SAFEGUARDING THE CONSTITUTIONAL RIGHTS OF THE INTELLECTUALLY DISABLED: REQUIRING COURTS TO APPLY CRITERIA THAT DO NOT DEVIATE FROM THE CURRENT EDITION OF THE DSM

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I. INTRODUCTION

Bobby James Moore was convicted of capital murder and sentenced to death.[1] In 2015, the Texas Court of Criminal Appeals rejected Moore's argument that his death sentence violated the Eighth Amendment of the United States Constitution due to his intellectual disability.[2] Moore filed a writ of certiorari to challenge his death sentence, claiming that it violated the Eighth Amendment's prohibition of "cruel and unusual punishment."[3] The Supreme Court of the United States granted *certiorari*.[4] This term, the Court will decide whether Texas' decision to prohibit "the use of current medical standards on intellectual disability" and require "the use of outdated medical standards, in determining whether an individual may be executed"[5] violates the Eighth Amendment and Supreme Court precedent.[6]

When individuals are sentenced to death, courts must provide necessary safeguards to ensure that the sentence does not violate the individual's constitutional rights. Forbidding the fact-finder from making decisions based on current, up-to-date scientific information deprives individuals of these necessary safeguards.[7] Thus, the Court should not only rule in Moore's favor, but it should go further and hold that the fact-finder *must* apply criteria that do not contradict the most current medical standards. This requirement ensures that convicted individuals are not being sentenced

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[1] *Ex parte* Moore, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015).

[2] *Id.* at 489.

[3] Petition for Writ of Certiorari at 12, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797); *see* Atkins v. Virginia, 536 U.S. 304, 306-07, 321 (2002) (holding that executing intellectually disabled individuals constitutes "cruel and unusual punishment" in violation of the Eighth Amendment of the United States Constitution).

[4] *See* Moore v. Texas, 136 S. Ct. 2407 (2016).

[5] Brief for the Petitioner, Moore v. Texas, 136 S. Ct. 2407 (2016).

[6] The two Supreme Court cases of importance on this issue are Hall v. Florida*,* 134 S. Ct. 1986 (2014) and Atkins v. Virginia, 536 U.S. 304 (2002).

[7] *See* Jill Feluren, *Moving the Focus Away from I.Q. Score Toward the Subjective Assessment of Adaptive Functioning: The Effect of the DSM-5 on the Post-Atkins Categorical Exemption of Offenders with Intellectual Disability from the Death Penalty,* 38 NOVA. L. REV. 323, 357-58 (2014).

to death on the basis of outdated measurements that are rejected by the medical community. The Court should implement this requirement by insisting that all courts adopt a definition of intellectual disability that does not contradict the definition provided in the fifth edition of the American Psychiatric Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders ("DSM").[8] To make sure that the diagnostic criteria remain current and updated, the Court should also require courts to update their definitions of intellectual disability whenever subsequent editions of the manual are published, if their existing definition contradicts the definition provided by the new edition.

II. INTELLECTUAL DISABILITY AS DEFINED BY THE DSM-5

The DSM-5, the most current edition of the DSM,[9] defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains."[10] Three criteria must be met in order for a diagnosis to be made.[11]

First, there must be "deficits in intellectual functions, such as reasoning, problem-solving, planning, abstract thinking, judgment, academic learning and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing."[12] These intellectual functions "are typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence."[13] A valid I.Q. test is one of the tools used to measure a deficit in intellectual functioning.[14] Typically, an I.Q. score of seventy or as high as seventy-five indicates that an individual is intellectually disabled.[15]

Second, the individual must have "deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility."[16] These adaptive deficits must, without continuous support, "limit functioning in one or more activities of daily life, such as communication, social participation, and

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[8] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter DSM V].

[9] *See About DSM-5,* AM. PSYCHIATRIC ASS'N, http://www.dsm5.org/psychiatrists/practice/dsm/about-dsm (last visited Jan. 18, 2017).

[10] DSM V, *supra* note 8, at 33.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Definition of Intellectual Disability*, AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition#.WCuVOGNSPIU (last visited Dec. 17, 2017).

[15] *Id.*

[16] DSM V, *supra* note 8, at 33.

independent living, across multiple environments, such as home, school, work, and recreation."[17] These "deficits in adaptive functioning must be directly related to the intellectual impairments" of the first requirement.[18]

Third, the onset of the adaptive and intellectual deficits must occur in the developmental period.[19] The severity level of intellectual disabilities is determined on the basis of adaptive functioning because that determines the amount of support an individual requires.[20] The levels of severity are "mild," "moderate," "severe," and "profound."[21] Intellectually disabled individuals are three to four times more likely to have a co-occurring mental or neurodevelopmental disorder.[22]

III. FACTUAL AND PROCEDURAL BACKGROUND OF MOORE'S CASE

Moore was convicted of capital murder and sentenced to death for killing a grocery store clerk.[23] The day of the murder, Koonce, one of Moore's co-defendants, suggested that he, Moore, and another individual commit a robbery to steal money to make their car payments.[24] Moore provided the weapons needed, and the three men drove around in Koonce's car looking for a place to rob.[25] After selecting a grocery store, the co-defendants decided that Moore would take a shotgun and guard Koonce, who would take money from the courtesy booth and watch the door.[26] Moore entered the store, wearing a wig and sunglasses, while obscuring his gun in two plastic bags.[27] Koonce and Moore went to the courtesy booth, and Koonce announced to two employees that they were being robbed.[28] Moore pointed his shotgun at one of the two employees and then shot the employee in the head.[29]

Ten days later, Moore was found at his grandmother's house in Louisiana.[30] After being extradited to Houston, Moore gave a written statement and admitted killing the employee.[31] Moore contended that the shooting was an accident.[32] He claimed that panic ensued after the announcement of the robbery, causing him to fall back and the gun to go

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[17] DSM V, *supra* note 8, at 33.
[18] *Id.* at 38.
[19] *Id.*
[20] *Id.* at 33.
[21] *Id.*
[22] *Id.*
[23] *Ex parte* Moore, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015).
[24] *Id.* at 490.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Moore*, 470 S.W.3d at 490.
[30] *Id.* at 491.
[31] *Id.*
[32] *Id.*

off.[33] At Moore's suppression hearing, Moore stated that officers coerced him into signing his written statement by threatening to beat him if he refused to cooperate.[34] At trial, Moore denied any involvement with the offense and claimed that he was in Louisiana on the day the robbery occurred.[35] However, the jury found Moore guilty of capital murder and sentenced him to death.[36]

