collateral review to state *Atkins* claims. See *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007) (per curiam) (finding *Atkins* claim not exhausted); *Moore v. Quarterman*, 454 F.3d 484 (5th Cir. 2006) (finding *Atkins* claim not exhausted); *Moore v. Dretke*, 369 F.3d 844 (5th Cir. 2004) (per curiam) (vacating conditional grant of relief and remanding); *Moore v. Dretke*, No. 6:03-CV-224, 2005 U.S. Dist. LEXIS 37431 (E.D. Tex. July 1, 2005) (applying de novo standard based on its finding that claim was not adjudicated on the merits in state court); *Moore v. Johnson*, No. 6:03cv224, 2003 U.S. Dist. LEXIS 27338 (E.D. Tex. May 15, 2003) (applying successive writ authorization procedure).

trial), and his *Atkins* WAIS-III score of sixty-six at age thirty-eight.⁵⁰² Moore also presented adaptive behavior evidence including record evidence and testimony of family members and friends that Moore was enrolled in special education classes; his achievement levels were three years lower than his age level; and he had difficulties with self-care, work skills, interpersonal skills, and conceptual skills (such as counting money, telling time, and following directions).⁵⁰³ Based on his examination of Moore, interviews of others, review of relevant records, and IQ and other testing, Moore's *Atkins* expert diagnosed him as mentally retarded.⁵⁰⁴ The State presented testimony from Moore's teachers and correctional officers indicating that they did not consider Moore mentally retarded and regarding his adaptive abilities in school and prison.⁵⁰⁵ Although the State's expert appeared to concede the intellectual functioning element,⁵⁰⁶ he did not find that Moore had the required adaptive behavior deficits for a diagnosis of mental retardation based on his examination of Moore, the administration of the VABS test, and review of materials.⁵⁰⁷

In determining Moore's mental retardation, the federal trial court applied the AAMR definition⁵⁰⁸ and declined to utilize the *Briseno* factors in its analysis.⁵⁰⁹ In finding that Moore satisfied the

502. See *Moore*, 2005 U.S. Dist. LEXIS 37431, at *13–14. The defense expert found all of these IQ scores consistent, found no evidence of intentional poor performance, and administered an additional confirmatory test. See *id.*

503. See *id.* at *19–34.

504. See *id.* at *14, *35–36. The defense expert's assessment of Moore's significant deficits in adaptive behavior was based on his clinical judgment after his interviews of Moore and family members and administration of various tests. This expert did not view the VABS or similar scales as appropriate to make a retrospective assessment of adaptive behavior. See *id.* at *35–36.

505. See *id.* at *23–30 (containing teacher testimony acknowledging limited personal recollection of Moore and limited knowledge of the legal mental retardation definition); *id.* at *34–35 (containing correctional officer testimony reflecting Moore's communication, reading, and hygiene abilities and ability to follow rules).

506. On cross-examination of the defense expert and examination of its own expert, the State questioned the validity and accuracy of the submitted IQ tests. On cross-examination, however, the State's expert adopted the test results and agreed that Moore satisfied this element. See *id.* at *14 & n.5.

507. See *id.* at *36–38 (basing assessment on Moore's interview and self-reported VABS results and records and other evidence reflecting Moore's educational, work, and interpersonal history).

508. See *id.* at *8–11 (citing its use in *Briseno* and finding that both parties used this definition at the evidentiary hearing).

509. See *id.* at *15 n.6 (finding these factors are discretionary and not part of the AAMR mental retardation definition and were presented to assist in distinguishing mental retardation from a personality disorder, an issue not present in Moore's case).

intellectual functioning component, the trial judge averaged the three IQ scores cited above at seventy-two, applied a five-point standard error of measurement, and relied on the agreement between the experts that Moore satisfied this element.⁵¹⁰ The trial court reviewed all of the lay and record evidence regarding Moore's adaptive behavior, but found the defense expert's assessment of Moore's adaptive functioning more credible than that of the State expert, based in part on his more comprehensive procedure.⁵¹¹ Both experts agreed that Moore had some adaptive deficits, but disagreed on whether these deficits were significant.⁵¹² Concluding that Moore had significant adaptive limitations concerning his conceptual and social skills, the trial judge found this element was satisfied. Also finding the satisfaction of developmental period onset, the trial judge found that Moore was mentally retarded for *Atkins* purposes.⁵¹³ Applying a "deferential lens" to the trial judge's determinations of credibility and conflicting evidence, the Fifth Circuit found that the trial judge's determination of Moore's mental retardation was not clearly erroneous and affirmed the trial court's grant of habeas corpus relief.⁵¹⁴

510. *See id.* at *15.

511. *See id.* at *19–45.

512. *See id.* at *40.

513. The trial judge supported his finding of significant deficits in conceptual skills by noting Moore's academic achievement levels below his age and difficulties in following directions and learning new skills (e.g., counting money, telling time, and driving). He found significant limitations in Moore's social skills based on his difficulties in navigating difficult family relationships and forming relationships with others. The judge also found some (but not significant) limitations in Moore's practical skills. *See id.* at *38–45. The experts agreed that any deficits arose during Moore's developmental period. *See id.* at *45–47. Based on his finding of Moore's mental retardation, the trial judge granted the writ directing Moore's release unless the State permanently stayed his execution or reformed his death sentence to life imprisonment. *See id.* at *1, *47.

514. *See Moore v. Quarterman*, 342 F. App'x 65, 66, 71, 74 (5th Cir. 2009) (per curiam). The majority found the trial judge's determination that the State expert had conceded the intellectual functioning component was reasonable and there was adequate IQ evidence to support its intellectual functioning finding. *See id.* at 68–71 (including expert testimony supporting the averaging of the IQ scores, use of the measurement error standard, consideration of mental retardation based on an IQ score up to seventy-five, presence of an IQ score below seventy, and the absence of evidence of Moore's intentional poor performance on the IQ test). Regarding Moore's adaptive behavior, the majority found that the trial judge did not abuse his discretion in declining to apply the discretionary *Briseno* factors in the instant case (and actually did consider record evidence pertaining to the factors in making his adaptive skill deficit determination) and did not clearly err in resolving the conflicting evidence concerning Moore's adaptive behavior and making related credibility determinations. *See id.* at 71–74. *But see id.* at 74–93 (Smith, J. dissenting) (finding the trial court erred in its mental retardation analysis, including

In assessing Jose Rivera's intellectual functioning, the federal trial court relied on his *Atkins* WAIS-III IQ score of sixty-eight. The trial judge found Rivera's prior school and prison screening IQ test scores of seventy, eighty-five, ninety-two, and eighty insufficiently reliable, based on their more limited nature and the lack of information regarding their administration and scoring.⁵¹⁵ The trial court's finding that Rivera had adaptive behavior deficits regarding self-care, social skills, home living, and functional academics was supported by evidence of his academic difficulties during school, work challenges, and issues with personal care supplied by the testimony of Rivera's teachers, family, and experts, as well as documentary evidence.⁵¹⁶ Acknowledging the important role of the trial judge in weighing the evidence, the Fifth Circuit found that the trial court's findings regarding these elements, as well as developmental onset, were not clearly erroneous and affirmed its finding of Rivera's mental retardation.⁵¹⁷

3. *Illustrative Unsuccessful Texas State and Federal Atkins Claims on Collateral Review*

Although six of the successful *Atkins* claims described above resulted from contested *Atkins* collateral proceedings,⁵¹⁸ most contested Texas *Atkins* claims have been unsuccessful on collateral

averaging Moore's IQ scores, finding mental retardation based on an IQ above seventy, determining a State concession regarding Moore's IQ, failing to apply the *Briseno* factors, and inconsistently using AAMR adaptive behavior criteria; and finding that the majority applied too deferential a review standard to the trial court's findings). The Court denied the State's certiorari petition. *Thaler v. Moore*, 130 S. Ct. 1736 (2010).

515. *See Rivera v. Quarterman*, 505 F.3d 349, 356–57, 361–62 (5th Cir. 2007) (noting the trial court's rejection of the State's criticism of the defense expert's administration of the WAIS test).

516. *See id.* at 356–57, 362–63 (noting the State's acknowledgement of Rivera's adaptive limitations, but its attribution of them to his inhalant abuse and antisocial personality); *see also* Successor Application for a Writ of Habeas Corpus, *Ex parte* Rivera, No. 27,065-03 (Tex. Crim. App. Aug. 6, 2003) (describing Rivera's placement in special education, achievement scores at the fifth grade level or below at age nineteen, inability to live independently, and inability to maintain work).

517. *See Rivera*, 505 F.3d at 363 (noting the trial judge's characterization of the case as presenting a "close call"). Although the Fifth Circuit affirmed the trial court's mental retardation finding, it vacated the court's judgment in part and remanded the case for consideration of the issue of the equitable tolling of the AEDPA statute of limitations. *See id.* at 353–55. The Court denied Rivera's certiorari petition on the statute of limitations issue. *Rivera v. Quarterman*, 129 S. Ct. 176 (2008). The limitations issue has not been addressed by the federal trial court. Commutation of Rivera's death sentence is also being pursued through the Texas Board of Pardons and Paroles.

518. *See supra* notes 403–05 and accompanying text.

review.⁵¹⁹ This section examines some illustrative unsuccessful, but vigorously contested, *Atkins* collateral review claims. These illustrative cases include instances in which the Texas Court disagreed with certain findings by the convicting trial court,⁵²⁰ instances in which the Texas federal court disagreed with certain findings by the Texas Court,⁵²¹ and instances in which the convicting trial court simply found the State's evidence regarding mental retardation more persuasive than that of the defense.⁵²² Reflecting the significant deference granted to the trial courts' ultimate factual findings regarding mental retardation, their rejection of these *Atkins* claims was maintained upon review by the Texas Court and any further Texas federal court review.⁵²³

a. Texas Court Disagreement with Aspects of Convicting Trial Courts' Findings

In three of these illustrative cases (involving Elroy Chester, John Matamoros, and Elkie Taylor),⁵²⁴ the Texas Court disagreed with aspects of the convicting trial courts' findings before ultimately endorsing their rejection of the offenders' *Atkins* claims.⁵²⁵ Elroy Chester supported his *Atkins* claim in state court⁵²⁶ by presenting

519. See *supra* Table 1 (describing the resolution of Texas *Atkins* collateral review claims).

520. See *infra* notes 524–58 and accompanying text.

521. See *infra* notes 559–69 and accompanying text.

522. See *infra* notes 570–97 and accompanying text.

523. See *supra* Table 1 (describing the resolution of Texas *Atkins* collateral review claims).

524. Taylor v. Quarterman, 498 F.3d 306 (5th Cir. 2007); Matamoros v. Thaler, No. H-07-2613, 2010 U.S. Dist. LEXIS 35425 (S.D. Tex. Mar. 31, 2010); Chester v. Quarterman, No. 5:05cv29, 2008 U.S. Dist. LEXIS 34936 (E.D. Tex. Apr. 28, 2008); *Ex parte* Matamoros, No. WR-50,791-02, 2007 Tex. Crim. App. LEXIS 1861 (Tex. Crim. App. June 13, 2007) (per curiam); *Ex parte* Chester, No. AP-75,037, 2007 Tex. Crim. App. LEXIS 1852 (Tex. Crim. App. Feb. 28, 2007); *Ex parte* Taylor, No. WR-48,498-02, 2006 Tex. Crim. App. LEXIS 2534 (Tex. Crim. App. Feb. 1, 2006) (per curiam); *cf. Ex parte* Henderson, No. WR-37,658–03 (Tex. Crim. App. Jan. 25, 2006) (per curiam) (rejecting one of the trial court's factual findings about a previous IQ test, but maintaining the denial of the *Atkins* claim); *id.* (Cochran, J., joined by Keller, P.J., and Price and Johnson, JJ., concurring) (indicating the case represented a “close question” regarding the determination of Henderson's mental retardation).

525. See *infra* notes 526–58 and accompanying text.

526. Soon after *Atkins* was announced, a Texas federal trial court ordered that Chester be given a new sentencing hearing or a sentence reduction to life imprisonment. The Fifth Circuit vacated this decision and ordered the federal application dismissed without prejudice so that Chester could first exhaust his *Atkins* claim in the state court system. See Chester v. Cockrell, 62 F. App'x 556 (5th Cir. 2003) (per curiam).

evidence of the following full scale IQ scores: sixty-nine at age seven and one-half (WISC-Revised), fifty-nine at age twelve (WISC-Revised), seventy-seven at age thirteen and one-half (WISC-Revised), sixty-nine at age eighteen (WAIS-Revised), and sixty-six at age twenty-nine (WAIS-Revised).⁵²⁷ He was placed in special education early in his schooling and admitted into the prison MROP program at approximately age eighteen. Achievement testing in prison placed him at third grade levels or below. He received a score of fifty-seven on the VABS adaptive behavior assessment in connection with his MROP placement.⁵²⁸ Two of his sisters testified regarding his adaptive behavior deficits, including his inability to live or work independently.⁵²⁹ A special education teacher testified regarding his limited abilities at school.⁵³⁰ Chester asserted that he demonstrated deficits regarding the broader conceptual and practical adaptive skill areas, as well as the specific skill areas of communication, work, functional academics, self-direction, and community use. He asserted that he also satisfied the *Briseno* factors.⁵³¹ One expert diagnosed Chester as mentally retarded based on a review of his records, interviews with Chester, and observation of the State expert's interview with him. Another expert classified him as mildly mentally retarded based on a review of his MROP records.⁵³²

The convicting trial court adopted the State's proposed findings and conclusions.⁵³³ The trial court found that Chester had insufficiently established the intellectual functioning component of

527. See Transcript of Record at 406–11, *Chester*, 2007 Tex. Crim. App. LEXIS 1852 (Nos. 76044-B; 45,249–02; AP-75,037) (containing Applicant's Proposed Findings of Fact and Conclusions of Law). Chester disputed the reliability of the IQ score of seventy-seven due to the practice effect, anomaly regarding the performance component score, and use of an incorrect age. See *id.* at 411–13.

528. See *id.* at 397, 399–406, 415–20. Chester disputed as erroneous references in his school records to a learning disability and in his MROP records to a borderline intellectual functioning (rather than or in addition to references to mental retardation). See *id.* at 381, 405–06, 419–20.

529. See *id.* at 380, 397–99, 414.

530. See *id.* at 381–82, 400–01.

531. See *id.* at 414–33. Chester asserted that the *Briseno* factors did not apply in his case, that they did not supplant the AAMR mental retardation definition, and that he satisfied the *Briseno* factors in any event. See *id.* at 430–33.

532. See *id.* at 379, 381. The State's expert agreed that the proper diagnosis for a person with a full scale IQ of sixty-nine and a VABS score of fifty-seven is mild mental retardation. See *id.* at 419–20.

533. See *id.* at 437–62 (containing Respondent's Proposed Findings of Fact, Conclusions of Law and Order).

mental retardation based on the proffered IQ test scores. The trial court specifically found two of the scores inconclusive because they were subject to differing interpretations and questioned the WISC scores as outdated and potentially culturally biased. It further noted the debatable validity of IQ scores in close cases and their inherent error margins. Finally, the trial court stated that component scores on four of Chester's IQ tests would not reflect mental retardation under a Texas Education Agency definition.⁵³⁴ The trial court rejected an adaptive behavior deficit finding based on its application of the *Briseno* factors, including Chester's classification in some school records as learning disabled rather than mentally retarded; his graduation from high school; his ability to communicate rationally with the State expert who determined that he was not mentally retarded; and the planning, forethought, and execution of his capital crime and other crimes.⁵³⁵ The trial court also noted Chester's classification as having borderline intellectual functioning (rather than mental retardation) in connection with his MROP participation.⁵³⁶

Contrary to the trial court, the Texas Court found that Chester had met his burden in establishing his intellectual functioning deficits based on his IQ scores, with three full scale test scores below seventy during the developmental period and the one higher score likely affected by a practice effect.⁵³⁷ The Texas Court further stated that even the State's expert acknowledged that a person with Chester's VABS adaptive functioning score of fifty-seven combined with an accompanying IQ of sixty-nine would be "correctly diagnosed" as mildly mentally retarded, and that such evidence was "persuasive." However, the Texas Court also noted that it could not substitute its own judgment for that of the trial court as long as the record

534. *See id.* at 440–45. The trial court misreported Chester's IQ score of fifty-nine on one of his tests as sixty-nine. *Id.* at 441.

535. *See id.* at 445–57. The trial court relied in part on testimony concerning Chester's school records from a school diagnostician presented by the State. *See id.* at 444–48. The trial court found the testimony of Chester's sisters and teacher regarding his mental retardation (as opposed to a learning disability) as a child less persuasive. *See id.* at 447, 459–60. The trial court also compared the credentials of the State expert to the defense primary expert. *See id.* at 438.

536. *See id.* at 457–59.

537. *See Chester*, 2007 Tex. Crim. App. LEXIS 1852, at *6–10 (noting the trial court's incorrect reporting of one of Chester's IQ scores and the State expert's agreement that a person with similar IQ scores would be classified as mildly mentally retarded). The Texas Court stated that there was no dispute regarding the developmental onset factor. *See id.* at *6.

supported the trial court's findings.⁵³⁸ The Texas Court found that the trial court had addressed each of the *Briseno* factors and concluded that Chester had failed to satisfy any of them. With regard to the final *Briseno* factor concerning the crime's planning and execution, the Texas Court provided a lengthy description of the facts of Chester's crimes before concluding that the trial court did not err in rejecting Chester's *Atkins* claim.⁵³⁹ In denying Chester's subsequent federal habeas corpus application based on the adaptive functioning component,⁵⁴⁰ the Texas federal trial court found that 1) the Texas courts' use of the *Briseno* factors to determine his *Atkins* claim was not contrary to or an unreasonable application of federal law, 2) an "affirmative finding" regarding the final *Briseno* factor was sufficient in itself to deny federal relief on an *Atkins* claim, and 3) Chester did not challenge the state courts' factual determination that his crime involved forethought, planning, and complex execution of purpose.⁵⁴¹

In support of his *Atkins* claim, John Matamoros presented the following full scale IQ scores: seventy-one at age fourteen (WISC-Revised), seventy-four at almost age seventeen (WAIS), and sixty-five by his *Atkins* expert (WAIS-III).⁵⁴² Evidence of his adaptive behavior limitations was presented by two of his sisters, his youth custody records, his *Atkins* VABS score of forty-one (with deficits in multiple areas), and achievement test results at less than fourth grade level.⁵⁴³ While in youth custody, he had been classified as mildly mentally retarded.⁵⁴⁴ The convicting trial court adopted the State's

538. *Id.* at *10–12.

539. *See id.* at *12–27.

540. *See* Chester v. Quarterman, No. 5:05cv29, 2008 U.S. Dist. LEXIS 34936, at *5–6 (E.D. Tex. Apr. 28, 2008) (noting the Texas Court's findings regarding the intellectual functioning aspect (that were not disputed by the State) and the basis for the Texas Court's findings regarding Chester's adaptive behavior functioning).

541. *See id.* at *15–21; *see also id.* at *6–14 (repeating detailed description of the crime's facts). The federal trial court also concluded that the final *Briseno* factor itself was not contrary to federal law due to its alleged requirement of a nexus between the crime and an offender's mental retardation. *See id.* at *17–19. Based on its finding regarding the final *Briseno* factor, the federal trial court found it unnecessary to address the other *Briseno* factors. *See id.* at *20–21.

542. *See* Transcript of Record at 411, 415, 419, 422, *Ex parte* Matamoros, No. WR-50,791-02, 2007 Tex. Crim. App. LEXIS 1861 (Tex. Crim. App. June 13, 2007) (per curiam) (Nos. 643410-B; WR-50,791-02) (containing Applicant's Proposed Findings of Facts and Conclusions of Law).

543. *See id.* at 412–13, 415, 419.

544. *See id.* at 411, 420, 422, 423–24; *cf. id.* at 444 (describing a reference to Matamoros as "borderline mentally retarded" in his youth records). Matamoros also relied on the

proposed findings and conclusions.⁵⁴⁵ The trial court noted the above IQ scores, as well as the State expert's full scale IQ result of sixty-two (SB5) that the expert felt was affected by Matamoros' bilingualism and limited education, and concluded that Matamoros had not established the required intellectual functioning deficits.⁵⁴⁶ The trial court also found the adaptive behavior aspect deficient based on evidence of Matamoros' adaptive functioning in youth and adult custody, his ability to communicate with his trial counsel, his testimony in the capital proceedings, some work history, and the application of the *Briseno* factors.⁵⁴⁷ The trial court accepted the State expert's upward adjustment of Matamoros' ABAS test results to leave a significant deficit only in the functional academics area (and an overall score of sixty-three to sixty-five) and his discrediting of the contrary VABS results. The trial court also noted the general inadequacy of adaptive behavior testing for *Atkins* purposes, and stated that Matamoros' youthful classification as mentally retarded did not include an adaptive behavior component.⁵⁴⁸ The Texas Court rejected the convicting trial court's finding that Matamoros had not satisfied the intellectual functioning aspect of mental retardation, but maintained the trial court's findings and conclusions regarding Matamoros' adaptive functioning and developmental period onset.⁵⁴⁹ The federal trial court recited the adaptive behavior evidence relied on by the Texas courts, found their conclusions were reasonable and entitled to deference under the AEDPA, and denied Matamoros federal collateral relief.⁵⁵⁰

State expert's IQ test results of less than seventy and his preadjusted adaptive behavior test results that indicated deficits in four skill areas. *See id.* at 422–24.

545. *See id.* at 431–73 (containing Respondent's Proposed Findings of Fact, Conclusions of Law and Order).

546. *See id.* at 440–46, 469–71 (noting other testing that was also consistent with the higher IQ scores).

547. *See id.* at 446–60, 467–69, 471; *see also id.* at 453–55 (finding Matamoros' sisters' testimony "unpersuasive").

548. *See id.* at 447, 460–67. Based on the absence of the required deficits, the trial court found no developmental period onset. *See id.* at 469, 471–72.

549. *See Matamoros*, 2007 Tex. Crim. App. LEXIS 1861, at *2–3 (rejecting the specific findings regarding the effect of bilingualism on Matamoros' intellectual and adaptive functioning as well). The Texas Court took no action on Matamoros' motion for a rehearing based on the trial court's failure to use the AAMR's current adaptive behavior categories. *See Ex parte Matamoros*, WR-50,791-02 (Tex. Crim. App. Sept. 12, 2007) (per curiam).

550. *See Matamoros v. Thaler*, No. H-07-2613, 2010 U.S. Dist. LEXIS 35425, at *12–41 (S.D. Tex. Mar. 31, 2010); *see also id.* at *30–31 (rejecting claim that the courts were required to use the newest AAMR adaptive behavior categories); *cf. Matamoros v.*

In the case of Elkie Taylor, the Texas Court re-remanded his writ application after the convicting trial court denied his *Atkins* claim without a live evidentiary hearing.⁵⁵¹ Taylor relied on his full scale IQ scores of approximately seventy-five at age ten (WISC), sixty-nine in prison (WAIS-Revised), sixty-five by the State's *Atkins* expert (WAIS-III), and seventy-one by the defense *Atkins* expert (Kaufman).⁵⁵² His experts had conducted VABS, SIB-R, and ABAS adaptive behavior testing and one expert found adaptive functioning deficits in at least five skill areas. Taylor also offered evidence of his achievement test scores at or below third grade level, his inability to stay in school or the Job Corps, his placement in the prison MROP program, and testimony of family and friends regarding his limited work, independent living, communication, and leisure skills.⁵⁵³ The convicting trial court substantially adopted the State's findings and conclusions.⁵⁵⁴ The trial court found that the one IQ test administered during the developmental period understated Taylor's intellectual functioning.⁵⁵⁵ In finding that Taylor did not meet the adaptive functioning element, the court found the results of the State expert's administration of the SSSQ test (that did not reflect mental retardation) were more meaningful than the defense tests, and were consistent with a previous prison administration of the SSSQ test. The trial court also found that Taylor's behavior in the capital crime and surrounding events, as well as other crimes, reflected a higher level of adaptive functioning than the defense contended. It further found that Taylor demonstrated an ability to adapt in prison, and effectively communicate in his underlying case and with the State

Thaler, No. H-07-2613, 2010 WL 1404375 (S.D. Tex. Mar. 30, 2010) (denying stay based on licensing board complaint against the State's expert).

551. See *Ex parte* Taylor, No. WR-48,498-02, 2005 Tex. Crim. App. Unpub. LEXIS 265 (Tex. Crim. App. Mar. 23, 2005) (per curiam).

552. See Transcript of Record at 237–38, 241–42, *Ex parte* Taylor, No. WR-48,498-02, 2006 Tex. Crim. App. LEXIS 2534 (Tex. Crim. App. Feb. 1, 2006) (per curiam) (Nos. C–297-006327-0542281-B; WR-48,498-02) (containing Taylor's Proposed Findings of Fact and Conclusions of Law); see also *id.* at 242 (stating that the State expert conceded that Taylor met the intellectual functioning element); *id.* at 239 (stating that the Flynn effect reduced Taylor's IQ score at age ten to between sixty-three and seventy-three).

553. See *id.* at 239–49. The State expert found an adaptive deficit regarding Taylor's functional academics. See *id.* at 243.

554. See *id.* at 34–58, 264–69 (containing State's Subsequent Proposed Memorandum and trial court's Order).

555. See *id.* at 41, 43.

expert.⁵⁵⁶ In rejecting his *Atkins* claim, the trial court noted that Taylor had not been diagnosed as mentally retarded prior to this *Atkins* proceeding.⁵⁵⁷ Based on the trial court's findings, both the Texas Court and Texas federal trial court denied Taylor collateral relief on his *Atkins* claim.⁵⁵⁸

b. Texas Federal Court Disagreement with Aspects of Texas Court Findings

In his *Atkins* subsequent writ application, Jeffrey Williams presented his full scale WISC-Revised IQ score of seventy at age sixteen, a hospital notation regarding his mild mental retardation, participation in special education classes, and adaptive functioning difficulties in the Navy and elsewhere.⁵⁵⁹ The State countered with Williams' graduation from high school with satisfactory grades and achievement test scores, his participation in special education classes due to his diagnosed emotional disturbance rather than mental retardation, and his adaptive skills in the Navy and in securing subsequent jobs and living independently.⁵⁶⁰ In dismissing Williams' subsequent writ application as an abuse of the writ, the Texas Court repeated its requirement that an applicant present evidence of all three elements of mental retardation in order to establish the prima facie showing required for an *Atkins* subsequent writ claim.⁵⁶¹ Although noting Williams' proffered IQ score of seventy, the Texas

556. See *id.* at 37–51 (finding family testimony inconsistent with other evidence and MROP participation not contingent on mental retardation, as well). But see *id.* at 239 (describing defense criticism of the use of the SSSQ test).

