THE *BRISEÑO* FACTORS: HOW LITERARY GUIDANCE OUTSTEPS THE BOUNDS OF *ATKINS* IN THE POST-*HALL* LANDSCAPE

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I. INTRODUCTION

This comment will discuss the constitutionality of the *Briseño* factors in light of the Supreme Court's decision in *Hall v. Florida*. In 2002, the Supreme Court in *Atkins v. Virginia* stated that it is unconstitutional to apply the death penalty to individuals with an intellectual disability[1] because it violates the Cruel and Unusual Punishments Clause of the Eighth Amendment,[2] but left it up to the states how to determine if one is intellectually disabled.[3] In 2004, the Texas Court of Criminal Appeals set forth a list of factors, known as the *Briseño* factors, for Texas courts to determine if an individual is intellectually disabled.[4] The *Briseño* factors are heavily criticized for their divergence from clinical standards of intellectual disability.[5] In 2014, the Supreme Court held in the *Hall* decision that

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[1] Intellectual disability was formerly known as mental retardation. Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); *see* Robert L. Schalock et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116 (2007).

[2] 536 U.S. 304, 321 (2002).

[3] *Id.* at 317.

[4] *Ex parte* Briseño, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

[5] *E.g.*, Brief for the American Ass'n on Intellectual & Developmental Disabilities & the Arc of the United States as Amici Curiae Supporting Petitioner at 15–17, Lizcano v. Texas, 562 U.S. 1182 (2011) (No. 10-6788), 2010 WL 4382046, at *15–17; John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 711–14 (2009);

Florida's standards for determining intellectual disability are unconstitutional because they deviate from clinical standards.[6] The issue of whether the *Briseño* factors are unconstitutional in light of *Hall* is present in *Moore v. Texas*,[7] for which the Supreme Court granted the petition for writ of certiorari on June 6, 2016.[8] Because the *Briseño* factors differ from the clinical definitions of adaptive behavior deficits created by the same professional organizations whose opinions were relied on in *Hall*, it is likely that the *Briseño* factors will be found to violate *Atkins* in light of the Court's decision in *Hall*.[9]

II. HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE DEATH PENALTY

A. General Background on the Cruel and Unusual Punishments Clause of the Eighth Amendment

The Eighth Amendment of the United States Constitution protects against "cruel and unusual punishment[]."[10] The founding fathers provided almost no guidance to the courts for the application of the Eighth Amendment, and there was very little reported debate or discussion surrounding the Cruel and Unusual Punishments Clause when the amendment was being passed.[11] Consideration of the Cruel and Unusual Punishments Clause by the courts was virtually nonexistent until the middle of the twentieth century.[12] Though the courts have not defined the exact

Christin Grant, Comment, *The Texas Intellectual Disability Standard in Capital Murder Cases: A Proposed Statute for a Broken Method*, 54 S. TEX. L. REV. 151, 153 (2012); Doug Lieb, Comment, *Can Section 1983 Help to Prevent the Execution of Mentally Retarded Prisoners?*, 121 YALE L.J. 1571, 1577–79, 1582 (2012); Press Release, Senator Rodney Ellis, Ellis Statement on Wilson Execution, Offender with Mental Retardation (Aug. 3, 2012), http://www.rodneyellis.com/2012/08/03/ellis-statement-on-wilson-execution-offender-with-mental-retardation; *see, e.g.*, Mia-Carré B. Long, Comment, *Of Mice and Men, Fairy Tales, and Legends: A Reactionary Ethical Proposal to Storytelling and the Briseño Factors*, 26 GEO. J. LEGAL ETHICS 859, 859 (2013).

[6] 134 S. Ct. 1986, 1990 (2014).

[7] 470 S.W.3d 481, 487, 528–34, 536, 538–43 (Tex. Crim. App. 2015).

[8] Moore v. Texas, 136 S. Ct. 2407 (2016).

[9] *See Hall*, 134 S. Ct. at 1993–96.

[10] U.S. CONST. amend. VIII.

[11] John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 481–82 (1990).

[12] *Id.* at 483.

scope of the phrase "cruel and unusual punishments," the courts have generally found that it prohibits punishment that fails to comport with contemporary standards of decency.[13] As Chief Justice Warren put it, the Eighth Amendment serves to make sure that "[the power of the state] be exercised within the limits of civilized standards."[14] This definition of "cruel and unusual punishments" is particularly prone to evolution as what is deemed "civilized" and "decent" changes over time with scientific advances, differing philosophy, and cultural shifts. What may have seemed routine or acceptable in 1800 might be described as uncivilized or indecent today. Courts have also found that a punishment is cruel and unusual if the sentence is grossly disproportionate to the severity of the crime[15] or if the sentence doesn't serve retributive or deterrent purposes.[16]

B. Application of the Cruel and Unusual Punishments Clause to the Death Penalty

Issues of cruel and unusual punishment have commonly arisen in the context of the death penalty. In 1972, the Supreme Court found that application of the death penalty under the laws enacted at the time, as a whole, constituted cruel and unusual punishment as the application of the death penalty was discretionary, haphazard, and discriminatory in that it was primarily inflicted on certain minority groups.[17] While the system reformed and a death sentence was upheld four years later in *Gregg v. Georgia*,[18] other, more specific challenges to the application of the death penalty have been lodged on Eighth Amendment cruel and unusual

[13] *See* Furman v. Georgia, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring) (per curiam) (noting that prohibition of cruel and unusual punishment draws meaning from "public opinion . . . enlightened by . . . humane justice" (quoting Weems v. United States, 217 U.S. 349, 378 (1910))); Trop v. Dulles, 356 U.S. 86, 101 (1958) (noting that the Eighth Amendment draws meaning from evolving standards of decency that mark progress of maturing society).

[14] *Trop*, 356 U.S. at 100.

[15] Coker v. Georgia, 433 U.S. 584, 592, 597 (1977) (stating that barbaric or excessive punishment is unconstitutional); Gregg v. Georgia, 428 U.S. 153, 171–73 (1976) (finding that the penalty may not involve "unnecessary or wanton infliction of pain" and may not be grossly disproportionate to severity of crime); *see* Enmund v. Florida, 458 U.S. 782, 801 (1982) ("[P]unishment must be tailored to [the defendant's] personal responsibility and moral guilt.").

[16] Atkins v. Virginia, 536 U.S. 304, 321 (2002) (both); *Enmund*, 458 U.S. at 801 (retributive).

