

## Notes

# The Writing Is on the Wall: How the *Briseno* Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability\*

### I. Introduction

In 2002, the Supreme Court held in *Atkins v. Virginia*<sup>1</sup> that the execution of intellectually disabled people is cruel and unusual punishment in violation of the Eighth Amendment.<sup>2</sup> When *Atkins* was decided, Texas did not have a statute governing how intellectual disability claims should proceed in the capital context, so Texas’s highest criminal court, the Court of Criminal Appeals (CCA), created the legal framework to govern these claims.<sup>3</sup> Notably, the CCA did more than create procedural rules to govern *Atkins* claims; citing concerns about whether Texans believe that all intellectually disabled capital offenders should be exempted from the death penalty, the CCA created a distinctive and restrictive approach to determining intellectual disability. Recently though, in *Hall v. Florida*,<sup>4</sup> the Supreme Court held a Florida practice unconstitutional because it was restrictive and diverged from professional norms.<sup>5</sup> This Note serves as a comprehensive evaluation of Texas’s approach in theory and practice, highlighting its departure from *Atkins* and *Hall* and the important policy objectives that guided those decisions.

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1. 536 U.S. 304 (2002).

2. *Id.* at 321. In the mid-2000s, “intellectual disability” (ID) became the preferred term for the disability previously known as “mental retardation.” 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). Court opinions used the term “mental retardation” until *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014), when the Supreme Court changed its terminology. Thus, while I will use “intellectual disability” throughout this Note, quotations from court cases may use “mental retardation.”

3. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

4. 134 S. Ct. 1986 (2014).

5. *Id.* at 1990, 1995, 2001.

First and foremost, the Note will argue that the CCA's approach to determining intellectual disability contradicts the fundamental holding of *Atkins*: that all individuals with intellectual disability should be exempt from execution. The Note will then examine and demonstrate how, in order to effectuate its more restrictive understanding of intellectual disability, the CCA substantively changed the definition of intellectual disability, departing from traditional diagnostic practices by creating new categories of assessment—"the *Briseno*<sup>6</sup> factors." These factors ignore many professional notions about how to assess an individual's adaptive deficits—an aspect of the intellectual disability diagnosis that focuses on how the individual functions day-to-day in society. Because of the *Briseno* factors' deviation from professional practices, this Note argues that they create an unconstitutional risk of executing an intellectually disabled person under *Hall*, in which the Supreme Court reaffirmed the importance of professional practices in *Atkins* determinations.<sup>7</sup> This is true despite several cases decided since *Hall* that have attempted to justify the use of the *Briseno* factors.<sup>8</sup> Finally, this Note concludes by recognizing that while there are inherent difficulties in evaluating and diagnosing capital defendants for intellectual disability, the solution is to privilege the best and most reliable information that can be obtained consistent with best practices in the clinical community—not to add artificial categories to the diagnosis that do not add to the accuracy of the analysis and which ultimately undermine the existing clinical approach.

## II. Underenforcement of *Atkins v. Virginia* in Texas

### A. *Atkins v. Virginia and the Texas Response*

*Atkins* was a dramatic reversal of *Penry v. Lynaugh*,<sup>9</sup> decided a short thirteen years earlier. In *Penry*, the Court had considered creating a categorical bar on executing intellectually disabled people but declined to do so, finding no "national consensus" against execution of the intellectually disabled because only one state and the federal government barred their execution.<sup>10</sup> Furthermore, Justice O'Connor found that while intellectual disability should be considered by the jury as a mitigating factor against

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

7. *Hall*, 134 S. Ct. at 1995–2000.

8. *See, e.g., Ex parte Cathey*, 451 S.W.3d 1, 10 n.22 (Tex. Crim. App. 2014) (characterizing *Atkins* hearings as "a subjective battle between dueling forensic experts," necessitating the CCA's development of the "more objective" *Briseno* factors); *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012) (stating that while clinical determinations of mental retardation are "instructive," they do not always conclusively answer whether the Constitution permits the death penalty in a given case).

9. 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

10. *Id.* at 334. At the time of the decision, one other state had enacted legislation barring the execution of the intellectually disabled, but it had not yet taken effect. *Id.*

imposition of the death penalty, not “all mentally retarded people of Penry’s ability . . . inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.”<sup>11</sup>

By the time *Atkins* was decided in 2002, seventeen additional states had passed legislation barring the execution of intellectually disabled people.<sup>12</sup> Although this number did not constitute a majority of states, or even a majority of death penalty states—a factor that the Court has found important in other cases<sup>13</sup>—the Court emphasized the “consistency of the direction of change”<sup>14</sup> in demonstrating a national consensus against the execution of the intellectually disabled. The Court also indicated, contrary to its finding in *Penry*, that all individuals who are clinically diagnosed as having intellectual disability “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>15</sup> Thus, they bear “diminish[ed] . . . personal culpability.”<sup>16</sup> The Court recognized that “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.”<sup>17</sup> Quoting *Ford v. Wainwright*,<sup>18</sup> which prohibited the execution of insane defendants,<sup>19</sup> the Court left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”<sup>20</sup>

Notably, the Court in *Atkins* listed Texas among the seventeen states that had passed legislation exempting capital offenders with intellectual disability.<sup>21</sup> In 2001, the Texas legislature unanimously passed a bill barring the execution of the intellectually disabled,<sup>22</sup> which Rick Perry, then Governor of Texas, subsequently vetoed.<sup>23</sup> However, he did so not because he disagreed with the principle of exempting persons with intellectual disability, but because of what he perceived as a procedural flaw in how the bill allocated responsibility between judges and juries in determining intellectual

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11. *Id.* at 338 (opinion of O’Connor, J.).

12. *Atkins*, 536 U.S. at 314–15.

13. *E.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 422–23 (2008), *modified on denial of reh’g*, 554 U.S. 945 (2008); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 594 (1977).

14. *Atkins*, 536 U.S. at 315.

15. *Id.* at 318.

16. *Id.*

17. *Id.* at 317.

18. 477 U.S. 399 (1986).

19. *Id.* at 401.

20. *Id.* at 416–17.

21. *Atkins*, 536 U.S. at 315.

22. *Id.*

23. *Id.* at 315 n.16.

disability.<sup>24</sup> In his veto statement, Governor Perry wrote: “We do not execute mentally retarded murderers today.”<sup>25</sup>

Because of this veto, Texas did not have a legislative framework in place to enforce *Atkins*'s holding.<sup>26</sup> Thus, when the first post-*Atkins* intellectual disability claim was submitted to the CCA, the CCA announced the various procedures and standards that would be used in the determination of intellectual disability.<sup>27</sup> In addition to resolving purely procedural issues, such as the burden of proof and whether a jury determination was required,<sup>28</sup> the CCA adopted a new substantive definition of intellectual disability.<sup>29</sup> The CCA justified its more restrictive definition based on its view that not all persons who satisfy the prevailing clinical definition of intellectual disability are undeserving of the death penalty.<sup>30</sup> The centerpiece of this more limited approach focuses on the adaptive deficits prong of intellectual disability.<sup>31</sup> Instead of adopting the standard clinical definition, the court promulgated the *Briseno* factors, ostensibly to supplement the standard clinical definition of intellectual disability.<sup>32</sup> In fact, those factors have supplanted the professional definition in Texas courts and have resulted in a troublingly low rate of success in Texas *Atkins* claims compared to other death penalty states.<sup>33</sup>

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24. Veto Proclamation of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001), <http://www.lrl.state.tx.us/scanned/vetoes/77/hb236.pdf> [<https://perma.cc/X35Z-DQ8P>].

25. *Id.*

26. *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

27. *Id.*

28. *Id.* at 10, 12 (holding that defendants are not entitled to have a jury determine the question of mental retardation and that defendants must establish their intellectual disability by a preponderance of the evidence).

29. *Id.* at 7–8 (adopting the American Association on Mental Retardation definition for mental retardation as “(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” until an alternate definition is provided by the Texas Legislature for capital sentencing (footnotes omitted)).

30. *See id.* at 5–6 (observing that mental retardation ranges in severity and emphasizing that it is up to the states to determine which individuals are so impaired as to fall within the range of offenders who would be ineligible for the death penalty under *Atkins*).

31. *See id.* at 8, 18 (adopting additional factors for adaptive behavior and denying the applicant’s claim of mental retardation based on a failure to show significant limitations in adaptive functioning); John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court’s Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 407–08 (2014) (noting how the *Briseno* factors distort the analysis of adaptive functioning).

32. *See Briseno*, 135 S.W.3d at 8–9.

33. *See* Blume et al., *supra* note 31, at 397, 413 (finding that the average national success rate for *Atkins* claims is 55% while the success rate in Texas is only about 17%). In that article, the authors found that success rates were significantly lower in states that deviate substantially from clinical practices. *Id.* at 412–14. Texas, of course, deviates from clinical practices with its use of the *Briseno* factors. *Id.* at 414. Florida and Alabama, with success rates of 0% and 15% respectively, adhered to strict IQ-score cutoffs (prior to *Hall*, which invalidated this practice). *Id.* at 413–14. Georgia, with a success rate of 11%, is the only state that requires a showing of intellectual

Specifically, as this Note will demonstrate, the *Briseno* factors have functionally displaced and distorted the “adaptive deficits” inquiry that is used in widely accepted clinical definitions of intellectual disability. The following subparts will describe: (1) the *Briseno* factors and the CCA’s administration of intellectual disability claims, demonstrating how the factors have been deployed to defeat even strong claims of intellectual disability, (2) the ways in which *Ex parte Briseno* misreads *Atkins* as permitting a substantive redefinition of intellectual disability in violation of *Atkins* and *Hall*, and (3) the ways in which the factors defy clinical definition, perpetuate unfounded stereotypes about intellectual disability, and underprotect the class of persons that *Atkins* intended to exempt from execution.

#### B. *The Briseno Factors*

Although the Supreme Court gave discretion to states to develop appropriate procedures for implementing *Atkins*, the Court gave no discretion to states to alter the class of people protected—the intellectually disabled. Throughout the decision, the Court discusses this class of people by reference to clinical definitions of intellectual disability.<sup>34</sup> Specifically, the Court cited the definitions promulgated by the major national professional organizations on the subject: the American Association on Intellectual and Developmental Disabilities (AAIDD)—at the time known as the American Association on Mental Retardation (AAMR)—and the American Psychiatric Association (APA), which produces the Diagnostic and Statistical Manual (DSM).<sup>35</sup> Both definitions are similar and require the defendant to meet the following three criteria:

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disability beyond a reasonable doubt—other states require the lower burden of preponderance of the evidence. *Id.* at 401 n.39, 412–14.

34. For example, the Court stated:

As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

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

35. *Id.* at 308 n.3; Press Release, Am. Ass’n on Mental Retardation, World’s Oldest Organization on Intellectual Disability Has a Progressive New Name (Nov. 27, 2006), <http://www.pnewswire.com/news-releases/worlds-oldest-organization-on-intellectual-disability-has-a-progressive-new-name-56524127.html> [<https://perma.cc/R3Z6-NUF8>].

1. Significant subaverage intellectual functioning (usually defined as an IQ that is two standard deviations below the mean, generally 70 or below with a 5-point standard error measurement);<sup>36</sup>
2. Significant limitations in adaptive functioning (normally this means a finding of significant deficits in two or more skill areas);<sup>37</sup> and
3. Onset in the developmental period (typically considered to be before the age of eighteen).<sup>38</sup>

The second criterion, adaptive functioning, refers to the “skills that people have learned to be able to function in their everyday lives. Significant limitations in adaptive behavior impact a person’s daily life and affect the ability to respond to a particular situation or to the environment.”<sup>39</sup> For purposes of evaluating an individual’s adaptive functioning, a basic tenet of professional diagnosis is that “people with ID . . . have strengths mixed with deficits.”<sup>40</sup> This means that individuals with intellectual disability are able to function in some areas like normally functioning people while having weaknesses in other areas.<sup>41</sup> This is especially true of individuals with mild intellectual disability, who are often able to function normally in many or even most respects, and whose disability may go unnoticed for much of their lives.<sup>42</sup>

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36. *Atkins*, 536 U.S. at 308 n.3.

37. *Id.* For the AAIDD, the defendant must show limitations in two or more of the following areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, or work. AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 8 (10th ed. 2002). For the DSM, the defendant must show sufficient impairment in at least one domain of adaptive functioning—conceptual, social, or practical—that the defendant needs ongoing support to perform adequately in one or more life settings at school, work, home, or in the community. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013).

38. *Atkins*, 536 U.S. at 308 n.3.

39. AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, FREQUENTLY ASKED QUESTIONS ON INTELLECTUAL DISABILITY AND THE AAIDD DEFINITION 2 (2008), [http://aaid.org/docs/default-source/sis-docs/aaiddfaqonid\\_template.pdf?sfvrsn=2](http://aaid.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2) [<http://perma.cc/3U6J-WJTD>]; see also J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 2. The Importance of Adaptive Behavior*, PSYCHOL. MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, Fall 2006, at 7, 7 (“[A]t its heart, the diagnosis of mental retardation is not primarily about test scores; it is about whether the individual has been able to function adequately in age-appropriate roles throughout life. In other words, the essence of a valid diagnosis is adaptive behavior.”).

40. Stephen Greenspan, *The Briseño Factors*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 229 (Edward A. Polloway ed., 2015).

41. *Id.*

42. *Id.* at 221 (emphasizing that “ID at the upper end of the spectrum is a somewhat hidden disability, as many individuals who apply for *Atkins* relief do not stand out in appearance or behavior in routine (especially brief) settings as obviously impaired”).

