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## The Failure of Mitigation?

Robert J. Smith

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## Articles

### The Failure of Mitigation?

ROBERT J. SMITH,\* SOPHIE CULL, AND ZOË ROBINSON\*\*

*A vast literature details the crimes that condemned inmates commit, but very little is known about the social histories of these capital offenders. For example, how many offenders possessed mitigating characteristics that demonstrate intellectual or psychological deficits comparable to those shared by classes of offenders categorically excluded from capital punishment? Did these executed offenders suffer from intellectual disability, youthfulness, mental illness, or childhood trauma? The problem with this state of affairs is that the personal characteristics of the defendant can render the death penalty an excessive punishment regardless of the characteristics of the crime. This Article begins to fill the mitigation knowledge gap by describing the social histories of the last hundred offenders executed in America. Scouring state and federal court records, this Article documents the presence of significant mitigation evidence for eighty-seven percent of executed offenders. Though only a first step, our findings suggest the failure of the Supreme Court's mitigation project to ensure the only offenders subjected to a death sentence are those with "a consciousness materially more depraved" than that of the typical murderer. Indeed, the inverse appears to be true: the vast majority of executed offenders possess significant functional deficits that rival—and perhaps outpace—those associated with intellectual impairment and juvenile status; defendants that the Court has categorically excluded from death eligibility.*

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## INTRODUCTION

The Eighth Amendment limits the death penalty to those offenders with “a consciousness materially more depraved” than that of the typical murderer.<sup>1</sup> Offenders who meet this threshold for death eligibility are identified as having “extreme culpability.”<sup>2</sup> Extreme culpability marks one end of a death-eligibility spectrum. The perpetrator of the typical murder occupies the other end.<sup>3</sup> To *elevate* the culpability of the perpetrator beyond that of the typical murderer, the prosecution must prove the existence of at least one aggravating factor such as the existence of multiple victims or the heinousness of the offense.<sup>4</sup> To *reduce* culpability, capital defendants introduce mitigating evidence such as intellectual impairments, youthfulness, severe mental illness, and chronic

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1. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (internal quotation marks omitted) (reversing a death sentence due to insufficient proof that the defendant had “a consciousness materially more depraved than that of any person guilty of murder”).

2. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (internal quotation marks omitted) (explaining that the death penalty “must be limited to those offenders . . . whose extreme culpability makes them the most deserving of execution”).

3. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that “the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State”).

4. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (citation omitted) (internal quotation marks omitted) (“Because Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of a greater offense the Sixth Amendment requires that they be found by a jury.”); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 397–430 (1998) (listing aggravating factors by state).

childhood trauma.<sup>5</sup> Aggravating and mitigating factors, then, drive movement along the death-eligibility spectrum.<sup>6</sup> The process of jurors considering mitigating factors—including the circumstances of the crime and the background and character of the offender—is known as individualized sentencing.<sup>7</sup>

Intellectually disabled<sup>8</sup> and juvenile offenders are no longer located on the death-eligibility spectrum.<sup>9</sup> Instead, because intellectually disabled and juvenile offenders have diminished culpability relative to the typical death-ineligible murderer, these classes of offenders are treated as outliers; they are exempted from capital punishment altogether.<sup>10</sup> The exemption from capital punishment granted to particular classes of offenders is known as categorical exemption.<sup>11</sup> Taken together, individualized sentencing and categorical exemption are mitigation-facilitating procedures that allow jurors to make death determinations for offenders situated along the death-eligibility spectrum, but not for classes of offenders characterized by diminished culpability.<sup>12</sup>

This Article asks whether the Court's mitigation-facilitating procedures succeed in limiting capital punishment to only those offenders

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5. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 658–83 (2004) (listing mitigating factors by state).

6. *Walton v. Arizona*, 497 U.S. 639, 659 (1990) (explaining that the Court “upheld against Eighth Amendment challenge” death penalty statutes “which, in varying forms, require[] the sentencer to consider certain specified aggravating and mitigating circumstances in reaching its decision”).

7. See *infra* note 20 and accompanying text.

8. As recently as 2013, the Supreme Court employed the term “mental retardation” to describe those individuals with intellectual disabilities. See, e.g., *Wos v. E.M.A.*, 133 S. Ct. 1391, 1395 (2013). However, in the recent decision of *Hall v. Florida*, the Court aligned its terminology with that used in the medical community. See *Hall v. Florida*, No. 12-10882, 2014 WL 2178332, at \*3 (U.S. May 27, 2014). Writing for the Court, Justice Kennedy stated that “[p]revious opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.” *Id.* The Court’s shift in terminology has been widely applauded. See, e.g., Tony Mauro, *Supreme Court’s Use of ‘Intellectual Disability’ Wins Praise*, LEGAL TIMES (May 28, 2014), <http://www.nationallawjournal.com/legaltimes/id=1202657038598/Supreme+Courts+Use+of+Intellectual+Disability+Wins+Praise%3Fmcode=1202615034968&curindex=2&curpage=ALL>.

9. *Atkins*, 536 U.S. at 306 (finding that intellectually disabled offenders are excluded due to their “disabilities in areas of reasoning, judgment, and control of their impulses”); *Roper v. Simmons*, 543 U.S. 551, 569–74 (2005) (juveniles are excluded due to their “lack [of] maturity,” “transitory, less fixed [identities]” and “underdeveloped sense of responsibility”).

10. *Atkins*, 536 U.S. at 320–21; *Simmons*, 543 U.S. at 574.

11. *Graham v. Florida*, 560 U.S. 48, 61 (2010) (citation omitted) (“[I]n cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18 or whose intellectual functioning is in a low range.”).

12. Categorical exemptions also prohibit the imposition of the death penalty on defendants convicted of non-homicide offenses. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (prohibiting the death penalty for adult rape); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (prohibiting the death penalty for the rape of a child). Those defendants convicted of murder who did not kill or act with reckless indifference are also exempt from the death penalty. *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

with extreme culpability. Specifically we ask: How many offenders possessed mitigating characteristics that demonstrate intellectual or psychological deficits comparable to those shared by classes of offenders categorically excluded from capital punishment? Did these executed offenders suffer from intellectual disability, youthfulness, mental illness or childhood trauma? By illustrating that the social histories of the last hundred offenders executed in the United States exhibit the presence of extensive and widespread mitigation, this project is the first step toward building a knowledge base of the social histories of America's condemned inmates.

But first a note about methodology. Our aim here is modest. We hope to give pause to those scholars and judges who presume that *Atkins v. Virginia* and *Roper v. Simmons* winnowed down the death-eligibility pool to those offenders with the most extreme personal culpability. We do not aim to prove that any particular executed offenders possessed lesser culpability than that of the typical categorically excludable offender (though it might be the case that some of the offenders we identify did possess reduced culpability comparative to a typical *Atkins* or *Roper* excludable offender). Nor do we mean to suggest that the evidence that we were able to gather from the available records (which are often sparse, due to, for example, factors including poor representation, inadequate funding for penalty phase or post-conviction investigation, or where defendant prohibited his counsel from presenting mitigating evidence) is sufficient to prove mitigated culpability. Rather, our aim is to begin a scholarly conversation about the functionality of the Supreme Court's mitigation project. To that end, we err on the side of overinclusion of mitigation evidence. Where available, we cite to a state or federal court appellate opinion. In the absence of mitigation evidence in the appellate record, we include information from the following sources in descending order of preference, where preference ordering is based on the credibility of the source: a finding relayed by an expert, regardless of where that finding is articulated; a news account; a pleading filed by a defendant. When we rely on pleadings, which we do very sparingly, such reliance is noted in the footnote and we also note any evidence cited in the parallel pleadings filed by the prosecution that tends to contradict the claim articulated by the defendant.

Part I of this Article explains the requirement of extreme culpability and describes the procedures designed to enforce it. Part II examines the mitigation histories of the last one hundred executed offenders in America. It reveals that the overwhelming majority of executed offenders had intellectual and psychological deficits that rivaled—and sometimes outpaced—those associated with intellectual disability and juvenile status. Part III connects the dots: it raises the inference that procedures entrusted to enforce the extreme culpability requirement might not be sufficient.

## I. THE EXTREME CULPABILITY REQUIREMENT AND THE PROCEDURES DESIGNED TO ENFORCE IT

This Part begins by detailing the extreme culpability requirement and how the Supreme Court characterizes offenders who possess it. It then describes the two procedures designed to ensure that only defendants with extreme culpability are executed—individualized sentencing and categorical exemption. The framework that we construct here provides context for the mitigation histories discussed in Part II.

### A. THE EXTREME CULPABILITY REQUIREMENT

The Eighth Amendment prohibits excessive punishments, which in capital cases, limits the death penalty to offenders who commit “a narrow category of the most serious crimes” and “whose extreme culpability makes them the most deserving of execution.”<sup>13</sup> In *Coker v. Georgia*, for instance, the Court found the death penalty to be an excessive punishment for the rape of an adult woman because rape, though a very serious crime, does not compare in terms of “moral depravity” with murder.<sup>14</sup> More recently, in *Kennedy v. Louisiana*, which involved the rape of a child, the Court held that the death penalty is an excessive punishment for any civilian crime that does not result in death.<sup>15</sup> After *Kennedy*, then, only homicide crimes are death-eligible.

