

The Legacy of *Atkins v. Virginia* and Its Impact on *Fuston v. State*

Katelyn L. Steele, PhD, and Scott Orth, PsyD

In *Atkins v. Virginia*, the U.S. Supreme Court ruled that the execution of defendants with an intellectual disability is “cruel and unusual punishment” prohibited by the Eighth Amendment. In a 6 to 3 decision, the Court noted the increasing number of states that blocked the executions of persons with an intellectual disability, reflecting the country’s growing consensus that defendants with an intellectual disability are less culpable for their crimes than those without such a disability. Since this milestone decision, several subsequent cases have referenced this opinion. This article reviews other cases in which the execution of persons with an intellectual disability has been called into question, concluding with the *Atkins*-related appeal in *Fuston v. State*. In that case, the Oklahoma Court of Criminal Appeals considered Oklahoma statutes regarding the bright-line cutoff by which defendants meet criteria for intellectual disability, as applied to the multiple intelligence measures that were administered to Mr. Fuston. The Oklahoma Court of Criminal Appeals determined that Mr. Fuston did not meet the criteria for intellectual disability because of his performance on a single IQ measure administered when he was 12 years old, instead of the totality of his performance on subsequent intelligence measures. Mr. Fuston was also denied 14 other, unrelated propositions on appeal, and the state reaffirmed his death sentence. Implications and recommendations for forensic practice are discussed.

J Am Acad Psychiatry Law 49(4) online, 2021. DOI:10.29158/JAAPL.210091-21

Key words: *Atkins* hearing; intellectual disability; death penalty

The Eighth Amendment of the United States is often cited in the context of capital punishment. It states in part that cruel and unusual punishments should not be inflicted. The matter of executing individuals suspected of intellectual disability was first broached in *Penry v. Lynaugh* (1989).¹ Johnny Paul Penry was convicted of capital murder in Texas state court and sentenced to death. A psychologist testified that Mr. Penry had an IQ “between 50 and 63,” and had the “mental age of a 6 1/2-year-old” (Ref. 1, pp 307–8).

During the trial, the jury was not instructed to consider Mr. Penry’s intellectual functioning in its sentencing. The U.S. Supreme Court eventually heard Mr. Penry’s appeal. In a 5 to 4 decision,¹ the Court opined that, while the jury should have been instructed to consider Mr. Penry’s intellectual functioning in its sentencing, the Eighth Amendment did not bar the execution of “retarded” defendants. The Court’s ruling was consistent with those held by states at that time, with only two states banning the execution of individuals with an intellectual disability.² The Court did not revisit this decision until 2001. In *McCarver v. North Carolina*,³ Ernest Paul McCarver was tried for robbery and murder. The jury returned guilty verdicts for first-degree murder and robbery with a dangerous weapon. Mr. McCarver contended that errors made by the trial court entitled him to a new trial.³ In its proportionality review, the Supreme Court of North Carolina commented that the trial jury found two aggravating

Published online November 11, 2021.

Dr. Steele is employed by Liberty Healthcare Corporation as a Registered Psychological Assistant. Dr. Orth is Director of Forensic Psychology, Oklahoma Forensic Center, OK Department of Mental Health and Substance Abuse Services, Vinita, OK. Address correspondence to: Scott Orth, PsyD. E-mail: sorth@odmhsas.org.

The views expressed in this article do not necessarily reflect those of Liberty Healthcare Corporation or the Oklahoma Department of Mental Health and Substance Abuse Services.

Disclosures of financial or other potential conflicts of interest: None.

circumstances and 14 mitigating circumstances, one of which was that the “defendant’s intelligence quotient [IQ] is in the lower range of borderline intellectual functioning, similar to that of a ten- to twelve-year-old” (Ref. 3, p 48). Following their review, the court did not find that Mr. McCarver’s case presented any serious proportionality question and concluded that it fell within the class of first-degree murders for which they had previously upheld the death penalty (Ref. 3, p 51).