After the Supreme Court decided *Atkins*, the Texas Court of Criminal Appeals in *Briseno* adopted the AAMR (and the very similar Texas Health and Safety Code) definition of intellectual disability.<sup>43</sup> However, the CCA was concerned that this definition, while appropriate in the context of social services, might not conform to what most Texans would agree justifies exemption from the death penalty.<sup>44</sup> The court stated: “Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment.”<sup>45</sup> To this end, the CCA stated that their role was to “define *that level and degree of mental retardation* at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”<sup>46</sup> As an example of an individual that most Texans would agree should be exempt, the court cited Lennie, the fictional character in Steinbeck’s *Of Mice and Men*.<sup>47</sup>

With regard to the AAMR definition of intellectual disability, the court was especially concerned with the second prong—adaptive deficits—which the Court found to be “exceedingly subjective.”<sup>48</sup> To alleviate these concerns and to help establish the proper “level and degree” of intellectual disability required for exemption in Texas, the CCA established factors which “factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.”<sup>49</sup>

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43. *Ex parte Briseno*, 135 S.W.3d 1, 7–8 (Tex. Crim. App. 2004).

44. *See id.* at 6 (“[I]s there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a ‘mental retardation’ bright-line exemption from our state’s maximum statutory punishment?”).

45. *Id.* at 8. While the CCA implied that Texas citizens would find this definition to be over-inclusive, it is worth noting that the pre-*Atkins* bill exempting intellectually disabled capital offenders—which was passed unanimously by the Texas House and Senate, but later vetoed by then-Governor Perry—adopted the Texas Health and Safety Code definition of intellectual disability. *Id.* at 6.

46. *Id.* (emphasis added).

47. *Id.*

48. *Id.* at 8.

49. *Id.* at 6, 8. This statement—that the factors should be used by factfinders to “weigh[] evidence as indicative of mental retardation or a personality disorder”—could be read to mean that the factors should only be used to differentiate symptoms that could be indicative of a personality disorder (for which there is no constitutional exemption) rather than intellectual disability. *See id.* at 8. However, in practice this distinction has been almost entirely ignored, and the factors have been used in cases where no evidence of personality disorder is presented. *See, e.g., Ex parte Butler*, 416 S.W.3d 863, 874–78 (Tex. Crim. App. 2012) (per curiam) (reviewing evidence of the defendant’s intellectual ability—without discussing any evidence of a personality disorder—in upholding the trial judge’s determination that the defendant failed to prove that he was mentally retarded).

These seven factors are now known as the *Briseno* factors, enumerated as follows:

- [1.] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- [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?
- [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?<sup>50</sup>

In creating these factors, the CCA emphasized:

Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.<sup>51</sup>

Thus, the court made clear that experts could agree that a defendant meets the diagnostic criteria of intellectual disability, yet a jury or judge could still find that this defendant does not meet the standard of intellectual disability required for exemption from the death penalty.<sup>52</sup> And indeed, this scenario has played out in several cases as illustrated below.

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50. *Briseno*, 135 S.W.3d at 8–9.

51. *Id.* at 9.

52. See, e.g., Findings of Fact and Conclusions of Law at 18, *Ex parte* Clark, No. F-93-0713-C (211th Dist. Ct., Denton County, Tex. Nov. 20, 2003) [hereinafter *Ex parte* Clark Findings of Fact and Conclusions of Law] (“[E]ven if Applicant falls within the upper range of mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty.” (emphasis added)); Findings of Fact and Conclusions of Law at 9, *Ex parte* Taylor, No. C-297-006327-0542281-B (297th Dist. Ct., Tarrant County, Tex. Sept. 29, 2004) (coming to the same conclusion) [hereinafter *Ex parte* Taylor Findings and Conclusions].



C. *Application of Briseno Factors*

Juan Lizcano was found guilty of capital murder in 2007.<sup>53</sup> The same jury that convicted Lizcano was charged with deciding whether he was intellectually disabled during the sentencing phase of the trial—at the same time they decided whether he deserved to live or die.<sup>54</sup> Lizcano needed to show by a preponderance of the evidence that he was intellectually disabled.<sup>55</sup> Lizcano had a full-scale IQ of 60,<sup>56</sup> and the CCA subsequently determined that Lizcano had adequately shown significant deficits in intellectual functioning.<sup>57</sup>

The claim, then, turned on the adaptive-deficits inquiry.<sup>58</sup> In order to meet this burden, the defense had psychologists administer various tests and review interviews with his family and friends.<sup>59</sup> Two psychologists testified that Lizcano had significant deficits in adaptive behaviors.<sup>60</sup> One testified that Lizcano had deficits in two areas—communication and self-care—thus meeting the clinical requirement of significant deficits in at least two areas.<sup>61</sup> On cross-examination, though, the prosecutor insisted that Texas’s definition of intellectual disability differed from the clinical definition the expert had used, specifically because of Texas’s embrace of the *Briseno* factors.<sup>62</sup>

The defense elicited testimony from Lizcano’s elementary school teacher that Lizcano was a “very slow” learner, having remained in the sixth grade until the age of fifteen, when he had to leave because he was too old to remain.<sup>63</sup> Testimony from others revealed that Lizcano didn’t understand funny stories and often laughed inappropriately,<sup>64</sup> couldn’t read a clock,<sup>65</sup> had difficulty following simple directions, and dressed inappropriately—including one time when he wore his girlfriend’s blouse, thinking it was a t-

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53. *Ex parte* Lizcano, No. WR-68,348-03, slip op., at 1 (Tex. Crim. App. Apr. 15, 2015) (per curiam) (not designated for publication), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=ba5373fd-f5bd-40d0-9057-f8745da181b7&coa=coscca&DT=OTHER&MediaID=80ee9ff7-6d94-48ab-b0cc-f9b7277bcd00> [https://perma.cc/6LMZ-5ECS].

54. *Id.* at 1–2 (applying TEX. CODE CRIM. PROC. ANN. art. 37.071 2(e)(1) (West 2006)).

55. *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at \*11 (Tex. Crim. App. May 5, 2010) (not designated for publication).

56. Transcript of Proceedings vol. 56 at 46, *State v. Lizcano*, No. F05-59563-QS (282nd Dist. Ct., Dallas County, Tex. Oct. 31, 2007) [hereinafter *Lizcano* Transcript].

57. *See Lizcano*, 2010 WL 1817772, at \*11–12 (finding that Lizcano “clearly satisfied” the sub-average general intellectual functioning prong of the intellectual disability inquiry).

58. *Id.* at \*11.

59. *Lizcano* Transcript, *supra* note 56, vol. 56 at 8–9, 28–29, 103–05.

60. *Id.* at 8–9, 103–05, 117.

61. *Id.* at 40.

62. *Id.* at 56 (“So the definition that the jury has is going to be different, then, than the definition you used in the clinical approach . . . ?”).

63. *Lizcano*, 2010 WL 1817772, at \*12.

64. *Lizcano* Transcript, *supra* note 56, vol. 54 at 31.

65. *Id.* vol. 53 at 25.

shirt.<sup>66</sup> Lizcano's former supervisor testified that he had to help Lizcano read the measurements on a ruler ten to fifteen times a day and that Lizcano was "almost childish."<sup>67</sup> Lizcano could perform tasks immediately after they were explained to him, but would be unable to perform those same tasks ten to fifteen minutes later.<sup>68</sup> He was never able to learn how to use a saw and was not trusted with putting traffic cones on the streets because his supervisors didn't believe he could adequately gauge the proper stopping distance.<sup>69</sup> Lizcano's supervisor testified that, of all the employees he had encountered on the job, Lizcano was the only one who was simply unable to learn the skills for the job.<sup>70</sup>

The state presented no expert testimony on the issue of Lizcano's intellectual disability, despite having engaged a psychologist to interview Lizcano.<sup>71</sup> Instead, the state called a used-truck salesman who had sold a truck to Lizcano.<sup>72</sup> The salesman testified that during the transaction, he saw nothing about Lizcano's mental capacity that caused him to hesitate in selling Lizcano a truck.<sup>73</sup> The jury found that Lizcano was not intellectually disabled and sentenced him to death.<sup>74</sup>

Michael Wayne Hall, executed in 2011, likewise lost his *Atkins* claim because of the CCA's *Briseno* approach.<sup>75</sup> During the *Atkins* hearing in the state trial court, three defense experts provided testimony or affidavits concluding that Hall was intellectually disabled,<sup>76</sup> and the only expert for the state conceded that Hall was either mildly intellectually disabled or borderline intellectually disabled.<sup>77</sup> Hall's mother and brother testified that Hall had been in special education classes from first through eighth grade,<sup>78</sup> that

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66. *Id.* at 33, 36–37.

67. *Lizcano*, 2010 WL 1817772, at \*14; *Lizcano* Transcript, *supra* note 56, vol. 54 at 56.

68. *Lizcano* Transcript, *supra* note 56, vol. 54 at 57.

69. *Id.* at 55–56.

70. *Id.* at 57.

71. *Id.* vol. 58 at 37.

72. *Id.* vol. 56 at 162–64.

73. *Id.* at 165.

74. *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at \*1, \*10 (Tex. Crim. App. May 5, 2010) (not designated for publication).

75. See *Hall v. State*, 160 S.W.3d 24, 38 (Tex. Crim. App. 2004) (observing that the groundwork for the court's conclusion in the case at bar had been laid in *Briseno*); *Executed Offenders*, TEX. DEP'T CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_executed\\_offenders.html](http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html) [<https://perma.cc/4ZVP-K5Z2>].

76. *Hall*, 160 S.W.3d at 39–40.

77. *Id.* at 30. This expert testified that Hall was "at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's—it's sort of a judgment call." *Id.*

78. *Id.* at 27–28. The majority emphasized that Hall's school labeled him "learning disabled" and not "mentally retarded." *Id.* at 29. But in fact, school records showed that the school had tried to designate Hall as "mentally retarded" but had not done so at his mother's request. *Id.* at 44 (Johnson, J., dissenting).

at the age of fifteen he played with eight- to nine-year-olds, that he could not count money or tell time on a traditional clock, that he could not use public transportation, and that he often became lost just a few blocks from home.<sup>79</sup>

One teacher testified that Hall could not understand concepts, even after repetition, and that he would forget things from one day to the next.<sup>80</sup> Another teacher testified that she had to set a five-minute task timer to keep Hall on task; otherwise he would fall asleep or sit and stare.<sup>81</sup> Several teachers noted that Hall drooled in class, and one remarked that he was the object of ridicule by his classmates.<sup>82</sup>

A fellow death row inmate, incarcerated in a cell immediately adjacent to Hall's, noted that Hall was called "Half Deck" by guards and inmates and that Hall had become very upset when he found out that a civil lawsuit had been filed against him by the victim's family because he thought he could get another death penalty from the suit.<sup>83</sup> Hall's trial attorneys submitted affidavits stating that even after repeated explanations, Hall could not understand the legal theory that made him eligible for capital murder (Hall's codefendant had killed the victim, so Hall was only death eligible under the law of parties), and that Hall would ask them a question, say that he understood the answer, and then re-ask the same question within a short period of time.<sup>84</sup>

In support of its case, the state presented the testimony of a waitress who had once served Hall and who observed that he had ordered his own meal and appeared to eat it using proper eating utensils.<sup>85</sup> A former coworker testified to Hall's ability to bag groceries.<sup>86</sup> The state also presented affidavits from five guards on death row, who stated that they did not believe that Hall was intellectually disabled.<sup>87</sup> In affirming the trial court's finding that Hall was not intellectually disabled, the CCA also emphasized that Hall could read and write at a fourth-grade level, use a phone, operate a microwave, unload a dishwasher, and use a pen and pencil, among other things.<sup>88</sup> The CCA further noted that one of the defense experts conceded that during one

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79. *Id.* at 27–28 (majority opinion).

80. *Id.* at 28.

81. *Id.*

82. *Id.* at 29, 34.

83. *Id.* at 34.

84. *Id.* at 34; *id.* at 42 (Johnson, J., dissenting).

85. *Id.* at 31 (majority opinion).

86. *Id.*

87. *Id.* at 34–35.

88. *Id.* at 28.

of his interviews, Hall had lied to him about several issues relating to the crime.<sup>89</sup> The court also cited the circumstances of the crime itself as evidence that Hall was not intellectually disabled.<sup>90</sup>

The cases of Juan Lizcano and Michael Wayne Hall are not “battles of the experts” like so many factually difficult cases. In all of these cases, the experts were overwhelmingly on the defense’s side, yet the *Briseno* factors, with their emphasis on lay opinion and anecdotal evidence of functioning, allowed the state to prevail.

Thus, the *Briseno* factors enable the CCA to affirm findings of no intellectual disability despite unrebutted expert testimony to the contrary. And while the CCA has indicated that consideration of the factors is not mandatory, they have functionally become required, especially if a trial judge credits the defendant’s expert and not the state’s. In *Ex parte Sosa*,<sup>91</sup> the CCA remanded a trial court’s finding of intellectual disability for further consideration,<sup>92</sup> notwithstanding the CCA’s position that in reviewing a trial court’s *Atkins* determination, “we afford almost total deference to a trial judge’s determination of the historical facts supported by the record, especially when those fact findings are based on an evaluation of credibility and demeanor.”<sup>93</sup> But the trial judge in *Sosa*’s case had credited the defense expert, who stated that the last *Briseno* factor—whether the facts of the crime itself showed “forethought, planning, and complex execution of purpose”—was contrary to AAIDD standards for diagnosing intellectual disability.<sup>94</sup> Furthermore, the case involved an actual innocence claim, so the expert did

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89. *Id.* at 30.

