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*Alexander Kassoff**

I. Introduction

In 2002, the United States Supreme Court handed down *Atkins v. Virginia*,[1] holding that the Eighth Amendment prohibits the execution of people with intellectual disability.[2] In the years since that ruling, some change has occurred, but questions remain. This article will examine significant developments in *Atkins* jurisprudence during that time period. It will look at the two post-*Atkins* United States Supreme Court cases, and at the development of the law—in Mississippi especially, but also to some extent in other jurisdictions that still have the death penalty.

The seminal Mississippi case is *Chase v. State*,[3] handed down in 2004. In *Chase*, the Mississippi Supreme Court began to set forth the principles that would be applied in adjudicating capital cases involving claims of intellectual disability. (In *Atkins*, the United States Supreme Court announced that the Constitution prohibits the execution of the intellectually disabled, but stated that "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[4])

In 2006, this journal published a casenote, written in March 2005 by this author, on *Chase* and *Atkins*.[5] At that time, the decisions were quite recent and there had not been much case law on them yet. In the interim, the United States Supreme Court handed down two decisions with important holdings on the subject. Several cases have been litigated in the state courts as well.

Some of these cases have built on and modified the initial guidelines of *Atkins* and *Chase*. The United States Supreme Court has attempted to clarify the some of the standards, including the instruction that decisions should be "informed by the medical community's diagnostic framework."[6] This article will explain those developments and examine the problems the cases have addressed, failed to address, or left unresolved.

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

2. At the time, this disability was known as "mental retardation." That term is now considered outmoded, and it has been replaced with "intellectual disability." *See* Hall v. Florida, 572 U.S. 701, 704 (2014) (citing Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010)).

3. Chase v. State, 873 So. 2d 1013 (Miss. 2004).

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

5. Alexander Kassoff, *Evolving Standards of Decency in Mississippi: Chase v. State, Capital Punishment, and Mental Retardation*, 25 Miss. C. L. Rev. 221 (2006).

6. *Hall*, 572 U.S. at 721.

II. BACKGROUND: *Atkins v. Virginia*

The United States Supreme Court's decision in *Atkins v. Virginia* was guided by the principle set forth by Chief Justice Earl Warren that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7] With that as its touchstone, and looking at "objective factors to the maximum possible extent,"[8] the *Atkins* Court held that the execution of people with intellectual disability violates the amendment's prohibition of cruel and unusual punishments. The Court found that there is "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[9] As the Court put it:

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.[10]

The Court stated that intellectually disabled people "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[11] They "act on impulse" and tend to be "followers rather than leaders."[12] Because of the disability, the two justifications for the death penalty that the Court recognizes, deterrence and retribution, do not apply. "Unless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."[13]

III. A TANGLED THICKET

So, states may not execute intellectually disabled people. But as I wrote in 2005, "If only it were that simple."[14] Questions remained. Some still do. In some ways, this area of the law has gotten even less clear in the intervening years. As Justice Jess H. Dickinson observed in 2015, "capital punishment jurisprudence, with its ambitious dicta and plurality opinions has become a metaphorist's playground: it is a 'tangled thicket,' a 'haphazard maze,' a

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7. Trop v. Dulles, 356 U.S. 86, 101 (1958).
8. Coker v. Georgia 433 U.S. 584, 592 (1977).
9. *Atkins*, 536 U.S. at 316.
10. *Id.* at 317.
11. *Id.* at 318.
12. *Id.*
13. *Id.* at 319 (internal quotations marks omitted).
14. Kassoff, *supra* note 5, at 221.

'veritable minefield,' a 'morass.' No area of capital-punishment jurisprudence is more worthy of this criticism than the cases addressing intellectual disability."[15] He had previously written, in 2004, not long after the *Atkins* decision, "[*Atkins*] created an extremely difficult task for the appellate courts throughout the [c]ountry, particularly since we were provided virtually no guidance from the *Atkins* Court in determining the procedure and guidelines for the determination of mental retardation with its resulting exemption from the death penalty."[16]

IV. UNITED STATES SUPREME COURT CASES SINCE *ATKINS*

The United States Supreme Court has handed down two decisions on intellectual disability and the death penalty since *Atkins*: *Hall v. Florida*,[17] in 2014, and *Moore v. Texas*,[18] in 2017.

A. Hall v. Florida

Freddie Lee Hall had been on Florida's death row since long before the *Atkins* decision came down. After *Atkins*, he filed a petition seeking relief due to intellectual disability.[19] Interestingly, at his trial Hall had not been able to use his disability even in mitigation. At that time, what was then known as mental retardation was not on the list of statutory mitigating factors and thus not permitted as evidence.[20] Later, the United States Supreme Court held that defendants must be allowed to present non-statutory mitigating evidence, and Hall was resentenced. [21] But even at his resentencing he was unsuccessful, despite

> substantial and unchallenged evidence of intellectual disability. School records indicated that his teachers identified him on numerous occasions as "[m]entally retarded." Hall had been prosecuted for a different, earlier crime. His lawyer in that matter later testified that the lawyer "[c]ouldn't really understand anything [Hall] said." And, with respect to the murder trial given him in this case, Hall's counsel recalled that Hall could not assist in his own defense because he had "'a mental . . . level much lower than his age,'" at best comparable to the lawyer's 4–year–old daughter. A number of medical clinicians testified that, in their professional opinion, Hall was "significantly retarded," was "mentally retarded," and had levels

15. Dickerson v. State, 175 So. 3d 8, 40 (Miss. 2015) (Dickinson, P.J., concurring in part and dissenting in part) (quoting Note, *Implementing Atkins,* 116 HARV. L. REV. 2565, 2566 (2003)).

16. Hughes v. State, 892 So. 2d 203, 217 (Miss. 2004) (Dickinson, J., concurring in part and dissenting in part).

17. Hall v. Florida, 572 U.S. 701 (2014).

18. Moore v. Texas, 137 S. Ct. 1039 (2017).

19. *Hall*, 572 U.S. at 707.

20. *Id.* at 705.