But not all homicide crimes are death-eligible. The perpetrator of the typical murder does not reach the extreme culpability threshold.<sup>16</sup> To cross the extreme culpability threshold, the prosecution must prove the existence of at least one factor that aggravates the murder.<sup>17</sup> Common examples of aggravating factors include the heinousness of the offense, the number of victims, and the prior record of the offender.<sup>18</sup> Taken

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13. *Kennedy*, 554 U.S. at 420 (internal quotation marks omitted).

14. *Coker*, 433 U.S. at 598 (“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.”).

15. *Kennedy*, 554 U.S. at 447 (“Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.”).

16. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“[T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.”).

17. *Ring v. Arizona*, 536 U.S. 584, 585 (2002) (citation omitted) (internal quotation marks omitted) (“Because Arizona’s enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.”).

18. Kirchmeier, *supra* note 4, at 397–430 (listing aggravating factors). The Court has given its blessing to a variety of state legislative attempts to define aggravated homicide in a manner that captures in its net only the most culpable offenders. See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (asserting that “the narrowing function required for a regime of capital punishment” can be met either by legislative narrowing of “the definition of capital offenses” or “the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase”). Many states permit the prosecution to prove aggravated culpability by reference to

together, the narrowing of death-eligible crimes to homicide offenses and the characterization of the extremely culpable offender as one with a “consciousness materially more depraved” than that of the perpetrator of the typical murder are best thought of as the velocity necessary to elevate the culpability of the offender.<sup>19</sup> The next Subpart focuses on how mitigation evidence operates as a downward pressure that prevents the State from proving that the offender meets the extreme culpability threshold.

#### B. THE PROCEDURES DESIGNED TO ENSURE THE EXTREME CULPABILITY REQUIREMENT

The Court has enacted two procedures to ensure that insufficiently culpable offenders are not executed: individualized sentencing and categorical exemption. This Article addresses them in turn.

The first requirement—individualized sentencing—is a process requirement. Defendants are permitted to introduce—and jurors are required to consider—(almost) any evidence about the character or background of the offender that suggests that death is not an appropriate punishment.<sup>20</sup> This broad definition of mitigation includes factors such as remorse, lack of any criminal record, and a lesser role in the crime than codefendants, among myriad other factors.<sup>21</sup> These factors do not directly impact moral culpability. This Article focuses instead on the subset of mitigating factors that demonstrate intellectual and psychological deficits directly related to the moral culpability of the offender. These factors include: intellectual impairments, youthfulness, mental illness, and childhood trauma.<sup>22</sup> Each factor is correlated with diminished functioning—some factors suggest impaired reasoning skills, poor judgment, or suggestibility; others suggest decreased impulse control or enhanced emotional volatility; each of them suggest a downward

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the defendant’s previous acts of serious violence. Kirchmeier, *supra* note 4, at 378. Other factors involve the heightened “depravity” or “cold-blooded” or “pitiless” nature of the offense in comparison to other homicides. *See, e.g.*, *Arave v. Creech*, 507 U.S. 463, 471–75 (1993) (affirming the constitutionality of an Idaho statutory aggravator that required the jury to find that the defendant is a “cold-blooded, pitiless slayer”). Still others focus on the elevated dangerousness of the offender. Kirchmeier, *supra* note 4, at 378–79. Indeed, there is such a proliferation of aggravating circumstances that commentators have noted that aggravators do not truly narrow the types of homicide that result in death-eligibility. *See, e.g.*, James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607, 1658 (2006) (noting that death-eligibility is too broad and calling for “additional narrowing”).

19. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (internal quotation marks omitted).

20. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (allowing every defendant to introduce “any aspect of [his] character or record” that he “proffers as a basis for a sentence less than death”).

21. Kirchmeier, *supra* note 5, at 658–83.

22. *See infra* Part II (describing the characteristics of childhood trauma, mental illness, youthfulness, and intellectual impairment).

departure from extreme culpability.<sup>23</sup> To be clear, these mitigating factors do not excuse the crime. Instead, they provide capital juries with the necessary context for deciding whether a death sentence is appropriate.

Individualized sentencing serves as a primary protection for ensuring that only offenders with extreme culpability are executed.<sup>24</sup> The integrity of the procedure depends on the ability of jurors to sort the perpetrator of the typical murderer from the comparatively few murders committed by a perpetrator with extreme culpability.<sup>25</sup> Though the jury is entrusted to determine whether a death sentence is appropriate for any offender located on the death-eligibility spectrum—which, again, ranges from the perpetrator of the typical murder to the murderer with extreme culpability—the Court finds this culpability-sorting task to be impossibly difficult when the defendant is intellectually disabled or a juvenile.<sup>26</sup> Hence the second procedural protection used to ensure that only offenders with extreme culpability are executed: categorical exemption.

Classes of offenders that are characterized by their diminished culpability receive blanket exemption from capital punishment.<sup>27</sup> For example, in *Atkins v. Virginia*, the Court exempted intellectually disabled offenders because the typical intellectually disabled offender has “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>28</sup> Similarly, in *Roper v. Simmons*, the Court exempted juveniles because the typical juvenile offender has a “lack of maturity and an underdeveloped sense of responsibility,” tends to engage in “impetuous and ill-considered actions and decisions,” is more “vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and has a “more transitory, less fixed” identity than the typical adult.<sup>29</sup> Thus, intellectually disabled and juvenile offenders are defined in part by their diminished moral culpability.

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23. See *infra* Part II.

24. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (citation omitted) (“[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”).

25. *Id.* at 305 (noting that “death is qualitatively different from a sentence of imprisonment” and stating that “[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”).

26. See *supra* note 9 (citing the cases in which the Court created categorical exemptions for intellectually disabled and juvenile offenders).

27. See *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (intellectually disabled offenders); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (juveniles).

28. *Atkins*, 536 U.S. at 318; see *Hall v. Florida*, No. 12-10882, 2014 WL 2178332, at \*16 (U.S. May 27, 2014) (holding that states cannot use fixed IQ scores to determine death eligibility).

29. *Simmons*, 543 U.S. at 569–75.

Diminished culpability is not an argument from determinism, but rather one that recognizes that physiological and cognitive deficits constrain and shape choices.<sup>30</sup> “Diminished” has a reference point: it means diminished culpability in relation to that of the perpetrator of the typical murder.<sup>31</sup> Because the perpetrator of the typical murder is at the low-end of the death-eligibility spectrum, and intellectually disabled and juvenile offenders are less culpable still, classes of offenders with diminished culpability are treated as outliers—they are not on the death-eligibility spectrum. This is not to claim that it is impossible for any intellectually disabled or juvenile offender to have the requisite extreme culpability, but rather that because such an offender is so exceedingly rare, intellectually disabled or juvenile offenders as a class “cannot with reliability be classified among the worst offenders.”<sup>32</sup>

This Part detailed both the extreme culpability requirement and the mitigation-facilitating procedures designed to ensure that the death penalty functions properly. The next Part details the mitigation histories of the hundred most recently executed offenders in the United States. It raises an inference that the mitigation-facilitating procedures are not preventing the execution of offenders who do not possess the extreme culpability contemplated by the Eighth Amendment.

## II. THE MITIGATION HISTORIES OF THE LAST ONE HUNDRED EXECUTED OFFENDERS

This Part examines the mitigation histories of the last one hundred executed offenders in the United States.<sup>33</sup> We compiled these histories to construct a portrait of *who* is being executed despite the individualized sentencing and categorical exemption frameworks.<sup>34</sup> We considered only

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30. See *Atkins*, 536 U.S. at 318 (“Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”).

31. See *Simmons*, 543 U.S. at 571 (“Whether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

32. *Id.* at 569.

33. We examined a total of 102 cases but excluded two defendants from our analysis because they refused to introduce mitigation evidence in their respective cases. See *Kemp v. Ryan*, 638 F.3d 1245, 1249–51 (9th Cir. 2011) (stating that at trial Kemp did not seek to prove the existence of any statutory mitigating factors at sentencing; Kemp attempted to prove the existence of non-statutory mitigation but did not offer any evidence or present witnesses); *South Dakota v. Robert*, 820 N.W. 2d 136, 140 (S.D. 2012) (noting that Robert instructed “his counsel not to present mitigating evidence on his behalf” because he wished to be executed).

34. We chose the one hundred most recently executed offenders for three reasons: First, by definition, there is no future proceeding from which new information will displace current knowledge

mitigating circumstances that demonstrate intellectual and psychological deficits that compare to those that intellectually disabled and juvenile offenders possess, namely: intellectual disability, youthfulness, mental illness, and childhood trauma.<sup>35</sup> Our examination reveals that the vast majority of executed offenders—eighty-seven percent—fell into at least one mitigation category; and most offenders fell into two or more categories.<sup>36</sup> This Part begins by considering each of the major mitigation types.

#### A. INTELLECTUAL IMPAIRMENT

Intellectual impairment is an umbrella term that encompasses both intellectual disability and borderline functioning that falls just outside of intellectual disability definitions. One-third of the last hundred executed offenders were burdened by intellectual disability, borderline intellectual functioning, or traumatic brain injury—a similarly debilitating intellectual impairment.<sup>37</sup>

The American Association on Intellectual and Developmental Disabilities (“AAIDD”), an interdisciplinary organization of professionals concerned with intellectual disability, defines intellectual disability as “a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills.”<sup>38</sup> The AAIDD suggests that a sub-76 IQ suggests

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of whether the defendant deserved death. Second, and relatedly, mitigation information is often not adequately documented until the completion of the federal habeas and the clemency process. Third, we would expect executed offenders to be the most culpable. These individuals met state requirements for death-eligibility, a prosecutor decided to charge the case capitally, a jury returned a death verdict, no appellate court reversed the death sentence, and no executive figure or body granted clemency. In other words, if these offenders possess mitigated culpability, then we have every reason to believe that death row inmates generally possess similar—indeed, more pronounced—mitigation histories. We sourced information from state supreme court decisions, state and federal habeas petitions, state and federal habeas rulings, petitions for certiorari to the United States Supreme Court, clemency petitions, news articles, state department of corrections websites, and online databases of death row defendants.