557. See *id.* at 44. The trial court also referred to the application of the *Briseno* factors. See *id.* at 55. The trial court found that Taylor did not satisfy the three-part definition of mental retardation, he did not satisfy the adaptive behavior element, and he did not have the type of mental retardation regarding which there was a national consensus that would bar his execution. See *id.* at 52–54, 55–57, 268.

558. See *Taylor v. Quarterman*, 498 F.3d 306 (5th Cir. 2007) (denying certificate of appealability from federal trial court habeas corpus denial); *Taylor*, 2006 Tex. Crim. App. LEXIS 2534; *Ex parte Taylor*, No. 48,498-02 (Tex. Crim. App. Feb. 1, 2006) (Johnson, J., joined by Keasler, Hervey, and Cochran, JJ., concurring); see also *Ex parte Taylor*, Nos. WR-48,498-02, WR-48,498-04 (Tex. Crim. App. Nov. 6, 2008) (dismissing subsequent writ application regarding and declining to reconsider Taylor's *Atkins* claim).

559. See *Application for Post Conviction Writ, Ex parte Williams*, No. 50,662-02 (Tex. Crim. App. Oct. 8, 2003) (per curiam).

560. See *Respondent's Motion to Dismiss Applicant's Subsequent Application, Williams*, No. 50,662-02.

561. See *Williams*, No. 50,662-02 (requiring at least one IQ test (or other comparable evidence in the absence of an available IQ test result) reflecting mental retardation and supporting school, medical, and record evidence or expert or lay affidavits establishing adaptive skill deficits and developmental period onset).

Court stated that this evaluation resulted in a diagnosis of emotional disturbance rather than mental retardation and an assessment of Williams' adaptive behavior as "adequate" for his age. The Texas Court also noted his graduation from high school.⁵⁶²

When Williams filed his *Atkins* claim in federal court, the Texas federal trial court found the Texas Court's dismissal of his subsequent writ application to be an "unreasonable" determination of the presented facts, and thus not entitled to deference under the AEDPA. The court ordered an evidentiary hearing to consider the *Atkins* claim de novo.⁵⁶³ Although characterizing it as a "close case," the court rejected Williams' *Atkins* claim.⁵⁶⁴ On appeal, the Fifth Circuit reviewed evidence in support of and opposition to a mental retardation finding produced in the "battle of the experts" waged in the trial court.⁵⁶⁵ Additional intellectual functioning evidence included post-conviction full scale IQ scores of seventy-one on two tests (WAIS-III and SB5), and achievement test and other scores in the nonmentally retarded range.⁵⁶⁶ Additional adaptive functioning evidence included defense identification of deficits in the areas of self-care, home living, social and personal skills, work, and leisure versus State identification of a potential deficit only in socialization based on VABS testing.⁵⁶⁷ Lay and expert witnesses presented varying characterizations of Williams' intellectual and adaptive functioning during his school, military, post-military, and prison periods.⁵⁶⁸ After a review of the evidence, the Fifth Circuit concluded that the federal trial court's determinations that Williams had failed

562. *See id.* (noting also that evidence regarding Williams' adaptive difficulties in the Navy occurred after the developmental period and thus did not support his *Atkins* claim).

563. *See Williams v. Dretke*, No. H-04-2945, 2005 U.S. Dist. LEXIS 34438, at *12-19 (S.D. Tex. July 15, 2005). The court found that the additional expert and lay affidavits presented with Williams' federal application supplemented rather than fundamentally altered the claim presented in state court and thus did not render the claim unexhausted. *See id.* at *13-17.

564. *See Williams v. Quarterman*, 293 F. App'x 298, 307, 311 (5th Cir. 2008) (per curiam).

565. *See id.* at 301-14; *cf. id.* at 311-14 (reciting but not applying the *Briseno* factors).

566. *See id.* at 303-04. The Fifth Circuit noted the State's view that Williams was deliberately performing poorly on the IQ tests and the inconsistency between the IQ test results and his achievement test results and high school performance. The appellate court stated that the trial court was not restricted to a consideration of IQ test results alone in determining Williams' intellectual functioning. *See id.* at 308-11.

567. *See id.* at 304-05, 312.

568. *See id.* at 305-07, 312, 314. The Fifth Circuit found that the trial court could consider Williams' adaptive strengths as well as weaknesses in determining whether any of his alleged adaptive deficits were significant. *See id.* at 312-14.

to establish either the intellectual or adaptive functioning elements were not clearly erroneous and affirmed the denial of *Atkins* relief.⁵⁶⁹

c. Contested *Atkins* Claims Unsuccessful in Texas State and Federal Courts

The cases of two offenders (James Clark and Curtis Moore)⁵⁷⁰ illustrate vigorously contested *Atkins* claims that were nevertheless unsuccessful in Texas state and federal courts. James Clark's full scale IQ test results were seventy-four at age fifteen (WISC-Revised), sixty-eight (Kaufman) by the defense *Atkins* expert, and sixty-five (WAIS-III) by the *Atkins* expert initially retained by the State.⁵⁷¹ The defense expert assessed Clark's adaptive functioning using the VABS and SIB-R tests, and the original State expert used the ABAS test to find deficits in four skill areas. Both of these experts determined that Clark was mentally retarded.⁵⁷² The defense also presented evidence of Clark's special education placement and record evidence from his juvenile incarceration indicating adaptive functioning deficits.⁵⁷³ The State presented evidence that Clark's first IQ score underrepresented his intellectual capacity and asserted that the *Atkins* IQ and adaptive

569. See *id.* at 300, 308, 310–11, 312, 314 (noting deference to the trial court's credibility determinations).

570. *Moore v. Quarterman*, 517 F.3d 781 (5th Cir. 2008); *Clark v. Quarterman*, 457 F.3d 441 (5th Cir. 2006); *Moore v. Quarterman*, No. 4:07-CV-077-A, 2007 U.S. Dist. LEXIS 49024 (N.D. Tex. July 6, 2007); *Ex parte Moore*, WR-42,810-03 (Tex. Crim. App. Jan. 31, 2007) (per curiam); *Ex parte Clark*, No. 37288-02, 2004 WL 885583 (Tex. Crim. App. Mar. 3, 2004) (per curiam); *cf.* *Thomas v. Quarterman*, 335 F. App'x 386 (5th Cir. 2009) (per curiam) (denying certificate of appealability after finding the Texas courts' resolution of the conflicting evidence, including rejection of the Flynn effect, not unreasonable and no error in the federal trial court's denial of *Atkins* relief without an evidentiary hearing); *Lewis v. Quarterman*, 541 F.3d 280 (5th Cir. 2008) (vacating federal trial court's denial of *Atkins* relief and remanding for consideration of additional, previously proffered *Atkins* evidence); *Lewis v. Quarterman*, 272 F. App'x 347 (5th Cir. 2008) (per curiam) (denying certificate of appealability regarding evidentiary and procedural issues related to *Atkins* claim); *Lewis v. Thaler*, No. 5:05cv70, 2010 U.S. Dist. LEXIS 111135 (E.D. Tex. Oct. 19, 2010) (denying *Atkins* claim after considering additional proffered evidence); *Lewis v. Quarterman*, No. 5:05cv70, 2007 U.S. Dist. LEXIS 45358 (E.D. Tex. June 22, 2007) (denying *Atkins* relief based on intellectual functioning alone after finding the evidence in "equipoise"); *Ex parte Thomas*, WR-16,556-04, 2006 Tex. Crim. App. Unpub. LEXIS 61 (Tex. Crim. App. Dec. 13, 2006) (per curiam); *Ex parte Lewis*, No. 44,725-02 (Tex. Crim. App. June 29, 2005).

571. See Transcript of Record at 765, 768, 771, *Clark*, 2004 WL 885583 (Nos. F-93-0713-C; 37288-02) (containing Clark's proposed Findings of Fact and Conclusions of Law).

572. See *id.* at 763–71 (concluding that Clark was not manipulating the test results).

573. See *id.* at 771–72.

functioning test results were subject to Clark's manipulation.⁵⁷⁴ Evidence from several lay, investigative, and correctional witnesses described Clark's completion of a GED, his ability to work and live independently in the community, his adaptation to life in custody, and his ability to plan the commission of his crime and its concealment.⁵⁷⁵ The State also presented an additional expert who, based on a review of the records and an interview of Clark, concluded that he was not mentally retarded.⁵⁷⁶

The convicting trial court substantially utilized the State's proposed findings and conclusions in this pre-*Briseno* case.⁵⁷⁷ After citing the five-point standard measurement error regarding each IQ test, the trial court concluded that Clark's IQ result of seventy-four at age fifteen had been deemed reliable by all of the experts and it was the most reliable test result. The trial court further concluded that it underrepresented Clark's intellectual functioning, and it did not reflect significant intellectual functioning deficits.⁵⁷⁸ The trial court also found that the retrospective adaptive behavior tests were not reliable indicators of Clark's adaptive functioning during the developmental period due, in part, to their reliance on information supplied by Clark and others with a bias. Instead, the trial court determined that record and testimonial evidence of Clark's actual adaptive functioning in the community, in youth and adult custody, and regarding his crime reflected an absence of adaptive functioning deficits during the developmental period and in adulthood.⁵⁷⁹ Agreeing with the assessment of the State's *Atkins* hearing expert, the trial court found that Clark was not mentally retarded.⁵⁸⁰

The Texas Court reviewed the evidence relied on by the convicting trial court, determined that its findings and conclusions

574. *See id.* at 779–81, 789–90 (containing the State's Proposed Findings of Fact and Conclusions of Law).

575. *See id.* at 782–89 (including educational and work activities during juvenile incarceration, active engagement during trial, and reading and adaptive activities in prison).

576. *See id.* at 790–91 (concluding that Clark had an antisocial personality disorder).

577. *See id.* at 1–19 (containing Findings of Fact and Conclusions of Law).

578. *See id.* at 4–7 (noting Clark's intellectual potential between the dull average and average ranges based on his first IQ test, his verbal component score of seventy-four on the WAIS-III test, and the manipulation potential regarding the *Atkins* IQ testing).

579. *See id.* at 7–18.

580. *See id.* at 18 (finding, alternatively, that even if Clark was in the upper ranges of mild mental retardation, he was not so impaired as to fall within the national consensus warranting an exemption from execution).

were supported by the record, and denied Clark *Atkins* relief.⁵⁸¹ Finding no error in the Texas courts' determination that Clark had failed to establish the intellectual functioning component of mental retardation, the federal trial court denied his federal claim for *Atkins* relief.⁵⁸² On appeal, the Fifth Circuit held that it was not contrary to clearly established federal law for the Texas courts to fail to use the lowest IQ score in the measurement error range in assessing this element.⁵⁸³ The appellate court further found that the federal trial court did not err in its resolution of this aspect of Clark's *Atkins* claim, and that the federal trial court did not err in only considering this aspect of the mental retardation definition in denying Clark's *Atkins* claim.⁵⁸⁴ Out of an "abundance of caution," the Fifth Circuit reviewed the Texas Court's findings regarding the adaptive functioning and developmental period onset elements. The Fifth Circuit noted the appropriate role of evidence of adaptive strengths in a skill area to demonstrate the absence of an adaptive weakness in the skill area. It also found no error in the Texas courts' finding that evidence of Clark's actual adaptive functioning was more credible than the retrospective adaptive behavior assessments administered by the *Atkins* experts. The Fifth Circuit found that Clark had failed to show by clear and convincing evidence that the Texas Court made unreasonable factual determinations based on the presented evidence and affirmed the denial of *Atkins* relief.⁵⁸⁵

Curtis Moore presented, in support of his *Atkins* claim, evidence of two full scale IQ scores of sixty-eight and seventy-two on WISC-Revised tests taken at ages twelve and thirteen, respectively; a youth incarceration recommendation of special education; and an *Atkins* IQ

581. See *Clark*, 2004 WL 885583 (noting also Clark's achievement test results "only slightly below" grade norms, special education placement due to truancy and negative behavior, juvenile diagnosis of conduct disorder, and planning associated with the crime).

582. See *Clark v. Quarterman*, 457 F.3d 441, 443 (5th Cir. 2006).

583. See *id.* at 444–46. The Fifth Circuit noted that although the Court referred to the AAMR and APA mental retardation definitions in *Atkins*, the Court did not mandate that states exactly follow all of the professional organizations' approaches in diagnosing mental retardation. See *id.* at 445. In implementing *Atkins*, the Texas Court had advised flexibility in interpreting IQ scores. See *id.* at 444. This approach suggests that courts should not "rigidly consider an IQ score to be determinative of the defendant's intellectual functioning." *Id.* at 445. In light of the evidence of Clark's intellectual functioning described above, the Texas Courts' determination regarding this element of mental retardation was not unreasonable. See *id.* at 445–46.

584. See *id.* at 443–44 (noting the offender's burden to establish all three elements of mental retardation).

585. See *id.* at 446–48.

score of sixty-three (WAIS-III). Moore asserted that his IQ score of seventy-six (WAIS-Revised) as assessed at trial was inflated due to the Flynn effect. The expert who administered this test (as well as Moore's initial IQ test) reviewed Moore's *Atkins* expert's findings and agreed that Moore was mentally retarded.⁵⁸⁶ Moore's adaptive behavior deficits were supported by information supplied by juvenile records, correctional personnel, and family members regarding his limitations in self-care, communication, and academic and social skills. He also presented *Atkins* VABS test results reflecting deficits in communication, daily living, and socialization, in addition to achievement test results at the fourth to sixth grade level.⁵⁸⁷ Regarding his intellectual functioning, the State asserted that Moore's initial IQ test underrepresented his intellectual functioning, and additionally cited a full scale IQ score of seventy-two (WISC-Revised) at age fifteen, the trial IQ score of seventy-six (rejecting any Flynn effect), and its own *Atkins* IQ score of seventy-six (WAIS-III).⁵⁸⁸ As to Moore's adaptive functioning, the State noted his written and oral communication abilities reflected during his incarceration and at trial; his work abilities in prison and in the community; his completion of his GED while in prison; his adaptive functioning during his school, community, and incarceration periods; his relationships with women; his leadership role in planning, executing, and attempting to avoid detection and responsibility for his crime; and his satisfactory performance in seven of nine areas measured by the *Atkins* SSSQ test administered.⁵⁸⁹ The State noted the absence of any pre-*Atkins* diagnosis of Moore's mental retardation.⁵⁹⁰

586. See Transcript of Record at 661–63, *Ex parte* Moore, WR-42,810-03 (Tex. Crim. App. Jan. 31, 2007) (per curiam) (Nos. C-297-006492-0631559-C; WR-42,810-03) (containing Applicant's Proposed Findings of Fact and Conclusions of Law) (noting also the absence of records regarding any additional IQ test administered at age fifteen and criticizing the State's *Atkins* IQ score as the outlier).

587. See *id.* at 663–64; see also *id.* at 12–14 (containing expert affidavit accompanying Moore's initial *Atkins* application); *id.* at 74–77 (containing information from Moore's amended application); *cf. id.* at 664 (criticizing the State expert's use of the SSSQ test to measure adaptive behavior).

588. See *id.* at 130–33 (containing State's Reply to Moore's amended pleading).

589. See *id.* at 133–43 (criticizing the defense expert's use of the VABS test and attacking the inconsistencies in and limitations of the defense expert witnesses and inconsistencies in and credibility of the defense lay witnesses).

590. See *id.* at 143 (noting characterizations of his borderline to low-average intellectual functioning and diagnoses of conduct and behavior disorders).

The convicting trial court substantially adopted the State's proposed findings and conclusions.⁵⁹¹ The trial court noted all of the IQ scores described above. It found that Moore's initial IQ scores of sixty-eight and seventy-two underrepresented his intellectual capacity; none of his IQ scores should be adjusted for the Flynn effect; his *Atkins* expert's score was likely affected by his poor motivation or the test setting; the State expert's test results were not affected by any practice effect and were a reliable and accurate measure of Moore's IQ; and multiple IQ assessments supported a determination that Moore functioned in the borderline (not mentally retarded) range of intellectual functioning.⁵⁹² Regarding Moore's adaptive functioning, the court adopted the State's evidence of Moore's adaptive functioning (including the State expert's SSSQ results as one source of adaptive functioning information). The trial court found the defense expert and lay witnesses' evidence inconsistent or less credible and found fault with the defense expert's use and administration of the VABS test. Finally, the convicting trial court found that Moore failed to satisfy each element of the *Briseno* factors.⁵⁹³ The trial court noted that Moore had no pre-*Atkins* diagnosis of mental retardation and concluded instead that he had a conduct and oppositional disorder that developed into an antisocial personality disorder.⁵⁹⁴

With the exception of one factual finding, the Texas Court adopted the convicting trial court's findings and conclusions and denied Moore *Atkins* relief.⁵⁹⁵ The federal trial court reviewed the conflicting evidence regarding Moore's intellectual and adaptive functioning, including the evidence applying the *Briseno* factors that "amply supported" the absence of significant deficits in his adaptive behavior. The federal trial court concluded that the Texas courts' finding that Moore was not mentally retarded was not unreasonable

591. *See id.* at 643–59 (containing State's Proposed Findings of Fact and Conclusions of Law); *id.* at 667 (containing trial court's order correcting one aspect of a proposed factual finding).

592. *See id.* at 646–50 (reciting a State *Atkins* IQ score of seventy-eight rather than seventy-six).

593. *See id.* at 650–57.

594. *See id.* at 646, 647, 649, 656 (noting developmental period diagnoses of borderline intellectual functioning and oppositional syndrome).

595. *See Moore*, WR-42,810–03 (deleting the factual finding rejecting the conclusions of one of the defense experts who did not personally examine Moore).

and was thus entitled to due deference under the AEDPA.⁵⁹⁶ The Fifth Circuit, though it described the conflicting nature of the evidence, determined that Moore presented a “thin case” of mental retardation and accordingly denied his application for a certificate of appealability from the trial court’s denial of his *Atkins* claim.⁵⁹⁷

4. Conclusion

The vast majority of Texas *Atkins* claims have been pursued through the collateral review process in Texas state and federal courts.⁵⁹⁸ The Texas Court has found that approximately thirty percent of the eighty-one *Atkins* collateral review claimants presented insufficient evidence of their mental retardation to warrant further review and has dismissed their subsequent writ applications as an abuse of the writ.⁵⁹⁹ On the other hand, approximately ten percent of these *Atkins* claimants successfully established their claims following agreed findings of their mental retardation.⁶⁰⁰ In their review of the remainder of these *Atkins* claims (representing approximately sixty percent of the total number of claimants), Texas state and federal trial courts have been presented with an array of often conflicting expert and lay testimony and record evidence.⁶⁰¹ Not surprisingly, as illustrated by the cases presented above, these fact-intensive inquiries have not produced uniform results: sometimes seemingly similar factual presentations have produced differing determinations of mental retardation⁶⁰² and courts have not always uniformly interpreted the elements of the mental retardation definition.⁶⁰³ In

596. See *Moore v. Quarterman*, No. 4:07-CV-077-A, 2007 U.S. Dist. LEXIS 49024, at *15–20 (N.D. Tex. July 6, 2007).

597. See *Moore v. Quarterman*, 517 F.3d 781, 784 (5th Cir. 2008).

598. Compare *supra* Table 1 (describing collateral review cases), with *infra* Table 2 (describing direct appeal cases).

599. See *supra* Table 1 (identifying twenty-four *Atkins* claimants whose cases were dismissed due to the absence of prima facie or clear and convincing evidence, but not including Moore and Rivera who successfully established their mental retardation in federal court).

600. See *supra* Table 1; *supra* notes 407–66 and accompanying text (describing these eight cases resolved by the Texas Court and Texas Governor).

601. See *supra* Table 1 (identifying the remaining forty-nine *Atkins* claimants); *supra* notes 376–400 and accompanying text (describing challenges in the review of *Atkins* claims).

602. Compare *Ex parte Plata*, No. AP-75,820, 2008 Tex. Crim. App. LEXIS 1398 (Tex. Crim. App. Jan. 16, 2008) (per curiam), with *Ex parte Chester*, No. AP-75,037, 2007 Tex. Crim. App. LEXIS 1852 (Tex. Crim. App. Feb. 28, 2007).

603. See, e.g., Transcript of Record at 440–45, *Chester*, 2007 Tex. Crim. App. LEXIS 1852 (Nos. 76044-B; 45,249-02; AP-75,037) (using Texas Education Agency IQ standard);

some cases, the *Briseno* factors, unique to Texas *Atkins* proceedings, have played a determinative role in the rejection of a mental retardation finding.⁶⁰⁴ In light of the offender's burden of proof, "close" cases are more likely to be resolved against the offender.⁶⁰⁵ Following contested proceedings in Texas state and federal trial courts, approximately seven percent of the total number of *Atkins* collateral review claimants have successfully established their *Atkins* claim and approximately fifty-three percent have not.⁶⁰⁶

The factual determinations by these Texas trial courts have played a critical role in these *Atkins* proceedings. The Texas Court has repeatedly noted the significant deference it accords to the convicting trial courts' *Atkins* mental retardation findings.⁶⁰⁷ Although there have been occasional disagreements between the Texas Court and convicting trial courts concerning aspects of an *Atkins* claim, the Texas Court has never rejected a convicting trial court's ultimate determination of mental retardation.⁶⁰⁸ Similarly, the AEDPA prescribes a highly deferential review standard regarding state court factual findings, including those regarding mental retardation in an *Atkins* claim.⁶⁰⁹ Consequently, the Texas federal courts have denied *Atkins* relief in all cases subject to the AEDPA review standard and made mental retardation findings only in two cases subject to de novo review in federal court.⁶¹⁰ Thus, although

Transcript of Record at 37–51, *Ex parte Taylor*, No. WR-48,498-02, 2006 Tex. Crim. App. LEXIS 2534 (Tex. Crim. App. Feb. 1, 2006) (per curiam) (Nos. C-297-006327-0542281-B; WR-48,498-02) (finding SSSQ adaptive behavior assessment more persuasive than VABS and SIB-R tests).

604. See, e.g., *Chester*, 2007 Tex. Crim. App. LEXIS 1852, at *12–27; see also *infra* notes 857–72 and accompanying text.

605. See *Ex parte Henderson*, No. WR-37,658-03 (Tex. Crim. App. Jan. 25, 2006) (Cochran, J., joined by Keller, P.J., and Price and Johnson, J.J., concurring) (indicating the case represented a "close question" regarding the determination of Henderson's mental retardation).

606. See *supra* notes 467–517 and accompanying text (describing six successful contested *Atkins* cases); see also *supra* Table 1 (identifying forty-three remaining unsuccessful *Atkins* claimants).

607. See, e.g., *Ex parte Cockrell*, No. AP-76,168, 2009 Tex. Crim. App. Unpub. LEXIS 409, at *2–3 (Tex. Crim. App. June 10, 2009) (per curiam); *Chester*, 2007 Tex. Crim. App. LEXIS 1852, at *10–12; *Ex parte Modden*, 147 S.W.3d 293, 298–99 (Tex. Crim. App. 2004).

608. See *supra* notes 524–58 and accompanying text (describing illustrative cases); see also *supra* Table 1.

609. See, e.g., *Thomas v. Quarterman*, 335 F. App'x 386, 388–91 (5th Cir. 2009) (per curiam); *Clark v. Quarterman*, 457 F.3d 441, 443–48 (5th Cir. 2006).

610. See *supra* notes 372, 501–17 and accompanying text (describing the de novo review cases); see also *supra* Table 1 (identifying unsuccessful *Atkins* claims in Texas federal courts).

Atkins has generated significant collateral review litigation in Texas, it has resulted in relatively limited changes in the capital outcomes of these cases.⁶¹¹

V. The Texas Court and Texas Trial Courts Address *Atkins* Claims

A. Overview

Unlike the significant number of *Atkins* claims that have been raised through the collateral review process in Texas state and federal courts, relatively few *Atkins* claims have been raised during Texas capital trial proceedings or on direct review by the Texas Court in the period since the *Atkins* decision in 2002.⁶¹² Nevertheless, in the absence of legislative action, the Texas Court has provided a general framework for the resolution of *Atkins* claims at trial and on direct appeal.⁶¹³

In *Hall v. State*,⁶¹⁴ the Texas Court's first direct appeal decision involving an *Atkins* claim and decided a few months after *Briseno*,⁶¹⁵ the Texas Court applied several aspects of its interim *Atkins* collateral review procedures to cases in the trial and direct appeal stages. At the outset, the Texas Court identified key components of the interim *Atkins* procedure it had adopted in the collateral review context. It had defined mental retardation for *Atkins* purposes as "(1) 'significantly subaverage general intellectual functioning' (an IQ of

611. See *supra* Table 1 (describing the results in these cases). Factors describing the difference in the Texas results in *Atkins* cases and those elsewhere are described more fully *infra* notes 707–87 and accompanying text.

612. Compare *supra* Table 1 (describing *Atkins* claims on collateral review), with *infra* Table 2 (describing *Atkins* claims at trial and on direct appeal).

613. See *infra* notes 614–65 and accompanying text (describing these standards).

614. *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004).