90. *Id.* at 40. The court does not explain exactly which aspects of the crime demonstrate Hall’s intellectual ability, but to the extent that it is relevant, Hall and a friend abducted a mentally disabled former co-worker and they took her to a remote location where they shot at her with various weapons. *Id.* at 27. Hall’s codefendant did the brunt of the shooting, including the fatal shot, but Hall shot at her with a pellet gun. *Id.* Several days later, Hall and his codefendant returned to the crime scene, and a few weeks later they were arrested while trying to flee to Mexico. *Id.* While this was undoubtedly a heinous crime, nothing about it is particularly sophisticated or well planned, and Hall appears to have been following the lead of his older and more violent codefendant—behavior consistent with intellectually disabled individuals. *See id.* (explaining the codefendant’s leading role in the crime); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (stating that “[m]entally retarded persons” are more apt to act on impulse rather than construct premeditated plans and, in group settings, are “followers rather than leaders”).

91. 364 S.W.3d 889 (Tex. Crim. App. 2012).

92. *Id.* at 890.

93. *Ex parte Briseno*, 135 S.W.3d 1, 12–13 (Tex. Crim. App. 2004).

94. *Sosa*, 364 S.W.3d at 893. The AAIDD does, in fact, instruct professionals that they should not consider the facts of the crime. Brooke Amos, *Atkins v. Virginia: Analyzing the Correct Standard and Examination Practices to Use when Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 494 (2011).

not discuss the facts of the crime with the defendant.<sup>95</sup> As a result, the defense expert offered no opinion about whether the facts of Sosa's crime revealed forethought or planning.<sup>96</sup>

On review, the CCA was concerned with this perceived omission, noting that

[t]here appears to be a marked inconsistency between the evidence of the applicant's actions adduced at the applicant's 1984 trial and the evidence of his abilities adduced at his 2008 habeas hearing. In the current record, we have no basis on which to make a determination of whether a man who committed the offense that a jury found beyond a reasonable doubt in 1984 could have had the disabilities that the applicant proved by a preponderance of the evidence to a habeas judge in 2008.<sup>97</sup>

This reasoning exemplifies the CCA's belief that a professional diagnosis of intellectual disability—which by its nature will not address the facts of the crime—may not suffice for purposes of an *Atkins* exemption. Thus, the CCA remanded the case so that the judge could make findings as to whether the symptoms of mental retardation that the applicant has alleged are inconsistent with his being able to commit the crime of which he was convicted, and whether, considering the facts of the offense and the applicant's role in the offense, the judge still finds that the applicant is mentally retarded.<sup>98</sup>

The CCA seemed to recognize the contradiction between their holding in *Ex parte Sosa* and the fact that they “did not make consideration of any or all of these [*Briseno*] factors mandatory.”<sup>99</sup> However, the court justified this contradiction by emphasizing that the *Briseno* factors reflected concerns expressed by the Supreme Court in *Atkins*: whether the defendant's limitations in adaptive functioning make him “less morally culpable, less responsive to deterrence, and less capable of assisting in his own defense.”<sup>100</sup> In cases of severe intellectual disability, the court went on to say, the answer to these questions is certainly “yes.”<sup>101</sup> But in more borderline cases, a clinical diagnosis of intellectual disability is not always enough.<sup>102</sup> In these cases,

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95. *Sosa*, 364 S.W.3d at 893.

96. *Id.*

97. *Id.* at 895.

98. *Id.* at 896.

99. *Id.* at 892.

100. *Id.*

101. *Id.*

102. *Id.* (“Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive as to whether the defendant falls into the ‘range of mentally retarded offenders’ protected by the Eighth Amendment, but it will not always provide a conclusive answer to that ultimate legal question.”).

then—as demonstrated in *Ex parte Sosa*—consideration of the *Briseno* factors is functionally required in order to find a defendant intellectually disabled.

*Briseno* has been challenged in the Fifth Circuit on several occasions, but each time the court has stated its approval of *Briseno* and the *Briseno* factors.<sup>103</sup> The factors have also found support in Pennsylvania, where the Supreme Court of Pennsylvania has approved their use in the consideration of intellectual disability.<sup>104</sup>

### III. *Briseno* Departs from Professional Standards and Conflicts with Supreme Court Decisions

#### A. *Briseno* Stems from a Misreading of *Atkins* v. Virginia

In creating the *Briseno* factors, the CCA stated that “[w]e . . . must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.”<sup>105</sup> This statement—and the subsequent creation of the *Briseno* factors—reveals a major misinterpretation of *Atkins* by the CCA. The CCA viewed *Atkins* as a substantive delegation to the states to determine the class exempt from the death penalty. While the Court did delegate to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,”<sup>106</sup> the class of individuals protected was clear—all intellectually disabled offenders. *Briseno* rejects that conclusion.<sup>107</sup>

The CCA’s confusion seems to come from a misreading of a key sentence in *Atkins*, in which the Court states that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.”<sup>108</sup>

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103. *Rosales v. Quarterman*, 291 F. App’x 558, 562 (5th Cir. 2008) (“This court has repeatedly approved the use of the framework laid out in *Briseno*.”). It is important to note that the Fifth Circuit is a federal appeals court, and as such must usually give deference to state court legal and factual determinations. *Chester v. Thaler*, 666 F.3d 340, 348 (5th Cir. 2011). Particularly in the federal habeas context, an appellate court may only overturn a lower court’s findings if it finds that the lower court’s legal determination is “contrary to, or involve[s] an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1) (2012). Thus, the Fifth Circuit’s approval of the factors may only mean that it does not find them contrary to clearly established law.

104. *Commonwealth v. DeJesus*, 58 A.3d 62, 86 (Pa. 2012) (“Because the *Briseno* factors relate directly to considerations in *Atkins* and appear to be particularly helpful in cases of retrospective assessment of mental retardation, we approve their use in Pennsylvania.”).

105. *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).

106. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (alteration in original) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

107. See *Briseno*, 135 S.W.3d at 6 (defining the “level and degree of mental retardation” at which a defendant should be exempt from the death penalty in spite of *Atkins*’s requirement that all intellectually disabled individuals be exempt).

108. *Atkins*, 536 U.S. at 317.

This sentence, properly read, speaks only to the need for states to develop procedures with which to sort out individuals *claiming* to be intellectually disabled, but who are in fact not intellectually disabled. The “range of mentally retarded offenders about whom there is a national consensus” seems plainly to refer to *all* individuals who meet the professional definition of intellectual disability, which is referenced multiple times in the Court’s decision.<sup>109</sup> However, the CCA misread this sentence as stating that not all individuals who in fact *are* intellectually disabled are so impaired as to fall within the range for which there is a national consensus. Relying on this misreading, the CCA was able to justify creating a substantive definition of the class of individuals protected by *Atkins*—a different and narrower definition than the one endorsed by the Supreme Court. The result in Texas has been the continual denial, in contravention of *Atkins*, of valid claims of intellectual disability in Texas.<sup>110</sup>

Importantly, the Supreme Court recently reaffirmed and expounded upon its holding in *Atkins*, finding that state policies that deviate from clinical definitions of intellectual disability create an unacceptable risk of executing intellectually disabled individuals and are therefore unconstitutional.<sup>111</sup> *Hall v. Florida* concerned Florida’s bright-line cutoff for IQ scores, which required defendants to show an IQ score below 70, despite professional understandings that IQ tests have margins of error of about five points.<sup>112</sup> Thus, under professional standards, an individual with an IQ score of 75 could still meet clinical standards for intellectual disability, but would be unable to get relief in Florida courts.<sup>113</sup>

The Court acknowledged that “the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.”<sup>114</sup> Instead, the Court described *Atkins*—which cited to professional definitions of intellectual

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109. *See id.* at 308 n.3, 317–18.

110. *See supra* subpart II(C).

111. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (holding unconstitutional a Florida law defining intellectual disability based on an IQ score of 70 or below because those scoring slightly above the cutoff fall within the test’s medically recognized margin of error).

112. *Id.* at 1990, 1999.

113. *Id.* at 1999.

114. *Id.* at 1998.

disability—as providing “substantial guidance on the definition of intellectual disability.”<sup>115</sup> In fact, the *Hall* Court noted, “[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*.”<sup>116</sup> *Atkins* stated that

those persons who meet the “clinical definitions” of intellectual disability “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Thus, they bear “diminish[ed] . . . personal culpability.”<sup>117</sup>

Turning to the Florida rule, the Court stated that in determining whether a particular practice is constitutional, “it is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning” of the practice in question to determine how it relates to the Court’s holding in *Atkins*.<sup>118</sup> In reviewing the professional studies and practices, the Court found that the Florida rule “disregards established medical practice” by using the IQ score as conclusive evidence when experts would consider other evidence, and by refusing to recognize the professional understanding that IQ scores are imprecise.<sup>119</sup> The Court relied heavily on these professional understandings and practices in finding the IQ cutoff unconstitutional.<sup>120</sup>

*Hall* has generated enormous interest and speculation. Many scholars and practitioners contend that *Hall* requires the discontinuation of some practices relating to the legal determination of ID,<sup>121</sup> and lower courts have begun to interpret the holding. The Fifth Circuit entered the fray almost immediately after *Hall* was decided, construing the Court’s holding

115. *Id.* at 1999.

116. *Id.*

117. *Id.* (alterations in original) (citations omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Diminished personal culpability is a factor considered by the Court when determining whether a class of persons is ineligible for the death penalty. See *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (discussing the diminished culpability of juvenile defenders and barring the imposition of the death penalty on capital offenders under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (discussing the diminished culpability of intellectually disabled defendants and the availability of the death penalty); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (rejecting the imposition of the death penalty in an accomplice-liability case due to culpability concerns).

118. *Hall*, 134 S. Ct. at 1993.

119. *Id.* at 1995.

120. See *id.* at 2002 (Alito, J., dissenting) (arguing that the Court struck “down a state law based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA)”).

121. E.g., James W. Ellis, *Hall v. Florida: The Supreme Court’s Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 390 (2014); Bidish J. Sarma, *How Hall v. Florida Transforms the Supreme Court’s Eighth Amendment Evolving Standards of Decency Analysis*, 62 UCLA L. REV. DISCOURSE 186, 195–96 (2014); Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a “Scientific Stare Decisis,”* 23 WM. & MARY BILL RTS. J. 415, 423 (2014); *The Supreme Court, 2013 Term—Leading Cases*, 128 HARV. L. REV. 271, 279–80 (2014).



narrowly.<sup>122</sup> In *Mays v. Stephens*,<sup>123</sup> the Fifth Circuit limits *Hall* to striking down an impermissible restriction on a defendant's ability to present evidence.<sup>124</sup> The court argues that *Briseno* creates no restrictions on a defendant's ability to present evidence and that "no reasonable jurist could theorize that the reasoning animating *Hall* could possibly be extended to *Briseno*."<sup>125</sup> Thus, the court concludes that *Hall* "in no way affects this court's reading and application of *Briseno*, and we so hold."<sup>126</sup>

Although the Fifth Circuit is not alone in interpreting *Hall* narrowly,<sup>127</sup> this reading is simply not supported by the text of the opinion. In finding that Florida's bright-line cutoff for IQ scores was unconstitutional, the Court emphasized that every defendant who meets the clinical definition of intellectual disability "by definition" bears "diminish[ed] . . . personal culpability" for their actions<sup>128</sup>—in direct conflict with *Briseno*'s interpretation of *Atkins* as stating that not all defendants who meet the diagnostic criteria fall within the class of people exempt from the death penalty. Furthermore, the Court stated that it is proper to consult professional practices when determining the constitutionality of a procedure relating to the diagnosis of ID, and when the Florida rule was viewed against the overwhelming professional understanding of IQ scores as having margins of error, the Court rejected

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122. See *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015) (deciding that *Hall* "exclusively addresses the constitutionality of mandatory, strict IQ test cutoffs").

123. 757 F.3d 211 (5th Cir. 2014).

124. *Id.* at 218.

125. *Id.*

126. *Id.* The Fifth Circuit seemed determined to bar the use of *Hall* as a means of obtaining relief for Texas defendants in federal habeas. In doing so, however, the court chose an unusual vehicle. *Mays* had procedurally defaulted his initial *Atkins* claim and was before the Fifth Circuit asking for a certificate of appealability (COA) based on the district court's denial of an ineffective assistance of counsel claim that would allow him back into court. *Id.* at 212. The Fifth Circuit denied the COA, but then went on to address *Mays*' contention that *Hall* casts doubt upon the constitutionality of *Briseno*. *Id.* at 217. However, because the determination about *Hall* was not necessary to deny the COA, it is not clear that this is a true legal holding, despite the court's contention that it is. See *id.* at 219 (holding that "the *Briseno* factors do not conflict with *Atkins*" but denying petitioner's claim for a COA based on Fifth Circuit precedent). Regardless, it is clear that the Fifth Circuit recognized the potential import of *Hall* for the *Briseno* factors and acted swiftly to narrow its reach. However, the Fifth Circuit's decision in *Mays* will likely have no impact if the Supreme Court invalidates *Briseno* based on *Hall*, because the Supreme Court is much more likely to take a case on direct review, where it can assess the permissibility of *Briseno* without the procedural morass of federal habeas and the Anti-Terrorism and Effective Death Penalty Act of 1996.

127. See *In re Hill*, 777 F.3d 1214, 1224 (11th Cir. 2015) (holding that "*Hall* and its consideration of Florida's strict IQ cut-off of 70 (that barred presenting any other evidence) are materially different from the issue in this case concerning Georgia's beyond-a-reasonable-doubt standard for capital intellectual disability claims").