[17] *See Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

[18] 428 U.S. at 207.

punishment grounds in the years since.[19] For example, the Supreme Court struck down two statutory schemes where the death sentence was mandatory upon a finding of first-degree murder.[20] The Court used the rationale that the inability to apply discretion and grant mercy where it is warranted when concerning a punishment as harsh as death departs from contemporary standards.[21]

In 1977, the Court began to opine that the death penalty was disproportionate for all crimes except murder.[22] In *Coker v. Georgia*, the Court held that the death penalty was a disproportionate punishment to the crime of rape.[23] Five years later, the Supreme Court found that it was cruel and unusual punishment to give the death sentence to an accomplice convicted of first-degree murder who had not actually perpetrated the murder, was not at the scene of the murder, and who had neither intended nor anticipated the murder because the sentence was not consistent with the retributive goals.[24] In 2008, the Court held that the death penalty was a disproportionate punishment when a defendant raped, but did not kill, a child[25]—this decision removed from death row the only two men in the United States who had not been convicted of murder.[26] Today, there remain a few statutes that allow for the death penalty where the defendant has not been convicted of murder.[27] However, while these statutes that allow for the

[19] *See, e.g.*, *Atkins*, 536 U.S. at 321; Penry v. Lynaugh, 492 U.S. 302, 340 (1989); Ford v. Wainwright, 477 U.S. 399, 417 (1986); *Enmund*, 458 U.S. at 801.

[20] Woodson v. North Carolina, 428 U.S. 280, 301, 305 (1976); Roberts v. Louisiana, 428 U.S. 325, 334–36 (1976).

[21] *Woodson*, 428 U.S. at 302–05; *see Roberts*, 428 U.S. at 335–36.

[22] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 598 (1977) (holding that death is a disproportionate penalty for the crime of rape because, despite the severe consequences rape has on the victim and the public as a whole, rape is incomparable to murder).

[23] *Id.* at 592.

[24] *Enmund*, 458 U.S. at 801.

[25] Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

[26] *Death Penalty for Offenses Other Than Murder*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-offenses-other-murder (last visited Jan. 30, 2016).

[27] *See, e.g.*, ARK. CODE ANN. § 5-4-104 (West 2015) (treason); COLO. REV. STAT. ANN. § 18-3-301(2) (West 2016) (first degree kidnapping where the person kidnapped suffered serious bodily injury and was not liberated alive prior to the conviction of the kidnapper); FLA. STAT. ANN. § 893.135 (West 2016) (trafficking 300 kilograms or more of cocaine knowing that the probable result of such importation would be the death of any person); GA. CODE ANN. § 16-5-44 (West 2016) (aircraft hijacking); IDAHO CODE ANN. § 18-5411 (West 2016) (perjury resulting in the execution of an innocent person); MISS. CODE ANN. § 97-25-55 (West 2016) (aircraft piracy); MONT. CODE ANN. § 45-5-503 (West 2015) (sexual intercourse without consent if the victim is

death penalty for crimes other than murder remain on the books, no one in the United States has actually been executed for a crime that didn't involve murder since the *Coker v. Georgia* decision in 1977.[28] If an individual were to be handed the death sentence for one of these non-murder crimes, we can certainly expect it to head straight for the Supreme Court.

After the death penalty was limited to the crime of murder, one of the biggest Eighth Amendment decisions the Supreme Court rendered was that it was cruel and unusual punishment to execute an insane person.[29] In 1974, Alvin Bernard Ford was convicted of murder and sentenced to death.[30] There was no sign of any mental health symptoms or incompetence during the commission of his crime, at trial, or during sentencing.[31] However, in 1982, Ford developed an obsession concerning the Ku Klux Klan and a delusion that he was the target of a complex conspiracy involving the Klan and prison guards who held hostage 135 of Ford's friends and family members.[32] Ford began referring to himself as Pope John Paul III and wrote to senators assuming responsibility for the hostage crisis.[33] Ford's interviews with psychologists revealed that he had a mental disorder closely resembling paranoid schizophrenia and that he did not understand why he was being executed.[34] The Court ultimately decided not to execute Ford by holding that insane people could not be executed per the Cruel and Unusual Punishments Clause because the execution of an individual who does not have the capacity to understand why he is being stripped of his right to life offends society's sense of justice and morality.[35] In justification, the Court detailed how the execution of insane individuals has never been sanctioned by the law or society and how no state had legislation allowing the execution of an insane person.[36]

less than 16 years of age, the offender is four years older or more than the victim, this is the second time the offender has been convicted of this crime, and serious bodily injury was inflicted on the victim both times).

[28] DEATH PENALTY INFO. CTR., *supra* note 26.

[29] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

[30] *Id.* at 401.

[31] *Id.*

[32] *Id.* at 402.

[33] *Id.*

[34] *Id.* at 402–03.

[35] *Id.* at 409–10.

[36] *Id.* at 407–08.

Three years after *Ford*, the Supreme Court was faced with the decision of whether it is unconstitutional to execute intellectually disabled individuals.[37] It is important to note here that insanity and intellectual disability are distinct concepts, so the *Ford* decision was not directly precedential on the issue of intellectual disability. Insanity is an entirely legal concept that focuses on whether the defendant lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct at the time the offense was committed.[38] Intellectual disability is a medical diagnosis that clinicians use to prescribe treatment and recommend services.[39] In *Penry v. Lynaugh*, Johnny Paul Penry confessed to raping, beating, and stabbing a woman who later died of her injuries.[40] Penry was then charged with capital murder.[41] As a child, Penry was diagnosed with brain damage that probably resulted from trauma at birth.[42] Penry repeatedly failed to pass the first grade until he was removed from school at the age of twelve.[43] Throughout his life, Penry had been tested as having an Intelligence Quotient (IQ) between 50 and 63, indicating mild to moderate intellectual disability.[44] At a competency hearing before trial, a psychologist testified that Penry was intellectually disabled and had the mental age of a six-and-a-half year old child.[45] The jury found Penry competent to stand trial, decided that his confession was given voluntarily, and determined that Penry was not insane—they then sentenced him to death.[46] While the Supreme Court held that the jury should have considered Penry's intellectual disability as mitigating evidence during the punishment phase,[47] it also held that the execution of an individual with an intellectual disability is constitutional under the Cruel and Unusual Punishments Clause of the

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

[38] EDIE GREENE & KIRK HEILBRUN, WRIGHTSMAN'S PSYCHOLOGY & THE LEGAL SYS. 209–11 (Jon-David Hague ed., 7th ed. 2011).

[39] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013); *see id.* at xli.

[40] 492 U.S. at 302, 307.

[41] *Id.*

[42] *Id.* at 307–08.

[43] *Id.* at 309.

[44] *Id.* at 307–08.

[45] *Id.* at 308.

[46] *Id.* at 308–11.

[47] *Id.* at 322.