35. These categories will be discussed in more detail below. The following are examples of mitigating factors that fall into these categories: (1) Mental illness: post-traumatic stress disorder (“PTSD”), alcohol and drug abuse/dependency, bi-polar disorder, major depression, schizophrenia, hallucinations, psychosis, delusions, personality disorders, suicidal ideation, and self-harm; (2) Intellectual impairments: adaptive deficits, head injury, brain damage, and low IQ; (3) Age: under twenty-five years old; (4) Childhood trauma: death of caregivers and immediate family members, sexual assault, physical abuse, criminal neglect, poverty, exposure to interpersonal violence, and homelessness.

36. The Court’s decision in *Hall v. Florida*—holding that states cannot rely solely on a fixed IQ score to conclusively determine death eligibility—came down when this Article was in final production. See *Hall v. Florida*, No. 12-10882, 2014 WL 2178332, at \*16 (U.S. May 27, 2014). The idea that states need to take a more functional approach to assessing intellectual impairment to guard against retributive mismatch is consistent with our thesis.

37. *Id.*

38. AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *Definition of Intellectual Disability*, [http://aidd.org/intellectual-disability/definition#.Uvm\\_pXddU\\_M](http://aidd.org/intellectual-disability/definition#.Uvm_pXddU_M) (last visited June 1, 2014) (emphasis omitted).

intellectual disability.<sup>39</sup> The *Atkins* Court did not explicitly adopt the AAIDD definition of intellectual disability in its decision to exclude intellectually disabled offenders from capital punishment, but rather chose to divest the responsibility of defining intellectual disability to state legislatures.<sup>40</sup> The result has been a lack of uniformity among the states about how intellectual disability is defined, and therefore, about which offenders are exempt from the death penalty.<sup>41</sup> Eight percent of executed offenders received at least one sub-70 IQ score.<sup>42</sup> This is the range of intellectual functioning that the *Atkins* Court described as consisting of offenders with “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>43</sup>

Consider Elroy Chester.<sup>44</sup> No one disputes that Elroy Chester was intellectually disabled under the standard clinical definitions of intellectual disability despite the fact that Texas executed him on June 12, 2013. The Texas Department of Corrections had determined that Chester had an IQ of 69.<sup>45</sup> In fact, Chester scored under 70 in four of the five full-scale IQ tests that he took from the age of seven onwards.<sup>46</sup> He attended special education classes from the third through twelfth grades, never learning at an academic level higher than the third grade.<sup>47</sup> The Texas Court of Criminal Appeals noted that, “even the State’s expert witness . . . acknowledged that a person with [Chester’s scores] . . . would be correctly diagnosed as mildly mentally retarded.”<sup>48</sup> Yet despite these findings—and the fact that the Texas Department of Criminal Justice had previously enrolled Chester in its Mentally Retarded Offenders Program<sup>49</sup>—Texas executed Chester. The inability of the *Atkins* exemption to halt the execution of Elroy Chester (and other executed offenders like him) raises

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39. *Id.*

40. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (citations omitted) (internal quotation marks omitted) (leaving “to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences”).

41. See Alexis Krulish Dowling, Note, *Post-Atkins Problems with Enforcing the Supreme Court’s Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 790 (2003). See generally John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689 (2009).

42. See *infra* Table 1 (listing Gayland Charles Bradford, Elmer Leon Carroll, Elroy Chester, Robert Wayne Harris, Rickie Lynn Lewis, Milton Wuzael Mathis, William Gerald Mitchell, and Marvin Wilson).

43. *Atkins*, 536 U.S. at 318.

44. *Chester v. Thaler*, 666 F.3d 340, 362–63 (5th Cir. 2011).

45. *Id.* at 363.

46. *Id.* at 353.

47. *Id.* at 355.

48. *Ex parte Chester*, No. AP-75037, 2007 WL 602607, at \*3 (Tex. Crim. App. Feb. 28, 2007).

49. *Chester*, 666 F.3d at 363.

serious questions about the effectiveness of *Atkins* in the absence of a clear Court-sanctioned definition of intellectual disability.

An IQ between 71 and 84 is categorized as borderline intellectual functioning.<sup>50</sup> Only nine percent of the general population has an IQ of 80 or below.<sup>51</sup> Fifteen percent of our sample group had IQ scores below 80 recorded in their mitigation histories, with half of these receiving scores in the 60s.<sup>52</sup> The difference between an offender with an IQ score that renders him categorically ineligible for the death penalty and an offender with borderline intellectual functioning is often negligible.<sup>53</sup> Relative to the typical adult, borderline mental deficiency—like intellectual disability—diminishes defendants’ capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand the reactions of others.<sup>54</sup> Thus, the line between offenders exempted under *Atkins* and offenders with borderline intellectual deficiency is an arbitrary one—both classes of offenders possess diminished culpability relative to the typical adult.

Many states base their definitions of intellectual disability, at least in part on the American Psychological Associations’ *Diagnostic and Statistical Manual on Mental Disorders* (“DSM”). The most recent version of the DSM, the DSM-5, which was released in 2013, conspicuously removed IQ test scores from the diagnostic criteria.<sup>55</sup> The DSM-5 supports the delineation of skill types or “domains” in which intellectual disabled people will experience impairments.<sup>56</sup> IQ scores remain in the text description of the intellectual disability but the American Psychological Association has taken pains to ensure that IQ scores “are not overemphasized as the defining factor of a person’s overall ability, without adequately considering functioning levels.”<sup>57</sup> DSM-5 notes that its caution about overreliance on IQ scores “is especially important in forensic cases” because IQ scores that fall outside traditional definitions of intellectual disability can mask functional intellectual deficits on par with those of individuals with lower IQ scores.<sup>58</sup> Thus, it is reasonable to

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50. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 684 (4th ed. 1994).

51. See generally WECHSLER INTELLIGENCE SCALE FOR CHILDREN (4th ed. 2004) (presenting an IQ classification table that reflects that the distribution of population with IQ scores below 80 is 8.9%).

52. See *infra* Table 1 (listing Daniel Lee Bedford, Charles Henry Blue, Gayland Charles Bradford, Elmer Leon Carroll, Clarence Carter, Elroy Chester, Guadalupe Esparza, Rodney Gray, Robert Wayne Harris, Yokamon Laneal Hearn, Rickie Lynn Lewis, Milton Wuzael Mathis, William Gerald Mitchell, Jeffrey Demond Williams, and Marvin Wilson).

53. AM. PSYCHIATRIC ASS’N, DSM-5 INTELLECTUAL DISABILITY FACT SHEET 1–2 (2013).

54. *Id.* at 1.

55. *Id.*

56. *Id.* at 1–2.

57. *Id.*

58. *Id.* at 2.

assume that at least some executed offenders with sub-80 IQs that did not qualify under the DSM-4's definition of intellectual disability would qualify under the DSM-5. Moreover, even those offenders who would not qualify under either version of the DSM nonetheless possess significant intellectual impairments relative to the typical adult.

Other executed offenders had a traumatic brain injury, which can result from birth defects or head injuries that onset before or after age eighteen.<sup>59</sup> Traumatic brain injury is strongly associated with "attention deficits," "memory deficits," "irritability or anger," and "uninhibited or impulsive" behavior.<sup>60</sup> These injuries often do not qualify under *Atkins* because intellectual disability must onset before the age of eighteen in a most jurisdictions.<sup>61</sup> Consider James DeRosa.<sup>62</sup> He had an injury in the left frontal lobe of his brain that interfered with his ability to reason and caused him to act impulsively and lose control easily.<sup>63</sup> It is unlikely that the typical seventeen-year-old would have greater impulsivity problems than the typical person with traumatic brain injury; thus no more likely that the person with a brain injury would account for the risk of execution any more than would the typical juvenile. Brain injury is also subject to the double-edged sword problem: brain injuries should be mitigating, but they run the risk of aggravating the culpability calculus since increased impulsivity and decreased self-control suggest future dangerousness.

Table 1: Defendants Who Demonstrated Evidence of Intellectual Disability

Daniel Lee Bedford <sup>64</sup>	Charles Henry Blue <sup>65</sup>	Gayland Charles Bradford <sup>66</sup>
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59. See *infra* Table 1 (listing Richard Cobb, Daniel Cook, Robert Jackson Samuel Villegas Lopez, Benny Joe Stevens, and Richard Stokley).

60. CTRS. FOR DISEASE CONTROL, DEP'T OF HEALTH & HUMAN SERVS., TRAUMATIC BRAIN INJURY IN PRISONS AND JAILS: AN UNRECOGNIZED PROBLEM 2 (2013) (noting that among male offenders, traumatic brain injuries are highly correlated with violent offenses).

61. See *supra* note 38.

62. DeRosa v. Workman, 679 F.3d 1196, 1212-18 (10th Cir. 2012).

63. *Id.* at 1213-14.