21. *Id.* at 705 (citing Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987)).

of understanding "typically [seen] with toddlers . . . ."[22]

Voluminous additional evidence of Hall's horrific, abusive childhood was admitted:

> Hall's upbringing appeared to make his deficits in adaptive functioning all the more severe. Hall was raised—in the words of the sentencing judge—"under the most horrible family circumstances imaginable." Although "[t]eachers and siblings alike immediately recognized [Hall] to be significantly mentally retarded . . . [t]his retardation did not garner any sympathy from his mother, but rather caused much scorn to befall him." Hall was "[c]onstantly beaten because he was 'slow' or because he made simple mistakes." His mother "would strap [Hall] to his bed at night, with a rope thrown over a rafter. In the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." Hall was beaten "ten or fifteen times a week sometimes." His mother tied him "in a 'croaker' sack, swung it over a fire, and beat him," "buried him in the sand up to his neck to 'strengthen his legs,'" and "held a gun on Hall . . . while she poked [him] with sticks."[23]

Despite all this, the trial court sentenced Hall to death again.[24] Its explanation is noteworthy in illuminating one of the difficulties that such defendants and their counsel face. The trial judge found that while "Hall has been mentally retarded his entire life," the court "suspect[ed] that the defense experts [were] guilty of some professional overkill," because "[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed."[25] Further, the judge stated, even if the experts were correct about Hall's intellectual disability, "mental retardation, and other mental difficulties . . . cannot be used to justify, excuse or extenuate the moral culpability of the defendant in this cause."[26]

These comments illustrate a hurdle that defendants and their counsel often face in death-penalty cases. In this author's experience, it is not uncommon for lay people, and even lawyers and judges, to misunderstand the role that mitigating evidence is supposed to play. It is not intended to "justify" or to "excuse" criminal conduct. (It may not even *explain* the conduct.) Typically, when capital defense counsel puts on mitigating evidence, it is not to persuade the factfinder to excuse the defendant's crime—it is too late for that anyway; the defendant has already been convicted at that point. What mitigation evidence is intended to do is to show why the defendant should not be adjudged a member of

22. *Id.* at 705 (internal citations omitted) (alterations in original).
23. *Id.* at 706 (internal citations omitted) (alterations in original).
24. *Id.*
25. *Id.*
26. *Id.* at 706–07.

that theoretically very small class of "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[27] To excuse criminal conduct, arguably, would be to say to the defendant, "You are excused. Go and sin no more." That is not the point. Mitigating evidence is not offered as an excuse, but rather to try to impart an understanding of the unique characteristics of a particular human being, characteristics that might convince a jury to decide that the individual, who committed a serious, even horrific, crime, nonetheless does not deserve to have society give up on him or her entirely. At that point in the proceedings, in Mississippi as elsewhere, the question is whether the defendant is going to be sent to death row (there to wait for years—and, increasingly, decades—for a less-than-certain fate), or instead be sent to prison for life with no chance of release. The latter outcome is not synonymous with "excusing" or "justifying" the crime. Mitigating evidence is offered to show why this particular defendant deserves the lesser of the two most severe punishments possible.

So along came *Atkins*, and renewed hope for Hall. Unfortunately, though, Florida had a statute defining intellectual disability that—as construed by the Florida Supreme Court in this case—categorically excluded anyone who had scored above 70 on an IQ test; Hall had a 71.[28] The Florida court denied relief.[29]

The United States Supreme Court reversed[30] and issued the first of its two important post-*Atkins* decisions. It made several points regarding intellectual disability, science, and the law. Probably the biggest takeaways are (1) the law must be guided by sound science—that is, "informed by the work of medical experts in determining intellectual disability,"[31] and (2) the science says that the concept of the standard error of measurement (SEM) must be taken into consideration in an *Atkins* case.

The *Hall* Court observed that

> [o]n its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. That strict IQ test score cutoff of 70 is the

27. Roper v. Simmons, 543 U.S. 551, 568 (2005) (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)).
28. *Hall*, 572 U.S. at 707.
29. *Id.*
30. *Id.* at 704.
31. *Id.* at 710.

issue in this case.[32]

The Court explained that "[t]he flaws in Florida's law are the result of the inherent error in IQ tests themselves. An IQ score is an approximation, not a final and infallible assessment of intellectual functioning."[33] The medical community recognizes that IQ test results are subject to error, which can be quantified using the "standard error of measurement."[34] It went on:

> Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.[35]

So, the expertise of the scientific community must guide the courts:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.[36]

Among those opinions is the concept of the SEM. The Court explained:

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32. *Id.* at 711–12 (citing Cherry v. State, 959 So. 2d 702, 712–713 (Fla. 2007) (per curiam) (holding that a strict IQ score "cut-off" is permissible)).

33. *Id.* at 722.

34. *Id.* (internal citation omitted).

35. *Id.* at 723 (citing AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 37 (5th ed. 2013)) [hereinafter "DSM-5"].

36. *Id.* at 710.

> A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. . . . The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. [For the intellectually disabled, the margin is] generally +5 points [which means the upper limit as actually measured would be in the range of] a score of 65–75 (70 ± 5) . . . .[37]

The Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."[38]

The assessment of intellectual disability, after *Hall*, requires an interrelated assessment of intellectual functioning (measured by IQ testing) and adaptive functioning. The latter term refers to one's ability "to learn basic skills and adjust behavior to changing circumstances."[39] "[T]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability."[40] So "people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior" can be intellectually disabled.[41] The analysis involves consideration of both types of functioning together.