615. The *Hall* appeal reached the Texas Court in an unusual posture. Evidence regarding mental retardation was introduced in Hall's pre-*Atkins* trial with reference to the mitigating evidence punishment issue and no specific findings were sought regarding mental retardation as a separate issue. The Texas Court had rejected Hall's claim that the execution of mentally retarded persons was unconstitutional when it initially considered his appeal prior to *Atkins*. While Hall was pursuing a certiorari petition on this issue from the Court, he asserted the same claim in state habeas corpus proceedings. While both matters were pending, the Court announced its *Atkins* decision. The Court subsequently vacated Hall's direct appeal judgment and remanded the appeal for reconsideration based on its *Atkins* ruling—an action resulting in the instant appellate decision. Before the Texas Court delivered its decision in the direct appeal case, however, the state habeas corpus proceeding was completed, with the Texas Court denying *Atkins* relief based on the convicting court's determination that Hall was not mentally retarded. See *id.* at 26–27.

about 70 or below), (2) ‘related limitations in adaptive functioning,’ and (3) onset of the above two characteristics before age eighteen.”⁶¹⁶ The Texas Court had entrusted the fact-finder with the determination of mental retardation, with expert testimony relevant, but not “necessarily conclusive” in this determination. It had concluded that no separate jury determination of mental retardation was required. The Texas Court stated that, at least in the habeas corpus context, it had assigned the defendant the burden to prove mental retardation by a preponderance of the evidence. The Texas Court completed its recitation of its interim *Atkins* collateral review procedure by stating that its appellate review would be characterized by “almost total deference” to trial courts’ factual findings, especially those based on credibility and demeanor determinations.⁶¹⁷

The Texas Court then noted that none of the typical bases for differences in the evaluation of claims on direct appeal and habeas corpus review were present in the *Hall* case.⁶¹⁸ However, with regard to cases tried before, but appealed after, *Atkins*, the Texas Court acknowledged that a “serious question” about the adequacy of the direct appeal record with regard to the *Atkins* mental retardation issue would be presented. In such cases, mental retardation evidence would have been presented at trial only in terms of its relevance to the elements of the crime or the sentencing issues, and not for the purpose of establishing a constitutional bar to execution.⁶¹⁹

616. *Id.* at 36 (quoting *Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004)). In *Briseno*, the Texas Court identified the similar pre-*Atkins* AAMR and Texas mental retardation law definitions as the bases for the mental retardation definition it adopted for *Atkins* purposes. In its recitation of the mental retardation definition in *Hall*, the Texas Court used language from the AAMR definitions it cited. *Compare id.* at 36, with *Briseno*, 135 S.W.3d at 7; *see supra* notes 227–40 (containing definitions from *Briseno*).

617. *Hall*, 160 S.W.3d at 36. Only with regard to the assignment to the defendant of the burden to prove mental retardation by a preponderance of the evidence did the Texas Court add the additional qualifier that these standards were established “at least on habeas corpus,” implicitly indicating the application of the other standards to proceedings beyond the habeas corpus context. *See id.*

618. The Texas Court identified these aspects as related to potential differences in the adequacy of the appellate and habeas corpus record to support a claim and differences in the evaluation standards sometimes applied to claims in these differing contexts. Because the Texas Court concluded that it could consider the evidence developed in connection with the habeas corpus proceedings in this appeal and because it applied essentially the same review standards to the *Atkins* claim presented on direct appeal, the Texas Court determined that these noted differences were not relevant in the instant case. *See id.* at 36–38.

619. *See id.* at 37; *see also id.* at 40–41 (Price, J., joined by Cochran, J., concurring) (noting the general advisability of an evidentiary hearing to resolve contested *Atkins* claims); *id.* at 41–44 (Johnson, J., joined by Holcomb, J., dissenting) (criticizing the

Nevertheless, other aspects of the procedures articulated in *Briseno* applied with equal force in the trial and appellate stages, specifically the burden and standard of proof and appellate review standard.⁶²⁰ The Texas Court repeated its comparison of the *Atkins* mental retardation determination to an affirmative defense, and expanded the analogy to several statutory punishment-reducing factors, all of which required that the defendant prove the “discrete” facts at issue by a preponderance of the evidence.⁶²¹ The Texas Court therefore concluded: “Given the legislative backdrop for similar affirmative defenses and analogous punishment mitigating factors, we find, absent further legislative guidance, that mental retardation is the type of issue that must be proven by the defendant by a preponderance of the evidence—regardless of when the claim is presented.”⁶²² Based on this conclusion, the Texas Court further determined that the review standard of “almost total deference” to the trial court’s factual findings (if supported by the record), as adopted in the habeas corpus context, also applied on direct appeal: “Given the same burden, the standard of deference will also be the same, whether the Court conducts a sufficiency review of a mental retardation claim decided at trial or a legal review of a trial court’s recommendation on habeas corpus.”⁶²³

reliance on punishment evidence and affidavit evidence in rejecting Hall’s *Atkins* claim); *id.* at 44–45 (Holcomb, J., dissenting) (criticizing the reliance on punishment evidence and affidavit evidence in rejecting Hall’s *Atkins* claim).

620. *See id.* at 38–39.

621. In *Briseno*, the Texas Court had compared the *Atkins* mental retardation determination to an insanity affirmative defense and to the competency to stand trial and to be executed determinations. *See Briseno*, 135 S.W.3d at 12. In *Hall*, the appellate court expanded the analogy to certain punishment-reducing factors, such as murder committed in the context of sudden passion and a release of the victim in a safe place in an aggravated kidnapping context. In each of these areas, the Texas Legislature assigned the defendant the burden of proof by a preponderance of the evidence. Moreover, the Texas Court found that like the punishment-reducing factors, the proof of mental retardation involves a “single, discrete fact” and contrasted this with the proof relating to the mitigating circumstances sentencing issue. *See Hall*, 160 S.W.3d at 38–39.

622. *Hall*, 160 S.W.3d at 39; *see Escamilla v. State*, 143 S.W.3d 814, 827–28 (Tex. Crim. App. 2004) (rejecting the contention that the State must affirmatively show that a capital defendant is not mentally retarded).

623. *Hall*, 160 S.W.3d at 39. Interestingly, the Texas Court compared this deferential review standard to that articulated by the Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1972), regarding review of the legal sufficiency of the evidence in support of a guilt determination. In this analysis, evidence is reviewed in the light most favorable to the prosecution to determine whether a rational fact-finder could have found the elements of the crime beyond a reasonable doubt. In a guilt determination, of course, the prosecution has the burden of proof beyond a reasonable doubt. *See Hall*, 160 S.W.3d at 39 & n.48.

In *Atkins* direct appeal cases after *Hall*, the Texas Court has maintained most of the standards adopted in *Hall*, clarified and articulated other standards, and left some standards open for resolution in the trial and direct appeal context.⁶²⁴ At the outset, the Texas Court has held that there is no separation of powers constitutional violation as a result of the Texas Court's articulation of *Atkins* standards in the absence of legislative action.⁶²⁵ The Texas Court has maintained the burden and standard of proof allocations identified in *Hall*, i.e., placing the burden of proof on the offender to prove his mental retardation by a preponderance of the evidence at trial.⁶²⁶ The determination of mental retardation at trial is a question of fact, based on all the expert and lay evidence and credibility findings.⁶²⁷ On appellate review of a factual finding at trial that an offender is *not* mentally retarded, the Texas Court considers all of the relevant evidence presented, and with "great deference" to the fact-finder's conclusion, determines whether the mental retardation finding is "so against the great weight and preponderance of the evidence as to be manifestly unjust."⁶²⁸

In the *Atkins* context, however, the Texas Court had placed the mental retardation burden of proof on the defendant by a preponderance of the evidence after comparing this determination to affirmative defenses and punish-reducing factors. In this context, the Texas Court had previously adopted a review standard concerning findings adverse to the defendant which reviewed all the evidence presented without the restriction to that most favorable to the prosecution and which set aside the adverse finding if it was "so against the great weight and preponderance of the evidence so as to be manifestly unjust." *Meraz v. State*, 785 S.W.2d 146, 154–55 (Tex. Crim. App. 1990). In subsequent *Atkins* direct appeal cases, the Texas Court referred to this review standard rather than the legal sufficiency standard. See *infra* note 628 and accompanying text.

624. See *infra* notes 625–65 and accompanying text (describing these cases).

625. See *Neal v. State*, 256 S.W.3d 264, 270–72 (Tex. Crim. App. 2008) (finding that *Atkins* does not require legislative implementation procedures and declining to delay *Atkins* proceedings until legislative action). The Texas Court also rejected an equal protection claim based on the absence of uniform statutory procedures and the possibility of different procedures being utilized by different trial courts. See *id.* at 272.

626. See, e.g., *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *10 (Tex. Crim. App. May 5, 2010); *Neal*, 256 S.W.3d at 273, 277; *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).

627. See *Lizcano*, 2010 WL 1817772, at *10.

628. See *id.* at *35–37; see also *Gallo*, 239 S.W.3d at 770 (quoting *Meraz*, 785 S.W.2d at 155); cf. *Lizcano*, 2010 WL 1817772, at *39 n.39 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting) (concluding that the result of an appellate finding of insufficient evidence regarding mental retardation would be a remand for a new sentencing hearing unless the State requested a sentence reformation to life imprisonment). But cf. *Hall*, 160 S.W.3d at 39 (citing a different review standard); *supra* note 623.

The Texas Court has stated that an offender is entitled to a “full and fair hearing” on his mental retardation claim at trial.⁶²⁹ However, it has declined to specify who must be the fact-finder for an *Atkins* claim at trial and it has rejected claims of error based on the fact-finder in particular cases.⁶³⁰ In this connection, the Texas Court has found no due process violation in a trial court’s denial of an offender’s request for a pretrial determination of mental retardation by a judge or specially called jury.⁶³¹ It has held that a jury determination of mental retardation at trial is not required by *Atkins*.⁶³² In instances in which a jury has served as the fact-finder regarding mental retardation at trial, the Texas Court has found no error in the jury that determined guilt also determining mental retardation during the punishment proceedings in the case (rather than a separate jury).⁶³³ The Texas Court has further held that a punishment phase determination of mental retardation sufficiently protects an offender’s constitutional rights under *Atkins*.⁶³⁴ In fact, the Texas Court has indicated that the jury that has determined guilt might be “especially well-prepared” to also consider an offender’s mental retardation due to its knowledge of the facts of the crime that may be relevant to mental retardation.⁶³⁵ In instances in which both the trial judge and jury have made mental retardation findings, the

629. *Williams v. State*, 270 S.W.3d 112, 132 (Tex. Crim. App. 2008).

630. See *infra* notes 631–39 and accompanying text.

631. See *Lizcano*, 2010 WL 1817772, at *8–9 (suggesting that the defense policy argument for a pretrial determination be addressed to the Legislature). In another case, the Texas Court found that the trial court did not err in denying the offender’s request for the pretrial determination of his mental retardation by a judge or separate jury in the “absence of legislation or a constitutional requirement directing when the determination of mental retardation is to be made or by whom.” *Hunter v. State*, 243 S.W.3d 664, 672 (Tex. Crim. App. 2007). But see *Neal*, 256 S.W.3d at 285 (Meyers, J., concurring) (stating that mental retardation should be determined by a separate jury prior to the capital trial in cases in which the offender makes a prima facie case of his *Atkins* claim).

632. See *Hunter*, 243 S.W.3d at 672; *Gallo*, 239 S.W.3d at 770. Both of these cases cited the Court’s decision in *Schriro v. Smith*, 546 U.S. 6, 7–8 (2005) (per curiam), holding that the Ninth Circuit erred in preemptively requiring Arizona courts to conduct a jury trial to determine the mental retardation of an offender before the state court had the opportunity to apply its own procedures to the *Atkins* claim.

633. See *Neal*, 256 S.W.3d at 272 (rejecting claim of error based on trial court’s refusal to empanel a separate jury to determine mental retardation).

634. See *Lizcano*, 2010 WL 1817772, at *8–9.

635. See *id.*, at *9 (quoting *Neal*, 256 S.W.3d at 272). But see *Neal*, 256 S.W.3d at 285 (Meyers, J., concurring) (noting the negative aspects of the punishment jury deciding mental retardation).

Texas Court has addressed only the finding of the jury.⁶³⁶ In a few cases tried prior to *Atkins*, but resolved on direct appeal after *Atkins*, the Texas Court has effectively served as fact-finder regarding mental retardation during the appellate proceedings.⁶³⁷ Although contested

636. See *Neal*, 256 S.W.3d at 264; Lomi Kriel, *Court Rejects Appeal of Man Who Killed Heights Teacher*, SAN ANTONIO EXPRESS-NEWS, June 19, 2008, at B2 (indicating that the trial judge also made a finding that the offender was not mentally retarded). The *Atkins* decision was announced during the retrial of Johnny Paul Penry following the Court's second reversal of his case. The defense attorney, with the agreement of the prosecutor, requested that the trial judge make a determination regarding Penry's mental retardation. The trial judge found that Penry was not mentally retarded, out of the presence of the jury. The parties subsequently agreed to submit an issue regarding mental retardation to the jury during the sentencing proceeding, using the three-part definition, but no burden of proof. The jury found that Penry was not mentally retarded. See Mark Babineck, *Jury Sentences Johnny Paul Penry to Death*, ASSOCIATED PRESS STATE & LOCAL WIRE, July 4, 2002; John Council, *The Penry Predicament: How Should Texas Handle Mental Retardation Claims in Capital Cases?*, TEX. LAWYER, July 15, 2002, at 1. The Texas Court's subsequent reversal of Penry's death sentence was based on errors in the trial court's instructions. See *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005); *infra* notes 660–64 and accompanying text (describing this decision).

637. See *Hall v. State*, 160 S.W.3d 24 (Tex. Crim. App. 2004). The Court had vacated the judgment in Hall's initial appeal and remanded the case for reconsideration following *Atkins*. Prior to the Texas Court's reconsideration of this direct appeal, it had already denied relief on an intervening habeas corpus application asserting an *Atkins* claim. See *supra* note 615 (describing the procedural history of the case). The Texas Court determined that the habeas corpus proceeding "satisfied the mandate" of *Atkins*. Its own judicial notice of the habeas corpus proceedings and their outcome satisfied the Court's remand order in the direct appeal case. Moreover, because the Texas Court had determined that the burden of proof and standard of review regarding the *Atkins* claim were the same in the collateral review and direct appeal contexts, its conclusion on the merits of the claim was the same on direct appeal as in the habeas corpus proceeding. After "re-reviewing" the trial record and the additional affidavit evidence introduced in the habeas corpus proceeding, the Texas Court found that each supported a finding that Hall was not mentally retarded. See *Hall*, 160 S.W.3d at 39–40; *cf. id.* at 40–41 (Price, J., joined by Cochran, J., concurring) (noting the general advisability of an evidentiary hearing to resolve contested *Atkins* claims). *But see id.* at 41–44 (Johnson, J., joined by Holcomb, J., dissenting) (criticizing the reliance on punishment evidence and affidavit evidence in rejecting *Atkins* claim); *id.* at 44–45 (Holcomb, J., dissenting) (criticizing the reliance on punishment evidence and affidavit evidence in rejecting *Atkins* claim).

During federal collateral review proceedings, the federal trial court initially denied collateral relief based on the state court *Atkins* record. See *Hall v. Quarterman*, 443 F. Supp. 2d 815 (N.D. Tex. 2006). The Fifth Circuit found that Hall had not received a "full and fair" hearing on his *Atkins* claim in state court in light of his pre-*Atkins* trial, pre-*Briseno* habeas corpus proceeding based on affidavit evidence, and some erroneous findings in the state court record. The appellate court determined that the federal trial court abused its discretion in not holding an evidentiary hearing on the *Atkins* claim, vacated its judgment, and remanded the case for an evidentiary hearing. See *Hall v. Quarterman*, 534 F.3d 365, 369–72 (5th Cir. 2008) (per curiam). Following an evidentiary hearing, the federal trial court again denied collateral relief on the *Atkins* claim and the Fifth Circuit affirmed its judgment. See *Hall v. Thaler*, 597 F.3d 746 (5th Cir. 2010) (per curiam); *Hall v. Quarterman*, No. 4:06-CV-436-A, 2009 U.S. Dist. LEXIS 18021 (N.D.

post-*Atkins* mental retardation claims have generally been resolved during punishment proceedings by the jury that determined guilt,⁶³⁸ the Texas Court has not required this procedure in trial proceedings.⁶³⁹ Thus, until the Court or Texas Court or Legislature specifies otherwise, Texas capital trial judges appear to have the discretion to determine when in the capital proceeding and by whom the mental retardation determination is made.⁶⁴⁰

In *Hall*, the Texas Court restated the three-part mental retardation definition articulated in *Briseno*, based on the Texas mental retardation law and AAMR definitions.⁶⁴¹ Post-*Hall* direct appeal cases have also used this three-part definition, as well as the *Briseno* factors.⁶⁴² The Texas Court has characterized the *Briseno* factors as “relevant” to evaluating all three parts of the mental retardation definition.⁶⁴³ It has further rejected the claim that the *Briseno* factors changed the AAMR mental retardation definition by assigning “superior status” to lay evidence regarding adaptive

Tex. Mar. 9, 2009); *cf. Hall*, 597 F.3d at 747 (Higginbotham, J., concurring) (noting the appellate panel’s division regarding whether AEDPA deference was due to the state court finding and the federal trial court’s mental retardation findings under the deferential standard and as an original matter).

In the case of another offender sentenced prior to *Atkins* who raised an *Atkins* claim in his direct appeal, the Texas Court applied its *Briseno* mental retardation definition to the evidence introduced at trial. It concluded that although the trial evidence supported impairment in the offender’s intellectual and adaptive functioning to “some degree,” it was not “sufficiently developed” to establish his mental retardation under the *Briseno* definition. The Texas Court therefore rejected the offender’s *Atkins* claim. *See Howard v. State*, 153 S.W.3d 382, 386–87 (Tex. Crim. App. 2004) (per curiam).

638. *See, e.g., Neal*, 256 S.W.3d at 272.

639. In addressing a challenge on direct appeal regarding the denial of a pretrial mental retardation determination procedure, the Texas Court stated that its *Briseno* interim guidelines “do not address when the determination of mental retardation is to be made.” *Hunter v. State*, 243 S.W.3d 664, 672 (Tex. Crim. App. 2007). In the absence of legislative or constitutional articulation of when or by whom the mental retardation determination must be made, the Texas Court found no error in a trial court’s choice of a punishment jury procedure and rejection of a pretrial procedure to determine mental retardation. *See id.*

640. *See id.*

641. *See Hall*, 160 S.W.3d at 36 (citing *Ex parte Briseno*, 135 S.W.3d 1, 7–8 (Tex. Crim. App. 2004)); *see also Howard*, 153 S.W.3d at 386 (citing *Briseno*’s reference to both definitions).

642. *See Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *10–11 (Tex. Crim. App. May 5, 2010); *Williams v. State*, 270 S.W.3d 112, 113–14 (Tex. Crim. App. 2008); *Hunter*, 243 S.W.3d at 666–67. *See generally Briseno*, 135 S.W.3d at 5–9; *supra* notes 227–40 and accompanying text (discussing the Texas mental retardation definition adopted in *Briseno* for *Atkins* purposes, including the *Briseno* factors).

643. *See Neal*, 256 S.W.3d at 273.

behavior. The Texas Court has concluded that, although these factors incorporate lay evidence (such as regarding the crime and the offender's behavior surrounding its commission), they do not exclude or diminish the importance of expert evidence in the determination of mental retardation. The ultimate factual determination of mental retardation for *Atkins* purposes is based on all of the evidence and related credibility determinations.⁶⁴⁴

Post-*Hall* direct appeal cases have also addressed some evidentiary and other trial-related issues.⁶⁴⁵ The Texas Court has rejected claims that only expert testimony can establish (or disprove) mental retardation and that the prosecution has a burden of production to introduce expert evidence to overcome a mental retardation claim.⁶⁴⁶ Despite the fact that the offender has the burden of proof regarding mental retardation, the State retains the right to make the final punishment argument when mental retardation is presented as one of the punishment issues.⁶⁴⁷

Finally, the Texas Court has addressed post-*Hall* claims of error based on the instructions given to jurors to guide their mental retardation determinations. All of the reviewed instructions used the three-part definition of mental retardation, but provided differing information regarding the diagnostic criteria accompanying them.⁶⁴⁸ In one case, the trial court defined significantly limited intellectual functioning using the AAMR and Texas mental retardation law criterion of two standard deviations below the instrument's mean and included a standard measurement error of five points. The trial court defined the requisite adaptive behavior limitations in terms of the AAMR's more recent consolidated conceptual, social, and practical

644. See *Gallo v. State*, 239 S.W.3d 757, 775–77 (Tex. Crim. App. 2007) (rejecting claim of error based on trial court's denial of a mistrial or additional continuance to gather additional evidence and otherwise respond to *Briseno*, decided during trial).

645. See, e.g., *Lizcano*, 2010 WL 1817772, at *7–8 (finding trial court may order independent State psychological examination when offender indicates intent to use expert evidence of mental retardation and no constitutional violation based on the manner in which the examination was conducted in this case); *Neal*, 256 S.W.3d at 273 (noting testimony regarding the Flynn effect and the Texas Court's past refraining from applying it because it is an "unexamined" principle of insufficient reliability to establish the level of intellectual functioning).

646. See *Lizcano*, 2010 WL 1817772, at *10 (finding that the State's failure to introduce rebuttal expert testimony did not require the trial court to disregard the jury's finding that the offender was not mentally retarded).

647. See *id.* at *15–16 (rejecting claimed error based on trial court denial of defense request to open and close punishment argument regarding mental retardation).

648. See *infra* notes 649–64 and accompanying text (describing these cases).

skill areas and the required performance on standardized measures of two standard deviations below the mean regarding one of these three areas or overall.⁶⁴⁹ The Texas Court rejected the claim that the instructions were “arcane and almost incomprehensible.” It found that the mental retardation issue was litigated pursuant to *Briseno* and the AAMR definition and these instructions were not “glaringly inconsistent” with these standards. Finally, in the absence of a trial objection, the Texas Court concluded that the offender was not deprived of a “fair” determination of his mental retardation or “egregiously harmed” by the instructions.⁶⁵⁰

In another case, the trial court generally used definitions from the Texas mental retardation law, including the two or more standard deviations from the mean criterion for the intellectual functioning component (also used in the AAMR definition). The trial court defined the adaptive functioning component using the Texas law’s definition regarding the “effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person’s age and cultural group” rather than the defense-requested AAMR standard regarding deficits in two or more identified adaptive skill areas.⁶⁵¹ On review, the Texas Court stated that it had endorsed the Texas mental retardation law and AAMR definitions in the *Briseno* interim procedure and therefore the trial court did not err in refusing the offender’s proposed instruction.⁶⁵²

However, in a subsequent case in which this Texas statutory adaptive behavior definition and the *Briseno* factors were used,⁶⁵³ three dissenting Texas Court Judges vigorously rejected their use in measuring the sufficiency of the adaptive functioning evidence.⁶⁵⁴

649. See *Williams v. State*, 270 S.W.3d 112, 133–34 (Tex. Crim. App. 2008); *supra* notes 177, 265–66, 389 and accompanying text (describing these standards).

650. See *id.* 132–34. The jury was also instructed that it could find Williams mentally retarded based on the affirmative votes of ten jurors; a unanimous verdict was required to reject a mental retardation finding; and no verdict on the issue should be entered in the absence of either of these two results. See *id.* at 134 n.30.

651. See *Gallo v. State*, 239 S.W.3d 757, 777–78 (Tex. Crim. App. 2007) (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2010)).

652. See *id.* at 778; see also *id.* (rejecting claim of error based on a defense-requested instruction that the State had the burden to prove the offender was not mentally retarded).

653. See *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *15 (Tex. Crim. App. May 5, 2010).

654. See *id.* at *32–40 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting). The jury returned a general verdict on the mental retardation claim. All

Although the Texas Court had referenced the state mental retardation law definition in *Briseno*, it had also referenced the pre-*Atkins* AAMR definition that included the determination of adaptive functioning by “clinical assessment and, usually, standardized scales.”⁶⁵⁵ The AAMR and APA adaptive functioning definitions referenced in *Atkins* both contained specific diagnostic criteria for assessing adaptive functioning that required deficits in at least two of the identified skill areas.⁶⁵⁶ The dissenting Judges expressed concern that the Texas Court adopted the three-part clinical mental retardation definition in *Briseno* without expressly adopting its accompanying diagnostic criteria identified in *Atkins*, further promulgated non-diagnostic criteria through the *Briseno* factors, and ultimately entrusted the determination of mental retardation to the fact-finder without the explicit incorporation of the diagnostic criteria identified in *Atkins*.⁶⁵⁷ These Judges further explained:

In failing thus to anchor the fact-finder’s decision on the specific diagnostic criteria, we seem to have granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes.

Or, stated another way (in terms of the actual jury instruction that was submitted in this case), *Briseno* would seem to authorize the fact finder to decide just what “the standard” *is* in Texas for “personal independence and social responsibility expected of the person’s age and cultural group”—without necessarily taking into account the specific criteria that diagnosticians in the field routinely use to make that determination.⁶⁵⁸

members of the Texas Court found that Lizcano satisfied the intellectual functioning aspect of the mental retardation definition. However, the Texas Court majority upheld the evidentiary sufficiency of the jury’s presumed rejection of his adaptive functioning deficiency using the Texas mental retardation law definition that had been used at trial without defense objection. *See id.* at *32–33 & n.4.

655. *See id.* at *33 (quoting *Ex parte Briseno*, 135 S.W.3d 1, 7 n.25 (Tex. Crim. App. 2004)).

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

657. *See id.* at *33–35 (noting that the parties and convicting court in *Briseno* had used the AAMR definition, including the diagnostic criteria regarding adaptive functioning).

658. *Id.* at *35.

In order to carry out *Atkins*' mandate, the dissenting Judges maintained that the diagnostic criteria should be incorporated in both the jury instructions regarding mental retardation and the Texas Court's sufficiency review of mental retardation evidence on appeal.⁶⁵⁹

The Texas Court has thus far found one set of jury instructions concerning mental retardation fatally flawed.⁶⁶⁰ In a sentencing proceeding underway when *Atkins* was announced, the trial court incorporated the mental retardation issue into the mitigating evidence punishment instruction. The jury was instructed that mental retardation is mitigating as a matter of law.⁶⁶¹ Under the procedure for the determination of mitigating punishment evidence,⁶⁶² if the jury found that the offender was mentally retarded, it was instructed to answer the mitigating evidence issue in the offender's favor. If it found that the offender was not mentally retarded, the jury was instructed to consider whether "any other" mitigating circumstance existed. In that case, the jury did not find the existence of any mitigating factor.⁶⁶³ On appeal, the Texas Court found that the instruction impermissibly restricted the consideration of mental impairment as a mitigating factor in the event that the jury found the offender was not mentally retarded, and reversed and remanded the death sentence.⁶⁶⁴

Thus, in the absence of legislative action, the Texas Court has articulated most of the core aspects of the procedure to resolve *Atkins* claims at trial and on direct appeal, including the burden and standard of proof, the three-part mental retardation definition, and the appellate review standard. It has not dictated a specific fact-finder regarding mental retardation or specified when in the trial court proceeding the mental retardation finding must be made. The

659. *See id.* at *35, *39–40.