In 2001, the U.S. Supreme Court granted the petition for writ of *certiorari* in *McCarver*. Mr. McCarver’s appeal cited society’s evolved consensus against executing individuals with intellectual disability as the basis for prohibiting such executions, and North Carolina subsequently adopted a state statute barring their execution. The Court dismissed the case as moot but granted cert in a similar case, *Atkins v. Virginia*.²

Atkins v. Virginia (2002)

In *Atkins v. Virginia*,⁴ the question was whether the Eighth Amendment’s prohibition against cruel and unusual punishment applied to the execution of persons with an intellectual disability. Daryl Renard Atkins was found guilty of abduction, armed robbery, and capital murder. It was determined that, on August 16, 1996,⁵ Mr. Atkins and an accomplice abducted Eric Nesbitt, robbed him, and fatally shot him. During the penalty phase, a forensic psychologist, Dr. Evan Nelson, testified that he evaluated Mr. Atkins before trial and determined that he was “mildly mentally retarded” (Ref. 4, p 308). Dr. Nelson’s opinion was informed by interviews with people who knew Mr. Atkins, review of school and court records, and the administration of the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III)⁵ that determined Mr. Atkins to have a Full-Scale IQ (FSIQ) of 59. Jurors sentenced Mr. Atkins to death, but he was provided a second sentencing hearing due to the trial court having provided a misleading verdict form. Mr. Atkins was re-sentenced to death at the second hearing. Mr. Atkins appealed the death sentence, and the U.S. Supreme Court subsequently heard the case.

In a 6 to 3 decision,⁴ the Court opined that the executions of persons with an intellectual disability are cruel and unusual punishment as prohibited under the Eighth Amendment. The Court’s decision

was consistent with the increasing number of states that blocked the executions of persons with intellectual disability, reflecting the country’s growing consensus that defendants with intellectual disability are less culpable for their crimes than those without such a disability. The Court stated that it was “not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty” (Ref. 4, p 321). Representing the majority, Justice John Paul Stevens noted that capital punishment is not indicated for defendants with an intellectual disability because of the possibility of more false confessions to charges, less ability to present mitigating evidence in their defense, decreased efficacy in working with their attorney in their defense, difficulty responding to questions when taking the stand, and the possibility that others involved in court proceedings will misjudge the defendant’s intellectual functioning for callousness. The Court’s decision demonstrated a reversal of *Penry*, in which the Court had opined that the Eighth Amendment did not bar the execution of persons with an intellectual disability.

Hall v. Florida (2014)

The question in *Hall v. Florida*⁷ was whether a statutory definition of intellectual disability with a bright-line cutoff IQ score of 70 or below sufficiently delineates the constitutional imperative barring the execution of “mentally retarded” defendants. Freddie Lee Hall was convicted of capital murder stemming from a 1978 case. This sentence was vacated, and he was again sentenced to death in 1991. At the time of his 1991 sentencing, the judge stated that Mr. Hall was “mentally retarded” but that this was an “unqualifiable” mitigating factor.⁸ After *Atkins*, Mr. Hall petitioned for and received an evidentiary hearing in which results from previous IQ measures were presented: 71 on the WAIS-III, and 73 and 80 on the Wechsler Adult Intelligence Scale-Revised (WAIS-R).

The Florida Supreme Court opined that scores above 70 on the WAIS-III did not indicate an intellectual disability and rejected Mr. Hall’s argument that the court’s review of these test data should consider the standard error of measurement (SEM) in IQ measures. Mr. Hall appealed this decision, and his case was heard by the U.S. Supreme Court. In 2014, the U.S. Supreme Court held the Florida statute to be unconstitutional as it did not consider the SEM in assessing an *Atkins* claim. The SEM for the

WAIS-III is noted as plus or minus five points and reflects the notion that an individual's intellectual functioning cannot be understood as a single numerical score. In all administrations of the WAIS-III, it is noted that there is a 95 percent confidence interval in determining FSIQ.⁹ This confidence interval demonstrates a 95 percent likelihood that an individual's performance will be seen in a range of scores. For an FSIQ score of 70 on the WAIS-III, the 95 percent confidence interval is 65–75. Accounting for the SEM, Mr. Hall's FSIQ score of 71 on the WAIS-III was within the 95 percent confidence interval for the cutoff score of 70 in capital cases. In its 5 to 4 ruling, the Court opined that by failing to take into account the SEM and setting a strict cutoff at 70, Florida “goes against the unanimous professional consensus” and misinterprets *Atkins* (Ref. 7, p 722).

Brumfield v. Cain (2015)

In *Brumfield v. Cain*,¹⁰ the U.S. Supreme Court reaffirmed the outcome of *Hall*. Kevan Brumfield was convicted of the 1995 killing of a Louisiana police officer and given the death penalty. In response, Mr. Brumfield argued that he was “mentally retarded” and thus ineligible for the death penalty. The state denied Mr. Brumfield an *Atkins* hearing based on his stated claims of an IQ score of 75, a fourth-grade reading level, and a history of special education coursework. The District Court subsequently determined Mr. Brumfield to be an individual with an intellectual disability, though the Fifth Circuit reversed. Mr. Brumfield appealed this decision. The U.S. Supreme Court commented that an IQ score of 75 put Mr. Brumfield “squarely in the range of potential intellectual disability” and that an “IQ between 70 and 75 or lower is typically considered the cutoff score for the intellectual function prong of the mental retardation definition” (Ref. 10, p 309). The Court found that Mr. Brumfield was entitled to a hearing on his *Atkins* claim. It vacated the Fifth Circuit decision and remanded for further proceedings.

