Evaluating Intellectual Disability after the *Moore v. Texas* Redux

Alexander H. Updegrove, PhD, and Michael S. Vaughn, PhD

This article reviews the history of the U.S. Supreme Court's rulings on intellectual disability in capital cases, highlighting the difficulty states have had in devising a workable definition that meets constitutional standards. The Court's decisions in *Penry v. Lynaugh* (1989), *Atkins v. Virginia* (2002), and *Hall v. Florida* (2014) are briefly summarized. Next, the Texas Court of Criminal Appeals' ruling in *Ex parte Briseno* (2004) is discussed as a prelude to the Supreme Court's decision in *Moore v. Texas I* (2017). On remand, the Texas Court of Criminal Appeals interpreted the Supreme Court's *Moore I* ruling in a manner that resulted in finding Mr. Moore intellectually able, and therefore eligible for the death penalty, in *Ex parte Moore II* (2018). Finally, the importance of the Supreme Court's most recent ruling on intellectual disability in capital cases, *Moore v. Texas II* (2019), is explored in depth. The article concludes with recommendations for best practices among forensic evaluators who assess capital defendants for intellectual disability.

J Am Acad Psychiatry Law 47:486–92, 2019. DOI:10.29158/JAAPL.003884-19

In *Atkins v. Virginia*,[1] the U.S. Supreme Court ruled that the Eighth Amendment categorically forbids executing intellectually disabled individuals because it is contrary to evolving standards of decency in violation of the prohibition against cruel and unusual punishment. Writing for the majority, Justice Stevens outlined several reasons why the death penalty is inappropriate for intellectually disabled individuals, including increased likelihood of false confessions; reduced capacity to present compelling mitigation evidence; limited ability to help their lawyer present an effective defense; vulnerability if they take the stand; and tendencies of others to misinterpret their intellectual disability as callousness (Ref. 1, pp 320–21). The Court's *Atkins* decision in 2002 marked a reversal from *Penry v. Lynaugh*,[2] in which the Court found that the Eighth Amendment did not prohibit executing intellectually disabled individuals. Psychologists reported Penry's IQ at "between 50 and 63," which translated to "the mental age of a 6 1/2-year-old" (Ref. 2, pp 307–8). Writing for the majority, Justice O'Connor ruled that the specifics of Mr. Penry's case did not mean that similarly situated capital defendants should automatically be exempted from death without further exploration of relevant case details (Ref. 2, p 338).

Twelve years after *Atkins*, in 2014, the Court revisited the subject of executing intellectually disabled inmates in *Hall v. Florida*.[3] The *Atkins* Court stated that, "as was our approach in *Ford v. Wainwright*, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences'" (Ref. 1, p 317, citing Ref. 4, p 417). Some states used this discretion to create standards for establishing intellectual disability in capital cases that were more restrictive than the criteria they relied upon in civil matters.[5] Texas, for example, required capital defendants to demonstrate that their adaptive deficits specifically resulted from intellectual disability.[6] Texas civil law, however, did not require school students to establish a specific cause for their adaptive deficits to be considered intellectually disabled in an educational setting

Published online September 18, 2019.

Dr. Updegrove is Assistant Professor at the Department of Social Sciences, Texas A&M International University, Laredo, Texas. Dr. Vaughn is Professor at the Department of Criminal Justice and Criminology, College of Criminal Justice, Sam Houston State University, Huntsville, Texas. He is Co-Director of the Institute for Legal Studies in Criminal Justice at Sam Houston. Address correspondence to Michael S. Vaughn, PhD, Department of Criminal Justice and Criminology, College of Criminal Justice, Sam Houston State University, 816 17th St., PO Box 2296, Huntsville, TX 77341-2296. E-mail: mvaughn@shsu.edu.

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

(Ref. 6, p 1052). As a result, some states may have executed inmates who possibly could have been found intellectually disabled if evaluated in a civil rather than criminal context.

Following *Atkins*, the Florida legislature enacted a statute that classified individuals as intellectually disabled for the purposes of execution if they scored 70 or lower on an IQ test. Evidence of an IQ score greater than 70, however, rendered inmates eligible for execution with "further exploration of intellectual disability . . . foreclosed" (Ref. 3, p 1990). The *Hall* Court recognized that the central question was "how intellectual disability must be defined," writing "in determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions" (Ref. 3, p 1993). The *Hall* Court held that "*Atkins* did not give the States unfettered discretion" to define intellectual disability in the capital context (Ref. 3, p 1998). Instead, the Court noted, "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*" (Ref. 3, p 1999). Florida's statute was unconstitutional, therefore, because it "disregard[ed] established medical practice" (Ref. 3, p 1995). Confusion remained concerning the Court's definition of intellectual disability, however, because it ruled that the "legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals" (Ref. 3, p 2000).