B. Moore v. Texas

Three years later, the Court handed down *Moore v. Texas*.[42] Moore, the petitioner, had several IQ test scores that were under 75, and some that were above.[43] The Texas appellate court found that Moore's IQ was 78.[44] It held that one of the low scores was due to the stress of being on death row, and that other low test results were unreliable.[45] It then applied its so-called *Briseno* factors, a seven-factor test invented by the Texas Court of Criminal Appeals in *Ex Parte Briseno*.[46] And it found that under these criteria, Moore was not disabled.[47] He mowed lawns and played pool for money, he functioned fairly well in prison,

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37. *Id.* at 713 (internal citation omitted) (alterations added).
38. *Id.* at 723.
39. *Id.* at 710 (internal citations omitted).
40. *Id.* at 711 (internal citation omitted).
41. *Id.* at 720 (internal citation omitted).
42. Moore v. Texas, 137 S. Ct. 1039 (2017).
43. *Id.* at 1047 (citing Ex Parte Moore, 470 S.W.3d 481, 518–19 (Tex. Crim. App. 2015)).
44. *Id.* (citing *Ex parte Moore*, 470 S.W.3d at 518–19).
45. *Id.* (citing *Ex parte Moore*, 470 S.W.3d at 519).
46. Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017).
47. *Moore*, 137 S. Ct. at 1047 (citing *Ex parte Moore*, 470 S.W.3d at 519).

and he was not perceived as "retarded" by his family.[48]

The United States Supreme Court reversed.[49] It held, first, that the Texas court failed to take into account the standard error of measurement in evaluating Moore's IQ scores, and that Moore clearly met the IQ criterion for intellectual disability.[50]

Turning to adaptive functioning deficits, the Supreme Court disapproved the use of the *Briseno* factors, noting that the "medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," so that "significant limitations in conceptual, social or practical skills [should not be] outweighed by the potential strengths of some adaptive skills."[51] This point is important, and often misunderstood; it is adaptive functioning deficits, and not strengths, that are considered in diagnosing intellectual disability. This is so important that it is emphasized in bold print on page 1 of the User's Guide to the manual published by the American Association on Intellectual and Developmental Disabilities.[52]

In Mississippi, this point has at times gotten overlooked or misunderstood, too. For example, when William Wiley's application for *Atkins* relief came before the Mississippi Supreme Court, the State argued that the evidence of Wiley's abilities—his adaptive strengths—proved that he could not be intellectually disabled. It urged the court to give weight to

> [a]ffidavits of Wiley's friends and relatives assert that Wiley was a good husband, father, son and grandson, that he was a good, reliable worker with steady employment at various employers, that he performed household maintenance, repaired automobiles, babysat children, ran errands, supported his family and did numerous other things. Wiley was also in the Army until injuring his leg and getting honorably discharged.[53]

The Mississippi Supreme Court agreed with the State.[54] It denied relief.[55]

Even in *Chase*, the Mississippi Supreme Court seemed not to fully apprehend the principle that it is adaptive deficits and not strengths that matter. As in *Wiley*, the State's attorneys had argued that Chase's abilities should disprove his claim of intellectual disability:

> The State provides us with a great deal of what it characterizes as evidence that Chase is not deficient in adaptive functioning, beginning with an analysis of Chase's testimony at trial, at the

48. *Id.* (citing *Ex parte Moore*, 470 S.W.3d at 522–23).

49. *Id.* at 1044.

50. *Id.* at 1049–50.

51. *Id.* at 1050.

52. ROBERT L. SCHALOCK ET AL., USER'S GUIDE TO ACCOMPANY THE 11TH EDITION OF INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 1 (11th ed. 2012) ("Within an individual, limitations often coexist with strengths.").

53. Wiley v. State, 890 So. 2d 892, 896 (Miss. 2004).

54. *Id.* at 897.

55. *Id.* at 898.

> suppression hearing, at the hearing on the motion to revoke change of venue, and at the guilt phase of the trial.
>
> Numerous portions of Chase's testimony are cited to demonstrate that Chase speaks and reasons too well to be mentally retarded. Certain words, phrases, analogies, and "detailed, coherent and lengthy responses" are pointed out.
>
> The State points to numerous examples where Chase read well, spoke well, reasoned well, provided lengthy, complicated answers to questions, and "demonstrated insight into his life, the crime, and the situation he was in." The State then offered its opinion that "[m]entally retarded people do not have this type of insight into their situation."
>
> The State offers other evidence that Chase does not suffer severe limitations in adaptive functioning. He was never in special education classes, never failed a grade in school, and played quarterback on the football team. He completed a welding course with the Job Corps, became a certified welder, and worked as a welder and, when he wasn't welding, he did yard work and washed cars.
>
> Finally, the State observes that Chase cooked for his mother, had a girlfriend and other friends, and had no deficits in his social skills.[56]

In response, the court stated that "while all of these arguments, if properly offered and admitted, would certainly be persuasive and interesting to the trial judge at the hearing, it is our function here only to determine whether to allow the hearing to take place."[57] But it should be clear now, after *Moore v. Texas*, that this sort of evidence *should not* be "persuasive." The "medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," so that "significant limitations in conceptual, social or practical skills [should not be] outweighed by the potential strengths of some adaptive skills."[58]

Next, the *Moore* Court noted that experts in the field discount behavior in "controlled settings" like prison, and that "the medical profession has endeavored to counter lay stereotypes" like those reflected in the *Briseno* factors.[59] Finally, the Court dismissed the lower court's suggestion that some of Moore's problems came from childhood abuse rather than intellectual deficits by pointing out that these types of traumatic experiences "count in the medical community as '*risk factors*' for intellectual disability."[60]

56. Chase v. State, 873 So. 2d 1013, 1022 (Miss. 2004).
57. *Id.*
58. Moore v. Texas, 137 S. Ct. 1039, 1050 (2017) (emphasis in original).
59. *Id.* at 1052.
60. *Id.* at 1051 (emphasis in original).