Moore v. Texas

Texas addressed whether a defendant's adaptive functioning should be considered in *Atkins* claims. The case also called into question if outdated medical diagnostic criteria could be utilized in determining

intellectual disability in the context of capital punishment. Bobby James Moore was given the death sentence in 1980 for the killing of James McCarble. The conviction was upheld in 1985.¹¹ Mr. Moore again received the death penalty in 2001 following a new punishment-phase trial from a federal *habeas corpus* petition, which was affirmed by the Texas Court of Criminal Appeals. In 2014, Mr. Moore was granted a hearing from the *habeas* court, which opined that he had an intellectual disability. The *habeas* court instructed the Texas Court of Criminal Appeals to consider Mr. Moore not eligible for the death penalty under *Atkins*. In *Ex parte Moore I*, the Texas Court of Criminal Appeals ruled that the *habeas* court utilized improper criteria for assessing Mr. Moore's claim of intellectual disability, stating that the *habeas* court disregarded evidence “that cannot rationally be squared with a finding of intellectual disability” (Ref. 12, p 489). The U.S. Supreme Court subsequently heard the case in *Moore v. Texas I*.

Moore v. Texas I (2017)

The question in *Moore v. Texas I*¹³ was two-fold: if the Texas Court of Criminal Appeals could use the *Briseno*¹⁴ factors in its determination of intellectual disability and if the Texas Court of Criminal Appeals could reference medical diagnostic criteria from 1992 to make determinations of intellectual disability, as those criteria were modified in 2010 in the manual titled *Intellectual Disability: Definition, Classification, and Systems of Supports*, 11th Edition published by the American Association on Intellectual and Developmental Disabilities (AAIDD). The 11th Edition is the first AAIDD manual to use the terminology “intellectual disability,” and it contains best practices for diagnosing intellectual disability and establishing systems of support for individuals with an intellectual disability.¹⁵ The Texas Court of Criminal Appeals had created the *Briseno* factors following *Atkins* because the Texas Legislature did not have a statute detailing intellectual disability in death penalty cases. The Texas Court of Criminal Appeals adopted novel criteria based on the fictional character Lennie Small from the novel *Of Mice and Men* by John Steinbeck,¹⁶ ruling that “most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt [from capital sentencing]” (Ref. 14, p 6). The Texas Court of Criminal Appeals further stated that “until the Texas Legislature provides an alternate statutory definition of [intellectual

disability] for use in capital sentencing, we will follow the [American Association of Mental Retardation manual published in 1992] . . . in addressing *Atkins* [intellectual disability] claims” (Ref. 14, p 8). Representing the majority, Justice Ruth Bader Ginsburg stated that the *Briseno* factors depended on “lay perceptions of intellectual disability [and that] those [lay] stereotypes, much more than medical and clinical appraisals, should spark skepticism” when utilized to determine intellectual disability (Ref. 13, pp 1051–52). The Court opined that the *Briseno* factors increased the danger of inadvertently executing a defendant with an intellectual disability, which violated the Eighth Amendment and *Atkins*.

In *Moore I*, the Court defined current medical manuals as the medical standards that states must use to indicate intellectual disability in death penalty cases. The Court also found that the Texas Court of Criminal Appeals was incorrect in finding Mr. Moore intellectually able based on dated manuals. The Court remanded Mr. Moore’s case to the Texas Court of Criminal Appeals for them to determine his intellectual ability consistent with the *Moore I* decision. The case’s prosecutor subsequently filed a brief, stating that her opinion was that Mr. Moore had an intellectual disability per current medical criteria and requested that his sentence be commuted to life imprisonment without the possibility of parole.