128. *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014) (alteration in original) (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

it.<sup>129</sup> Although the Court was attentive to the particular Florida rule at issue, the Court wrote broadly, using language and reasoning that applies to all *Atkins* determinations.<sup>130</sup>

Given the Court's concern with practices that depart from professional standards and the nearly unanimous rejection of the *Briseno* factors in the professional community as described below,<sup>131</sup> the continuing validity of *Briseno* is a serious question. Indeed, two judges on the CCA have separately expressed doubts about the legitimacy of the *Briseno* factors. Judge Alcala recently dissented from an opinion affirming a trial court's denial of an *Atkins* claim, writing that "*Briseno* conflicts with the Supreme Court's rationale in *Hall* in that its test for determining intellectual disability is not grounded in the current consensus of the medical community."<sup>132</sup> Similarly, Judge Price has noted that "[p]articularly after the recent opinion of the United States Supreme Court in *Hall v. Florida*, I should think that the writing is on the wall for the future viability of *Ex parte Briseno*."<sup>133</sup>

This past term, the Supreme Court reversed the Fifth Circuit in an *Atkins* case, ruling for the defendant.<sup>134</sup> While the issue in *Brumfield v. Cain*<sup>135</sup> was related to federal habeas, not to Louisiana's definition of intellectual disability, in answering the question before it the Court had to make detailed factual findings.<sup>136</sup> The majority opinion, written by Justice Sotomayor, makes a passing reference to the facts of *Brumfield*'s crime, stating that they "might arguably provide reason to think that *Brumfield* possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns."<sup>137</sup> This statement reflects the troubling reality that many judges, including Supreme Court Justices who would be charged with analyzing the constitutionality of the *Briseno* factors, are confused or misguided about the nature of mild intellectual disability. Justice Sotomayor did recognize this potential conflict by following the above statement with a "But cf." citation to the portion of the AAMR text that warns about overemphasizing a person's strengths,<sup>138</sup> but

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129. *Id.* at 1995, 1998.

130. *See id.* at 1999 (explaining that clinical definitions of intellectual disabilities were a fundamental premise of the *Atkins* decision).

131. Greenspan, *supra* note 40, at 219 ("Few if any intellectual disability (ID) scholars, representative bodies, or specialists consider that the *Briseno* factors provide a valid diagnostic framework.").

132. *Ex parte Moore*, No. WR-13,374-05, 2015 WL 5449887, at \*39 (Tex. Crim. App. Sept. 16, 2015) (Alcala, J., dissenting) (not designated for publication).

133. *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring).

134. *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (2015).

135. 135 S. Ct. 2269.

136. *See id.* at 2276–77 (identifying and examining "two underlying factual determinations on which the trial court's decision was premised").

137. *Id.* at 2281.

138. *Id.*

*Brumfield*'s nod to the facts of an *Atkins* defendant's crime creates cause for concern.<sup>139</sup> Importantly, though, the case also makes clear that the Court is paying attention to state and lower court practices, and is willing to intervene when practices do not conform to *Atkins*. Considering the myriad ways that the *Briseno* factors depart from professional norms—as detailed below—the Court would have ample reason to intervene.

### B. *The Briseno Factors Versus Professional Norms*

As described above, the professional diagnosis of intellectual disability requires showing three things—significant subaverage intellectual functioning (usually demonstrated by performance on IQ tests); substantial deficits in two or more areas of adaptive behavior; and onset in the developmental period.<sup>140</sup> The *Briseno* factors implicate the second criterion of the diagnosis; they were created because the CCA viewed the adaptive-deficits prong of the diagnosis as “exceedingly subjective.”<sup>141</sup> The factors are used to varying degrees depending on the court; some courts consider them in addition to professional categories of adaptive deficits, while others have completely replaced the adaptive-deficits analysis with the *Briseno* factors. Regardless of how the factors are used, they depart from professional understandings of how to assess deficits in adaptive behavior in several significant ways, resulting in the systematic denial of valid intellectual disability claims and underenforcement of *Atkins*.

1. *The Briseno Factors Focus on Strengths.*—The *Briseno* factors incorrectly focus on a defendant's strengths rather than his weaknesses.<sup>142</sup> Professionals understand and emphasize that individuals with intellectual

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139. The Fifth Circuit has already held that *Brumfield* “does not cast any doubt on the constitutionality of the *Briseno* standard.” *Henderson v. Stephens*, 791 F.3d 567, 586 (5th Cir. 2015).

140. *See supra* subpart II(B).

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

142. At least three judges of the CCA have explicitly endorsed this focus on strengths, reasoning in one case:

Applicant argues that the trial judge was wrong to rely upon objective examples of applicant's strengths, competencies, and skills. Instead, he argues, we should focus on evidence of limitations and deficiencies. Were applicant's methodology required, then any evidence of a purported limitation would prevent the factfinder from balancing that evidence against evidence of competency in that particular area. Such is not the law. Instead, in making her determination, the trial judge used “the proper methodology of examining *all evidence* pertaining to a possible deficit in adaptive behavior,” including evidence of applicant's “strengths that clearly rebutted allegations of his limitations.”

*Ex parte Butler*, 416 S.W.3d 863, 878 (Tex. Crim. App. 2012) (Cochran, J., concurring) (footnotes omitted).

disability possess strengths in addition to weaknesses.<sup>143</sup> This is particularly true for individuals with mild intellectual disability, who are often able to lead relatively normal lives.<sup>144</sup> Thus, professional literature instructs psychiatrists and psychologists to look only for weaknesses, and once these weaknesses have been established to the requisite degree, the deficit in adaptive behavior is deemed present.<sup>145</sup> In contrast, the *Briseno* factors allow judges and juries to focus on a defendant's strengths to the exclusion of evidence of significant weaknesses.<sup>146</sup> Finding strengths is not difficult, particularly since factfinders are required to consider the facts of the crime—and most defendants before them have demonstrated the ability to commit capital murder.<sup>147</sup> Though criminal activity may show some minimal ability, it does not necessarily show “strengths” as understood by professionals; in fact, criminal activity is often demonstrative of maladaptive behavior.<sup>148</sup>

But even if criminal activity is evidence of adaptive behavior, professionals understand that strengths coexist with weaknesses, and that people with intellectual disability are capable of many age-relevant activities such

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143. AM. ASS'N ON MENTAL RETARDATION, *supra* note 37, at 8. The AAMR's definition of “mental retardation” is premised upon an assumption that “[w]ithin an individual, limitations often coexist with strengths.” *Id.* AAMR explained:

This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

*Id.*

144. As one expert put it:

He's not severely or profoundly mentally retarded. I don't really even believe that he's moderately mentally retarded. I believe that he's in the middle to upper range of a mild mental retardation range of intelligence. So these individuals can do things. They can function. Most of them can live independently.

*Lizcano* Transcript, *supra* note 56, vol. 55 at 215.

145. *See, e.g.*, AM. ASS'N ON MENTAL RETARDATION, *supra* note 37, at 8 (defining “mental retardation” as a disability characterized by significant limitations in functioning, without any reference to strengths).

146. *See supra* subparts II(B)–(C).

147. Although 156 individuals have been exonerated from death row since 1973, *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> [<http://perma.cc/3CKY-ATW4>], the majority of individuals on death row do not claim factual innocence. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 126 (2008) (reporting the results of an empirical study of exonerations that found “exonerees often did not invoke factual claims during their appeals and postconviction proceedings, much less claims of their innocence”).

148. For example, criminal behavior is one type of non-socially acceptable behavior that is often viewed as indicative of a personality disorder, most notably antisocial personality disorder. *See* Sophie Davison & Aleksandar Janca, *Personality Disorder and Criminal Behaviour: What is the Nature of the Relationship?*, 25 CURRENT OPINION PSYCHIATRY 39, 39–45 (2012) (analyzing a “framework for understanding how personality disorder may contribute to criminal behaviour”).

as independent living and employment.<sup>149</sup> There is no reason to think that the ability to commit crime should be treated any differently. But the *Briseno* factors disregard these professional understandings, allowing a handful of facts that seem to indicate adaptive behavior to undermine otherwise valid claims of intellectual disability.<sup>150</sup>

The case of Elkie Lee Taylor exemplifies this practice of privileging strengths over weaknesses. Taylor was convicted in 1994 of capital murder.<sup>151</sup> Taylor was administered two intellectual-functioning tests by officials in the Texas Department of Criminal Justice and scored a sixty-three and sixty-nine.<sup>152</sup> As a result, he was placed in Texas's "Mentally Retarded Offenders Program."<sup>153</sup> Despite this, and a wealth of other evidence indicating his intellectual disability, the district court found that he was not intellectually disabled.<sup>154</sup> In finding that Taylor did not possess significant adaptive deficits, the court relied in large part upon his ability to drive a manual gear tractor that he stole while fleeing from police.<sup>155</sup> The court detailed the process of changing gears, emphasizing that Taylor had to "perform[] a coordinated series of movements by which Applicant would depress of the truck's clutch pedal, place the truck's transmission into one of the five forward gears, and depress the truck's accelerator pedal while simultaneously releasing pressure on the truck's clutch pedal."<sup>156</sup>

While apparently conceding that Taylor suffered from some level of intellectual disability, the court nonetheless concluded that "Applicant's conduct in properly operating and driving a vehicle equipped with a manual transmission is indicative that Applicant's mental abilities are not at the level at which a consensus of the citizenry would agree that *Applicant's mental retardation* should exempt Applicant from the imposition of the death sentence."<sup>157</sup> Thus, the focus on Taylor's strength—his ability to drive a manual-transmission vehicle—superseded all other evidence of intellectual disability. The court also stated that Taylor was a leader, not a follower—

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149. Greenspan, *supra* note 40, at 228–29.

150. This issue has not gone unnoticed in the CCA. In an unpublished opinion in *Lizcano v. State*, No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting) (not designated for publication), three judges stated that finding strengths in some areas should not necessarily rebut a defendant's *Atkins* claim so long as weaknesses are identified in at least two other areas. *Id.* at \*37. In *Ex parte Butler*, 416 S.W.3d 863 (Tex. Crim. App. 2012) (Price, J., dissenting), two of those judges reiterated this concern, arguing in dissent that "this emphasis on adaptive strengths rather than adaptive weaknesses runs contrary to standard diagnostic protocol, which I believe the courts are obliged to follow in implementing *Atkins*." *Id.* at 883.

151. *Ex parte Taylor*, No. WR-48498-02, 2006 WL 234854, at \*1 (Tex. Crim. App. Feb. 1, 2006) (not designated for publication).

152. *Id.* at \*3.

153. *Id.*

154. *Id.* at \*2.

155. See *Ex parte Taylor Findings and Conclusions*, *supra* note 52, at 4.

156. *Id.*

157. *Id.* (emphasis added).

one of the *Briseno* factors—because he had bragged about killing the victim to several individuals.<sup>158</sup> The court did not explain how this behavior indicated leadership ability; nor did the court consider how bragging about a murder to multiple people might in fact have been evidence of deficits in adaptive behavior. Taylor was subsequently executed in 2008.<sup>159</sup>

Clifton Williams was convicted of capital murder in 2005.<sup>160</sup> During his sentencing trial, the defense presented the testimony of two experts who diagnosed Williams as mildly intellectually disabled.<sup>161</sup> One expert used the Vineland Adaptive Behavior Scales and found significant adaptive deficits in the areas of academic functioning, communication, daily living skills, and socialization.<sup>162</sup> The jury also heard that Williams's elementary school had tried to hold him back in kindergarten but his mother refused; Williams subsequently failed the first grade and was later placed in remedial classes.<sup>163</sup> At the age of nineteen, Williams could only read and write at a fourth-grade level, was repeatedly fired from jobs at fast-food restaurants, and had been homeless off and on throughout his life.<sup>164</sup>

But one major source of contention was Williams's former job at Kentucky Fried Chicken. After lengthy questioning about the responsibilities of fast-food workers and the process of frying chicken, the prosecution's expert stated, "there's been testimony about him putting orders together and cooking chicken. It just—when you're talking about the bottom 2 or 3 percent, that just doesn't fit at all for me."<sup>165</sup> The defense was able to elicit from this expert, on cross-examination, that fast-food restaurants regularly hire people with intellectual disability and that working in a fast-food restaurant is within the capabilities of someone with mild intellectual disability.<sup>166</sup> Despite the defense's efforts to explain why the jury should not let perceived

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158. *Id.* at 3–4.

159. *Elkie Lee Taylor*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/taylor1130.htm> [<http://perma.cc/39L5-MFEP>].

160. *Clifton Williams*, TEX. TRIB., <https://www.texastribune.org/library/data/texas-prisons/inmates/clifton-williams/840014/> [<https://perma.cc/U3AX-GH4X>].

161. Transcript of Proceedings vol. 56 at 219–20, 273, *State v. Williams*, No. 114-1505-06 (114th Dist. Ct., Smith County, Tex. Oct. 21, 2006) [hereinafter *Williams* Trial Transcript].

162. *Id.* at 96–97.

163. *Id.* at 81–83, 90–91.

164. *Id.* vol. 55 at 197, 201, 216.

165. *Id.* vol. 59 at 59–60.

166. *Id.* at 193. One defense expert also tried to combat the prosecution's emphasis on Williams's perceived strengths, stating:

[O]ften a mildly retarded person can do a lot, and it becomes tricky, because you can get involved in cherry picking, meaning this: Well, they can do this, so, therefore, you generalize it to all of this. They adapted to homelessness; therefore, they have high adaptive behavior skills, which is a preposterous idea in the field of measuring adaptive behaviors. If you get in there and say they can swing a hammer, that means they should be a construction worker; that's a mistake to generalize like that.