Since his sentencing, Moore filed numerous direct appeals and writs of *habeas corpus*.[37] Moore challenged his sentence on the ground of his intellectual functioning for the first time in his second writ of *habeas corpus*—filed in 1993.[38] In that petition, Moore alleged that his attorneys rendered ineffective assistance because they did not discover, or present at trial, evidence of his troubled childhood or his reduced intellectual functioning.[39] In an effort to support this allegation, Moore presented school and prison records.[40] Among these records was a pre-kindergarten medical examination, in which a doctor found that Moore could possibly be intellectually disabled.[41] Moore's school records also included two I.Q. scores: (1) a score of seventy-seven on an Otis-Lennon Mental Abilities Test ("OLMAT") that he received when he was twelve years old and in the fifth grade and (2) a score of seventy-eight on the Wechsler Intelligence Test for Children ("WISC") that he received when he was thirteen-years-old and in the sixth grade.[42] The Texas Department of Criminal Justice records indicate that Moore was deemed "work-capable" and listed his most up-to-date I.Q. score as seventy four, which Moore received on the Wechsler Adult Intelligence Scale – Revised ("WAIS-R").[43]

At an evidentiary hearing for Moore's habeas-proceeding, a clinical neuro-psychologist analyzed Moore's records and concluded that Moore was within the "borderline range of intelligence," and that Moore's mental age was no more than a fourteen year old at the time of the offense.[44] However, the clinical neuro-psychologist *did not* diagnose Moore as intellectually disabled because he found that those who receive scores in "the borderline range" can live as fully functional adults in society.[45]

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[33] *Moore*, 470 S.W.3d at 491.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 492.
[37] *See generally id.* at 492-505 (outlining the numerous direct appeals and writs Moore filed).
[38] *Id.* at 493.
[39] *Moore*, 470 S.W.3d at 493.
[40] *Id.*
[41] *Id.* at 494. ("The examining doctor recommended psychological testing, commenting, 'Child is very withdrawn—maybe retarded but most likely emotional problems.'").
[42] *Id.*
[43] *Id.* at 495.
[44] *Id.*
[45] *Moore*, 470 S.W.3d at 495.

Two of Moore's sisters also testified at the evidentiary hearing.[46] They testified that their father was an alcoholic who was neglectful and abusive.[47] She claimed that their father would physically abuse Moore because he would watch his parents fight and attempt to protect his siblings when their father tried to beat them.[48] Both sisters testified that their father threw Moore out of the house at fourteen.[49] One sister claimed that their father kicked Moore out because Moore "could not spell and [their father] thought [Moore] was stupid."[50]

Moore testified at the evidentiary hearing, as well.[51] He affirmed that he was thrown out of the house at age fourteen, which forced him to drop out of school and adopt the "street life."[52] He further testified that he always had difficulty in school; he "really couldn't comprehend words as most kids would;" and he had trouble reading and writing.[53] However, since entering prison, Moore claimed that he "spent a lot of time studying and trying to develop himself."[54] The habeas court ultimately recommended that the Texas Court of Criminal Appeals deny Moore's requested relief, and the court followed this recommendation.[55]

In response, Moore filed a second writ of habeas corpus in the United State District Court for the Southern District of Texas, asserting the same claims.[56] The district court found that Moore's counsel performed deficiently at both the guilt and sentencing phases of Moore's trial, but that the performance only resulted in prejudice at the sentencing phase.[57] Accordingly, the district court found that Moore was entitled to punishment relief.[58] The Fifth Circuit Court of Appeals affirmed.[59]

At Moore's punishment retrial, Moore called nine of his family members to testify about his background.[60] The family members reiterated the abuse Moore suffered.[61] Moore's mother and sister also recalled an incident where Moore was hit in the head with a brick while being bullied at school.[62] Guards from the Texas Department of Criminal Justice also

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[46] *Moore*, 470 S.W.3d at 495.
[47] *Id.*
[48] *Id.* at 496.
[49] *Id.* at 495-96.
[50] *Id*. at 496.
[51] *Id.*
[52] *Moore*, 470 S.W.3d at 497.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 497-98.
[58] *Moore*, 470 S.W.3d at 498.
[59] *Id.*
[60] *Id.* at 499.
[61] *Id.* at 499-500.
[62] *Id.* at 499.

testified that Moore read a lot while in prison.[63] Additionally, the defense presented two expert witnesses.[64] One expert testified that, based on her review of Moore's school records, Moore operated at a "low-average range of intellectual functioning," but that he "definitely had some ability to learn that wasn't tapped early in his school years."[65] The other expert testified that Moore "was nowhere near retarded" and had an average I.Q. with the ability to learn.[66] The jury ultimately sentenced Moore to death.[67]

In an automatic direct-appeal of the Moore's new death sentence, Moore requested a stay of execution, asserting that despite having experts testify that he was not intellectually disabled at the punishment retrial, he "ha[d] a strong claim of [intellectual disability]" under the Supreme Court's decision in *Atkins v. Virginia*,[68] which held that the execution of the intellectually disabled violates the Eighth Amendment.[69] The Texas Court of Criminal Appeals denied the relief.[70]

Moore filed his current habeas petition in 2003.[71] In this petition, Moore attached affidavits of a social worker and clinical psychologist who doubted his score of seventy seven on the OLMAT.[72] The social worker asserted that because Moore was unable to read when the test was administered and because the test requires the test-taker to be able to read, Moore's score is questionable.[73] The social worker and clinical psychologist also referenced the low scores Moore received on other assessments in the past, including scores of fifty-seven on the Slosson test, sixty-seven on the Bender Gestalt test, and seventy-two on the Goodenough test.[74] The habeas court appointed mental-health experts to examine Moore.[75] A clinical neuropsychologist administered a Raven's Colored Progressive Matrices ("RCPM") and reported that Moore received a score of eighty-five.[76] A clinical and forensic psychologist – appointed by the State – indicated that Moore scored a fifty-nine on the WAIS-IV.[77]

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[63] *Moore*, 470 S.W.3d at 501-02.
[64] *Id.* at 502.
[65] *Id.* at 503.
[66] *Id.* This expert believed that Moore's drug use worsened his problems at school. *Id*.
[67] *Id.* at 504.
[68] 536 U.S. 304 (2002).
[69] *Id*. at 321.
[70] *Moore*, 470 S.W.3d at 504.
[71] *Id.*
[72] *Id.* at 505.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 508-09.
[76] *Moore*, 470 S.W.3d at 509.
[77] *Id.*

IV. LEGAL HISTORY OF THE CONSTITUTIONAL PROHIBITION AGAINST EXECUTING THE INTELLECTUALLY DISABLED

The Supreme Court of the United States first considered the constitutionality of executing the intellectually disabled in *Penry v. Lynaugh*.[78] Penry, who was convicted of capital murder,[79] claimed that his death sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment because he was "mentally retarded."[80] Although the Court acknowledged that it was possible for a jury to find a defendant so severely intellectually disabled as to preclude criminal responsibility, the Court refused to implement a complete bar on the execution of the intellectually disabled.[81] Due to the range of functionality exhibited by those labeled "mentally retarded," the Court found that not all intellectually disabled defendants are incapable of distinguishing right from wrong—i.e., some defendants diagnosed with an intellectual disability possess the requisite culpability to receive the death penalty.[82]