Ex Parte Moore II (2018)

The Texas Court of Criminal Appeals “adopt[ed] the framework set forth in the DSM-5 [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition],” stating that “the DSM-5 should control our approach to resolving the issue of intellectual disability” (Ref. 17, p 560). Per DSM-5 criteria, intellectual disability is defined by the following three criteria: “deficits in intellectual functions” (e.g., reasoning, problem-solving, planning); “deficits in adaptive functioning [and] without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life” (e.g., social participation, independent living); and “onset of intellectual and adaptive deficits [must occur] during the developmental period” (Ref. 18, p 33). The Texas Court of Criminal Appeals indicated that, in assessing Mr. Moore for intellectual disability, they should also “take into account the warning from the [U.S.] Supreme Court, as well as the DSM-5, that we should be cautious about relying upon adaptive

strengths developed in a controlled setting such as prison” (Ref. 17, p 569). The Texas Court of Criminal Appeals “conclude[d] that Applicant’s low scores on adaptive skills testing, in the practical area or otherwise, lack reliability, not only because of the skewing effect of Applicant’s lack of exposure to certain skills, but also due to lack of effort or malingering on Applicant’s part in taking the tests” (Ref. 17, p 572). The Texas Court of Criminal Appeals subsequently ruled that Mr. Moore “failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability” (Ref. 17, p 573).

Moore v. Texas II (2019)

On February 19, 2019, the U.S. Supreme Court reversed the decision of the Texas Court of Criminal Appeals in *Ex parte Moore II* in *Moore v. Texas II*. In a 6 to 3 decision,¹⁹ the Court opined that the Court of Criminal Appeals ignored indicators of Mr. Moore’s adaptive deficits that were presented before the trial court. Consistent with its 2017 *Moore I* opinion, the Court wrote that the Court of Criminal Appeals in *Ex parte Moore II* “again relied less upon the adaptive *deficits* . . . than upon Moore’s apparent adaptive *strengths*” (Ref. 19, p 670, emphasis in original). The Court also found that the Texas Court of Criminal Appeals “relied heavily upon adaptive improvements made in prison [and that *Ex parte Moore II*] used many of [the *Briseno*] factors” in establishing Mr. Moore’s intellectual ability (Ref. 19, p 671). Subsequently, the *Moore II* Court opined that “on the basis of the trial court records, Moore has shown he is a person with intellectual disability” (Ref. 19, p 672).

Fuston v. State (2020)

In *Fuston v. State*,²⁰ the Oklahoma Court of Criminal Appeals considered if the appellant, Ronnie Eugene Fuston, was entitled to an *Atkins*’ hearing to determine if his “mental retardation” precluded him from eligibility for the death penalty. Consistent with the procedure outlined in 21 O.S.Supp.2019, § 701.10b, an *Atkins* hearing is an “evidentiary hearing to determine whether the defendant is intellectually disabled.” Specifically, an *Atkins* hearing allows the defense to further develop arguments regarding intellectual disability, including testimony relevant to adaptive deficits, and to present intellectual disability as a special consideration to the jury prior to

Table 1 Decisions on Intellectual Disability and the Death Penalty before *Fuston v. State*

Case	Decision
<i>Penry v. Lynaugh</i> (1989) ¹	Defendants with intellectual disability eligible for execution
<i>McCarver v. North Carolina</i> (2001) ³	Defendants with intellectual disability not eligible for execution
<i>Atkins v. Virginia</i> (2002) ⁴	Defendants with intellectual disability not eligible for execution, consistent with states' decisions; indicated reasons why defendants with intellectual disability are not eligible for the death penalty (e.g., increased danger of false confessions, increased difficulty presenting mitigating evidence)
<i>Hall v. Florida</i> (2014) ⁷	Accounted for the SEM in determining the FSIQ for intellectual disability in capital cases
<i>Brumfield v. Cain</i> (2015) ¹⁰	Considered the upper limits of the SEM of FSIQ scores in <i>Atkins</i> ' determinations
<i>Moore v. Texas I</i> (2017) ¹³	Defined current medical manuals as the medical standards that states are required to use for the determination of intellectual disability; states determined intellectual disability if criteria were consistent with medical consensus
<i>Moore v. Texas II</i> (2019) ¹⁹	Inclusion of adaptive functioning for the determination of intellectual disability in capital cases; considered adaptive deficits reported outside of a controlled setting (e.g., prison)

SEM = standard error of measurement.

FSIQ = Full-Scale IQ.

determination and in its sentencing. Table 1 summarizes court decisions before *Fuston v. State*.