*Id.* vol. 56 at 32.

strengths outweigh Williams's significant deficits in adaptive functioning, the jury found that Williams was not intellectually disabled and sentenced him to death.<sup>167</sup>

James Lee Clark was convicted of capital murder in 1994 and executed in 2007.<sup>168</sup> At his *Atkins* hearing, two experts concluded that Clark was intellectually disabled and had significant deficits in adaptive behavior after interviewing Clark and Clark's ex-wife, performing various assessments, and reviewing past school records and the circumstances of the offense.<sup>169</sup> One

167. *Williams v. State*, 270 S.W.3d 112, 113 (Tex. Crim. App. 2008). It is worth noting that even if a defendant has never had a legitimate job, courts often cite to their criminal behavior as an example of adapting to their environment, and if the defendant has a long criminal record, this is evidence of some success as a criminal. Thus, defendants are put in a difficult position—earning a legitimate income, no matter how menial the work, is used as evidence of adaptive behavior, but earning income through illegal means is also used as evidence of adaptive behavior. See, for example, this exchange during a cross-examination:

Q: [S]omebody chooses that that's the line of work that they want to commit and they're pretty darn good at it, that doesn't necessarily mean they have a deficit in adaptive behavior, does it?

A: It may mean if they don't do well in it.

Q: Well, how would you characterize somebody that has committed eight to ten aggravated robberies and has really only been caught doing one? I'd say they're pretty successful."

Transcript of Punishment Proceedings vol. 27 at 33–34, *State v. Hunter*, No. 968719 (230th Dist. Ct., Harris County, Tex. July 22, 2004) [hereinafter *Hunter* Transcript]. And another example:

Q: So essentially, at least in his teenage years, he is choosing to lead a life of crime? Fair?

A: He is leading a life of crime.

...

Q: And when you were looking at the records pertaining to his crimes, I'm sure you saw that—that a lot of those, if not all of them, require some forethought and some planning and some execution. Would you agree with that?

A: Most of them, yes.

Q: Sure. For example, when he broke into the theatres in Wichita Falls, he had to pry open a door, had to get the tools to do that with, remember?

Transcript of Trial vol. 37 at 186–87, *State v. Neal*, No. 2005-CR-0698 (226th Dist. Ct., Bexar County, Tex. Apr. 6, 2006) [hereinafter *Neal* Transcript]. This emphasis on illegal behavior departs from professional practices, which focus more on the "integrated-in-society, healthy, having-a-good-job, work-ethic type of things as opposed to the law-violation kind of behavior." *Hunter* Transcript, *supra*, vol. 27 at 71.

168. *James Lee Clark*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/clark1070.htm> [<http://perma.cc/AM2Z-6YET>].

169. One of these experts was Dr. George Denkowski, who was reprimanded in 2011 by the Texas State Board of Examiners of Psychologists for his unscientific methods that artificially inflated scores on intelligence tests and adaptive-behavior scores. See Brandi Grissom, *Texas Psychologist Punished in Death Penalty Cases*, TEX. TRIB. (Apr. 15, 2011), <http://www.texastribune.org/2011/04/15/texas-psychologist-punished-in-death-penalty-cases/> [<http://perma.cc/9L7F-2DQD>] ("As part of a settlement, the Texas State Board of Examiners of Psychologists issued a reprimand against Dr. George Denkowski, whose testing methods have been sharply criticized by other psychologists and defense attorneys as unscientific."). Because of his controversial methods, Denkowski was usually retained by prosecutors in capital cases. *Id.* But in Clark's case, he concluded that Clark was intellectually disabled and testified for the defense. *Ex parte Clark* Findings of Fact and Conclusions of Law, *supra* note 52, at 14–16.

of these experts found Clark's adaptive skills to be "extremely dysfunctional."<sup>170</sup> But the court denied relief, citing one expert who testified that Clark was not intellectually disabled as well as the testimony of several individuals who knew Clark briefly.<sup>171</sup> For example, the Ranger who investigated the case testified that he found the butt stock of a gun in a trash can in Clark's trailer home that matched the remainder of the gun found in the creek where the bodies were recovered.<sup>172</sup> The Ranger testified that he believed, based on this, that Clark "understood the ramifications of leaving evidence at the scene."<sup>173</sup> The Ranger also testified that it takes some skill to operate a gun, and that in order to buy ammunition, Clark would have had to know what type of gun it was.<sup>174</sup> Hence, a capital defendant's use of a gun is almost enough by itself to deny *Atkins* relief in Texas.

Texas courts have also emphasized the ability to communicate as a ground for denying claims of intellectual disability. A court has cited a Spanish-speaking defendant's ability to understand English as evidence of adaptive skills,<sup>175</sup> and courts often reference a defendant's vocabulary to negate an intellectual disability claim. For example, one judge cited the defendant's use of the word "subpoena" in a phone call with his mother.<sup>176</sup> The judge failed to acknowledge, however, that while "subpoena" is not a word regularly used outside the legal profession, individuals who have been through lengthy trial proceedings would be very familiar with the term.<sup>177</sup>

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170. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 16.

171. *Id.* at 9–14, 17, 18–19.

172. *Id.* at 10.

173. *Id.* The court did not discuss the fact that Clark seemingly failed to understand the ramifications of leaving evidence in his home.

174. *Id.* In finding that Clark was not intellectually disabled, the court also referenced the testimony of the officer who took Clark to and from jail during trial. This officer stated that during trial, Clark took notes and passed notes to his lawyers, made comments about what was happening, and "reacted emotionally by crying in his holding cell after the sentence of death was assessed." *Id.* at 11. While it might seem odd to think of crying in response to a death sentence as a "strength," it makes more sense when viewed in light of the stereotype that intellectually disabled people always behave differently and irrationally. Thus, reacting in a way that factfinders can relate to becomes proof of normalcy.

175. Findings of Fact, Conclusions of Law and Recommendations of the Trial Court on Application of Writ for Habeas Corpus at 9–10, *Ex parte* Ibarra, No. 1996-634-CB (54th Dist. Ct., McLellan County, Tex. Sept. 18, 2006).

176. Findings of Fact and Suggested Conclusions of Law at 25, *Ex parte* Bridgers, No. 114-81252-97-B (114th Dist. Ct., Smith County, Tex. Mar. 6, 2007).

177. Two mental health experts who have consulted in numerous *Atkins* cases have pointed out that incarcerated individuals often spend a lot of time watching The History Channel, The Discovery Channel, and other relatively sophisticated TV shows. Stephen Greenspan & Harvey N. Switzky, *Lessons from the Atkins Decision for the Next AAMR Manual*, in *WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY* 279, 289 (Harvey N. Switzky & Stephen Greenspan eds., 2006). Thus, *Atkins* defendants may sometimes use words or phrases that appear to be beyond the repertoire of intellectually disabled people. *Id.* These isolated incidents, however, should not be used to trump other standardized assessments.



Finally, a defendant's behavior in prison has often been used as a means of refuting a claim of intellectual disability. Prison guards often testify or submit affidavits about a defendant's cleanliness,<sup>178</sup> ability to understand orders and use the grievance system,<sup>179</sup> communication skills with guards and other inmates,<sup>180</sup> and use of the commissary system.<sup>181</sup> This type of testimony is problematic for several reasons. First, it relies on perceived strengths instead of weaknesses, as previously discussed. Even more, these prison guards are usually unable to say whether they actually saw the defendant writing out his grievance or commissary form by himself or whether he received help from others, as the guards are not present when these tasks are accomplished.<sup>182</sup> This is a troubling omission, since cellmates or neighbors often testify that they help the defendant with writing and other tasks.<sup>183</sup>

However, even if the defendant is able to fill out a grievance or commissary form by himself, this information should be viewed in light of the fact that individuals with intellectual disability thrive in highly structured environments where their options are limited and day-to-day decision making is kept to a minimum.<sup>184</sup> Thus, while many defendants have spent years or even decades in prison, their behavior there is not representative of their ability to function in free society, which is what adaptive behavior assessments attempt to measure.

Not only do the *Briseno* factors allow factfinders to focus on strengths in spite of professionals' objections, they have occasionally been used to discredit entirely a defense expert who refuses to consider an individual's strengths. For example, one district court discredited a defense expert who stated that the conflicting objectives—professionals' emphasis on weaknesses versus Texas courts' emphasis on strengths—created a "train wreck"

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178. *E.g.*, Findings of Fact, Conclusions of Law and Order at 21, *Ex parte* Matamoros, No. 643410-B (180th Dist. Ct., Harris County, Tex. Dec. 18th, 2006).

179. *See* Findings of Fact and Conclusions of Law at 18, *Ex parte* Simpson, No. 25200 (3d Judicial Dist. Ct., Anderson County, Tex. July 28, 2003) (discussing a report by officers detailing some of the defendant's communications and highlighting a number of articulate inmate requests that defendant made while in prison prior to trial).

180. *E.g.*, *Ladd v. Thaler*, No. 1:03CV239, 2013 WL 593927, at \*4 (E.D. Tex. Feb. 15, 2013), *aff'd sub nom.* *Ladd v. Stephens*, 748 F.3d 637 (5th Cir. 2014); Findings of Fact, Conclusions of Law and Order, *supra* note 178, at 28.

181. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 12.

182. *See, e.g.*, TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 52–54 (2004) (detailing the Texas grievance procedure whereby prisoners are responsible for independently retrieving and filling out grievance forms and, if needing assistance, are helped by a unit grievance investigator).

183. *See, e.g.*, *Ladd*, 2013 WL 593927, at \*10 ("After committing the present crime, Ladd was able to use the prison library to research the *Atkins* case and utilize the services of other inmates to help him write letters.").

184. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38 (5th ed. 2013) ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.").

between the DSM definition of intellectual disability and the legal determination.<sup>185</sup> The district court found that this statement “indicates a misunderstanding of, or an unwillingness to follow, the law in *Atkins*, which left to the States the task of developing appropriate ways to enforce the constitutional restriction on execution of persons with mental retardation.”<sup>186</sup>

The court explained:

Applicant argues that this Court cannot consider evidence of applicant’s adaptive behavioral strengths.

. . . While this assertion may be true in a clinical setting geared toward developing a treatment plan and providing support, the Court rejects this method for criminal forensic purposes. As noted above, the Court of Criminal Appeals in *Briseno* lists several factors that are relevant to determining whether, in the criminal context, an applicant has adaptive skill deficits. These factors clearly contemplate consideration of a person’s behavioral strengths as well as weaknesses.<sup>187</sup>

Thus, the court found that “Dr. Garnett’s disregard of applicant’s behavioral strengths in this case when *Briseno* specifically allows for it . . . indicate[s] he is biased in favor of applicant.”<sup>188</sup>

This particular expert was discredited for the same reason in two other *Atkins* proceedings.<sup>189</sup> The CCA did not reverse any of the three findings.<sup>190</sup> The CCA has recognized that its position regarding adaptive strengths is a controversial one,<sup>191</sup> but has sought to justify it by reasoning that

it would seem foolhardy to say that a person who has obtained a graduate law degree (demonstrating his conceptual abilities), who is a television talk-show host (demonstrating his social skills), but who

185. Findings of Fact and Conclusions of Law at 29, *Ex parte* Thomas, No. W86-85539-M(B) (194th Dist. Ct., Dallas County, Tex. Aug. 15, 2008).

186. *Id.*

187. *Id.* at 18–19 (citations omitted).

188. *Id.* at 30.

189. Findings of Fact, Conclusions of Law and Order at 15–16, *Ex parte* Pierce, No. 267685-C (174th Dist. Ct., Harris County, Tex. Jan. 18, 2007) (“The Court finds, based on official records, that Dr. Garnett has been found to be a biased witness by the 114th District Court in Smith County, Texas for ‘failure to open-mindedly review all the evidence in making an assessment of mental retardation.’”); Findings of Fact and Conclusions of Law at 30, *Ex parte* Lewis, No. 01-91-32-B (114th Dist. Ct., Smith County, Tex. Feb. 14, 2005) [hereinafter *Ex parte* Lewis Findings of Fact and Conclusions of Law] (“The failure of Dr. Garnett to open mindedly review all the evidence in making an assessment of mental retardation is evidence of bias by said expert in his opinions and diminishes his credibility in his opinions and evaluations.”).

190. Order of No Action Taken, *Ex parte* Lewis, No. WR-44,725-02 (Tex. Crim. App. Apr. 8, 2013); *Ex parte* Thomas, No. WR-16556-05, 2010 WL 1240296, at \*1 (Tex. Crim. App. Mar. 31, 2010) (not designated for publication); *Ex parte* Pierce, No. WR-15859-04, 2007 WL 1139414, at \*1 (Tex. Crim. App. Apr. 18, 2007) (not designated for publication).

191. See *Ex parte* Cathey, 451 S.W.3d 1, 27 (Tex. Crim. App. 2014) (“Some psychologists also say that factfinders should not consider a person’s strengths, but only his weaknesses, when deciding the question of intellectual disability.”).

simply cannot learn to drive properly and has multiple automobile accidents (demonstrating a limitation in practical skills), meets the adaptive-deficits prong of intellectual disability by ignoring all of his educational and social strengths and focusing exclusively on his deficiencies.<sup>192</sup>

If an individual were able to attain a law degree and become a talk-show host, the CCA is correct that this person is likely not intellectually disabled, despite an inability to learn how to drive. However, as the above examples demonstrate, courts simply are not being presented with lawyers and television hosts. Instead, courts focus on a defendant's ability to fry chicken, drive a car, swim, and eat out<sup>193</sup> in order to trump a diagnosis of ID. These are the types of basic functions that professionals correctly recognize should not be allowed to outweigh significant deficits in other areas.

2. *The Briseno Factors Require Consideration of the Facts of the Crime.*—The final *Briseno* factor requires factfinders to ask whether “the commission of [the capital] offense require[d] forethought, planning, and complex execution of purpose.”<sup>194</sup> In addition to yet again emphasizing a defendant's strengths over his weaknesses, this factor is particularly problematic for several reasons.