Eighth Amendment.[48] The Court stated that in order to have an individualized assessment when considering whether the death penalty should be applied, a jury needs to consider individual circumstances like the presence of an intellectual disability.[49]

When discussing whether the execution of an intellectually disabled person in and of itself is unconstitutional, the *Penry* Court cited old common law that banned the execution of "idiots" due to their inability to tell right from wrong.[50] Yet the Court found that the historical term "idiot" referred to a condition that is more severe and handicapping than what is needed to diagnose intellectual disability—finding that "idiot" is more analogous to a profound or severe intellectual disability.[51] The Court came to the conclusion that those individuals who are so profoundly intellectually disabled as to fit within the term "idiot" would be protected by the bar on executing insane people, so the Court need not bar the execution of intellectually disabled people to conform to the contemporary standard of decency.[52] The Court also cited a lack of a national consensus that intellectually disabled people shouldn't be executed because, at the time of the decision, only two states had passed laws against it.[53] The Court disregarded the opinions of professional associations that opposed execution of the intellectually disabled because it was insufficient evidence of a national consensus—which is objectively measured by what has been written into legislation.[54] By waiting until the opinions of professional associations are written into state law, the Court effectively ensured that Supreme Court rulings would remain far behind medical and scientific advancements. While Justice William Brennan, Jr. dissented that the execution of intellectually disabled defendants is cruel and unusual punishment and that the consideration of the condition as a mitigating factor was insufficient, he was joined only by Justice Thurgood Marshall.[55] Justice Brennan wrote that executing intellectually disabled individuals is disproportionately excessive to the crime and does not serve the penal goals of retribution or deterrence because intellectual disability limits the

[48] *Id.* at 340.

[49] *Id.* at 319.

[50] *Id.* at 331–33.

[51] *Id.* at 333.

[52] *See id.*

[53] *Id.* at 334.

[54] *Id.* at 335.

[55] *Id.* at 341, 343, 346–47 (Brennan, J., dissenting).

culpability of defendants[56]—a line of reasoning that would be adopted by the Court years later.[57]

As stated earlier, the contemporary standards of decency that govern Eighth Amendment decisions evolve over time; and so it turned out that the country's contemporary standard of decency did change concerning applying the death penalty to individuals with an intellectual disability. In 2002, the Supreme Court held in *Atkins v. Virginia* that executing intellectually disabled people violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.[58] The *Atkins* Court pointed out how in the thirteen years since *Penry* had been decided, sixteen additional states—for a total of eighteen states—had passed legislation exempting the intellectually disabled from the death penalty.[59] The Supreme Court also pointed to the fact that even in states that allow the execution of intellectually disabled persons, the power is exercised so infrequently it serves as evidence there is a national consensus against applying the death penalty to intellectually disabled defendants.[60]

The trend of finding that contemporary standards of decency have evolved to protect more groups from the death penalty continued in 2005, when the Supreme Court found in *Roper v. Simmons* that applying the death penalty to any individual under age eighteen when they committed their capital crime violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.[61] The *Roper* Court recognized the parallel reasoning in the *Atkins* decision—state legislation prohibits the application of the death penalty in this situation, so there is proof of a national consensus against the practice, meaning it is a cruel and unusual punishment for violating contemporary standards of decency.[62] Given the Supreme Court's reliance on national consensus when considering whether to expand the protection of the Cruel and Unusual Punishments Clause, more groups will likely find protection from the death penalty by way of the Cruel and Unusual Punishments Clause of the Eighth Amendment when state legislation begins to protect them from the death penalty.

[56] *Id.* at 348.

[57] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[58] *Id.*

[59] *Id.* at 314–15; *see* Roper v. Simmons, 543 U.S. 551, 564–65 (2005).

[60] *Atkins*, 536 U.S. at 316.

[61] 543 U.S. at 560, 568.

[62] *See id.* at 564–67.

III. HOW THE *ATKINS* DECISION PLACED LIMITATIONS ON HOW STATES DEAL WITH INTELLECTUAL DISABILITY AND THE DEATH PENALTY

Ultimately, the *Atkins* Court held that giving the death penalty to individuals with intellectual disability violates the Eighth Amendment's ban on cruel and unusual punishment due to the diminished culpability of intellectually disabled persons.[63] The *Atkins* Court referenced clinical criteria in coming to the conclusion that individuals with intellectual disability have a diminished culpability.[64] However, the *Atkins* decision failed to adopt one of these definitions and lay out how intellectual disability was to be identified, leaving that power to the states.[65] The *Atkins* Court stated in an accompanying footnote, "The [state] statutory definitions of [intellectual disability] are not identical, but generally conform to the clinical definitions . . . ."[66] While the states that had statutes defining intellectual disability may have been in line with the clinical definition, many states did not—and still do not—have a statutory definition for intellectual disability.[67] Texas is one of those states that did not have a statutory definition of intellectual disability at the time of the *Atkins* decision, and to this day continues not to have a statutory definition of intellectual disability.[68]

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[63] *See Atkins*, 536 U.S. at 321.

[64] *Id.* at 318. The *Atkins* Court specifically cited to the definition of intellectual disability proffered by the American Association of Mental Retardation (AAMR), which states that:

> *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.

Id. at 308 n.3 (quoting MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

[65] *Id.* at 317.

[66] *Id.* at 317 n.22.

[67] Brief for the State of Arizona et al. as Amici Curiae Supporting Respondent at 8, Moore v. Texas, 136 S. Ct. 2407 (2016) (No. 15-797), 2016 WL 4937780, at *8.

[68] *See Ex parte* Moore, 470 S.W.3d 481, 526–27 (Tex. Crim. App. 2015) (continuing to apply the Briseño factors to determine intellectual disability); *Ex parte* Briseño, 135 S.W.3d 1, 5 & n.9 (Tex. Crim. App. 2004) (recognizing the absence of statutory guidance and applying judicially-created factors to determine intellectual disability).

Some critics of the *Atkins* decision proffer that the *Atkins* Court's failure to create standards for the determination of intellectual disability (including a definition of intellectual disability, a determination of the appropriate burden of proof, and a statement of which party this burden falls upon) essentially left the states free to continue to execute individuals with an intellectual disability.[69] Without a procedure from the Supreme Court for defendants who allege they are intellectually disabled to point to in order to identify a violation of *Atkins*, those defendants are left with no remedy or recourse to protect their newfound right.[70] While the only guaranteed way for the states to not execute defendants with intellectual disability would be to abolish the death penalty, the next best solution would be to create a unified definition of intellectual disability based on clinical criteria.[71]

Members of the legal community are recognizing that because state definitions of intellectual disability are inconsistent with clinical standards, it is possible that prisoners with intellectual disability are being executed despite the decision in *Atkins*.[72] In fact, some have made very public allegations that the state of Texas has executed intellectually disabled defendants under the framework Texas created with the freedom afforded by *Atkins*.[73]

[69] Änna M. Hagstrom, Atkins v. Virginia*: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 242 (2009).

[70] *See id.*

[71] *Id.* at 275–76.

[72] Lieb, *supra* note 5, at 1573 (suggesting the use of § 1983 to challenge state procedures for determining intellectual disability).