Moore v. Texas I (2017)

Bobby James Moore was first sentenced to death in 1980 for killing a grocery store employee during an attempted robbery. The Texas Court of Criminal Appeals upheld his conviction in 1985,[7] and Mr. Moore was subsequently sentenced to death again in 2001 after he received a new punishment-phase trial, resulting from a successful federal *habeas corpus* petition. In 2004, the Texas Court of Criminal Appeals affirmed the lower court's decision.[8] Mr. Moore received a two-day evidentiary hearing from the *habeas* court in 2014, which found that he was intellectually disabled. As a result, the *habeas* court advised the Texas Court of Criminal Appeals to consider Mr. Moore ineligible for execution under *Atkins v. Virginia*. In *Ex parte Moore I*,[9] the Texas Court of Criminal Appeals ruled that the *habeas* court used the wrong criteria for evaluating Mr. Moore's intellectual disability claim. Furthermore, the Texas Court of Criminal Appeals found that the *habeas* court overlooked evidence "that cannot rationally be squared with a finding of intellectual disability" (Ref. 9, p 489). The U.S. Supreme Court agreed to hear the case in *Moore v. Texas I*.

Moore v. Texas I picked up where *Hall* left off and focused on two central questions: whether the Texas Court of Criminal Appeals could use the *Briseno*[10] factors to determine intellectual disability, given that those factors were "not aligned with the medical community's information" (Ref. 6, p 1044); and whether the Texas Court of Criminal Appeals could use medical diagnostic criteria from 1992 to make intellectual disability determinations, given that those criteria had been last revised in 2010.

The Texas Court of Criminal Appeals created the *Briseno* factors in the aftermath of *Atkins* because the Texas legislature had yet to enact a statute defining intellectual disability in capital cases. Absent legislative guidance, the Court of Criminal Appeals crafted its own criteria influenced by the character Lennie Small from the fictional novel *Of Mice and Men* by John Steinbeck.[11] In the novel, Lennie is "a grown man, a clumsy giant, but [with] the mind of a child" (Ref. 12). The Texas Court of Criminal Appeals wrote in *Ex parte Briseno*, "Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt" from execution (Ref. 10, p 6). In response, scholars expressed concern that the *Briseno* factors may inadvertently perpetuate stereotypes about intellectual disability that are not informed by current medical knowledge.[13] Research has confirmed, for example, that some judges hold misconceptions about intellectual disability.[14] The *Briseno* factors included:

> Did those who knew the person best during the development stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
>
> Has the person formulated plans and carried them through, or is his conduct impulsive?
>
> Does his conduct show leadership, or does it show that he is led around by others?

> Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?
>
> Can the person hide facts or lie effectively in his own or others' interests?
>
> Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? (Ref. 10, pp 8–9)

In *Briseno*, the Texas Court of Criminal Appeals also wrote, "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. 10, p 8). This manual, now associated with the American Association on Intellectual and Developmental Disabilities (AAIDD), is currently in its 11th edition[15] and was last published in 2010.

Three experts presented testimony on Mr. Moore's behalf during the 2014 evidentiary hearing regarding his intellectual capability. Two of these experts considered him intellectually disabled, whereas the third declined to offer an opinion because he had never interacted with Mr. Moore (Ref. 9, pp 511–12). The state employed a single expert, who testified that "there was a greater probability than not" that Mr. Moore's IQ was above the cutoff for intellectual disability (Ref. 9, p 513). The defense experts discounted several IQ scores above the threshold (as well as at least one score below the cutoff), either because the tests were not appropriate in this context or because the numbers needed to be adjusted downward to account for standard errors of measurement (Ref. 9, pp 515–16). In its subsequent *Ex parte Moore I* decision, the Texas Court of Criminal Appeals called the state expert's testimony "far more credible and reliable" than that of the defense experts (Ref. 9, p 525). According to the Texas Court of Criminal Appeals, the state expert's credentials were more relevant, and she had conducted a more comprehensive evaluation that drew from a greater variety of information sources.