Mr. Fuston was tried by jury in the District Court of Oklahoma County and convicted of First-Degree Malice Murder, and Possession of a Firearm After Former Juvenile Adjudication in the killing of Michael Rhodes at his residence in Oklahoma City, Oklahoma. The killing occurred in the context of a dispute between Mr. Rhodes's niece and a group of girls in the 107 Hoover Crips gang. On October 20, 2012, Mr. Rhodes was home with his daughter and 19-year-old son, Jalon. Mr. Rhodes was sleeping on the couch when Mr. Fuston and his accomplices entered the residence while firing weapons. Jalon heard the gunshots and ran to where his father was asleep on the couch. Mr. Rhodes had been shot three times, with the fatal wound on his left shoulder. Following his arrest, Mr. Fuston denied that he was near the Rhodes's home at the time of the murder. His cell phone records, however, indicated that he was indeed in the area at that time, and other evidence established a relationship between Mr. Fuston and his accomplices. A phone conversation between Mr. Fuston and his cousin while in jail indicated the location of the murder weapon, a .45 caliber Taurus handgun. In the punishment phase of the trial, the State pursued the death penalty. Following conviction, the defense raised 15 propositions of error in the appeal of his judgment and sentence. In the first proposition of error, Mr. Fuston asserted that the trial court was incorrect in denying his request for an *Atkins* hearing to determine whether his "intellectual disability" made him ineligible for the

death penalty. His appeal was subsequently heard by the Oklahoma Court of Criminal Appeals.

In response to the first proposition of error, the Court of Criminal Appeals stated that an IQ score of 75 is "typically considered the cutoff IQ for the intellectual function prong of the mental retardation definition" and that states are charged with defining procedures to determine defendants' intellectual functioning in the context of capital cases (Ref. 20, p 315, citing Ref. 4, p 309). In 2006, the Oklahoma Legislature, citing *Atkins*, codified that a defendant must demonstrate an IQ score of "70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist" and that "the onset of the mental retardation must have been manifested before the defendant attained the age of eighteen (18) years."²¹

Mr. Fuston had received a score of 81 on the Woodcock-Johnson III (WJ-III),²² an achievement measure and test of cognitive abilities, when he was 12-years-old. Another test administered four years later indicated a score of 67 on the Kaufman Brief Intelligence Test,²³ though this is not a Full-Scale IQ measure and only yielded an estimated IQ. Following his charges for the above-cited offenses, Mr. Fuston was administered four IQ tests from March 2014 to June 2015, which yielded scores of 59, 80, 69, and 75. The state refused a hearing due to his score of 81 on the WJ-III, arguing that the test is a standardized intelligence measure.

On appeal, Mr. Fuston's defense cited several prior U.S. Supreme Court decisions related to *Atkins* and its progeny, one of which was *Hall*. The defense

asserted that the District Court of Oklahoma County erred in not accounting for the SEM of intelligence testing, as indicated in *Hall*. The Court of Criminal Appeals noted that the Oklahoma statutes indicate that

[i]n determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account (21 O.S.2011, § 701.10b[C]). . . . By directing that no defendant be considered mentally retarded who has received an IQ score of 76 or above on any scientifically recognized standardized test, the Legislature has implicitly determined that any score of 76 or above are in a range whose lower error-adjusted limit will always be above the threshold score of 70. . . . [B]ecause the statute's [§ 701.10b] cutoff score excludes only those whose SEM-adjusted IQ score would fall outside the generally accepted range for intellectual disability, Oklahoma's statutory regime accounts for the SEM as required by *Hall* (Ref. 20, pp 316-17).

The court stated that Mr. Fuston's previous test results were not all in the SEM-adjusted IQ range to be considered an individual with an intellectual disability. As the burden was on Mr. Fuston to prove that the statute was unconstitutional, the court found that *Hall* did not support his claim that Section 701.10b was unconstitutional.

Mr. Fuston's defense also argued that he was ineligible for the death penalty because of *Brumfield*, in which the Court opined that the appellant's IQ score of 75 placed him "squarely in the range of potential intellectual disability" (Ref. 20, p 317, citing Ref. 10, p 309). The Court of Criminal Appeals noted that this was not the case for Mr. Fuston as his score on the WJ-III was above the range of that set for intellectual disability.

Mr. Fuston's defense asserted that the *Moore* Court referred to *Hall* as holding that "a state cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70" (Ref. 20, p 318, citing Ref. 13, p 1048). Defense counsel argued that the trial court did not account for the SEM in their decision or the downward adjustment from the "Flynn Effect." The court responded that

[t]he Flynn Effect is a theory based on the premise that results on any given IQ test will rise approximately 3 points for every 10 years that the test is in existence. The Flynn Effect has not achieved universal acceptance in courts where it has been raised. In this instance, however, unlike other jurisdictions that have considered the Flynn Effect, the Oklahoma Legislature has directed that only the standard error of measurement be included in the consideration of a defendant's IQ scores when making a mental retardation determination. Thus, it seems that under

the Oklahoma statutory scheme, the Flynn Effect, whatever its validity, is not a relevant consideration in the mental retardation determination for capital defendants. (Ref. 20, p 316, fn 3, citing Ref. 24, p 1244, fn 6)

None of the authority depended upon by Mr. Fuston indicated that an individual with an IQ score of 81, obtained before the age of 18, whose SEM yields a range of 76 to 86 is entitled to an *Atkins* hearing, and the appeals court denied his proposition that *Moore* precluded him from capital punishment.