[73] Andrew Cohen, *Of Mice and Men: The Execution of Marvin Wilson*, THE ATLANTIC (Aug. 8, 2012), http://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/ (explaining that Marvin Wilson was executed by the state of Texas in 2012 despite the facts Wilson scored 61 on an IQ test, couldn't navigate a phone book or handle money, sucked his thumb, and couldn't always tell the difference between left and right); John Rudolf, *Milton Mathis, Convicted Killer, Executed in Texas Despite Evidence of Retardation*, HUFFINGTON POST (Dec. 1, 2011), http://www.huffingtonpost.com/2011/06/21/milton-mathis-executed-killer_n_881885.html (explaining that Milton Mathis was executed by the state of Texas in 2011 even though he scored in the low 60s on an IQ test because he was deemed by the court to be "street smart").

IV. HOW TEXAS IDENTIFIED INTELLECTUALLY DISABLED INDIVIDUALS IN THE FACE OF *ATKINS*

A. The Creation of the Briseño *Factors*

The Texas Legislature has not enacted legislation on how the courts should determine if individuals have an intellectual disability,[74] so the task of defining intellectual disability for *Atkins* purposes is left to the courts.[75] The working definition of intellectual disability that the courts of Texas use in deciding *Atkins* claims was created in a Court of Criminal Appeals case entitled *Ex parte Briseño*.[76] The *Briseño* court classified the *Briseño* factors as "temporary judicial guidelines in addressing *Atkins* claims" "during this legislative interregnum."[77] However, the legislature has yet to step in to create guidelines for the courts in determining *Atkins* claims, and so the "legislative interregnum" has lasted longer than a decade.[78] The *Briseño* factors are still used today, and the Fifth Circuit described them as "definitions of [intellectual disability]" under Texas law.[79] In the absence of any other guiding criteria, several courts in Texas have found that the *Briseño* factors are the sole criterion for intellectual disability.[80]

Mental health professionals define "intellectual disability" broadly (encompassing mild, moderate, severe, and profound), even including those mildly intellectually disabled individuals who may not be termed intellectually disabled after they improve with supplemental social services and assistance.[81] In *Atkins*, the Supreme Court noted that any "serious disagreement about the execution of [intellectually disabled] offenders . . . is in determining which offenders are in fact [disabled]."[82] The Court

[74] *Ex parte* Briseño, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

[75] *See id.*

[76] *Id.* at 8–9.

[77] *Id.* at 5.

[78] *See id.* at 5, 8 (recognizing the absence of statutory guidance and applying judicially-created factors to determine intellectual disability); *see also Ex parte* Moore, 470 S.W.3d 481, 526–27 (Tex. Crim. App. 2015) (continuing to apply the *Briseño* factors to determine intellectual disability).

[79] Moreno v. Dretke, 450 F.3d 158, 164 (5th Cir. 2006); *see Moore*, 470 S.W.3d at 526–27 (applying the *Briseño* factors that the Fifth Circuit recognized as the definition of intellectual disability).

[80] Long, *supra* note 5, at 868.

[81] AM. PSYCHIATRIC ASS'N, *supra* note 39, at 39.

[82] Atkins v. Virginia, 536 U.S. 304, 317 (2002).

reasoned, "Not all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus."[83] The *Briseño* court latched onto the previous statement in *Atkins* and concluded that the class of individuals exempted from execution under *Atkins* should be much narrower than the clinical definition of intellectual disability.[84] This conclusion was arrived at because the court's purpose was not to provide treatment, but rather to determine the point at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.[85] The example the court gives of an individual whom most Texans would agree should be exempted from the death penalty is the fictional character Lennie from John Steinbeck's *Of Mice and Men*.[86] The court gives no analysis as to why Lennie is an appropriate guide for determining *Atkins* claims beyond stating that Lennie has a "lack of reasoning ability and adaptive skills."[87]

To qualify as intellectually disabled according to the criteria set out by the American Association on Intellectual and Developmental Disabilities (AAIDD),[88] an individual must exhibit significant deficits in one of the following three adaptive behavior areas: conceptual, social, or practical.[89] The assessment for adaptive behavior deficits looks at a person's limitations.[90] Although that person may have strengths in other areas, clinical professionals and standards do not consider strengths in certain areas to offset or serve as a defense against the limitations being assessed.[91] The *Briseño* court classified the clinical adaptive behavior criteria as

[83] *Id.* at 317.

[84] *Ex parte* Briseño, 135 S.W.3d 1, 5–6 (Tex. Crim. App. 2004).

[85] *Id.* at 6, 9.

[86] *Id.* at 6 (citing JOHN STEINBECK, OF MICE AND MEN (1937)).

[87] *See id.*

[88] The AAIDD was formerly known as the AAMR, which is the group who created the clinical criteria referenced in *Atkins*. *Atkins*, 536 U.S. at 308 n.3. *See About AIDD*, AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, https://aaidd.org/about-aaidd#.WEhhTfkrKM9 (last visited Jan. 30, 2016).

[89] John Matthew Fabian, William W. Thompson IV & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More Than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 420 (2011).

[90] *Id.*

[91] *Id.*

"exceedingly subjective."[92] The court found that because clinical experts often come to different conclusions despite using the same clinical criteria, the court needed to create additional factors courts could use in their analysis of whether an intellectual disability exists.[93] The court also expressed the concern that clinical criteria for intellectual disability conflated intellectual disability and antisocial personality disorder.[94] The court's concern about the conflation of intellectual disability and antisocial personality disorder resulted from the fact that the defense's expert interpreted Briseño's symptoms as an intellectual disability and the state's expert interpreted them as antisocial personality disorder.[95] Due to the court's concerns for the subjectivity of clinical criteria and the conflation with antisocial personality disorder, the *Briseño* factors were born.[96] The *Briseño* factors are as follows:

1. Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
2. Has the person formulated plans and carried them through or is his conduct impulsive?
3. Does his conduct show leadership or does it show that he is led around by others?
4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
6. Can the person hide facts or lie effectively in his own or others' interests?

[92] *Briseño*, 135 S.W.3d at 8.

[93] *Id.*

[94] *Id.* Antisocial personality disorder is a pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen years. AM. PSYCHIATRIC ASS'N, *supra* note 39, at 659. This pattern has also been referred to as psychopathy, sociopathy, or dissocial personality disorder. *Id.*

[95] *Briseño*, 135 S.W.3d at 13.

[96] *Id.*

7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[97]

All Texas courts now consider these factors in determining *Atkins* claims.[98]

B. Previous Challenges to the Briseño *Factors*

Texas courts and the Fifth Circuit upheld the *Briseño* factors and continue to apply them.[99] The Fifth Circuit stated that "*Briseño* is not contrary to clearly established Supreme Court precedent"[100] and the use of the *Briseño* factors as a determination of adaptive behavior deficits is consistent with *Atkins*.[101] In fact, the Fifth Circuit opined "the seven so-called '*Briseño* factors' are practical examples of evidence that may be pertinent to some of the adaptive limitations described in the AAMR [requirements for intellectual disability]."[102]

An example of the *Briseño* factors' application can be found in *Chester v. Quarterman*.[103] In *Chester*, Chester broke into a home, sexually assaulted two sisters inside, and shot the women's uncle when he came into the house to check on them.[104] Chester was convicted of capital murder and sentenced to death.[105] Although Chester obtained a score on an adaptive behavior survey accepted by clinical psychologists that indicated his adaptive behavior deficits were significant, the state court found him to not have an intellectual disability based on the *Briseño* factors.[106] The evidence under the *Briseño* factors that indicated Chester was not intellectually disabled: the people who knew Chester as a child did not think that he was intellectually disabled, his conduct showed he was a leader, he responded

[97] *Id.* at 8–9.