Writing for the U.S. Supreme Court majority in *Moore I*, Justice Ginsburg faulted the *Briseno* factors for relying on "lay perceptions of intellectual disability" (Ref. 6, p 1051). The Court held that the medical profession has actively sought to correct public misperceptions of intellectual disability, and therefore "those [lay] stereotypes, much more than medical and clinical appraisals, should spark skepticism" when used to define intellectual disability (Ref. 6, p 1052). The Court also highlighted the fact that Texas exclusively relied on the *Briseno* factors in capital cases, writing "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake" (Ref. 6, p 1051). Because the Court found the *Briseno* factors to be "wholly nonclinical" (Ref. 6, p 1053), it ruled that "[b]y design and in operation, the *Briseno* factors" increase the risk of accidentally executing an intellectually disabled defendant in violation of the Eighth Amendment and its *Atkins* decision (Ref. 6, p 1051).

Although *Moore I* provided some clarity for how states must define intellectual disability, it did not entirely resolve the question. The *Moore I* Court observed that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards" (Ref. 6, p 1049). Consequently, states remain free to define intellectual disability as they see fit as long as their definition does not conflict with current medical consensus. As the Court said, "The medical community's current standards supply one constraint on States' leeway" (Ref. 6, p 1053).

In *Moore I*, the Court identified current medical manuals, specifically the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5),[16] and Intellectual Disability: Definitions, Classification, and System of Supports, 11th Edition (AAIDD-11),[15] as the medical standards that states must use to determine intellectual disability in capital cases (Ref. 6, p 1053). In other words, states cannot find anyone intellectually able who would be considered intellectually disabled according to the most recently published version of the DSM or the AAIDD. To do so would be "to diminish the force of the medical community's consensus" (Ref. 6, p 1044). Consequently, the Court ruled that the

Texas Court of Criminal Appeals erred in *Ex parte Moore I* by finding Moore intellectually able according to the Intellectual Disability: Definitions, Classification, and System of Supports, Ninth Edition (AAIDD-9) instead of using current medical manuals to evaluate him, noting "In *Hall v. Florida* . . . we relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and AAIDD-11" (Ref. 6, p 1048). The Court remanded the case to the Court of Criminal Appeals, tasking it with determining Mr. Moore's intellectual ability according to its *Moore I* decision. Following the Court's decision, the prosecutor filed a brief to the Texas Court of Criminal Appeals, stating that she considered Mr. Moore to be intellectually disabled according to current medical criteria and asking the court to commute his sentence to life imprisonment without the possibility of parole.[17]

Ex Parte Moore II (2018)

On remand from *Moore v. Texas I*,[6] the Texas Court of Criminal Appeals once again considered the topic of Mr. Moore's intellectual ability in *Ex parte Moore II*.[17] In keeping with the U.S. Supreme Court's decision, the Court of Criminal Appeals "adopt[ed] the framework set forth in the DSM-5" to evaluate Mr. Moore (Ref. 18, p 555). The Court of Criminal Appeals further recognized that "the DSM-5 should control our approach to resolving the issue of intellectual disability" rather than the AAIDD-9, which it had previously used (Ref. 18, p 560). According to the DSM-5, intellectual disability consists of three criteria: "deficits in general mental abilities"; "impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers"; and "onset . . . during the developmental period" (Ref. 16, p 37). Adaptive deficits are measured based on "how well a person meets community standards of personal independence and social responsibility" relative to their peers in conceptual, social, and practical domains (Ref. 16, p 37). The second criterion supports a diagnosis of intellectual disability if "at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community" (Ref. 16, p 38).

When reassessing Mr. Moore for intellectual disability, the Texas Court of Criminal Appeals wrote, "We take into account the warning from the 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. 18, p 569). In its *Ex parte Moore II* decision, the Court of Criminal Appeals cited evidence from both Mr. Moore's time in the community and in an institutionalized setting (i.e., prison) to find him intellectually able. When these sources of information conflicted with each other, the court prioritized evidence from Mr. Moore's time in prison. The court noted Mr. Moore's various prison activities:

> Applicant displayed considerable skill with writing and math, employed in practical uses such as reading books and newspaper articles—some of which related to the claims being made in his legal proceeding—writing letters, composing or at least copying legal motions, filling out commissary slips (which required both math and writing), and playing dominoes [Ref. 18, p 572].