660. *See Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005).

661. *See id.* at 784–85. The trial court did not assign a burden of proof regarding this issue. It used the three-part mental retardation definition. The court defined the intellectual functioning component as an IQ of approximately seventy or below. It defined the adaptive functioning component as deficits in two or more of the specific skill areas. *See id.* at 790; Council, *supra* note 636 (describing the process of deciding on a jury instruction in this case).

662. *See Penry*, 178 S.W.3d at 790 (requiring ten votes to respond in the offender's favor and a unanimous vote to reject the mitigation issue).

663. *See id.* at 785.

664. *See id.* at 783–84, 788–89. *But see id.* at 794–97 (Cochran, J., joined by Keller, P.J., and Keasler and Hervey, JJ., dissenting).

Texas Court continues to address specific evidentiary issues and challenges to jury instructions as they arise.⁶⁶⁵

B. Resolution of *Atkins* Claims in the Texas Court and Texas Trial Courts

Although many fewer *Atkins* claims have been resolved in the Texas trial courts and by the Texas Court on direct appellate review than through the collateral review process, the outcomes in these cases resemble those on collateral review.⁶⁶⁶ In some cases, the evidence of mental retardation has affected the prosecutor's decision not to seek the death penalty in a capital case.⁶⁶⁷ In cases in which the issue of mental retardation has been contested, the capital defendant generally has not prevailed. In fact, as described in the table below, no capital offender has thus far successfully established mental retardation in a contested trial proceeding⁶⁶⁸ or had a trial level rejection of mental retardation reversed on appeal.⁶⁶⁹

665. See *supra* notes 614–64 and accompanying text.

666. Compare *supra* Table 1 (describing collateral review cases), with *infra* Table 2 (describing cases at trial and on direct appellate review).

667. See *infra* Table 2.

668. See *infra* Table 2. In two cases in which the offender raised mental retardation, he received a life sentence on other grounds. See *Depue v. State*, No. 04-08-00487-CR, 2009 WL 5150069 (Tex. App. Dec. 30, 2009) (stating life sentence based on jury's finding regarding punishment issue related to the offender's role in the crime); *Baskin v. State*, No. 01-05-00842-CR, 2007 WL 1441036 (Tex. App. Apr. 2, 2008) (stating life sentence based on jury's finding of unspecified mitigating circumstances); Elizabeth Allen, *Man Gets Life in Retired Edison Teacher's Fatal Shooting*, SAN ANTONIO EXPRESS-NEWS, June 25, 2008, at B2 (indicating punishment jury's rejection of Depue's mental retardation); Andrew Tilghman, *Lawyer Urges Jurors to Spare Life of Killer; Defense Says Man Convicted of Capital Murder Is Mentally Retarded*, HOUS. CHRONICLE, Aug. 11, 2005, at B3 (describing Baskin's assertion of mental retardation during punishment proceeding); cf. *Cooper v. State*, No. 01-03-00835-CR, 2004 WL 2415433 (Tex. App. Oct. 28, 2004) (reflecting a life sentence based on punishment jury finding regarding mitigating circumstances); Council, *supra* note 636, at 1 (describing defense plan to raise Cooper's mental retardation at trial); Ron Nissimov, *Convicted Killer Gets Life in Slayings at Video Store*, HOUS. CHRONICLE, Aug. 8, 2003, at A27 (identifying nonmental retardation mitigating circumstances).

669. The Texas Court reversed Penry's sentence due to an erroneous mitigating circumstances jury instruction. See *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005); *supra* notes 660–64 and accompanying text. In lieu of resentencing, Penry agreed to a life sentence without parole and a stipulation that he was not mentally retarded. Mike Tolson, *An End to a Legal Saga*, HOUS. CHRONICLE, Feb. 16, 2008, at B1 (noting that Penry's death sentence had been reversed three times). Milam's case has not yet been decided by the Texas Court. See Howard Roden, *Jury Gives Milam Death Sentence*, CONROE COURIER NEWS, May 27, 2010, http://www.hcnonline.com/articles/2010/05/27/conroe_courier/news/milam052810b.txt (noting the punishment jury's rejection of Milam's mental retardation claim); cf. Adriana M. Chavez, *Fabian Hernandez Sentenced to Death*, EL PASO TIMES,

Table 2. Action on *Atkins* Claims in Texas Trial Courts and the Texas Court

| Last Name | Prosecutor Action | Trial Stage Action | Texas Court Action | Executed |
|-----------|-------------------|--------------------|--------------------|----------|
| Alexander | No DP | | | |
| Cantu | No DP | | | |
| Delao | No DP | | | |
| Gallo | | No MR | No MR | |
| Hall | | | No MR | |
| Howard | | | No MR | |
| Hunter | | No MR | No MR | |
| Lizcano | | No MR | No MR | |
| Milam | | No MR | | |
| Neal | | No MR | No MR | |
| Penry | | No MR | | |
| Williams | | No MR | No MR | |

Legend: Prosecutor Action: No DP = prosecutor decision not to pursue the death penalty in case in which mental retardation asserted; Trial Stage Action: No MR = mental retardation claim rejected by the fact-finder; Texas Court Action: No MR = Texas Court upholding of fact-finder's rejection of mental retardation on direct appeal or finding, on direct appeal, that evidence did not support a mental retardation finding in cases tried pre-*Atkins*.

Prosecutorial decisions not to pursue the death penalty in cases in which the offender has asserted mental retardation have occurred at various stages of the proceeding. In two cases, the decision was made prior to the capital trial.⁶⁷⁰ In another case, however, jury selection had already begun when the State's experts returned conflicting reports on the defendant's mental retardation. The

Nov. 25, 2009, <http://www.tdcaa.com/node/5576>; Adriana M. Chavez, *Prosecutors, Defense Rest Case in Murder Trial*, EL PASO TIMES, Nov. 11, 2009, 2009 WLNR 22610664 (noting assertion in pretrial filings that Hernandez was mentally retarded). In two cases tried pre-*Atkins*, the Texas Court effectively had a fact-finding role when an *Atkins* claim was made on direct appeal. See *supra* note 637 and accompanying text (describing the Hall and Howard cases).

670. See *Alexander v. State*, 229 S.W.3d 731 (Tex. App. 2007) (noting life sentence for capital murder); *Delao v. State*, No. 10-05-00323-CR, 2006 WL 3317718 (Tex. App. Nov. 15, 2006) (describing capital murderer who received statutory life sentence as suffering from "moderate" mental retardation with an IQ of approximately fifty-five (and schizophrenia, disruptive behavior disorder, and alcohol abuse) in issue regarding the voluntariness of his confession); Maro Robbins & Karisa King, *Retardation Issue Looms Big in Bexar*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 2006, at A1 (noting Alexander's IQ scores from sixty-nine to seventy).

prosecutor decided not to pursue a death sentence to avoid the risk of an “appellate quagmire.”⁶⁷¹

Illustrative cases in which mental retardation has been contested at trial resemble contested *Atkins* collateral review proceedings. In Tomas Gallo’s case, the defense presented evidence that, at age fourteen, he had a full scale WISC-Revised IQ score of seventy-four and an adolescent adaptive behavior test score of seventy-one. He began special resource or education classes at approximately age thirteen and remained eligible for them at age seventeen when he tested at or below a sixth grade level in the tested areas on the WRAT achievement tests. A teacher testified regarding his academic limitations. His mother testified regarding his adaptive functioning limitations, including his inability to perform simple household tasks, read a clock, and make change.⁶⁷² Based on an interview with Gallo and review of various records, the defense expert concluded that Gallo’s intellectual functioning was two standard deviations below average, that he had adaptive limitations in at least two of the clinical skill areas, that both deficiencies were manifest before Gallo was eighteen, and that he was mentally retarded.⁶⁷³

The State’s expert tested Gallo’s full scale IQ at sixty-eight at age twenty-seven, but believed that his IQ was above seventy based on Gallo’s youthful IQ score and the score deflating effect of his depression and anxiety during the recent testing. He adjusted Gallo’s adolescent adaptive testing score from seventy-one to eighty-five based on the test’s “bad” norms. His own ABAS testing resulted in a score of seventy-one, with identified deficiencies in academic functioning and health and safety. However, the expert also noted that the “scaled” score range was sixty-nine to seventy-seven, that Gallo had a high level of adaptive functioning in his own environment (including work, drug selling, and gang activities), and the areas of adaptive deficiency could be attributed to nonmental retardation factors. Based on the above testing and his review of records and interviews of Gallo, four of his teachers, and his juvenile probation officer, the State’s expert concluded that Gallo was not mentally

671. See *Cantu v. State*, No. 13-02-694-CR, 2004 WL 1532263 (Tex. App. July 8, 2004) (reflecting life sentence); John Council, *A Difficult Diagnosis: Determining Mental Retardation in Death Penalty Cases*, TEX. LAWYER, Nov. 4, 2002, at 1 (noting Cantu’s IQ scores of fifty-five and sixty-five and three defense experts that found him mildly mentally retarded).

672. See *Gallo v. State*, 239 S.W.3d 757, 770–72 (Tex. Crim. App. 2007).

673. See *id.* at 770–71 (describing review of school and criminal justice records, an interview transcript with Gallo’s mother, and the results of the State expert’s testing).

retarded.⁶⁷⁴ Cross-examination of Gallo's mother and testimony of another teacher and a juvenile probation officer revealed Gallo's ability to interact and communicate with others, work as a short-order cook as a teen, and find and perform more sophisticated work cleaning reactor tanks and live on his own as an adult.⁶⁷⁵

The jury unanimously found that Gallo was not mentally retarded.⁶⁷⁶ In response to Gallo's challenge to the sufficiency of that finding on appeal, the Texas Court noted that the case involved "dueling" experts and summarized evidence that supported and contradicted a finding of mental retardation. The Texas Court noted that the jury was in the best position to evaluate the conflicting evidence and make related credibility determinations.⁶⁷⁷ The Texas Court then applied the *Briseno* factors and found that they provided "further support" for the jury's conclusion.⁶⁷⁸ The Texas Court found that the evidence was sufficient to support the jury's determination.⁶⁷⁹

Although Clifton Williams had not had his IQ tested prior to age eighteen,⁶⁸⁰ he was evaluated for Social Security disability benefits purposes at age nineteen. In this evaluation, he had a full scale WAIS-III IQ score of sixty-three and WRAT academic performance scores at the fourth grade level. Based on this testing and self-reported information by Williams and his father, he was diagnosed as

674. *See id.* at 772–73. The State's expert stated that Gallo had a lack of motivation and not a lack of ability, noted his ability to perform better academically when motivated, and described his mother's characterization of him as above average in several areas on an adolescent personality inventory test. *See id.*

675. *See id.* at 772–74.

676. *See id.* at 770. The instructions followed the Texas mental retardation law: two or more standard deviations below the test's age group mean for the intellectual functioning component and the "effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group" regarding adaptive functioning. *See id.* at 777–78.

677. *See id.* at 774.

678. The Texas Court stated that although there was conflicting testimony, there was also testimony that Gallo's mother and juvenile probation officer did not regard him as mentally retarded in his youth and some testimony that he had good leadership and communication skills. Although Gallo's commission of the instant crime may have been impulsive, Gallo was able to lie and attempt to cover up and diminish his role in it subsequently. While incarcerated, Gallo also stated that he had failed the IQ test and that "he'd probably beat the case" due to his retardation. *See id.*

679. *See id.* at 775 (applying the standard whether the finding was so "against the great weight and preponderance of the evidence" as to be "manifestly unjust").

680. *See Williams v. State*, 270 S.W.3d 112, 116 (Tex. Crim. App. 2008). Although Williams was classified as a "special needs" student, he was not in special education. *See id.* at 116–17.

“mildly” mentally retarded.⁶⁸¹ The defense also presented its expert’s testing of Williams’ IQ with a full scale score of sixty-five.⁶⁸² Two defense experts identified Williams’ adaptive deficits in three skill areas.⁶⁸³ The State and State’s expert criticized the limited nature of the Social Security evaluation and aspects of the defense experts’ assessments.⁶⁸⁴ In the State expert’s administration of the WAIS-III, Williams’ full scale IQ score was seventy-one.⁶⁸⁵ Based on his interview of twenty-three teachers and seven family members, this expert found that Williams could live and work independently and that he did not have significant deficits in any adaptive skill areas.⁶⁸⁶ A second State expert characterized Williams as in the below average and borderline range of intellectual function, but above the mentally retarded level.⁶⁸⁷ Teachers and family members testified that Williams was not regarded as mentally retarded as a youth, that he had many passing and above-average grades before he dropped out of school in twelfth grade, and that he could perform customer service tasks at fast food restaurants during this period.⁶⁸⁸ Upon review of the conflicting mental retardation evidence, the Texas Court concluded that the jury could have reasonably found the State’s evidence more

681. *See id.* at 118–21.

682. *See id.* at 124 (no indication of the test used).

683. *See id.* at 122–23 (finding deficits regarding functional academics, home living, and community use); *see also id.* at 124–25 (finding deficits regarding academic functioning, daily living skills, and socialization). One of the defense experts stated that the facts of Williams’ crime were not relevant to his mental retardation diagnosis and that this crime was not complex in any event. *See id.* at 125.

684. With regard to the Social Security evaluation, Williams’ father had told the evaluator that Williams had been in special education classes. The inaccuracy of this report was discussed with this expert on cross-examination as well as Williams’ above average grades in some subjects and his alcohol and drug problems. The expert responded that this incomplete and inaccurate information could have affected his assessment of Williams’ adaptive functioning. *See id.* at 118–21. On cross-examination, it was noted that one of the defense experts was a special education consultant who cannot legally diagnose mental retardation. *See id.* at 122. The other defense expert stated that he did not interview any of Williams’ teachers in his evaluation. *See id.* at 124. The State’s expert noted the incomplete and inaccurate information used for the Social Security and defense experts’ evaluations, questioned whether the disability determination was based on mental retardation, and challenged the finding of a significant deficit in functional academics. *See id.* at 128–31.

685. *See id.* at 127 (noting additional unidentified IQ tests with scores of seventy, seventy-three to seventy-four, seventy-eight, and eighty-three).

686. *See id.* at 125–28.

687. *See id.* at 131.

688. *See id.* at 116, 121–22.

persuasive when it determined Williams was not mentally retarded⁶⁸⁹ and that its finding was “not so against the great weight and preponderance of the evidence” as to be “manifestly unjust.”⁶⁹⁰

Juan Lizcano presented evidence of IQ test scores performed by three defense experts of forty-eight, fifty-three, sixty, sixty-two, and sixty-nine.⁶⁹¹ One defense expert found Lizcano had significant adaptive behavior deficits regarding communication, self-care, functional academics, home living, self-direction, and work.⁶⁹² Another defense expert found adaptive behavior deficits, without any countervailing strengths, in the areas of communication, self-care, functional academics, and use of community resources.⁶⁹³ The State presented no expert testimony.⁶⁹⁴ Lay witnesses included Lizcano’s mother, relatives, teacher, employers, girlfriends, and correctional officers who provided conflicting descriptions of Lizcano’s adaptive functioning. Witnesses indicated he had limited vocabulary skills and also had difficulty learning and socializing, following instructions and performing simple tasks at work, and completing simple personal tasks (including maintaining personal hygiene and appropriate dress). On the other hand, Lizcano was recognized by his employers as a hard and reliable worker. Witnesses also confirmed that he maintained continuous employment, made regular payments on a vehicle he bought, regularly sent funds and other items to his family in Mexico, had romantic relationships with at least two women who did not consider him mentally retarded, and did not have difficulties

689. *See id.* at 114–15, 132; *see also id.* at 133–34 (describing jury instructions defining intellectual functioning as two standard deviations below the instrument’s mean and identifying the standard measurement error; and defining adaptive functioning deficits with reference to conceptual, social, and practical skills and testing two standard deviations below the mean in one area or overall).

690. *See id.* at 132.

691. *See Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *11 (Tex. Crim. App. May 5, 2010). No information was supplied as to which IQ tests were administered. *See id.*

692. *See id.* at *36 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting). Because the standardized adaptive functioning tests are not normed for native Spanish speakers, this expert based his conclusions on his clinical interview with Lizcano and information supplied by the defense mitigation investigator. He did not consider the facts of the crime in his assessment, but stated that, had he done so, he would have considered them as further evidence of Lizcano’s adaptive behavior deficits. *See id.*

693. *See id.* (finding adaptive behavior deficits in at least six areas, including some with co-existing strengths).

694. *See id.* at *37 & n.34 (referencing a State expert who did not testify).

adapting to confinement.⁶⁹⁵ The jury returned a general verdict that Lizcano was not mentally retarded.⁶⁹⁶

Addressing Lizcano's challenge to the jury's finding on direct appeal, the Texas Court determined that he had satisfied the intellectual functioning component of the mental retardation definition.⁶⁹⁷ In its review of the adaptive functioning evidence, the Texas Court applied the Texas mental retardation law definition on which the jury had been instructed: the "effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."⁶⁹⁸ Giving "great deference" to the jury's determination regarding mental retardation and finding that there was "significant" evidence of Lizcano's effectiveness in meeting these adaptive standards,⁶⁹⁹ the Texas Court concluded that the jury's finding was

695. *See id.* at *12–15.

696. *See id.* at *32 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting).

697. *See id.* at *11–12 (rejecting the State's contentions, made without expert support, that Lizcano's IQ scores should be adjusted upward because he is a Spanish speaker, for the standard measurement error, and based on a regression to the mean theory that was not presented at trial); *id.* at *32 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting).

698. *See id.* at *12, *15 (applying the definition to Lizcano's age of twenty-eight and all Texans as his cultural group); *see also id.* at *15 (noting that the jury could also consider evidence relevant to the *Briseno* factors). *But see id.* at *33–40 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting); *supra* notes 653–59, *infra* notes 880–87 and accompanying text (criticizing the use of the Texas mental retardation law adaptive functioning definition without the diagnostic criteria regarding this aspect of mental retardation).

699. *See Lizcano*, 2010 WL 1817772, at *15. Using the diagnostic criteria accompanying the clinical definition of mental retardation, the three dissenting Judges addressed the evidence in support of adaptive deficits regarding Lizcano's communication, self-care, and functional academics skills, regarding which both defense experts agreed. They found that the State had failed to undermine Lizcano's evidence. These Judges cited lay testimony reflecting his difficulties in understanding and responding to information, as well as test results that measured his communication skills at the level of someone eight to ten years old. The evidence of Lizcano's self-care deficits regarding his personal dress and hygiene and performance of personal tasks was not overcome by testimony that he could function in the controlled environment of incarceration. His limited functional academics were reflected by his graduation from sixth grade at age sixteen only because of his age. The dissenting Judges noted that the majority had not even referenced the defense expert testimony regarding Lizcano's adaptive functioning. *See id.* at *36–40 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting); *see also* Andrea Grimes, *The State of Texas Cannot Execute the Mentally Retarded, But That May Not Prevent a Dallas Cop Killer From Being Put To Death*, DALLAS OBSERVER, July 1, 2010, <http://www.dallasobserver.com/content/printVersion/1821463>.

“not so against the great weight and preponderance of the evidence” as to be “manifestly unjust.”⁷⁰⁰

Thus, as these illustrative cases reflect, taken together with the other information regarding the resolution of *Atkins* claims in Texas trial courts and in the Texas Court on direct appeal, prosecutors are not unwilling to forgo pursuit of a death sentence upon a persuasive showing of a capital offender’s mental retardation. However, when the State has contested a capital offender’s mental retardation at trial, the State has thus far prevailed and the trial court determination has been upheld on appeal.⁷⁰¹

VI. The Differences in Texas’s Post-*Atkins* Path, Its Results, and Its Compliance with *Atkins*

A. Overview

The Court prohibited the execution of mentally retarded capital offenders in *Atkins* based on its determination that a national consensus in support of such a constitutional ban had evolved since it rejected the ban over a decade earlier in *Penry*.⁷⁰² This concluding section revisits the concepts of mental retardation reflected in this national consensus against the execution of mentally retarded offenders.⁷⁰³ To determine how different a path Texas has chosen to implement *Atkins*, this section then compares the Texas mental retardation definition and procedures articulated to implement the *Atkins* mandate with these *Atkins* concepts of mental retardation and with those definitions and procedures adopted by other capital punishment states.⁷⁰⁴ The actual Texas results, after almost a decade of post-*Atkins* litigation described in this Article, are compared with projections of Texas mentally retarded capital offenders and other states’ *Atkins* litigation.⁷⁰⁵ Finally, this Article examines Texas’s compliance with the *Atkins* mandate to identify mentally retarded

700. See *Lizcano*, 2010 WL 1817772, at *15 (finding consideration of the developmental onset aspect unnecessary).

701. See *supra* Table 2 (describing these cases); see also notes 668–69 and accompanying text (describing additional case resolutions).

702. Compare *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), with *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

703. See *infra* notes 709–13 and accompanying text.

704. See *infra* notes 714–69 and accompanying text.

705. See *infra* notes 770–87 and accompanying text.

offenders and exclude them from execution, and potential Court responsive action.⁷⁰⁶

B. How Different Is Texas's Post-*Atkins* Path?

As the Supreme Court had previously done regarding the prohibition of the execution of insane offenders,⁷⁰⁷ the *Atkins* Court entrusted the states with the “task of developing appropriate ways to enforce the constitutional restriction upon [the] execution of sentences” for mentally retarded offenders.⁷⁰⁸ The Court however, did not leave the states without guidance in their task of identifying mentally retarded capital offenders in order to enforce the constitutional ban on their execution.⁷⁰⁹ The *Atkins* Court discussed mental retardation with express reference to and quotation of the three-part clinical definitions of the AAMR and APA requiring 1) significantly subaverage intellectual functioning, 2) significant limitations in two or more specified adaptive functioning skill areas (e.g., communication, self-care, and functional academics), and 3) manifestation prior to age eighteen.⁷¹⁰ The Court further noted that the statutory definitions of mental retardation in the state execution bans—on which its finding of national consensus was based—“generally conform[ed] to the clinical definitions” referenced in its opinion.⁷¹¹ In light of the fact that the Supreme Court imposed its constitutional ban on the execution of mentally retarded offenders with express reference to these clinical definitions, it clearly appears that offenders who meet these clinical definitions are therefore the mentally retarded offenders about whom there exists a national consensus against their execution. Thus, while entrusting

706. See *infra* notes 788–943 and accompanying text.

707. See *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (plurality opinion).

708. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416–17).

709. Although the Court subsequently stated that its *Atkins* opinion did not “provide definitive procedural or substantive guides” to identify mentally retarded offenders for *Atkins* purposes, it identified Ohio’s adoption of the three-part clinical definitions of mental retardation referenced in *Atkins* when determining if the federal courts’ intervention in the state proceedings was warranted. See *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009).

710. See *Atkins*, 536 U.S. at 308 n.3, 318; *supra* note 162 and accompanying text. Although the quoted AAMR definition did not reference a particular IQ score regarding the intellectual functioning element, the APA definition included an IQ of “approximately 70” as an upper boundary for “mild” mental retardation. The Court also cited another definition describing the intellectual functioning element as an IQ between seventy and seventy-five or lower. See *Atkins*, 536 U.S. at 308–09 nn.3, 5.

711. See *Atkins*, 536 U.S. at 317 n.22.

enforcement of the constitutional ban to the states, the Court provided clear guidance that state definitional provisions in their capital punishment exclusion provisions should be at least as comprehensive as the clinical definitions referenced by the *Atkins* Court.⁷¹² On the other hand, the *Atkins* Court was silent regarding the procedures that the states might adopt to implement the constitutional ban.⁷¹³

In articulating its *Atkins* procedures in *Briseno*, the Texas Court adopted the general three-part definitions of mental retardation of the AAMR and Texas mental retardation law.⁷¹⁴ With regard to the intellectual functioning component of the standard, the Texas Court referred to definitions that defined this as an IQ of approximately seventy or below or approximately two standard deviations below the mean. The Texas Court, however, also recognized some flexibility in assessments of mental retardation based on IQ test scores, as well as differences in the content and accuracy of various IQ tests.⁷¹⁵ The Texas Court has maintained this concept of the intellectual functioning element in subsequent cases and has also recognized an IQ assessment measurement error of approximately five points that could vary based on the IQ testing instrument.⁷¹⁶ Regarding the third prong of the mental retardation definition, the Texas Court stated in *Briseno* that the AAMR definition characterized the developmental period onset as occurring before age eighteen, and it has used this standard in subsequent cases.⁷¹⁷

712. See, e.g., Blume et al., *supra* note 21, at 693–94; Bonnie & Gustafson, *supra* note 169, at 818–19, 822–23; Everington & Olley, *supra* note 376, at 2–3; Fabian, *Life*, *supra* note 376, at 8; Penny J. White, *Treated Differently in Life But Not In Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 TENN. L. REV. 685, 690 (2009). But see, e.g., Mossman, *supra* note 376, at 274–76.

713. Cf. Blume et al., *supra* note 21, at 693–94 (suggesting *Atkins* left states “free” to craft procedural rules regarding the mental retardation determination, including the burden of proof, fact-finder, and timing of the determination).

714. See *Ex parte Briseno*, 135 S.W.3d 1, 5–9 (Tex. Crim. App. 2004); *supra* notes 227–46 (describing the *Briseno Atkins* standards).

715. See *Briseno*, 135 S.W.3d at 7 n.24.

716. See *supra* notes 261–63, 616, 641–42 and accompanying text (describing the intellectual functioning standard in subsequent trial, direct appeal, and collateral review cases). The Texas Court has rejected the use of clinical assessment as a replacement for IQ scores to establish this element and has not endorsed the application of the Flynn effect regarding the interpretation of IQ scores. See *supra* notes 262–63 and accompanying text.

717. See *Briseno*, 135 S.W.3d at 7 & n.26; *supra* notes 616, 641–42 and accompanying text.

In its description of the adaptive functioning element in *Briseno*, the Texas Court quoted the Texas mental retardation law standard addressing comparisons to the personal independence and social responsibility expected of the person's age and cultural group.⁷¹⁸ It also quoted a similar standard in a pre-*Atkins* AAMR definition requiring significant limitations in effectiveness in meeting the above-identified expectations, as well as maturation and learning expectations, as clinically assessed (and usually including standardized scales).⁷¹⁹ The Texas Court did not reference the more specific AAMR and APA adaptive functioning definitions quoted in *Atkins* that required deficits in two or more of the specified skill areas (e.g., communication, self-care, social skills, and functional academics).⁷²⁰ Instead, in a formulation unique to Texas, the Texas Court identified several evidentiary factors (i.e., the *Briseno* factors) that might assist fact-finders in their mental retardation determination. These factors included others' perception of the offender as mentally retarded during the developmental period, the offender's ability to formulate and execute plans generally and regarding his capital crime, the offender's ability to act and communicate coherently as well as deceptively, and the offender's leadership abilities.⁷²¹ Although in subsequent cases the Texas Court has acknowledged and endorsed fact-finders' use of the more specific AAMR and APA adaptive skill area criteria, it has also maintained its endorsement of the *Briseno* factors—including their use to reject a finding of mental retardation.⁷²²

In *Briseno* and subsequent cases, the Texas Court articulated the primary aspects of the procedural framework for resolving *Atkins*

718. See *Briseno*, 135 S.W.3d at 7 n.25; *supra* note 236 and accompanying text.

719. See *Briseno*, 135 S.W.3d at 7 n.25; *supra* note 235 and accompanying text.

720. Compare *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2004), and *supra* notes 162–63 and accompanying text, with *Briseno*, 135 S.W.3d at 5–9, and *supra* notes 227–40 and accompanying text.

721. See *Briseno*, 135 S.W.3d at 8–9; *supra* note 237–40 and accompanying text. The Texas Court articulated the *Briseno* factors in the context of its characterization of the adaptive functioning criteria it had identified as being “exceedingly subjective” and as a way to help distinguish between evidence of mental retardation and of a personality disorder. See *Briseno*, 135 S.W.3d at 8. Subsequently, the Texas Court endorsed the relevance of these factors to all three elements of mental retardation. See, e.g., *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008).

722. See *supra* notes 264–71, 616, 641–44, 648–64, *infra* notes 857–79 and accompanying text.

claims on collateral review.⁷²³ The normal statutory procedures regarding initial habeas corpus review of claims apply to *Atkins* claims.⁷²⁴ For post-*Atkins* subsequent writ applications raising *Atkins* claims, the Texas Court adopted a screening test requiring prima facie evidence of mental retardation prior to remand to the convicting trial court.⁷²⁵ The Texas Court also recognized the possibility of raising an *Atkins* claim through a second post-*Atkins* subsequent writ, but imposed a clear and convincing evidence of mental retardation screening test on such *Atkins* claims.⁷²⁶ The offender bears the burden to prove his mental retardation by a preponderance of the evidence, and by clear and convincing evidence regarding this final category of *Atkins* collateral review claims.⁷²⁷ In all of these collateral review proceedings, and as specified by statute and endorsed by the Texas Court, the convicting trial court is the initial fact-finder.⁷²⁸ The Texas Court reviews and takes action on these factual findings regarding mental retardation with “almost total” deference.⁷²⁹

The Texas Court has prescribed some, but not all of the primary procedural requirements for the determination of *Atkins* claims at the trial and direct appeal levels.⁷³⁰ At the trial level, the defendant bears the burden to prove his mental retardation by a preponderance of the evidence.⁷³¹ Although the Texas Court has stated that a jury determination of mental retardation for *Atkins* purposes is not required at trial, it has thus far declined to specify who the fact-finder must be or when in the trial proceeding the mental retardation finding must be made, currently leaving both of these determinations to the discretion of the trial court.⁷³² On direct appeal from the rejection of an *Atkins* claim at trial, the Texas Court has adopted a

723. See *Briseno*, 135 S.W.3d at 9–13; *supra* notes 241–59, 275–80 and accompanying text.

724. See *supra* notes 247–49 and accompanying text.

725. See *supra* notes 221–25 and accompanying text.

726. See *supra* notes 250–59 and accompanying text.

727. Compare *supra* note 242 and accompanying text, with *supra* note 258 and accompanying text.

728. See *supra* notes 243–45 and accompanying text.

729. See *supra* note 246 and accompanying text.

730. See *Hall v. State*, 160 S.W.3d 24, 36–39 (Tex. Crim. App. 2004); *supra* notes 614–40, 645–65.

731. See *supra* notes 617, 620–22, 626 and accompanying text.

732. See *supra* notes 629–40 and accompanying text.

deferential review standard regarding the mental retardation finding made.⁷³³

In their review of Texas state courts' resolution of *Atkins* claims on federal collateral review, the Fifth Circuit and Texas federal trial courts have applied the procedural requirements and deferential review standards prescribed by the AEDPA.⁷³⁴ The Fifth Circuit adopted its own prima facie evidence screening test for *Atkins* claims filed through successive writ applications.⁷³⁵ In general, the Fifth Circuit has found that the Texas Court's mental retardation definition—including the *Briseno* factors—and *Atkins* procedures are not contrary to clearly established federal law, as articulated by the Court in *Atkins*.⁷³⁶

In many respects, Texas's mental retardation definition and *Atkins* procedures are similar to those of other states that legislatively or judicially developed definitions and procedures to exclude mentally retarded offenders from execution either before or after *Atkins*.⁷³⁷ Thirty-four of the thirty-eight states that authorized capital punishment as of the *Atkins* decision have adopted such definitions and procedures regarding trial or collateral review proceedings, or both.⁷³⁸ Virtually all of the states, including Texas, have adopted some variation of the three-part clinical definition of mental

733. See *supra* notes 623, 628 and accompanying text.

734. See *supra* notes 281–313, 318–23, 344–50 and accompanying text.

735. See *supra* notes 313–17 and accompanying text.

736. See *supra* notes 324–43 and accompanying text.

737. See Tobolowsky, *supra* note 5, at 77 (describing *Atkins* definitional and primary procedural provisions regarding thirty states). Other studies have surveyed certain aspects of state statutory mental retardation definitions. See Duvall & Morris, *supra* note 376; Patton & Keyes, *supra* note 376; cf. David DeMatteo et al., *A National Survey of State Legislation Defining Mental Retardation: Implications for Policy and Practice After Atkins*, 25 BEHAV. SCI. & L. 781, 790 (2007).

738. See *Ex parte* Alabama, No. 1060427, 2007 Ala. LEXIS 91 (Ala. May 25, 2007); *Ex parte* Perkins, 851 So. 2d 453 (Ala. 2002); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005); *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004); Tobolowsky, *supra* note 5, at 77 n.6, 78 nn.7, 9, 141 n.*; see also OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011) (describing statutory *Atkins* definition and procedures following interim judicial definition and procedures); *King v. State*, 960 So. 2d 413 (Miss. 2007); *Commonwealth v. Vandivner*, 962 A.2d 1170 (Pa. 2009). Since *Atkins*, Illinois, New Mexico, and New Jersey have abolished capital punishment and New York has not enacted legislation to remedy a finding of unconstitutionality regarding its capital punishment statute. See *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Sept. 23, 2011). These states' *Atkins* provisions are nevertheless included in this analysis for illustrative purposes. Montana, New Hampshire, Oregon, and Wyoming have not yet adopted *Atkins*-specific definitions or developed *Atkins* procedures.

retardation for *Atkins* purposes,⁷³⁹ but the prescribed degree of detail regarding the elements of these definitions varies.⁷⁴⁰ For example, of the thirty-one states that include a developmental period onset criterion in their mental retardation definitions, twenty-three states (including Texas) define that period as prior to age eighteen; three states define it as before age twenty-two; and five states do not further define the term.⁷⁴¹

All thirty-four states have a significantly subaverage intellectual functioning element in their definitions.⁷⁴² Ten states do not further define the term.⁷⁴³ In their intellectual functioning definitions, nineteen states (including Texas) include some reference to a specific IQ score⁷⁴⁴ and four states refer to IQ scores two or more standard deviations below the instrument mean.⁷⁴⁵ Kansas uniquely defines the term by referencing the standard deviation below the mean benchmark, but adding that the intellectual functioning must be at a level that “substantially impairs one’s capacity to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirement of law”—essentially a criminal insanity definition.⁷⁴⁶

There is similar variation in the adaptive functioning definitions of the thirty-three states that include this criterion in their mental retardation definitions.⁷⁴⁷ Fifteen states provide no further definition beyond the requirement of limitations or significant limitations in this

739. Three states (Kansas, Nebraska, and New Mexico) do not include a developmental period onset criterion, and Kansas does not include an adaptive functioning element. See Tobolowsky, *supra* note 5, at 90 & nn. 76–77.

740. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Perkins*, 851 So. 2d at 456; *Jimenez*, 908 A.2d at 184 n.3; *Miller*, 888 A.2d at 630–31; *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 89–93, 141 n.*.

741. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Perkins*, 851 So. 2d at 456; *Jimenez*, 908 A.2d at 184 n.3; *Miller*, 888 A.2d at 630–31; *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 91, 93, 141 n.*.

742. See *Perkins*, 851 So. 2d at 456; *Jimenez*, 908 A.2d at 184 n.3; *Miller*, 888 A.2d at 630–31; *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 90–92, 141 n.*.

743. See Tobolowsky, *supra* note 5, at 90–92, 141 n.*.

744. Seventeen of the nineteen states that reference an IQ score refer to an IQ of seventy or approximately seventy; one state uses an IQ score of seventy-five; and one uses an IQ of sixty-five. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Perkins*, 851 So. 2d at 456; *Jimenez*, 908 A.2d at 184 n.3; *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 90–92, 141 n.*.

745. See *Miller*, 888 A.2d at 629–30; Tobolowsky, *supra* note 5, at 90, 92.

746. See Tobolowsky, *supra* note 5, at 90 & n.83 (quoting the Kansas statute).

747. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Perkins*, 851 So. 2d at 456; *Jimenez*, 908 A.2d at 184 n.3; *Miller*, 888 A.2d at 630–31; *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 90–93, 141 n.*.

area.⁷⁴⁸ Twelve states incorporate a reference to deficits in two or more of the skill areas identified in the AAMR and APA clinical definitions quoted in *Atkins*, or the consolidated skill area groupings in the current AAMR definition.⁷⁴⁹ Five states (including Texas) refer to the more general comparisons to maturation, learning, personal independence, and social responsibility included in a pre-*Atkins* AAMR definition.⁷⁵⁰ Utah has customized its definition to reference “significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas.”⁷⁵¹ Finally, Texas has uniquely added the *Briseno* factors to aid in the assessment of this element.⁷⁵²

In terms of their procedural requirements to implement *Atkins*, twenty-six states (including Texas) expressly assign the burden to the offender to prove his mental retardation and eight states do not expressly assign this burden to any party.⁷⁵³ Twenty-four states (including Texas) use the preponderance of the evidence standard of proof.⁷⁵⁴ Four states use the clear and convincing evidence standard.⁷⁵⁵

748. See *Perkins*, 851 So. 2d at 456; Tobolowsky, *supra* note 5, at 91–93, 141 n.*.

749. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Jimenez*, 908 A.2d at 184 n.3; *Miller*, 888 A.2d at 630–31; Tobolowsky, *supra* note 5, at 91–93.

750. See *Briseno*, 135 S.W.3d at 5–9; Tobolowsky, *supra* note 5, at 91; *cf. supra* notes 265–66 and accompanying text (describing the Texas Court’s reference to adaptive skill area definitions in subsequent cases).

751. See Tobolowsky, *supra* note 5, at 93 & n.95 (quoting the Utah statute and noting it includes a contingent ban if there are significant adaptive deficits without the quoted restrictions).

752. See *Briseno*, 135 S.W.3d at 8; *supra* notes 237–40, 721 and accompanying text. Although two panels of the Tennessee Court of Criminal Appeals have previously cited the *Briseno* factors, the Tennessee Supreme Court has never adopted these factors in its adaptive behavior analysis for *Atkins* purposes. Instead, the Tennessee Supreme Court has noted that, in implementing the state’s *Atkins* statute, Tennessee’s “trial and appellate courts have repeatedly relied upon expert analysis of adaptive behavior or functioning predicated” on clinical definitions and related authoritative texts. *Coleman v. State*, No. W2007-02767-SC-R11-PD, 2011 Tenn. LEXIS 319, at *73 (Tenn. Apr. 11, 2011), *aff’g in part and vacating in part*, No. W2007-02767-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 36, at *69–70 (Tenn. Crim. App. Jan. 13, 2010) (citing the *Briseno* factors); see *Van Tran v. State*, 66 S.W.3d 790, 795 (Tenn. 2001) (referring to deficits in at least two adaptive skill areas in interpreting the statutory adaptive functioning element). *But see Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 899, at *71–72 (Tenn. Crim. App. Nov. 9, 2006) (citing the *Briseno* factors).

753. See OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Ex parte Alabama*, No. 1060427, 2007 Ala. LEXIS 91, at *32 (Ala. May 25, 2007); *Jimenez*, 908 A.2d at 190; *Miller*, 888 A.2d at 631; *Briseno*, 135 S.W.3d at 12; Tobolowsky, *supra* note 5, at 118 & n.235, 141 n.*.

754. See *Alabama*, 2007 Ala. LEXIS 91, at *32; *Jimenez*, 908 A.2d at 190; *Miller*, 888 A.2d at 631; *Briseno*, 135 S.W.3d at 12; Tobolowsky, *supra* note 5, at 118–19, 141 n.*; see

North Carolina and Oklahoma use both standards (depending on who the fact-finder is and at what stage of the proceeding).⁷⁵⁶ Georgia alone uses the beyond a reasonable doubt standard at trial.⁷⁵⁷ Three states have not specified a standard of proof.⁷⁵⁸

Of the thirty-three states that have specified the *Atkins* trial level fact-finder, twenty-two identify the trial judge as the sole fact-finder regarding mental retardation.⁷⁵⁹ Eleven states authorize the trial judge or a jury to make the determination in specified circumstances.⁷⁶⁰ Texas, however, has not specified who the fact-finder must be.⁷⁶¹ Regarding the timing of the trial level mental retardation determination, thirteen states require a pretrial determination,⁷⁶² and one additional state encourages a pretrial determination.⁷⁶³ One state requires a guilt determination.⁷⁶⁴ Nine states authorize a pretrial and/or post-guilt determination.⁷⁶⁵ Eight states require a post-guilt determination.⁷⁶⁶ Texas and another state have not specified when the determination must be made.⁷⁶⁷ The states that have addressed *Atkins*' implementation on collateral review either adapt their trial phase procedures for determining

also *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005) (finding the statutory clear and convincing evidence standard unconstitutional).

755. *See* Tobolowsky, *supra* note 5, at 118–19; *see also* *Pruitt*, 834 N.E.2d at 103.

756. *See* OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); Tobolowsky, *supra* note 5, at 118 & n.236 (using the clear and convincing evidence standard for pretrial court determination and preponderance of the evidence standard for any subsequent jury determination).

757. *See* Tobolowsky, *supra* note 5, at 119 & n.237 (using the preponderance standard in collateral review proceedings).

758. *See id.* at 118.

759. *See* *Alabama*, 2007 Ala. LEXIS 91, at *36; *King v. State*, 960 So. 2d 413, 424–28 (Miss. 2007); *Commonwealth v. Vandivner*, 962 A.2d 1170, 1183–89 (Pa. 2009); Tobolowsky, *supra* note 5, at 111–12, 141 n.*; *supra* note 753.

760. *See* OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *Jimenez*, 908 A.2d at 191–92; Tobolowsky, *supra* note 5, at 111–12, 141 n.*.

761. *See supra* notes 630–40 and accompanying text.

762. *See* *Alabama*, 2007 Ala. LEXIS 91, at *36; *Vandivner*, 962 A.2d at 1183–89; Tobolowsky, *supra* note 5, at 111–12, 141 n.*.

763. *See* Tobolowsky, *supra* note 5, at 111 & n.188.

764. *See id.* at 111 & n.191.

765. *See* OKLA. STAT. ANN. tit. 21, § 701.10b (West Supp. 2011); *King*, 960 So. 2d at 424–28; *Jimenez*, 908 A.2d at 191–92; Tobolowsky, *supra* note 5, at 111–12, 141 n.*.

766. *See* Tobolowsky, *supra* note 5, at 111–12.

767. *See id.* at 111 & n.195; *supra* notes 630–40 and accompanying text.

mental retardation or the procedures generally applicable to collateral review in the state.⁷⁶⁸

Thus, in comparing the Texas mental retardation definition and procedures to those of the other states that have implemented *Atkins*, Texas stands with the majority of states in adopting a three-part definition of mental retardation that references an IQ score regarding the intellectual functioning component and sets the developmental period as prior to age eighteen. Texas also joins the majority of these states in assigning the defendant the burden to prove his mental retardation by a preponderance of the evidence. On the other hand, of the states that have defined the adaptive functioning element, most have chosen a definition that references the AAMR or APA skill areas. Moreover, no other state has adopted a definitional aid similar to the *Briseno* factors. In addition, all of the other states have assigned a fact-finder to make the mental retardation determination at trial, and almost all have specified when in the trial proceedings the determination should be made. Thus, the Texas Court has clearly taken a path that differs from the other states both in its actions and in its failure to act regarding its *Atkins* definition and procedures.⁷⁶⁹

C. What Are the Results of Texas's Post-*Atkins* Path?

An important way to measure the significance of the different path that Texas has taken to implement the *Atkins* mandate is to compare the results of Texas *Atkins* cases with anticipated results based on estimates of mentally retarded capital offenders, and also to compare the Texas *Atkins* case results with those of other states implementing *Atkins*.⁷⁷⁰ The first comparison reveals that Texas has identified fewer mentally retarded capital offenders than general

768. See *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005); *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004); Tobolowsky, *supra* note 5, at 122–27, 141 n.*.

769. Compare *supra* notes 714–33 and accompanying text, with *supra* notes 737–68 and accompanying text. Of course, Texas is not alone in taking a different path in implementing *Atkins*. Kansas has adopted a unique mental retardation definition based on a single criterion that adds a restriction based on criminal insanity rather than mental retardation definitions. See *supra* note 746 and accompanying text. Utah has adopted a unique conditional limitation regarding its adaptive functioning criterion. See *supra* note 751 and accompanying text. Finally, Georgia is the only state that requires a reasonable doubt standard regarding mental retardation. See *supra* note 757 and accompanying text. The Court of Appeals for the Eleventh Circuit recently found this standard of proof unconstitutional, but the decision has been vacated pending consideration by the court en banc. See *Hill v. Schofield*, 608 F.3d 1272 (11th Cir.), *vacated by* 625 F.3d 1313 (11th Cir. 2010) (per curiam) (en banc).

770. See *infra* notes 773–86 and accompanying text.

estimates would predict.⁷⁷¹ The second comparison indicates that a smaller percentage of claimants has been successful in asserting *Atkins* claims in Texas than in several other states that have considered a meaningful number of *Atkins* claims.⁷⁷²

In his dissent in *Atkins*, Chief Justice Rehnquist cited expert estimates indicating that as many as ten percent of death row inmates are mentally retarded.⁷⁷³ Other estimates of the proportion of convicted capital offenders who are mentally retarded range between four and twenty percent.⁷⁷⁴ As of the end of 2002, six months after *Atkins* was decided, there were 450 Texas prisoners with death sentences.⁷⁷⁵ Using the lowest estimate of four percent, eighteen of these capital offenders would be predicted to be mentally retarded. Using former Chief Justice Rehnquist's ten percent estimate would result in forty-five predicted Texas mentally retarded capital offenders. Using the highest estimate of twenty percent would result in ninety predicted Texas mentally retarded capital offenders. As described previously in this Article, a total of *fourteen* convicted capital offenders have been determined to be mentally retarded in post-*Atkins* collateral review proceedings in the Texas state and federal courts or by the Texas Governor.⁷⁷⁶ This number of successful *Atkins* claimants is over twenty percent lower than the lowest estimate of mentally retarded Texas death row offenders as of the *Atkins* decision and approximately eighty-five percent lower than the highest estimate of mentally retarded Texas convicted capital offenders at the time of *Atkins*. Thus, the application of Texas's

771. See *infra* notes 773–77 and accompanying text.

772. See *infra* notes 778–86 and accompanying text.

773. See *Atkins v. Virginia*, 536 U.S. 304, 324 n.* (2002) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting).

774. See EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 39 (1993); Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 911 (2001); Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 327 (2002); Carol S. Steiker, Commentary, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1478 n.10 (2002); cf. Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Review of the Literature*, 20 BEHAV. SCI. & L. 191, 199 (2002) (describing clinical studies that reported some data regarding the intellectual capability of their death row samples).

775. See THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, *CAPITAL PUNISHMENT*, 2002, at 5 (2003).

776. See *supra* Table 1; *supra* notes 351–72, 402–517 and accompanying text.

Atkins mental retardation definition and the review of Texas *Atkins* collateral relief claims have identified Texas mentally retarded convicted capital offenders at a rate, at best, meaningfully below, and at worst, substantially below, that predicted by the above estimates.⁷⁷⁷

The Texas *Atkins* results also differ from those of several other states that have resolved a meaningful number of *Atkins* claims. In a 2008 study, researchers identified 234 adjudicated *Atkins* claims.⁷⁷⁸ Nationally, they found that thirty-eight percent of the *Atkins* claimants had successfully established their mental retardation.⁷⁷⁹ Of the states that had resolved more than ten *Atkins* claims, the percentage of successful *Atkins* claimants ranged between twelve percent in Alabama and eighty percent in North Carolina.⁷⁸⁰ At the time of the study, twelve Texas *Atkins* claimants had been found mentally retarded out of the forty-six reported resolved cases. This represents a Texas *Atkins* success rate of twenty-six percent. In comparison to other states that had resolved over ten *Atkins* claims, Texas's success rate was higher than that of Alabama, Florida, Ohio, and Mississippi, where *Atkins* claimants were successful in from twelve to slightly over twenty percent of cases. The Texas *Atkins* success rate was lower than that of Oklahoma, Louisiana, Pennsylvania, and North Carolina, all of which had success rates in excess of fifty percent.⁷⁸¹

Since the completion of this 2008 study, Texas has resolved a significant number of *Atkins* collateral review claims. Using the current numbers, Texas has identified fourteen convicted capital offenders as mentally retarded out of the eighty-one resolved collateral review claims, for an *Atkins* success rate of seventeen percent.⁷⁸² Based on the success rates identified in the 2008 study,

777. Even if the three Texas post-*Atkins* cases in which the prosecutor chose not to pursue a death sentence are added to this number, the total number of seventeen successful *Atkins* claimants is still below the lowest projection of mentally retarded offenders, based on the Texas death row population as of *Atkins*. See *supra* Table 2; *supra* notes 670–71 and accompanying text.

778. See Blume et al., *supra* note 26, at 627–28 (indicating search for reported and unreported adjudicated cases); Blume, *supra* note 204 (reflecting cases successfully resolved at various stages); cf. Blume et al., *supra* note 26, at 637 (reflecting 232 cases in study).

779. See Blume et al., *supra* note 26, at 628 n.16.

780. See *id.* at 629, 637.

781. These success rates are calculated based on the comparison of the number of state claims reported at Blume et al., *supra* note 26, at 637, and the number of successful state claims reported at Blume, *supra* note 204.

782. See *supra* Table 1; *supra* notes 351–74 and accompanying text.

only Alabama's twelve percent success rate remains lower than this current Texas success rate regarding *Atkins* collateral review claims.⁷⁸³ If the three successful *Atkins* claimants (based on prosecutorial decision making) of the additional nine unduplicated claimants who have raised *Atkins* claims through the trial and direct appeal stages are added to these numbers, the Texas *Atkins* success rate regarding these seventeen successful cases out of ninety unduplicated claimants rises only to less than nineteen percent.⁷⁸⁴ This would place Texas's current *Atkins* success rate higher than Alabama, and only slightly higher than Florida's 2008 rate of almost eighteen percent.⁷⁸⁵ Both methods of assessing Texas's current *Atkins* success rate demonstrate that the rate is substantially below the thirty-eight percent national success rate reflected in the 2008 study of adjudicated *Atkins* claims.⁷⁸⁶

Of course, the *Atkins* Court did not mandate any particular number or percentage of *Atkins* claimants that must be found mentally retarded in order for states to be deemed to have followed its mandate. However, it did bar the execution of mentally retarded offenders regarding whom it had found that there existed a national consensus against their execution.⁷⁸⁷ The fact that the Texas *Atkins* results fall below, and even substantially below, the projected estimates of Texas mentally retarded death row offenders as of the *Atkins* decision, as well as the national success rate of states implementing *Atkins*, must raise questions regarding whether Texas's path in implementing *Atkins* complies with the *Atkins* mandate. The next section examines those aspects of Texas's different *Atkins* path that may contribute to these results.

D. Does Texas's Post-*Atkins* Path Comply with *Atkins*?

Almost a decade after the Court's decision in *Atkins*, state legislatures and state and federal courts continue to struggle with the application—in the context of capital punishment litigation—of concepts of mental retardation primarily designed for diagnostic, clinical, and service provision purposes.⁷⁸⁸ These challenges are

783. See *supra* note 781.

784. See *supra* Tables 1, 2; *supra* notes 670–71 and accompanying text.

785. See *supra* note 781.

786. See Blume et al., *supra* note 26, at 628 n.16.

787. See *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

788. See Duvall & Morris, *supra* note 376, at 664; Mossman, *supra* note 376, at 271–74, 289–91; Patton & Keyes, *supra* note 376, at 239, 253; Weithorn, *supra* note 376, at 1232–34; *supra* notes 376–400 and accompanying text.

experienced by all capital punishment states. The results of the Texas post-*Atkins* litigation described in this Article, however, reveal determinations of mental retardation at rates meaningfully lower than both expert estimates would predict and research regarding the national success rate for *Atkins* claims reflects.⁷⁸⁹ These results support the exploration of the question whether Texas's particular post-*Atkins* definitional and procedural path complies with the *Atkins* mandate to identify mentally retarded capital offenders and exclude them from execution.⁷⁹⁰ In examining Texas's compliance with *Atkins*, two aspects of the Texas path are sufficiently distinct from other state approaches to warrant further exploration: 1) the Texas Court's failure to specify the fact-finder for and timing of the mental retardation determination at trial and 2) its crafting of the *Briseno* factors to aid in the determination of mental retardation.⁷⁹¹

1. Texas Court's Failure to Specify the Fact-finder for and the Timing of the Mental Retardation Determination at Trial

In the absence of legislative action, the Texas Court has prescribed interim procedures addressing most aspects of *Atkins* litigation.⁷⁹² However, in the "absence of legislation or a constitutional requirement directing when the determination of mental retardation is to be made or by whom,"⁷⁹³ the Texas Court has expressly declined to specify either of these aspects of the *Atkins* trial procedure or to find error on appeal based on these factors.⁷⁹⁴ In the few post-*Atkins* cases in which *Atkins* claims have been presented at trial, they have been resolved by a jury during post-conviction punishment proceedings.⁷⁹⁵ The capital punishment jury has not found the offender mentally retarded in any of these cases.⁷⁹⁶

789. See *supra* notes 770–86 and accompanying text.

790. See *Atkins*, 536 U.S. at 316–17, 321.

791. See *supra* notes 707–69 and accompanying text.

792. See *supra* notes 241–59, 272–80, 617–40, 645–65 and accompanying text.

793. *Hunter v. State*, 243 S.W.3d 664, 672 (Tex. Crim. App. 2007).

794. See *id.* at 672; *supra* notes 630–40 and accompanying text.

795. See *supra* notes 633–36 and accompanying text (including a description of two cases in which both the trial judge and punishment jury determined that there was insufficient evidence of mental retardation, but the Texas Court only addressed the jury finding on appeal).

796. See *supra* Table 2; see also Maro Robbins & Karisa King, *Retardation Issue Looms Big in Bexar*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 2006, at 1A (indicating that of the few cases in which juries had determined the *Atkins* issue, no jury had yet found a defendant mentally retarded during punishment proceedings).

As previously described, use of the punishment proceeding jury to resolve mental retardation for *Atkins* purposes represents the minority position among the capital punishment states.⁷⁹⁷ State legislatures, courts, and commentators have disagreed about the desirability and appropriateness of entrusting the *Atkins* mental retardation determination to the same jury that has just convicted the offender of a heinous crime. Those supporting a pretrial judicial determination of mental retardation cite the similarity of this determination to others typically entrusted to the judge, such as competency; the *Atkins* Court's conversion of mental retardation from a culpability factor requiring jury determination to a death penalty eligibility factor, appropriate for judicial determination; and the risk of accuracy-diminishing juror confusion of issues relevant to the mental retardation issue and those relevant to punishment and resulting prejudice. Those supporting a punishment jury resolution cite the appropriateness of jury resolution of the punishment-affecting mental retardation issue, the relevance of some guilt or punishment evidence to the mental retardation assessment, and the unsubstantiated risk of unreliable jury determinations.⁷⁹⁸

Although one may argue the merits of a pretrial judicial versus a punishment jury determination of mental retardation for *Atkins* purposes, the *Atkins* Court did not address the procedural aspects of implementing the constitutional ban generally or this procedural

797. See *supra* notes 759-67 and accompanying text.

798. See, e.g., Neal v. State, 256 S.W.3d 264, 285 (Tex. Crim. App. 2008) (Meyers, J., concurring); J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 1,000-07 (2011); James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, MENTAL & PHYSICAL DISABILITY L. REP., Jan.-Feb. 2003, at 11, 14-17; Steiker & Steiker, *supra* note 21, at 725, 727; Scott R. Poe, Note, *Inconsistent Methods for the Adjudication of Alleged Mentally Retarded Individuals: A Comparison of Ohio's and Georgia's Post-Atkins Frameworks for Determining Mental Retardation*, 54 CLEV. ST. L. REV. 405, 424-30 (2006). But see, e.g., People v. Smith, 752 N.Y.S.2d 356, 357 (N.Y. Sup. Ct. 2002); Neal, 256 S.W.3d at 272; Poe, *supra* at 429. See generally Tobolowsky, *supra* note 5, at 104-10, 112-13 (describing competing arguments). Some have suggested that the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2002), and *Ring v. Arizona*, 536 U.S. 584 (2002), regarding jury determination of sentence-enhancing facts also require a jury determination of mental retardation for *Atkins* purposes. See generally Tobolowsky, *supra* note 5, at 106-08 (describing competing arguments and concluding no constitutional jury requirement). However, the Court's decision in *Schiro v. Smith*, 546 U.S. 6, 7-8 (2005) (per curiam), vacating a federal court's pre-emptive imposition of a jury requirement on Arizona's *Atkins* collateral review decision making suggests that jury decision making is not a constitutional imperative for *Atkins* claims. See also Gallo v. State, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007); *Ex parte Briseno*, 135 S.W.3d 1, 10-11 (Tex. Crim. App. 2004).

aspect specifically.⁷⁹⁹ Had the Texas Court chosen *either* approach as its interim trial level procedure, it would likely survive constitutional scrutiny at this stage of post-*Atkins* litigation.⁸⁰⁰ The Texas Court's failure to adopt a uniform procedure for the trial level mental retardation determination, however, raises equal protection, if not due process, concerns.⁸⁰¹ Commentators have previously raised these issues regarding the lack of uniform *Atkins* procedures *across* the capital punishment states and the resulting possibility of inconsistent mental retardation determinations.⁸⁰²

By declining to specify an interim fact-finder and timing for the *Atkins* mental retardation determination, and thus effectively entrusting this decision to the discretion of the trial court, the Texas Court has created the possibility of inconsistent procedures *within* Texas *Atkins* trial proceedings.⁸⁰³ The lack of uniform procedures within the state exacerbates already existing equal protection concerns about varying post-*Atkins* procedures across capital punishment states. Of course, the Texas Court could easily eliminate the Texas internal equal protection concern by specifying the fact-finder for and timing of the trial level mental retardation determination on an interim basis, as it has done regarding other aspects of the *Atkins* procedure. Its failure to do so leaves this equal protection concern unresolved. Moreover, if the varying trial level procedures are subsequently demonstrated to produce meaningfully inconsistent *Atkins* mental retardation determinations, some may be

799. See *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009); *Atkins v. Virginia*, 536 U.S. 304 (2002); see also Blume et al., *supra* note 21, at 691, 693; Steiker & Steiker, *supra* note 21, at 725, 731–32.

800. See *Smith*, 546 U.S. at 7–8 (vacating federal court preemptive imposition of jury procedure for resolving state *Atkins* collateral review claim); cf. *Hill v. Schofield*, 608 F.3d 1272, 1291 n.13 (11th Cir.) (Hull, J., dissenting) (identifying three cases in which the Court had denied certiorari petitions challenging the constitutionality of Georgia's *Atkins* reasonable doubt standard), *vacated by* 625 F.3d 1313 (11th Cir. 2010) (per curiam) (en banc).

801. See *Neal*, 256 S.W.3d at 272 (rejecting equal protection challenge based on the absence of uniform statutory *Atkins* procedures); cf. *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *8–9 (Tex. Crim. App. May 5, 2010) (rejecting due process challenges based on trial court's refusal to determine mental retardation prior to trial or to empanel a separate jury to make the determination pretrial).

802. See, e.g., *Poe*, *supra* note 798, at 430–31; cf. *DeMatteo et al.*, *supra* note 737, at 792; *Mossman*, *supra* note 376, at 274–75.

803. See *Neal*, 256 S.W.3d at 272.

deemed to be constitutionally “inappropriate” ways to enforce the *Atkins* ban.⁸⁰⁴

2. *The Briseno Factors*

The *Atkins* Court concluded that the execution of mentally retarded offenders is unconstitutional after reviewing objective evidence of national consensus, such as the actions of state legislatures, and applying its own constitutional excessiveness jurisprudence.⁸⁰⁵ In describing mental retardation throughout the opinion, the Court expressly referenced the three-part clinical definitions of mental retardation of the AAMR and APA.⁸⁰⁶ Even when the Court noted that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,” the Court observed that the state statutory mental retardation definitions supporting the national consensus it had found, though “not identical,” nevertheless “generally conform[ed]” to the AAMR and APA clinical definitions it had provided in the opinion.⁸⁰⁷ Both of these clinical definitions described the adaptive functioning component by reference to limitations in two or more specified skill areas such as communication, self-care, home living, functional academics, work, social skills, and self-direction.⁸⁰⁸

The Court’s statement, in a post-*Atkins* case, that its *Atkins* opinion “did not provide *definitive* procedural or substantive guides for determining when a person who claims mental retardation ‘will be

804. See *Atkins*, 536 U.S. at 317 (entrusting the states with the task of developing “appropriate” ways to enforce the constitutional execution ban). Although the Court has not yet substantively addressed any challenges to *Atkins* state procedures, it has acknowledged that such “measures might, in their application, be subject to constitutional challenge.” *Smith*, 546 U.S. at 7; see Steiker & Steiker, *supra* note 21, at 731–35 (noting the importance of the implementing procedure in accomplishing the *Atkins* ban). In reviewing any future challenges to *Atkins* procedures, the Court would be guided by its previous entrustment to the states of the enforcement of the constitutional ban on the execution of insane capital offenders in *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (plurality opinion). The *Ford* plurality identified the “lodestar of any effort to devise a procedure [as] the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination.” *Id.* at 417; see *id.* at 410–12.

805. See *Atkins*, 536 U.S. at 311–21; *supra* notes 138–57 and accompanying text.

806. See *Atkins*, 536 U.S. at 308 & n.3, 309 n.5, 316, 317 & n.22, 318; *supra* notes 161–67 and accompanying text.

807. See *Atkins*, 536 U.S. at 317 & n.22 (referring to three-part AAMR and APA clinical definitions of mental retardation quoted at n.3 of the opinion).

808. *Id.* at 308 n.3.

so impaired as to fall [within *Atkins*' compass]”⁸⁰⁹ does not alter the fact that the clinical definitions of mental retardation provided the sole definitional framework for the Court's national consensus finding regarding mentally retarded offenders in *Atkins*.⁸¹⁰ Thus, in carrying out the *Atkins* Court's mandate to the states to develop “appropriate ways” to enforce the constitutional execution ban regarding mentally retarded offenders,⁸¹¹ it remains clear that state mental retardation definitions for *Atkins* purposes should at least “generally conform” to the clinical definitions in order to carry out the national consensus mandate established in *Atkins*.⁸¹² Moreover, while entrusting enforcement of the constitutional ban to the states, the Court has also stated, in another post-*Atkins* case, that measures adopted by the states for adjudicating *Atkins* claims “might, in their application, be subject to constitutional challenge.”⁸¹³ In this context, are the *Briseno* factors that the Texas Court established to aid in the determination of adaptive functioning⁸¹⁴ “appropriate ways” to enforce the national constitutional ban on the execution of mentally retarded offenders?

809. *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009) (emphasis added) (reversing federal court grant of *Atkins* relief prior to state court opportunity to address the claim). The Court, however, noted that the Ohio state *Atkins* procedure used the three-part clinical definition of mental retardation cited in *Atkins*, including the demonstration of limitations in two or more of the specified adaptive skill areas. *See id.* at 2150. In addition, in reversing the federal court's grant of *Atkins* relief prior to state action, the Court stated that “[n]o court found, for example, that Bies suffered ‘significant limitations in two or more adaptive skills.’” *Id.* at 2152 (quoting *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam)).

810. *See Atkins*, 536 U.S. at 308 & n.3, 309 n.5, 316, 317 & n.22, 318; *supra* notes 161–69 and accompanying text.

811. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416–17 (plurality opinion), regarding states' task to develop “appropriate ways” to enforce the constitutional ban on the execution of insane offenders).

812. *See, e.g.*, Blume et al., *supra* note 21, at 690–91, 693–94; Bonnie & Gustafson, *supra* note 169, at 812–16, 818–19, 821, 822–23; Everington & Olley, *supra* note 376, at 2–3; Steiker & Steiker, *supra* note 21, at 732; White, *supra* note 712, at 689–90; *cf.* Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 223, 226, 237 (2008); Duvall & Morris, *supra* note 376, at 658–59; Hagstrom, *supra* note 21, at 260, 270; Patton & Keyes, *supra* note 376, at 243; Weithorn, *supra* note 376, at 1204, 1209. *But see, e.g.*, Fabian, *Life*, *supra* note 376, at 8; Mossman, *supra* note 376, at 274.

813. *Schriro v. Smith*, 546 U.S. 6, 7 (2005) (vacating federal court preemptive imposition of jury requirement on *Atkins* state collateral proceeding).

814. The Texas Court articulated the *Briseno* factors in the context of its expression of concern about the subjectivity of the adaptive behavior definitional element. *See Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004). Although the Texas Court subsequently stated that these factors were relevant to examining all three aspects of the mental retardation definition, they have primarily been used regarding the adaptive

In *Briseno*, before adopting an interim mental retardation definition for *Atkins* purposes, the Texas Court noted that the term “mental retardation” includes a “large and diverse population,” the majority of which would be classified as “mildly” mentally retarded. The Texas Court further noted the value of a broad definition by mental health professionals for the purpose of providing services and assistance to those whose functioning might benefit from such. In the absence of legislative action, however, the Texas Court identified its definitional task differently:⁸¹⁵

We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty. Most Texas citizens might agree that Steinbeck’s Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a “mental retardation” bright-line exemption from our state’s maximum statutory punishment? As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.⁸¹⁶

Noting the use of the three-part state mental retardation law definition in past proposed *Atkins*-type legislation, its own use of this definition and the AAMR definition in previous capital cases, and the *Briseno* parties’ and trial court’s use of the AAMR definition, the Texas Court concluded that it would apply either of these definitions in addressing *Atkins* claims until the Texas Legislature enacted an “alternative statutory definition.”⁸¹⁷

functioning element. See *Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008); cf. *Ex parte Hearn*, 310 S.W.3d 424, 429–31 (refusing to permit clinical assessment to be substituted for full scale IQ scores in determining intellectual functioning).

815. *Briseno*, 135 S.W.3d at 5–6.

816. *Id.* at 6.

817. See *id.* at 6–8.

In defining the adaptive behavior criterion in *Briseno*, the Texas Court referenced the state mental retardation law regarding the degree to which a person “meets the standards of personal independence and social responsibility expected of the person’s age and cultural group.”⁸¹⁸ It also referenced a pre-*Atkins* AAMR definition of the term: “significant limitations in an individual’s effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales.”⁸¹⁹ After *Briseno*, however, the Texas Court has also reviewed *Atkins* claims that have used and has itself applied the AAMR adaptive skill areas referenced in *Atkins* (e.g., communication and functional academics) and the subsequently consolidated AAMR adaptive skill areas (i.e., conceptual, social, and practical skills).⁸²⁰

The Texas Court, however, did not simply adopt these clinical definitions of adaptive functioning in *Briseno* and subsequent cases. Perhaps reflecting its above-described perceived task to define mental retardation to reflect a distinct *Texas* consensus regarding the exemption of mentally retarded offenders from execution, rather than to enforce the *national* consensus the Court found in *Atkins* in support of the constitutional execution ban, the Texas Court promulgated a set of evidentiary factors for use by *Atkins* fact-finders in addition to what it characterized as the “exceedingly subjective” adaptive behavior clinical criteria:⁸²¹

Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

Has the person formulated plans and carried them through or is his conduct impulsive?

818. *Id.* at 7 n.25.

819. *Id.*

820. See, e.g., *Hearn*, 310 S.W.3d at 427–29; *Williams v. State*, 270 S.W.3d 112, 122–28 (Tex. Crim. App. 2008); *Gallo v. State*, 239 S.W.3d 757, 770–73 (Tex. Crim. App. 2007); see also *supra* notes 430, 432, 433, 436, 443, 450, 485, 494, 531, 553, 587 and accompanying text (describing Texas cases referencing the adaptive skill areas).

821. See *Briseno*, 135 S.W.3d at 8 (indicating that *Atkins* fact-finders “might” also focus on these factors).

Does his conduct show leadership or does it show that he is led around by others?

Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

Can the person hide facts or lie effectively in his own or others' interests?

Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?⁸²²

Although the initially stated purpose of these *Briseno* factors, unique to Texas and presented without citation to any mental retardation scholarly sources, was to potentially assist *Atkins* fact-finders in distinguishing evidence as indicative of mental retardation or a personality disorder,⁸²³ these factors have been used to defeat evidence of adaptive functioning limitations corresponding to other aspects of the clinical criteria and, in some instances, to make the facts of the offender's crime dispositive of this definitional element.⁸²⁴ In their examination of *Atkins* collateral review claims, the Fifth Circuit and Texas federal trial courts have not only endorsed review of the application of the AAMR adaptive functioning skill area criteria, they have also concluded that the *Briseno* factors are not inconsistent with *Atkins* regarding the evaluation of adaptive behavior and have approved, but not required, their use.⁸²⁵

Critics of the *Briseno* factors have assailed them as contrary to the basic clinical concepts of mental retardation, consequently

822. *Id.* at 8–9.

823. *See id.* at 8. *But see* Blume et al., *supra* note 21, at 725–29 (noting that mental retardation and mental disorders can coexist).

824. *See Gallo*, 239 S.W.3d at 769 (identifying the *Briseno* factors as “[o]ther evidentiary factors” that fact-finders “might also focus on in weighing evidence as indicative of mental retardation” without limitation to distinguishing mental retardation from personality disorder); *see also supra* notes 526–58, 586–97 and accompanying text (describing Texas state and federal courts’ application of the *Briseno* factors in denials of *Atkins* claims).

825. *See supra* notes 336–43 and accompanying text.

excluding a smaller group of capital offenders from execution than mandated by *Atkins*.⁸²⁶ In this regard, the AAMR has identified some “key factors” regarding the adaptive behavior component of mental retardation and its assessment. These include the concepts that 1) the adaptive behavior criterion addresses “significant limitations” in adaptive behavior, 2) “adaptive skill limitations often coexist with strengths,” and 3) the assessment of adaptive behavior is based on the person’s “typical (not maximum) performance.”⁸²⁷ The AAMR notes that “[i]ndividuals with [mental retardation] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills is [sic] not outweighed by the potential strengths in some adaptive skills.”⁸²⁸ The AAMR further explained this notion of the coexistence of strengths and limitations in a mentally retarded person:

“Within an individual, limitations often coexist with strengths.” This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.⁸²⁹

826. See, e.g., Blume et al., *supra* note 21, at 691–92, 695–97, 704–25; Steiker & Steiker, *supra* note 21, at 727–28; cf. Hagstrom, *supra* note 21, at 253–54, 269–70.

827. AAIDD, *supra* note 5, at 45. Another key factor regarding adaptive behavior assessment is that adaptive strengths and limitations should be evaluated within the “context of community and cultural environments typical of the person’s age peers.” AAIDD, *supra* note 5, at 45 (indicating that this focus is “tied to the person’s need for individualized supports”). Adaptive behavior testimony from correctional officers regarding offenders’ functioning in the very structured death row environment is often introduced in *Atkins* proceedings. Critics of the use of such testimony assert that it is contrary to the community context prescribed for the assessment of mental retardation and is not a meaningful measure of an offender’s typical adaptive functioning. See, e.g., Blume et al., *supra* note 21, at 717–21; Blume et al., *supra* note 26, at 635–36; cf. Stevens & Price, *supra* note 376, at 19–20; Young et al., *supra* note 263, at 174–75. In the 2008 study of *Atkins* proceedings results, researchers found that almost thirty percent of the losing cases relied, at least partially, on the offender’s prison behavior. See Blume et al., *supra* note 26, at 636.

828. AAIDD, *supra* note 5, at 47.

829. AM. ASS’N ON MENTAL RETARDATION, *supra* note 5, at 8; see also *id.* at 13.

The concerns about *Atkins* claim fact-finders and reviewing courts focusing on an offender's adaptive strengths rather than assessing asserted limitations and relying on stereotypical notions of mental retardation are not, of course, limited to Texas *Atkins* cases.⁸³⁰ Without an evidentiary focus on an offender's asserted adaptive limitations, an *Atkins* proceeding can easily become a setting for wide-ranging evidence, much of which is irrelevant to the adaptive behavior determination, but may nevertheless militate against a finding of mental retardation.⁸³¹ Rather than a *generalized* assessment of adaptive behavior, the clinical definition requires a "particularized balancing of skill area-specific strengths versus weaknesses within skill areas."⁸³² Courts reviewing *Atkins* claims also must always be mindful of their own stereotypical notions of mental retardation and those presented by lay witnesses in making a mental retardation determination.⁸³³ Critics of the *Briseno* factors, however, assert that rather than addressing these concerns, the Texas Court's adoption of these factors exacerbates these concerns:⁸³⁴

830. See, e.g., *McGowan v. State*, 990 So. 2d 931, 999 (Ala. Crim. App. 2003) (noting offender's strengths); *Brown v. State*, 959 So. 2d 146, 149–50 (Fla. 2007) (rejecting mental retardation due to offender's work and relationship history and car-related abilities); Blume et al., *supra* note 21, at 704–10; White, *supra* note 712, at 701–03.

831. See Blume et al., *supra* note 21, at 710–11, 713 (noting that the adaptive behavior determination only becomes a perceived subjective "battle of the experts" if it is detached from its clinical underpinnings and distinguishing between clinical judgment and subjectivity); see also Fabian, *Life*, *supra* note 376, at 17 (stressing the importance of communicating an offender's adaptive limitations versus strengths compared to the correct reference populations and cautioning about the use of strengths to overcome a mental retardation finding); Patton & Keyes, *supra* note 376, at 250 (noting that strengths are often used to discredit a mental retardation claim despite professional agreement that adaptive strengths can coexist with deficits and deficits need not be shown in all adaptive skill areas); White, *supra* note 712, at 702–03 (noting judges' use of personal notions regarding an offender's strengths and related stereotypes to overcome professional adaptive behavior assessment and clinical judgment).

832. See Blume et al., *supra* note 21, at 707. This approach was taken in *Holladay v. Campbell*, 463 F. Supp. 2d 1324 (N.D. Ala. 2006), *aff'd sub nom. Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009) and *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005).

833. See Blume et al., *supra* note 21, at 707–10; Fabian, *Life*, *supra* note 376, at 17; Patton & Keyes, *supra* note 376, at 239–40; cf. Boccaccini et al., *supra* note 395, at 1.

834. One group of scholars states that the *Briseno* factors present an "array of divergences from the clinical definitions." Blume et al., *supra* note 21, at 712. For example, the factor seeking others' perceptions of the offender as mentally retarded relies on stereotypes and labels. Those factors addressing the offender's abilities regarding the crime and other abilities focus on the offender's strengths rather than limitations. Those factors that address certain of the adaptive behavior skill areas do so only through generalizations. See *id.*

Overall, the *Briseno* factors narrow the scope of relevant behaviors to a limited group of questions from a universe of possibilities, and as such fail to fully address all skill areas set out in the clinical definitions—areas such as home living and self-care are ignored. Thus, a factfinder applying all of the factors will not necessarily have assessed the full possibility of adaptive deficits, and therefore cannot rule out the possibility of significant limitations in adaptive functioning.

....

. . . [T]he *Briseno* factors create their own world of relevance, redefining the questions that make up the constitutional determination. Undoubtedly, this gives courts more direction. But the *Briseno* factors focus on a few facts, which portray stereotype, strength-first or strength-only reasoning, at best a handful of itemized weaknesses,⁸³⁵ and are satisfied by the answers to those questions alone.

Of particular concern is the important, and sometimes dispositive, role attached to the facts of the crime by the *Briseno* factors,⁸³⁶ the consideration of which has been subject to debate in the mental retardation professional and scholarly communities with regard to adaptive functioning.⁸³⁷ Of note in assessing the impact of this concern, the Texas Court has acknowledged that “many of the *Briseno* factors pertain to the facts of the offense and the defendant’s behavior before and after the commission of the offense.”⁸³⁸ The introduction of the facts of the crime is not limited to Texas *Atkins* proceedings.⁸³⁹ Those supporting the introduction of such evidence

835. *Id.* at 712, 713–14.

836. See *infra* notes 526–41 and accompanying text (describing the Elroy Chester case); see also William Lee Hon, *Claims of Mental Retardation in Capital Litigation*, 69 TEX. B.J. 742, 744 (2006) (providing overview by a Texas prosecutor and noting that “in many instances the facts of the crime will be the best evidence of a defendant’s level of adaptive functioning”).

837. See *supra* note 395, *infra* notes 838–49 and accompanying text.

838. Gallo v. State, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007).

839. See Fabian, *State*, *supra* note 376, at 24; Kan et al., *supra* note 385, at 7; Stevens & Price, *supra* note 376, at 18; White, *supra* note 712, at 704–05. In a study involving twenty psychiatrists and psychologists who had conducted at least one evaluation of mental retardation in a Texas capital case (before or after *Atkins*), sixteen felt that it was appropriate to consider the crime facts and the offender’s past criminal behavior in assessing adaptive behavior. However, only five respondents identified the review of criminal records or history as an “essential” element of a complete capital mental retardation evaluation and only one actually reported using such information in capital

assert that it can illustrate areas of strengths and deficits in adaptive behavior in the same manner as other types of evidence.⁸⁴⁰ Moreover, unlike often incompletely documented retrospective evidence used in *Atkins* proceedings, evidence related to a capital crime is generally well-documented.⁸⁴¹ Critics of the use of such evidence to establish or negate mental retardation state that its use is contrary to the AAMR diagnostic approach,⁸⁴² including its focus on a single event rather than the offender's typical adaptive behavior⁸⁴³ and its conflation of maladaptive or problem behavior with adaptive behavior that is the focus of the diagnostic criteria.⁸⁴⁴ There are also no normative data regarding the types of crimes that mentally retarded people can or cannot perform or professionally validated methods to relate this behavior to the adaptive behavior deficit areas or their assessment.⁸⁴⁵ Some or all of the crime facts may not be relevant to the offender's

adaptive functioning evaluations. See Young et al., *supra* note 263, at 169–70, 173, 174. In another study reviewing the transcripts of Texas pre-*Atkins* capital cases, researchers found that evidence of criminal behavior was introduced in thirteen of nineteen cases with reference to the offender's level of adaptive functioning. See Kan et al., *supra* note 385, at 8, 17. In reviewing a claim of ineffective assistance of counsel for failure to “pursue and present” mitigating evidence of mental retardation and potential strategic reasons for attorneys' non-presentation of this evidence, the Court noted that such evidence “may have led to rebuttal testimony about the capabilities [the offender] demonstrated through his extensive criminal history.” *Wood v. Allen*, 130 S. Ct. 841, 845, 850 n.3 (2010).