Thus, as it had in *Hall*, the Court made it clear that decisions in *Atkins* cases must be guided by the science. "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does precedent license disregard of current medical standards."[61] "[T]he medical community's current standards[ ] reflect[ ] improved understanding over time . . . ."[62] "As we instructed in *Hall,* adjudications of intellectual disability should be informed by the views of medical experts. That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus."[63]

V. MISSISSIPPI CASES

As of this writing in early 2019, six published Mississippi Supreme Court cases have cited *Hall v. Florida.* In chronological order, they are *Brown v. State*,[64] *Chase v. State*,[65] *Dickerson v. State*,[66] *Carr v. State*,[67] *State v. Scott*,[68] and *State v. Russell*.[69]

A. Brown v. State

In most of these cases, the court did not discuss *Hall*, but rather merely cited it for a relatively minor point. For example, in *Brown v. State*, both dissents referred the reader to *Hall*—and then only in footnotes—as authority for the replacement of the term "mental retardation" with "intellectual disability."[70]

B. Chase v. State

This case, the most recent opinion in the ongoing legal saga of Rick Chase, contains some discussion of the holding of *Hall*—primarily of the principle that courts must be guided by the science when deciding *Atkins* cases.[71]

C. State v. Scott

In *State v. Scott*, again in a footnote, the opinion cited *Hall* to support the validity of a particular method of evaluating malingering.[72] There was no real discussion of the holding of *Hall*.

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61. *Id.* at 1042.
62. *Id.* at 1043.
63. *Id.* at 1044.
64. Brown v. State, 168 So. 3d 884 (Miss. 2015).
65. Chase v. State, 171 So. 3d 463 (Miss. 2015).
66. Dickerson v. State, 175 So. 3d 8 (Miss. 2015).
67. Carr v. State, 196 So. 3d 926 (Miss. 2016).
68. State v. Scott, 233 So. 3d 253 (Miss. 2017).
69. State v. Russell, 238 So. 3d 1105 (Miss. 2017), *reh'g denied* (Apr. 12, 2018).
70. *Brown*, 168 So. 3d at 900 n.7 (Dickinson, P.J., dissenting); *id.* at 901 n.14 (Kitchens, J., dissenting).
71. *Chase*, 171 So. 3d at 470–71 ("While a legal determination of intellectual disability for the purposes of the Eighth Amendment is distinct from a medical diagnosis, legal determinations of intellectual disability are informed by established clinical standards.").
72. *Scott*, 233 So. 3d at 262 n.15.

D. State v. Russell

And in *State v. Russell*, the court cited *Hall* in support of the proposition that "[w]hile *Atkins* determinations are legal decisions, they are decisions that, according to the United States Supreme Court, must be informed by medical experts."[73]

E. Dickerson v. State

The *Dickerson* case is interesting in part for the dissent by Justice Dickinson, discussed *infra* in this article. Justice Randolph specially concurred to discuss his difference of opinion with Justice Dickinson regarding how intellectual disability should be defined. The special concurrence cites *Hall* in support of the point "that states' discretion to define intellectual disability for Eighth Amendment purposes is not unlimited[;] that the states lack 'unfettered discretion to define the full scope of the constitutional protection'[;] and that '*Atkins* provide[s] substantial guidance on the definition of intellectual disability.'"[74] Justice Randolph pointed out that "*Hall* also recognized the significant role of the medical and mental-health communities in informing legal determinations of intellectual disability . . . ."[75]

F. Carr v. State

Anthony Carr, on death row in Mississippi since 1990, filed a successive application for post-conviction relief following the *Atkins* decision, and the Mississippi Supreme Court granted a hearing in Quitman County Circuit Court on his intellectual disability claim.[76] That hearing took place in 2013; the circuit court denied relief.[77] Carr appealed to the Mississippi Supreme Court.[78]

The circuit court held that the IQ scores, which were 70, 72, and 75, disqualified Carr from *Atkins* relief.[79] It stated, "Certainly, Carr's intelligence level is at the lower end of the spectrum, but is it *significantly* sub-average? Given the range within which the test results are found and the applicable margin of error, this court cannot find by a preponderance of the evidence that Carr has carried his burden of proof."[80] And then: "While this finding alone is sufficient to deny Carr's claim of mental retardation, because of the significance of this decision, the court will consider the other two remaining factors."[81]

In its opinion reversing and remanding the case, the Mississippi Supreme Court boldfaced the words "While this finding alone is sufficient to deny Carr's

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73. *Russell*, 238 So. 3d at 1110.

74. Dickerson v. State, 175 So. 3d 8, 38 (Miss. 2015) (Randolph, P.J., specially concurring).

75. *Id.*

76. Carr v. State, 873 So. 2d 991, 1007 (Miss. 2004).

77. Carr v. State, 196 So. 3d 926, 929 (Miss. 2016).

78. In the interest of full disclosure, the author represented Carr during that appeal and continues to do so as of this writing.

79. *Id.* at 935

80. *Id.* at 941.

81. *Id.*

claim of mental retardation" for emphasis.[82] It called this "an erroneous legal standard,"[83] and stated that "where . . . the trial judge has applied an erroneous legal standard, we should not hesitate to reverse."[84] And it found, in light of *Hall*, that the circuit court had done so. It explained that the *Hall* Court taught that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." So, it reversed and remanded the case to the circuit court "for proceedings consistent with this opinion."[85]

In so doing, the Mississippi Supreme Court arguably created another problematic legal standard. The opinion remanding the case to the circuit court held:

> [w]e therefore reverse the trial court judgment and remand this case to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75.[86]

The problem with this language is the use of the term "severe." Elsewhere the opinion states, arguably erroneously, that "the medical community's diagnostic framework recognizes that Carr's IQ between 70 and 75, coupled with 'severe adaptive behavior problems' could support a diagnosis of intellectual disability . . . ."[87] The term "diagnostic framework" does not appear in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)—one of the two medical manuals that contain the two definitions of intellectual disability approved by the courts in *Atkins* and *Chase*, and the manual from which the Mississippi Supreme Court apparently took the word "severe" in this opinion. The term "Diagnostic Criteria" does,[88] but the word "severe" does not appear within the Diagnostic Criteria.[89]

This "so severe" language can be found elsewhere in the DSM-5, but it is not part of the "Diagnostic Criteria"[90] for intellectual disability, and it never has been. It is, rather, part of the commentary on the criteria, contained in a section of the DSM-5 titled "Diagnostic Features."[91] In context, it appears that that