The Court held that Penry, who was found to have "mild to moderate retardation" and the mental age of a six-and-a-half-year-old,[83] was not sufficiently intellectually disabled to have his death sentence overturned.[84] The Court reasoned that, because Penry was deemed competent to stand trial and the jury rejected his insanity defense, he must be sufficiently intelligent to possess the moral culpability required for the death penalty.[85] However, the Court stated that an intellectual disability *must* be considered as mitigating evidence when the death penalty is sought at sentencing.[86]

In 2002, the Supreme Court of the United States overruled its decision in *Penry*, finding that the execution of the intellectually disabled constitutes "cruel and unusual punishment" in violation of the Eighth Amendment.[87] In *Atkins v. Virginia*, Atkins was convicted of abduction, armed robbery, and capital murder.[88] He was found to be "mildly mentally retarded" with an I.Q. score of fifty-nine.[89] Atkins appealed his death sentence, claiming that he could not be sentenced to death due to his intellectual disability.[90]

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[78] 492 U.S. 302 (1989).
[79] *Id.* at 310.
[80] *Id.* at 328.
[81] *Id*. at 337-38.
[82] *Id.* at 338.
[83] *Id.* at 307-08.
[84] *Penry*, 492 U.S. at 338.
[85] *Id*. at 333.
[86] *Id.* at 340.
[87] *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
[88] *Id*. at 307.
[89] *Id.* at 308-09.
[90] *Id.* at 310.

Citing *Trop v. Dulles*,[91] the Supreme Court indicated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[92] In drawing this meaning, the Court stated that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[93] The Court noted that, following its *Penry* decision, nineteen states had enacted legislation prohibiting the execution of the intellectually disabled and two states had similar bills pending,[94] and that these enactments indicated a "consistency in the direction of change" that society viewed the intellectually disabled as less morally culpable than the average criminal.[95]

The *Akins* Court found that the justifications that exist for death sentences are not applicable to intellectually disabled offenders.[96] For example, the execution of the intellectually disabled does not serve the retributive social purpose of the death penalty.[97] In administering retribution, the severity of the punishment must be proportionate to the culpability of the offender.[98] The Court also found that because the average murderer is not even deemed culpable to receive the death penalty, it cannot be said that the intellectually disabled—who due to their reduced mental capacity are less culpable than the average criminal—can *ever* be found to possess the requisite culpability to receive a death sentence.[99] The Court also determined that the execution of the intellectually disabled does not serve the death penalty's social purpose of deterrence.[100] Acknowledging that a death sentence can only serve as a deterrent when the murder involved premeditation and deliberation, the Court stated that such punishment is inappropriate for the intellectually disabled given their reduced culpability due to mental and behavioral impairment.[101] The Court deduced that the intellectually disabled are not likely to exhibit "cold calculus" that precedes the decision to kill, and similarly are not likely to anticipate the imposition of a death sentence as punishment for their conduct.[102]

The Court also found that executing the intellectually disabled violated the Eighth Amendment because these individuals face an increased risk of

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[91] 356 U.S. 86, 100-01 (1958).
[92] *Atkins*, 536 U.S. at 311-12 (citation omitted).
[93] *Id.* at 312 (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
[94] *Id*. at 313-15.
[95] *Id.* at 315-16.
[96] *Id.* at 318-19.
[97] *Id*. at 319.
[98] *Atkins*, 536 U.S. at 319.
[99] *Id*. (emphasis added).
[100] *Id*.
[101] *Id.* at 319-20.
[102] *Id.*

wrongful conviction and execution.[103] The Court explained that this heightened danger exists because of an increased risk of false confession; the "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors;" their reduced ability to "give meaningful assistance to their counsel;" and the possibility that their demeanor is more likely to "create an unwarranted impression of lack of remorse for their crimes."[104]

The Court concluded that, due to the inability to further the retributive and deterrence purposes of the death penalty and the "evolving standards of decency," the execution of the intellectually disabled is unconstitutional.[105] To determine which defendants are intellectually disabled and constitutionally precluded from the death penalty, the Court left to the states "the task of developing *appropriate ways* to enforce the constitutional restriction upon [their] execution of sentences."[106]

In *Ex parte Briseno*,[107] the Texas Court of Criminal Appeals responded to the Supreme Court's instruction in *Atkins* and defined intellectual disability in the context of death penalty cases.[108] The Texas Court of Criminal Appeals held that courts could use the definitions of "mental retardation" outlined by § 591.003(13) of the Texas Health and Safety Code[109] or the American Association on Mental Retardation (AAMR).[110] The court indicated that these definitions differed from those used for providing psychological assistance, social services, and financial aid, but reasoned that the disparity is permissible until the legislature decides otherwise.[111]

The *Briseno* court went further and listed factors to assist the fact-finder in determining whether the defendant has an intellectual disability or a

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[103] *Atkins*, 536 U.S. at 320-21.

[104] *Id*.

[105] *Id.* at 321. ("[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

[106] *Id.* at 317 (emphasis added) (quoting *Ford*, 477 U.S. at 405, 416-17).

[107] 135 S.W.3d 1 (Tex. Crim. App. 2004).

[108] *Id.* at 8.

[109] *Id*. at 7. Section 591.003(13) of the safety code defines "mental retardation" as "intellectually disabled." TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (West 2015). Section 591.003(7-a) of the safety code defines "intellectually disabled" as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id.* § 591.003(7-a).

[110] *Briseno*, 135 S.W.3d at 7. The AAMR stated that intellectual disability is characterized by: "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Id*. (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed.1992)).

[111] *Id.* at 8.

personality disorder.[112] This analysis included seven factors for the fact-finder to consider:

> (1) whether the people who knew him during his developmental stage believed he was intellectually disabled at the time;
> (2) whether his conduct was the product of formulated plans or impulse;
> (3) whether he acted as a leader or followed others;
> (4) whether "his conduct in response to external stimuli [is] rational and appropriate, regardless of whether it is socially acceptable;"
> (5) whether he responds "coherently, rationally, and on-point to oral or written questions;"
> (6) whether he can "hide facts or lie effectively in his own or others' interests;" and
> (7) whether the offense required "forethought, planning, complex execution of purpose."[113]

The judge that authored the opinion claimed that these factors were based on Lennie Smalls, a fictional intellectually disabled character from John Steinbeck's novel *Of Mice and Men*.[114] The judge modeled the factors on Lennie Smalls behavior because she believed that he was the kind of intellectually disabled individual Texans would want to spare the death penalty.[115] The court further indicated that while mental health experts offer insightful opinions as to whether a particular defendant is intellectually disabled, it is ultimately up to the fact-finder to determine whether the evidence qualifies the defendant as intellectually disabled.[116]

In 2014, the Supreme Court revisited the issue of executing the intellectually disabled in *Hall v. Florida*.[117] There, it held that a Florida statute barring further exploration of a defendant's intellectual disability after the defendant receives an I.Q. score higher than seventy was unconstitutional.[118] The Court concluded that the Florida statute could not remain in effect because it disregarded established medical practice.[119] Experts in intellectual disability would not rely solely on an I.Q. score, but would consider other factors in making a diagnosis.[120] Also, those who