[98] Taylor v. Quarterman, 498 F.3d 306, 308 n.4 (5th Cir. 2007); Woods v. Quarterman, 493 F.3d 580, 587 n.6 (5th Cir. 2007); Maldonado v. Thaler, 662 F. Supp. 2d 684, 730 (S.D. Tex. 2009), *aff'd*, 625 F.3d 299 (5th Cir. 2010); Simpson v. Quarterman, 593 F. Supp. 2d 922, 932–33 (E.D. Tex. 2009); Chester v. Quarterman, No. 5:05cv29, 2008 WL 1924245, at *6 (E.D. Tex. Apr. 29, 2008)*; see* Williams v. Quarterman, 293 F. App'x 298, 312 (5th Cir. 2008).

[99] *See* cases cited *supra* note 98.

[100] *Taylor*, 498 F.3d at 308 n.4.

[101] *Woods*, 493 F.3d at 587 n.6.

[102] *Simpson*, 593 F. Supp. 2d at 933.

[103] 2008 WL 1924245, at *6–8.

[104] *Id.* at *3–4.

[105] *Id.* at *1.

[106] *Id.* at *2.

rationally to external stimuli, he responded coherently and on point to questions, he lied in his own interest, and he had the ability to carry out a capital murder that required forethought, planning, and purpose.[107] Chester challenged the validity of each of the seven *Briseño* factors as none of them comport with clinical standards.[108] However, federal courts give so much credence to the *Briseño* factors that the *Chester* court did not feel the need to address Chester's argument as to six of the *Briseño* factors.[109] The court simply determined the validity of the seventh factor—that the commission of the offense requires forethought, planning, and complex execution of purpose—and stopped the analysis.[110] The *Chester* court found that meeting just a single *Briseño* factor would justify the state court's finding that an intellectual disability is not present.[111]

V. HOW *HALL* WILL AFFECT TEXAS'S USE OF THE *BRISEÑO* FACTORS WHEN THE ISSUE COMES BEFORE THE SUPREME COURT

A. The Court's Holding in Hall *and How it Changed the Precedent*

Florida took its freedom under *Atkins* to statutorily require an IQ test before any other analysis in determining intellectual disability for *Atkins* purposes.[112] If the score was above a 70, "all further exploration of intellectual disability [was] foreclosed."[113] The Florida statutory scheme provided no allowance for the five-point standard error of measurement (SEM) that clinicians take into account when determining the presence of intellectual disability.[114] In *Hall*, the Supreme Court deemed this rigid practice unconstitutional because it did not comport with clinical standards and procedures.[115]

Hall was one of the defendants to which Florida applied their rigid framework for determining intellectual disability in *Atkins* cases.[116] Hall's

[107] *Id.* at *6–7.
[108] *Id.* at *6.
[109] *Id.* at *7.
[110] *Id.*
[111] *Id.*
[112] Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
[113] *Id.*
[114] *Id.* at 1999, 2000.
[115] *Id.* at 1990, 1999.
[116] *Id.* at 1990–91.

school teachers, siblings, previous lawyer for an unrelated offense, and his current lawyer all stated they had suspicions Hall was intellectually disabled because he functioned at a much lower age than he was and was unable to assist in his defense; his current lawyer described Hall's mental level as similar to that of his 4-year-old daughter.[117] Hall was abused by his mother as a child because he was "slow."[118] A number of clinicians testified that Hall was "significantly retarded" in their professional opinion and that Hall had levels of understanding on par with toddlers.[119] Hall received nine IQ evaluations over 40 years with scores ranging from 60 to 80, but the sentencing court eliminated the two scores below 70 for evidentiary reasons.[120] Since Hall's remaining IQ tests were above the 70 threshold, all further investigation into intellectual disability was foreclosed by the Florida Supreme Court and Hall's death sentence was allowed to stand.[121]

Hall appealed his death sentence to the Supreme Court.[122] In starting its analysis, the *Hall* Court stated that it was proper for the Court to turn to psychiatric studies to determine the clinical purpose and meaning of IQ scores to inform the Court's decision of whether Florida's strict IQ threshold at 70 was constitutional.[123] The *Hall* Court then acknowledged that medical experts find evidence of deficits in adaptive functioning and other evidence of intellectual disability (such as medical records, school records, and testimony regarding past behavior) probative of whether intellectual disability exists in individuals with an IQ higher than 70.[124] Florida's cutoff of investigation into intellectual disability if the IQ exceeded 70 was contrary to standard clinical practice.[125] The *Hall* Court also considered that other states had taken the SEM into account in determining a national consensus, finally concluding there was a national consensus that a strict cutoff for IQ at 70 was improper.[126]

Turning back to its decision in *Atkins*, the Supreme Court clarified that *Atkins* did not give states "unfettered discretion" in defining the scope of

[117] *Id.*
[118] *Id.* at 1991.
[119] *Id.*
[120] *Id.* at 1992.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 1993.
[124] *Id.* at 1994.
[125] *Id.* at 2000.
[126] *Id.* at 1997–98.

constitutional protection afforded to intellectually disabled individuals in the *Atkins* decision.[127] The *Hall* Court found that the strict IQ cutoff at 70 violated *Atkins* because the *Atkins* Court cited clinical definitions of intellectual disability that reject a strict IQ cutoff at 70.[128] The *Hall* Court faulted Florida's statute for going against "the unanimous professional consensus" and for being unable to cite a definition of intellectual disability that encompasses the strict IQ cutoff at 70.[129] Scalia's dissent in *Hall* criticizes the majority for mistaking a national consensus of who America thinks should be protected by *Atkins* for a consensus of who professional organizations think should be protected by *Atkins*.[130] It is true that in past Eighth Amendment cases, the Court looked for a national consensus rather than the opinion of a certain community or professional association, no matter how relevant or qualified the narrow group is to address the matter.[131] However, this change in direction by the Court sets new precedent for when the Court next considers an *Atkins* claim—like the claim in *Moore* that the *Briseño* factors are unconstitutional for deviating from clinical standards.[132] It seems likely that if the Court found the clinical definition of the IQ prong of intellectual disability binding on the states, it would also find the clinical definition of the adaptive behavior prong of intellectual disability binding on the states.