The American Association for Intellectual and Developmental Disabilities strongly discourages professionals from considering the facts of the crime when diagnosing an individual.<sup>195</sup> Different concerns are implicated for post-*Atkins* cases and pre-*Atkins* cases. For cases going to trial post-*Atkins*, experts will generally testify at the sentencing phase (though sometimes during the guilt/innocence phase as well) that immediately follows the determination of guilt.<sup>196</sup> This means that defense attorneys must arrange to have their clients evaluated before the determination of guilt. Discussing the facts of the crime at this point would create constitutional concerns about the defendant's right against self-incrimination,<sup>197</sup> so professionals generally never ask about the crime.

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192. *Id.*

193. *E.g.*, *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 9.

194. *Ex parte* Briseno, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004).

195. See ROBERT L. SCHALOCK ET AL., AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 22 (10th ed. 2007) (advising professionals to refrain from using past criminal behavior to infer a patient's level of adaptive behavior or about having an intellectual disability because of a lack of available and normative information).

196. Kathryn Raffensperger, Comment, *Atkins v. Virginia: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENVER U. L. REV. 739, 748 (2012).

197. Greenspan, *supra* note 40, at 227–28.

For cases tried pre-*Atkins*, consideration of the facts of the crime is less problematic from a legal standpoint,<sup>198</sup> but there are concerns about the adequacy of the information for diagnostic purposes. The facts of the crime, even after trial, are typically not revealed in sufficient detail to know exactly what happened, including the possible role of others in aiding the defendant or planning the crime.<sup>199</sup> Furthermore, while some crimes may appear sophisticated on the surface, they often in fact contain a strong element of impulsivity; for example, a robbery gone awry that results in homicide.<sup>200</sup>

Consideration of the facts of the crime is also inconsistent with professional norms because the crime in question will have occurred after the defendant was eighteen years of age.<sup>201</sup> Because the definition of intellectual disability requires that an individual demonstrate adaptive deficits during the developmental period (interpreted as before the age of eighteen), professionals try to gather information from the developmental period. This is another reason why the defendant's family, friends, and teachers are typically mined for information about the defendant's behavior growing up, and why the facts of crimes committed after the defendant turned eighteen are not necessarily probative for diagnosis.<sup>202</sup> And although the defendant's behavior after the

198. With the exception of potential innocence claims, as occurred in the case of Pedro Solis Sosa. See *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012) (“We cannot agree that the facts of the offense are categorically irrelevant to the determination of mental retardation for Eighth Amendment purposes.”).

199. Greenspan, *supra* note 40, at 228. The AAIDD's position regarding the facts of the crime is in direct contrast to many judges, who view the capital offense as the most well-documented period of the defendant's life and thus more reliable than the testimony of friends or family. See, e.g., *Sosa*, 364 S.W.3d at 894 (“The capital offense for which an *Atkins* claimant was convicted will generally be one of the best documented events in his life, and certain facts will have been proven to a jury beyond a reasonable doubt.”).

200. Greenspan, *supra* note 40, at 228.

201. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (barring the execution of individuals who committed a capital offense before the age of eighteen).

202. The questioning of the defense expert in Clifton Williams's sentencing hearing is illustrative of the clash between this *Briseno* factor and professionals' considerations for diagnosis:

Q: . . . Did you ever ask him if he committed this crime?

A: I don't think so.

Q: Okay. Would that not be—if you're trying to diagnose the behavior of an individual, would—whether or not they committed an offense this horrific, would that not be relevant to you?

A: You don't have to take a confession to determine whether or not someone is [mentally retarded]. . . .

. . . .

Q: Well, I mean, by asking him, you would have first information from him regarding the complex or not complex, depending on how you interpreted it as the person interviewing him, aspects of the crime.

A: . . . [T]his was not a particular [sic] complex crime. A lot of crime is not very complex. . . . [T]he complexity you're describing is not a complex, violent crime. I mean, a 10-year-old can do all of those things. Literally, they can break into houses.

developmental period may be of some value, particularly in cases where evidence from the developmental period is limited, focusing on the facts of the crime carries a risk of “cherry-picking”—emphasizing the facts that seem to demonstrate strengths while ignoring facts that exhibit deficits. Often, for example, capital defendants are identified and arrested quickly, and many of them confess to their crimes even though doing so is undoubtedly not in their best interests.<sup>203</sup> But courts rarely discuss these circumstances when analyzing the facts of the crime.<sup>204</sup> The risk of cherry-picking is especially high when considering the facts of capital murder, because the gruesome and tragic details of the crime might distract from the reality that the crime was not, in fact, all that sophisticated.

The gruesome and tragic nature of most every capital murder case creates another risk: that juries will nullify a valid *Atkins* claim because they believe that even if intellectually disabled, the defendant deserves the death penalty. This is especially true in states such as Texas, where the jury is usually charged with determining intellectual disability during the sentencing phase of the trial—the same time when they are also charged with determining whether the defendant deserves the death penalty.<sup>205</sup> The jury will have already heard evidence of the defendant’s capital crime and convicted him of that crime. Then, during the sentencing phase, while the defense puts on evidence of intellectual disability and other mitigating factors, the prosecution presents evidence of the defendant’s past crimes and testimony from family members of the victim.<sup>206</sup> It is not hard to imagine, then, that jurors might choose (perhaps unconsciously) to ignore a very compelling *Atkins* claim because they believe the defendant still deserves the death penalty. But the Supreme Court’s decision in *Atkins* created a categorical bar that should not be replaced by a jury’s moral reasoning on the issue. Yet a focus on the facts of the crime and the placement of the decision during the sentencing phase—as opposed to a pretrial determination—inevitably creates this risk.

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They can kill people. They can try to drive cars and wreck them. That I had to interview him in terms of the specifics of the murder to determine if he was M.R. is just false. You just don’t have to do that.

*Williams* Trial Transcript, *supra* note 161, vol. 56 at 157–58.

203. See, e.g., Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 956–60 (2008) (reporting research that showed nearly two-thirds of executed convicts were arrested within ten days of the crime and that approximately half of those executed had confessed to the crime).

204. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 307–08 (2002) (discussing the case facts without analyzing facts that exhibit defendant’s intellectual deficits).

205. See *In re Allen*, 462 S.W.3d 47, 52 (Tex. Crim. App. 2015) (“[W]e have endorsed, but have not mandated, the submission of a ‘special issue’ on intellectual disability to the jury . . .”).

206. See, e.g., *Ex parte Briseno*, 135 S.W.3d 1, 13–18 (Tex. Crim. App. 2004) (analyzing a lower court’s handling of the sentencing phase of a capital murder trial in which the defendant was determined not “mentally retarded” after each party presented witness testimony).

Despite these concerns, the *Briseno* factors require judges and juries to consider the facts of the crime in their determination, sometimes to the exclusion of all other evidence of adaptive deficits.<sup>207</sup> In one case, the CCA held that the trial court was free to discount the testimony of the defendant's friends and family and rely instead on the defendant's "remarkably competent crime-spree behavior."<sup>208</sup> The court found that this behavior "was well-documented by both applicant and the various crime victims" and asked: "Did this conduct paint the portrait of a mentally retarded person?"<sup>209</sup>

Trial judges and prosecutors have readily followed the CCA's lead, regularly relying on the facts of a defendant's crime. Elkie Lee Taylor was administered a Street Survival Skills Questionnaire—one of the many objective tests that can be used to measure aspects of adaptive functioning.<sup>210</sup> Taylor registered below normal range on the tools subtest.<sup>211</sup> The trial court wrote, however, that

[w]hile Applicant failed to score in the normal range on the "Tools" subtest by only a single point, Applicant demonstrated his mental ability to take an instrument or tool designed for one purpose and adapt it to his desired purpose by using a wire coat hanger as a deadly weapon to strangle the victim of the instant underlying capital offense.<sup>212</sup>

The test administered to Taylor had nothing to do with the facts of the crime, nor did it allow for supplementation of the results by resorting to facts outside the purview of the test.<sup>213</sup> Yet the *Briseno* factors' focus on the facts of the crime allowed for this manipulation of the test results.<sup>214</sup>

207. See, for example, the questioning of a defense expert by the prosecutor in Clifton Williams's sentencing hearing:

Q: . . . [W]hat you've told the jury is that someone who can break into a lady's house, stab her, take her purse, dispose of the property, leave in her car, hide his clothes, lie to the police does not have the ability to mix spices?

A: Sure, that can be entirely consistent. I mean, you can get some incredibly dumb people who commit murder, Mr. Bingham.

*Williams* Trial Transcript, *supra* note 161, vol. 56 at 131.

208. *Ex parte* Butler, 416 S.W.3d 863, 873–76 (Tex. Crim. App. 2012) (per curiam).

209. *Id.* at 875.

210. See *Ex parte* Taylor Findings and Conclusions, *supra* note 52, at 6.

211. *Id.*

212. *Id.*

213. See *id.* at 6–7 (noting that the test assesses the subject's ability to "perform certain tasks demonstrative of whether that person has significant deficits in adaptive behaviors" and does not rely on self-reporting).

214. See Findings of Fact, Conclusions of Law and Order, *supra* note 178, at 32–33 ("The Court finds, based on the 2006 writ hearing testimony, that the applicant possesses the following skills that show logic, knowledge, and adaptability even though he would not receive credit for such skills on adaptive behavior tests: stealing cars, attempting to manipulate the TYC staff, committing the instant offense and attempting to escape detection, procuring marijuana while on deathrow, and committing an attack for the Mexican Mafia in prison . . .").

Taylor's case represents a particularly innovative use of the facts of the crime to bolster a denial of an *Atkins* claim. More often, courts simply list the facts of the defendant's crime and then use those facts to address the other *Briseno* factors. With such a surface-level analysis (and with the previously discussed emphasis on strengths over deficits), the facts are usually found to answer each factor in a way that indicates no intellectual disability. For example, in one case a judge wrote,

that [habeas corpus petitioner] Moore did not have significant deficits in adaptive behavior was amply supported by the application of the *Briseno* factors.

For example, the crime itself implicates at least four of the seven *Briseno* factors, including Moore's ability to formulate and execute plans, to do so in the role of leader, to respond to external stimuli rationally, and to execute a crime that required planning and complex execution.<sup>215</sup>

In another case, a judge found that

the applicant attempted to keep his victims under control by placing the complainant in a position where he could not do anything, an action that indicates purposeful, goal-directed behavior and a certain degree of discipline; that the applicant understood what was said to him by his victims and the applicant was able to respond; and, that the applicant analyzed the situation based on reality, responded appropriately to the situation, and attempted to avoid apprehension.<sup>216</sup>

Neither of the crimes in the above two cases were particularly complex or sophisticated, and both defendants were apprehended quickly.<sup>217</sup> Yet viewed through the final *Briseno* factor, their crimes alone sufficed as evidence that they did not have adaptive deficits and consequently that they were not intellectually disabled.

This technique is used in jury trials as well. During closing arguments in the sentencing phase of a trial, one prosecutor argued to the jury,

You have all those crimes [referencing the defendant's string of aggravated robberies] to look at. Was he a leader or a follower? He planned out those activities? He sure did . . . That's not impulsivity.

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215. Moore v. Quarterman, No. 4:07-CV-077-A, 2007 WL 1965544, at \*5 (N.D. Tex. July 6, 2007) (footnote omitted). Moore was executed in 2009. *Curtis Moore*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/moore1137.htm> [<http://perma.cc/X958-JRTE>].

216. Findings of Facts, Conclusions of Law and Order at 8, *Ex parte McCoskey*, No. 615396-B (185th Dist. Ct., Harris County, Tex. Aug. 5, 2003). McCoskey was executed in 2013. *Jamie Bruce McCoskey*, CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/US/mccoskey1354.htm> [<http://perma.cc/BW6H-JD9D>].

217. See *Moore*, 2007 WL 1965544, at \*2–3 (detailing the facts and circumstances surrounding the murder); Findings of Facts, Conclusions of Law and Order, *supra* note 216, at 2–4 (same).

That's not a lack of planning. That is someone who plans a career as an aggravated robber and plans to be successful at it.<sup>218</sup>

Like the *Briseno* factors' focus on strengths rather than weaknesses, this factor has also been used to discredit defense experts who refuse to consider the facts of the crime. In Elkie Lee Taylor's *Atkins* hearing, the defense expert presented standardized tests used by professionals to measure adaptive behavior, which showed that Taylor had deficits in several areas.<sup>219</sup> However, after detailing the facts of the capital offense, the judge concluded that "[th]e results received by the testing conducted by Dr. Keyes [were] inconsistent with the objective trial evidence demonstrating Applicant's conduct and the mental abilities required of Applicant to perform such conduct."<sup>220</sup> Because of this inconsistency, the defense expert was discredited.<sup>221</sup>

The *Briseno* factors' emphasis on a defendant's strengths and the final factor's consideration of the facts of the crime clash with professional approaches to diagnosing intellectual disability. This disconnect creates an atmosphere in which prosecutors and judges can cherry-pick behaviors that they think demonstrate a defendant's adaptive functioning, and can cite to the one thing that all *Atkins* applicants have in common—capital murder—to undermine convincing evidence of adaptive deficits. Furthermore, requiring the consideration of the facts of the crime results in the systematic discrediting of experts who try to adhere to the professional approach, and inevitably results in the denial of valid claims of intellectual disability.

3. *The Briseno Factors Are Grounded in Stereotypes and Misconceptions About the Intellectually Disabled.*—As discussed above, most individuals who have intellectual disability in the criminal setting have mild intellectual disability—a “somewhat hidden disability.”<sup>222</sup> Individuals with mild intellectual disability do not appear or sound disabled, especially if viewed only in brief instances.<sup>223</sup> Furthermore, individuals with mild intellectual disability are often able to live independently and maintain employment.<sup>224</sup> But the lay conception of an intellectually disabled person is of someone who immediately stands out as disabled in the way they look, speak, and behave, and who is incapable of functioning on almost any level.<sup>225</sup> These traits, however, are more typical of those with moderate or

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218. *Hunter* Transcript, *supra* note 167, vol. 29 at 22–23.