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[112] *Briseno*, 135 S.W.3d at 8-9.
[113] *Id*.
[114] *See* Brief for The American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 16, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797) [hereinafter "ACLU Amici Curiae Brief"] (citing Julia Barton, *John Steinbeck's Lennie*, LIFE OF THE Law, http://www.lifeofthelaw.org/2013/09/judging-steinbeck-lennie (Sept. 3, 2013)).
[115] *Id*. at 16.
[116] *Briseno*, 135 S.W.3d at 9.
[117] 134 S. Ct. 1986 (2014).
[118] *Id.* at 2001.
[119] *Id.* at 1995.
[120] *Id.*

create, give, and interpret I.Q. test scores interpret the results as a range of scores and not a fixed number.[121]

Significantly, the Court emphasized how society currently relies on medical and professional expertise in the diagnoses of mental disabilities.[122] The Court considered it proper to consult the medical community's opinion when determining who qualifies as mentally disabled.[123] Although acknowledging that the *Atkins* decision gave the states the authority to define intellectual disability, the Court explicitly stated that the decision "did not give the States *unfettered* discretion to define the full scope of the constitutional protection," and that "[i]f states were to have the complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality."[124]

V. MOORE'S CURRENT CASE AND THE QUESTION BEFORE THE SUPREME COURT

In January 2014, the habeas court held an evidentiary hearing for Moore's case.[125] Following the hearing, Moore filed proposed findings of fact and conclusions of law in which he asserted two claims.[126] *First*, he claimed that he is intellectually disabled under the current definition provided by the American Association on Intellectual and Development Disabilities ("AAIDD").[127] *Second*, he claimed that he had established by a preponderance of the evidence that he is intellectually disabled under the criteria outlined by the fourth and fifth editions of the APA's DSM.[128] The habeas court recommended that relief should be granted on his intellectual disability claim.[129]

The Texas Court of Criminal Appeals, however, rejected the recommendation of the habeas court.[130] Emphasizing that *Atkins* vested states with the discretion to determine what measures to take to enforce the constitutional prohibition against sentencing the intellectually disabled to death, the court held that Moore did not meet the diagnostic criteria Texas adopted in *Briseno*.[131] The court found that the habeas court erred when it decided that the most current AAMR and APA definition of intellectual disability should be applied instead of the 1992 AAMR definition applied

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[121] *Hall,* 134 S. Ct. at 1995.
[122] *Id*. at 1993.
[123] *Id.*
[124] *Id.* at 1998-99 (emphasis added).
[125] *Ex parte* Moore, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015).
[126] *Id*. at 485.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 486.
[130] *Id.* at 489.
[131] *Moore*, 470 S.W.3d at 486.

in *Briseno*.[132] The court held that, while medical and mental-health experts inform the determination of who should be exempt from the death penalty, the decision to modify an outdated legal standard for intellectual disability lies with the legislature.[133]

The court also found that the habeas court erred because Moore did not demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related significantly to his "sub-average general intellectual functioning."[134] The habeas court allegedly committed this error when it failed to apply the *Briseno* factors.[135] Accordingly, the court denied Moore's relief.[136] In response, Moore filed a *writ of certiorari*, and the Supreme Court granted certiorari limited to question one of the petition: "Whether it violates the Eighth Amendment and [the Supreme Court's] decisions in *Hall v. Florida* . . . and *Atkins v. Virginia* . . . to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed."[137]

VI. PROPOSAL: HOW THE SUPREME COURT SHOULD RULE

The Supreme Court should hold that states cannot prohibit the use of current diagnostic criteria and find the *Briseno* factors unconstitutional.[138] To ensure that the *Atkins* ruling is enforced, the Court should go further and require that states' diagnostic criteria not contradict the most current medical standards. Those who are candidates for the death penalty should not be executed if the medical community would consider them to be intellectually disabled. Given laypersons' misunderstanding of and possible prejudice toward intellectual disability, and the fact that such misunderstanding and prejudice has been applied in previous capital cases, such a requirement is necessary to provide a sufficient constitutional safeguard.[139] In addition, the Court's emphasis in *Hall* on the importance of giving deference to the medical community and its reference to the most

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[132] *Moore*, 470 S.W.3d at 486.
[133] *Id.* at 487.
[134] *Id.* at 488 n.9.
[135] *Id.* at 489.
[136] *Id.*
[137] *See* Moore v. Texas, 136 S. Ct. 2407 (2016); *see also* Petition for Writ of Certiorari, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797).
[138] The American Psychiatric Association also supports this argument. *See* Brief for The American Psychiatric Association et al. as Amici Curiae Supporting Petitioner at 3-6, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797) [hereinafter "APA Amici Curiae Brief"].
[139] *See* Nancy Haydt, *The DSM-5 and Criminal Defense: When Diagnosis Makes a Difference*, 2015 UTAH L. REV 847, 848-49 (2015); *see also infra* notes 159-94 and accompanying text.

up-to-date diagnostic criteria provides support for requiring states to abide by current medical standards.[140]

The Court should further hold that courts *must* apply up-to-date measurements that do not contradict the criteria of the most current edition of the DSM. Many states employ criteria based on the previous edition of the DSM, which is problematic because today's medical community no longer considers those criteria when providing an accurate measurement of intellectual disability.[141] Requiring compliance with the most current DSM ensures that states' measurements comport with current medical standards.[142] Additionally, such a requirement will provide the additional benefit of sentencing uniformity.[143]

Finally, the Court should require that courts update their measurement tools whenever a new version of the DSM is released to guarantee that their tools do not contradict the most current diagnostic criteria. This will ensure that those individuals who are intellectually disabled by the medical community's standards have their constitutional rights protected.

VII. THE COURT SHOULD REQUIRE STATES' DIAGNOSTIC CRITERIA TO COMPLY WITH, AND NOT CONTRADICT, CURRENT MEDICAL STANDARDS

The Supreme Court should rule in Moore's favor, finding that prohibiting the use of current medical standards is unconstitutional and that the *Briseno* factors are unconstitutional.[144] However, ruling in Moore's favor and striking the *Briseno* factors is not enough to enforce the *Atkins* prohibition of the execution of the intellectually disabled. Because of laypersons' misconceptions and possible disdain for the intellectually disabled, and the fact that such misconceptions and disdain have been incorporated into some states' diagnostic standards, states should be required to create and apply standards based on the most current diagnostic criteria.[145] This requirement is supported by the *Hall* decision, which indicated the importance of giving deference to medical professionals.[146]

Permitting courts to create their own diagnostic criteria without requiring them to consult current medical standards threatens the constitutional rights of the intellectually disabled because of the risk that judges and legislators do not understand, or are prejudiced toward,

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[140] *Hall v. Florida*, 134 S. Ct. 1986, 1990, 1993-95, 2000 (2014); *see also* APA Amici Curiae Brief, *supra* note 138 at 3-4.