B. How the Briseño *Factors Deviate from Clinical Standards*

One legal commentator stated that the state of Texas "botched it" when the *Briseño* Court created the *Briseño* factors to define intellectual disability[133]—I am inclined to agree. In determining a starting point for the creation of the factors that would define intellectual disability for death row inmates in Texas, the *Briseño* Court decided on the fictional character Lennie from John Steinbeck's *Of Mice and Men* as the Court reasoned that most Texans would agree Lennie should be exempt from execution based on his intellectual acumen.[134] The Court gives no analysis as to why Lennie

[127] *Id*. at 1998.

[128] *Id.* at 1998–99.

[129] *Id.* at 2000.

[130] *Id.* at 2002 (Alito, J., dissenting).

[131] *Id.*

[132] *Ex parte* Moore, 470 S.W.3d 481, 487, 528–34, 536, 538–43 (Tex. Crim. App. 2015).

[133] Lieb, *supra* note 5, at 1575.

[134] *Ex parte* Briseño, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

is an appropriate guide for determining *Atkins* claims beyond stating that Lennie has a "lack of reasoning ability and adaptive skills."[135] The son of author John Steinbeck, Thomas Steinbeck, made a public statement criticizing the use of the *Briseño* factors stating:

> My father was a highly gifted writer who won the Nobel Prize for his ability to create art about the depth of the human experience and condition. His work was certainly not meant to be scientific, and the character of Lennie was never intended to be used to diagnose a medical condition like intellectual disability. I find the whole premise to be insulting, outrageous, ridiculous and profoundly tragic. I am certain that if my father, John Steinbeck, were here, he would be deeply angry and ashamed to see his work used in this way.[136]

Members of the AAIDD, the country's oldest and largest organization devoted to the study of intellectual disability and other developmental disabilities, reached out to the courts stating that the *Briseño* factors "bear little or no relationship to clinical understandings of [intellectual disability]."[137] Rodney Ellis, a Texas state senator who has introduced bills to define intellectual disability for *Atkins* purposes by more scientific standards than *Briseño*, criticized the *Briseño* factors:

> Not only are these Briseño factors not accepted by the scientific or medical community, they are not effective in excluding all offenders with [intellectual disability] in accordance with *Atkins*. The Briseño factors have no basis in science, clearly fail under the law, and furthermore, violate any basic standard of justice and morality.[138]

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[135] *Id.*

[136] Robert Mackey, *Steinbeck Family Outraged That Texas Judge Cited 'Of Mice and Men' in Execution Ruling*, THE LEDE: BLOGGING THE NEWS WITH ROBERT MACKEY (Aug. 8, 2012, 6:46 PM), http://thelede.blogs.nytimes.com/2012/08/08/steinbeck-family-outraged-texas-judge-cited-of-mice-and-men-in-execution-ruling/.

[137] Brief for the American Ass'n on Intellectual & Developmental Disabilities & the Arc of the United States as Amici Curiae Supporting Petitioner at 3, Lizcano v. Texas, 562 U.S. 1182 (2011) (No. 10-6788), 2010 WL 4382046, at *7.

[138] Press Release, Senator Rodney Ellis, Ellis Statement on Wilson Execution, Offender with Mental Retardation (Aug. 3, 2012), http://www.rodneyellis.com/2012/08/03/ellis-statement-on-wilson-execution-offender-with-mental-retardation.

While we may never truly know what John Steinbeck thinks of the *Briseño* Court's use of Lennie, we know that many legal and medical experts across the nation are critical of the *Briseño* factors and their bases.

In evaluating adaptive behavioral deficits, the AAIDD states that standardized measures employed by the medical community should be used.[139] The precise standardized criteria should be used as they set a guideline to determine mild intellectual disability, which entails harder-to-detect limitations than those that characterize moderate, severe, and profound intellectual disability that come to mind when lay people envision intellectual disability.[140] The *Briseño* factors two through six—ability to carry out plans, coherent and rational answers to questions, and ability to lie in one's own interest—are actually typical capabilities of an individual with a mild-intellectual disability.[141] The use of the *Briseño* factors creates the possibility that individuals with a mild-intellectual disability will be excluded from the protection of *Atkins*.[142] This is problematic as 80–90% of the intellectually disabled population fall in the mild range and these individuals still experience significant difficulties "achieving success or even a healthy existence in adulthood."[143]

The neglect of the mildly intellectually disabled population for consideration of *Atkins* claims by the *Briseño* court probably has to do with the stereotypes the general public ascribes to people with an intellectual disability. One study found that 46% of their participants agreed with the statement "[Intellectually disabled] people are readily recognizable as such."[144] This belief may pervade the courtroom manifesting itself in the belief of judges and fact-finders that if a defendant is intellectually disabled,

[139] Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM. & MARY BILL RTS. J. 467, 469 (2014); Fabian et al., *supra* note 89, at 421–22; Kathryn Raffensperger, Comment, Atkins v. Virginia*: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 747 & 761 (2012) (over 200 different assessments of adaptive behavior exist—although Scales of Independent Behavior (SIB-R), AAIDD Adaptive Behavior Scale (ABAS-II), or Inventory for Client and Agency Planning (ICAP) are the most commonly used).

[140] Fabian et al., *supra* note 89, at 422.

[141] Everington, *supra* note 139, at 481.

[142] *Id.*

[143] Martha E. Snell & Ruth Luckasson, *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 220–21 (2009).

[144] Richard F. Antonak, Craig R. Fielder & James A. Mulick, *Misconceptions Relating to Mental Retardation*, 27 MENTAL RETARDATION 91, 95 (1989).

they will easily be able to recognize it—meaning that the more discrete signs displayed by mildly intellectually disabled persons are not to be interpreted as signs of intellectual disability. In addition, people tend to underestimate the abilities of individuals labeled as "intellectually disabled,"[145] meaning that they believe the abilities of a person with an intellectual disability are less than they are; this line of reasoning leads to the conclusion that in identifying defendants with intellectual disability, the courts will seek deficits that are far more severe than the average individual with an intellectual disability.[146] When the above described stereotype is applied to the courtroom setting, it explains why the *Briseño* court created a set of factors that seek deficits characterized by moderate, severe, and profound intellectual disability to grant *Atkins* protection. As much as we can analyze the matter, the *Briseño* court never gives a satisfactory analysis of why it considers its factors more dispositive of intellectual disability than the clinical standards—only that the factors are less subjective and more helpful to a fact-finder than the accepted clinical standards.[147]

The *Briseño* factors ask the fact-finder to focus on the strengths of the defendant, the effects of which can be seen in *Maldonado v. Thaler*.[148] In *Maldonado*, Maldonado and one other man entered the victim's apartment and demanded a gun and marijuana they believed to be hidden in the apartment.[149] When the victim refused to reveal the location of the demanded items, the two intruders tied him up with the cord of a kitchen appliance.[150] After finding both the gun and the marijuana, Maldonado shot the victim twice in the head.[151] Maldonado confessed involvement in the murder when he was arrested several months later on an unrelated charge.[152] Maldonado was convicted of capital murder and sentenced to death.[153] Maldonado's raw score on a clinical measure of adaptive behavior

[145] Mary E. Wood, *The Prototypical Stereotype: Perceptions of Functioning When Categorized as Intellectually Disabled* 50 (2013) (unpublished M.A. thesis, University of Alabama) (on file with Acumen Library, University of Alabama).