The Court of Criminal Appeals also observed that, "in prison, [Mr. Moore] progressed from being illiterate to being able to write at a seventh-grade level" (Ref. 18, p 565). At another point in its opinion, the court discussed Mr. Moore's ability to understand math and money based on his commissary purchases and the fact that he "played dominoes, a game that requires counting" (Ref. 18, p 569). Elsewhere, the court wrote that "there were a number of incidents in prison in which Applicant refused to follow orders" (Ref. 18, p 571). The court found this behavior important because prisons typically discourage defying authorities (Ref. 18, p 571). These observations led the Court of Criminal Appeals to:

> conclude 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. 18, p 572].

Based on the totality of the evidence, including a few examples of adaptive strengths exhibited within prison, the Texas Court of Criminal Appeals ruled in *Ex parte Moore II* that Mr. Moore had "failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability" (Ref. 18, p 573). In reaching this decision, the Court of Criminal Appeals stated that "the [U.S. Supreme] Court said that we were wrong to suggest that adaptive deficits in certain areas could be offset by strengths in unrelated areas"

(Ref. 18, p 559). Any adaptive strengths that the Court of Criminal Appeals identified, therefore, were perceived to be directly related to (rather than unrelated to) the relevant adaptive deficits.

The Court of Criminal Appeals' decision also used language in a few areas that the U.S. Supreme Court associated with the *Briseno* factors, which the *Moore I* Court had ordered it to "abandon reliance on" (Ref. 18, p 560). The Court of Criminal Appeals wrote in *Ex parte Moore II*, for example, that "Applicant's willingness to stand up to authority in prison (and at times give reasoned explanations for doing so) is at odds with the claim that he is an impressionable, easily led follower" (Ref. 18, p 571). The Court of Criminal Appeals referenced this again later when it highlighted Mr. Moore's "ability to stand up for himself and to influence others" (Ref. 18, p 572). As the U.S. Supreme Court explained in its *Moore v. Texas II*[19] decision, there are similarities between this rationale and one of the *Briseno* factors rejected by the Court in *Moore v. Texas I*, which asked, "Does his conduct show leadership, or does it show that he is led around by others?" (Ref. 10, p 8).

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 *per curiam* opinion, the U.S. Supreme Court ruled that the Texas Court of Criminal Appeals had overlooked compelling evidence of Mr. Moore's adaptive deficits that had been presented before the trial court. The Court summarized this evidence as follows:

> Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the years, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school, because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning [Ref. 19, pp 667–668, citing Ref. 6, p 1045].

Echoing 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 *Moore II* Court also found that the Court of Criminal Appeals "relied heavily upon adaptive improvements made in prison" (Ref. 19, p 671). As the Court observed, "The length and detail of the [Court of Criminal Appeals'] discussion on these points is difficult to square with our caution against relying on prison-based development" (Ref. 19, p 671). The DSM-5 similarly states that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)" (Ref. 16, p 38). As a remedy, the DSM-5 recommends that, "if possible, corroborative information reflecting functioning outside those settings should be obtained" (Ref. 16, p 38). The AAIDD-11 criteria are more strict, "seeming to enact a flat ban on ever looking to [adaptive] functioning in prison" (Ref. 6, p 1059). Thus, the Court of Criminal Appeals erred in *Ex parte Moore II* by focusing too much attention on Mr. Moore's time in prison. It is important to note, however, that the Court of Criminal Appeals did not rely exclusively on Mr. Moore's time in prison, rather only disproportionately so, according to the Supreme Court in *Moore II*. Furthermore, the Court of Criminal Appeals recognized both the Supreme Court and the DSM-5 admonition against "relying upon adaptive strengths developed in a controlled setting such as prison" (Ref. 18, p 569).

Even so, the *Moore II* Court found that the Court of Criminal Appeals in *Ex parte Moore II* still "used many of [the *Briseno*] factors" in determining that Mr. Moore was intellectually able (Ref. 19, p 671). In the *Moore II* Court's words, "the similarity of language and content between *Briseno*'s factors and the court of appeals' statements suggests that *Briseno* continues" to influence how the Court of Criminal Appeals makes intellectual disability determinations (Ref. 19, p 672). In the end, the *Moore II* Court ruled:

> . . . the appeals court's opinion [in *Ex parte Moore II*], when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court [Ref. 19, p 672].

Acting in a manner that the dissent perceived as fact-finding rather than judicial review (Ref. 19, p 674),[20] the Court concluded that, "on the basis of

the trial court record, Moore has shown he is a person with intellectual disability" (Ref. 19, p 672).