Also called into question was the fact that Mr. Fuston had been administered four IQ measures within approximately 15 months when these measures typically are not repeated for a minimum of 12 months. Furthermore, evidence was presented that Mr. Fuston was aware that obtaining an IQ score below 75 would preclude him from a death penalty sentence. The appeals court concluded, "Based upon the record in this case, the pretrial evidentiary hearing outlined in § 701.10b(E) was not required. The trial court properly denied Mr. Fuston's request for an *Atkins* hearing" (Ref. 20, p 318).

Mr. Fuston was also denied 14 other, unrelated propositions on appeal, and he is currently awaiting execution in Oklahoma. Mr. Fuston may file a petition to be reviewed by the next high court.

Forensic Practice Implications from Fuston

As discussed above, Mr. Fuston's defense cited previous cases in which intellectual disability was accounted for in capital cases in granting *Atkins* hearings. Specifically, prior decisions have stated that the SEM of intelligence measures and adaptive functioning should be considered when intellectual disability is questioned in capital cases. In *Fuston*, the court found that the results of single IQ measures, regardless of the context of the administration or age of the defendant at the time of administration, are sufficient to deny an appeal based on stated intellectual disability, where he had an IQ score of 81 before the age of 18. Mr. Fuston's case differs from prior cases in that he was administered four IQ measures within 15 months and that the state relied heavily on a measure (i.e., WJ-III) administered to him when he was 12-years-old. Defense counsel did not dispute the WJ-III results but asserted that the court should account for the totality of Mr. Fuston's performance on intelligence measures, as previous test results were not all outside the SEM-adjusted IQ range to be

considered an individual with an intellectual disability. The appeals court rejected this claim, indicating that the WJ-III is a scientifically recognized, standardized IQ test and that Mr. Fuston's performance on this measure barred him from an *Atkins* hearing. As the symptoms of intellectual disability must manifest before an individual has attained the age of 18, testing results from ages five and older are sufficient to diagnose intellectual disability.²⁵ Furthermore, the defense did not present evidence that sound clinical practices were not followed in the WJ-III test administration, and the 81 score was the only score from a Full-Scale IQ measure before age 18. The WJ-III, therefore, met the necessary standard for determining intellectual disability. Furthermore, although asserted by the defense, there was no clear and convincing evidence that Mr. Fuston had adaptive functioning deficits before age 18.

It is also noted that Mr. Fuston's test results varied significantly between administrations. Specifically, test results from March 2014 to June 2015 differed by more than one standard deviation (i.e., FSIQ = 80 vs. FSIQ = 59). The standard deviation for the standard scores of IQ measures is 15-points and reflects the amount of variability of an individual's data from the mean. The reason for the observed variation in Mr. Fuston's results might be due to differences (or errors) in administration, the environment in which he was tested (e.g., noisy versus quiet setting), comfortability with the administering professional, prescribed medications at the time of testing (e.g., side effect of slowed processing speed), or a combination of these and other factors. Engagement, cooperation, and effort are also crucial in determining the validity of test results.²⁶

Mr. Fuston's case demonstrates that these factors are essential to consider in test administration, particularly as the threshold for assigning intellectual disability is very specific (e.g., standard scores of 75 vs. 76 for the WAIS-III) in Oklahoma. It is noted that the DSM-5 and AAIDD have not defined a bright-line cutoff score for the diagnosis of intellectual disability. Furthermore, intellectual disability is a clinical diagnosis, not a legal concept. State legislatures require direction in applying the Court's decision in *Atkins*, and the SEM of intelligence measures are absorbed into judicial assessments of intellectual disability.^{27,28} Nevertheless, it is essential that test administrators adhere to professional practices and account for the limitations in test administration.