[146] *See id.*

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

[148] *See* Maldonado v. Thaler, 662 F. Supp. 2d 684 (S.D. Tex. 2009), *aff'd*, 625 F.3d 229 (5th Cir. 2010).

[149] *Id.* at 690–91.

[150] *Id.*

[151] *Id.* at 690.

[152] *Id.*

[153] *Id.* at 691.

placed him in the range that would qualify him for intellectual disability.[154] One psychologist testified that Maldonado had numerous adaptive behavioral deficits that included functional academics, banking, public transportation, and social relationships.[155] However, using the *Briseño* factors, the court found Maldonado was not intellectually disabled based on his ability to care for himself, carry out plans, respond rationally to external stimuli, respond coherently and on point to questions, manipulate others, lie in his own interest, and carry out a capital murder that required forethought, planning, and purpose.[156] Maldonado challenged the Texas state court's application of the *Briseño* factors because the fact-finders were using his strengths in certain areas of adaptive behavior to discount his limitations in other areas of adaptive behavior.[157] The court found that the application of the *Briseño* factors and the use of strengths in adaptive behavior to show a lack of limitations were allowable.[158]

However, the AAIDD makes clear that in the determination of whether intellectual disability is present, "significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills."[159] To "cherry-pick" certain strengths for the focus of the analysis falsely inflates the adaptive abilities of the defendant[160] and brings a "less stable character" to the analysis.[161] Moreover, looking for strengths may lead to a false inflation of skill.[162] For example, a prosecutor might point out that because the defendant was a drug dealer in the past, he is able to handle money.[163] In fact, there has been no proof that the defendant has handled the money correctly or that he was proficient in his drug dealing business.[164] These false inflations don't occur when the fact-finder looks only at what limitations the defendant exhibits.[165]

[154] *Id.* at 728.

[155] *Id.*

[156] *Id.* at 730.

[157] *Id.* at 731.

[158] *Id.*

[159] AAIDD AD HOC COMMITTEE ON TERMINATION AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 47 (11th ed. 2010).

[160] Fabian et al., *supra* note 89, at 421.

[161] Blume, *supra* note 5, at 710.

[162] *See id.*

[163] *See id.*

[164] *See id.*

[165] *Id.*

Strengths in some areas do not preclude a diagnosis of intellectual disability and are, in fact, to be expected.[166]

Additionally, the *Briseño* factors instruct the fact-finder to look for evidence of leadership ability and the ability to carry out plans to disprove existence of intellectual disability.[167] More than this, the *Briseño* factors direct the fact-finder to look at the commission of the crime to see if the offense "require[s] forethought, planning, and complex execution of purpose."[168] However, the AAIDD advises professionals to not consider criminal behavior to infer limitations or strengths in adaptive behavior or to determine the existence of intellectual disability.[169] This is because an expert is not able to know to a reliable degree the actual functioning of the defendant in the commission of a crime or how much assistance or guidance the defendant received in the commission of the crime.[170] For a variety of reasons, many people with an intellectual disability will actively try to conceal their limitations,[171] and the testimony of co-defendants of their own involvement is suspect because it speaks to their own liability and there is incentive to put responsibility for the act on another party.[172] Therefore, experts and fact-finders do not have a reliable basis to determine an inference of intellectual disability from the commission of the crime. In fact, some recommend that the determination of the existence of intellectual disability should be made pre-trial so that the fact-finder is not inappropriately affected by the details of the crime.[173]

The *Briseño* factor asking the fact-finder to look at the commission of the crime is important because it can be pivotal in some cases. In *Taylor v. Johnson*, Taylor and another man were invited into a home to smoke crack cocaine by a woman who sometimes stayed there.[174] Suspecting that the men were looking around for items to steal, the woman asked the men to

[166] Everington, *supra* note 139, at 471.

[167] *Ex parte* Briseño, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

[168] *Id.*

[169] ROBERT L. SCHALOCK, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 22 (Am. Ass'n on Intellectual & Developmental Disabilities ed., 10th ed. 2007).

[170] Everington, *supra* note 139, at 478.

[171] Snell & Luckasson, *supra* note 143, at 222.

[172] Samuel Buffaloe, *Minimizing Confrontation: The Eighth Circuit Uses* Crawford *to Avoid* Bruton *for Non-Testimonial Statements*, 76 MO. L. REV. 895, 902 (2011).

[173] Raffensperger, *supra* note 139, at 768.

[174] No. 4:01-CV-0264-A, 2001 WL 863614, at *2 (N.D. Tex. July 13, 2001).

leave.[175] The owner of the home was a sixty-five-year-old mentally ill man who lived alone.[176] The woman returned two hours later to find the house ransacked and the owner of the house strangled to death, his hands and feet bound and a wire coat hanger wrapped around his neck.[177] Taylor and his companion were seen exiting the house with a bag of items.[178] When the police came to arrest Taylor two days later, Taylor tried to escape by driving away in the cab of an eighteen-wheeler truck and drove 150 miles before police shot out the tires and radiator.[179] Taylor confessed to the robbery, but maintained his companion had strangled the victim.[180] Taylor was convicted of capital murder and sentenced to death.[181]

At trial, Taylor presented evidence of adaptive behavioral deficits that he suffered from in both childhood and adulthood: trouble cooking simple foods like rice, getting confused by public transportation, and inability to keep a steady job.[182] Taylor's adaptive behavioral deficits present throughout his childhood and adulthood were overshadowed by his behavior in the commission of his crime.[183] The court determined Taylor did not have adaptive behavioral deficits because he perceived an opportunity to rob the victim, planned out the murder, lied about stealing from his victim, was able to successfully maneuver an eighteen-wheeler cab when trying to escape police, and blamed someone else for his crime.[184] Decisions like the one in *Taylor,* where acts made in such a short period of time outweigh a solid history of adaptive behavioral deficits throughout the

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at *1.

[182] Taylor v. Quarterman, 498 F.3d 306, 308 (5th Cir. 2007).

[183] In addition to discounting Taylor's evidence of his adaptive behavior deficits, the court also discounted IQ scores that indicated Taylor was in the intellectually disabled range because of Taylor's incentive to malinger—to feign symptoms in order to garner a diagnosis. *Id.* However, the incentive to malinger is present in every *Atkins* claim where the defendant is able to escape the death penalty with a finding of intellectual disability. *See* Daniel B. Kessler, *Atkins v. Virginia*: Suggestions for the Accurate Diagnosis of Mental Retardation, 43 JURIMETRICS J. 415, 423 (2003) (noting that "[o]bviously, defendants facing capital punishment have a great incentive to malinger–the preservation of their life.") This seems like a way for the courts to disregard the clinical requirements for IQ as well as adaptive deficits.