[141] *See* Feluren, *supra* note 7, at 351-54 (describing the change in the DSM-5 and the subsequent implications).

[142] *Id*. at 357.

[143] *Id*.

[144] *See* APA Amici Curiae Brief, *supra* note 138, at 3-6.

[145] Haydt, *supra* note 139, at 848-49; *see infra* notes 154-93 and accompanying text.

[146] *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014); *see also* APA Amici Curiae Brief, *supra* note 138, at 26-27.

intellectually disabled individuals.[147] This risk affects the rights of the intellectually disabled because misunderstanding and possible animus toward them has influenced the creation and application of various courts' diagnostic criteria,[148] which has likely resulted in the execution of intellectually disabled individuals.[149]

Historically, courts have expressed skepticism toward the field of psychiatry, regarding it as an "inexact science."[150] Some courts have held that psychiatry is separate from the rest of medicine, resulting in courts' distrust of the science behind professional diagnostic criteria.[151] This distrust often leads courts to disregard the testimony of forensic mental health professionals, regarding them as "hired guns" and "professional elitists."[152] In addition to courts' skepticism toward medical professionals, intellectually disabled individuals face further disadvantage because they often try to conceal their disability by pretending to comprehend their conversations with their lawyers and their legal proceedings in general. Also, there is the risk that judges and attorneys have prejudice toward intellectually disabled individuals, as many of these individuals view mental disorders to be the result of "weakness, moral laxity, cunning, and self-interest."[153]

This distrust of medical professionals and possible animus toward the intellectually disabled is incorporated in the formation and application of some states' diagnostic criteria.[154] *Atkins* left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon

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[147] Haydt, *supra* note 139, at 848-49.

[148] *See infra* notes 154-93 and accompanying text.

[149] For a detailed analysis of failed *Atkins* claims and related I.Q. scores, see Susan Unok Marks, *Courts' Elusive Search for the Meaning of Intellectual Disability for Evaluating Atkins Claims*, 25 U. FL. J.L. & PUB. POL'Y 347, 366-71 (2005).

[150] *See* Eileen P. Ryan & Sarah B. Benson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. L. REV. 351, 363 (2006) (citing Ake v. Oklahoma, 470 U.S. 68, 81 (1985)); *see also* Haydt, *supra* note 139, at 848 ("[T]he law has long been skeptical about psychiatry and unaccommodating to the evolution of diagnosis and classification of mental disorders."); Michael L. Perlin, *"Half-Wrecked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as it Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 14 (1999) (stating that judges tend to "express discomfort" toward social science).

[151] *See* Ryan & Benson, *supra* note 150, at 363.

[152] Haydt, *supra* note 139, at 848.

[153] *See id*. 848-49 (citations omitted); *see also* Perlin, *supra* note 150, at 15 (stating that judges "reflect and project the conventional morality of the community," and as a result the law surrounding intellectual disability can reflect laypersons' stereotypes of the intellectually disabled).

[154] *See* 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, 689 (2009) ("[S]ome states, looking often to stereotypes of persons with mental retardation, apply exclusion criteria that deviate from and are more restrictive than the accepted scientific and clinical definitions."); Ryan & Benson, *supra* note 150, at 363.

[their] execution of sentences."[155] Though most state definitions of intellectually disabled "generally conform[ed]" to professional standards, some states, and even some federal courts, have taken an impermissible detour from acceptable standards, qualifying those whom a medical expert would be certain is intellectually disabled for the death penalty.[156]

For example, in *Williams v. Quarterman*,[157] the United States Court of Appeals for the Fifth Circuit erroneously concluded that a defendant's social and practical skill deficits, which included the inability to maintain good hygiene, cook, keep a job, or select appropriate clothing for the weather, constituted "bizarre and antisocial conduct" that "could be explained by anti-social personality rather than mental retardation," and as a result, precluded a finding of intellectual disability.[158] In addition, the court determined that the defendant could not be intellectually disabled because he rented an apartment, bought two vehicles, and washed his clothes.[159] Such application of diagnostic criteria deviates from current professional standards because personality disorders and intellectual disability are not considered to be mutually exclusive, and because intellectual disability is determined by weaknesses in adaptive ability rather than strengths.[160]

In *Cherry v. State*, Florida qualified a defendant for the death penalty after he received an I.Q. score of seventy-two.[161] This was erroneous because at the time of the defendant's appeal, it was accepted in the medical community that a "Standard Error of Measurement" was required because a single I.Q. score indicated a range of scores.[162] The most current diagnostic criteria of the time indicated that the standard of error should be five points.[163] Thus, a score up to seventy-five could qualify for intellectual disability.[164] In addition, the inquiry into the defendant's intellectual disability halted before a medical professional would have stopped inquiring, as a medical professional would have went on to consider the defendant's adaptive abilities.[165] Therefore, this defendant may have been

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[155] *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)).

[156] *See* Blume et al., *supra* note 154, at 691-92.

[157] 293 Fed. App'x. 298, 312 (5th Cir. 2008).

[158] *See* Blume et al., *supra* note 154, at 692 (citing *Williams*, 293 Fed. App'x. at 312).

[159] *Williams*, 293 Fed. App'x. at 310-14.

[160] Blume et al., *supra* note 154, at 705; *see also* DSM V, *supra* note 8, at 40 (stating that psychiatric conditions are three to four times more likely to be present in the intellectually disabled individuals than the general public).

[161] Blume et al., *supra* note 154, at 697 (citing Cherry v. State, 959 So.2d 702 (2007)).

[162] *Id*. at 698.

[163] *Id*. at 699 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41-42 (4th ed. 2000)).

[164] *Id*.

[165] *Id.* at 704.

unconstitutionally sentenced to death as a result of the court's misunderstanding and misapplication of intellectual disability standards.[166]

Such misunderstanding and misapplication was exemplified in *Briseno*, where the Texas Court of Criminal Appeals generated a list of diagnostic factors, largely based on stereotypes of the intellectually disabled that impermissibly focused on the offender's adaptive strengths and included the mistaken notion that personality disorders and intellectual disability are mutually exclusive.[167] These factors are "outdated, confusing, and asks the fact-finder to make a life or death decision based on subjective and irrelevant criteria."[168]

In its amicus brief for *Moore v. Texas*, the American Civil Liberties Union expressed concern about how these factors were based on Lennie Smalls, a fictional character in John Steinbeck's *Of Mice and Men*.[169] The amicus brief noted that the judge who created the factors expressed her belief that Lennie Smalls was the kind of intellectually disabled individual the *Atkins* decision was meant to safeguard.[170] The judge said that she "believe[d] her ruling balances criminals' claims of mental retardation against a Texas culture that encourages speedy executions."[171] Basing diagnostic criteria on Lennie Smalls is problematic because his characterization is one of "moderate" to "severe" intellectual disability.[172] The majority of intellectually disabled individuals have "mild" intellectual disability, and those who have "moderate" or "severe" intellectual disability, like Lennie, "rarely . . . have the capacity to commit capital crimes."[173] Therefore, most intellectually disabled individuals subject to the *Atkins* analysis are capable of substantially higher functioning than Lennie Smalls, and thus fall out of the scope of the *Briseno* factors.[174] The APA also expressed concern with the use of Lennie Smalls in its amicus brief, admonishing the Texas Court of Criminal Appeals for basing the factors on a fictional character rather than any professional mental health or medical standards.[175]

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[166] *See* Blume et al., *supra* note 154, at 704 ("[The defendant in *Cherry*] was entitled to a fair assessment of adaptive functioning before being excluded from Atkins's pool.").