Consistent with professional practices, professionals' knowledge of psychological tests should be considered; they need to be aware of changes to IQ measures as well as the consistent administration of tests to curtail a decline in their ability to administer these tests properly. Concerning effort, it is essential to consider the results of embedded validity indicators (e.g., WAIS-IV Reliable Digit Span²⁹) and to administer effort tests as warranted (e.g., Dot Counting Test,³⁰ Test of Memory Malingering,³¹ Validity Indicator Profile,³² the Rey 15-Item Test²⁹). Malingering (the intentional production, faking, or gross exaggeration of physical or psychological symptoms to obtain an external reward) should be considered in all capital cases as ineligibility for execution is in itself an avoidance of punishment. There is no specific evidence that Mr. Fuston was malingering during the appeals process, despite his death penalty sentence. Nevertheless, malingering should be considered in any forensic evaluation, as well as in all test administrations, particularly those in which a defendant has an apparent gain (e.g., ineligibility for capital punishment).³³

Mr. Fuston was administered four IQ measures within 15 months, despite the minimum of 12 months' professional standard of time between test administrations.⁵ Excessive testing might have affected subsequent results, as Mr. Fuston would have recently completed the same tasks. Specifically, practice effects (i.e., improvement in cognitive test performance following repeated evaluations with the same materials) may falsely improve an individual's results (e.g., elevated IQ score). In doing so, the professional standards of psychological testing were not upheld in *Fuston* and might have affected test data.

Finally, there is evidence that Mr. Fuston was aware of the IQ score needed to be ineligible for the death penalty. For example, during one instance of psychological testing, Mr. Fuston indicated to the administering psychologist his understanding that he would be ineligible for the death penalty with an FSIQ below 75. Professionals must account for defendants' possible knowledge of related statutes and specifics regarding the administration of psychological measures. This knowledge includes, though is not limited to, foreknowledge of the process and purpose of feigning measures. Thus, it is essential that those trained in test administration adhere to professional practices and do not educate the defendant on

the interpretation of test results.^{34,35} Mr. Fuston's case indicates that defendants might have foreknowledge of statutes and psychological measures, and professionals need to account for this possibility in their work with defendants, since there is no way to remove such foreknowledge.

Conclusion

Since *Atkins*, it has been reaffirmed through subsequent Court decisions that defendants with an intellectual disability are not eligible for execution. Later Court decisions demonstrate the importance of considering the SEM of IQ scores as well as defendants' adaptive skills in the granting of *Atkins* claims. In *Fuston*, the defendant was not granted an *Atkins* hearing, primarily due to a standardized intelligence measure score above the SEM of the bright-line cutoff IQ score of 70. *Fuston* also demonstrates the importance of following professional practices, particularly allowing for sufficient time between administrations of psychological assessments and communication between all professionals involved in court proceedings. It is thus of great importance that forensic psychologists are thoroughly trained in the proper administration of standardized tests.

Although psychologists typically administer psychological measures, it is nonetheless important that forensic psychiatrists be able to identify frequently utilized measures of intelligence (e.g., Wechsler Adult Intelligence Scale,⁵ Wechsler Intelligence Scale for Children,³⁶ Woodcock-Johnson Tests of Cognitive Ability,³⁷ Stanford-Binet Intelligence Scale³⁸) as well as tests of adaptive functioning (e.g., Vineland Adaptive Behavior Scales,³⁹ Adaptive Behavior Assessment System⁴⁰). It is also important that forensic psychiatrists are readily able to identify problems in psychological testing (including multiple administrations of measures below the 12 months professional standard, test administration by those unqualified to do so, and results that are inconsistent with an individual's observed functioning, such as an FSIQ of 59 for an individual with a valid driver's license). It might also be necessary for attorneys to understand psychological testing and the minimum time allowed between test administrations. Should forensic psychiatrists or attorneys be uncertain regarding psychological testing standards or results, consultation with a qualified psychologist may be beneficial. Curbing defendants' understanding of the

bright-line cutoff score to be considered an individual with an intellectual disability is also indicated.