Discussion

Chief Justice Roberts, joined by Justices Thomas and Alito, noted in dissent in *Moore v. Texas I*, "The Court . . . crafts a constitutional holding based solely on what it deems to be medical consensus about intellectual disability" (Ref. 6, p 1054). Chief Justice Roberts further alleged in *Moore I* that the Court's "decision departs from this Court's precedents, followed in *Atkins* and *Hall*, establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice" (Ref. 6, pp 1057–58). In contrast, "the Court instead finds error in the [Criminal Court of Appeals'] analysis based solely on what the Court views to be departure from typical clinical practice" (Ref. 6, p 1058). Roberts also took exception to the lack of clarity that the Court provided for determining "when a State's deviation from medical consensus" should be considered unconstitutional (Ref. 6, p 1059). According to Roberts, the *Moore I* Court failed to "clarify the scope of the 'flexibility' [that] . . . States retain in this area" (Ref. 6, p 1058). The end result, Roberts warned, is that states will remain confused on this question and may misapply the Court's standard for determining intellectual disability in capital cases.

The Court's *Moore v. Texas II* ruling highlights the tension that has at times existed between medical and legal definitions.[21] When the Court decided *Atkins*, it found a Constitutional prohibition against executing intellectually disabled defendants without providing a clear legal definition of intellectual disability or procedures for assessing it.[22, 23] In *Hall*, the Court drew upon its "positive view of psychiatric expertise" to begin clarifying how states must define intellectual disability; in that instance, by incorporating the standard error of measurement into IQ scores (Ref. 22, p 1188). With confusion lingering, the Court further clarified in *Moore I* that states must evaluate capital defendants for intellectual disability in a manner consistent with the DSM-5 or AAIDD-11, including the manuals' focus on adaptive deficits, not adaptive strengths. *Moore I* suggests that the Court sought to reduce the existing tension between legal and medical definitions. Forensic evaluators, therefore, should follow current clinical definitions and practices, as established in the DSM-5 or the AAIDD-11, when evaluating capital defendants for intellectual disability.[24]

Despite "caution[ing] against relying on prison-based development" (Ref. 19, p 671), the *Moore II* Court did not establish a clear rule for when states' use of prison-based information becomes problematic. Even though the question remains unsettled, the Court has provided some guidance. Throughout *Atkins*, *Hall*, *Moore I*, and *Moore II*, the Court has repeatedly emphasized the importance of abiding by current medical consensus and established that the DSM-5 and AAIDD-11 reflect this consensus. Thus, forensic evaluators should look to these sources for further instruction. The DSM-5 warns that highly structured environments like prison may mask adaptive deficits (Ref. 16, p 38), and the AAIDD-11 prohibits evaluators from basing their assessments on behaviors exhibited in prison (Ref. 15, p 1059).

Khan and Noffsinger[25] suggest that the medical community agrees that evaluators should avoid assessing adaptive deficits in abnormal environments, including prison (Ref. 25, p 551). Yet the Court has not gone so far as to prohibit evaluators from considering prison-based information altogether. Instead, like the DSM-5, the Court stipulates that evaluators must exercise caution about the manner in which they use this information. Forensic evaluators, therefore, should continue familiarizing themselves with information about the defendant's functioning while in prison if they consider it relevant to their evaluation. Indeed, obtaining as much information from as many sources as possible is generally recommended,[26] and prison-based data remain legally permissible under *Moore II*. At the same time, evaluators should be careful when reaching conclusions based on this information.[27] On the one hand, evaluators should feel confident in their use of prison-based information to support conclusions suggested by community-based information. On the other, evaluators should avoid drawing conclusions from prison-based information that cannot be corroborated by community-based information, or that appear to conflict with such information. It is this latter practice that the Court appears to have objected to in *Moore II*.

Conclusion

State and defense experts are sometimes tasked with assessing capital defendants' intellectual ability

in cases where little evidence exists to support a conclusion either way.[28] The *Moore II* Court's recognition that information about defendants' functioning in the community provides a better indicator of their adaptive deficits than how they function in prison only makes forensic evaluators' job that much more challenging.[28] Evaluators may be tempted to draw conclusions from defendants' functioning in prison because it is the only information available, or because it is the most recent. In *Moore II*, however, the U.S. Supreme Court limited the manner in which evaluators can use this information. *Moore II* only reinforces the need for forensic evaluators to seek information from as many sources as possible, especially ones that can inform evaluators about defendants' functioning in the community prior to incarceration.[29] Although it is difficult to find these sources, it is preferable to conduct interviews with people who have had long-term interactions with the defendant during different developmental stages, including family members, teachers, neighbors, acquaintances, employers, and religious counselors. Forensic evaluators may also seek court, school, or health records, showing comorbidity or dual diagnoses of intellectual disabilities with other mental, medical, cognitive, behavioral, or developmental disorders.[30]