219. *Ex parte* Taylor Findings and Conclusions, *supra* note 52, at 5–6.

220. *Id.* at 5.

221. *Id.* at 5–6.

222. Greenspan, *supra* note 40, at 221.

223. *Id.*

224. *Id.* at 228–29.

225. *See id.* at 221 (bemoaning the “lay conception” that all people with intellectual disabilities are “globally deficient”).



severe intellectual disability, not the mild intellectual disability presented by most *Atkins* claimants.<sup>226</sup> But the *Briseno* factors, by emphasizing the observations and opinions of lay individuals, allow these misconceptions about intellectually disabled people to overrule professional diagnosis.

Indeed, several of the *Briseno* factors are based on stereotypical assumptions about the intellectually disabled: one factor asks whether the defendant can lie effectively in his own interest, even though many very young children can lie effectively, as can many intellectually disabled individuals.<sup>227</sup> Another factor asks whether the defendant's conduct in response to external stimuli is rational and appropriate. This is a broad and ill-defined factor, but it seems to imply that individuals with ID are incapable of ever acting appropriately.<sup>228</sup> As such, it is an incorrect characterization of the intellectually disabled—especially those with mild intellectual disability.<sup>229</sup>

A third factor asks whether the defendant can respond coherently, rationally, and on point to oral or written questions.<sup>230</sup> This factor originates from a common misconception of the intellectually disabled as unable to communicate “normally,” even though research has shown that individuals with mild intellectual disability actually have relatively normal syntax, vocabulary, and grammar.<sup>231</sup> While individuals with mild intellectual disability do suffer from some communication deficits, these deficits tend to be sociolinguistic in nature—for example, a person's ability to recognize and correct a mistaken understanding, or to perceive how specific instances of communication fit into a larger goal, and to act accordingly.<sup>232</sup> These deficits are subtler than the formal grammatical and syntactical deficits that lay people expect, and are not immediately apparent in short samples of communication.<sup>233</sup>

Despite the problems with these factors, *Briseno* states that they are tools to aid judges and juries in the determination of intellectual disability.<sup>234</sup> As a result, judges have felt free to cite their direct observations of the

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226. *See id.*

227. *See id.* at 227 (“Lying is virtually a universal behavior that starts early in childhood; it may begin around age 2 or 3, although understanding that one is lying starts around age 4.”).

228. *Id.* at 225. As one particularly snarky defense expert retorted to a question of whether the defendant's conduct in response to external stimuli was rational (the fourth *Briseno* factor), “Well, acting appropriately to external stimuli is something that a snail can do, if you're using scientific terminology. . . .” *Lizcano* Transcript, *supra* note 56, vol. 55 at 214.

229. *See supra* notes 218–21 and accompanying text.

230. *See Greenspan, supra* note 40, at 225–26.

231. *Id.* (“Of all the *Briseno* factors, written and oral communication may be the aspect of everyday functioning that most ties into the popular stereotype that characterizes people with ID. That stereotype, which derives from the functioning of people with *moderate* or *severe* ID, is reinforced in popular portrayals on television . . . or film . . .”).

232. *See id.* at 226 (conjuring an example of a defendant discussing his case on the phone despite being told not to on multiple occasions).

233. *See id.*

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

defendant's demeanor at trial or during a hearing as support for their finding of no intellectual disability. For example, one judge remarked that while a witness was testifying, the defendant "watched him intently with his eyes moving from the lawyer to the witness with each question and answer."<sup>235</sup> Later, the judge concluded that "[a]lthough the Trial Court cannot articulate with expertise a definition and identification of mental retardation, the Court concludes that it can identify it when it sees it; the court [sic] has not observed mental retardation in the Defendant."<sup>236</sup> The trial judge thus cited the defendant's ability to follow a conversation with his eyes to rebut his claim of mild intellectual disability,<sup>237</sup> even though this is a skill that people with even moderate or severe intellectual disability can accomplish. And the very notion that intellectual disability is always visible clashes directly with professional understandings of mild intellectual disability.<sup>238</sup>

Another judge noted that in the many years he had served as a judge, he had "come into contact on numerous occasions with persons who are mentally ill, legally incompetent and retarded."<sup>239</sup> While acknowledging that "the applicant did not testify during the trial or otherwise conduct any lengthy conversations to, or in the presence of the court," the judge nonetheless found that "there was no indication that the applicant acted unusually or in a manner consistent [with] a person who is mentally retarded . . . nor did he ever act in a manner indicating that he was unable to understand or comprehend the charges against him, or the nature of the proceedings."<sup>240</sup> As has been

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235. Findings of Fact and Conclusions of Law ¶ 30, *Texas v. Henderson*, No. 181-CR-12-93 (102d Dist. Ct., Red River County, Tex. Oct. 5, 2011).

236. *Id.* ¶ 44.

237. Similarly, in the case of Rickey Lynn Lewis, the judge remarked that during the hearing, Lewis's job supervisor on death row testified that Lewis carried tray carriers with eight to ten trays per carrier. *Ex parte Lewis* Findings of Fact and Conclusions of Law, *supra* note 189, at 23. Lewis interrupted her testimony and corrected her, indicating that there were only seven trays per carrier. *Id.* The judge used this ability to follow along to testimony as a strength to rebut Lewis's intellectual disability claim, implying that individuals with intellectual disability are unable to follow a conversation. *See id.* Notably, this instance was actually strong evidence of impairment, because Lewis failed to understand that how many trays were on the tray carrier was of no import to the larger question and that it is inappropriate to interrupt a testifying witness.

238. *See* Findings of Fact and Conclusions of Law at 18, *Ex parte Mathis*, No. 31361-A (268th Dist. Ct., Fort Bend County, Tex. Jan. 4, 2006) ("Applicant's testimony and demeanor in court during the trial was a significant indicator that Applicant was not acting with a significant sub-average level of intelligence or significant deficits in adaptive skills."). *Compare Ex parte Lewis* Findings of Fact and Conclusions of Law, *supra* note 189, at 23, with *supra* notes 218–21 and accompanying text.

239. Findings of Fact and Conclusions of Law at 5, *Ex parte Hernandez*, No. A 97-364 (216th Dist. Ct., Kerr County, Tex. Mar. 7, 2006).

240. *Id.* at 6. Note that comprehending the charges against him and the nature of the proceedings is the standard used for competency to stand trial—a completely different (and more burdensome) claim than intellectual disability. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (noting that the test for whether a defendant is competent to stand trial is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable

explained, denying a claim of ID because there is no outward manifestation of disability relies on the stereotype and misconception that ID is always visible.

Judges are not the only individuals whose stereotypes about intellectually disabled people are given weight by the *Briseno* factors. The first *Briseno* factor asks whether the defendant's family, friends, and teachers thought the defendant was intellectually disabled.<sup>241</sup> While professionals typically rely heavily on the memories of these individuals regarding the defendant's behaviors growing up, professionals do not directly ask these individuals whether or not they thought the defendant was intellectually disabled.<sup>242</sup> Instead, they ask for examples of the defendant's behavior growing up, looking for behavior that might reveal deficits in adaptive functioning.<sup>243</sup> The *Briseno* factor, however, requires lay individuals to explicitly state that the defendant was intellectually disabled; anything less is viewed as evidence against a finding of disability.

Thus, in one case, the defendant's mother, brother, and sister-in-law stated in affidavits that he was "a slow learner, slow to develop, gullible, and a concrete thinker."<sup>244</sup> The defendant's former employer additionally stated that he "had difficulty performing his duties as a cook or dishwasher if left unsupervised."<sup>245</sup> These are all statements that a professional would deem to be evidence of intellectual disability, but the court used the statements as evidence against a finding of disability because "not one of these individuals asserts they ever believed applicant to be mentally retarded."<sup>246</sup>

Similarly, another judge found that the first *Briseno* factor was not met, even though several family members and friends of the defendant testified that they considered him to be "slow," because they did not state that they considered him to be mentally retarded.<sup>247</sup> Given the somewhat hidden nature of mild intellectual disability, the common misunderstanding of how mild intellectual disability manifests in individuals, and the societal stigma

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degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him" (internal quotations omitted).

241. *Ex parte Briseno*, 135 S.W.3d 1, 8 (2004).

242. *See Greenspan & Switzky, supra* note 177, at 290–91 (discussing how the adaptive-behavior assessment instruments used by professionals assess a child's "typical" performance of adaptive behavior over time, as described by informants familiar with the child's typical level of functioning over a period of time).

243. *See id.* at 287–90 (discussing the types of behaviors evaluated in adaptive-behavior assessments and evaluating the problems associated with these measurements).

244. Findings of Fact and Conclusions of Law at 26, *Ex parte Hines*, No. W91-21511-1(B) (2d Dist. Ct., Dallas County, Tex. June 23, 2005).

245. *Id.* at 26–27.

246. *Id.* at 27.

247. Findings of Fact and Conclusions of Law at 5, *Ex parte Wilson*, No. 62490-B (Dist. Ct., Jefferson County, Tex. Aug. 31, 2004).

that is attached to individuals labeled as such, it is not surprising that friends and family often cannot meet the factor's needlessly high burden.<sup>248</sup>

However, when family members or friends do assert that they thought the defendant was intellectually disabled, their testimony is often discredited because they are not experts or because they may be biased. One defendant's ex-wife asserted that during their marriage, the defendant displayed characteristics indicative of ID.<sup>249</sup> But the court found that her statement did not constitute "any evidence of mental retardation, particularly since the witness was a 15 or 16 year old at the time of this offense with no training or expertise in diagnosis of mental retardation."<sup>250</sup> In another case, a defense expert was discredited in part because he relied on statements from the defendant's wife, but "d[id] not account for the bias of Applicant's wife to help Applicant avoid execution."<sup>251</sup>

As demonstrated above, this *Briseno* factor is highly manipulable, and puts defendants in a difficult position. If their family or friends give statements supporting a clinical finding of intellectual disability but do not explicitly say that the defendant is intellectually disabled, the factor will not be met. But if they do state that the defendant is intellectually disabled, their statements may be discredited because they are not experts or because they are potentially biased.

Professionals also rely heavily on interviews with the defendant's former teachers to collect anecdotal evidence that may support a finding of intellectual disability. However, the first *Briseno* factor has the same impact on these individuals, giving teachers the authority to state whether or not they thought the defendant was intellectually disabled despite their lack of expertise in the area. For example, in one case the defendant's first-grade teacher testified that "the characteristics of an MR [mentally retarded] child would be that that child possibly couldn't even learn the alphabet or learn to read at

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248. The questioning in Calvin Hunter's case detailed this dynamic:

Q: Are parents—in terms of adaptive behavior in children, are parents generally relied upon to assess adaptive behavior.

A: They're used as one source of information. Parents are typically, specially at that age, having real [sic] a difficult time with whatever the growing signs of problems are, and they have problems with that and have to get used to it over time. Sometimes they refuse to have their children in special education.

Q: Why is that?

A: It's denial and it's fear. It's a whole variety of reasons.

Q: I guess most parents don't want to—well, I mean, no one would really want to have their child be disabled?

A: I was a professional in the field and I had trouble, so it's pretty common for parents and families to have trouble.

*Hunter* Transcript, *supra* note 167, vol. 26 at 222–23.

249. Findings of Fact and Conclusions of Law, *supra* note 179, at 21–22.

250. *Id.*

251. *Ex parte* Clark Findings of Fact and Conclusions of Law, *supra* note 52, at 16.

[the] level [of a first-grader].”<sup>252</sup> Because the defendant was able to do these things, she did not think he was intellectually disabled.<sup>253</sup>

In another case, a defendant’s former teacher stated: “I do not believe that he was mentally retarded. I do, however, believe that he was a slow learner and that he suffered from sort [sic] of learning disability. I also do not believe that [he] was so mentally deficient as not to be able to determine right from wrong.”<sup>254</sup> This statement reveals the danger of allowing lay individuals to make a clinical determination: knowing right from wrong is not a consideration in the diagnosis of intellectual disability and is more closely related to mental illness and competency concerns.<sup>255</sup> In fact, in many jurisdictions a defendant’s inability to distinguish right from wrong is a complete insanity defense, exempting that defendant from all criminal liability and punishment.<sup>256</sup> Despite these incongruities, though, the court credited the teacher’s statement.<sup>257</sup>

Consideration of whether friends and family members thought the defendant was intellectually disabled also allows prosecutors—aware of the jury’s potential distrust or skepticism of experts—to emphasize the failure of friends, family, and teachers to diagnose the defendant to the jury. In closing argument, one prosecutor argued to the jury that the individuals they heard from are “not psychologists, they’re not psychiatrists, they’re not experts but they are the people who know the defendant. None of them thought he was mentally retarded.”<sup>258</sup> This argument discounts the experts and privileges the testimony of the family because they were the only witnesses who knew the defendant during the developmental period. The problem, of course, is that

252. *Williams* Trial Transcript, *supra* note 161, vol. 57 at 100–01.

253. *See id.* at 101 (“The disparity wasn’t that great in—in the gap between where he was and passing and the gap that a mentally retarded child more than likely would have been, and so I did not request testing.”). However, it is well established that individuals with mild intellectual disability are often able to meet elementary academic levels. *See Intellectual Disabilities (Formerly Mental Retardation)*, HEAD START, [http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/teaching/Disabilities/Services%20to%20Children%20with%20Disabilities/Disabilities/disabl\\_fts\\_00014\\_061105.html](http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/teaching/Disabilities/Services%20to%20Children%20with%20Disabilities/Disabilities/disabl_fts_00014_061105.html) [<https://perma.cc/FG9W-2SFJ>] (explaining that limitations may not be obvious and that children with intellectual disabilities can do well in school).