840. See Young et al., *supra* note 263, at 173. In the Texas survey of mental health professionals, fourteen of the twenty respondents indicated that it was appropriate to consider criminal behavior because it could show “planning and organizational behavior.” However, there was considerable variability in their views of the “strength of the connection between criminal behavior and adaptive behavior.” See *id.* at 173–74. In the Texas study of nineteen pre-*Atkins* cases, evidence of criminal behavior was primarily presented in thirteen cases with reference to the self-direction adaptive skill area, but few cases “relied explicitly” on this type of testimony. See Kan et al., *supra* note 385, at 17, 20.

841. See Young et al., *supra* note 263, at 173.

842. See Kan et al., *supra* note 385, at 3, 21 (noting that use of criminal behavior information in the mental retardation diagnostic process is inconsistent with AAMR user guidelines); Steiker & Steiker, *supra* note 21, at 727–28 (stating that use of crime facts and related *Briseno* factors “significantly departs” from diagnostic measures used by professionals and is “not grounded in professional practice or guidelines”).

843. See AAIDD, *supra* note 5, at 47; Everington & Olley, *supra* note 376, at 11. One mental health professional observed that an *Atkins* mental retardation assessment should follow the diagnostic criteria and classification systems established by the AAMR and APA. Even if evidence of the offender's criminal behavior and crime facts are considered by the court as evidence of adaptive functioning, “one cannot generalize an entire diagnosis on the defendant's isolated behavior in the context of an event.” Fabian, *State*, *supra* note 376, at 19.

844. See AAIDD, *supra* note 5, at 49; Blume et al., *supra* note 21, at 724; Everington & Olley, *supra* note 376, at 11; White, *supra* note 712, at 704.

845. See Kan et al., *supra* note 385, at 8; Young et al., *supra* note 263, at 173–74.

asserted adaptive deficit areas.⁸⁴⁶ The crime facts may not provide sufficient or sufficiently reliable adaptive functioning information if based on the faulty reporting or limited communication skills of a mentally retarded person.⁸⁴⁷ Finally, heinous crime facts have been used to overcome evidence of adaptive functioning deficits established pursuant to the diagnostic criteria⁸⁴⁸ despite the fact that the Court has not required a nexus between the capital crime and a mental retardation finding, but instead has found mentally retarded offenders constitutionally exempt from execution despite their capital crimes.⁸⁴⁹

The AAMR itself has directly criticized the *Briseno* factors as a “departure” from clinical standards for determining mental retardation that results in an “under-protection of *Atkins* rights.”⁸⁵⁰

846. See Blume et al., *supra* note 21, at 724–25. This concern has led some courts to find some crime facts irrelevant to the *Atkins* mental retardation determination. See, e.g., *Holladay v. Campbell*, 463 F. Supp. 2d 1324 (N.D. Ala. 2006), *aff’d sub nom.* *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009); *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005).

847. See Blume et al., *supra* note 21, at 723, 725; Kan et al., *supra* note 385, at 8; Young et al., *supra* note 263, at 173; *cf.* *Atkins v. Virginia*, 536 U.S. 304, 318, 320–21 (2002); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 427–32 (1985) (describing characteristics of mentally retarded persons that may affect the completeness or accuracy of their reporting of information).

848. See, e.g., *Ex parte Smith*, No. 1010267, 2003 Ala. LEXIS 79, at *26–29 (Ala. Mar. 14, 2003); *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 899, at *75–76 (Tenn. Crim. App. Nov. 9, 2006); White, *supra* note 712, at 704–05; *supra* notes 537–41 and accompanying text (describing the Elroy Chester case); *cf.* *State v. Dunn*, 41 So. 2d 454, 471–73 (La. 2010) (considering crime facts in the assessment of adaptive functioning).

849. See *Atkins*, 536 U.S. at 317–21; *cf.* *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). See generally Fabian, *State*, *supra* note 376, at 18 (reviewing use of homicide facts in *Atkins* assessment of mental retardation and concluding that professional practice and Court rulings preclude meaningful use of such).

850. See Brief of the American Association on Intellectual and Developmental Disabilities (“AAIDD”) and the Arc of the United States as Amici Curiae in Support of Petitioner at 21, *Hall v. Thaler*, No. 10-37 (U.S. Aug. 5, 2010) [hereinafter AAMR Brief]. In a case in which the offender’s *Atkins* claim was addressed both before and after *Briseno* and was resolved by the Texas state and federal courts without explicit recitation of the *Briseno* factors, the offender nevertheless expressly challenged the *Briseno* factors in his certiorari petition. See Petition for a Writ of Certiorari at 28–37, *Hall v. Thaler*, No. 10-37 (U.S. June 30, 2010). *But see* Respondent’s Brief in Opposition at 33–35, *Hall v. Thaler*, No. 10-37 (U.S. Sept. 13, 2010) (contending that the Texas state and federal courts did not rely on the *Briseno* factors in denying the offender’s *Atkins* claim). The AAMR and another mental retardation professional organization filed an amicus curiae brief in this proceeding. See AAMR Brief, *supra*; see also Brief of Texas State Senator Rodney Ellis et al. as Amici Curiae in Support of Petitioner, *Hall v. Thaler*, No. 10-37 (U.S. Aug. 5, 2010) (criticizing the *Briseno* factors in an additional amicus curiae brief filed by a group including Texas mental retardation organizations).

The AAMR has stated that the *Briseno* factors have “no basis of support in the clinical literature or in the understanding of mental retardation by experienced professionals in the field.”⁸⁵¹ It has cautioned that “*Briseno* has planted a seed that legal principles can be built out of preconceived notions of what mental retardation looks like to the lay person and that their conclusions will be followed even if they are flatly contrary to science.”⁸⁵² The AAMR has expressed concern about according “independent and significant weight” to non-expert mental retardation assessments for *Atkins* purposes.⁸⁵³

Briseno's reliance on these “evidentiary factors” that have no basis in the clinical diagnosis of mental retardation is infectious and has the potential to render the protections afforded by *Atkins* meaningless. Because the legal standard under *Atkins* is the diagnosis itself, an *Atkins* determination should not be based on a list of jury charge-style questions with no clinical foundation whatsoever.⁸⁵⁴

In light of the Court's reliance on the AAMR's concepts of mental retardation in *Atkins*,⁸⁵⁵ its criticism of the *Briseno* factors is particularly noteworthy.

In addition to the views of *Briseno* among the mental retardation professional and scholarly communities,⁸⁵⁶ another way to assess the constitutional “appropriateness” of the *Briseno* factors is to examine the impact that they have had in actual cases.⁸⁵⁷ At the outset, although the Texas Court has provided the *Briseno* factors for use by

851. AAMR Brief, *supra* note 850, at 23.

852. *Id.* at 24. The AAMR identified several concerns about lay persons' assessment of an offender's adaptive behavior, including lay persons' incomplete, inaccurate, or biased recollections about an offender's adaptive functioning and a lack of “understanding of the continuum of skills and deficits that an individual may exhibit across different aspects of everyday life.” *See id.* at 20. On the other hand, experts document adaptive skill limitations in the “ordinary community environments typical of the person's age and peers,” analyze gathered observations “across multiple environments and time periods,” apply clinical judgment, and filter “potential inaccuracies and biases” of nonexperts to produce a “more complete and accurate” assessment of an offender's adaptive deficits. *See id.* at 20–21.

853. *See id.* at 20–21.

854. *Id.* at 24–25.

855. *See supra* notes 160–67 and accompanying text; *see also supra* note 159 (describing the Court's use of the AAMR mental retardation definition and acknowledgment of the AAMR's position in *Penry*).

856. *See supra* notes 826–55 and accompanying text.

857. *See supra* notes 408–597, 672–700, *infra* notes 858–79 and accompanying text (describing application in Texas cases).

Atkins fact-finders, it has not mandated their use.⁸⁵⁸ The Texas Court has also stated that these factors are not designed to replace expert testimony in the *Atkins* determination of mental retardation, but that this determination remains for the fact-finder based on “all of the evidence and determinations of credibility.”⁸⁵⁹ Nevertheless, the *Briseno* factors have often played an important role in the success or failure of the illustrative *Atkins* claims presented in this Article.⁸⁶⁰

Of the fourteen successful *Atkins* collateral review claims, interestingly the *Briseno* factors played an actual role in the adaptive behavior determination in only four of the cases.⁸⁶¹ Of the eight successful *Atkins* collateral review claims resulting from initial or ultimately agreed findings of mental retardation, offenders’ establishment of deficits in enumerated AAMR adaptive skill areas (or related areas of adaptive behavior) served as the primary basis for the adaptive functioning finding.⁸⁶² An offender’s additional satisfaction of the *Briseno* factors was discussed in the resolution of only one of these cases.⁸⁶³ Of the four contested collateral review cases in which the Texas Court granted *Atkins* relief, the convicting court in one case primarily found the adaptive functioning element

858. See *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (identifying the factors as “other” evidentiary factors that fact-finders in criminal proceedings “might also focus upon in weighing evidence” regarding mental retardation); *accord Gallo v. State*, 239 S.W.3d 757, 769, 776 (Tex. Crim. App. 2007).

859. See *Gallo*, 239 S.W.3d at 776–77. In rejecting a claim that *Briseno* assigned “superior status” to lay testimony regarding adaptive behavior, the Texas Court stated that the *Briseno* factors incorporated lay testimony, but did not “exclude or downplay the importance of expert testimony or other evidence.” *Id.*

860. See *infra* notes 861–79 and accompanying text.

861. See *infra* notes 862–72 and accompanying text.

862. See *supra* notes 407–66 and accompanying text (describing the cases of Willie Mack Modden, David DeBlanc, Darrell Carr, Demetrius Simms, Exzavier Stevenson, Alberto Valdez, Robert Smith, and Doil Lane, resulting in *Atkins* relief by the Texas Court or Texas Governor).

863. See *supra* note 451 (identifying factual findings and legal conclusions regarding Valdez’s satisfaction of the *Briseno* factors). In *Ex parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004), the Texas Court noted that the convicting trial court had made its findings in the case prior to the issuance of the *Briseno* opinion and had used the AAMR and APA mental retardation definitions recited in *Atkins*, including the adaptive skill area criteria regarding adaptive functioning. The Texas Court noted the “consistent” mental retardation definitions it had adopted in *Briseno* and the *Briseno* factors and stated that it would apply the criteria adopted in *Briseno* in its review. However, the Texas Court’s analysis reiterated that the trial court did not use the *Briseno* factors in its analysis and it nevertheless found the trial court’s findings of mental retardation supported by the record. See *id.* at 295–97. But see *id.* at 299–311 (Hervey, J., joined by Keasler, J., dissenting) (indicating that the offender did not satisfy the *Briseno* factors among other things).

based on identification of adaptive skill area deficits, also reciting but not applying the *Briseno* factors.⁸⁶⁴ In two cases, the convicting trial court determined the adaptive functioning element primarily based on deficits in adaptive skill areas, but also found the offender's satisfaction of the *Briseno* factors.⁸⁶⁵ In one case, although the convicting trial court received evidence concerning the offender's adaptive skill area deficits, its analysis focused on the offender's satisfaction of the *Briseno* factors.⁸⁶⁶ In the two successful contested cases in which the Texas federal courts determined mental retardation de novo on collateral review, the courts' adaptive functioning finding was based on adaptive skill area deficits and not the *Briseno* factors.⁸⁶⁷

Of the six illustrative contested unsuccessful *Atkins* collateral review cases described in this Article, the *Briseno* factors were applied to support the rejection of an adaptive behavior deficit finding in four of them.⁸⁶⁸ In three of these cases, the convicting trial court applied the *Briseno* factors in addition to other conflicting evidence in rejecting the adaptive behavior element and the Texas Court and reviewing federal courts upheld the adaptive functioning finding.⁸⁶⁹ The convicting trial court's rejection of the adaptive behavior element in the fourth unsuccessful case was primarily based on its application of the *Briseno* factors. In this case, although the convicting trial court received evidence concerning the offender's

864. See *supra* notes 484–92 and accompanying text (describing the case of Timothy Cockrell).

865. See *supra* notes 468–73, 493–500 and accompanying text (describing the cases of Walter Bell and Daniel Plata).

866. See *supra* notes 474–83 and accompanying text (describing the case of Gregory Van Alstyne).

867. See *supra* notes 501–17 and accompanying text (describing the cases of Eric Moore and Jose Rivera); cf. *supra* note 514 (finding that the federal trial court did not abuse its discretion in expressly declining to apply the *Briseno* factors, but noting that the trial court did consider record evidence pertaining to the factors in determining Moore's adaptive skill deficits).

868. See *supra* notes 524–58, 586–97 and accompanying text (describing the cases of Elroy Chester, John Matamoros, Elkie Taylor, and Curtis Moore). The convicting trial court conducted its *Atkins* proceedings in the James Clark case before *Briseno* and the Texas Court and federal courts did not apply the *Briseno* factors in their review of the convicting trial court's *Atkins* findings. See *supra* notes 571–85 and accompanying text. The Texas Court dismissed the Jeffrey Williams subsequent writ application as an abuse of the writ for failure to allege prima facie evidence of mental retardation and the federal courts recited the *Briseno* factors, but did not apply them in rejecting his *Atkins* claim. See *supra* notes 559–69 and accompanying text.

869. See *supra* notes 542–58, 586–97 and accompanying text (describing the Matamoros, Taylor, and Moore cases).

adaptive skill area deficits, its analysis focused on the offender's failure to satisfy the *Briseno* factors. In its review of the case, the Texas Court noted the "persuasive" evidence establishing the offender's mental retardation pursuant to the diagnostic criteria, but found that the trial court had addressed the offender's failure to satisfy each *Briseno* factor and concluded that the trial court did not err in rejecting the *Atkins* claim. In its description of the evidence supporting the trial court's *Briseno* factor findings, the Texas Court devoted the vast majority of its discussion to a recitation of the facts of the offender's crime. After repeating this lengthy recitation of the facts of the crime, the Texas federal trial court denied collateral relief, finding that the *Briseno* factors were not contrary to or an unreasonable application of federal law and that the final *Briseno* factor regarding the capital crime was sufficient in itself to deny federal *Atkins* relief.⁸⁷⁰

Based on the successful *Atkins* collateral review cases, offenders prevailed in over seventy percent of the cases in which the *Briseno* factors played no role versus almost thirty percent of the cases in which the *Briseno* factors played an additional or primary role.⁸⁷¹ In the illustrative unsuccessful *Atkins* collateral review cases, these percentages were almost reversed: the *Briseno* factors played an additional or primary role in approximately sixty-seven percent of the unsuccessful illustrative cases versus no role in approximately thirty-three percent of the unsuccessful cases.⁸⁷² These results suggest that the *Briseno* factors have been a more frequent factor in unsuccessful than successful *Atkins* cases and that they can have a resulting impact in determining the success or failure of an *Atkins* claim.

The impact of the *Briseno* factors on the resolution of *Atkins* claims at the trial level is still evolving. No contested *Atkins* claim has thus far been successful at the trial level.⁸⁷³ The Texas Court has reviewed only five post-*Briseno* cases in which punishment juries have rejected *Atkins* claims and it has upheld the jury determinations in all of them.⁸⁷⁴ In each appellate opinion, the Texas Court has

870. See *supra* notes 526–41 and accompanying text (describing the Chester case).

871. See *supra* notes 861–67 and accompanying text.

872. See *supra* notes 868–70 and accompanying text.

873. See *supra* Table 2; *supra* note 668 and accompanying text.

874. See *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *11–15 (Tex. Crim. App. May 5, 2010); *Williams v. State*, 270 S.W.3d 112, 113–32 (Tex. Crim. App. 2008); *Neal v. State*, 256 S.W.3d 264, 272–75 (Tex. Crim. App. 2008); *Hunter v. State*, 243 S.W.3d 664, 666–72 (Tex. Crim. App. 2008); *Gallo v. State*, 239 S.W.3d 757, 769–75 (Tex. Crim.

accompanied its recitation of the applicable three-part mental retardation definition with a recitation of the *Briseno* factors.⁸⁷⁵ In upholding the jury determinations, the Texas Court has expressly referenced record evidence indicating the offenders' failure to satisfy at least one of the *Briseno* factors in all of these cases.⁸⁷⁶ In addressing challenges to jury instructions in these cases, the Texas Court has approved, but not required jury instructions that include the AAMR diagnostic skill area adaptive behavior criteria.⁸⁷⁷ It has also upheld the use of the more general state mental retardation law adaptive behavior definition referencing "standards of personal independence and social responsibility expected of the person's age and cultural group,"⁸⁷⁸ as well as that definition accompanied by the *Briseno* factors.⁸⁷⁹

A particularly telling indication of concern about the Texas Court's development of an "appropriate" way to determine the adaptive functioning component of the *Atkins* mental retardation determination was expressed in a dissent by three of the nine Texas Court Judges. The majority in this case upheld an *Atkins* jury verdict based on the trial court's use of the state mental retardation law adaptive behavior definition (accompanied by the *Briseno* factors). The dissenting Judges specifically criticized the majority's failure to apply a "hypothetically correct" jury instruction incorporating the clinical diagnostic criteria in its appellate review.⁸⁸⁰ However, they also raised more general concerns about the Texas Court's

App. 2007); *supra* notes 672–700 and accompanying text (describing the Gallo, Williams, and Lizcano cases).

875. *Lizcano*, 2010 WL 1817772, at *11 n.44; *Williams*, 270 S.W.3d at 113–14; *Neal*, 256 S.W.3d at 272–73; *Hunter*, 243 S.W.3d at 666–67; *Gallo*, 239 S.W.3d at 769–70.

876. *See Lizcano*, 2010 WL 1817772, at *15 (describing lack of others' perception of the offender as mentally retarded); *Williams*, 270 S.W.3d at 115–16, 132 (describing crime facts and lack of others' perception of the offender as mentally retarded); *Neal*, 256 S.W.3d at 275 (describing planning of the crimes and attempting to conceal evidence); *Hunter*, 243 S.W.3d at 671–72 (describing lack of others' perception of the offender as mentally retarded); *Gallo*, 239 S.W.3d at 774 (describing how the *Briseno* factors "lend further support" to the jury's determination).

877. *See Williams*, 270 S.W.3d at 132–34 (using instructions regarding the AAMR conceptual, social, and practical skills areas); *supra* note 649–50 and accompanying text.

878. *See Gallo*, 239 S.W.3d at 777–78; *supra* note 651–52 and accompanying text.

879. *See Lizcano*, 2010 WL 1817772, at *12, *15; *supra* notes 653–59 and accompanying text.

880. *See Lizcano*, 2010 WL 1817772, at *32–40 (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting). These Judges concurred regarding the guilt phase appellate issues and the majority's finding that the offender had established the requisite intellectual functioning limitations for mental retardation. *See id.* at *32.

interpretation of the adaptive behavior criterion. Rather than “expressly embracing the specific [AAMR adaptive skill area] diagnostic criteria” provided in *Atkins*, the dissenting Judges stated that the Texas Court adopted the more general state mental retardation law and pre-*Atkins* AAMR definitions in *Briseno* and “promulgated certain non-diagnostic criteria of our own—the so-called “*Briseno*” factors.”⁸⁸¹ However, the dissenting Judges expressed doubt that the Court’s entrustment to the states of *Atkins* enforcement authority included the option of defining mental retardation “less comprehensively than the clinical definitions it cited approvingly in *Atkins*.”⁸⁸²

The dissenting Judges acknowledged the scholarly criticism of the *Briseno* approach regarding the adaptive behavior element.⁸⁸³ They further expressed concern that the definitional framework adopted in *Briseno* permits fact-finders of Texas *Atkins* claims to base mental retardation findings on normative judgments rather than the clinical concepts articulated in *Atkins*.⁸⁸⁴

[Identifying mental retardation as a question of fact] does not justify our apparent grant of latitude to fact-finders in Texas to adjust the clinical criteria for adaptive deficits to conform to their own normative judgments with respect to which mentally retarded offenders are deserving of the death penalty and which are not. *Atkins* adopted a categorical prohibition. It was founded upon the Supreme Court’s ratification of the prevalent legislative judgment that it is inappropriate to execute mentally retarded offenders. That legislative judgment comprehended mental retardation in essentially the same “clinical” terms as the AAMR’s and APA’s diagnostic criteria. Even if the Supreme Court in *Atkins* “did not mandate the application of a particular mental health standard for mental retardation, . . . it did recognize the significance of professional standards and

881. *Id.* at *34–35; *cf. id.* at *33 (noting that the pre-*Atkins* AAMR definition contained a somewhat similar standard to the state law, but significantly stated that it was to be determined by “clinical assessment” usually involving “standardized scales”). The dissenting Judges concerns are directed to the majority’s failure to apply the adaptive behavior diagnostic criteria in its review of the sufficiency of the jury’s determination of mental retardation. These concerns encompass the use of the state mental retardation law definition in this case referencing “social responsibility” and “personal independence” without any use of diagnostic criteria. By characterizing the *Briseno* factors as “non-diagnostic criteria,” these concerns raise issues about the *Briseno* factors as well. *See id.* at *34–35.

882. *See id.* at *34 & n.17.

883. *See id.* at *34 n.23 (citing scholarly criticism of the *Briseno* factors).

884. *See id.* at *35; *supra* text accompanying note 658 (describing this concern).

framed the constitutional prohibition in medical rather than legal terms.” It would be anomalous to allow the fiat of a fact-finder to undermine the essentially diagnostic character of the inquiry. We should not sanction incomplete jury instructions that would permit a jury, in the guise of “fact-finder,” capriciously to deviate from the specific diagnostic criteria in order to conform to its own normative, necessarily subjective, and certainly unscientific judgment regarding who deserves the death penalty.⁸⁸⁵

In applying a hypothetically correct jury charge that included the adaptive behavior diagnostic criteria (requiring deficits in at least two of the identified skill areas) to the evidence presented, the dissenting Judges concluded that the offender had established the necessary adaptive deficit areas to support a finding of mental retardation—contrary to the jury’s conclusion based on the instructions it had received.⁸⁸⁶ The dissenting Judges, representing one-third of the Texas Court Judges, then summarized their views regarding the state of the Texas Court’s *Atkins* adaptive behavior jurisprudence:

In *Briseno*, we decried the “exceedingly subjective” nature of the adaptive-behavior criteria. And it may well be true that determining mental retardation under those criteria is as much an art as a science. But it is no solution to this lamentable subjectivity to substitute the normative caprice of the fact-finder for the comparative scientific objectivity inherent in the diagnostic criteria. It is not enough that individual jurors might choose to be guided by the diagnostic criteria, as depicted to them by the testifying experts. The jury should be explicitly bound to those criteria by the hypothetically correct jury instruction as the best available scientific basis for distinguishing the mildly mentally retarded offenders from those who are merely borderline intelligent. Perhaps the diagnostic criteria are designedly over-inclusive in order to avoid leaving any deserving individuals out of the social services net. But it seems to me that to err on the side of over-inclusiveness is no less a virtue in the Eighth Amendment context.

I am put to mind of the familiar due-process adage that “it is far worse to convict an innocent man than to let a guilty man go free.[”] The [Texas] Court’s scattershot approach to adaptive deficits—letting the fact-finder hunt and peck among adaptive

885. *Id.* at *35 (citation omitted).

886. *See id.* at *36–39.

deficits, unfettered by the specific diagnostic criteria that inform the expert opinion—will allow some capital offenders whom every rational diagnostician would find meets [sic] the clinical definition of mental retardation to be executed simply because they demonstrate a few pronounced adaptive strengths along with their manifest adaptive deficits. Better, I think, to be over-inclusive and mistakenly sentence some borderline intelligent capital offenders to the not-inconsiderable penalty of life imprisonment without the possibility of parole than to inadvertently execute even a single mildly mentally retarded offender in violation of the strictures of the Eighth Amendment. The [Texas] Court’s arbitrary approach today is unfaithful to—it does not even “generally conform” with—the criteria for mental retardation that was the basis for the national consensus the Supreme Court found in *Atkins*.⁸⁸⁷

Are the factors examined in this section, i.e., 1) the specific concerns about the *Briseno* factors articulated by the mental retardation professional and scholarly communities, 2) the indication of their impact in actual cases, and 3) the concern by these dissenting Texas Court Judges about the determination of mental retardation for *Atkins* purposes without the diagnostic criteria endorsed in *Atkins*,⁸⁸⁸ sufficient to cause the Supreme Court to undertake review of the “non-diagnostic” *Briseno* factors? This question is explored in the following section.

E. Will the Court Find Texas’s Different Path an “Appropriate Way” to Enforce the *Atkins* Mandate?

After finding a national consensus against the execution of mentally retarded offenders, the *Atkins* Court entrusted the states with the “task of developing *appropriate* ways to enforce the constitutional restriction upon [their] execution of sentences.”⁸⁸⁹ The two aspects of the Texas Court’s post-*Atkins* path that are sufficiently distinct from other states are its failure to identify a trial level fact-finder and timing for the mental retardation determination and its adoption and application of the *Briseno* factors.⁸⁹⁰ Concerns about the Texas Court’s failure to identify a trial level fact-finder and timing

887. *Id.* at *39–40.

888. *See supra* notes 826–87 and accompanying text.

889. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (plurality opinion) regarding the execution of insane offenders) (emphasis added).

890. *See supra* notes 788–91 and accompanying text.

for the mental retardation determination may not be ripe for Court resolution.⁸⁹¹ However, the Texas Court's unique *Briseno* factors, endorsed by the Fifth Circuit, have been available for use in a significant volume of collateral review cases and are beginning to be applied at the trial level. Concerns about the *Briseno* factors may be sufficiently developed to warrant Court determination of their constitutional appropriateness to carry out the *Atkins* mandate.⁸⁹² Moreover, the Court has previously found that the Texas Court and Fifth Circuit have developed constitutionally *inappropriate* ways to carry out other Court mandates regarding the consideration of mitigating evidence in capital cases and the execution of insane offenders. These decisions may provide guidance regarding the Court's potential consideration of the *Briseno* factors.⁸⁹³

The Court's dissatisfaction with the Texas Court and Fifth Circuit implementation of its mandates has been especially pronounced regarding the consideration of capital mitigating evidence.⁸⁹⁴ In *Penry v. Lynaugh*,⁸⁹⁵ the Court concluded that the Texas capital sentencing statute did not provide a constitutionally adequate vehicle for jurors to "consider and give effect to" proffered mitigating evidence of mental retardation and was therefore unconstitutional, as applied in the case.⁸⁹⁶ In addressing post-*Penry* claims raising concerns about the constitutionally inadequate consideration of a variety of mitigating evidence under this sentencing statute, the Fifth Circuit and Texas Court adopted restrictive definitions of "constitutionally relevant" mitigating evidence, requiring a "uniquely severe permanent handicap" that had a nexus with the crime and that was not otherwise adequately addressed by the pre-*Penry* punishment procedures.⁸⁹⁷

891. See *supra* notes 792–804 and accompanying text.

892. See *supra* notes 805–88 and accompanying text.

893. See *infra* notes 894–912 and accompanying text.

894. See *infra* notes 895–904 and accompanying text.

895. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

896. See *id.* at 307, 313, 319–28; see *id.* at 341–42 (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part); *id.* at 349–50 (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part); see also *supra* notes 64–73 and accompanying text; cf. *Penry*, 492 U.S. at 308–10, 312–13 (addressing this issue also regarding *Penry*'s mitigating evidence of childhood abuse).

897. See *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994); *Graham v. Collins*, 950 F.2d 1009, 1029, 1033 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993); *Nobles v. State*, 843 S.W.2d 503, 506 (Tex. Crim. App. 1992); *Goss v. State*, 826 S.W.2d 162, 165 (Tex. Crim. App. 1992) (plurality opinion); *Lackey v. State*, 819 S.W.2d 111, 132–35 (Tex. Crim. App. 1991 (rehearing opinion)); *Tobolowsky, Texas, supra* note 1,

In a case over a decade after the Fifth Circuit's adoption of this standard, the Court criticized the Fifth Circuit's adoption of "its own restrictive gloss" on *Penry* and stated that the Fifth Circuit's analytical framework had "no foundation" in the Court's decisions and was an "improper legal standard."⁸⁹⁸ The Court specifically held that the Fifth Circuit's "uniquely severe permanent handicap" and nexus tests for ascertaining *Penry* evidence were "incorrect," and the Court explicitly rejected them.⁸⁹⁹ The following term, the Court rejected the Texas Court's adoption of the Fifth Circuit's *Penry* evidence standards and found that the Texas Court had "erroneously relied on a [*Penry* evidence] test we never countenanced and now have unequivocally rejected."⁹⁰⁰

In two other cases, the Court found that the Texas Court and Fifth Circuit had incorrectly implemented *Penry*'s mandate by upholding sentencing procedures that they had deemed to provide an "adequate vehicle" for mitigating evidence or "sufficient mitigating effect," rather than providing the constitutionally required "full" or "meaningful" effect for proffered mitigating evidence.⁹⁰¹ The Court specifically found that the Fifth Circuit had "mischaracterized the law" by adopting a "sufficient" mitigating effect standard in its review of *Penry* claims and that, once again, the "sufficient effect" standard had "no foundation" in the Court's decisions.⁹⁰² Finally, the Court rejected the Texas Court's and Fifth Circuit's approval of "nullification" jury instructions used post-*Penry* in conjunction with the pre-*Penry* sentencing statute, and found these instructions were a constitutionally inadequate means to permit the consideration of mitigating evidence.⁹⁰³ Thus, the Court has forcefully and repeatedly rejected attempts by the Texas Court and Fifth Circuit to restrict or

at 62–65, 70–77, 92, 97–100 (describing the Texas Court's restrictive *Penry* evidence and error tests before it adopted the described Fifth Circuit standards); *supra* notes 96–109 and accompanying text.

898. See *Tennard v. Dretke*, 542 U.S. 274, 283–87 (2004).

899. *Id.* at 289.

900. *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam).

901. See *Brewer v. Quarterman*, 550 U.S. 286, 292 n.2, 295–96 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 243, 253 n.14, 259, 260, 262, 264 (2007).

902. *Brewer*, 550 U.S. at 295–96 (quoting *Tennard*, 542 U.S. at 284); see also *id.* at 296 (referring to the "Fifth Circuit's difficult *Penry* jurisprudence").

903. See *Smith*, 543 U.S. at 45–49; *Penry v. Johnson*, 532 U.S. 782, 796 (2001); see also *Smith v. Texas*, 550 U.S. 297 (2007); *Tobolowsky, Texas*, *supra* note 1, at 68–71, 79–80, 93–98 (describing the Texas Court and Fifth Circuit treatment of nullification instruction issues).

limit its constitutional mandate regarding the consideration of mitigating evidence in capital cases.⁹⁰⁴

The Court similarly rejected the Fifth Circuit's standard to implement the constitutional ban on the execution of "insane" offenders⁹⁰⁵ established in *Ford v. Wainwright*,⁹⁰⁶ the original case in which the Court entrusted enforcement of its constitutional ban to the states.⁹⁰⁷ For execution competency, the Fifth Circuit required only that an offender be aware that 1) he committed the underlying murder, 2) he was to be executed, and 3) the state's articulated reason for the execution was his commission of the crime.⁹⁰⁸ In addressing an execution competency claim by an offender whose delusions potentially precluded him from having a *rational* understanding of the state's reason for his execution, the Fifth Circuit determined that an offender's "rational understanding" of the reason for his execution was not a necessary part of the execution competency determination.⁹⁰⁹ In a decision twenty years after *Ford*, the Court found the Fifth Circuit's determination that the offender's delusions regarding the reason for his execution could not render him incompetent for execution was "inconsistent with" and based on a "flawed interpretation" of *Ford*:⁹¹⁰ "It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be

904. See *Abdul-Kabir*, 550 U.S. at 263 (identifying these cases in which the Court had "repudiated several Fifth Circuit precedents providing the basis for its narrow reading" of *Penry*); *supra* notes 894–903 and accompanying text. *But cf.* *Johnson v. Texas*, 509 U.S. 350, 359–73 (1993) (finding that mitigating evidence of the offender's youth could be adequately given mitigating effect in the pre-*Penry* procedure); *Graham v. Collins*, 506 U.S. 461, 466–78 (1993) (finding that the offender's claim seeking additional punishment instructions regarding pre-*Penry* mitigating evidence of "some arguable relevance" beyond the punishment issues sought a "new rule" of constitutional law not permitted on collateral review).

905. See *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007). Although the Court's constitutional ban concerns the execution of "insane" offenders, it essentially addresses the constitutional requirements for competency for execution. See generally Peggy M. Tobolowsky, *To Panetti and Beyond—Defining and Identifying Capital Offenders Who Are Too "Insane" To Be Executed*, 34 AM. J. CRIM. L. 369 (2007).

906. *Ford v. Wainwright*, 477 U.S. 399 (1986).

907. See *id.* at 416–17 (plurality opinion).

908. See *Panetti*, 551 U.S. at 956.

909. See *id.* at 954–56.

910. See *id.* at 956, 959.

inflicted.”⁹¹¹ The Court found that the Fifth Circuit’s “strict test for competency” was “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.”⁹¹²

Thus, the Court has not been reluctant to reject Texas Court and Fifth Circuit implementation standards for its constitutional mandates when it has found these standards too restrictive to carry out the mandates.⁹¹³ In the approximately ten years since the *Atkins* ban on the execution of mentally retarded offenders was announced, however, the Court has not demonstrated any eagerness to assess whether the states’ development of ways to enforce the constitutional ban are constitutionally “appropriate.” To the contrary, the Court has rejected attempts by federal courts in two cases to pre-empt states’ resolution of *Atkins* claims under their chosen implementation procedures, and has denied petitions for certiorari challenging state implementation procedures themselves and their application.⁹¹⁴

In *Schriro v. Smith*,⁹¹⁵ the Court vacated the Ninth Circuit’s judgment suspending federal collateral review of an *Atkins* claim and directing its collateral review resolution by an Arizona state court jury, unless waived.⁹¹⁶ In finding that the Ninth Circuit had exceeded its collateral review authority by imposing the jury trial requirement, the Court noted its entrustment to the states of the task to develop “appropriate ways” to enforce the *Atkins* ban.⁹¹⁷

States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition.⁹¹⁸

911. *Id.* at 960.

912. *Id.* at 956–57, 960.

913. *See supra* notes 894–912 and accompanying text.

914. *See infra* notes 915–33 and accompanying text.

915. *Schriro v. Smith*, 546 U.S. 6 (2005) (per curiam).

916. *See id.* at 7–8.

917. *See id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

918. *Id.* Upon remand, an Arizona state court, without a jury, found the offender was not mentally retarded under the state’s clear and convincing evidence standard (and also under a preponderance of the evidence standard). *Smith v. Kearney*, No. 2 CA-SA 2008-0019, 2008 Ariz. App. LEXIS 227, at *5–6 (Ariz. Ct. App. July 11, 2008).

In *Bobby v. Bies*,⁹¹⁹ an Ohio trial court had ordered an *Atkins* collateral review hearing pursuant to its state procedure when the Sixth Circuit intervened and granted Bies *Atkins* relief based on some prior state court findings regarding Bies' mental retardation as a mitigating factor in his pre-*Atkins* trial. The Sixth Circuit deemed these prior findings to be a definitive factual determination of mental retardation that prevented further review of Bies' mental retardation on issue preclusion and double jeopardy grounds.⁹²⁰ In unanimously reversing the Sixth Circuit judgment, the Court stated that the prior statements regarding Bies' mental retardation for mitigating circumstances purposes in his pre-*Atkins* trial were not determinative of his mental retardation for *Atkins* purposes.⁹²¹

In rejecting Bies' claim, the Court noted that its *Atkins* "opinion did not provide *definitive* procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass]" and entrusted the task of developing "appropriate ways" to enforce the *Atkins* execution ban to the states.⁹²² The Court nevertheless continued to acknowledge the centrality of the clinical definitions it had utilized in *Atkins* by further stating that Ohio had "heeded *Atkins*' call" and adopted the three-part clinical definition of mental retardation for *Atkins* purposes that included the requirement of significant limitations in two or more of the AAMR and APA adaptive skill areas (e.g., communication, self-care, and self-direction).⁹²³ More specifically, in finding that no prior preclusive factual determination of Bies' mental retardation had been made, the Court stated that "[n]o court found, for example, that Bies suffered 'significant limitations in two or more adaptive skills.'" ⁹²⁴ The Court concluded that the federal intervention had "derailed" the state proceeding designed to determine Bies' *Atkins* claim.⁹²⁵

Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision. The State acknowledges that

919. *Bobby v. Bies*, 129 S. Ct. 2145 (2009).

920. *See id.* at 2148–51.

921. *See id.* at 2148, 2151–53.

922. *Id.* at 2150 (emphasis added).

923. *See id.*; *see also* State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (per curiam).

924. *Bies*, 129 S. Ct. at 2152.

925. *See id.* at 2153.

Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the postsentencing precedents set in *Atkins* and [the state procedure].⁹²⁶

In the *Smith* and *Bies* cases, the Court articulated its desire to let states have the initial opportunity to resolve *Atkins* claims under the procedures that they have developed to implement the constitutional execution ban.⁹²⁷ The Court also stated, however, that these state “measures might, in their application, be subject to constitutional challenge.”⁹²⁸ Nevertheless, the Court has thus far denied certiorari petitions challenging whether states have adopted and applied constitutionally “appropriate ways” to enforce the *Atkins* execution ban.⁹²⁹ For example, the Court has denied certiorari petitions challenging Georgia’s unique pre-*Atkins* adoption of a reasonable doubt standard that offenders must satisfy to establish an *Atkins* claim.⁹³⁰ The Court has also denied certiorari petitions challenging states’ application of their *Atkins* definitions and procedures.⁹³¹ Finally, of particular note, the Court recently denied certiorari petitions in the Texas case in which the trial court used the general state mental retardation law definition of adaptive behavior and the *Briseno* factors and regarding which the three Texas Court Judges presented a vigorous dissent,⁹³² as well as another Texas case that directly challenged the *Briseno* factors.⁹³³

926. *Id.* at 2153–54.

927. *See supra* notes 917–18, 925–26 and accompanying text.

928. *Schriro v. Smith*, 546 U.S. 6, 7 (2005) (per curiam).

929. *See infra* notes 930–33 and accompanying text.

930. An Eleventh Circuit panel found the Georgia reasonable doubt standard a constitutionally “inappropriate” *Atkins* enforcement mechanism because its restrictiveness “eviscerated the right announced in *Atkins*” and therefore violated the “command” of *Atkins*. *See Hill v. Schofield*, 608 F.3d 1272, 1283 & n.11 (11th Circuit 2010). The panel’s opinion has been vacated pending rehearing by the appellate court en banc. *Hill v. Schofield*, 625 F.3d 1313 (11th Circuit 2010) (per curiam) (en banc). The dissent in the panel opinion cited three cases in which the Court denied certiorari petitions challenging the reasonable doubt standard. *See Hill*, 608 F.3d at 1291 n.13 (Hull, J., dissenting) (citing *Schofield v. Holsey*, 642 S.E.2d 56, 63 (Ga.), *cert. denied sub nom. Holsey v. Hall*, 552 U.S. 1070 (2007); *Head v. Stripling*, 590 S.E.2d 122, 128 (Ga. 2003), *cert. denied*, 541 U.S. 1070 (2004); *King v. State*, 539 S.E.2d 783, 798, 802 (Ga. 2000), *cert. denied*, 536 U.S. 957 (2002)).

931. *See, e.g., Clark v. Quarterman*, 457 F.3d 441 (5th Cir. 2006), *cert. denied*, 549 U.S. 1254 (2007).

932. *See Lizcano v. State*, No. AP-75,879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010), *cert. denied*, 131 S. Ct. 999 (2011).

933. *See Hall v. Thaler*, 131 S. Ct. 414 (2010); Petition for a Writ of Certiorari at i, 28–37, *Hall v. Thaler*, No. 10-37 (U.S. June 30, 2010) (challenging the *Briseno* factors); *supra*

Thus, at this point, the Court does not appear ready to address substantive challenges to the mental retardation definitions or implementing procedures that states have adopted to enforce the *Atkins* constitutional ban or states' application of them—including the *Briseno* factors.⁹³⁴ In this regard, it must be noted that the Court's rejection of the Texas Court and Fifth Circuit restrictive implementation of the Court's *Penry* and *Ford* mandates came over a decade after the restrictive *Penry* standards were adopted and over two decades after the *Ford* decision.⁹³⁵ The time may simply not be ripe for the Court to determine the outer boundaries of constitutionally “appropriate” ways for states to enforce the *Atkins* ban.⁹³⁶

When such a time arrives, however, the *Briseno* factors remain a leading candidate for Court scrutiny.⁹³⁷ Although the Court declined to review a recent challenge to the *Briseno* factors,⁹³⁸ the AAMR's concerns about the *Briseno* factors, articulated in its amicus curiae brief in the case, remain unaddressed.⁹³⁹

note 850. *But see* Respondent's Brief in Opposition at 33–35, *Hall v. Thaler*, No. 10-37 (U.S. Sept. 13, 2010) (contending that the Texas state and federal courts did not rely on the *Briseno* factors in denying the offender's pre- and post-*Briseno Atkins* claim).

934. *See supra* notes 930–33 and accompanying text.

935. *Compare* *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007), and *Tennard v. Dretke*, 542 U.S. 274 (2004), with *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Graham v. Collins*, 950 F.2d 1009, 1029, 1033 (5th Cir. 1992) (en banc), *aff'd on other grounds*, 506 U.S. 461 (1993).

936. Using the Court's *Panetti* decision as a model, some scholars suggest a progression over time from the Court's declaration of the *Atkins* constitutional ban to its constitutional regulation of implementing procedures. They identify the Georgia reasonable doubt standard of proof and the *Briseno* factors' focus on crime facts as among the “more extreme procedural impediments to vindicating *Atkins*'s substantive ban” that could be “winnowed out” through a challenge of this kind. *See* Steiker & Steiker, *supra* note 21, at 737–39; *see also supra* note 769 (identifying unique aspects of the Kansas and Utah *Atkins* provisions); *cf.* Blume et al., *supra* note 21 (contrasting *Atkins* constitutional ban with implementing decisions). Another factor that will influence the likelihood of the Court addressing future claims challenging *Atkins*' implementation is the change in Court membership since the decision. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 962–81 (2007) (Thomas, J., joined by Roberts, C.J., and Scalia and Alito, JJ., dissenting); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 265–80 (2007) (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting); *id.* at 280–85 (Scalia, J., joined by Thomas and Alito, JJ., dissenting).

937. *See supra* notes 805–88 and accompanying text.

938. *See supra* note 933 and accompanying text; *see also infra* note 954.

939. *See* AAMR Brief, *supra* note 850, at 21–26. *See generally id.* at 2–26 (identifying concerns relevant to the *Briseno* factors and the attribution of the offender's intellectual and adaptive behavior deficits to postnatal “environmental” factors).

This Court has made clear that the Eighth Amendment prohibits the execution of individuals who have mental retardation. The limited task of crafting the procedures under which courts will determine whether a defendant has mental retardation has been left, in the first instance, to the states. The majority of the states have had relatively little difficulty in establishing procedures that are designed to assure even-handed evaluation of individual claims based on clinical diagnoses and expert testimony.

A few states, however, in addition to selecting implementing procedures, have crafted their own substantive definitions of mental retardation that are incompatible with scientific and clinical understanding. The result is that many individuals who clearly meet the accepted clinical definition of mental retardation are at risk of being sentenced to death and executed. Texas is such a state.

....

This case provides the Court with an appropriate vehicle to remind lower courts that fidelity to the holding of *Atkins* requires even-handed application of the definition *Atkins* embraced, and requires adherence to the clinical understanding of mental retardation that is its foundation. More importantly, this case provides the Court the opportunity to confirm that *Atkins* did not give states license to narrow the class of persons who fall within the constitutional prohibition and to exclude some who, in fact, have mental retardation. Unless the Court acts to affirm *Atkins*'s meaning, persons whom any reasonable clinician would deem to have mental retardation will be erroneously and unconstitutionally determined to be death eligible.⁹⁴⁰

Even if it did not dictate “*definitive* procedural or substantive guides” in *Atkins* for the resolution of *Atkins* claims,⁹⁴¹ the Court clearly indicated that offenders who meet the AAMR and APA mental retardation definitions—repeatedly referenced in *Atkins* as a foundation for the national consensus it found warranting the constitutional execution ban—fall within “*Atkins*’ compass.”⁹⁴² The

940. See *id.* at 2–4 (summarizing the AAMR’s position regarding Texas’s use of non-clinical “irrelevant questions to gauge adaptive limitations,” i.e., the *Briseno* factors, and application of “environmental” factors in its mental retardation determination).

941. *Bobby v. Bies*, 129 S. Ct. 2145, 2150 (2009) (emphasis added).

942. See *id.*; *supra* notes 805–13 and accompanying text.

concerns about the *Briseno* factors' compliance with the *Atkins* mandate are at least as significant as those the Court previously addressed regarding the Texas implementation of the Court's *Penry* and *Ford* constitutional mandates. As concerns about the *Briseno* factors' restriction of the scope of the clinical mental retardation definition grow and their application in the significant volume of Texas *Atkins* cases continues, the Court should address these concerns that the Texas Court and Fifth Circuit have not adopted an "appropriate" way to enforce this constitutional execution ban, but rather an "improper legal standard" that fails to exclude from execution offenders protected by *Atkins*.⁹⁴³

Conclusion

Almost a decade ago in *Atkins*, the Court held that the execution of mentally retarded offenders is unconstitutional and entrusted the states with the development of "appropriate ways" to enforce the constitutional execution prohibition.⁹⁴⁴ Since the *Atkins* decision, and in the absence of responsive Texas legislative action,⁹⁴⁵ the Texas

943. See *Tennard*, 542 U.S. at 287; *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *supra* notes 168, 805–942 and accompanying text.

944. See *Atkins*, 536 U.S. at 316–17, 321.

945. As of the writing of this Article, the Texas Legislature has not enacted *Atkins* legislation. Companion legislation on this subject did not proceed past committee review in either chamber during the Legislature's 2011 regular session. The proposed legislation defined the intellectual functioning element with reference to performance two or more standard deviations below the test's age-group mean and established a presumption of mental retardation if the offender had an IQ of seventy-five or less. It defined adaptive behavior as the "effectiveness or degree to which a person meets generally recognized standards of personal independence and social responsibility by using learned conceptual, social, and practical skills in everyday life." The legislative proposal defined a "person with mental retardation" as one meeting the three-part clinical definition, as "determined by a clinician in the exercise of clinical judgment." It provided for a pretrial mental retardation determination by a jury (or judge, if the jury was waived) in which the defendant had the burden to prove mental retardation by a preponderance of the evidence. The proposed legislation also applied these definitions and procedures to *Atkins* collateral review claims. See S. 1079, 82nd Leg., Reg. Sess. (Tex. 2011); H.R. 1670, 82nd Leg., Reg. Sess. (Tex. 2011); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited June 5, 2011) (describing the legislation and legislative action). Of aid to future *Atkins* subsequent writ applicants, however, the Texas Legislature modified its subsequent writ provisions in capital cases to provide appointed counsel regarding subsequent writ applications that satisfy the statutory filing requirements and are filed on or after January 1, 2012. See H.R. 1646, 82nd Leg., Reg. Sess. (Tex. 2011); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Aug. 1, 2011) (describing the legislation and legislative action). In the state mental retardation law definitional provisions, the Texas Legislature also substituted the term "intellectual disability" for "mental retardation" without substantive change in the meaning of the term. See H.R. 1481, 82nd Leg., Reg.

Court has adopted definitional and procedural standards, endorsed by the Fifth Circuit and Texas federal trial courts, to carry out this constitutional mandate.⁹⁴⁶ These courts have reviewed the *Atkins* claims of ninety Texas capital offenders,⁹⁴⁷ a volume of *Atkins* claimants that far exceeds that of any other capital punishment state.⁹⁴⁸ Texas *Atkins* claimants, however, have been meaningfully less successful than expert estimates of mental retardation among capital offenders would predict⁹⁴⁹ and than national estimates of success regarding *Atkins* claims have indicated.⁹⁵⁰

One key distinguishing factor in the Texas *Atkins* approach is the Texas Court's adoption, and the Fifth Circuit's endorsement, of the *Briseno* factors, primarily to aid in the determination of the adaptive functioning element of the mental retardation definition.⁹⁵¹ Concerns about the *Briseno* factors have been articulated by the mental retardation professional and scholarly communities, acknowledged by one-third of the members of the Texas Court, and demonstrated by their impact on actual *Atkins* claims.⁹⁵² Nevertheless, Texas state and federal courts continue to apply the *Briseno* factors in their assessment of *Atkins* claims.⁹⁵³ The Supreme Court, at this point, has declined to address these concerns.⁹⁵⁴ However, as concerns about the *Briseno* factors grow, and as it has done in the past regarding other Court constitutional mandates,⁹⁵⁵ the Court should determine whether Texas's different path regarding *Atkins* claims represents an approach

Sess. (Tex. 2011); TEXAS LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/> (last visited Aug. 1, 2011) (describing the legislation and legislative action).

946. See *supra* notes 217–80, 295–350, 612–65 and accompanying text. But see *supra* notes 792–804 and accompanying text (describing the Texas Court's failure to identify the trial level fact-finder for and timing of the mental retardation determination).

947. See *supra* Tables 1, 2.

948. See Blume et al., *supra* note 26, at 637 (describing the number of *Atkins* state claims in this 2008 study).

949. See *supra* notes 773–77 and accompanying text.

950. See *supra* notes 778–86 and accompanying text.

951. See *supra* notes 815–25 and accompanying text.

952. See *supra* notes 826–88 and accompanying text.

953. See, e.g., *Chester v. Quarterman*, No. 5:05cv29, 2008 U.S. Dist. LEXIS 34936, at *5–21 (E.D. Tex. Apr. 28, 2008); *Williams v. State*, 270 S.W.3d 112, 115–16, 132 (Tex. Crim. App. 2008).

954. See *Hall v. Thaler*, 131 S. Ct. 414 (2010). One possible explanation for the Court's denial of this certiorari petition is the State's position that the Texas state and federal courts did not actually rely on the *Briseno* factors in denying this offender's pre- and post-*Briseno Atkins* claim. See *supra* notes 850, 933 (identifying the adversarial certiorari pleadings).

955. See *supra* notes 894–912 and accompanying text.

that is “too restrictive” to afford Texas *Atkins* claimants the protections granted by the Eighth Amendment.⁹⁵⁶ The resolution of this issue is literally a matter of life or death for Texas mentally retarded capital offenders.⁹⁵⁷

956. *Cf. Panetti v. Quarterman*, 551 U.S. 930, 956–57 (2007) (reaching this conclusion regarding the Fifth Circuit’s standard for execution competency).

957. Since the writing of this Article, Michael Hall, in whose case the certiorari petition challenging the *Briseno* factors was denied, and Gayland Bradford and Milton Mathis, two other offenders who raised *Atkins* claims, have been executed. *See Searchable Execution Database*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/executions> (last visited June 24, 2011); *supra* notes 933, 954 and accompanying text (describing the denial of the certiorari petition).

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