References

1. Atkins v. Virginia, 536 U.S. 304 (2002)
2. Penry v. Lynaugh, 492 U.S. 302 (1989)
3. Hall v. Florida, 134 S. Ct. 1986 (2014)
4. Ford v. Wainwright, 477 U.S. 399 (1986)
5. Updegrove AH, Vaughn MS, del Carmen RV: State statutes on intellectual disability in capital defendants: the current dilemma facing the Supreme Court in Moore v. Texas. Notre Dame JL Ethics & Pub Pol'y 32:527–62, 2018
6. Moore v. Texas, 137 S. Ct. 1039 (2017)
7. Moore v. State, 700 S.W.2d 193 (Tex. Crim. App. 1985)
8. Moore v. State, 2004 WL 231323 (Tex. Crim. App. 2004), reh'g denied, (May 5, 2004)
9. Ex parte Moore, 470 S.W.3d 481 (Tex. Crim. App. 2015)
10. Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004)
11. Steinbeck J: Of Mice and Men. New York: Penguin Books, 1937
12. Wertheimer L: Supreme court will consider legality of the 'Lennie standard.' National Public Radio, August 28, 2016. Available at: https://www.npr.org/2016/08/28/491699616/supreme-court-will-consider-legality-of-the-lennie-standard. Accessed July 23, 2019
13. Crowell H: The writing is on the wall: how the Briseno factors create an unacceptable risk of executing persons with intellectual disability. Tex L Rev 94:743–84, 2016
14. Gresham FM, Reschly DJ: Standard of practice and Flynn effect testimony in death penalty cases. Intellect Dev Disabil 49:131–40, 2011
15. Schalock RL, Borthwick-Duffy SA, Buntinx WHE, *et al*: Intellectual Disability: Definitions, Classification, and System of Supports, 11th Edition. Silver Spring, MD: American Association on Intellectual and Developmental Disabilities, 2010
16. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Washington, DC: American Psychiatric Association, 2013
17. Blakinger K: Prosecutors ask for life sentence for Texas death row inmate Bobby Moore. Houston Chronicle, November 1, 2017. Available at: https://m.chron.com/news/houston-texas/article/Prosecutors-ask-judge-to-resentence-death-row-12324475.php. Accessed July 23, 2019
18. Ex parte Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018)
19. Moore v. Texas, 139 S. Ct. 666 (2019)
20. Redish MH, Gohl WD: The wandering doctrine of constitutional fact. Ariz L Rev 59:289–338, 2017
21. Cheung N: Defining intellectual disability and establishing a standard of proof: suggestions for a national model standard. Health Matrix Clevel 23:317–51, 2013
22. Appelbaum PS: Hall v. Florida: Defining intellectual disability in the shadow of the death penalty. Psychiatr Serv 65:1186–8, 2014
23. Duvall JC, Morris RJ: Assessing mental retardation in death penalty cases: critical issues for psychology and psychological practice. Profess Psychol Res Pract 37:658–65, 2006
24. Bundrick J, Martinez R: Determination of intellectual disability in death penalty cases. J Am Acad Psychiatry Law 45:505–7, 2017
25. Khan J, Noffsinger S: Determining intellectual disability for capital defendants. J Am Acad Psychiatry Law 46:549–52, 2018
26. Salekin KL, Doane BM: Malingering intellectual disability: the value of available measures and methods. Appl Neuropsychol 16: 105–13, 2009
27. Olley JG: Knowledge and experience required for experts in Atkins cases. Appl Neuropsychol 16:135–40, 2009
28. Fabian JM: State supreme court responses to Atkins v. Virginia: adaptive functioning assessment in light of purposeful planning, premeditation, and the behavioral context of the homicide. J Forensic Psychol Pract 6:1–25, 2006
29. Stevens KB, Price JR: Adaptive behavior, mental retardation, and the death penalty. J Forensic Psychol Pract 6:1–29, 2006
30. Ellis JW, Everington C, Delpha AM: Evaluating intellectual disability: clinical assessments in Atkins cases. Hofstra L Rev 46: 1305–419, 2018