254. Findings of Fact and Conclusions of Law at 10, *Ex parte* Wooten, No. 16820 HC-2 (6th Dist. Ct., Lamar County, Tex. Feb. 14, 2006).

255. As the expert in Ronnie Neal’s case explained the distinction, not knowing the difference between right and wrong is more often a function of a pathology, a psychopathic person, somebody that has schizophrenia, a psychotic episode and can’t—doesn’t know what reality is. What you have with people with mental retardation is again the whys of the behavior. . . . And so doing something that you know is wrong may be doing it for a simple reason like a pat on the back, although it’s a bad thing to do. Like you may steal something to give to somebody else. It’s that superficiality, lack of understanding the complexities of it.

*Neal* Transcript, *supra* note 167, vol. 37 at 245.

256. PAUL H. ROBINSON, *CRIMINAL LAW* 512–13 (1997).

257. Findings of Fact and Conclusions of Law, *supra* note 254, at 10.

258. *Hunter* Transcript, *supra* note 167, vol. 29 at 24.

the family members are lay witnesses, who like the jury are uneducated about the behaviors of individuals with mild intellectual disability.

Individuals who work at the prison where the defendant is housed are also often solicited for their opinion regarding the defendant's intellectual capacity. In Michael Wayne Hall's case, another inmate and five prison guards submitted affidavits stating that they did not believe Hall was intellectually disabled.<sup>259</sup> A fellow inmate referenced Hall's habit of listening to the radio as evidence that Hall was not intellectually disabled.<sup>260</sup> A guard stated that he "knew some children in school with Down's syndrome, but he had not seen anything in [Hall] to indicate that he is mentally retarded."<sup>261</sup> A second guard stated that he "had been around people who were slow mentally" but did not see the same traits in Hall.<sup>262</sup>

In another case, the prosecution presented the testimony of Cesar Garcia, a pharmacist who worked at the defendant's prison and who saw the defendant for five to ten minutes every month.<sup>263</sup> Garcia stated that he had no training in diagnosing intellectual disability and had never held a lengthy conversation with the defendant, but went on to testify that the defendant "doesn't present like a mentally retarded person does. He's articulate, he can make his needs known, he knows how to navigate through the system there."<sup>264</sup> Describing his perception of the intellectually disabled, Garcia stated, "they are inept, they are inadequate, they are passive, they are dependent, they are needing adult supervision, redirection."<sup>265</sup>

It is not surprising that judges, juries, and lay witnesses have misconceptions about the intellectually disabled—most people do. But the intellectual disability determination should be an educational process in which misconceptions and stereotypes are rebutted with sound diagnostic

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259. Hall v. State, 160 S.W.3d 24, 34 (Tex. Crim. App. 2004); *id.* at 42 (Johnson, J., dissenting).

260. See *id.* at 34 (majority opinion) ("He listened to cartoons on the radio . . . and could parrot what he heard, if it was something he has heard over and over again.").

261. *Id.* at 35.

262. *Id.*

263. Neal Transcript, *supra* note 167, vol. 38 at 307, 310, 312–13.

264. *Id.* at 307, 311–12.

265. *Id.* at 310. Similarly, a former girlfriend of Juan Lizcano, Jessica Barron, testified during the punishment phase of his trial that Lizcano had difficulty finding her home even when given simple directions, had a "basic" vocabulary, and always responded to questions "simply." Lizcano Transcript, *supra* note 56, vol. 49 at 143–44, 146–48. But on cross-examination, she testified that she did not believe Lizcano was intellectually disabled because "[h]e didn't have any problems understanding me." *Id.* at 166. Barron stated that she had some experience with intellectual disability, because her aunt had severe intellectual disability to the point that she could not speak. *Id.* at 166–67. In contrast to her aunt, Lizcano probably did appear to be quite functional, because Barron was unaware of the various levels and manifestations of intellectual disability. Despite these issues with her understanding, Barron was still allowed to give extremely damaging testimony on the matter.

criteria and information about the actual functioning of the mildly intellectually disabled. One judge who found that a defendant was intellectually disabled remarked that

before being educated through this writ process, [Mr. Van Alstyne's] appearance on the televised interview is not one which this court would have thought was indicative of mental retardation. As noted in *Briseno*, Steinbeck's Lenny [sic] is more what this court would think a mentally retarded individual would look and act like. Unfortunately, in this case, it is not that easy and the court must look at all the factors and not just one.<sup>266</sup>

In the vast majority of cases, however, the depiction of Lenny referenced in *Briseno* and embodied in the *Briseno* factors serves only to reinforce a judge or juries' preexisting notions about intellectual disability, guaranteeing that some individuals with valid claims will fall through the cracks.

#### IV. *Briseno* Is the Wrong Answer to a Real Problem

The *Briseno* factors have served only to complicate an already difficult diagnostic procedure. After *Atkins*, many legal and mental-health professionals wrote articles highlighting important issues in *Atkins* claims.<sup>267</sup> One article identified fifty-two unresolved issues in the diagnostic process for capital defendants, and seventeen of those issues related directly to the adaptive-deficits criteria.<sup>268</sup> Despite these issues, the adaptive-deficits criteria is becoming increasingly important in the diagnosis of ID, in part because of the current understanding that IQ scores have been historically overemphasized as a generalized standard of overall ability.<sup>269</sup>

One ongoing debate amongst mental-health professionals is the use of standardized measures of adaptive functioning. In the past, professionals usually measured adaptive behavior by conducting structured interviews with family members and others who knew the individual well, and then using that information to assess adaptive behavior.<sup>270</sup> However, standardized measures,

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266. *Ex parte* Van Alstyne, 239 S.W.3d 815, 822 n.21 (Tex. Crim. App. 2007) (per curiam) (quoting the trial judge). Interestingly, this judge did a thorough analysis of the *Briseno* factors, but he seems to have taken the professional viewpoint about intellectual disability seriously, allowing him to find intellectual disability in spite of the factors. *See id.* at 822–23.

267. Lisa Kan et al., *Presenting Information About Mental Retardation in the Courtroom: A Content Analysis of Pre-Atkins Capital Trial Transcripts from Texas*, 33 LAW & PSYCHOL. REV. 1, 2–3 (2009).

268. J. Gregory Olley et al., *Division 33 Ad Hoc Committee on Mental Retardation and the Death Penalty*, PSYCHOL. MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES, Winter 2006, at 11, 12–13.

269. James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 CURRENT OPINION PSYCHIATRY 260, 260–62 (2013).

270. *See* J. Gregory Olley & Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II*, in ADAPTIVE BEHAVIOR ASSESSMENT SYSTEM-II: CLINICAL USE AND INTERPRETATION 381, 393 (Thomas Oakland &

such as the Vineland Adaptive Behavior Scale, are increasingly becoming the norm in intellectual disability diagnosis. In 2002, the American Association of Intellectual and Developmental Disabilities changed its definition of intellectual disability to encourage the use of standardized measures.<sup>271</sup> Some scholars have even hypothesized that the difference in outcome between two similarly situated capital defendants may be attributable to the use of, or failure to use, a standardized assessment for adaptive behavior.<sup>272</sup>

The emphasis on standardized scales for adaptive behavior is problematic in the capital context, though, because no scale has been created for or normed on individuals who have been incarcerated for a significant portion of their lives.<sup>273</sup> Because the adaptive behavior inquiry focuses on how an individual functions in society, many of the questions relate to behaviors that an incarcerated person may be barred from doing (“participates in an organized program for a sport or hobby” or can cook a meal) or may have no choice but to do (“bathes daily”).<sup>274</sup> The highly restrictive and regimented environment of death row simply does not easily allow for a realistic and comprehensive assessment of adaptive behavior.<sup>275</sup>

Because of the difficulties in assessing the adaptive behavior of an incarcerated person, and because the diagnostic inquiry is more concerned with the defendant’s functioning during the developmental period (in order to meet the third criterion) and at the time of the offense (because of concerns about reduced moral culpability),<sup>276</sup> evaluators often conduct a retroactive assessment of adaptive behavior.<sup>277</sup> If the defendant was identified early in life as having intellectual disability, there may be plenty of test records and other data to pull from in order to conduct the retroactive assessment.<sup>278</sup> Similarly, if credible individuals are located who were close to the defendant during the developmental period, they can fill out an adaptive-behavior rating instrument to provide data about the defendant’s functioning.<sup>279</sup>

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Patti L. Harrison eds., 2008) (discussing the use of interviews with family, neighbors, friends, and employers to obtain information about an individual’s adaptive behavior).

271. See AM. ASS’N ON MENTAL RETARDATION, *supra* note 37, at 13 (suggesting that limitations on adaptive behavior should be established through the use of standardized measures).

272. Dennis R. Olvera et al., *Mental Retardation and Sentences for Murder: Comparison of Two Recent Court Cases*, 38 MENTAL RETARDATION 228, 228–30 (2000).

273. Kan et al., *supra* note 267, at 6.

274. Greenspan & Switzky, *supra* note 177, at 285–86, 291.

275. *Id.* at 291.

276. See, e.g., *Ex parte Sosa*, 364 S.W.3d 889, 895 (Tex. Crim. App. 2012) (explaining that the court had “no basis on which to make a determination of whether a man who committed the offense that a jury found beyond a reasonable doubt in 1984 could have had the disabilities that the applicant proved by a preponderance of the evidence to a habeas judge in 2008”).

277. Greenspan & Switzky, *supra* note 177, at 290.

278. *Id.*

279. *Id.* at 291.



However, many *Atkins* claimants were never diagnosed with intellectual disability.<sup>280</sup> This may be because their families and communities did not have the resources for proper identification and assessment, because the stigma associated with intellectual disability prevented families from seeking assessment or acknowledging signs, or because the defendant was experiencing so much trauma from other sources that his poor functioning was never identified as intellectual disability. Regardless, a lack of childhood diagnosis does not and should not preclude a later finding of intellectual disability.<sup>281</sup>

Attempting a retroactive assessment of intellectual functioning, though, can be difficult and the results may be easily attacked. “The process of assessing adaptive behavior is a matter of drawing information from many sources, all of which are imperfect. When a conclusion is based on many imperfect sources, and that conclusion is stated in court, the expert witness can expect many critical questions in cross-examination.”<sup>282</sup> This is further complicated when family members and teachers must remember behavior up to twenty years before the assessment. Furthermore, if no assessments were conducted in childhood that can corroborate the memories of the family members, they may be easily accused of bias. Some professionals have argued that the best practice for assessing individuals on death row is to synthesize assessments of preincarceration functioning and current functioning, but there is no consensus, and professionals continue to use widely varying approaches.<sup>283</sup>

The issues outlined above are only a fraction of the difficulties that mental-health professionals face when assessing a defendant and testifying in his case. While none of these issues have been satisfactorily resolved, it is clear that the *Briseno* factors are not the solution. As demonstrated above, the factors inject improper considerations into the *Atkins* inquiry and focus factfinders on considerations such as the facts of the crime and isolated incidents of strengths that most professionals intentionally do not rely upon. Furthermore, the factors are indeterminate—it has never been explained what level of proof must be shown to meet a factor, nor is it clear how many factors must be met to support a finding of intellectual disability. When none of the factors are necessary or sufficient, the factors can be manipulated in ways

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280. *Id.* at 281.

281. *See id.* at 290 (explaining that mental retardation is a dynamic status that an individual can come into and out of at various stages of life).

282. *See* Olley, *supra* note 39, at 7.

283. Stanley L. Brodsky & Virginia A. Galloway, *Ethical and Professional Demands for Forensic Mental Health Professionals in the Post-Atkins Era*, 13 *ETHICS & BEHAV.* 3, 7 (2003). Only half of the psychologists in one study used standardized assessments of adaptive behavior, and many evaluators felt that it was appropriate to use information about the crime to assess functioning—a position inconsistent with that of the AAIDD. *See* Bethany Young et al., *Four Practical and Conceptual Assessment Issues that Evaluators Should Address in Capital Case Mental Retardation Evaluations*, 38 *PROF. PSYCHOL.: RES. & PRAC.* 169, 172 (2007).

that allow for outcome-oriented analysis. And when a defendant's life is on the line, this risk of biased, uninformed, or arbitrary decision making should not be tolerated.

Instead, professionals must continue to research and develop methodologies that meet the specific needs created by the *Atkins* inquiry, and courts should rely on these methodologies instead of creating their own. Otherwise, as has been demonstrated in the preceding sections, serious problems occur, valid claims are denied, and intellectually disabled individuals continue to be executed.

## V. Conclusion

Supreme Court decisions such as *Atkins* are often heralded as important transformations in the protections afforded to an entire class of people, and indeed *Atkins* reflects an improved understanding of the ways in which intellectual disability affects individuals. But these decisions rely on diligent enforcement by states and lower courts. In Texas, the Court's decision in *Atkins* was greeted with outright skepticism by the Court of Criminal Appeals. This skepticism translated into a substantive redefinition of intellectual disability that underenforces the Court's mandate and allows for the continuing execution of the intellectually disabled.

It is not yet clear how this unconstitutional practice will be corrected, either. Although the Court has already chastised Florida for erecting an artificial and unscientific barrier to *Atkins*,<sup>284</sup> Texas courts have not embraced that decision as applying to the *Briseno* factors: while one of the judges on the CCA has recognized that the *Briseno* factors are likely unconstitutional under *Hall*, none of the other eight judges agreed.<sup>285</sup> And the Texas legislature's inability to pass a statute to govern *Atkins* claims in the thirteen years since *Atkins* was decided does not inspire confidence that the legislature will dismantle *Briseno*. Thus, the discontinuation of the *Briseno* factors will likely have to come from the Supreme Court. And given the pace at which Texas executes individuals, the Court should decide this issue sooner rather than later.

—Hensleigh Crowell

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284. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

285. *Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring).