JUDGMENTS OF DIMINISHED CULPABILITY IN CRIMINAL LAW

A Dissertation

Presented to the Faculty of the Graduate School

of Cornell University

in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

by

Amelia Courtney Hritz

August 2018

JUDGMENTS OF DIMINISHED CULPABILITY IN CRIMINAL LAW

Amelia Courtney Hritz, J.D., Ph.D.

Cornell University 2018

In *Atkins v. Virginia*, the Supreme Court held that the execution of individuals with intellectual disability violated the Eighth Amendment to the United States Constitution.[1] When creating the categorical exemption in *Atkins* the Court recognized that without the exemption juries might consider intellectual disability to be a two-edged sword: "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[2] The Supreme Court also held that the Eight Amendment limits the extent that states can impose the most serious punishments on juveniles, including certain forms of life without parole.[3] This dissertation examines whether the two-edged nature of intellectual disability or young age may influence other decisions in the justice system that ultimately affect criminal sentences. The first Chapter examines whether parole board decisions in South Carolina cause some juvenile offenders to serve de facto life without parole sentences. Chapter Two explores whether mental health experts may be influenced by the facts of a heinous crime or their beliefs about the death penalty when they diagnose intellectual disability in death penalty cases. Chapter Three examines the post-conviction relief process for people appealing their death sentences because they are categorically exempt from the death penalty. It argues that the more-forgiving procedural exemptions applied in claims of innocence should be applied in claims of ineligibility for the death penalty.

Keywords: adolescence, juvenile, intellectual disability, death penalty, life without parole, criminal sentencing, habeas corpus.

---

[1] 536 U.S. 304, 318 (2002).

[2] *Id*. at 321.

[3] Miller v. Alabama, 567 U.S. 460, 480 (2012); Graham v. Florida, 560 U.S. 48, 71–72 (2010).

BIOGRAPHICAL SKETCH

Amelia Courtney Hritz was born in New York City. She received her B.A. in Mathematics and Psychology from the Johns Hopkins University in 2009 and her M.A. in Forensic Psychology from John Jay College of Criminal Justice, City University of New York in 2012. While attending John Jay, she also worked full-time as a paralegal for Schlam, Stone & Dolan LLP and completed a clinical psychology externship at Kirby Forensic Psychiatric Center in New York City. She came to Cornell University to join the first class of JD/PhD students in Law and Developmental Psychology. She served as President of the Women's Law Coalition and Editor-in-Chief of the *Cornell Law Review*. In 2017, she married Alexander Bodell, her partner of twelve years. She was awarded the Robert B. Kent Public Interest Law Fellowship and, after graduation, will be defending juveniles serving life sentences in South Carolina.

To Alex

ACKNOWLEDGEMENTS

I would like to thank the people who participated in these studies and the American Association on Intellectual and Developmental Disabilities for their cooperation. I am also grateful for the research funding from the Human Ecology Alumni Association and the Cornell Graduate School.

I am thankful for the guidance from the chair of my special committee, Stephen Ceci. He has been a wonderful mentor. I have benefited tremendously from countless opportunities provided by John Blume. His work inspired me to write this dissertation. I would also like to thank Charles Brainerd for his valuable insight throughout the dissertation writing process. In addition, I have learned a great deal from working closely with Valerie Hans, Wendy Williams, Sheri Johnson, and Andrea Mooney. I wish to thank them for the incredible opportunities they have provided.

This dissertation would not be possible without the collaboration with members of the Child Witness and Cognition Lab and the Juvenile Life Without Parole Clinic. I would especially like to thank my fellow JD/PhD student Caisa Royer. I learned so much from working with her and I will miss our partnership. I would also like to thank the undergraduate research assistants Alyssa Alishoev, Aliza Cohen, Zoey Costanzo, Gina Garrett, Michelle Morris, and Isabelle Leipziger for their tremendous hard work.

I thank my Mom, Dad and Mary Beth for their love and encouragement. I thank Alex for making sacrifices to join me on this journey to Ithaca. He has supported me throughout graduate school and learned so much about this research that he also deserves a Ph.D. Finally, for their affection, I would like to thank Pierre, Chuck, and Eloise.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

JUDGMENTS OF DIMINISHED CULPABILITY IN CRIMINAL LAW

In *Atkins v. Virginia*, the Supreme Court held that the execution of individuals with intellectual disability (or, as the *Atkins* Court phrased it, "mental retardation") ran afoul of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.[1] When creating the categorical exemption in *Atkins* the Court recognized that without the exemption juries might consider intellectual disability to be a two-edged sword: "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[2] The Supreme Court also held that the Eight Amendment limits the extent that states can impose the most serious punishments on juveniles. Specifically, the Court held that the Eighth Amendment prohibits sentencing any juvenile to death,[3] life without parole for non-homicides,[4] and mandatory life without parole.[5] This dissertation examines whether the two-edged nature of intellectual disability or young age influences other decisions in the justice system, which in turn affect criminal sentences.

The first Chapter examines how age at the time of a crime affects the likelihood of being granted parole in serious cases. The Chapter considers whether juvenile offenders may appear to be more dangerous to the parole board due to their criminal and institutional records. The Chapter presents a study of over ten years of parole decisions in South Carolina, a state that gives complete discretion to the parole board. The study concludes that factors associated with the crime appear to play a large role in parole board decision making. This finding suggests that many juvenile

[1] Atkins v. Virginia, 536 U.S. 304, 318 (2002).

[2] *Id*. at 321.

[3] Roper v. Simmons, 543 U.S. 551 (2005).

[4] Graham v. Florida, 560 U.S. 48, 71–72 (2010).

[5] Miller v. Alabama, 567 U.S. 460, 480 (2012).

offenders may be serving de facto life without parole because they are being repeatedly denied parole for things they cannot change.

Chapter Two explores whether mental health experts may be influenced by the facts of a heinous crime or their beliefs about the death penalty when they diagnose intellectual disability in death penalty cases. This Chapter presents an empirical study that tests the influence on context and attitudes on intellectual disability diagnosis. This Chapter concludes that attitudes and beliefs can play a role in legal judgments in ambiguous cases, even by people with substantial experience in the field.

Chapter Three examines the post-conviction relief process for people appealing their death sentences because they are categorically exempt from the death penalty. The Chapter argues that the more forgiving exceptions applied to claims of innocence should be applied to death ineligibility claims. That is especially so because many states have been hostile to *Atkins* claims and have adopted procedures that make it virtually impossible for people to prove that they have intellectual disability.[6] Federal courts are the last resort to ensure that people with intellectual disability are not unjustly executed.[7]

[6] For example, some states have adopted definitions of intellectual disability that deviate markedly from accepted clinical definitions. Moore v. Texas, 137 S. Ct. 1039, 1044 (2017); Hall v. Florida, 134 S. Ct. 1986, 1995 (2014).

[7] *In re Hill*, 715 F.3d at 302 (Barkett, J., dissenting).

CHAPTER 1

TOWARDS A "MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE"

INCREASING TRANSPARENCY IN PAROLE DECISIONS

INTRODUCTION

How does age at the time of a crime affect the likelihood of being granted parole in serious cases? While the Supreme Court has said that juvenile offenders serving life sentences have a right to a meaningful opportunity to obtain release,[1] many states still give the parole board complete discretion. When there is discretion, research on adolescent development suggests that age could be a two-edged sword, both increasing fears of future dangerousness and decreasing culpability in serious cases. This Chapter focuses on how age at the time of the crime influences parole board decisions in serious cases. First, the Chapter reviews the existing evidence that juvenile offenders can have records that may make them appear to be more dangerous and at the same time more deserving of leniency than adult offenders. It also presents theoretical explanations for parole board decision making in serious cases. Second, this Chapter investigates how a parole board treats juvenile and adult offenders by an examination of over ten years of parole decisions in South Carolina, a state that gives complete discretion to the parole board. Finally, this Chapter considers whether the two-edged sword effect is present parole board decisions in this sample of cases and whether this obstructs a "meaningful opportunity to obtain release."[2]

[1] *See infra*, Part 1.

[2] Graham v. Florida, 560 U.S. 48, 75 (2010).

I.

CRUEL AND UNUSUAL PUNISHMENTS OF YOUTH

In a series of cases, the Supreme Court has limited the extent that states can impose the most serious punishments on juveniles based on the Cruel and Unusual Punishment Clause of the Eighth Amendment. Specifically, the Court held that the Eighth Amendment prohibits sentencing any juvenile to death,[3] life without parole for non-homicides,[4] and mandatory life without parole.[5] The Court emphasized that these holdings were consistent with common sense–"what any parent knows"– and social science and neuroscience research.[6] Young people have diminished culpability based on class-wide traits and are categorically less deserving of the most severe punishments.

The Court's juvenile sentencing jurisprudence establishes that the Eighth Amendment requires states to give individualized consideration to juvenile offenders' youth at the time of a crime before sentencing them to the death penalty or life without parole. When a crime reflects "transient immaturity," a sentence of life in prison violates the Eighth Amendment, even with individualized consideration.[7] Individuals whose juvenile crimes reflect immaturity, and who have since matured, should be given "some meaningful opportunity to obtain release" based on demonstrated rehabilitation or life sentences become the functional equivalent of life without

[3] Roper v. Simmons, 543 U.S. 551 (2005).

[4] *Graham*, 560 U.S. at 71–72 (2010).

[5] Miller v. Alabama, 567 U.S. 460, 480 (2012).

[6] *Id*. at 471-472.

[7] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("Because *Miller* determined that sentencing a child to life without parole is excessive for all but "'the rare juvenile offender whose crime reflects irreparable corruption,'" it rendered life without parole an unconstitutional penalty for "a class of defendants because of their status"—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.").

parole.[8] For an opportunity to be meaningful, it must be realistic and more than just a remote possibility.[9]

A few states have modified their sentencing procedures and directed their parole boards to consider juveniles offenders to be less culpable.[10] Yet many states, like South Carolina, give parole boards complete discretion, meaning parole boards can deny parole solely based on the crime and without a consideration of rehabilitation.[11] This suggests a possible due process violation for juveniles if their sentences of life with parole are the functional equivalent life *without* parole. A federal district court recently held that plaintiffs had presented a plausible claim that Maryland's system of parole amounts to de facto life without parole sentences because it does not provide juvenile offenders with a realistic and meaningful opportunity for release and rejected the State's motion to dismiss.[12] The court distinguished opportunities for release that are merely 'remote,' rather than 'meaningful' and 'realistic,' as required by *Graham*." *Id.* at *27.

Even with parole board guidelines requiring consideration of youth as a mitigating factor, there may still be a "two-edged sword" problem. The Supreme Court described the two-edged sword problem in *Atkins v. Virginia*, when it found the execution of a person with intellectual

[8] Graham v. Florida, 560 U.S. 48, 75 (2010); *see also Roper*, 534 U.S. at 570 ("Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.").

[9] *Graham,* 560 U.S. at 82 ("A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some *realistic opportunity* to obtain release before the end of that term.") (emphasis added).

[10] Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 388-93 (2014).

[11] *Id.* at 396-97.

[12] Maryland Restorative Justice Initiative v. Hogan, Civil Case No. ELH-16-1021, 2017 WL 467731 *26 (D. Md. Feb. 3, 2017).

disability to be unconstitutional.[13] The Court noted that while intellectual disability is a mitigating factor for culpability, juries might also view it as an aggravating factor for dangerousness.[14] For example, the demeanor of individuals with intellectual disability may be inappropriate or misinterpreted by the jury during trial and "may create an unwarranted impression of lack of remorse for their crimes" and the perception that an individual poses a future danger.[15]

The Supreme Court of Missouri described the two-edged sword problem in the case of a juvenile offender sentenced to death:

> "[A]lthough nominally under Missouri law defendants are permitted to use their youth as a mitigating factor, this case provides a graphic illustration of the fact that their youth can become a further argument against them. In closing argument in Mr. Simmons' case, the state argued that the jury should not let him use his age to protect himself because if it did so, then he "wins." The state then argued, "Think about age. Seventeen years old. Isn't that scary. Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." Thus, Mr. Simmons' youth was used to suggest greater immorality and future dangerousness and so to provide a further reason to impose the death penalty."[16]

Even with the changes in state parole procedures, there is still a risk that age is a two-edged sword. The board may perceive youth as mitigating for culpability but aggravating for predicting future dangerousness. The following section reviews the research on adolescent development that may cause people who committed crimes as juveniles to appear to be worse candidates for parole as adults.

---

[13] MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 38-56 (2018); Robert F. Schopp, *Two-Edged Swords, Dangerousness, and Expert Testimony in Capital Sentencing*, 30 LAW & PSYCHOL. REV. 57, 60 (2006).

[14] Schopp, *supra* note 13, at 60.

[15] *Atkins*, 536 U.S. at 319-321. *See also* Penry v. Lynaugh, 492 U.S. 302, 324 (1989) ("[Intellectual disability] may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."). *Id.* at 347 (Brennan, J., concurring in result) ("[A] sentencer will entirely discount an offender's retardation as a factor mitigating against imposition of a death sentence if it adopts this line of reasoning: '…[k]illers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen.'")

[16] State ex rel. Simmons v Roper, 112 S.W.3d 397, 413 (Mo. 2003). While the Supreme Court eventually upheld the ultimate result in this case, they did not apply discuss the two-edged sword application. Simmons v. Roper, 112 S.W.3d 397 (2003).

A. Adolescent Development and Criminal Behavior

Psychology and neuroscience research has found that adolescents experience many transitions including cognitive and social changes. These changes are associated with increased sensation seeking and externalizing behaviors. These changes can cause juveniles to appear to be both less culpable for their actions and more at risk of future criminal behavior.

Throughout the lifespan, the human brain is plastic, meaning neural pathways can change. The brain is most plastic during two periods: the first three years of life and adolescence.[17] Brain connectivity is influenced by experience, and adverse life consequences can influence connectivity.[18] Two parts of the brain that change the most during adolescence are the limbic system and the prefrontal cortex. The limbic system is responsible for emotion processing, social information processing, and reward appraisal. The limbic system changes early in adolescence, partly due to puberty. The changes in the limbic system are associated with adolescents becoming more emotional, more sensitive to stress, more sensitive to rewards, and more likely to engage in sensation-seeking.[19] The prefrontal cortex allows people to engage in sophisticated thinking like planning and weighing risks and rewards. This allows people to take other people's perspectives[20] and to modulate impulses, including planned action and long-term goals. During adolescence connectivity between the limbic system and the prefrontal cortex increases, which improves the

[17] LAURENCE STEINBERG, ADOLESCENCE 51-58 (11 ed., 2017); Daniel Romer, Valerie F. Reyna & Theodore D. Satterthwaite, *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 19, 19-21 (2017).

[18] JAMES GARBARINO, MILLER'S CHILDREN: WHY GIVING TEENAGE KILLERS A SECOND CHANCE MATTERS FOR ALL OF US 11-12 (2018); STEINBERG, *supra* note 17, at 54.

[19] STEINBERG, *supra* note 17, at 55-56.

[20] Sarah-Jayne Blakemore, *Avoiding Social Risk in Adolescence,* 27 CURRENT DIRECTIONS IN PSYCHOL. SCI. 116 (2018).

ability to regulate emotions.[21] The prefrontal cortex is last to mature and is not fully developed until the mid-twenties.[22]

The asynchronicity in brain maturation in adolescence, with the limbic system (reward seeking) changing before the prefrontal cortex (impulse control) is associated with increased sensation seeking.[23] Adolescence is characterized as a period when people have the accelerator, but not the brakes, meaning they are driven to take risks, but they often do not think about the consequences.[24] While there is considerable variation in the types of risks taken, most people engage in more risky behaviors during adolescence than at any other point in their lives.[25] The Supreme Court discussed these cognitive differences and concluded that adolescent offenders are less culpable for their actions than adult offenders.[26]

Adolescents also experience many social changes. During adolescence, people become closer to their friends and develop more intimate relationships.[27] Peers become an important factor in adolescents' happiness and adolescents are particularly affected by social exclusion.[28] Possibly due to the fear of social exclusion, peer pressure is an important motivator in adolescent behavior.[29]

---

[21] *Id.*

[22] STEINBERG, *supra* note 17, at 60.

[23] B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*. 28 DEVELOPMENTAL REV. 62, 63 (2008).

[24] Elizabeth Cauffman, *Arrested Development: Adolescent Development & Juvenile Justice*, TEDX TALKS (2016), https://www.youtube.com/watch?v=wUa0bIqZ0XU.

[25] JEFFREY J. HAUGAARD, PROBLEMATIC BEHAVIORS DURING ADOLESCENCE 41 (2001).

[26] Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (noting that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions." In addition, their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults), *see also* GARBARINO, *supra* note 18, at 11-15 ("For a start, teenage killers are not playing with a full deck when it comes to making good decisions and managing emotions because of their immature brains. But many of them are also playing with a *stacked* deck because of the developmental consequences of adverse life circumstances.").

[27] STEINBERG, *supra* note 17, at 127-8.

[28] STEINBERG, *supra* note 17, at 128; Sarah-Jayne Blakemore & Mills, *Is Adolescence a Sensitive Period for Sociocultural Processing?*, 65 ANNUAL REV. PSYCHOL. 187 (2014).

[29] Blakemore, *supra* note 20, at 118.

Adolescents are more likely to make decisions based on social consequences compared to health and legal consequences.[30] For example, in a simulated driving task, adolescents took the most risks when a peer was present.[31] Consistent with the research on adolescent risk taking, adolescents were more likely to take risks compared to adults.[32] The increased importance of peers can be seen in analysis of juvenile homicides. Analysis of arrests shows that adolescent homicide offenders are more likely than adult offenders to have a co-defendant.[33] This trend follows a reverse "U" shape, with a decline in the portion of co-offending following a similar path to the decline in crime overall after the adolescent years, leading many to conclude that group pressure is an important cause of adolescent crime.[34] The Supreme Court noted that social changes in adolescent development makes adolescents less culpable for their actions.[35]

While normative changes during adolescence make young people less culpable for their actions, they may also cause them to appear more dangerous than adults. Many adolescents experience externalizing problems like criminal behavior and substance abuse.[36] Criminal offending, as with all externalizing behavior, tends to increase in the teenage years and then decrease in the twenties and the rest of life.[37] This "age-crime curve" suggests that most adolescent

[30] *Id*.

[31] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 629-30 (2005).

[32] *Id*.

[33] See Franklin E. Zimring & Hannah Laqueur, *Kids, Groups, and Crime: In Defense of Conventional Wisdom*, J. RES. CRIM. & DELINQ. 403, 409-11 (2015).

[34] *Id*. at 411.

[35] Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (stating that juveniles "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure").

[36] Steinberg, *supra* note 17, at 362.

[37] ELIZABETH SCOTT & LAWRENCE STEINBERG, RETHINKING JUVENILE JUSTICE 52-55 (2008).

offenders will not continue to reoffend as adults.[38] Previous research has found that people will be lenient towards juvenile offenders compared to adult offenders, unless the crime is heinous.[39] When the crime is heinous, they will punish adolescent offenders similarly to adult offenders. The cognitive differences between juveniles and adults may cause the homicides committed by juveniles to be more impulsive, which may make those homicides seem to be more heinous. Homicides committed by adolescents are more likely than adult homicides to involve another felony, other offenders present, a firearm, and interracial encounters.[40] Most juveniles do not intend to commit murder; they intend to commit another type of crime or act of delinquency that culminates in murder.[41] Despite the fact that these murders are not intentional, felony murder often carries the same punishment as intentional murder and is seen as equally dangerous.[42]

Cognitive changes in adolescence are also likely to be associated with institutional records. The age-crime curve present in the community is also present in the criminal justice system and is likely to be exacerbated by the stressful prison environment. Adolescent offenders are likely to have worse institutional records compared to adult offenders, at least during the time that they are adolescents.[43] Differences in cognitive and social development make adolescents less well-

[38] *Id; see also* Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy,* 100 PSYCHOL. REV. 674, 675 (1993).

[39] Edie Greene & Andrew J. Evelo, *Attitudes Regarding Life Sentences for Juvenile Offenders,* 37 LAW & HUMAN BEHAV. 276, 277 (2013).

[40] Richard Block & Franklin Zimring, *Homicide in Chicago, 1965-1970*, 10 J. RES. CRIME & DELINQ. 1, 7-8 (1973); Derral Cheatwood & Kathleen J. Block, *Youth and Homicide: An Examination of the Age Factor in Criminal Homicide*, 7 JUST. Q. 265, 277-79 (1990) (comparing murders by adults and juveniles in Baltimore); Alison Roscoe, Mohammad S. Rahman, Hetal Mehta, David While, Louis Appleby & Jenny Shaw, *Comparison of a National Sample of Homicides Committed by Lone and Multiple Perpetrators*, 23 J. FORENSIC PSYCHIATRY & PSYCHOL. 510 (2012).

[41] *Id*. at 271.

[42] *See e.g.*, Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads,* 70 CORNELL L. REV. 446, 446-49 (1985).

[43] Attapol Kuanliang Jon R. Soren & Mark. D. Cunningham, *Juvenile Inmates in an Adult Prison System*, 35 CRIM. JUST. & BEHAV. 1186, 1188, 1197 (2008).

equipped to deal with the stress of prison and increase the likelihood that they will exhibit behavior problems and commit disciplinary infractions in prison.[44] A study in Florida found that rate of juvenile disciplinary infractions is 2.7 times the rate of adult infractions in adult prison.[45] As the severity of the infraction increased, the ratio of juvenile offending to adult offending also increased.[46] Increased disciplinary infractions may cause juveniles to appear to be more dangerous than adults.

While research on adolescent development caused the Supreme Court to find youth to be less culpable, the changes associated with youth are also associated with increased crime severity and worse institutional records. The next section reviews research on parole board decision making to examine the relative importance of culpability, crime severity, and institutional record in determining parole outcomes.

B. Application to Parole Decisions

Parole Boards are faced with a difficult task, especially in serious cases and in jurisdictions where they are given a lot of discretion. They have to try to predict future dangerousness, which is notoriously difficult, even for experts.[47] Most parole board members are politically appointed and fear backlash if someone they release reoffends.[48] Parole hearings generally cover the

---

[44] Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENCE TO THE CRIMINAL COURT 227 (J. Fagan & F.E. Zimring eds., 2000); Marilyn D. McShane & Frank P. Williams, III, *The Prison Adjustment of Juvenile Offenders*, 35 CRIME & DELINQ. 254 (1989) (finding that the youngest prisoners in their sample (ages 18 to 21) had the highest rates of prison misconduct and violence).

[45] Kuanliang et al., *supra* note 43, at 1193.

[46] *Id.*

[47] Barefoot v. Estelle, 463 U.S. 880, 920 (1983) ("[The American Psychiatric Association's] best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong") (Blackmun, J., dissenting) (emphasis in original); John S. Carroll, *Causal Theories of Crime and Their Effect upon Expert Parole Decisions*, 2 LAW & HUM. BEHAV. 377, 378 (1978); *see also* Robert M. Garber & Christina Maslach, *Parole Hearing: Decision or Justification?,* 1 LAW & HUMAN BEHAV. 261, 279 (1977); R. Barry Ruback & Charles H. Hopper, *Decision Making by Parole Interviewers: The Effect of Case and Interview Factors*, 10 LAW & HUMAN BEHAV. 203, 207-11 (1986).

[48] Kathryn D. Morgan & Brent Smith, *The Impact of Race on Parole Decision-Making,* 25 JUST. Q. 411, 414 (2008).

individual's criminal record and the details of the crime for which the person is seeking parole, their institutional behavior, and their plans for release.[49] Previous research finds that some or all of these factors can significantly predict parole outcomes.[50] The extent to which each variable predicts parole varies greatly across studies of different jurisdictions, years, and types of crimes.[51]

Like many states, in South Carolina all parole board members review a case summary report that includes a description of the crime, criminal record, medical history, work experience, prison and disciplinary records, risk classification reports, and statements from law enforcement, witnesses, prosecutors and the judge.[52] In order to grant release the parole board states that it must determine "that the conduct of the offender merits a lessening of the rigors of imprisonment; that the interests of society will not be impaired by granting parole; and that the offender has secured, or will be able to secure, suitable employment and residence."[53] The hearing itself involves a presentation by the person seeking parole (or their lawyer) to the Board, a limited number of statements of support, and questioning by the board members. Next, the offender is excused and those opposing parole may speak. The board deliberates immediately after the hearing and then informs interested parties of its decision. If parole is denied, the department sends a brief written

---

[49] *E.g.*, Kathryne M. Young, Debbie A. Mukamal, Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates*, 28 FED. SENT'G REP. 268, 269 (2016).

[50] Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROB. 16, 16 (2007).

[51] Vilcicia, *supra* note 57, at 1361-62.

[52] SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, POLICY AND PROCEDURE: SOUTH CAROLINA BOARD OF PAROLES AND PARDONS 21 (June 2017), https://www.dppps.sc.gov/content/download/120663/2749351/file/Parole+Board+Manual+June+7+2017.pdf ("Every file that the Department prepares for the Board's review includes, though it is not limited to, the following information: The criminal offense and a description of it; The sentencing date, the "max-out" date, the parole eligibility date, the date of any previous parole hearings, the names of any co-defendants; The offender's criminal record; The offender's prison and disciplinary records; Risk classification reports; A medical history and psychological reports, if any; A history of the offender's supervision on probation or parole, if any; The parole examiner's recommendation(s); Any statements from law enforcement; Any statement from the prosecuting witness or the prosecuting witness's next of kin, if the witness is deceased; Any statement from the solicitor or his successor; Any statement from the sentencing judge; The offender's social history; The offender's employment experience.").

[53] *Id*. at 26.

notice of denial that includes a checklist indicating which of the six official reasons for rejection applied in the case.

The relative importance to parole boards of culpability, crime severity, and institutional record varies by the boards' goals. The goals of parole boards vary by the jurisdiction and the type of sentence. For example, if the goal of the board is purely rehabilitation, the board may grant parole after a person has served a minimum sentence, so long as the institutional record is favorable and the individual has positive psychological reports.[54] In these jurisdictions, institutional records play an important role.

In other jurisdictions, especially if there is no minimum sentence, the parole board may have broader goals including retribution, rehabilitation, and incapacitation.[55] These parole boards will focus more on crime severity and culpability. Criminal record affects judgments of crime severity.[56] Parole boards consider the type of charge, with more serious charges being less likely to result in parole even after controlling for other variables that may predict future dangerousness.[57] Adolescent offenders may be worse candidates for parole if their crime is viewed as more serious, possibly reflected in multiple charges associated with the murder. In South Carolina, like many states, the parole board has complete discretion in deciding whether to grant parole.[58] The board seems to consider culpability as well as rehabilitation. The parole board describes a number of

[54] John S. Carroll & Pamela A. Burke*, Evaluation and Prediction in Expert Parole Decisions*, 17 CRIM. JUST. & BEHAV. 315, 317 (1990); Garber & Maslach, *supra* note 47, at 279.

[55] *Id.*

[56] Carroll, *supra* note 47, at 383-84.

[57] E. Rely Vilcica, *Revisiting Parole Decision Making: Testing for the Punitive Hypothesis in a Large U.S. Jurisdiction,* 62 Int'l J. Offender Therapy & Comparative Criminology 1357, 1363 (2018).

[58] *Id.*

factors it considers when weighing whether to grant a person parole.[59] Age is not one of these factors.

Parole board members' personal beliefs about the causes of crime also predict their decisions to grant parole.[60] An analysis of parole files and surveys of parole board members revealed that board members' judgments about the underlying causes of the crimes significantly predicted outcome.[61] When crimes were associated with temporary causes, such as drunkenness, rather than stable causes, like a pathological personality, parole board members were more likely to grant parole and were less likely to rate the individuals as high risk.[62] In addition, when parole board members judged the cause of the crime to be internal, such as youth or mental illness, rather than external, such as the neighborhood, family members or the economy, they were less likely to grant parole.[63]

Parole members' personal beliefs likely affect judgments about rehabilitation, culpability and incapacitation. This is consistent with public opinion surveys finding that punishment

---

[59] SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, *supra* note 52, at 26-27 ("The risk that the offender poses to the community; The nature and seriousness of the offender's offense, the circumstances surrounding that offense, and the prisoner's attitude toward it; The offender's prior criminal record and adjustment under any previous programs of supervision; The offender's attitude toward family members, the victim, and authority in general; The offender's adjustment while in confinement, including his progress in counseling, therapy, and other similar programs designed to encourage the prisoner to improve himself; The offender's employment history, including his job training and skills and his stability in the workplace; The offender's physical, mental, and emotional health; The offender's understanding of the causes of his past criminal conduct; The offender's efforts to solve his problems; The adequacy of the offender's overall parole plan, including his proposed residence and employment; The willingness of the community into which the offender will be paroled to receive that offender; The willingness of the offender's family to allow the offender, if he is paroled, to return to the family circle; The opinion of the sentencing judge, the solicitor, and local law enforcement on the offender's parole; The feelings of the victim or the victim's family, about the offender's release; Any other factors that the Board may consider relevant, including the recommendation of the parole examiner.").

[60] Carroll, *supra* note 47, at 384-85.

[61] Carroll & Burke, *supra* note 54, at 330.; John S. Carroll, Richard L. Wiener, Dan Coates, Jolene Galegher & James J. Alibrio, *Evaluation, Diagnosis, and Prediction in Parole Decision Making*, 17 LAW & SOCIETY REV. 199, 215-17 (1982).

[62] Carroll, *supra* note 47, at 381-83; Carroll et al., *supra* note 61, at 215-16.

[63] Carroll, *supra* note 47, at 382.

motivation predicts support for juvenile life without parole sentences. People with retributive, incapacitative, and deterrent motivations are more supportive of juvenile life without parole sentences compared to people with rehabilitative constructs of punishment.[64] Personal bias, like racial bias, can also affect judgments about culpability and rehabilitation.[65] Adolescent offenders may be better candidates for parole if parole board members interpret the cause of their crime to be temporary and external. If board members interpret the causes of juvenile crime to be stable, like bad character traits, they will be less likely to grant parole.

Other differences between adolescents and adults may influence parole outcomes in unexpected ways. A common finding is that people with a prior criminal record actually have better chances at parole, possibly because they are better able to navigate the system.[66] If juveniles have less experience navigating the criminal justice system compared to adults, they may be at a disadvantage. In addition, some studies have found that age at the time of the hearing significantly predicts release, with older people being more likely to be released.[67] This suggests that youthful offenders may have to serve longer sentences before they reach the age when the parole board wants to release them.[68] Most parole boards have adopted a risk assessment instruments to improve

[64] Greene & Evelo, *supra* note 39, at 282.

[65] Sandra Graham & Brain S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders,* 28 LAW & HUMAN BEHAV. 483, 491-93 (2004) (finding that when police and probation officers are primed with stereotypes associated with black people, they rate juvenile offenders as more adult-like, more culpable, more deserving of punishment, and more likely to recidivate). Research on racial disparity in parole outcomes has led to mixed results: black inmates tend to serve longer sentences before being paroled, but there is inconclusive evidence as to the effect of race on parole outcomes. Morgan & Smith, *supra* note 48, at 417-18, 431; *see also* Shamena Anwar & Hanming Fang, *Testing for Racial Prejudice in the Parole Board Release Process: Theory and Evidence,* 44 J. LEGAL STUD. 1, 28 (2015); Stephane Mechoulan & Nicolas Sahuguet, *Assessing Racial Disparities in Parole Release*, 44 J. LEGAL STUD. 39, 69 (2015) (finding no evidence of bias against African Americans in parole release in a study of parole outcomes for a variety of crimes and in multiple jurisdictions).

[66] Carroll et al., *supra* note 61, at 211-13; Vilcicia, *supra* note 57, at 1375.

[67] Carroll et al., *supra* note 61, at 208; Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of Miller v. Alabama and Graham v. Florida,* 35 CARDOZO L. REV. 1031, 1079-81 (2014).

[68] *Id.*

accuracy of forecasting future dangerousness. It is unclear to what extent age at the time of the crime may influence these results, although there have been findings of racial bias.[69]

II

METHODS

Previous research generates mixed predictions about whether juvenile offenders will receive leniency before a parole board that has complete discretion in granting parole. Few studies have examined the direct influence of age at the time of the crime.[70] Research suggests that juveniles are more likely to have worse criminal records and worse institutional records but are likely to be viewed as less culpable for their crimes. All of these factors are important in parole decisions. In order to answer these questions I examined parole board decisions in South Carolina, and the influence of age at the time of the crime on the parole outcomes. I hypothesized that juveniles will have more disciplinary infractions and more charges on the same day as the crime and that these variables will reduce their likelihood of being granted parole.

I sent FOI requests to the South Carolina Department of Probation, Parole and Pardon Services (DPPP) and the Department of Corrections (SCDC) for information on people who had a parole hearing during 2006-2016 and were serving life sentences. The timeframe allows for a comparison of parole outcomes before and after *Graham* (2010) and *Miller* (2012).

DPPP and SCDC provided information on parole hearings and outcomes, criminal records, institutional disciplinary record, and institutional work history. DPPP provided all the convictions in their database for each person fitting the criteria. SCDC provided all disciplinary infractions and work histories. This includes disciplinary infractions during prison sentences before the murder

[69] Angwin, J., Larson, J., Mattu, S., & Kirchner, L. (2016). Machine bias. ProPublica. https://www. propublica.org/article/machine-bias-risk-assessments-in-criminal- sentencing.

[70] Cohen, *supra* note 68, at 1079-81.

charge. I also requested information on participation in education and rehabilitation programs, but SCDC declined to provide this information.

After reviewing the records of the life sentences, I decided to narrow the sample to individuals convicted of murder. There were only three juveniles serving life sentences for crimes other than murder and all three were charged with kidnapping. In contrast, there were many adults sentenced to life for crimes other than murder and there was more variation in their charges. Because I predicted that the type of crime would be an important predictor of parole, I decided to narrow the sample to the most serious cases to avoid other differences between the juvenile and adult populations. The final sample included 960 people and 3941 parole hearings.

A limitation of this data is the missing data and possible errors in records. SCDC provided institutional records for 941 of 960 people in our sample (98%). The parole board also appears to be missing the institutional records for these individuals so presumably the board cannot use those records in making parole decisions.[71] DPPP cautioned us to check the records closely: research assistants coded 200 cases (21%), checked dates where possible, and have found only minor errors. This process is still ongoing. Many variables, like disciplinary infractions, cannot be verified with outside sources.

There was a discrepancy in the charges listed by DPPP and SCDC. I have chosen to rely on the DPPP's description of the criminal charges for the current paper because DPPP carefully reviews the SCDC records before parole hearings and so it is likely to be more accurate. The DPPP data, however, may underestimate the number of murder charges. DPPP listed fewer cases as murder compared to SCDC (960 and 1081, respectively). Research assistants are continuing to

[71] *See e.g.*, Brief for Appellant at, Thompson v. DPPP, 2016-000781 (S.C. App. 2016) ("The [Parole Board] uses SCDC records of Appellant's activities while incarcerated in making it's (sic) decisions. These records are now computer based and very inaccurate and incomplete in Appellant's case.").

confirm the data with external sources when possible. Future studies will analyze this data, which may include more cases.

III

RESULTS

A. Comparing Juvenile and Adult Offenders

One hundred juveniles and 960 adults were convicted of murder, sentenced to life, and had a parole hearing in 2006-2016. Table 1 presents demographic variables by age group. Consistent with the homicide arrest rates in South Carolina, the population is mostly male and black.[72] The groups did not significantly differ by gender and race.

Table 1
Demographic Variables: Race and Gender

	Juveniles (n = 100)		Adults (n = 860)		
	n	%	n	%	*p*
Race					0.35
Black	67	67%	535	62%	
Native American	0	0%	2	0.2%	
Other	1	1%	2	0.2%	
White	32	32%	321	37%	
Sex					0.08
Female	1	1%	44	5%	
Male	99	99%	816	95%	

The murders were committed between 1954 and 1995. There were missing offense dates for 11 cases, which were filled with sentencing dates. This method overestimates age at the time of the offense, as it may be years between the offense date and the sentence date. Murders were

[72] *See* NATIONAL CENTER FOR JUVENILE JUSTICE, EASY ACCESS TO SUPPLEMENTAL HOMICIDE REPORTS (last visited June 12, 2018), https://www.ojjdp.gov/ojstatbb/ezashr/asp/off_selection.asp (finding that from 1980 to 1995, black youth were 76% of youth arrested (n=485), black adults are 65% of adults arrested (n=5452). Boys were 92% of youth arrests and men are 85% of adult arrests).

committed by people between the ages of 14 and 65. By definition, juveniles were younger at the age of the crime ($M = 16.96$, $SD = 0.82$) compared to adults ($M = 27.72$, $SD = 7.91$).

In order to measure the criminal records of people in the sample at each parole hearing, I counted the number of murder convictions, the number of convictions for crimes before the murder, the number of convictions for crimes on the same day as the murder, and the number of convictions for crimes after the murder.

In order to measure the institutional records, I examined disciplinary infractions and work history. For each parole hearing, I calculated the total number of disciplinary infractions, the years since the last disciplinary infraction, the number of level 1 and 2 disciplinary infractions (more serious infractions), and the number of infractions after the age of 25 (when the brain is fully mature[73]). For work history, I calculated the longest time at one job and the current level of employment.[74]

Table 2 displays the criminal record by age group. In order to test for significance between the two groups, I conducted t-tests or chi-square tests. Juvenile offenders were significantly more likely to have concurrent charges $t\ (958) = 2.23$, $p = 0.03$. For both juveniles and adults, the most common concurrent charge was armed robbery.

Table 2
Criminal Record by Age Group at the Individual Level

	Juveniles (n = 100)		Adults (n = 860)		Significance
	M	SD	M	SD	*p*
Age at crime	16.96	0.82	27.72	7.91	< .0001
Parole hearings 2006-16	3.67	2.58	4.16	2.78	0.10
Previous offenses	0.09	0.47	0.24	1.1	0.17
Concurrent offenses	2.16	1.39	1.82	1.43	0.03
Murders	1.04	0.2	1.07	0.3	0.33

[73] *See supra* note 22 and accompanying text.

[74] SCDC has four job levels, with lower numbers being harder to achieve. People can be promoted to lower job levels and be demoted to lower levels through poor performance or disciplinary infractions.

Table 3 displays the institutional records by age group. In order to test for significance between the two groups at the parole level, I estimated GEE models with random effects of identification number. There are a number of variables that distinguish juveniles and adults. Juveniles are significantly younger at their parole hearings, and therefore have served approximately the same amount of time in prison at the time of their hearings. Juveniles also have had less time since their last disciplinary infraction and have shorter amounts of time at one job. This may be because they have had less time as adults to develop these traits that the parole board may see as evidence of stability and rehabilitation. Juveniles also have significantly more disciplinary infractions and significantly more level one and two infractions (the more serious offenses). Juveniles do not have significantly more disciplinaries from adults after they reach the age of twenty-five, when their brain is likely to be fully mature. These differences between juveniles and adults may affect their relative likelihood of being granted parole.

Table 3.
Institutional Record by Age Group at the Hearing Level

	Juveniles (n = 367)		Adults (n = 3574)		Significance
	M or n	SD or %	M or n	SD or %	*p*
Time served	27.64	6.69	27.76	6.05	0.25
Age at hearing	44.77	6.72	55.17	8.45	< .0001
Later offenses	0.49	0.94	0.58	1.39	0.54
Last disciplinary	4.77	5.23	8.42	7.6	< .0001
All disciplinaries	82.47	113.16	45.45	97.36	0.002
Level 1 and 2	26.78	44.47	12.84	32.58	0.01
Disciplinaries after 25	51.54	75.07	39.56	79.49	0.73
Longest job	4.44	2.35	6.42	3.62	< .0001
Current job level					
2	7	2%	519	15%	
3	347	95%	2976	84%	0.33
5	8	2%	55	2%	0.55
7	5	1%	7	0%	0.58

B. Examining Parole Outcomes

Overall there were 175 grants of parole (just 4% of parole hearings). Table 4 displays demographic variables by parole outcome. The hearings of juveniles offenders were significantly more likely to result in grants of parole compared to adult hearings, although percent of juvenile hearings resulting in parole was still very low (8%). There was no significant interaction between age and race in predicting parole outcome.

Table 4
Demographic Variables by Parole Outcome at the Hearing Level

	Paroled (n = 175)		Denied (n = 3766)		Significance
	n	%	n	%	*p*
Age group					0.003
Juveniles	29	8%	340	92%	
Adults	146	4%	3426	96%	
Race					0.93
People of color	108	4%	2337	96%	
White	67	4%	1429	96%	
Sex					0.65
Female	11	6%	170	94%	
Male	164	4%	3596	96%	

The comparison of parole hearings resulting in grants and denials is displayed in Table 5. I estimated GEE models to predict parole outcome by the institutional and criminal record variables. I centered age at crime, time served, age at hearing, and parole hearings. Most variables were significant, suggesting that both criminal record and institutional record play a role in parole outcomes. Variables that distinguish juveniles and adults also affect parole outcomes. For example, juveniles are more likely to have concurrent charges and the odds of getting parole multiply by 0.78 with each additional concurrent offense. Age at the time of the hearing and previous offenses were not significant predictors of parole.

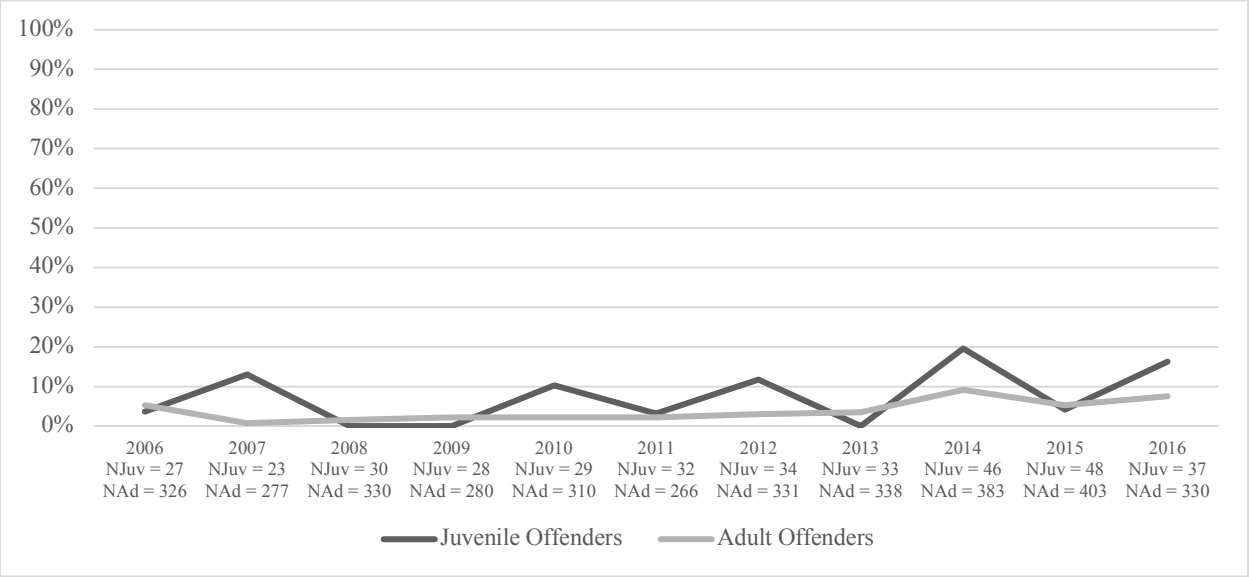
Table 5
Individual Variables Predicting Parole Outcome at the Hearing Level

	Paroled (n = 175)		Denied (n = 3766)		Significance
	M or n	SD or %	M or n	SD or %	*p*
Age at crime	25.34	8.13	26.22	7.55	<0.0001
Time served	27.58	6.24	27.76	6.11	<0.0001
Age at hearing	53.29	10.29	54.24	8.76	0.965
Parole hearings 2006-16	3.66	2.4	6.06	2.98	<0.0001
Previous offenses	0.15	0.54	0.21	0.9	0.47
Concurrent offenses	1.61	0.92	1.89	1.64	0.03
Later offenses	0.37	0.95	0.62	1.44	0.03
Murders	1.01	0.11	1.06	0.28	0.02
Last disciplinary	10.51	7.89	7.94	7.44	<0.0001
All disciplinaries	26.51	42.24	50.2	101.33	0.008
Level 1 and 2	6.56	13.62	14.6	34.82	0.008
Disciplinaries after 25	18.42	33.12	41.74	80.37	0.001
Longest job	5.68	3.41	6.26	3.57	0.04
Job level[75]					0.10
Highest	34	6%	492	94%	
Other	141	4%	3257	7%	

Figure 1 displays the percent of juvenile and adult offender hearings resulting in parole each year. The number of hearings for each group are displayed below the year. The rates of parole grants fluctuate somewhat for juvenile cases due to small cell counts, but the rates remain below 20% every year.

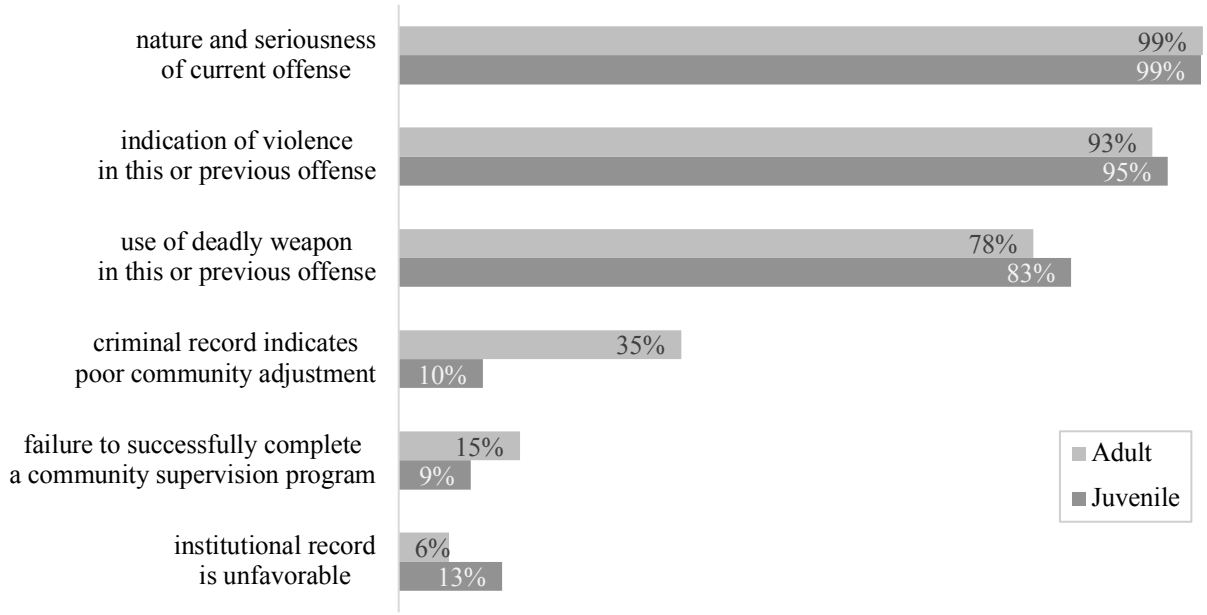
[75] I recoded job level to two categories: the best job level and the rest.

Figure 1
Percent of Hearings Resulting in Parole by Year and Age Group



Reasons for parole denial are presented in Figure 2. The first four official reasons relate to the crime or criminal record of the person seeking parole: "nature and seriousness of current offense," "indication of violence in this or previous offense," "use of a deadly weapon in this or previous offense," and "criminal record indicates poor community adjustment." Only two official reasons for denying parole relate to the institutional record: "failure to successfully complete a community supervision program" and "institutional record is unfavorable." The institutional record was rarely selected as reason for denial (13% of juvenile denials and 6% of adult denials). In the vast majority of cases, people are denied parole for the seriousness of the charge, indication of violence, and use of a deadly weapon (78 to 99%). These reasons for denial are all things individuals cannot change, suggesting their life with parole sentences may be more appropriately characterized as life *without* parole.

Figure 2.
Official Reasons for Denying Parole by Age Group



CONCLUSION

The comparison of criminal and institutional records of juvenile and adult offenders serving life sentences reveals a number of important findings. First, juvenile and adult offenders serving life sentences in South Carolina have different records when they appear before the parole board. Juveniles are more likely to have other charges on the same day as the murder, more disciplinaries, and shorter work history. These variables all distinguish people who are granted parole from people who are denied parole. Second, juvenile offender hearings are more likely to result in grants of parole compared to adult offender hearings, but still only a small portion receive parole (8%). Third, the most cited official reasons for parole denial are overwhelmingly related to characteristics of crime or previous offenses.

These preliminary findings raise the concern that these sentences are de facto life without parole. An examination of parole grant rates of people serving life sentences in California (the

majority of which are convicted of murder), found that the parole rate rose to 40% after courts prohibited parole boards from denying parole based solely on the facts of the crime unless there was a nexus between the crime and future criminal behavior.[76] In South Carolina, there is no limit to parole board's discretion to deny parole based on the crime, suggesting that many people may not be receiving a meaningful opportunity for parole because they are denied parole for things they cannot change.

While I was only able to consider criminal records, institutional work histories, and disciplinary infractions, these preliminary findings suggest that this is an important area for future research. With more information about the cases before the parole board, it would be possible to present a more complete picture of the differences between the juvenile and adult offenders when they appear before the parole board and how these differences affect parole decisions. This is an important area for future study as greater transparency can improve fairness for both people seeking parole and crime victims.

[76] Young, *supra* note 49, at 270.

CHAPTER 2

DUELING EXPERTS: THE INFLUENCE OF CRIME BELIEFS IN DIAGNOSING MILD INTELLECTUAL DISABILITY

INTRODUCTION

In *Atkins v. Virginia*, the Supreme Court identified the only situation where a clinical diagnosis prohibits someone from being sentenced to death.[1] A diagnosis of intellectual disability prohibits execution regardless of the link between the disability and the crime. This puts great importance on the accuracy and reliability of intellectual disability diagnosis. Previous research has called into question the ability of some factfinders to be impartial in mental health decisions, especially in the context of a death penalty case. There has been very little research on the ability of mental health experts to remain impartial in making intellectual disability diagnoses in death penalty cases. The present Chapter seeks to address this question. I begin by reviewing the challenges in diagnosing intellectual disability and the relevant empirical research on legal decision making. I then present a study of the influence of context and crime and punishment beliefs on intellectual disability diagnosis in a sample of people with experience with intellectual disability. Finally, I discuss the implications for the assessment of the intellectual disability diagnosis in legal contexts.

I

CHALLENGES IN DIAGNOSING INTELLECTUAL DISABILITY

The diagnosis of intellectual disability in *Atkins* claims is closely connected to the clinical

[1] Atkins v. Virginia, 536 U.S. 304, 318 (2002); MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 143 (2018).

definition. *Atkins* left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,"[2] but emphasized the importance of the clinical definition by "cit[ing] clinical definitions for intellectual disability . . . and not[ing] that the states' standards, on which the Court based its own conclusion, conform[] to those definitions."[3] After *Atkins*, states adopted varied procedures for deciding *Atkins* claims, but Supreme Court cases after *Atkins* emphasized the importance of adhering to the clinical definition. Recently, in *Moore v. Texas* and *Hall v. Florida*, the Supreme Court rejected Texas's attempts to narrow the criteria for diagnosing intellectual disability beyond the clinical definitions cited in *Atkins*. In *Moore v. Texas*, the Supreme Court rejected Texas's "Briseno factors," a list of qualities meant to be indicators of intellectual disability but not reflecting clinical consensus.[4] In *Hall v. Florida*, the Supreme Court rejected Florida's rule requiring a defendant to have an IQ score of 70 or less, because the rule ignored clinically recognized errors in measurement.[5] In *Hall* and *Moore*, the Court emphasized that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."[6]

In *Atkins*, the Court did not explicitly define intellectual disability but embraced the clinical definitions accepted by the American Association of Mental Retardation (AAMR) (now the American Association of Intellectual and Developmental Disabilities (AAIDD)) and the American

[2] Hall v. Florida, 134 S. Ct. 1986, 1999 (2014).

[3] *Atkins*, 536 U.S. at 317 (alterations in original) (quoting Ford v. Wainwright, 477 U.S. 399 (1986)); *see also* Bobby v. Bies, 556 U.S. 825, 831 (2009).

[4] Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

[5] Hall, 134 S. Ct. at 1995 ("Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.").

[6] *Id*. at 1998.

Psychiatric Association (APA).[7] Both definitions refer to substantial limitations in present functioning characterized by three prongs: deficits in intellectual functioning and adaptive functioning, and manifestation of these deficits in childhood. The Supreme Court suggested that state definitions of intellectual disability for capital cases would be "appropriate" so long as they "generally conformed" to these clinical definitions.[8]

Ambiguities in the diagnosis of intellectual disability leave room for the influence of factfinders' bias. The first prong of the clinical definition, intellectual functioning, is largely based on IQ scores. IQ scores, like a psychometric measurements, are subject to some variability. Variation may be caused by internal factors like differences in effort and environmental factors like the test setting.[9] In addition, test scores can be erroneously inflated by outdated norms or repeated testing causing practice effects.[10]

The second prong of the clinical definition of intellectual disability relates to the ways in which the intellectual deficits affect the individual's ability to function in life. This portion of the definition requires that an individual's diminished intellectual functioning involves actual impairment in the skills involved in everyday living.[11] Any person with intellectual disability will lack some basic skills and abilities that nondisabled individuals typically possess. Not every individual with intellectual disability, however, will be unable to do the *same* things. A

---

[7] *Atkins*, 536 U.S. at 309 n.3.

[8] *Id.* at 317 n.22, 309 n.3.

[9] John H. Blume, Sheri L. Johnson & Amelia C. Hritz, *The American Experience with the Categorical Ban Against Executing the Intellectually Disabled: New Frontiers and Unresolved Questions, in* VAGUENESS IN PSYCHIATRY 225-26 (Geert Keil, Lara Keuck & Rico Hauswald eds., 2017).

[10] *Id*. at 225-26; Tomoe Kanaya, Matthew H. Scullin & Stephen J. Ceci, *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society,* 58 AM. PSYCHOL. 778 (2003).

[11] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) [hereinafter DSM IV-TR]; AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002) [hereinafter AAMR 2002].

fundamental precept of the field of intellectual disability is that "[w]ithin an individual, limitations often coexist with strengths."[12] Because the mixture of skills and skill deficits varies widely among persons with intellectual disability, there is no clinically accepted list of common, ordinary skills or abilities that preclude a diagnosis of intellectual disability. This can be challenging for factfinders. It is tempting to conclude that a defendant could not be a person with intellectual disability because he was able to engage in a particular activity (such as driving a car, getting married, or holding a job), but this is at odds with the clinical understanding of intellectual disability.

An empirical study of jury pool members and mental health workers who worked with persons with intellectual disability found that jurors harbor stereotypical views about the abilities of persons with intellectual disability and often expect them to have vastly lower abilities.[13] This results in jurors being more hesitant than mental health workers to classify someone as having intellectual disability, especially when faced with evidence of the ability to form romantic relationships and operate a motor vehicle.[14] This suggests that jurors may be more likely than mental health experts to see evidence of intellectual disability as ambiguous, especially when they are motivated to come to a certain decision.

The diagnosis of intellectual disability is even more challenging when the person is in the mild range, which is generally defined as having an I.Q. score between 55 and 75.[15] Mild intellectual disability lacks a specified etiology. Individuals with mild intellectual disability often

---

[12] *Id.*

[13] Marcus T. Boccaccini, John W. Clark, Lisa Kan, Beth Caillouet & Ramona M. Noland, *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins-*Type Cases,* 34 LAW & PSYCH. REV. 1, 17 (2010).

[14] *Id.*

[15] TASSÉ & BLUME, *supra* note 1, at 114.

will not meet preconceived notions of intellectual disability.[16] They often do not have the easily identifiable characteristics that the public may associate with the disorder and they are likely to have some skills that seem to be above the cutoff for the diagnosis.[17]

Approximately 75% of people with intellectual disability fall within the mild range. Capital defendants are more likely to have mild intellectual disability. Persons who are more impaired are rarely subject to criminal proceedings: they are not likely to commit crimes due to the nature of their disability, and, if they do, they are more likely to be not competent to stand trial, to lack criminal responsibility, or to be offered a plea deal by the prosecution.[18] Unfortunately, courts often misunderstand mild intellectual disability.[19]

II

DECISION MAKING IN LEGAL CONTEXTS

In ambiguous cases, like many cases of mild intellectual disability, decision makers are more likely to be influenced by personal beliefs, especially when they are motivated to reach a certain result.[20] Empathy for the victim or a desire for retribution could motivate factfinders to avoid diagnosing intellectual disability in order to keep open the possibility of sentencing the defendant to death.[21]

---

[16] Frank M. Gresham, *Interpretation of Intelligence Test Scores in* Atkins *Cases: Conceptual and Psychometric Issues,* 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009).

[17] J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 APPLIED NEUROPSYCHOLOGY 135, 136-37 (2009).

[18] *Id.*; Blume et al., *supra* note 10, at 238-39; Gresham, *supra* note 16, at 92.

[19] *See e.g.* Moore v. Texas, 137 S. Ct. 1039, 1044 (2017); Hall v. Florida, 134 S. Ct. 1986, 1995 (2014).

[20] Kimberley S. Ackerson, Stanley L. Brodsky & Patricia A. Zapf, *Judges' and Psychologists' Assessments of Legal and Clinical Factors in Competence for Execution*, 11 PSYCHOL. PUB. POL'Y & LAW 164, 171 (2005)*;* Avani Mehta Sood, *Motivated Cognition in Legal Judgments–An Analytic Review*, 25 ANNUAL REV. L. SOCIAL SCI. 307, 308 (2013).

[21] John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Implementing (or Nullifying) Atkins?: The Impact of State Procedural Choices on Outcome in Capital Cases Where Intellectual Disability Is at Issue* 17 (Cornell Law Sch. Legal Studies Research Paper Series, Working Paper No. 2010-011, 2010), *available at* http://ssrn.com/abstract=1670108 (finding 28 jury verdicts and 216 judicial determinations regarding intellectual

In this part I review the research on the influence of crime details and attitudes towards punishment on legal decisionmaking. Most of this research focuses on jurors. Questions remain about the ability of experts to be impartial in evaluating criminal defendants in the emotional context of a death penalty case.[22] Criticism about attitudes and beliefs influencing mental health assessments are common.[23] When the evidence of intellectual disability is ambiguous, there is room for experts' opinions of the death penalty and the heinousness of the offense to affect the assessment.[24]

A. Crime Facts

Previous research on motivated cognition has found that evidence of bad acts can motivate people to punish, even when it is not relevant to the legal judgment. A defendant's bad moral character or a bad motive for a crime can motivate people to assign higher levels of blame to the defendant, even when it is not legally relevant.[25] For example, participants were more willing to allow a defendant to go free when he has been illegally searched by police if he is suspected of selling marijuana to cancer patients than if he is suspected of selling heroin to high school

disability) ("[R]isks of conflating the *Atkins* determination with the sentencing trial threaten to reduce the Court's mandate [in *Atkins*] to a paper tiger."); Peggy Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. Legis. 77, 109 (2003) (stating that juries' *Atkins* determinations "could be tainted by its consideration in conjunction with heinous crime facts and punishment evidence unrelated to the [intellectual disability] determination regarding intellectual functioning and adaptive behavior deficits");

[22] Bonnie, Dilemmas in administering the death penalty: *Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67 (1990); Stanley Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution: A Response to Bonnie,* 14 LAW & HUM. BEHAV 91 (1990).

[23] *Id.* at 290; Russell C. Petrella & Norman G. Poythress, *The Quality of Forensic Evaluations: An Interdisciplinary Study*, 51 J. CONSULTING & CLINICAL PSYCHOL. 76 (1983).

[24] *See* Mary Ann Deitchman, Wallace A. Kennedy & Jean C. Beckham, *Self-Selection Factors in the Participation of Mental Health Professionals in Competency for Execution Evaluations,* 15 LAW & HUM. BEHAV. 287, 289 (1991).

[25] Id. at 310-11.

students.[26] The type of drugs and customers are irrelevant to this decision, but they can motivate participants to see the defendant brought to justice. A similar study of psychologists and psychiatrists found that they were less likely to support an insanity defense in a mock case when the individual had a poor military and work record even though these factors did not relate to the insanity claim.[27]

Motivated cognition is also likely to influence death penalty decisions. Research by the Capital Jury Project suggests that jurors presume defendants deserve the death penalty if the evidence of their guilt is clear and unequivocal.[28] These jurors seemed to determine the sentence during the guilt phase of the trial, before hearing the mitigating evidence during the sentencing phase. Jurors may go through the same process when making the *Atkins* decision: in cases where there is strong evidence of guilt, jurors may have already decided to sentence a defendant to death before hearing their *Atkins* claim.

Unlike many laws involving insanity claims, the nexus between the defendant committing the crime unknowingly and having intellectual disability is not required by *Atkins*.[29] Evidence that the crime was committed knowingly has questionable relevance to adaptive functioning.[30] In general, criminal behavior is unreliable evidence of intellectual disability. The AAIDD Users

---

[26] Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEORGETOWN L.J. 1543, 1571 (2015).

[27] Robert J. Homant & Daniel B. Kennedy, *Subjective Factors in the Judgment of Insanity,* 14 CRIM. JUST. & BEHAV. 38, 51(1987).

[28] *Sood, supra note 26*, at 251.

[29] Evidence that the crime was planned often causes jury to reject insanity claims. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 218 (2007). One of the *Briseno* factors asked juries to consider whether the commission of the crime "require[d] forethought, planning, and complex execution of purpose." Ex parte Briseno, 135 S.W.3d 1, 8 (Tex. Crim App. 2004). The Supreme Court found that the *Briseno* factors "are [n]ot aligned with the medical community's information, . . . 'creat[e] an unacceptable risk that persons with intellectual disability will be executed,' . . . [and] may not be used . . . to restrict qualification of an individual as intellectually disabled." Moore v. Texas, 137 S. Ct. 1039, 1044 (2017) (quoting Hall v. Florida, 134 S. Ct. 1986, 1990 (2014)).

[30] Blume et al., *supra* note 21, at 17.

Guide cautions that it is improper to use past criminal behavior to diagnose intellectual disability.[31] Past criminal behavior is unreliable evidence of adaptive skills because there is often not enough information about the defendant's role in the crime. In addition, the norms regarding the criminal behavior of individuals with intellectual disability are not well researched. Despite the problems with nexus evidence, it may be an intuitive belief that motivates lay person decision making in *Atkins* cases.

In deciding *Atkins* claims, individuals may cite crime facts as evidence of higher functioning when they desire to impose the death penalty. For example, in one study, jury pool members were unlikely to find that a criminal defendant had intellectual disability unless the evidence suggested the defendant did not know what he was doing at the time of the crime.[32] Another study replicated this result and found that participants rated the defendant's behavior during the crime as the third most important factor in their *Atkins* decision.[33] When the participants were told that the defendant was involved in planning the crime with several others, very few participants found that the defendant had intellectual disability.[34]

Jurors may also be motivated by empathy for the victim and take into account crime details when assessing whether a defendant has intellectual disability.[35] In one study evidence of mild intellectual disability did not influence mock jurors' perceptions of defendant's responsibility and deviancy in serious cases (murder and assault). In contrast, mild intellectual disability did influence

---

[31] AAIDD 2007, *supra* note 11, at 22.

[32] Boccaccini et al., *supra* note 13, at 19.

[33] Lisa Kan, K. Turner, Marcus T. Boccaccini, Romona Noland & Beth Caillouet, Poster Session at the Annual Meeting of the American Psychology-Law Society: Jurors' Beliefs About Impaired Adaptive Functioning: Implications for Atkins-type Cases (March 2006) (on file with author).

[34] *Id*.

[35] *See e.g.*, Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 351-58 (2003).

their opinions in less-serious cases (shoplifting and drug offenses).[36] This finding is troubling since *Atkins* determinations are only made in serious crimes that are eligible for the death penalty.

In *Atkins*, the Court feared that the impairments associated with intellectual disability such as deficits in impulse control may cause crimes committed by people with intellectual disability to appear to be more heinous.[37] Heinous crime facts may cause jurors to fear the defendant will be dangerous in the future because of the intellectual disability. This may cause them weigh the future dangerousness against the evidence of intellectual disability.[38]

B. Attitudes Towards Punishment

The few studies that have examined mental health expert decision making in death penalty cases have focused on evaluations of competency to be executed.[39] Forensic examiners' attitudes toward capital punishment and attribution for criminal responsibility affect their decisions to participate in competency for execution evaluations[40] and their ultimate decision about whether an individual is competent.[41] This finding is also replicated in other legal judgments. A study of psychologists and psychiatrists found that people with liberal ideologies were more likely to

---

[36] Cynthia J. Najdowski, Bette L. Bottoms & Maria C. Vargas, *Jurors' Perceptions of Juvenile Defendants: The Influence of Intellectual Disability, Abuse History, and Confession Evidence.* 27 BEHAV. SCI. L. 401, 417 (2009).

[37] *Atkins*, 536 U.S. at 319-21 (stating that the demeanor of individuals with intellectual disabilities may be inappropriate or misinterpreted by the jury during trial and "may create an unwarranted impression of lack of remorse for their crimes." A perceived lack of remorse enhances the likelihood that the jury will believe that an individual poses a future danger); Penry v. Lynaugh, 492 U.S. 302, 324 (1989) ("[Intellectual disability] may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."); *see also Id.* at 347 (Brennan, J., concurring in result) ("[A] sentencer will entirely discount an offender's retardation as a factor mitigating against imposition of a death sentence if it adopts this line of reasoning: ' . . . [k]illers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen.'").

[38] Blume et al., *supra* note 21, at 17.

[39] *See e.g.*, Ackerson, et al., *supra* note 20, at 171.

[40] Deitchman, *supra* note 24, at 299.

[41] Ackerson, et al., *supra* note 20, at 171-2.

support the insanity defense in a mock case. [42]

In the context of juries, previous research has found that attitudes towards punishment, such as authoritarian beliefs, are significant predictors of decision making in death penalty cases. Much of this research seeks to understand whether the process of "death-qualifying" the jurors, or removing people who are unwilling to impose the death penalty under the law, causes the jury to be more punitive.[43] A significant body of research suggest that it does.[44] People with authoritarian beliefs tend to support the death penalty and are more likely to find a person to be guilty.

Authoritarian beliefs also affect decisions in mental health issues. People with authoritarian beliefs and are more likely to agree that "the insanity defense is a loophole."[45] Death-qualified jurors are more likely than excludable jurors to reject insanity claims in cases when the defendant had schizophrenia.[46] This study found that death-qualified and excludable jurors had similar beliefs towards insanity claims in cases when the defendant had intellectual disability. This study suggest that increased authoritarian beliefs may influence judgments in some types of mental health claims, but not necessarily intellectual disability.

III

METHODS

Based on previous research examining motivated cognition and judgments in death penalty contexts, there is reason to believe that crime details and views about *Atkins*-death ineligibility will

---

[42] Homant & Kennedy, *supra* note 27, at 49-50.

[43] Amelia Courtney Hritz, Caisa Elizabeth Royer & Valerie P. Hans, *Diminishing Support for the Death Penalty: Implications for Fair Capital Case Outcomes, in* CRIMINAL JURIES IN THE 21ST CENTURY: CONTEMPORARY CHALLENGES, PSYCHOLOGICAL SCIENCE, AND THE LAW (C. Najdowski & M. Stevenson, eds. in press).

[44] CRAIG HANEY, DEATH BY DEISGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 93 (2005).

[45] Valerie P. Hans & Dan Slater, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 401 (1986).

[46] Phoebe C. Ellsworth, Raymond M. Bukaty, Claudia L. Cowan & William C. Thompson, *The Death-Qualified Jury and the Defense of Insanity* 8 LAW & HUM. BEHAV. 81, 85 (1984).

impact mental health experts' diagnosis of intellectual disability in *Atkins* cases. Previous research has found that jurors are significantly more likely to find that a person is intellectually disabled in a disability benefits case compared to a death penalty case.[47] In the death penalty context, the heinous crime details may motivate jurors to reject the death penalty in order to preserve the possibility of the death penalty.

Unlike jurors, mental health experts may be able to remain more objective when faced with heinous crime facts. Alternatively, experts may be more motivated to diagnose the defendant as intellectual disabled in death penalty contexts in order to save the defendant from execution. This study examines the impact of attitudes and crime details on people in the field of intellectual disability. I hypothesized that attitudes toward capital punishment, criminal responsibility, and the *Atkins* decision will all affect their decisions in *Atkins* evaluations but these beliefs will not affect their decisions in benefits cases.

A. Participants

Participants were drawn from the membership list of the American Association for Intellectual and Developmental Disabilities (AAIDD). The AAIDD is "is the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities."[48] With permission from the AAIDD, I sent emails to 994 members of the AAIDD listserv requesting they complete a survey asking them to give an opinion as a mental health expert in a simulated legal case. It is unclear how many emails were successfully received, but at least 34 emails bounced. I sent three reminder emails and accepted responses during a four-week period. People who completed the study were entered into a lottery for one of five $100

[47] John Blume, Rebecca Helm, Amelia Hritz, Sheri Johnson & Jeffrey Rachlinski (manuscript in preparation).

[48] AAIDD, https://aaidd.org/about-aaidd#.Wxb-Yy_MzOQ (last visited June 5, 2018).

Amazon gift cards. Two-hundred-fourteen people opened the survey. Twenty-four people declined to participate because they were not mental health professionals. The final sample included 179 people, which is 84% of the people who opened the survey link.

B. Procedure

Participants were told that they were being hired by the court to give an independent assessment of intellectual disability. Participants were randomly assigned to read one of two vignettes about Keith Simpson, a person seeking to prove he was a person with intellectual disability in a death penalty case or a disability benefits context. Both vignettes provided the same definition of intellectual disability and the same evidence of Simpson's functioning. The vignettes were designed to present a strong case of intellectual disability, but arguments could be made for both positions. In the vignette, Simpson failed a grade in school, was in educable mentally handicapped classes for several years and in the low-functioning class for the rest of his time in the school system, and his IQ scores ranged from 83 to 69. Simpson had had three jobs, all involving manual labor. He had a driver's license, but no bank account. The vignettes included brief statements from state and defense experts who disagreed as to whether Simpson was a person with intellectual disability.

The vignettes also included facts about the underlying legal case. In the death penalty context, Simpson was charged with armed robbery and double homicide. Participants read a description of the crime, which included clear evidence of guilt (videotape footage), and aggravating facts including the murder of a child and a motive of pecuniary gain. In the disability benefits context, participants read about Simpson's experience of being fired from his job and applying for benefits. In the benefits context, participants also read about the disability benefits available to Simpson if he was diagnosed with intellectual disability including 24-hour

supervision, a job, and a supported living placement. After reading the narrative, participants and determined whether Simpson had intellectual disability and explained how they made their decision.

Participants responded to five items about their views on the death penalty, the *Atkins* decision, and giving benefits to people with intellectual disability. Participants stated whether they generally favor or oppose the death penalty for convicted murderers on a 5-point Likert scale, with 1 being designated as *Strongly Favor,* 2 as *Somewhat Favor*, 3 as *Unsure*, 4 as *Somewhat Oppose*, and 5 as *Strongly Oppose*. Next, participants responded to items encompassing attitudes towards intellectual disability in legal contexts on a 7-point Likert scale, with 1 being designated as *Agree Strongly*, 2 as *Agree Moderately*, 3 as *Agree Slightly*, 4 as *Not Sure*, 5 as *Disagree Slightly*, 6 as *Disagree Moderately*, and 7 as *Disagree Strongly*. The items included "intellectual disability isn't an excuse for a crime, at least not if the defendant is capable of telling right from wrong", "anyone with intellectual disability shouldn't be sentenced to death", "persons with intellectual disability should not be excluded from the death penalty", and "persons with intellectual disability should not be given benefits by the government." Finally, participants responded to demographic questions and questions about their experience as a mental health expert.

Three coders who were blind to everything but the explanation, coded participants' explanations of their diagnosis. Coded variables included statements about the consequences of the diagnosis, whether Simpson was acting intentionally, whether he was malingering, and the elements of an intellectual disability diagnosis (intellectual functioning, adaptive functioning, and age of onset). The interrater reliability averaged 90% across all variables. Fleiss' kappa values are displayed in Table 1.

Table 1
Qualitative Variables and Interrater Reliability

	Mentions (n = 179)	Coder Agreement	Kappa	*p*
Consequences of decision	12	0.93	0.603	< 0.00001
Acted intentionality	5	0.94	0.58	< 0.00001
Malingering	2	0.98	0.661	< 0.00001
Low intelligence but not ID	0	0.99	-0.00374	0.931
Borderline case	11	0.84	0.347	< 0.00001
Intellectual functioning	91	0.86	0.814	< 0.00001
Adaptive functioning	136	0.85	0.74	< 0.00001
Onset	32	0.77	0.534	< 0.00001
No rationale	22	0.90	0.711	< 0.00001

Note: Items were counted as mentioned when they were coded by 2 of 3 coders.

IV

RESULTS

A. Sample

Not all members of AAIDD were mental health professionals, but all had experience in the field of intellectual disability. People who completed this study included 154 mental health professionals (87%), with 0 to 60 years of experience in the field. ($M = 25.94$, $SD = 15.49$). Ninety-four respondents (53%) reported previous experience evaluating someone for intellectual disability, and 88 (49%) reported previous experience serving as an expert or a consultant in a legal case. Twenty-four participants (13%) reported no experience working as mental health professionals. The people with no mental health experience included university faculty who study intellectual disability ($n = 7$), an attorney who represents people with intellectual disability ($n = 1$), a family member of a person with intellectual disability ($n = 1$), a doctor ($n = 1$), a state agency employees ($n = 1$), a nonprofit employee ($n = 1$), and someone who was self-employed ($n = 1$). No significant difference was found between any of these variables and their decision of whether or not to diagnose Simpson as a person with intellectual disability, all ps > 0.10.

One-hundred-sixty-seven participants answered questions about demographic variables. The sample was predominantly white (96%) and female (59%), and most participants described themselves as Democrats (86%). Participants were between 23 and 93 years old ($M = 56.28$, $SD = 14.16$). Participants were from 39 different states, the most common being Illinois ($n = 14$), New York ($n = 12$), and Pennsylvania ($n = 12$).

Table 2 displays the demographic variables by ultimate decision in the intellectual disability determination. Women were significantly more likely to find Simpson to be intellectual disabled compared to men, $X^2(1,167) = 7.21$, $p = 0.007$. Democrats were significantly more likely to find intellectual disability than Republicans $X^2 (1,167) = 7.72$, $p = 0.005$. Ultimate decision did not differ by age, race or home state, all ps > 0.10.

Table 2
Summary of Demographic Variables by Intellectual Disability Determination

	Not ID		ID		
	N or M	% or SD	N or M	% or SD	p-value
Age	56.76	14.43	56.12	14.13	0.8
Gender					0.007
Male	25	36.76	43	63.24	
Female	17	17.17	82	82.82	
Political Party					0.005
Republican	12	50	12	50	
Democrat	30	20.98	113	79.02	
Race					0.82
White	41	25.62	119	74.38	
Black	1	25	3	75	
Asian	0	0	3	100	
State (n > 6)					0.16
California	2	22.22	7	77.78	
Illinois	3	21.43	11	78.57	
Massachusetts	1	10	9	90	
Minnesota	0	0	9	100	
New York	6	50	6	50	
North Carolina	1	11.11	8	88.89	
Ohio	3	33.33	6	66.67	
Pennsylvania	2	16.67	10	83.33	
Texas	4	44.44	5	55.56	

B. Crime Facts

Participants diagnosed Simpson as intellectually disabled at almost identical rates in the benefits case and the death penalty case 78% (n = 87) and 73% (n = 92), respectively, $p > 0.10$). People with experience in the field of intellectual disability may not allow the details of the crime to influence their opinion as suggested by the guidelines. Another possible explanation is that participants were equally motivated to diagnose Simpson as intellectually disabled in both cases: they may believe he should not be subjected to the death penalty and that he should receive government benefits.

An analysis of the participants' explanations for their decision helps to shed light on their motivations. Twelve people mentioned the consequences of the decision (taking the death penalty off the table or providing benefits), five people mentioned that the Simpson knew what he was doing, and two mentioned that he was (or was not) malingering. Of the 19 people who mentioned one of these explanations, all of these participants were in the death penalty context and found the person to be not intellectually disabled. This represented 100% of the people who found Simpson did not have intellectual disability in the death penalty case. This suggests that the people in this group may have been motivated by the crime details, but they were only a small portion of participants.

Most people mentioned at least one of the elements of an intellectual disability diagnosis: intellectual functioning (51%), adaptive functioning (76%), and age of onset (18%). Thirty-four people (19%) did not mention any of the elements of the diagnosis. This group included people in both the benefits (n = 18) and death penalty (n = 16) contexts, and people who diagnosed intellectual disability (n = 25) and people who did not diagnose intellectual disability (n = 9).

C. Attitudes

Most, but not all, participants opposed the death penalty (43% strongly oppose, 29% somewhat oppose). I estimated a logistic regression to predict which participants would determine that Simpson had intellectual disability based on context (murder or benefits) and attitude toward the death penalty. Results of the regression are displayed in Table 3. Beliefs about the death penalty significantly predicted the intellectual disability decision. Participants were significantly less likely to diagnose Simpson as intellectually disabled if they strongly supported the death penalty. The type of case did not significantly affect the decision. The odds of finding that Simpson was intellectually disabled were 6 to 27 times higher if participants did not strongly favor the death

penalty. Due to low cell counts in the groups strongly favoring (n = 10) and somewhat favoring (n = 23) the death penalty, the interaction of attitudes towards the death penalty and case type could not be reliably estimated.

Table 3
Logistic Regression Predicting Intellectual Disability Decision Based on Death Penalty Support

	B	SE	95% CI	OR	OR 95% CI
Death Penalty context	-0.33	0.38	-1.08, 0.40	0.72	0.34, 1.50
Death penalty support 2	3.28**	1.02	1.44, 5.55	26.55	4.24, 257.64
Death penalty support 3	2.15*	0.90	0.48, 4.07	8.59	1.61, 58.33
Death penalty support 4	1.83*	0.76	0.40, 3.48	6.23	1.50, 32.50
Death penalty support 5	2.13**	0.75	0.73, 3.75	8.39	2.08, 42.64

Note: ***$p < 0.001$, **$p < 0.01$, *$p < 0.05$

Most, but not all, participants agreed that intellectual disability was not an excuse for a crime if the defendant knew right from wrong (20% strongly agree, 28% moderately agree, 16% slightly agree). I estimated a second logistic regression to predict which participants would determine that Simpson was a person with intellectual disability based on context (murder or benefits) and belief that intellectual disability is not an excuse for a crime. Results of the regression are displayed in Table 4. "No excuse" beliefs significantly predicted the intellectual disability decision. The odds of finding that Simpson was intellectually disabled multiplied by 1.20 times as no excuse beliefs became more favorable. The type of case did not significantly affect the decision. Due to low cell counts in the not sure (n = 8) and disagree slightly (n = 11) groups, the interaction of excuse belief and case type could not be reliably estimated.

Table 4
Logistic Regression Predicting Intellectual Disability Decision Based on Belief that Intellectual Disability is Not an Excuse for a Crime

	B	SE	95% CI	OR	OR 95% CI
Death Penalty Context	-0.22	0.36	-0.92, 0.48	0.81	0.40, 1.62
No Excuse	0.18*	0.09	0.01, 0.37	1.20	1.01, 1.45

Note: *$p < 0.05$

While the beliefs tended to be similar among participants, results of the regressions suggest that attitudes predict intellectual disability diagnosis in both benefits and death penalty cases. People who strongly support the death penalty and believe that intellectual disability is no excuse for a crime are more likely to reject the intellectual disability diagnosis.

On the seven-point Likert scale, most participants fell into one of the extreme values on the remaining three attitudes questions. A majority of participants strongly agreed that anyone with intellectual disability should not be sentenced to death (61%) and disagreed strongly that persons with intellectual disability should not be excluded from the death penalty and should not be given benefits by the government (58% and 86%, respectively). These highly clustered beliefs are unsurprising given that the sample is drawn from members of the AAIDD, a group that has a history of submitting amicus curiae briefs in death penalty and disability cases.[49] Due to low cell counts in many of the cells, I could not reliably estimate whether these variables predicted diagnosis in benefits or death penalty contexts. A correlation table for the attitudes items is displayed in Table 5. All correlations are below 0.51.

[49] *Amicus Curiae Briefs*, AAIDD, http://aaidd.org/news-policy/policy/amicus-curiae-briefs#.WxcOvi_MzOQ (last visited June 5, 2018).

Table 5
Correlation Among Attitudes Questions

	1	2	3	4	5
1. Do you generally favor or oppose the death penalty for convicted murderers?	1				
2. Intellectual disability isn't an excuse for crime, at least not if the defendant is capable of telling right from wrong.	0.12	1			
3. Anyone with intellectual disability shouldn't be sentenced to death.	0.48	0.09	1		
4. Persons with intellectually disability should not be excluded from the death penalty	0.43	0.21	0.50	1	
5. Persons with intellectual disability should not be given benefits by the government.	0.26	0.13	0.21	0.03	1

CONCLUSION

The present study examined whether crime facts and attitudes towards the death penalty influenced intellectual disability diagnosis in an ambiguous case by people with experience with intellectual disability. This is relevant because most people with intellectual disability fall within the mild range, and errors in measurement and variations in adaptive skill levels can make diagnosis difficult.

Overall, participants had similar attitudes about the death penalty, the *Atkins* decision, and disability benefits. This is unsurprising given that they are all members of a group that regularly advocates for people with intellectual disability in death penalty and disability benefit cases. Despite the homogeneity of the participants, there was still evidence that attitudes influenced intellectual disability outcomes.

People who rejected the intellectual disability diagnosis in the death penalty context were the only participants who mentioned that Simpson acted intentionally and that he may have been feigning disability. This is consistent with previous research on motived cognition finding that

people find evidence to justify their beliefs and are just as certain about the accuracy of their decisions.[50] In addition, people who rejected the intellectual disability diagnosis in the death penalty context were the only participants who mentioned the consequences of the decision. It is possible that for this group, the death penalty was a motivating factor in their decision.

Personal beliefs about the death penalty and whether intellectual disability was an excuse for a crime predicted the diagnosis of intellectual disability in benefits and death penalty cases. The absence of an interaction between the case type and attitudes may have been caused by the low number of participants favoring the death penalty and feeling strongly that intellectual disability is not an excuse for a crime. Alternatively, people with those beliefs may be more punitive in both types of cases. Prior research has found that individuals who favor the death penalty tend to be more punitive, and are more likely to convict and sentence to death.[51]

Caution should be used before generalizing the results. Participants were only able to review a brief case history. In real cases they will have access to a lot of information to inform their decision.[52] In addition, the sample was drawn from one professional organization, groups with member's holding different attitudes and beliefs about the death penalty and criminal excuses are likely to generate different results. Despite these limitations, this Chapter add to the growing body of literature showing that attitudes and beliefs can play a role in legal judgments in ambiguous cases, even by people with substantial experience in the field.

[50] Sood, *supra* note 20, at 309-10.

[51] HANEY, *supra* note 44, at 106-12.

[52] See e.g. MICHAEL CHAFETZ, INTELLECTUAL DISABILITY: CIVIL AND CRIMINAL FORENSIC ISSUES 102-03 (2015).

CHAPTER 3

ATKINS CLAIMS AND THE "INNOCENCE OF THE DEATH PENALTY" EXCEPTION IN POST-CONVICTION LITIGATION

INTRODUCTION

In recent years, federal courts have rejected claims by individuals with intellectual disability who have been unconstitutionally sentenced to death when they have missed filing deadlines or improperly filed multiple petitions for habeas relief.[1] Several circuit courts have upheld these death sentences.[2] The Supreme Court, however, has never applied such strict rules in post-conviction relief unless explicitly required by law. Instead the Court typically grants exceptions when people are ineligible for the death penalty[3] or are innocent.[4]

The execution of individuals with intellectual disability is unconstitutional under *Atkins v. Virginia,* which held that the practice violates the cruel and unusual punishment clause of the Eighth Amendment.[5] In *Atkins*, the Court stated that people with intellectual disability are less culpable for their actions and cannot be the most heinous murderers.[6] "[T]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[7] Despite the categorical exception, many states have adopted procedures that make it

[1] *E.g.* In re Hill, 715 F.3d 284, 288-89 (11th Cir. 2013); In re Webster, 605 F.3d 256, 256 (5th Cir. 2010); Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997); see also PEGGY M. TOBOLOWSKY, EXCLUDING INTELLECTUALLY DISABLED OFFENDERS FROM EXECUTION: THE CONTINUING JOURNEY TO IMPLEMENT *ATKINS* 153 (2014).

[2] *E.g.*, *In re Hill*, 715 F.3d at 296; Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997).

[3] *See* Part I.

[4] *See* Part II.

[5] Atkins v. Virginia, 536 U.S. 304, 318 (2002).

[6] Atkins v. Virginia, 536 U.S. 304, 318 (2002).

[7] Hall v. Florida, 134 S. Ct. 1986, 1992-93 (2014).

virtually impossible for people to prove that they have intellectual disability.[8] If they appeal their death sentences in federal court, individuals with intellectual disability face high standards of review and gatekeeping provisions limiting the cases that the courts will hear.

The case of Warren Lee Hill illustrates the difficulties that a person with intellectual disability may have seeking post-conviction relief despite clear evidence of intellectual disability. At trial, Warren Lee Hill presented evidence of intellectual disability but was unable to meet Georgia's unusually high requirement of proof beyond a reasonable doubt.[9] After he was sentenced to death, Hill challenged the constitutionality of the statute, but he faced an even higher standard in post-conviction proceedings. After those appeals failed, Hill received new evidence: all the state's mental health experts from his original intellectual disability hearing reversed their opinions to agree that Hill had intellectual disability.[10] Finally armed with proof beyond a reasonable doubt, Hill went back to court. This time, the courts would not evaluate Hill's claim because of procedural rules. The state habeas court held that his petition was barred by res judicata because the court had already addressed his intellectual disability claim.[11] In federal court, the Eleventh Circuit held that Hill's claim was barred by a gatekeeping provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[12]

One of AEDPA's gatekeeping provisions prohibits successive petitions unless they meet two narrow exceptions: the basis for the claim could not have been discovered with due diligence

[8] See *infra* notes 36-**Error! Bookmark not defined.** and accompanying text.

[9] O.C.G.A. § 17–7–131. Georgia is the only state in the country with such a high burden of proof. Head v. Hill, 587 S.E.2d 613, 629-30 (2003) (Sears, J., dissenting).

[10] See *infra* note 97 and accompanying text.

[11] In re Hill, 715 F.3d 284, 289 (11th Cir. 2013) (describing Hill's state habeas petition).

[12] *Id.* at 288-89. Hill asked for permission to file the successive petition under 28 U.S.C. § 2244(b)(3)(A) (1996). Hill's previous federal petition was denied in *Hill v. Humphrey*. 662 F.3d 1335, 1337 (11th Cir. 2011).

and the facts "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[13] The Eleventh Circuit held that Hill's claim was procedurally barred under § 2244(b)(2)(B)(ii) because the new evidence relates to his eligibility for a death sentence, and not whether he is "guilty of the underlying offense." Before AEDPA, Hill would have been able to bring his claim under *Sawyer v. Whitley,* which allowed for successive petitions when the claims, if successful, would make individuals ineligible for the death penalty.

Imposing procedural defaults on "innocence of the death penalty" claims (where a person claims ineligibility for the death penalty), like the default imposed on Hill, is usually defended on four grounds: (1) promoting finality of judgments,[14] (2) promoting comity,[15] (3) applying AEDPA,[16] or (4) upholding AEDPA's goal of restricting post-conviction relief. The Supreme Court, however, has generally held that claims of innocence outweigh the interests finality and comity.[17] The Supreme Court likewise avoids interpreting AEDPA narrowly when it would "produce troublesome results" and "create procedural anomalies" and "close [the court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress's intent."[18]

---

[13] 28 U.S.C. § 2244(b)(2)(B) (1996).

[14] Williams v. Taylor, 529 U.S. 420, 436 (2000).

[15] *Id.*

[16] The Eleventh Circuit stated that "because the purpose of AEDPA is to greatly restrict the power of federal courts to entertain second or successive petitions, the Supreme Court has made clear that this is a narrow exception for claims that call into question the accuracy of a *guilty verdict*." In addition, the court held that because § 2244(b)(2) has two exceptions, Congress did not intend to incorporate a third exception from *Sawyer*. *In re Hill*, 715 F.3d at 296 (emphasis in original) (quoting Tyler v. Cain, 533 U.S. 656, 661-62 (2001); *see also* Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997).

[17] Schlup v. Delo, 513 U.S. 298, 322 (1995) (internal quotations omitted).

[18] Castro v. United States, 540 U.S. 375, 380 (2003); Panetti v. Quarterman, 551 U.S. 930, 946 (2007); Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998).

Allowing individuals to bypass gatekeeping provisions when their claims relate to innocence of the death penalty is consistent with the Court's general interpretation of AEDPA.[19] Habeas courts historically have the capacity to ensure people are not confined in violation of their rights, and the Supreme Court has been willing to apply a less-than-strict construction of AEDPA to avoid procedural defaults in innocence cases. In *Holland v. Florida*, the Court noted that it would "not construe a statute to displace courts' traditional equitable authority absent the clearest command."[20]

These precedents should similarly protect people with intellectual disability who have been sentenced to death. That is especially so because many states have been hostile to *Atkins* claims and have adopted procedures that make it virtually impossible for people to prove that they have intellectual disability.[21] Federal courts are the last resort to ensure that people with intellectual disability are not unjustly executed.[22]

This Chapter will begin (in Part I) by showing how difficult it can be for an individual with intellectual disability to prove that claim in state court. I briefly describe the requirements for death eligibility and the Supreme Court's categorical exemption in *Atkins*. Part II will then explain the various ways the innocence exception has been preserved in habeas corpus cases, despite the

---

[19] *See* Thompson v. Calderon, 151 F.3d 918, 924 & n. 4 (9th Cir. 1998) *as amended* (July 13, 1998) (en banc) ("We disagree with the Seventh and Eleventh Circuit decisions rejecting a petitioner's claim of innocence of the death penalty as not cognizable under § 2244(b)(2)(B)"); *see also* Frazier v. Jenkins, 770 F.3d 485, 497 (6th Cir. 2014) (applying *Sawyer* to an AEDPA claim); Sasser v. Norris, 553 F.3d 1121, 1125–26 (8th Cir. 2009), *abrogated on other grounds,* Wood v. Milyard, 132 S. Ct. 1826, 1834, (2012) (same); In re Webster, 605 F.3d 256, 256 (5th Cir. 2010); *but see* Rocha v. Thaler, 626 F.3d 815, 818–19 (5th Cir. 2010) (stating in dicta that "[A] claim of actual innocence of the death penalty under *Sawyer* is not itself a claim for relief under [AEDPA]. It is a gateway claim that, if successful, authorizes a federal court to review the merits of a habeas claim that would otherwise be procedurally barred").

[20] Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). (internal quotations omitted).

[21] See *infra* notes 36-**Error! Bookmark not defined.** and accompanying text.

[22] *In re Hill*, 715 F.3d at 302 (Barkett, J., dissenting) (noted that interpreting AEDPA narrowly would lead to the "[t]he perverse consequence . . . that a federal court must acquiesce to, even condone, a state's insistence on carrying out the unconstitutional execution of a mentally retarded person."). Hill was executed in January 2015, even though all mental health experts from his 2000 trial agree that he is intellectually disabled.

restrictions created by AEDPA. I show how AEDPA has not altered habeas courts' equitable authority and obligation to protect individual rights. In the process, I will summarize the complex AEDPA doctrine and I will explain why AEDPA cannot be interpreted broadly to overturn Supreme Court precedent. Part III will discuss the justifications offered for restricting the innocence of the death penalty exception and explain why those justifications are unsound.

In Part IV, I present psychological literature highlighting the difficulty of proving intellectual disability claims in post-conviction relief. This literature distinguishes *Atkins* claims from other forms of innocence of the death penalty and raises questions about the appropriateness of applying a high standard of review to *Atkins* claims. This suggests that the clear and convincing evidence standard applied in other innocence of the death penalty claims in too high because mental illness can almost never be diagnosed to a high level of certainty despite advances in psychiatric diagnosis. In addition, the high standard is disproportionate to state interests because the evidence is unlikely to decay and relief would not burden the state with a new trial. I conclude that the standard of proof in post-conviction relief ought to be lowered in claims of intellectual disability.

I.

INTELLECTUAL DISABILITY AND THE DEATH PENALTY

When the Supreme Court readdressed the death penalty in 1976, the Court made clear that death sentences must be reserved for the worst of the worst: the most heinous murderers and the most atrocious murders, otherwise the death penalty is an excessive sanction.[23] States must guide a factfinder's discretion in sentencing to limit the risk of arbitrariness. In addition, states must

[23] *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

allow for factfinders to consider individualized factors in selecting a sentence.[24] States guided factfinder discretion by adopting narrowing factors to limit the people who are eligible for the death penalty. For example, Georgia defined a narrow category of crimes eligible for death sentences[25] and required a jury to find at least one of ten statutory aggravating factors beyond a reasonable doubt before the defendant could be eligible for the death penalty.[26] Once a defendant is eligible for a death sentence, the factfinder must perform an individualized consideration and weigh aggravating and mitigating factors to decide whether to sentence the defendant to death.[27] Now, unlike other criminal cases, in a death penalty case, there are three decisions: guilt, death eligibility, and sentence.

In *Atkins v. Virginia*, the Supreme Court held that executing individuals with intellectual disability is inherently excessive because they cannot have the extreme culpability that would make them deserving of the most serious punishment.[28] In reaffirming this decision in *Hall*, the Supreme Court noted that "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[29] Individuals with intellectual disability have diminished capacity to understand and process information, to communicate, to learn from mistakes and experience, to engage in logical reasoning, to control impulses and to understand the reactions of others.[30] Their diminished capacity reduces the retributive and

---

[24] *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

[25] The crimes were murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason and aircraft hijacking. *Gregg*, 428 U.S. 153.

[26] *Id. at* 153.

[27] Lockett v. Ohio*,* 438 U.S. 586, 604 (1978).

[28] Atkins v. Virginia, 536 U.S. 304, 318 (2002).

[29] Hall v. Florida, 134 S. Ct. 1986, 1992-93 (2014).

[30] *Id.* at 320 ("[Their diminished ability to] process information, to learn from experience, to engage in logical reasoning, or to control impulses ... make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.")

deterrent impact of capital punishment: it reduces moral culpability and makes it less likely that they will be able to "make the calculated judgments that are the premise for the deterrence rationale."[31] Their diminished capacity also increases the risk of wrongful conviction and execution because they have reduced ability to assist counsel, because their demeanor may be misinterpreted, and because their disability may make them appear to be more dangerous.[32]

In *Atkins*, the Court did not explicitly define intellectual disability but embraced the clinical definitions accepted by the American Association on Mental Retardation (AAMR) (now the American Association on Intellectual and Developmental Disabilities (AAIDD)) and the American Psychiatric Association (APA).[33] Both definitions refer to substantial limitations in present functioning characterized by three requirements: deficits in intellectual functioning, deficits in adaptive functioning, and manifestation of these deficits in childhood. *Atkins* left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,"[34] but also "cited clinical definitions for intellectual disability . . . and noted that the states' standards, on which the Court based its own conclusion, conformed to those definitions."[35]

A few states have interpreted *Atkins* as granting license to states to create their own definitions and procedures for determining who meets the national consensus for being cruel and unusual to execute. Texas added requirements to their definition of intellectual disability that

---

[31] *Hall*, 134 S. Ct. at 1992–93 (quoting *Atkins*, 536 U.S. at 319).

[32] *Id.*

[33] *Atkins*, 536 U.S. at 309 n.3; *see also* MARC J. TASSÉ & JOHN H. BLUME, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 42 (2018).

[34] *Hall*, 134 S. Ct. at 1999.

[35] *Atkins*, 536 U.S. at 317 (alterations in original) (quoting Ford v. Wainwright, 477 U.S. 399 (1986)); *see also Bobby v. Bies,* 556 U.S. 825, 831 (2009).

deviate markedly from accepted clinical definitions and practices.[36] Florida adopted a strict cutoff for IQ scores, ignoring common errors in measurement.[37] Georgia adopted a high burden of proof, requiring proof of intellectual disability beyond a reasonable doubt.[38] These procedures make it virtually impossible for claimants to prove they have intellectual disability.

The case of Warren Lee Hill illustrates how an individual with intellectual disability can have trouble proving it in a capital case despite significant evidence. Hill was charged with capital murder in Georgia after he killed Handspike, a fellow inmate, who had been acting increasingly aggressive and making sexual advances towards him.[39] Hill was often victimized by other inmates because of his obvious deficits in decision-making and interpersonal skills.[40] Hill was unable to cope with the stress and reacted violently to Handspike's threats. Hill was convicted and sentenced to death, and the state court affirmed his sentence on direct appeal.[41] In 1996, Hill filed a state habeas petition alleging that he had intellectual disability and therefore could not be sentenced to death under Georgia law.[42] Georgia follows a three prong definition of intellectual disability consistent with the APA and AAIDD.[43] Hill succeeded in proving beyond a reasonable doubt that he had significantly sub-average intellectual functioning based on his IQ scores ranging from 69 to 77.[44] Hill was unable to prove beyond a reasonable doubt, however, that he had significant

---

[36] Moore v. Texas, 137 S. Ct. 1039, 1044 (2017).

[37] Hall v. Florida, 134 S. Ct. 1986, 1995 (2014).

[38] O.C.G.A. § 17–7–131. Georgia is the only state in the country to require such a high burden of proof. *See also* Head v. Hill, 587 S.E.2d 613, 629-30 (2003) (Sears, J., dissenting).

[39] *See* In re Hill, 715 F.3d 284, 285 (11th Cir. 2013).

[40] Petition for Writ of Habeas Corpus by a Person in State Custody at 6-7, Hill v. Schofield (M.D. Ga. Oct. 5, 2004) (No. 1:04-cv-00151) [hereinafter Hill State Habeas Brief].

[41] Hill v. State, 427 S.E.2d 770 (1993).

[42] *In re Hill*, 715 F.3d. at 285-86.

[43] *Id*. at 286; Hill v. Humphrey, 662 F.3d 1335, 1338 (11th Cir. 2011).

[44] *In re Hill*, 715 F.3d at 286.

deficits in adaptive behavior. The state habeas court found that there was doubt that Hill had intellectual disability "only because there was no unanimity of opinion by the experts. . . . Georgia limited [*Atkins* relief] to only those individuals who could establish mental retardation beyond any reasonable doubt, a standard that cannot be met when experts are able to formulate even the slightest basis for disagreement."[45] The state habeas court stated that it would have found Hill to be intellectually disabled under a preponderance of evidence standard.[46]

Recently, in *Moore v. Texas* and *Hall v. Florida*, the Supreme Court rejected states' attempts to narrow the criteria for diagnosing intellectual disability beyond the AAIDD and APA definitions because it risks exclusion of individuals who fall within the class protected by *Atkins*.[47] These decisions emphasize that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection."[48] Despite the *Atkins* Court's clear mandate, states like Georgia make it virtually impossible for a defendant to prove that he has intellectual disability. Thus, habeas courts have an important role in reviewing the constitutionality of these convictions.[49]

---

[45] *Hill*, 662 F.3d at 1374-75 (Barkett, J., dissenting).

[46] Hill State Habeas Brief at 12.

[47] In *Moore v. Texas*, the Supreme Court rejected Texas's *Briseno* factors which were meant to be indicators of intellectual disability but did not reflect clinical consensus. 137 S. Ct. 1039, 1044 (2017). In *Hall v. Florida*, the Supreme Court rejected Florida's rigid rule that required a defendant have an IQ score of 70 or less because it ignored clinically recognized errors in measurement. Hall v. Florida, 134 S. Ct. 1986, 1995 (2014) ("Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.").

[48] *Hall*, 134 S. Ct. at 1998; *see also In re Hill*, 777 F.3d at 1227-29 (Martin, J., dissenting) ("I read *Hall* as a paradigm shift in the basic assumptions about how much discretion states have to define intellectual disability *and* to craft procedures to enforce the Eighth and Fourteenth Amendments' prohibition against executing people who are intellectually disabled.") (emphasis in original).

[49] Brown v. Allen, 344 U.S. 443, 511, (1953) ("Equally am I aware that misuse of legal procedures, whereby the administration of criminal justice is too often rendered leaden-footed, is one of the disturbing features about American criminal justice.").

II.

HABEAS CORPUS AS AN EQUITABLE REMEDY

Habeas corpus plays an important role in ensuring that people who are in custody illegally have a remedy.[50] For years, courts have struggled to balance making the remedy available without opening the floodgates to unmeritorious claims.[51] One procedure to direct state prisoners to state court is the exhaustion requirement. If state prisoners do not properly bring their claim to state court first (and exhaust the state remedies), then their claim will be procedurally defaulted and cannot be litigated in federal court. Exhaustion also promotes federalism and comity because it avoids federal courts meddling in state law. In *Brown v. Allen*, Justice Frankfurter emphasized that "a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the states." In concurrence, Justice Jackson echoed this concern and noted that if procedures are relaxed to allow more habeas claims, the success of the meritorious claims could also be jeopardized.[52]

At the same time, a distrust for state courts prompted a need for federal courts to review questions of federal constitutional and statutory rights in state convictions. Justice Frankfurter noted that even the highest state courts had failed to give adequate protection to federal constitutional rights, and so a constitutional claim should be available in a habeas petition even if it had been fully litigated in state court. Justice Frankfurter noted that "[f]or surely it is an abuse

[50] Fay v. Noia, 372 U.S. 391, 401-02 (1963) ("For [habeas corpus's] function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints.").

[51] *Brown*, 344 U.S. at 498.

[52] *Id*. at 537 (Jackson, J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.")

to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy."[53] After balancing these interests, *Brown v. Allen* held that federal constitutional questions could be brought to federal court on habeas corpus even if fully and fairly litigated in the state courts, but the federal court must take account of state court proceedings. In an influential article, Professor Paul Bator echoed Justice Frankfurter's comment on the importance of the finality of state verdicts in enforcing the criminal justice system.[54] Bator also emphasized the friction that habeas creates between state and federal courts. Bator criticized *Brown v. Allen* for not protecting states' finality interests enough[55] and opening federal court dockets to frivolous habeas cases.[56]

Notwithstanding Bator's criticism, in *Fay v. Noia*, the Supreme Court reaffirmed the importance of allowing state prisoners to bring federal constitutional claims in federal court. The Court noted that "habeas corpus has traditionally been regarded as governed by equitable principles."[57] In outlining the restrictions of the exhaustion requirement, the Court held that a federal judge may deny a writ of habeas corpus to an applicant who has deliberately bypassed state courts. It was difficult, however, to show that a petitioner had deliberately bypassed state courts; indeed Fay himself intentionally avoided state court because he feared that if he a new trial and was convicted a second time the state court judge would sentence him to death.[58] This indicated a

---

[53] *Id*. at 499.

[54] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 462 (1963).

[55] *Id*. at 504 ("[T]he resentment among state law-enforcement officials and judges, many of them, surely, as conscientious in their adherence to the Constitution and as intellectually honest as their critics, counsels, not against the jurisdiction, but against its indiscriminate expansion without principled justification).

[56] *Id*. at 507 ("We should not encourage the flow of petitions by expanding the jurisdiction unless there is a felt need for such expansion.").

[57] Fay v. Noia, 372 U.S. 391, 438 (1963).

[58] *Id*. ("The gist of [Noia's] lawyer's testimony was that Noia was . . . motivated not to appeal by fear that if successful he might get the death sentence if convicted on a retrial.").

strong presumption that procedural defaults would not bar federal habeas corpus review.

After *Fay*, however, the trajectory of habeas corpus law emphasized states' criminal justice interest in convictions, and made it increasingly more difficult for prisoners to successfully file habeas claims. In *Wainwright v. Sykes*, the Supreme Court tightened the procedural default standard to allow a petitioner to raise a matter not previously litigated in state court only if there was proof of good cause for the omission and a prejudice to not being able to raise the issue pursuant to habeas corpus.[59] While *Faye* emphasized the importance of giving individuals the right to have their federal claims heard in federal court, under *Wainwright* the rights of states outweighed the rights of the individual. Even though the Court emphasized states' rights, it found a cause and prejudice exception in the equitable discretion of habeas courts to see that constitutional errors do not result in incarceration of innocent people.[60] This recognizes that "in appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration."[61]

The Court has extended the cause and prejudice requirement to federal petitions with the same claims as previous petitions (called successive petitions),[62] new claims not raised in a previous federal petition (called abusive petitions),[63] or claims that were not heard in state court because a petitioner violated a state procedural rule.[64] Like exhaustion, these rules promote finality of verdicts and efficiency. These obstacles, however, create a risk that people in prison, often

[59] Wainwright v. Sykes, 433 U.S. 72 (1977).

[60] Schlup v. Delo, 513 U.S. 298, 319 (1995) ("This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata.").

[61] Murray v. Carrier, 477 U.S. 478, 495 (1986).

[62] Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[63] McCleskey v. Zant, 499 U.S. 467 (1991).

[64] *Murray*, 477 U.S. at 478.

representing themselves, cannot bring their claims before the court when they violate a state procedural rule or do not include important constitutional claims on their first petition.

If petitioners cannot show cause and prejudice, they may still be able to present their federal claims to a federal court if they can show that without the exception there would be a fundamental miscarriage of justice.[65] The Supreme Court noted that the exception is still available even though the origin of the exception was language that was removed from the federal habeas statute in 1966.[66] The Court reached this conclusion after weighing the state's interests in finality and enforcing its criminal justice system against the prisoner's "powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated."[67]

Traditionally, a miscarriage of justice was any criminal conviction or sentence obtained in violation of a constitutional right. Like the narrowing of habeas in other areas, the Court narrowed the miscarriage of justice exception to when the individual is actually innocent of the crime.[68] The court narrowed the exception for the same reason it narrowed habeas in other areas: to "accommodate[] both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case."[69]

In *Murray v. Carrier*, the Court held that a petitioner can show innocence when a

---

[65] *Kuhlmann*, 477 U.S. at 448.

[66] *See* Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (describing the origin of the miscarriage of justice exception: "the language of the federal habeas statute, which, prior to 1966, allowed successive claims to be denied without a hearing if the judges were 'satisfied that the *ends of justice will not be served by such inquiry*.'") (quoting *Kuhlmann,* 477 U.S., at 448 (alterations in original)). "[D]espite the removal of this statutory language from 28 U.S.C. § 2244(b) in 1966, the miscarriage of justice exception [allows] successive claims to be heard if the petitioner establishes that under the probative evidence he has a colorable claim of factual innocence." *Id.* (internal quotations removed).

[67] *Kuhlmann*, 477 U.S. at 452.

[68] *Sawyer*, 505 U.S. at 352 (Blackmun, J., concurring) ("In a trio of 1986 decisions . . . the Court ignored . . . traditional teachings and, out of a purported concern for state sovereignty, for the preservation of state resources, and for the finality of state-court judgments, shifted the focus of federal habeas review of procedurally defaulted, successive, or abusive claims away from the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt.").

[69] Schlup v. Delo, 513 U.S. 298, 322 (1995) (internal quotations omitted).

constitutional violation "probably has caused the conviction of one innocent of the crime."[70] In *Kuhlman v. Wilson,* the Court elaborated that a petitioner establishes "actual innocence" by providing a "colorable claim of factual innocence."[71] For example, "another person has credibly confessed to the crime, and it is evident that the law has made a mistake."[72]

In *Sawyer v. Whitley*, the Supreme Court extended the innocence exception to death ineligibility. Death eligibility is determined by state law and includes a showing that "there was no aggravating circumstance or that some other condition of eligibility had not been met."[73] For example, Louisiana law makes people eligible for the death penalty when they are convicted of first-degree murder and guilty of at least one statutory-aggravating factor. Therefore, to show innocence of the death penalty, *Sawyer* would have had to refute either the charge of first-degree murder (an intentional killing while in the commission of aggravated arson), or the two aggravating factors: arson and heinous, atrocious or cruel murder, which he could not do.[74] *Sawyer's* "innocence of the death penalty" exception requires a higher showing than innocence of the crime. A petitioner can demonstrate "innocence of death" by showing with clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law.[75] After *Sawyer*, in *Schlup v. Delo*, the Court reaffirmed *Murray*'s more forgiving "probably resulted" standard for claims of actual innocence rather than

[70] 477 U.S. 478, 496 (1986).

[71] *Kuhlmann*, 477 U.S. at 494-55.

[72] *Sawyer*, 505 U.S. at 340–41.

[73] *Id.* at 344–45.

[74] *Id*.

[75] *Id.* at 341. The *Sawyer* Court did not limit innocence to the elements of the capital offense, and did not extend innocence to the existence of aggravating and mitigating evidence that bore on the discretionary decision to select the death penalty. *Id.* at 343. Instead, the *Sawyer* Court chose the middle ground: focusing on death eligibility because it is a similar type of inquiry to innocence of a crime: it is "confined by the statutory definitions to a relatively obvious class of relevant evidence." *Id.* at 347.

adopt the *Sawyer* standard for all innocence claims.[76]

Warren Lee Hill would have been able to present new evidence of intellectual disability to prove death ineligibility under *Sawyer*. The *Sawyer* exception, as well as the cause and prejudice and other miscarriage of justice exceptions are gateways that allow petitioners to present in federal court other constitutional claims, like prosecutorial misconduct or ineffectiveness of counsel. Meeting the *Sawyer* threshold does not afford petitioners relief, they must also prove their constitutional claims.[77] Thus, after making the *Sawyer* claim, Hill would still have had to prove a constitutional violation.[78]

In addition to the innocence gateway claims, habeas petitioners have also attempted to present freestanding innocence claims. For example, in *Herrera v. Collins*, the petitioner did not present another constitutional claim, but instead stated that even if his trial was error-free, his claim of innocence rendered his execution a "constitutionally intolerable event."[79] In this case, innocence was not a gateway to overcome the procedural default of another constitutional claim, but its own freestanding claim. The execution of an innocent person violates substantive due process because it shocks the conscious, and is "perilously close to simple murder."[80] The challenge with this type of claim is that it allows judges to change the outcome based solely on their own assessment of the evidence. The Supreme Court has not yet resolved whether "freestanding innocence" claims are a

[76] Schlup v. Delo, 513 U.S. 298, 324 (1995) ("We conclude that *Carrier,* rather than *Sawyer,* properly strikes that balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime).

[77] *Id.* at 315-16 ("[T]he evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial.") (emphasis in original).

[78] *See* Strickland v. Washington, 466 U.S. 668 (1984) (ineffectiveness of his counsel); Brady v. Maryland, 373 U.S. 83 (1963) (withholding of evidence by the prosecution).

[79] Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring).

[80] *Id*. at 446 (Blackmun, J., dissenting).

ground for federal relief.[81] In her concurrence, Justice O'Connor suggested in dicta that a truly persuasive demonstration of "actual innocence" should render an execution unconstitutional, regardless of any violation at trial.[82] She stated that if there were such a claim, it would be appropriate to apply an extraordinarily high standard of review because the constitution already afforded the petitioner a "full panoply of protections."[83] Four justices in dissent believed that there is a free-standing constitutional claim. The execution of someone who is ineligible for the death penalty would similarly be an unconstitutional event.[84] In Warren Lee Hill's successive habeas claim, Judge Barkett would have held that a freestanding death ineligibility exception falls under the miscarriage of justice exception.[85]

III

INNOCENCE EXCEPTIONS AFTER AEDPA

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which further restricted the availability of habeas corpus in order to advance the principles of comity, finality, and federalism.[86] AEDPA provided for great deference to the fact finding of state trials courts. For example, Warren Lee Hill filled an AEDPA § 2254 petition that claimed that he was ineligible for the death penalty under *Atkins* because he was a person with intellectual disability and that Georgia's beyond a reasonable doubt standard created an unconstitutional risk

[81] *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013).

[82] *Herrera*, 506 U.S. at 417.

[83] *Id*. at 426 (O'Connor, J., concurring).

[84] Hill v. Anderson, 2014 WL 2890416, at *57 (N.D. Ohio June 25, 2014) (rejecting the claim that Hill is actually innocent of the death penalty because he is intellectually disabled, finding that the Supreme Court has never found that a free standing actual innocence claim is cognizable on federal habeas review, and the Sixth Circuit has held that such a claim is not a valid ground for habeas relief).

[85] In re Hill, 715 F.3d 284, 302 (11th Cir. 2013) (Barkett, J., dissenting) ("I see no reason not to accord the same consideration to one who has a freestanding claim that he is, in fact and in law, categorically exempt from execution.").

[86] Williams v. Taylor, 529 U.S. 420, 436 (2000).

that a person with intellectual disability would be executed.[87] Under AEDPA, federal courts can only grant relief where the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[88] Applying this highly-deferential standard, the federal district court could not find that Georgia's beyond a reasonable doubt standard violated *Atkins.*[89] The Eleventh Circuit reversed, but then affirmed on rehearing *en banc*, noting that "AEDPA mandates that this federal court leave the Georgia Supreme Court decision alone—even if we believe it incorrect or unwise."[90]

AEDPA also added procedural barriers to bringing habeas petitions. It added a one-year statute of limitations,[91] broadened the exhaustion requirement,[92] generally prohibited successive habeas petitions with few exceptions,[93] and narrowed the scope of habeas petitions to state court determinations that were contrary to or involving unreasonable application of clearly established federal law as determined by the Supreme Court.[94] Under AEDPA, a petitioner may overcome the

---

[87] Hill v. Humphrey, 662 F.3d 1335, 1337 (11th Cir. 2011).

[88] 28 U.S.C. § 2254(d)(1) (1996).

[89] *See Hill,* 662 F.3d at 1342. The Eleventh Circuit interpreted *Atkins* as granting considerable discretion to the states in developing procedures for deciding *Atkins* claims. *Id*. *See also* Bobby v. Bies, 556 U.S. 825, 831 (2009) ("Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins*' compass. We left to the States the task of developing appropriate ways to enforce the constitutional restriction.") (internal quotations omitted). The Supreme Court has since made clear that this discretion is not "unfettered." Hall v. Florida, 134 S. Ct. 1986, 1998 (2014) ("[T[he 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.").

[90] *Hill*, 662 F.3d at 1433, 1360-61.

[91] 28 U.S.C. § 2244(d) (1996).

[92] Section 2254(b) states that a claim is exhausted when it has actually fairly been presented to state courts or the claim has not been presented to state courts and state law now forecloses possibility of presenting it, either because there is no available state process or the process does not effectively protect the rights of an individual.

[93] Section 2244(b) states that in a successive habeas petition, a claim that was presented before shall be dismissed, and a claim that was not presented before shall be dismissed unless the claim relies on a new rule made retroactive by the Supreme Court or the facts were not available before and the facts are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

[94] 28 U.S.C. § 2254(d) (1996).

default of a successive petition by demonstrating that the factual predicate for claim could not have been discovered previously through due diligence, and the factual predicate would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found claimant guilty of the underlying offense.[95] This is the higher standard articulated in *Sawyer*, rather than the "probable" standard from *Schlup.*

Some courts have interpreted AEDPA as overruling *Sawyer*.[96] For example, Hill attempted to file a successive petition after the mental health experts changed their opinion to unanimously agree that Hill had intellectual disability,[97] but the Eleventh Circuit held that Hill's claim was procedurally barred under § 2244(b)(2) because the new evidence relates to his eligibility for a death sentence, and not whether he is "guilty of the underlying offense" as required by § 2244(b)(2)(B)(ii). The Eleventh Circuit noted that AEDPA meant to greatly restrict federal courts' power to entertain successive petitions. In addition, because § 2244(b)(2) already includes two exceptions, Congress must not have intended to incorporate the additional *Sawyer* exception for death ineligibility claims.[98]

The interpretation of AEDPA as overruling *Sawyer* is inconsistent with the Supreme Court's habeas jurisprudence and leads to unconstitutional executions. Despite AEDPA's

[95] 28 U.S.C. § 2244(b)(2) (1996).