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82. *Id.* at 943,
83. *Id.* at 941.
84. *Id.* at 942.
85. *Id.* at 944.
86. *Id.* at 943.
87. *Id.*
88. DSM-5, *supra* note 35, at 33.
89. *See id.*
90. *Id.*
91. *Id.* at 37. Further support, by way of analogy, that the authors of the DSM-5 did not intend that the term "severe" should be considered essential can be found in an explanation of the placement in the text of the reference to IQ scores. Previous editions of the DSM had included IQ scores in the Diagnostic Criteria. By the fifth edition, the American Psychiatric Association concluded that IQ scores should be de-emphasized, as opposed to actual functioning that may result from impairments. So, the authors put the reference to IQ scores

paragraph, the fourth in this subsection of the manual, concerns diagnosing intellectual disability in patients who have IQ scores that are high enough to appear on the surface to exclude the diagnosis. To import the term "severe" from one part of the DSM-5 into the Diagnostic Criteria, which is essentially the definition of intellectual disability, is to change the definition. That is contrary to the edict of *Hall* and *Moore*, requiring that the jurisprudence be guided by the science: "The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."[92]

The word "severe" has never been part of the definition. A survey[93] of every edition of the DSM, beginning with the first edition in 1952, and of every edition of the diagnostic manual of the American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) dating back to 1959, shows that, while there has been some evolution of the diagnostic criteria over the past half a century or so, the core concepts have not changed substantially. Most editions speak of deficits in intelligence and in adaptive behavior, and of the onset in the developmental period. (Some editions specify an age of onset, while others, including the current DSM-5, simply use the term "developmental period.")

But not one of the fifteen manuals uses the term "severe" in its diagnostic criteria. "Significant" is the operative term.[94] That means deficits that, according to the DSM-5, "result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work and community."[95]

This interpretation of the DSM-5 has caused a bit of a stir in the capital-defense bar nationally, and has practitioners discussing how best to counter the mistaken belief that the DSM-5 mandates that a defendant prove that he or she

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in the commentary on the Diagnostic Criteria—the same location in the manual where one finds the passing reference to "so severe." The APA explained in its *DSM-5 Intellectual Disability Fact Sheet*:

> "DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone. By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels. This is especially important in forensic cases."

Amer. Psych. Ass'n, *DSM-5 Intellectual Disability Fact Sheet*, 1–2, http://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf (last visited Jan. 29, 2019).

92. Hall v. Florida, 572 U.S. 701, 721 (2014).

93. *See* Marc J. Tasse´, Ruth Luckasson, & Robert L. Schalock, *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, 54:6 INTELL & DEV. DISABILITIES 381, 384–86 (2016).

94. ROBERT L. SCHALOCK ET AL., INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (11th ed. 2010) [hereinafter AAIDD MANUAL].

95. DSM-5, *supra* note 35, at 33.

has "super deficits" in adaptive functioning. As of this writing, the Carr appeal is still pending in the Mississippi Supreme Court.

VI. MENTAL ILLNESS AND THE DEATH PENALTY

A. *Implications of* Atkins

In the final subsection before the conclusion of the casenote I wrote in 2005, I briefly tried to anticipate what the reasoning behind *Atkins* might portend for future rulings on capital punishment.[96] I argued that the rationale set out in *Atkins*—that those with intellectual disability should not be subject to the death penalty because of their lessened culpability due to "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"[97]—should apply with equal force to people with similar impairments caused by other disorders or by injuries.[98]

My reasoning was based in part on the work of the late Douglas Mossman, M.D., a psychiatrist who, until his untimely death in 2018, was Professor of Clinical Psychiatry and Program Director of the Forensic Psychiatry Fellowship at the University of Cincinnati College of Medicine. In an article I cited in the 2006 casenote, he called the *Atkins* decision "a psychiatric can of worms."[99] He argued that "the [*Atkins*] decision's most obvious logical consequence [is] the claim that defendants with other serious mental limitations deserve diagnosis-based death penalty exemptions."[100] He elaborated:

> Indeed, prominent psychiatrists called for this shortly after *Atkins* was announced. Dr. Diane H. Schetky, the principal author of the APA's position statement opposing death sentences for persons who commit crimes as juveniles, believes that "our current knowledge of neurological and psychological developments in adolescents" means that the Supreme Court's arguments for sparing retarded persons from the death penalty "can and should be applied to individuals who commit their crimes as juveniles."[101] Former APA president Dr. Alan A. Stone, noting that many forensic psychiatrists favor total abolition of the death penalty, believes that if executing the mentally retarded is unconstitutional, then "it is certainly reasonable for the abolitionists to argue that it is equally

96. Kassoff, *supra* note 5, at 257–58.

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

98. *See* Kassoff, *supra* note 5, at 257–58.

99. Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 278 (2003).

100. *Id.*

101. In March 2005, the United States Supreme Court did indeed outlaw the execution of those not yet eighteen at the time of their crimes. Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

> unconstitutional to execute the mentally ill." Mental illness and mental retardation have similar causes, says Dr. Stone, and "the mentally ill suffer from many of the same limitations" that (in the Supreme Court's view) diminish the blameworthiness of retarded persons. "I believe the time will come when we recognize that it is equally indecent to execute the mentally ill."[102]

Dr. Mossman proposed:

> Obvious candidates for mental illness-based exemptions would be defendants who acquire, after childhood, the types of intellectual and functional deficits that persons with mental retardation display throughout their lives. Because of their adulthood onset, psychiatrists call such conditions "cognitive disorders" or "personality changes caused by medical conditions," rather than mental retardation. Examples include mental deterioration that sometimes follows drug abuse, or brain-damaging events such as head injuries, infections, and Alzheimer's disease. Particularly when the brain's frontal lobes are affected, persons lose their ability to integrate information, utilize experience, and control impulses. If a psychiatric definition is all that is required to lead courts to believe that retarded defendants are not fully accountable for their acts, then consistency requires courts to exempt brain-damaged defendants from execution, too.[103]

B. Current Trends

As of this writing in 2019, this, for the most part,[104] has not come to pass. There have, however, been steps in this direction. At its 2006 annual meeting, the American Bar Association adopted and issued its "Mental Illness Resolution," Policy Number 2006 AM 122A.[105] In it, the ABA, "without taking a position supporting or opposing the death penalty, urges each jurisdiction that

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102. Mossman, *supra* note 99, at 278–79.