[167] *See id.* at 710-712 (describing how the *Briseno* factors "present an array of divergence from clinical definitions"); *see also* APA Amici Curiae Brief, *supra* note 138, at 6 ("[T]he presence or absence of the various factors identified in *Briseno* is not a reliable indication of intellectual disability.").

[168] Christin Grant, *The Texas Intellectual Disability Standard in Capital Murder Cases: A Proposed Statute for a Broken Method,* 54 S. TEX. L. REV. 151, 153 (2012).

[169] ACLU Amici Curiae Brief, *supra* note 114, at 16, (citing *Ex parte* Briseno, 135 S.W.3d 1, 6, n.19 (Tex. Crim. App. 2004)).

[170] ACLU Amici Curiae Brief, *supra* note 114, at 16-17; *see also* Barton, *supra* note 114.

[171] ACLU Amici Curiae Brief, *supra* note 114, at 18 (citation omitted).

[172] *Id*. at 20.

[173] *Id*. at 9 (citation omitted).

[174] *See id*.

[175] APA Amici Curiae Brief, *supra* note 138, at 17.

The APA, a leading authority of psychiatry and the author of the DSM,[176] went through each *Briseno* factor in its amicus brief and indicated why each was contrary to current diagnostic criteria.[177] The first factor, which asks whether "those who know the person best during the development stage . . . think he was mentally retarded at that time, and if so, acted in accordance with that determination"[178] goes against current medical standards because: (1) "a layperson's recognition of intellectual disability is neither sufficient nor necessary;" and (2) family and community members are at risk of "lack[ing] objectivity" in such an observation, particularly because of the stigma surrounding intellectual disability.[179] The second factor, which asks, "has the person formulated plans and carried them through or is his conduct impulsive,"[180] was deemed faulty because impulsivity is not considered when diagnosing intellectual disability, and because difficulty in making plans is not determinative in a diagnosis, but rather is only a factor to be considered.[181] The third factor asks whether "his conduct show[s] leadership or . . . show[s] that he is led around by others?"[182] The APA disregards this factor because adaptive strengths, including leadership, are not indicative of intellectual disability, which is based on adaptive deficits.[183]

Further, the fourth factor, which asks whether "his conduct in response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable,"[184] was deemed contrary to medical standards because it inappropriately places emphasis on "rationality," which is relevant in assessing mental illness, not intellectual disability.[185] The fifth factor, which asks if "he respond[s] coherently, rationally, and on point to oral or written questions or [if] his responses wander from subject to subject"[186] is not helpful in determining intellectual disability because while linguistic and communication skills are relevant, laypersons' "interpretations of isolated . . . communications" are not sufficient for a proper diagnosis.[187]

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[176] *About APA*, AM. PSYCHIATRY ASS'N, http://www.psychiatry.org/about-apa (last visited Jan. 16, 2018); *see also About DSM-5*, *supra* note 9.

[177] APA Amici Curiae Brief, *supra* note 138, at 21-26.

[178] *Ex parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

[179] APA Amici Curiae Brief, *supra* note 138, at 21.

[180] *Briseno*, 135 S.W.3d at 8.

[181] APA Amici Curiae Brief, *supra* note 138, at 21-22 (citing DSM V, *supra* note 8, at 33).

[182] *Briseno*, 135 S.W.3d at 8.

[183] APA Amici Curiae Brief, *supra* note 138, at 22 (citing DSM V, *supra* note 8, at 33).

[184] *Briseno*, 135 S.W.3d at 8.

[185] APA Amici Curiae Brief, *supra* note 138, at 22-23. Such a mistake "evidences a common confusion between mental illness and intellectual disability." *Id*. at 23.

[186] *Briseno*, 135 S.W.3d at 8.

[187] APA Amici Curiae Brief, *supra* note 138, at 23 (citing DSM V, *supra* note 8, at 33). The APA stated that this factor also erroneously inquired about rationality, which is not relevant for intellectual disability diagnoses. *See* APA Amici Curiae Brief, *supra* note 138, at 23-24.

The sixth factor asks, "can the person hide facts or lie effectively in his own or others' interests?"[188] This factor was criticized because the ability to "hide facts" or lie is not relevant in determining intellectual disability.[189] The seventh and final factor reads, "putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purposes?"[190] The APA disregarded this factor because intellectual disability is determined by deficits in adaptive behavior rather than strengths.[191] In sum, the APA argued that the "inclusion of [these seven] non-clinical factors to diagnose intellectual disability . . . create[s] significant risks that individuals with intellectual disability will be executed in violation of the Eighth Amendment."[192]

Texas was not the only state to approve of the non-scientific *Briseno* factors—Pennsylvania also supported the use of the factors.[193] In *Commonwealth v. DeJesus*, the Pennsylvania Supreme Court declared its approval, claiming that the *Briseno* factors "relate directly to considerations in *Atkins* and appear to be particularly helpful in cases of retrospective assessment of mental retardation . . . ."[194]

Thus, without requiring adherence to current medical standards, some states create and/or apply criteria informed by misunderstandings, stereotypes, and possibly feelings of disdain toward the intellectually disabled.[195] It is very likely that the application of these outdated, non-scientific standards has led to the execution of a number of intellectually disabled individuals.[196] In order to ensure that states are not given leverage to implement flawed qualification standards, the Supreme Court must strike Texas' prohibition of the use of current medical standards and further require that states not deviate from the most up-to-date diagnostic criteria. To hold otherwise would violate the Eighth Amendment, and possibly result in additional executions of intellectually disabled individuals.