[184] *Taylor*, 498 F.3d at 308.

life span, are what legal and medical experts are seeking to avoid in overturning the *Briseño* factors. The application of the *Briseño* factors makes the problem even more dramatic when a federal court found that just satisfying the seventh factor alone—that the commission of the offense requires forethought, planning, and complex execution of purpose—was enough to justify a finding that intellectual disability did not exist.[185]

Further, the *Briseño* court's fear that the clinical criteria for intellectual disability identify antisocial-personality disorder instead of intellectual disability is unfounded. It is not uncommon for individuals with an intellectual disability to have a co-existing diagnosis of antisocial-personality disorder.[186] Evidence of an intellectual disability should not be discounted or considered disproved due to evidence of a co-existing personality disorder or maladaptive behavior.[187] A responsible clinician will diagnose both intellectual disability and antisocial-personality disorder when the symptoms for both disorders are present.[188] Many prosecutors and courts view the existence of maladaptive behavior, the hallmark of antisocial-personality disorder, as evidence of "street smarts."[189] However, as stated above, strengths in one area of adaptive functioning should not serve to diminish or discount limitations in other areas of adaptive functioning that indicate the presence of an intellectual disability.[190]

In addition, some of the perceived conflation of antisocial-personality disorder and the behavior of defendants with an intellectual disability just may be conflation of antisocial-personality disorder and the behavior of defendants. *The Diagnostic and Statistical Manual of Mental Disorders*, the accepted guideline by psychological and medical professionals to diagnose mental disorders, cites the following as indicators of antisocial-personality disorder:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.

[185] *See* Chester v. Quarterman, No. 5:05cv29, 2008 WL 1924245, at *8 (E.D. Tex. Apr. 29, 2008).

[186] Fabian et al., *supra* note 89, at 426.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] AAIDD AD HOC COMMITTEE ON TERMINATION AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 47 (11th ed. 2010).

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for safety of self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.[191]

All of the above are representative of criminal behavior and would be easy enough to associate with any defendant being accused of that criminal behavior, but not because they are intellectually disabled.

The *Briseño* court may have also been tempted to create the *Briseño* factors to make the court's evaluation of *Atkins* claims easier. Clinical evaluation of adaptive behavior deficits rely on information that can be provided by those close to the individual who observe their everyday tasks and abilities.[192] However, there can often be difficulty in assessing adaptive behavior criteria as most people with an intellectual disability live independently or the individuals who have observed the defendant's everyday activities may not be readily available.[193] Most of the *Briseño* factors look at qualities that can be supported or discounted based on information within the court's possession—the defendant's crime and subsequent legal activity.[194] Factors two and three—ability to formulate and carry out plans and leadership skills—can often be supported by the commission of the crime.[195] Factors four through six—appropriate response to stimuli, coherent and rational response to written and oral questions, and ability to effectively lie in one's own interest—can be supported or disproved through a defendant's encounters with police in the investigation stage of the case.[196] Factor seven—whether the commission of the crime required forethought, planning, and complex execution of purpose—can be supported or disproved by facts that should be elicited in both investigation

[191] AM. PSYCHIATRIC ASS'N, *supra* note 39, at 659.

[192] Fabian et al., *supra* note 89, at 424.

[193] Hagstrom, *supra* note 69, at 272.

[194] *See Ex parte* Briseño, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

[195] *See id.*

[196] *See id.*

and at trial.[197] By using criteria the court can easily evaluate but that professional organizations specifically discourage in the evaluation of intellectual disability, the court is prioritizing fact-finding ease over the rights of those defendants alleging intellectual disability.

C. Prediction of the Outcome to the Challenge to the Briseño *Factors in Light of* Hall

In *Moore v. Texas*, the Supreme Court is faced with determining the constitutionality of the *Briseño* factors. The Texas Court of Criminal Appeals directly cites the *Briseño* factors in upholding Bobby James Moore's death sentence despite the evidence Moore meets the current clinical standards for intellectual disability.[198] The dissent to the *Moore* decision rendered by the Texas Court of Criminal Appeals urges the Texas courts to move away from the *Briseño* factors in light of the *Hall* decision and the consensus as to what constitutes intellectual disability in the medical community.[199] The dissent also gives a reminder that the *Briseño* factors are not based on any legal or medical authority.[200] The Petition for Writ of Certiorari directly points to the *Hall* decision and beseeches the Court to adopt modern clinical criteria in the determination of intellectual disability.[201]

Like the statutory scheme struck down by the Supreme Court in *Hall*, the *Briseño* factors do not comport with clinical standards. The *Briseño* factors direct the fact-finder to look at certain behaviors and abilities that clinical professionals and professional organizations state do not indicate the presence of intellectual disability.[202] The Texas courts' application of the *Briseño* factors have allowed strengths in certain areas of adaptive behavior to discount the presence of limitations in other areas of adaptive behavior contrary to the advice of professional organizations.[203] These

[197] *See id.*

[198] *Ex parte* Moore, 470 S.W.3d 481, 526–27 (Tex. Crim. App. 2015).

[199] *Id.* at 528 (Alcala, J., dissenting).

[200] *Id.* at 530.

[201] Petition for a Writ of Certiorari at 22–23, *Moore v. Texas*, No. 15-797 (U.S. *petition for cert. filed* Dec. 15, 2015), 2015 WL 9252271, at *10–11.

[202] *See* ROBERT L. SCHALOCK, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 18–22 (Am. Ass'n on Intellectual & Developmental Disabilities ed., 10th ed. 2007).

[203] *See* AAIDD AD HOC COMMITTEE ON TERMINATION AND CLASSIFICATION, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 47 (11th

professional organizations are the leading experts on intellectual disability and the same organizations whose criteria the Supreme Court referenced in *Atkins*.[204] Despite Scalia's opinion on its sensibility, the *Hall* Court created precedent for deference to clinical criteria proffered by professional organizations.[205] This required deference would compel the Supreme Court to find the *Briseño* factors unconstitutional.[206] As the *Atkins* Court stated, the execution of a defendant with an intellectual disability serves neither goal of the death penalty—retribution nor deterrence.[207] By utilizing the *Briseño* factors, Texas is executing intellectually-disabled defendants.

ed. 2010); Fabian et al., *supra* note 89, at 421; Blume, *supra* note 5, at 710; Everington, *supra* note 139, at 471.

[204] Atkins v. Virginia, 536 U.S. 304, 318 (2002). The *Atkins* Court specifically cited to the definition of intellectual disability proffered by the AAMR, which currently exists as the AAIDD. *Id.*

[205] Hall v. Florida, 134 S. Ct. 1986, 1993–96 (2014).

[206] *See id.*

[207] *Atkins*, 536 U.S. at 318–19.