103. *Id.* at 279–80 (citing Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (arguing that "that distinguishing between people with significant mental illness, people with mental retardation, and juveniles in the application of capital punishment violates the Equal Protection Clause")).

104. An exception was the state of Connecticut, which repealed the death penalty in 2012. Susan Haigh, *Connecticut governor signs bill to repeal death penalty*, BOSTON GLOBE (Apr. 26, 2012), https://www.bostonglobe.com/metro/2012/04/25/connecticut-governor-signs-bill-repeal-death-penalty/PWH6f8fHGD6RjsyrZVjrXO/story.html. Prior to repeal, it had a statute that was intended to exempt the mentally ill from the death penalty. CONN. GEN. STAT. § 53a-46a(h) (2002) (prohibiting imposition of the death penalty when the jury or judge finds, by special verdict, that "the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution").

105. Am. Bar Ass'n, *Mental Illness Resolution (2006)*, DEATH PENALTY REPRESENTATION, https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/mental-illness-2006/ (last visited Jan. 24, 2019).

imposes capital punishment to implement the following policies and procedures . . . ."[106] Among the recommendations:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.[107]

The American Psychiatric Association has taken a similar stand. In 2004, and again in 2014, that organization approved and reaffirmed its "Position Statement on Diminished Responsibility in Capital Sentencing."[108] Its language is similar to that of the ABA:

> Defendants shall not be sentenced to death or executed if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.[109]

There has also been some movement in state legislatures to exclude the mentally ill from the death penalty. In at least seven states—Arkansas, Indiana, Ohio, South Dakota, Tennessee, Texas, and Virginia—legislation has been introduced to that effect.[110] The wording of these bills varies. Some are consistent with the ABA and/or APA proposals. The most notable departure is in proposed measures that would identify the universe of protected persons by reference to a particular diagnosis rather than the effect a disorder has on the individual's functioning (as do the ABA and APA recommendations). This diagnosis-based approach has come under some criticism from the mental-health

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106. *Id.*

107. *Id.*

108. Am. Psychiatric Ass'n, *Position Statement on Diminished Responsibility in Capital Sentencing*, APA OFFICIAL ACTIONS, https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2014-Capital-Sentencing-Diminished-Responsibility.pdf (last visited Jan. 24, 2019).

109. *Id.*

110. Linda M. Richmond, *States Move to Exempt People With SMI From Death Penalty*, PSYCHIATRIC NEWS (Apr. 3, 2018), https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2018.4a7.

profession. Forensic psychiatrist Paul Appelbaum, M.D., a Past President of the APA, explained his objection as follows:

> "Why does the defendant get a pass from the death penalty simply by having a diagnosis?" he asked. "For any given psychiatric diagnosis, there can be a broad range of functional impairment." For example, even with schizophrenia, some individuals are quite functional: they may hold a job, be married, and have a driver's license, he pointed out, whereas others are so highly impaired that they have no social interactions and no prospects of holding gainful employment and are completely disorganized.
>
> "Both have schizophrenia, but their experiences differ greatly," said Appelbaum. Like intellectual disability, mental illness should be considered a bar on the death penalty only when it reaches a certain level of functional impairment, he said.[111]

Most recently as of this writing, in January 2019, the Virginia Senate (which is controlled by Republicans) voted to ban the execution of people with "severe mental illness."[112] The bill, which is yet to pass the Virginia House of Delegates and receive the governor's approval, contains a functioning-based definition of severe mental illness akin to the ABA's *Mental Health Resolution*:

> active psychotic symptoms that substantially impair a person's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include a disorder manifested primarily by repeated criminal conduct or attributable to the acute effects of voluntary use of alcohol or any drug.[113]

It also provides for jury determination of the illness and consequent ineligibility from a death sentence, unless there is a bench trial.[114]

So, there is some movement toward exempting the mentally ill from the death penalty, but the United States Supreme Court has not shown any tendency in that direction, and the Mississippi Supreme Court has, so far, explicitly and rather bluntly rejected such a change. For example, in *Dickerson v. State*,[115] the

111. *Id.*

112. Laura Vozzella, *Bill to ban death penalty for severely mentally ill clears GOP-controlled Va. Senate*, THE WASHINGTON POST (Jan. 17, 2019), https://www.washingtonpost.com/local/virginia-politics/bill-to-ban-death-penalty-for-severely-mentally-ill-clears-gop-controlled-va-senate/2019/01/17/afe1981c-1a87-11e9-8813-cb9dec761e73_story.html?utm_term=.506e0254c8c2.

113. *Id.*

114. *Id.*

115. Dickerson v. State, 175 So. 3d 8 (Miss. 2015).

court addressed the issue. This was a direct appeal in which the appellant[116] argued that he should be ineligible for death because of either intellectual disability or mental illness, or both.[117] The Mississippi Supreme Court did not agree.[118] It first rejected the *Atkins* claim, citing a lack of evidence at the trial stage.[119] Then it wrote:

> Dickerson also contends in the alternative that, even if he was competent to stand trial, his history of mental illness precludes imposition of the death penalty. He likens the mentally ill to the mentally retarded and to juveniles, who have "diminished personal culpability," and who are constitutionally ineligible for the death penalty under *Atkins* . . . and *Roper v. Simmons*, respectively. Dickerson asks the Court to hold that mentally ill defendants are exempt from the death penalty. The State responds that the Court should not extend *Atkins* and *Roper* to those with mental illness, because the Supreme Court has not held that mental illness renders a criminal ineligible for the death penalty . . .
>
> In [*Atkins* and *Roper*], the [United States] Supreme Court held that the penological justifications for the death penalty—retribution and deterrence—were not served by the execution of the mentally retarded or juveniles because those offenders had diminished culpability. Dickerson now seeks to have this Court extend *Atkins* and *Roper* to preclude the death penalty for the mentally ill. The Fifth Circuit has rejected this argument repeatedly.[120]
>
> *Roper* exempted juvenile offenders from the death penalty, and *Atkins* exempted the mentally retarded. Dickerson is neither under eighteen nor mentally retarded. Therefore, he is not exempt from the death penalty under *Atkins* or *Roper*. We will not extend those cases to apply to the mentally ill when "[t]he Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence." We cannot take

116. In the interest of full disclosure, the author of this article did not take part in Dickerson's trial or direct appeal, but does represent him in his ongoing collateral post-conviction proceedings.

117. *Dickerson*, 175 So. 3d at 15–18.

118. *Id.* at 17–18.

119. *Id.* at 17.

120. Here the opinion cited: Ripkowski v. Thaler, 438 Fed. App'x. 296, 303 (5th Cir. 2011) ("[T]he Fifth Circuit has recognized the distinction between the mentally ill and the mentally retarded and has held that *Atkins* only protects the latter."); In re Neville, 440 F.3d 220, 221 (5th Cir. 2006) (per curiam) (Defendant claimed that *Atkins* and *Roper* "created a new rule of constitutional law . . . making the execution of mentally ill persons unconstitutional." The Fifth Circuit held that "[n]o such rule of constitutional law was created, however, by either *Atkins* or *Roper*."); In re Woods, 155 Fed. App'x 132, 136 (5th Cir. 2005) ("*Atkins* did not cover mental illness separate and apart from mental retardation[.]").

> the *Atkins* opinion—which was so specific to mental retardation that the Court cited and discussed the clinical definition of mental retardation—and apply it to all other mental disorders. To do so would be no different than taking *Roper* and expanding it to preclude execution of criminals under age twenty-one, rather than age eighteen as the Supreme Court explicitly held. Dickerson's alternative argument that the death penalty cannot be imposed on the mentally ill is without merit.[121]

In a special concurrence, Presiding Justice Randolph, who in February 2019 will become the Chief Justice, made it clear that he is not interested in extending *Atkins*-style protection to the mentally ill: "*Atkins* and *Chase* do not protect all persons with mental defects or diseases, only those who meet the clinical definition of intellectual disability.[122] Five other justices joined this opinion.[123]

C. An Interesting Proposal in Mississippi

So that, it seems, is that. But the separate opinion by Justice Dickinson, concurring on the conviction but dissenting as to the sentence and—significantly—to the way in which *Atkins* cases are adjudicated in Mississippi, deserves attention. Dissents can have a significant influence on future decisions, sometimes even decisions of the United States Supreme Court. For example, in *Atkins*, the majority opinion cited the dissent by two justices of the Virginia Supreme Court, who had written that

> it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.[124]

The *Atkins* Court stated that it had taken certiorari in part "[b]ecause of the gravity of the concerns expressed by the dissenters."[125]

In *Dickerson*, Justice Dickinson led off by stating, "I believe that this Court has inadequately addressed the Eighth Amendment concerns expressed by the United States Supreme Court in *Atkins v. Virginia* . . . ."[126] The discussion of his concerns that followed has implications for the debate on whether to exempt the mentally ill from the death penalty. While he did not explicitly come out in favor of such a ban, his reasoning would appear to support it. And he outlines a

121. *Dickerson*, 175 So. 3d at 17–18 (some internal citations omitted).
122. *Id.* at 37 (Randolph, J., specially concurring).
123. *Id.* at 39.
124. Atkins v. Virginia, 536 U.S. 304, 310 (2002).
125. *Id.*
126. *Dickerson*, 175 So. 3d at 39 (Dickinson, P.J., concurring in part and dissenting in part).

procedure for adjudicating a capital case that involves a claim of mental deficiency that would be a step in that direction.

Justice Dickinson pointed out that Dickerson's appellate brief had argued

> that the prohibition announced in *Atkins* should be extended to include other intellectually impaired persons who do not satisfy the medical criteria to be formally diagnosed as intellectually disabled but who suffer from similar impairments. I would conclude that this issue is properly resolved by submission to a sentencing-phase jury, and that we must revise our decision in *Chase v. State* to address adequately the Eighth Amendment concerns articulated in *Atkins*.[127]

Those Eighth Amendment concerns that impelled the *Atkins* decision, according to Justice Dickinson, have to do with the "absolute reality"[128] "that the label 'mental retardation' or 'intellectual disability' is of far less importance than the 'national consensus' that persons who possess certain mental deficiencies and communication problems should not be executed."[129]

In *Atkins*, Justice Dickinson recounted, the United States Supreme Court had identified some of the "mental deficiencies and communication problems" that underlay its holding that execution of the intellectually disabled is unconstitutional—the characteristics, in short, that create an unacceptable risk of an unjust result:

> The Court found that executing intellectually disabled persons did not accomplish either of the justifications for the death penalty—retribution and deterrence—and that the "reduced capacity" of intellectually disabled persons presented an unacceptable risk of "false confessions," a reduced ability to "make a persuasive showing of mitigation," and a reduced ability "to give meaningful assistance to their counsel."
>
> The Court went on to point out that intellectually disabled persons "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." And finally, the Court worried that "reliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[130]

Justice Dickinson then discussed the challenges that the *Atkins* decision had posed for state courts in its implementation.[131] In his view,

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127. *Id.*
128. *Id.* at 42.
129. *Id.*
130. *Id.* at 41.
131. *Id.* at 44.

> [w]e then fell into the *Atkins* trap of merely requiring a label defined by the mental-health community. We cited the same definitions cited in *Atkins,* and we set forth a procedure that ultimately required a finding that "[t]he defendant is [intellectually disabled], *as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association.*"[132]

He was troubled that the mere labeling of someone as intellectually disabled according to the medical community's definitions, without a deeper analysis of the individual's mental deficiencies, an inquiry aimed at finding out whether the underlying concerns of the *Atkins* Court were implicated, is inadequate.[133]

As a remedy Justice Dickinson proposed, essentially, a new definition of intellectual disability. It is not the same as those of the AAIDD or the DSM. It seems likely, in fact, that the medical community would say that it is incorrect. But the definitions have different purposes. Justice Dickinson's has the goal of effectuating the Eighth Amendment concerns of the *Atkins* decision. It is not geared for any other purpose—as are the AAIDD and DSM definitions. This would not seem to be problematic though, because, first, the DSM has a "Cautionary Statement," warning that the purpose of the manual "is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to *diagnose, communicate about, study, and treat people* with various mental disorders. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments . . . ."[134] Justice Dickinson's proposed definition is relevant solely to legal judgments. It is not intended for use in studying and treating people, or for any other use in clinics, school, and other institutions. After all, *Atkins* evaluations are an infinitesimally small percentage of all instances of intellectual-disability assessments.

So, Justice Dickinson's opinion proposes that, instead of asking whether a defendant meets the current medical definition of intellectual disability, courts should be guided by the question: what is the goal of *Atkins* jurisprudence? The answer, logic suggests, is to exclude from execution those people who have certain types of mental deficiencies, regardless of the label, regardless of the etiology, regardless of age of onset. Courts should look at the deficiencies, at the resulting deficits in intellectual and adaptive functioning, to decide who should

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132. *Id.* at 44 (emphasis in original).

133. This was not the first time Justice Dickinson had expressed this concern. *See* Brown v. State, 168 So. 3d 884, 899–901 (Miss. 2015) (Dickinson, P.J., dissenting).

134. AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at xxxvii (4th ed. 2000) (emphasis added). Dr. Mossman was concerned about this issue, too. As I wrote in 2005, "[c]entral to Mossman's reservations is the very nature of the diagnostic tools that are being pressed into service in the criminal justice system. The definitions of mental retardation from the AAMR and APA manuals, Mossman points out, were designed to aid in treatment of mental disorders. He distinguishes "utility" from "validity"; the tools are useful to clinicians and social workers in the therapeutic setting, but whether they are valid as accurate descriptors is another matter. Imported into the courts, they may not be very meaningful. The result could be arbitrary reliance on standards that do not have much to do with reality." Kassoff, *supra* note 5, at 256 (citing Mossman, *supra* note 99, at 264–65).

receive *Atkins* exemption. To achieve this goal, Justice Dickinson proposed the following:

> Persons are intellectually disabled if they (1) have substantially reduced intellectual functioning or suffer from any mental defect or disease, (2) and that substantially reduced intellectual functioning, mental defect, or disease causes them to act out of impulse rather than a reasoned judgment of consequences, substantially reduces their ability to appreciate the wrongfulness of their actions, substantially reduces their ability to assist their counsel in their defense, or (in cases where the defendant has confessed) creates a substantial risk that the confession was false.[135]

This proposal has elements of the recommendations of the ABA, the APA, and state legislation described *supra*, although it diverges from those formulations in some ways. Justice Dickinson seems to have invented it without reference to those sources, although this is speculation. But what is most significant is the inclusion of the term "mental defect or disease."[136]

D. An Equal-Protection Argument?

Logically, this approach would effectuate the constitutional requirements of the *Atkins* decision. It would implement them a way that would broaden *Atkins* protection to those who have intellectual and adaptive-functioning deficits similar to people diagnosed with intellectual disability as defined in the AAIDD manual and the DSM, but who would not be diagnosed with intellectual disability under those regimes. It would extend the exemption from the death penalty that a person with intellectual and adaptive functioning deficits has as a result of "traditional" intellectual disability to someone who has identical deficits as a result of a brain injury that occurred after the individual's eighteenth birthday. (Textbook intellectual disability definitions have as one requirement "onset before age eighteen.[137])

That approach is logical. Of course, logic alone is not always enough to succeed in a challenge to existing law. As Judge Holmes famously declared, "The life of the law has not been logic: it has been experience."[138] Is there a way to get courts to decide that justice requires exempting the mentally ill from the death penalty?

One strategy that scholars have been exploring is through an equal-protection argument. Nearly twenty years ago, Professor Christopher Slobogin argued that "states that prohibit execution of mentally retarded people or juveniles violate the Equal Protection Clause if they continue to authorize

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135. *Dickerson*, 175 So. 3d at 45 (Miss. 2015) (Dickinson, P.J., concurring in part and dissenting in part).
136. *Id.*
137. AAIDD MANUAL, *supra* note 94, at 5; DSM-5, *supra* note 35, at 33.
138. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (ABA Publishing 2009) (1963).

imposition of the death penalty on people with mental illness."[139] This strategy is not without its challenges:

> One hurdle for this argument is likely to be the Supreme Court's consistent holding that laws that differentiate based on disability need only meet the "rational basis" test, which is generally an extremely easy test to meet. But that hurdle might not be as significant as many think. First, read carefully, the Supreme Court's equal protection case law can be said to require not only a plausible reason but a good reason for discrimination based on disability. Second, if—as Atkins seems to indicate—the most important factors in determining which murderers may be put to death are relative culpability and deterrability, there may even not be any plausible reasons for differentiating between execution of people with mental illness and execution of people with mental retardation or juveniles. Finally, it is worth noting that the death penalty is a special context that often produces surprising results; after all, as recently as two years ago, very few people would have predicted Atkins would be decided the way it was.[140]

A full discussion of this equal-protection argument is beyond the scope of this paper. The interested reader can find discussions on the subject in a variety of journals. Time will tell if this approach will eventually carry the day.

VII. CONCLUSION

As of this writing in 2019, as was the case in 2004 when *Chase v. State* was decided, the jurisprudence regarding intellectual disability and the death penalty is still in a state of flux. Some issues appear settled. Some implications of the law do not accord with logic. Advocates on all sides have ideas for reform. Perhaps the safest conclusion that can be drawn at this point is that we have not seen the last of the changes in this area of the law, and that the courts, the legislatures, the advocates, and the people still have some hard thinking to do.

139. Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 293 (2003).

140. *Id.*