The Supreme Court's holding in *Hall v. Florida* supports the requirement that states' qualification of individuals as intellectually disabled be informed by the most current diagnostic criteria.[197] In *Hall*, the Court held that the inquiry as to whether an individual is intellectually

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[188] *Briseno*, 135 S.W.3d at 8; APA Amici Curiae Brief, *supra* note 138, at 24.
[189] APA Amici Curiae Brief, *supra* note 138, at 24-25.
[190] *Briseno*, 135 S.W.3d at 8-9.
[191] APA Amici Curiae Brief, *supra* note 138, at 25.
[192] *Id*. at 26.
[193] *See* Commonwealth v. DeJesus, 58 A.3d 62, 86 (Pa. 2012).
[194] *Id.*
[195] *See* Haydt, *supra* note 139, at 848-49; *see also supra* notes 159-94 and accompanying text.
[196] *See generally* Unok Marks, *supra* note 149, at 366-75 (discussing failed *Atkins* claims, related I.Q. scores, and Texas' pattern of finding the prosecution's experts more persuasive).
[197] *See* APA Amici Curiae Brief, *supra* note 138, at 26-27.

disabled cannot cease after a finding that the individual has an I.Q. score over seventy.[198] Writing for the majority, Justice Kennedy asserted that Florida's use of this I.Q. cutoff was unconstitutional because it deviated from the current medical standards in two ways: (1) it established I.Q. on the basis of a fixed score rather than perceiving the score as a range of scores and (2) it did not take into consideration other evidence in addition to the score before making a determination on whether a defendant was intellectually disabled.[199]

In the opinion, Justice Kennedy declared that "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions."[200] He cited diagnostic tools such as the DSM-5 multiple times[201] and referred extensively to the American Psychiatric Association's amicus brief.[202] Justice Kennedy rationalized his use of this information by indicating that the Court had referred to the most current diagnostic criteria in the *Atkins* decision.[203] One of the bases of the *Atkins* ruling was that, because there was a large number of states that had prohibited the execution of the intellectually disabled since the *Penry* decision, there was a "consistency [in] the direction of change" indicating "evolving standards of decency that mark the progress of a maturing society."[204] Although the *Atkins* Court left to the states the decision as to how to implement the constitutional mandate,[205] it indicated that states' definitions of intellectual disability "generally conform[ed] to the clinical definitions.[206] Such a holding does not support diagnostic criteria that deviate widely from current medical standards.[207] Justice Kennedy also asserted that "*Atkins* did not give [s]tates unfettered discretion to define the full scope of the constitutional [prohibition]" and that "if States were to have the complete autonomy to define intellectual disability as they wished, the Court's decisions in *Atkins* would become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality."[208] Thus, the *Hall* decision provides support for a requirement that the states keep their diagnostic standards up to date.[209]

Therefore, the Court must declare unconstitutional the prohibition of the use of modern diagnostic criteria, as the Court in both *Atkins* and *Hall*

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[198] *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).
[199] *Id.* at 1995.
[200] *Id*. at 1993.
[201] *Id.* at 1990, 1994-95, 2000.
[202] *Id.* at 1994-95, 2000-01.
[203] *Id.* at 1998-99 (citing *Atkins v. Virginia*, 536 U.S. 304, 308 n.3, 309 n.5 (2002)).
[204] *Atkins,* 536 U.S. at 312, 315.
[205] *Id.* at 317.
[206] *Hall*, 134 S. Ct. at 1999 (citing *Atkins*, 536 U.S. at 317 n.22).
[207] *See* APA Amici Curiae Brief, *supra* note 138, at 5-6.
[208] *Hall*, 134 S. Ct. at 1998-99.
[209] *See* APA Amici Curiae Brief, *supra* note 138, at 5-6.

appear to give preference to the most current diagnostic criteria.[210] Additionally, the *Hall* decision mandates the determination that the *Briseno* factors applied in Moore's case are unconstitutional, as the Court struck Florida's I.Q. cutoff due to its gross deviation from accepted professional standards.[211] The *Briseno* factors are arguably a greater and more unacceptable divergence from current medical standards than the I.Q. cutoff because not only are they contrary to current understandings of intellectual disability, but they are based on laypersons' stereotypes of the behavior of the intellectually disabled.[212] Thus, if the Supreme Court struck the I.Q. cutoff, it will likely strike the *Briseno* factors as well.

The Court should further hold that states' diagnostic criteria should not deviate from the most current medical standards.[213] Given the lack of understanding laypeople have of the intellectually disabled and the fact that some courts have implemented diagnostic criteria formed by these misunderstandings, the Court should rule in a manner that prevents states from creating standards that are not up-to-date with current understandings of intellectual disability.[214] Otherwise, states still have the ability to generate and implement erroneously under-inclusive diagnostic criteria that potentially exclude those who are actually intellectually disabled from the constitutional protection against the death penalty.[215] Merely holding that states cannot be prohibited from using current medical standards and striking the *Briseno* factors is not enough to ensure the constitutional mandate is enforceable, as states would still be permitted to create and apply these under-inclusive criteria. It is likely that a number of intellectually disabled individuals have been executed unconstitutionally since the *Atkins* decision.[216] To prevent the execution of the intellectually disabled and ensure their constitutional safeguard, the Court must find that states' diagnostic criteria cannot deviate from current medical standards.

VIII. THE COURT SHOULD FURTHER REQUIRE THAT STATES' DIAGNOSTIC CRITERIA NOT DEVIATE FROM THE MOST CURRENT DSM

To ensure that intellectually disabled individuals' rights are adequately protected, the Court must require that states' diagnostic criteria do not deviate from current medical standards. Because the DSM-5 is a product of

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[210] *See Hall*, 134 S. Ct. at 1990, 1993, 1994-95, 2000; *Atkins*, 536 U.S. 304, 309 n.5; *see also* APA Amici Curiae Brief, *supra* note 138, at 3-6.

[211] *Hall*, 134 S. Ct., at 1994-95; *see also* APA Amici Curiae Brief, *supra* note 138, at 3-6.

[212] *See* Blume et al., *supra* note 154, at 710-12.

[213] *See* APA Amici Curiae Brief, *supra* note 138, at 3-6.

[214] *See* Haydt, *supra* note 139, at 848-49; *see also supra* notes 154-94 and accompanying text.

[215] *See* APA Amici Curiae Brief, *supra* note 138, at 6.

[216] *See* Unok Marks, *supra* note 149, at 366-71 (providing a table of failed *Atkins* claims, related I.Q. scores, reasons for denial of *Atkins* claims, and execution dates).

the APA and a compilation of medical experts' definitions of mental disorders,[217] states should be required to follow its contents. States should be prohibited from permitting their diagnostic criteria to deviate from the standards outlined in the DSM-5 in order to ensure that the states' criteria are consistent with current medical standards.[218] When many states created their diagnostic standards, they based the standards off of the previous version of the DSM, the DSM-IV-TR,[219] which is problematic because the current edition differs from the prior edition in two major ways.[220]

First, the new DSM has shifted its main focus from the individual's I.Q. score to his or her adaptive functioning.[221] This has resulted in a more subjective analysis and is considered by the psychiatric community to be a positive change because I.Q. scores are "less valid on the lower end of the range, where mild [I.Q.] is located."[222] Also, the APA emphasized that this development is important because I.Q. scores are "approximations of a person's intellectual functioning" and "may not be sufficient enough to assess [a person's] functioning in real-life situations."[223] Second, the new edition specifies that the disability must become apparent during the "developmental period" rather than before age eighteen.[224]