References

1. Penry v. Lynaugh, 492 U.S. 302 (1989)
2. Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727) [Internet]. Available from: <https://www.apa.org/about/offices/ogc/amicus/mccarver>. Accessed May 24, 2020
3. *State v. McCarver*, 462 S.E.2d 25 (N.C. 1995)
4. *Atkins v. Virginia*, 536 U.S. 304 (2002)
5. Wechsler D. Wechsler Adult Intelligence Scale®-Fourth Edition: Administration and Scoring Manual. San Antonio, TX: Pearson; 2008
6. Olive ME. The Daryl Atkins story. *Wm & Mary Bill Rts J.* 2014; 23:363–81
7. *Hall v. Florida*, 572 US. 701 (2014)
8. Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, *Hall v. Florida*, 134 S. Ct. 1986, 2014 (No. 12-10882) [Internet]. Available from: <https://www.apa.org/about/offices/ogc/amicus/hall>. Accessed May 24, 2020
9. Chafetz M. Capital cases. In Chafetz M. *Intellectual Disability: Civil and Criminal Forensic Issues*. New York: Oxford University Press; 2015. p 91-136
10. *Brumfield v. Cain*, 576 U.S. 305 (2015)
11. Updegrave AH, Vaughn MS. Evaluating intellectual disability after the *Moore v. Texas* Redux. *J Am Acad Psychiatry Law.* 2019 Dec; 47(4):486–92
12. *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App, 2015)
13. *Moore v. Texas*, 137 S. Ct. 1039 (2017)
14. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App, 2004)
15. Schalock RL, Borthwick-Duffy SA, Buntinx WHE, et al. *Intellectual Disability: Definition, Classification, and Systems of Supports*, Eleventh Edition. Washington DC: American Association on Intellectual and Developmental Disabilities; 2009
16. Steinbeck J. *Of Mice and Men*. New York: Penguin Books; 1937
17. *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018)
18. American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*. Washington, DC: American Psychiatric Association; 2013
19. *Moore v. Texas*, 139 S. Ct. 666 (2019)
20. *Fuston v. State*, 470 P.3d 306 (Okla. Crim. App, 2020)
21. 21 O.S. § 701.10b (2006).
22. Woodcock RW, McGrew KS, Mather N. *Woodcock-Johnson III*. Itasca, IL: Riverside Publishing; 2001
23. Kaufman AS, Kaufman NL. *Kaufman Brief Intelligence Test*. Circle Pines, MN: American Guidance Service; 1990
24. *Smith v. State*, 245 P.3d 1233 (Okla. Crim. App, 2010)
25. Kishore MT, Udipi GA, Seshadri SP. Clinical practice guidelines for assessment and management of intellectual disability. *Indian J Psychiatry.* 2019; 61:194–210
26. Melton GB, Petrila J, Poythress NG, et al. The nature and method of forensic assessment. In *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*. New York: Guilford Press; 2018. p. 42–65
27. Bonnie RJ. The American Psychiatric Association's resource document on mental retardation and capital sentencing: implementing *Atkins v. Virginia*. *J Am Acad Psychiatry Law.* 2004 Sept; 32(3):304–8
28. Guyer M, Fluent T. Intellectual disability, IQ measurement error, and the death penalty. *J Am Acad Psychiatry Law.* 2014 Dec; 42 (4):521–3

29. Greiffenstein MF, Baker WJ, Gola T. Validation of malingered amnesia measures with a large clinical sample. *Psychological Assessment*. 1994; 6:218–224
30. Boone KB, Lu P, Herzberg D. *The Dot Counting Test*. Los Angeles: Western Psychological Services; 2002
31. Tombaugh TN. *Test of Memory Malingering*. North Tonawanda, NY: Multi-Health Systems; 1996
32. Frederick RI. *Validity Indicator Profile Manual*. Minnetonka, MN: NCS Assessments; 1997
33. Resnick PJ, Knoll JL. Malingering psychosis. In Rogers R, Bender SD, editors. *Clinical Assessment of Malingering and Deception*. New York: Guilford Press; 2018. p. 98–121
34. *Ethical Principles of Psychologist and Code of Conduct* [Internet]. Available from: <https://www.apa.org/ethics/code>. Accessed June 22, 2020
35. *Specialty Guidelines for Forensic Psychology* [Internet]. Available from: <https://www.apa.org/practice/guidelines/forensic-psychology>. Accessed June 22, 2020
36. Wechsler D. *WISC-V: Technical and Interpretive Manual*. Bloomington, MN: Pearson; 2014
37. Woodcock RW, McGrew KS, Mather N. *Woodcock-Johnson III Tests of Cognitive Abilities*. Itasca, IL: Riverside Publishing; 2001
38. Roid GH. *Stanford-Binet Intelligence Scales, Fifth Edition, Technical Manual*. Rolling Meadows, IL: Riverside Publishing; 2003
39. Sparrow SS, Cicchetti DV, Balla DA. *Vineland Adaptive Behavior Scales: Second Edition (Vineland II), The Expanded Interview Form*. Livonia, MN: Pearson Assessments; 2008
40. Harrison P, Oakland T. *Adaptive Behavior Assessment System – Second Edition*. San Antonio, TX: Harcourt Assessment; 2003