[96] *See supra* note 16 and accompanying text.

[97] After his first federal habeas petition, all mental health experts from Hill's 2000 trial reversed their opinions, agreeing that Hill had intellectual disability. In re Hill, 715 F.3d 284, 288-89 (11th Cir. 2013). One of the state's doctors, Dr. Thomas Sachy stated that his earlier conclusion that Hill was not intellectually disabled was unreliable because of Dr. Sachy's "lack of experience at the time." *Id.* (quoting Dr. Thomas Sachy Aff.). After reading about Hill's scheduled execution, Dr. Sachy contacted Hill's attorney because he was concerned about his earlier opinion. Dr. Sachy reexamined the evidence, and based on his additional experience practicing psychiatry and conducting research in the field, he could no longer conclude that Hill was malingering during the 2000 evaluation and Hill's Naval records were "inconsistent with mild mental retardation." *Id.* The two other state doctors, Drs. Donald Harris and James Gary Carter, also reviewed the records and reversed their opinions. This meant that all the mental health experts from Mr. Hill's trial believed that Hill is intellectually disabled. *Id*. at 288-89.

[98] *Id*. at 296.

increased restrictions on habeas petitions, the Supreme Court has continued to apply equitable remedies unless Congress explicitly said otherwise. For example, in *Holland v. Florida*, the Supreme Court allowed a petitioner to overcome the statute of limitations by providing for equitable tolling when the circumstances were extraordinary and the petitioner was diligent.[99] Even though AEDPA does not explicitly incorporate equitable tolling in the statute, the Court noted that habeas corpus is an equitable remedy, and therefore it must be flexible. More specifically, AEDPA's statute of limitation "is not 'jurisdictional," and "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling.'"[100]

In *Holland*, the Court noted that it would "not construe a statute to displace courts' traditional equitable authority absent the clearest command."[101] If Congress intends that it's legislation should change a court ruling, Congress must make that intent specific.[102] Even though Congress did not adopt the exact language of the miscarriage of justice exception, for example by stating "actual innocence" instead of "guilt of the underlying offense,"[103] it does not mean that Congress clearly overruled *Sawyer.* The Court in *Sawyer* noted that the miscarriage of justice exception continued to apply even though it had been removed from the habeas statute.[104] The legislative history also does not show clear intent to overrule *Sawyer*.[105]

The Supreme Court also refrained from interpreting AEDPA expansively in *House v. Bell*. In *House*, the Supreme Court applied the *Schlup* standard to claims brought on a first federal

[99] Holland v. Florida, 130 S. Ct. 2549 (2010).

[100] *Id*. at 2560.

[101] *Id.* (internal quotations omitted).

[102] Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*,* 474 U.S. 494, 501 (1986).

[103] 28 U.S.C. § 2244(b)(2)(B)(ii) (1996).

[104] *Supra* notes 66-67 and accompanying text.

[105] Brief for Petitioner, In re Hill, 715 F.3d 284, 2013 WL 1087980 at *28 (11th Cir. 2013).

habeas petition that were defaulted in state court and include a showing of actual innocence.[106] The Court declined to apply § 2244(b)'s standard for successive petitions, which the state argued showed Congress's intent to replace *Schlup* with the higher *Sawyer* standard. The Court noted that § 2244(b) did not apply to a first federal petition. Turning to the facts, the Court found that that House showed actual innocence through blood and semen evidence and other evidence pointing to a different suspect. Because of the evidence of actual innocence, House could present his procedurally defaulted claim of ineffectiveness of counsel before the federal court.[107] The Court declined to apply a freestanding innocence claim. House's evidence fell short of the high standard suggested in *Herrera*.[108]

In *McQuiggin v. Perkins*, the Supreme Court held that the miscarriage of justice exception "survived AEDPA's passage."[109] The Court accepted the petitioner's actual innocence claim as a gateway to overcome AEDPA's statute of limitations. Even though AEDPA's statute of limitations does not mention an exception for innocence, the Court noted that Congress did not clearly intend to put a time limitation on an innocence claim. Congress understood that the innocence exception is part of habeas. In all other situations when Congress mentioned innocence it made a deviation from *Schlup* and *Sawyer*. The Court concluded that when Congress was silent, it acquiesced to *Schlup* and *Sawyer*.

These cases illustrate that the Supreme Court continues to apply habeas corpus as an equitable remedy. In cases of innocence and innocence of the death penalty, individual rights

---

[106] 547 U.S. 518, 522 (2006) ("In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition.") (citing *Schlup v. Delo,* 513 U.S. 298, 319–322 (1995)).

[107] *Id*. at 539-40.

[108] *Id*. at 554.

[109] 133 S. Ct. 1924, 1932.

outweigh state interests in finality. The Supreme Court seems unwilling to endorse leaving an innocent person in prison as a result of procedural rules. A strict interpretation of AEDPA can result in the unconstitutional execution of intellectually disabled individuals without due process, and this violates the Eighth and Fourteenth Amendments. As in *Hall*, under a strict interpretation, courts must ignore newly discovered evidence proving intellectual disability and uphold an unconstitutional punishment. Warren Lee Hill was executed in January 2015, even though all the mental health experts from his trial agree that he was a person with intellectual disability. He was not able to present the new evidence proving that he had intellectual disability beyond a reasonable doubt because of procedural defaults in state court and federal court.

IV

THE STANDARD OF REVIEW

In *Atkins*, the Court noted that people with intellectual disability have reduced culpability and an increased risk of wrongful convictions. The increased risk of wrongful convictions is due to their reduced ability to assist counsel and greater risk of false confessions. The possibility of a wrongful execution suggests that *Atkins* claims should have a lower standard of proof than other death ineligibility claims under *Sawyer* because "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[110] The standard of proof reflects "the relative importance attached to the ultimate decision."[111]

The Court in *Schlup* adopted the more forgiving "probably" standard, i.e. that a

[110] In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

[111] *Id.*

constitutional violation probably caused the conviction of one innocent of the crime[112] rather than adopting the higher *Sawyer* standard requiring clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law. The Court adopted the lower standard of proof in factual innocence claims instead of the *Sawyer* test for innocence of death penalty claims because "application of [the *Sawyer*] standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence."[113]

Executing someone with intellectual disability is a grave injustice; the diminished capacity associated with intellectual disability reduces their culpability and increases risk of wrongful conviction.[114] *Sawyer*'s high standard is inappropriate for examining categorical death ineligibility under *Atkins* because mental illness is difficult to prove to a high level of certainty. Considering the difficultly proving *Atkins* claims, the lower *Schlup* "probably resulted" standard would reduce the risk of executing someone with intellectual disability.

In innocence cases, higher standards of proof are justified to preserve the finality of judgments to avoid problems with decaying evidence. These state interests have less weight in intellectual disability claims compared to other innocence of the death penalty claims because the evidence of intellectual disability is unlikely to decay and relief would not require the state to have a new trial.

A number of aspects of intellectual disability make it difficult to diagnose to a high level of certainty in legal contexts. The standards for assessing intellectual disability evolved in large

---

[112] Schlup v. Delo, 513 U.S. 298, 324 (1995) ("We conclude that *Carrier,* rather than *Sawyer,* properly strikes that balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime).

[113] Schlup v. Delo, 513 U.S. 298, 325–26 (1995).

[114] See *supra* notes 28-32 and accompanying text.

part to determine what community supports the individual needs.[115] Traditionally, psychologists evaluate symptoms in conjunction with a review of personal history and come to a diagnosis.[116] This task is easily distorted by the adversarial process of *Atkins* determinations.[117] The clinical literature identifies four conditions that render the diagnosis of intellectual disability especially difficult: (1) mild intellectual disability, (2) comorbidity, (3) retrospective diagnosis, and (4) sub-optimal assessment conditions.[118] Almost all *Atkins* determinations involve at least one of those conditions.[119] The presence of one of these conditions or the possibility of malingering will generally preclude proof of intellectual disability to a high level of certainty.

The diagnosis of intellectual disability is more challenging when the person is in the mild range (an IQ between 55 and 75). Individuals with mild intellectual disability often do not have the identifiable characteristics that the public may associate with the disorder and they are likely to have some skills that seem to be above the cutoff for the diagnosis.[120] Most people with intellectual disability fall within the mild range.[121] Capital defendants are even more likely to be in the mild range because persons who are more impaired are rarely subject to criminal proceedings.[122]

---

[115] John H. Blume, Sheri L. Johnson & Amelia C. Hritz, *The American Experience with the Categorical Ban Against Executing the Intellectually Disabled: New Frontiers and Unresolved Questions, in* VAGUENESS IN PSYCHIATRY 235 (Geert Keil, Lara Keuck & Rico Hauswald eds., 2017).

[116] MICHAEL CHAFETZ, INTELLECTUAL DISABILITY: CIVIL AND CRIMINAL FORENSIC ISSUES 35 (2015).

[117] Blume et al., *supra* note 115*,* at 235.

[118] Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues,* 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009).

[119] *Id.*

[120] Olley, *supra* note 122, at 136-37.

[121] Almost all the capital defendants whom *Atkins* exempts from imposition of the death penalty are persons with mild intellectual disability in large part because of the statistical fact that of the two and a half percent of the population whose IQ is 70 or below, approximately 75% fall into the "mild" category, but also because persons who are more impaired would rarely be subject to criminal proceedings. Gresham, *supra* note 123, at 92.

[122] J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 APPLIED NEUROPSYCHOLOGY 135, 136-37 (2009). Individuals with moderate or severe intellectual disability are not likely to

The difficulty of diagnosing mild intellectual is heightened in a legal context. Defendants with mild intellectual disability often will not meet preconceived notions of intellectual disability, which gives them a greater risk for being misdiagnosed in courts.[123] For example, an empirical study found that jury pool members were more hesitant than mental health workers to classify someone as having intellectual disability.[124] One of the greatest discrepancies between the beliefs of jury pool members and mental health workers concerned an individual's ability to form romantic relationships and operate a motor vehicle. Mental health workers were much more likely to conclude that evidence of deficits in forming romantic relationships (but still engaging in sexual activity) could be present in an individual with intellectual disability. Jury pool members seemed to believe that people with intellectual disability could not be interested in sexual activity.

Comorbidity also makes intellectual disability diagnosis more challenging. Mental illness, particularly depression, may diminish performance on an IQ test, even when the depression has been treated. Thus, comorbidity makes it possible that low IQ scores are not accurate because they are artificially depressed by mental illness. Individuals with intellectual disability are three to four times more likely to have a comorbid mental illness than the general population.[125] Retrospective diagnosis of intellectual disability is also more difficult to prove in court. In many *Atkins* cases,

---

commit crimes due to the nature of their disability, and, if they do, they are more likely to be incompetent to stand trial, or to lack criminal responsibility. Blume et al., *supra* note 115*,* at 235.

[123] Frank M. Gresham, *Interpretation of Intelligence Test Scores in* Atkins *Cases: Conceptual and Psychometric Issues,* 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009); see also Marcus T. Boccaccini, John W. Clark, Lisa Kan, Beth Caillouet & Ramona M. Noland, *Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins*-Type Cases,* 34 LAW & PSYCH. REV. 1, 17 (2010) (questioning jury pool members and mental health workers who worked with persons with intellectual disability and finding that jurors harbor stereotypical views about the abilities of persons with intellectual disability and often expect them to have vastly lower abilities).

[124] Boccaccini et al., *supra* note 123, at 17.

[125] DSM-IV-TR, at 45.

the diagnosis is wholly retrospective because the defendant did not receive an official diagnosis of intellectual disability as a child, or because records of that diagnosis are no longer available.[126]

The prison setting further impedes diagnosis. Incarceration makes access to the defendant more difficult, testing conditions less optimal, and interviews less conducive to self-disclosure. The capital charge against the defendant may make others reluctant to "help" the defendant by providing evidence of his adaptive functioning deficits.[127] These challenges may raise doubts about the reliability of the diagnosis.

The final challenge in diagnosing intellectual disability in a legal context is the possibility of malingering. Current psychiatric malingering tests do not reliably identify feigned intellectual disability.[128] In *Atkins* determinations, defendants have an enormous incentive to be diagnosed with intellectual disability. No one can ignore the possibility that this would lead some defendants of normal intelligence to perform less than their best on a test of intellectual functioning or to exaggerate their adaptive functioning deficits. To any rational factfinder, the potential for malingering will be salient in a capital case.

All diagnoses of mental retardation are potentially challenging, and even in ideal settings, qualified experts ordinarily diagnose intellectual disability only to a reasonable degree of medical (or professional) certainty.[129] The high *Sawyer* standard: requiring clear and convincing evidence that, but for constitutional error, no reasonable juror would have found petitioner eligible for death penalty under applicable state law; could preclude almost all *Atkins* claims on successive petitions. High standards of proof allow the state to argue that a reasonable degree of certainty (the clinical

[126] Blume et al., *supra* note 115, at 239-40.

[127] *Id*. at 234-35.

[128] *Id.*, at 241-43.

[129] AAIDD, *User's Guide: Mental Retardation Definitions, Classification and Systems of Support* 14 (10th ed. 2007).

norm) fails to satisfy the required burden. Consistent with the challenges of proving intellectual disability claims, most states require defendants prove the presence of an intellectual disability by a preponderance of evidence.[130]

The reduced state interest in finality in *Atkins* death ineligibility cases is further reason that the standard of proof should be the *Schulp* "probably resulted" standard rather than the high *Sawyer* standard. State interests are weaker in procedural defaults of *Atkins* claims. In other death ineligibility contexts, states have an interest in preventing delay of habeas claims because evidence, for example eyewitness accounts, can fade with time.[131] Evidence of intellectual disability is unlikely to decay, and may even improve with advances in psychiatry and neuroscience. In the *Atkins* context, states also have a lower finality interest because *Atkins* relief will not burden the state with another penalty hearing. In other innocence of death cases, the state may retry the penalty phase, but in an *Atkins* claim, the relief will convert a death sentence to a life sentence without a trial.

The Supreme Court noted in the context of mental incompetency to be executed: "a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess however conscientious.'"[132] There is a greater need for guarding against error because "the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations."[133] Warren Lee Hill's claim illustrates the

[130] Georgia is the only state to apply the highest standard of proof, beyond a reasonable doubt, and only a few states apply a clear and convincing evidence standard. Head v. Hill, 587 S.E.2d 613, 622 (Ga. 2003).

[131] *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1936 (2013) ("The State fears that a prisoner might lie in wait and use stale evidence to collaterally attack his conviction when an elderly witness has died and cannot appear at a hearing to rebut new evidence.") (internal quotation omitted).

[132] Ford v. Wainwright, 477 U.S. 399, 412 (1986) (quoting *Solesbee v. Balkcom,* 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

[133] *Id.*

difficulty of proving intellectual disability to a high standard. Even with low IQ scores and clear deficits in decision-making and interpersonal skills, Hill was not able to meet Georgia's beyond a reasonable doubt standard and the deferential standard of post-conviction proceedings. The nature of clinical assessment of intellectual disability combined with the special difficulties created by the context of a capital trial, will make high standards of proof impossible to meet: "The stakes are high, and the 'evidence' will always be imprecise."[134]

CONCLUSION

Since *Atkins* left to the states the responsibility of selecting procedures for assessing who "fall[s] within the range of intellectually disabled offenders about whom there is a national consensus,"[135] some states have adopted procedures that make it virtually impossible for a defendant to prove that he has intellectual disability. This has led to the execution of people, like Warren Lee Hall, who should have been protected from the most extreme punishment due to his reduced culpability. Not only is this result unethical, it is inconsistent with habeas corpus jurisprudence. Allowing an individual to raise otherwise procedurally defaulted claims when they present evidence of death ineligibility due to intellectual disability is consistent with the Court's general application of habeas after AEDPA. Habeas corpus "balance[s] the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[136] AEDPA cannot be interpreted to prevent federal courts from ensuring that individuals with intellectual disability are not subject to the most extreme punishment. In addition, the standard of proof ought to be lowered for claims of intellectual disability. The difficulty of proving *Atkins* claims make it virtually impossible to meet the high

[134] Ford v. Wainwright, 477 U.S. 399, 417 (1986) (describing evidence of mental incompetency to be executed).

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

[136] *Schlup,* 513 U.S., at 324.

standard used in post-conviction relief of state court judgments. As Justice Frankfurter noted in *Brown v. Allen*, "The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities."[137]

[137] Brown v. Allen, 344 U.S. 442, 442 (1953).