Due to these changes, many states' definitions of intellectual disability are contrary to current medical standards.[225] I.Q. scores continue to be emphasized by states, even though such emphasis is now deemed erroneous by modern diagnostic criteria.[226] Thus, merely holding that it is unconstitutional to prohibit the use of current medical standards in determining intellectual disability is not enough to ensure that no intellectually disabled offender is executed. The Court must hold that the states abide by up-to-date diagnostic criteria, and instructing the states to have standards that do not deviate from the most current edition of the DSM satisfies this requirement. This requirement will provide a quick solution to a discrepancy that "could mean the difference between life and death for [some] criminal defendants."[227]

Requiring states to have definitions of intellectual disability that do not contradict the criteria in the DSM-5 has the additional benefit of providing a more uniform standard to be applied across the country.[228] Such uniformity is desirable, because otherwise, the application of the same

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[217] *About DSM-5 supra* note 9.
[218] *See* Feluren, *supra* note 7, at 357.
[219] *Id*. at 351.
[220] *Id*. at 347-48.
[221] *Id*.
[222] *Id*. at 353 (citing DSM V, *supra* note 8, at 33).
[223] *Id*.
[224] Feluren, *supra* note 7, at 348 (citing DSM V, *supra* note 8, at 33).
[225] *Id*. at 325, 351.
[226] *Id.* at 352.
[227] *Id*. at 351.
[228] *Id*. at 357.

constitutional safeguard results in an intellectually disabled individual being executed in one jurisdiction but not in another.[229] Such a disparity undermines *Atkins*'s constitutional mandate that the intellectually disabled cannot be executed without running afoul of the Eighth Amendment.[230] Thus, a more uniform approach would better implement the human rights standards *Atkins* sought to enforce.[231] Reducing these "state-to-state discrepancies" will further guarantee that constitutional protection is provided to all.[232]

While the DSM-5 informs courts of what medical experts believe to be proper diagnostic criteria, the DSM-5 contains a cautionary statement that asserts that it was "developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals."[233] However, the manual states, "[w]hen used appropriately, diagnoses and diagnostic information can assist legal decision makers in their determinations."[234] Given the gravity of the death penalty and the importance of safeguarding the constitutional protection of *Atkins*, the Court should require that states' definitions not be contradictory to what is written in the DSM, despite the manual's cautionary statement. Not requiring the states to abide by some modern, professional standard is unthinkable due to the likelihood that a number of intellectually disabled offenders have been executed as a result of the application of outdated or incorrect diagnostic criteria.[235] To ensure that no more intellectually disabled individuals are executed, the Court must point to some official diagnostic criteria that states are required to follow. To hold otherwise would prevent the constitutional mandate, described in *Atkins*, from being realized.

It is also important to consider that other countries have required that experts in their criminal justice systems employ the most up-to-date medical criteria.[236] For example, in Sweden, psychiatric experts are required to use standards set out by most current version of the International Statistical Classification of Diseases and Related Health Problems and the DSM-5.[237] If the experts fail to do so, they can receive sanctions. [238]

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[229] Feluren, *supra* note 7, at 342.

[230] *See id.*

[231] *See* Allison Freedman, *Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation*, 12 NW. J. HUM. RTS. 1, 14-15 (2014).

[232] Feluren, *supra* note 7, at 357.

[233] DSM V, *supra* note 8, at 25.

[234] *Id.*

[235] *See* Unok Marks, *supra* note 149, at 366-75 (providing a table of failed *Atkins* claims, related I.Q. scores, reasons for denial of *Atkins* claims, and execution dates).

[236] *See* Brief for International Organizations Interested in Medical Expertise, Psychiatry & Criminal Justice as Amici Curiae Supporting Petitioner at 7, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797) [hereinafter "International Organizations Amici Curiae Brief"].

[237] *Id.* at 14 (citation omitted).

[238] *Id*.

Germany also requires expert opinions to be prepared in congruence with current scientific standards.[239] Further, it has been found that a number of other developed countries prohibit the use of outdated diagnostic criteria.[240] While the United States is permitted to make its own rules regarding what kind of diagnostic criteria can be applied, various international organizations point to the U.S. Supreme Court's decision in *Roper v. Simmons,* which states "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishment.'"[241] Thus, the United States is permitted to, and should, follow other countries' examples, despite the DSM-5's cautionary statement.[242]

To ensure that the *Atkins* ruling is properly applied, the Court should go further and demand that states amend their definitions to comply with, rather than contradict, the DSM whenever a new edition of the DSM is released. This will provide a necessary safeguard by ensuring states' definitions abide by current medical standards and that their definitions have some uniformity. Requiring states to keep their definitions updated will help guarantee that the intellectually disabled receive constitutional protection from the death penalty.[243]

IX. CONCLUSION

In order to enforce the constitutional mandate of *Atkins* and protect intellectually disabled individuals, the Court must rule in Moore's favor and hold that states cannot prohibit the application of current medical standards to determine intellectual disability in death penalty cases.[244] In order to guarantee that the intellectually disabled receive constitutional protection, the Court must go further and require that courts diagnostic criteria do not deviate from current standards. Because the DSM-5 is an authoritative source of diagnostic criteria in the medical community,[245] the Court should recognize it as the paradigm of current diagnostic criteria and designate its contents as the standard that states must comply with. This recognition will ensure that states' standards are up to date and provide some desirable uniformity.[246] To guarantee that the states' criteria are never outdated, the

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[239] International Organizations Amici Curiae Brief, *supra* note 236, at 15 (citation omitted).

[240] *Id.* at 7.

[241] *Id.* at 6 n.5 (citing Roper v. Simmons, 543 U.S. 551, 575 (2005)).

[242] *See id* at 7.

[243] *See* Feluren, *supra* note 7, at 357. ("By embracing the new edition of the DSM and finally creating a uniform way to enforce the *Atkins* holding, those that the *Atkins* decision intended to protect are more likely to be spared form execution.").

[244] *See* APA Amici Curiae Brief, *supra* note 138, at 3-6.

[245] *About DSM 5*, *supra* note 9.

[246] Feluren, *supra* note 7, at 357.

Court should further require that states update their criteria whenever a new edition of the DSM is released.

Such a holding will guarantee that defendants, like Moore, are not sentenced to death if the medical community determines them to be intellectually disabled. Requiring such rigorous compliance is necessary because it is likely that Moore and many other defendants in capital cases fall within the "mild" range of intellectual disability, which does not conform to the stereotypes that most laypeople, including judges and lawyers, have of intellectually disabled people.[247] Therefore, it is imperative the courts abide by scientific measures to ensure that those sentenced to death are not intellectually disabled under current medical standards.[248] This proposed holding is necessary to uphold the ruling of *Atkins* and to ensure that intellectually disabled individuals are not unconstitutionally executed.[249]

[247] Haydt, *supra* note 139, at 848; *see also* Perlin, *supra* note 150, at 15.

[248] Feluren, *supra* note 7, at 356-57; *see also* APA Amici Curiae Brief, *supra* note 138, at 6.

[249] Feluren, *supra* note 7, at 357-58; *see also* Unok Marks, *supra* note 149, at 366-71.