64. Neuropsychological testing revealed that Bedford was moderately impaired in his memory abilities and in language skills and demonstrated deficits in his day-to-day functioning skills. See STATE OF OHIO ADULT PAROLE AUTH., IN RE: DANIEL LEE BEDFORD, OSP #A181-997: CLEMENCY REPORT 8 (2011), available at [http://www.drc.ohio.gov/Public/bedford\\_danielClemency.pdf](http://www.drc.ohio.gov/Public/bedford_danielClemency.pdf). He scored 70 on an IQ test when he was thirteen and 76 on an IQ test when he was thirty-six. *Id.* at 9. A specialist in neuropsychiatry diagnosed Bedford with mild intellectual disability. *Id.*

65. The Doctor's diagnosis determined that Carl Blue's IQ lay between 70 and 80. Blue v. Thaler, 665 F.3d 647, 659 (5th Cir. 2011).

66. State prison records indicate Bradford had an IQ score of 68 and he never completed his high school diploma. Bradford v. Cockrell, No. 3:00-2709, 2002 WL 32158719, at \*4 (N.D. Tex. Nov. 8, 2002); Brandon Scott, *Bradford Executed for 1988 Murder of Dallas Security Guard*, HUNTSVILLE ITEM

Elmer Leon Carroll <sup>67</sup>	Clarence Carter <sup>68</sup>	Elroy Chester <sup>69</sup>
Richard Aaron Cobb <sup>70</sup>	Daniel Wayne Cook <sup>71</sup>	James DeRosa <sup>72</sup>
Guadalupe Esparza <sup>73</sup>	Frank Garcia <sup>74</sup>	Rodney Gray <sup>75</sup>
Robert Wayne Harris <sup>76</sup>	Yokamon Laneal Hearn <sup>77</sup>	Bobby Hines <sup>78</sup>

(June 1, 2011), <http://itemonline.com/local/x962127241/Bradford-executed-for-1988-murder-of-Dallas-security-guard> (“Bradford never received a high school diploma.”).

67. A mental health expert testified that Carroll suffered from organic brain damage that affected his intellectual and cognitive capacities. *Carroll v. State*, 815 So. 2d 601, 615 (Fla. 2002). He was found to have learning disabilities and his IQ was determined to be 81. *Id.*

68. A forensic psychologist concluded that Carter suffered from organic brain dysfunction. *Carter v. Mitchell*, 443 F.3d 517, 528 (6th Cir. 2006). A neuropsychologist found that Carter had difficulty understanding the spoken word and struggled with complex information. *See id.* Carter’s IQ was in the range for borderline intellectual disability. *See id.* at 529; *see also* STATE OF OHIO ADULT PAROLE AUTH., IN RE: CLARENCE CARTER, OSP #A1213-146, DEATH PENALTY CLEMENCY 4 (2011), available at <http://www.drc.state.oh.us/public/ClarenceCarter2011.pdf>.

69. Chester took five full-scale IQ tests; he scored under 70 four times, and even the Texas Department of Corrections classified Chester as possessing a 69 IQ. *See infra* Part IIA.; *Chester v. Thaler*, 666 F.3d 340, 362–63 (5th Cir. 2011); *Ex parte* Chester, No. AP-75,037, 2007 WL 602607, at \*3 (Tex. Crim. App. Feb. 28, 2007).

70. Expert testimony revealed that Cobb suffered from brain damage as a result of his mother’s alcohol and drug use while she was pregnant with him. *Cobb v. Thaler*, No. 2:08-0123, 2011 WL 672333, at \*6 (E.D. Tex. Feb. 15, 2011).

71. Cook was diagnosed as suffering from organic brain damage due to his mother’s dependence on drugs and alcohol during her pregnancy. *See* Jason Lewis, *Daniel Cook, Convicted Murderer With Tortured Past, Executed in Florence*, PHX. NEW TIMES BLOGS (Aug. 8, 2012, 3:55 PM), [http://blogs.phoenixnewtimes.com/valleyfever/2012/08/daniel\\_cook\\_convicted\\_murderer.php](http://blogs.phoenixnewtimes.com/valleyfever/2012/08/daniel_cook_convicted_murderer.php); *see also* Cook v. Ryan, No. 97-00146, 2012 WL 2798789, at \*10 (D. Ariz. July 9, 2012).

72. DeRosa had an acquired brain injury. *DeRosa v. Workman*, 679 F.3d 1196, 1214 (10th Cir. 2012). The left frontal lobe of his brain had a deficiency that impacted his behavior by causing him to be impulsive and lose control easily, as well as interfering with his ability to reason. *Id.* at 1213.

73. Esparza was in special education as a child and failed the ninth grade and the General Educational Development Test. *Esparza v. Thaler*, 408 F. App’x 787, 791 (5th Cir. 2010). He had a history of adaptive problems in his childhood. *Id.* Esparza scored 71 on an IQ test and multiple experts concluded that he was intellectually disabled or mildly intellectually disabled. *Id.* at 790–94.

74. Garcia had “serious intellectual deficiencies.” Petitioner’s Second Amended Application for Writ of Habeas Corpus & Brief in Support Thereof at 96, *Garcia v. Thaler*, No. 08-0062, 2009 WL 4931069 (W.D. Tex. Nov. 9, 2009). He was a sub-standard student, and was believed to have suffered organic brain injury as a child due to a disability that regularly caused him to fall and hit his head. *Id.*

75. Gray’s IQ was disputed but test results put it between 74 and 80. *Gray v. Epps*, No. 4:04-0234, 2008 WL 4793796, at \*33–35 (S.D. Miss. Oct. 27, 2008). He was held back in the third and ninth grades and was in special education in the fourth grade. *Id.* at \*31, \*34.

76. Harris had an IQ of 68 and an “an impaired intelligence level.” Molly Hennessy-Fiske, *Texas Executes Robert Wayne Harris*, L.A. TIMES (Sept. 20, 2012), <http://articles.latimes.com/2012/sep/20/nation/la-na-nn-harris-execution-20120920>; Ramirez Domingo, Jr., *Brother Pleads for Life of Man Convicted in Carwash Deaths: A Forensic Psychologist and a Psychiatrist Detail the Troubled Past of Robert Wayne Harris*, FORT WORTH STAR-TELEGRAM, Sept. 29, 2000, at 8.

77. Hearn had Fetal Alcohol Syndrome and his parents were cognitively disabled. AMNESTY INT’L, SENSELESS KILLING AFTER SENSELESS KILLING: TEXAS INMATE WITH MENTAL DISABILITY CLAIM FACING EXECUTION FOR MURDER COMMITTED AS TEENAGER 11 (2012). He was consistently described as “slow”, a “follower,” “gullible,” “easily influenced,” and “impressionable” by friends, relatives, and former teachers during his childhood. *Id.* His IQ was 74. *Id.* He had poor grades and failed the first grade. *In re* Hearn, 376 F.3d 447, 455 (5th Cir. 2004).

Henry Curtis Jackson <sup>79</sup>	Robert Jackson <sup>80</sup>	Shannon Johnson <sup>81</sup>
Richard Albert Leavitt <sup>82</sup>	Rickie Lynn Lewis <sup>83</sup>	Samuel Villegas Lopez <sup>84</sup>
Milton Wuzael Mathis <sup>85</sup>	William Gerald Mitchell <sup>86</sup>	Robert Moormann <sup>87</sup>
George Ochoa <sup>88</sup>	Eddie Duvall Powell <sup>89</sup>	Benny Joe Stevens <sup>90</sup>

78. Hines had a diagnosed learning disability and adaptive behavioral deficits that suggested impaired functioning. *See* Jordan Smith, *Two More in Line for Death Penalty*, AUSTIN CHRON. (Oct. 19, 2012), <http://www.austinchronicle.com/news/2012-10-19/two-more-in-line-for-death-penalty>; *see also Ex parte Hines*, No. WR-40347-02, 2005 WL 3119030, at \*1 (Tex. Crim. App. Nov. 23, 2005).

79. Jackson suffered from a complex partial seizure disorder and possibly a brain dysfunction associated with multiple episodes of brain trauma. *Jackson v. State*, 860 So.2d 653, 669–70 (Miss. 2003). He was deemed “intellectually slow.” *See id.* at 669; *see also Jackson v. State*, 684 So. 2d 1213, 1232 (Miss. 1996) (direct appeal).

80. A neuropsychologist found that Jackson suffered from brain damage. *State v. Jackson*, No. 92003717DI, 2008 WL 5048424, at \*9 (Del. Super. Ct. Nov. 25, 2008).

81. Johnson was diagnosed with a learning disability that affected “his ability to master basic academics, such as reading and writing.” *Delaware v. Johnson*, No. 0609017045, 2008 WL 4140596, at \*6 (Del. Super. Ct. Sept. 5, 2008). The trial court found this to be a mitigating factor in his case. *Id.*

82. Scans of Leavitt’s brain revealed white matter that indicated a physical brain injury, thought to have arisen because of “Leavitt’s premature birth, because of a childhood head injury he suffered in an accident, [or] because of inhalation of toxic fumes during employment.” *See* Petition for Commutation Richard A. Leavitt at 4, *Leavitt v. Arave*, 682 F.3d 1138 (2012) (Nos. 12-35427, 12-35450).

83. Lewis’s IQ score was tested on numerous occasions, returning results as low as 59 and as high as 79. *Lewis v. Thaler*, 701 F.3d 783, 786 (5th Cir. 2012).

84. Genetic heritage and acquired brain damage combined to leave Lopez with “crippling” mental impairments. *See* Affidavit of George Woods, M.D. at 4, *Lopez v. Stewart*, No. 98-00072 (2012).

85. Mathis’s IQ was tested a number of times. *In re Mathis*, 483 F.3d 395, 397 (5th Cir. 2007). He received a score of 79 as a child, 62 in 2000, and 64 in 2005. *Id.* A Texas Department of Criminal Justice psychologist found Mathis to have a full-scale IQ of 62. *Mathis v. Dretke*, 124 F. App’x 865, 880 (5th Cir. 2005). A mental health expert found his full-scale IQ to be 79. *Id.* A neurological expert performed tests on Mathis and found that he had frontal lobe brain damage. *Id.* at 881.

86. Mitchell was diagnosed as mildly intellectually disabled more than once. *Mitchell v. Epps*, 2010 WL 1141126, at \*22 (S.D. Miss. Mar. 19, 2010). Records indicated that he suffered from deficits in two or more areas of adaptive behavior, and that his condition had onset before he turned eighteen. *Id.* Mitchell’s IQ scores ranged from 65 to 83. *Id.* at \*40–42.

87. Moormann was placed in a school for intellectually disabled children. He was institutionalized at the age of fifteen and diagnosed with a chronic brain syndrome associated with birth trauma, intellectual disability, and behavioral reactions. Moormann was described by state hospital physicians as a “known mental defective” and otherwise characterized as intellectually disabled. Opening Brief of Petitioner-Appellant at 9, *Moormann v. Schriro*, 628 F.3d 1102 (9th Cir. 2009) (No. 08-99035); *Moorman v. Ryan*, 628 F.3d 1102, 1005, 1113–14 (2010) (noting that Moormann’s trial counsel introduced the testimony of “two prison employees who had been acquainted with Moormann during his incarceration to testify about his good heavier in prison and his mental deficiencies” and rejecting a claim of ineffective assistance of trial counsel where “[e]xtensive evidence of Moormann’s history of behavioral, mental, social, and emotional difficulties was presented at trial,” including “a letter from Moormann’s fourth grade teacher” that “provided a summary of Moormann’s difficulties as a child and student”). He was institutionalized at the age of fifteen and diagnosed with a chronic brain syndrome associated with birth trauma, intellectual disability, and behavioral reactions. *Id.* He was described by state hospital physicians as a “known mental defective” and otherwise characterized as intellectually disabled. *Id.*

88. Ochoa was diagnosed as borderline intellectually disabled. *Ochoa v. State*, 963 P.2d 583, 604 (Okla. Crim. App. 1998).

Richard Stokley <sup>91</sup>	Lee Taylor <sup>92</sup>	Gary Welch <sup>93</sup>
Jeffrey Demond Williams <sup>94</sup>	Marvin Wilson <sup>95</sup>	

Whether an offender is intellectually disabled, borderline intellectually deficient, or the bearer of a traumatic brain injury, each of these conditions is associated with significant functional deficits. These findings point to the problematic notion that courts should treat intellectual disability differently than other intellectual impairments. To further complicate matters, our findings illustrate that intellectual impairments often occur with serious mental illness: Sixteen percent of executed offenders fell into both the mental illness and intellectual impairment categories. It seems unreasonable to rationalize excluding an offender with a 70+ IQ, but not an offender with a sub-80 IQ *and* a severe mental illness.

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89. Powell was diagnosed as mildly intellectually disabled in the fifth grade. *Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010).

90. A psychologist testified during the sentencing phase of his trial that Stevens endured head injuries at ages six, sixteen, and on the day of the crime. Memorandum Opinion & Order at 25–26, *Stevens v. Epps*, No. 2:04-0118 (S.D. Miss. Sept. 15, 2008), ECF No. 35, 2008 WL 423528. A neuropsychologist diagnosed Stevens with dysfunction from an old brain injury. *Id.* at 26.

91. Stokley endured head injuries that, when combined with alcohol consumption, resulted in moderate to severe impairments and an inability to control impulses. *State v. Stokley*, 898 P.2d 454, 470 (Ariz. 1995).

92. Taylor was in special education classes and spent time in a mental health facility during his childhood. Supplemental Claims at 3, *Taylor v. Dretke*, No. 4:04-0150 (E.D. Tex. Mar. 31, 2005), ECF No. 33. A intellectual disability examiner for the State of Texas concluded that there was “indicta for the possible existence [of] mental retardation or other psychological and neuropsychological conditions” in Taylor’s records. *Id.*

93. Welch suffered from blackouts and brain damage that made him more “susceptible to aggressive impulses.” *Welch v. Workman*, 639 F.3d 980, 990 (10th Cir. 2010) (noting the testimony of an expert who reported that “Welch’s drug and alcohol abuse caused brain damage but his behavior could be managed with medication in a controlled environment”).

94. “Williams showed developmental delays at an early age. He did not walk until he was sixteen months old and did not speak until he was four years old.” *Williams v. Dretke*, No. H-04-2945, 2005 U.S. Dist. LEXIS 34438, at \*4 (S.D. Tex. July 15, 2005). He was diagnosed as “emotionally disturbed” with a verbal IQ of 79, a performance IQ of 65, and a full scale IQ of 70 as a high school student. *Id.* at 5. His performance score was within the intellectually disabled range, and his other scores were borderline. *Id.* Based on this diagnosis, Williams was placed in a special education program. *Id.*

95. At age forty-six, Wilson received an IQ score of 61—a score that gives him the distinction as the Texas *Atkins* claimant executed with the lowest full-scale IQ not subject to expert dispute. *Wilson v. Thaler*, 450 F. App’x 369, 375 (5th Cir. 2011). A court-appointed specialist in Wilson’s case diagnosed him with intellectual disability. *Id.* The AAIDD filed an amicus brief in support of Wilson’s petition for certiorari to the United States Supreme Court before his execution, noting that Texas’s use of the *Briseño* factors has rendered the constitutional ban on execution a virtual nullity for mildly retarded offenders like Wilson. Brief of American Association on Intellectual and Developmental Disabilities as Amici Curiae Supporting Petitioner, *Wilson v. Thaler*, 133 S. Ct. 81 (2012) (No. 12-5349), 2012 WL 3277046, at \*2.

## B. YOUTHFULNESS

Richard Cobb was born into a family laboring under severe dysfunction and mental illness.<sup>96</sup> Cobb was born with brain damage because his mother abused alcohol and drugs while she was pregnant with him.<sup>97</sup> A woman who eventually adopted Cobb and his brothers observed “serious emotional problems” in each of them.<sup>98</sup> Cobb was arrested for murder when he was eighteen-years-old.<sup>99</sup> It was Cobb’s codefendant, not Cobb, who engaged in rape during the course of the crime, shot the victim, and was later identified by surviving witnesses as the “leader” of the two perpetrators.<sup>100</sup> Nevertheless, Cobb received the death penalty and was executed by the State of Texas on April 26, 2012.<sup>101</sup> Cobb was five months past his eighteenth birthday at the time of the crime for which he was put to death.<sup>102</sup>

Table 2: Defendants of the Last 100 Executed Under Twenty-one at the Time of the Crime

Beunka Adams <sup>103</sup>	Johnnie Baston <sup>104</sup>	Gayland Charles Bradford <sup>105</sup>
William Glenn Boyd <sup>106</sup>	Richard Aaron Cobb <sup>107</sup>	Andrew Allen Cook <sup>108</sup>
Troy Davis <sup>109</sup>	Andrew DeYoung <sup>110</sup>	Yokamon Hearn <sup>111</sup>

96. See generally Cobb v. Thaler, No. 2:08-0123, 2011 WL 672333 (E.D. Tex. Feb. 25, 2011).

97. *Id.* at \*6.

98. *Id.*

99. Michael Graczyk, *Richard Cobb Executed for Texas Store Abduction Slaying*, HUFFINGTON POST (Apr. 25, 2013, 9:41 PM), [http://www.huffingtonpost.com/2013/04/25/richard-cobb-executed-for\\_n\\_3158818.html](http://www.huffingtonpost.com/2013/04/25/richard-cobb-executed-for_n_3158818.html).

100. *Id.* at \*4.

101. Graczyk, *supra* note 99.

102. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Richard Aaron Cobb*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/cobbrichard.html](http://www.tdcj.state.tx.us/death_row/dr_info/cobbrichard.html) (last visited June 1, 2014).

103. Nineteen years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Beunka Adams*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/adamsbeunka.html](http://www.tdcj.state.tx.us/death_row/dr_info/adamsbeunka.html) (last visited June 1, 2014).

104. Twenty years old. Baston v. Bagley, 420 F.3d 632, 634 (6th Cir. 2005).

105. Twenty years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Gayland Bradford*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/bradfordgayland.jpg](http://www.tdcj.state.tx.us/death_row/dr_info/bradfordgayland.jpg) (last visited June 1, 2014).

106. Twenty years old. See CLARK CNTY. PROSECUTING ATTORNEY, *William Glenn Boyd*, <http://www.clarkprosecutor.org/html/death/US/boyd1245.htm> (last visited June 1, 2014) (citing ALA. DEP’T OF CORRECTIONS, *Executions*, <http://www.doc.state.al.us/Executions.aspx>).

107. Eighteen years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Richard Aaron Cobb*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/cobbrichard.html](http://www.tdcj.state.tx.us/death_row/dr_info/cobbrichard.html) (last visited June 1, 2014).

108. Nineteen years old. See Kate Brumback, *Andrew Allen Cook Executed For Georgia Murders He Confessed to FBI Agent Father*, HUFFINGTON POST (Feb. 22, 2013, 3:50 AM), [http://www.huffingtonpost.com/2013/02/22/andrew-allen-cook-executed\\_n\\_2741065.html](http://www.huffingtonpost.com/2013/02/22/andrew-allen-cook-executed_n_2741065.html) (reporting that Cook was not arrested until he was twenty-two, two years after the murders were committed).

Rodrigo Hernandez <sup>112</sup>	Bobby Hines <sup>113</sup>	Jerry Jackson <sup>114</sup>
Robert Jackson <sup>115</sup>	Derrick Mason <sup>116</sup>	Milton Wuzael Mathis <sup>117</sup>
George Ochoa <sup>118</sup>	Larry “Matthew” Puckett <sup>119</sup>	Lee Andrew Taylor <sup>120</sup>

Table 3: Defendants Between Twenty-one and Twenty-four at the Time of the Crime:

James DeRosa <sup>121</sup>	Jan Brawner <sup>122</sup>	Rodney Gray <sup>123</sup>
Brett Hartman <sup>124</sup>	Michael Edward Hooper <sup>125</sup>	Preston Hughes <sup>126</sup>

109. Twenty years old. Kim Severson, *Davis is Executed in Georgia*, N.Y. TIMES (Sept. 21, 2011), [http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html?pagewanted=all&_r=0).

110. Nineteen years old. Lena Sullivan, *Georgia Man Andrew DeYoung Executed for 1993 Killings*, GA DAILY NEWS, July 21, 2011, <http://www.gadailynews.com/news/70416-georgia-man-andrew-deyoung-executed-for-1993-killings.html>.

111. Nineteen years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Yokamon Hearn*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/hearnyokamon.html](http://www.tdcj.state.tx.us/death_row/dr_info/hearnyokamon.html) (last visited June 1, 2014).

112. Twenty years old. Appellant’s Brief at 15–16, *Hernandez v. Texas*, No. AP-74,931 (Tex. Crim. App. Mar. 21, 2005).

113. Nineteen years old. Smith, *supra* note 78.

114. Twenty years old. *Jerry Terrell Jackson Executed in Virginia*, HUFFINGTON POST (Oct. 18, 2011, 6:12 AM), [http://www.huffingtonpost.com/2011/08/18/jerry-terrell-jackson-executed\\_n\\_930989.html](http://www.huffingtonpost.com/2011/08/18/jerry-terrell-jackson-executed_n_930989.html).

115. Eighteen years old. STATE OF DEL. DEP’T OF CORRECTION, *Death Row Executions*, <http://www.doc.delaware.gov/deathrow/executions.shtml> (last visited June 1, 2014).

116. Nineteen years old. Memorandum Opinion of the U.S. Dist. Ct. for the N. Dist. of Ala. at 83, *Mason v. Campbell*, 5:05-1932 (N.D. Ala. Mar. 3, 2009) (denying the Amended Habeas Petition and Motion for an Evidentiary Hearing).

117. Nineteen years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Milton Mathis*, [https://www.tdcj.state.tx.us/death\\_row/dr\\_info/mathismilton.html](https://www.tdcj.state.tx.us/death_row/dr_info/mathismilton.html) (last visited June 1, 2014).

118. Eighteen years old. *Ochoa v. State*, 963 P.2d 583, 604 (Okla. Crim. App. 1998). CLARK CNTY. PROSECUTING ATTORNEY, *George Ochoa*, <http://www.clarkprosecutor.org/html/death/US/ochoa1318.htm> (last visited June 1, 2014).

119. Eighteen years old. MISS. DEP’T OF CORRECTIONS, *Offender Data Sheet—Larry Mathew Puckett*, [www.mdoc.state.ms.us/Death%20Row%20Inmates%20PDF%20Files/Puckett,%20Larry%20Mathew.pdf](http://www.mdoc.state.ms.us/Death%20Row%20Inmates%20PDF%20Files/Puckett,%20Larry%20Mathew.pdf) (last visited June 1, 2014).

120. Twenty years old. TEX. DEP’T OF CRIMINAL JUSTICE, *Offender Information—Lee Taylor*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/taylorlee.html](http://www.tdcj.state.tx.us/death_row/dr_info/taylorlee.html) (last visited June 1, 2014).

121. Twenty-three years old. *Derosa v. Workman*, 679 F.3d 1196, 1200, 1209 (10th Cir. 2012).

122. Twenty-three years old. Holbrook Mohr, *Jan Brawner Executed For Killing Paige Brawner, Barbara Craft, Carl Craft, Jane Craft In Mississippi*, HUFFINGTON POST (June 12, 2012, 8:16 PM), [http://www.huffingtonpost.com/2012/06/13/jan-brawner-executed-for\\_n\\_1592793.html](http://www.huffingtonpost.com/2012/06/13/jan-brawner-executed-for_n_1592793.html).

123. Twenty-two years old. Memorandum Opinion & Order Denying Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 at \*1, \*30, *Gray v. Epps*, No. 4:04-0234 (S.D. Miss. Oct. 24, 2008), 2008 BL 241359. A state psychologist characterized Gray as childlike and impulsive, and passive-aggressive with an undeveloped or underdeveloped conscience. *See id.* at \*43–44; *see also* Colleen Jenkins, *Mississippi Set to Execute Man for 1994 Murder*, REUTERS (May 17, 2011, 11:53 AM), <http://www.reuters.com/article/2011/05/17/us-execution-mississippi-idUSTRE74G51R20110517>.

Shannon Johnson <sup>127</sup>	Eric John King <sup>128</sup>	Andrew Lackey <sup>129</sup>
Humberto Leal <sup>130</sup>	Samuel Lopez <sup>131</sup>	Donald Palmer <sup>132</sup>
Martin Robles <sup>133</sup>	Michael Bascum Selsor <sup>134</sup>	Mario Swain <sup>135</sup>
Edwin Turner <sup>136</sup>	Mark Wiles <sup>137</sup>	Jason Williams <sup>138</sup>
Steven Woods <sup>139</sup>		

*Simmons* identified three differences between juveniles and adults that led the Court to exempt juveniles from the death penalty: a lack of maturity and underdeveloped sense of responsibility, susceptibility to

124. Twenty-three years old. Mitigation Charge, *Ohio v. Hartman*, No. CR 97 09 1987, 1997 WL 34650359 (Ohio Com. Pl. 1997). CLARK CNTY. PROSECUTING ATTORNEY, *Brett Xavier Hartman*, <http://www.clarkprosecutor.org/html/death/US/hartman1315.htm> (last visited June 1, 2014).

125. Twenty-one years old. Tim Talley, *Michael Hooper Dead: Oklahoma Man Executed For Killing Cynthia Lynn Jarman, Her Children*, HUFFINGTON POST (Aug. 14, 2012, 8:47 PM), [http://www.huffingtonpost.com/2012/08/14/michael-hooper-dead\\_n\\_1777451.html](http://www.huffingtonpost.com/2012/08/14/michael-hooper-dead_n_1777451.html). The court accepted youthfulness as a mitigator. *Hooper v. State*, 947 P.2d 1090, 1116 (Okla. Crim. App. 1997).

126. Twenty-two years old. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information—Preston Hughes*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/hughesprestoni.jpg](http://www.tdcj.state.tx.us/death_row/dr_info/hughesprestoni.jpg) (last visited June 1, 2014).

127. Twenty-two years old. *Delaware v. Johnson*, No. 0609017045, 2008 WL 4140596, at \*6 (Del. Super. Ct. Sept. 5, 2008).

128. Twenty-five years old. *State v. King*, 883 P.2d 1024, 1044–45 (Ariz. 1994).

129. Twenty-two years old. *Andrew Lackey Execution Raises Questions About the Death Penalty*, EQUAL JUSTICE INITIATIVE (July 26, 2013), <http://www.eji.org/node/795>. The trial court also found that Lackey seemed younger than his chronological age and was easily influenced by others, so that he often he may not have fully appreciated the reality of what he was doing. *Lackey v. State*, 104 So. 3d 234, 253 (Ala. Crim. App. 2010).

130. Twenty-one years old. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information—Humberto Leal*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/lealhumberto.jpg](http://www.tdcj.state.tx.us/death_row/dr_info/lealhumberto.jpg) (last visited June 1, 2014).

131. Twenty-four years old. ARIZ. DEP'T OF CORR., *Samuel Lopez*, [http://www.azcorrections.gov/inmate\\_datasearch/results\\_Minh.aspx?InmateNumber=043833&LastName=LOPEZ%20SAMUEL,%20V&FNMI=&SearchType=SearchInet](http://www.azcorrections.gov/inmate_datasearch/results_Minh.aspx?InmateNumber=043833&LastName=LOPEZ%20SAMUEL,%20V&FNMI=&SearchType=SearchInet) (last visited June 1, 2014).

132. Twenty-four years old. *State v. Palmer*, No. 89-B-28, 1996 WL 495576, at \*21 (Ohio Ct. App. Aug. 29, 1996), *aff'd*, 80 Ohio St. 3d 543, 1997-Ohio-312, 687 N.E.2d 685.

133. Twenty-four years old. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information—Martin Robles*, [https://www.tdcj.state.tx.us/death\\_row/dr\\_info/roblesmartin.html](https://www.tdcj.state.tx.us/death_row/dr_info/roblesmartin.html) (last visited June 1, 2014).

134. Twenty-one years old. Steve Olafson, *Oklahoma Executes Man Sentenced to Death Twice*, REUTERS (May 4, 2012), <http://www.reuters.com/article/2012/05/02/us-execution-oklahoma-idUSBRE84100I20120502>. *Oklahoma Death Row Inmate Faces Execution in 1975 Murder*, NEWSOK (Apr. 29, 2012), <http://newsok.com/oklahoma-death-row-inmate-faces-execution-in-1975-murder/article/3671002>.

135. Twenty-three years old. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information—Mario Swain*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/swainmario.html](http://www.tdcj.state.tx.us/death_row/dr_info/swainmario.html) (last visited June 1, 2014).

136. Twenty-two years old. *Edwin Hart Turner Executed in Mississippi Despite Claims He Was Mentally Ill*, HUFFINGTON POST (Feb. 8, 2012, 9:46 PM), [http://www.huffingtonpost.com/2012/02/09/edwin-hart-turner-executed\\_n\\_1265535.html](http://www.huffingtonpost.com/2012/02/09/edwin-hart-turner-executed_n_1265535.html).

137. Twenty-two years old. OHIO DEP'T OF REHAB. & CORR., *Ohio Executions—1999 to Present*, <http://www.drc.ohio.gov/web/Executed/executed25.htm> (last visited June 1, 2014).

138. Twenty-three years old. *Williams v. State*, 710 So. 2d 1276, 1345 (Ala. Crim. App. 1996).

139. Twenty-one years old. TEX. DEP'T OF CRIMINAL JUSTICE, *Offender Information—Steven Woods*, [http://www.tdcj.state.tx.us/death\\_row/dr\\_info/woodssteven.html](http://www.tdcj.state.tx.us/death_row/dr_info/woodssteven.html) (last visited June 1, 2014).

peer pressure and negative influences, and an unformed character.<sup>140</sup> The same studies that the Court relied on in *Simmons* to illuminate the differences between juveniles and adults also demonstrate that brain development continues past eighteen, particularly in the frontal lobes that control judgment, impulse control, the appreciation of consequences, empathy, and responsibility.<sup>141</sup> The brain also undergoes structural changes beyond age eighteen. Indeed, the prefrontal cortex does not fully mature until the mid-twenties.<sup>142</sup>

The *Simmons* Court acknowledged the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”<sup>143</sup> The Court chose to nonetheless rely on eighteen as “the point where society draws the line for many purposes between childhood and adulthood.”<sup>144</sup> Despite minimal differences in the functional deficits between, for instance, seventeen and twenty, the former offender is exempted from capital punishment while the latter is not. More than one-third (thirty-six) of executed offenders committed a capital crime before turning twenty-five—the age at which the brain fully matures.<sup>145</sup> Twenty offenders had not yet reached the age of twenty-one.<sup>146</sup> Four offenders were eighteen when the crime was committed—just months past the cutoff for an exemption from execution under *Simmons*.<sup>147</sup>

### C. MENTAL ILLNESS

The National Alliance on Mental Illness (“NAMI”) defines mental illnesses as “medical conditions that disrupt a person’s thinking, feeling, mood, ability to relate to others and daily functioning.”<sup>148</sup> As NAMI

140. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

141. *Id.* at 569–70, 573; Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339, 344 (1992) (“[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.”). The Court also relied on Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003). See generally ERIC H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

142. Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 740–46; Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 236–40 (2003); Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUMAN BRAIN MAPPING 766, 766–67 (2006); Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 471 (2000).

143. *Simmons*, 543 U.S. at 574.

144. *Id.*

145. See *supra* Tables 2, 3.

146. See *supra* Table 2.

147. See *supra* Table 2 (listing Richard Cobb, Robert Jackson, George Ochoa, and Larry “Matthew” Puckett).

148. NAT’L ALLIANCE ON MENTAL ILLNESS, *Mental Illnesses*, [http://www.nami.org/template.cfm?section=About\\_Mental\\_Illness](http://www.nami.org/template.cfm?section=About_Mental_Illness) (last visited June 1, 2014). The only mentally ill

highlights, “mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life.”<sup>149</sup> The American Bar Association has determined that severe mental illness warrants the exclusion of certain mentally ill offenders from the death penalty.<sup>150</sup> These illnesses include such clinical disorders as schizophrenia, bipolar disorder, major depressive disorders, post-traumatic stress disorder, substance-related disorders (such as substance abuse and chemical dependency), suicidal ideation, and dissociative disorders.<sup>151</sup>

Consider John Ferguson.<sup>152</sup> His father died when he was thirteen,<sup>153</sup> coinciding with the time Ferguson first displayed symptoms of mental illness.<sup>154</sup> He developed depression and began seeing “shadow people.”<sup>155</sup> Throughout his life, Ferguson experienced delusions that his father was still alive and would speak to him.<sup>156</sup> Ferguson’s mental health began to deteriorate precipitously when he was twenty-one-years-old.<sup>157</sup> He received a gunshot wound to the head and thereafter presented as “paranoid and hostile.”<sup>158</sup> He was hospitalized and diagnosed with paranoid schizophrenia.<sup>159</sup> Ferguson experienced delusional beliefs, including that he was the “Prince of God” who would be resurrected to sit at the right hand of God.<sup>160</sup> He was forcibly committed to a state psychiatric facility and discharged just months before he committed the crime that resulted in his execution.<sup>161</sup> On August 5, 2013, after thirty-four years on death row, Florida executed Ferguson; his last words before he died were: “I just want everyone to know that I am the Prince of God and I will rise again.”<sup>162</sup>

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offenders exempted from capital punishment are those who are insane at the time of execution. *Simmons*, 543 U.S. at 568. Insanity is a high threshold; it carries a requirement that the offender not have a rational understanding of why he is being executed. *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

149. NAT’L ALLIANCE ON MENTAL ILLNESS, *supra* note 148.

150. Am. Bar Ass’n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668 (2006).

151. *Id.* at 670, 672, 674.

152. *Ferguson v. State*, 593 So. 2d 508 (Fla. 1992).

153. *Id.* at 510.

154. *Id.*; see Tamara Lush, *Convicted Mass Murderer Executed in Florida*, USA TODAY (Aug. 5, 2013, 7:16 PM), <http://www.usatoday.com/story/news/nation/2013/08/05/convicted-mass-murderer-executed-in-florida/2621285>.

155. *Ferguson v. Secretary*, 716 F.3d 1315, 1324 (11th Cir. 2013).

156. *Id.*

157. Lush, *supra* note 154.

158. See *Ferguson*, 593 So. 2d at 510; see also Lush, *supra* note 154.

159. *Ferguson*, 716 F.3d at 1320.

160. *Id.* at 1324.

161. *Id.* at 1318–20.

162. David Ovalle, *Miami Killer John Errol Ferguson Executed*, MIAMI HERALD (Aug. 5, 2013), <http://www.miamiherald.com/2013/08/05/3543609/miami-mass-killer-john-ferguson.html>.

John Ferguson's mental illness, though profound, is not unrepresentative of the mental illnesses experienced by many executed offenders.

Table 4: Defendants Whose Mitigation Histories Included Symptoms or Diagnoses of Mental Illness

Garry Allen <sup>163</sup>	Johnnie Baston <sup>164</sup>	Daniel Lee Bedford <sup>165</sup>
Richard Lynn Bible <sup>166</sup>	William Glenn Boyd <sup>167</sup>	Jan Brawner <sup>168</sup>
Reginald Brooks <sup>169</sup>	Elmer Leon Carroll <sup>170</sup>	Richard Aaron Cobb <sup>171</sup>
Andrew Allen Cook <sup>172</sup>	Daniel Wayne Cook <sup>173</sup>	James DeRosa <sup>174</sup>

163. Allen attempted suicide upwards of five times in his teens. *Allen v. State*, 923 P.2d 613, 617 (Okla. Crim. App. 1996), *vacated*, 520 U.S. 1195 (1997). He began to abuse alcohol and drugs when he was seventeen. *Id.* While serving in the Navy as a young adult, he was hospitalized for psychological problems and drug and alcohol abuse. *Id.* Later, he was diagnosed with a personality disorder related to schizophrenia. *Id.*

164. A psychologist deemed it "very likely" that Baston suffered from an undiagnosed bipolar disorder which interfered with his functioning. *Baston v. Bagley*, 282 F. Supp. 2d 655, 664–65 (N.D. Ohio 2003).

165. Bedford abused alcohol from the age of fifteen, suffered from depression and suicidal ideation, and was diagnosed with Borderline Personality Disorder. *Bedford v. Collins*, No. C-1-92-547, 2007 U.S. Dist. LEXIS 33875, at \*30–31, \*36 (S.D. Ohio May 3, 2007).

166. Bible was a chronic drug user who was experiencing a four-day withdrawal at the time of the crime. *Bible v. Ryan*, 571 F.3d 860, 864–66 (9th Cir. 2009). A state expert attributed Bible's violent behavior to his drug addiction, which began in his early teens. *Id.* at 864–65.

167. Based on the trauma he experienced as a child, Boyd presented a high risk of being impulsive and "could not make sound decisions based on what he knew." *Boyd v. Allen*, 592 F.3d 1274, 1286–88 (11th Cir. 2010).

168. Brawner was diagnosed with depression and PTSD. *Brawner v. Epps*, No. 2:07-CV-16, 2010 WL 383734, at \*6 (N.D. Miss. Jan. 27, 2010). He was admitted to a hospital at fourteen for inhaling gasoline and was diagnosed with polysubstance abuse disorder. *Id.*

169. Brooks suffered from paranoid schizophrenia and associated delusions. STATE OF OHIO ADULT PAROLE AUTH., IN RE: REGINALD BROOKS, OSP #79-740, DEATH PENALTY CLEMENCY REPORT 6 (2011). A psychiatrist diagnosed Brooks with PTSD and Psychogenic Amnesia, suggesting he did not understand the connection between the crime he committed and his execution. *Id.* at 8.

170. A mental health expert determined that Carroll had "symptomatology that runs the entire gamut of several personality disorders, all the way through to a major mental disorder." *Carroll v. State*, 815 So. 2d 601, 615 (Fla. 2002).

171. Cobb began to use drugs at the age of twelve and thereafter developed a lifelong chemical dependency. *Cobb v. Thaler*, No. 2:08-0123, 2011 WL 672333, at \*6 (E.D. Tex. Feb. 15, 2011).

172. As a child, Andrew Cook was admitted to a psychiatric hospital for five weeks and several psychologists determined that he had tried to kill himself. *Cook v. Upton*, No. 5:09-0025, 2010 WL 1050404, at \*8 (M.D. Ga. Mar. 18, 2010), *aff'd sub nom.* Cook suffered from recurrent major depression, dysthymic disorder, and PTSD as a result of his family background. *See id.* at \*12; *see also* *Cook v. Warden*, 677 F.3d 1133, 1137–39 (11th Cir. 2012).

173. Daniel Cook developed PTSD, impaired cognitive functioning, and a drug addiction in response to the severe physical and sexual abuse he endured as a child. *Cook v. Ryan*, No. 97-00146, 2012 WL 2798789, at \*9–10 (D. Ariz. July 9, 2012). He attempted suicide on numerous occasions. *Id.* A psychiatrist said that Cook had "various types of alcohol and drug abuse and personality disorder problems in addition to the diagnosis of depression or dysthymic disorder." *Id.*; *see Lewis, supra* note 71.

174. DeRosa was diagnosed with depression and hyperactivity disorder when he was admitted to a psychiatric facility as a teenager. *DeRosa v. Workman*, 679 F.3d 1196, 1210 (10th Cir. 2012).

Andrew Grant DeYoung <sup>175</sup>	Douglas Alan Feldman <sup>176</sup>	John Ferguson <sup>177</sup>
Cleve Foster <sup>178</sup>	Robert Gleason <sup>179</sup>	Rodney Gray <sup>180</sup>
Jonathan Green <sup>181</sup>	Robert Wayne Harris <sup>182</sup>	Ramon Hernandez <sup>183</sup>
Michael Edward Hooper <sup>184</sup>	Jerry Terrell Jackson <sup>185</sup>	Robert Jackson <sup>186</sup>
Christopher Johnson <sup>187</sup>	Eric John King <sup>188</sup>	Andrew Lackey <sup>189</sup>

175. DeYoung was diagnosed with chronic depression and schizotypal personality disorder. *DeYoung v. Schofield*, 609 F.3d 1260, 1275–76 (11th Cir. 2010).

176. Feldman was diagnosed with bipolar II disorder one year before the crime and was later diagnosed with bipolar I. *Feldman v. Thaler*, 695 F.3d 372, 378 (5th Cir. 2012).

177. Ferguson experienced psychosis, delusions, and schizophrenia. *Ferguson v. Secretary*, 716 F.3d 1315, 1320, 1324–26 (11th Cir. 2013). He was hospitalized for treatment. *See Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992); *see also Lush, supra* note 154; *Ovalle, supra* note 162.

178. Foster served in the U.S. military in Iraq and developed PTSD because of “gruesome experiences” he witnessed during his time in the military. *Foster v. Thaler*, 369 F.App’x 598, 604–05 (5th Cir. 2010).

179. Gleason was found to have “a history of substance abuse, depression, and other problems” and he volunteered for execution. *See Gleason v. Pearson*, No. 7:12-CV-00619, 2013 U.S. Dist. LEXIS 4226, at \*5 (W.D. Va. Jan. 10, 2013); Frank Green, *Va. Man Who Killed Two Inmates is Executed*, RICHMOND TIMES DISPATCH (Jan. 18, 2013, 12:11 AM), [http://www.timesdispatch.com/news/latest-news/convicted-killer-robert-charles-gleason-jr-dies-in-electric-chair/article\\_533cc100-6029-11e2-9393-0019bb30f31a.html](http://www.timesdispatch.com/news/latest-news/convicted-killer-robert-charles-gleason-jr-dies-in-electric-chair/article_533cc100-6029-11e2-9393-0019bb30f31a.html).

180. Gray was committed to a mental health center as a child and a state psychologist testified that he had “various emotional problems . . . including suicidal tendencies, depression, sleep and memory problems, anxiety” and other mental health issues. Petitioner’s Memorandum of Law in Support of Petition for Writ of Habeas Corpus at 11, *Gray v. Epps*, No. 4:04-0234, 2008 WL 4793796 (S.D. Miss. Apr. 11, 2005).

181. Green was schizophrenic. Jordan Smith, *The View From Death Row: Next Week’s Scheduled Execution*, Austin Chronicle (Oct. 5, 2012), <http://www.austinchronicle.com/news/2012-10-05/the-view-from-death-row> (noting that “Green has been diagnosed schizophrenic, including by doctors who work for the state prison system”).

182. Harris suffered from fetal alcohol syndrome, PTSD, depression, anti-social personality disorder, and Tourette’s syndrome. *Harris v. Vasquez*, 943 F.2d 930, 940, 941 n.6 (9th Cir. 1990); Domingo Ramirez Jr., *Brother Pleads for Life of Man Convicted in Carwash Deaths: A Forensic Psychologist and a Psychiatrist Detail the Troubled Past of Robert Wayne Harris*, FORT WORTH STAR-TELEGRAM, Sept. 29, 2000, at 8.

183. Hernandez suffered from depression and PTSD brought on by witnessing his father’s murder. Manny Gonzales, *‘Your Worst Nightmare’ Is Sentenced to Death*, SAN ANTONIO EXPRESS NEWS, Oct. 12, 2002, at 3B. Hernandez became addicted to medication prescribed to treat his mental illnesses, and was undergoing withdrawal at the time of the crime. Michelle Mondo, *Execution Looms for Serial Rapist, Murderer*, MY SAN ANTONIO (Nov. 14, 2012, 2:00 PM), [http://www.mysanantonio.com/news/local\\_news/article/Execution-looms-for-serial-rapist-murderer-4027069.php](http://www.mysanantonio.com/news/local_news/article/Execution-looms-for-serial-rapist-murderer-4027069.php).

184. Hooper had a long history of depression and substance abuse since his teen years. *Hooper v. Workman*, 446 F. App’x 88, 90 (10th Cir. 2011); *Hooper v. State*, 947 P.2d 1090, 1116 (Okla. Crim. App. 1997).

185. As a child, Jerry Terrell Jackson was diagnosed with an adjustment disorder with depressed mood and attention deficit hyperactivity disorder. *Jackson v. Commonwealth*, 590 S.E.2d 520, 525 (Va. 2004). He developed an alcohol dependency at age twelve. *Jackson v. Kelly*, 650 F.3d 477, 486 n.6 (4th Cir. 2011).

186. Robert Jackson suffered from a mixed personality disorder, impulsive control disorder, and substance abuse disorder. *Jackson v. State*, 684 A.2d 745, 754 (Del. 1996).

Samuel Villegas Lopez <sup>190</sup>	Larry Mann <sup>191</sup>	Derrick Mason <sup>192</sup>
William Gerald Mitchell <sup>193</sup>	Donald Moeller <sup>194</sup>	Robert Moormann <sup>195</sup>
Jeffrey Motts <sup>196</sup>	George Ochoa <sup>197</sup>	Donald Palmer <sup>198</sup>
Manuel Pardo <sup>199</sup>	Eddie Duvall Powell <sup>200</sup>	Paul Rhoades <sup>201</sup>

187. Johnson was hospitalized on numerous occasions during his adolescence for psychiatric problems and began to use alcohol at age twelve and prescription drugs, crack cocaine powder, cocaine, crystal methamphetamine and marijuana at age sixteen. *Johnson v. State*, 40 So. 3d 753, 761–62 (Ala. Crim. App. 2009).

188. King had a substance abuse disorder and suffered from post-traumatic stress disorder as a result of his dysfunctional childhood. *State v. King*, 883 P.2d 1024, 1037 (Ariz. 1994).

189. Lackey suffered repeated episodes of persistent depression and “had long endured suicidal preoccupations.” *Lackey v. State*, 104 So. 3d 234, 243–44 (Ala. Crim. App. 2010). Texas prison officials treated Lackey with psychotropic medications while he was on death row, where he also tried to commit suicide. *Id.* at 245 n.3. However, no further mitigating evidence was presented in his case beyond what was presented at trial because Lackey dropped his appeals and was executed. *Andrew Lackey Execution*, *supra* note 129.

190. Lopez suffered acute trauma as a child, which caused hyperarousal, hypervigilance, high anxiety, agitation, guardedness, paranoia and night terrors throughout his childhood and into adulthood. Brief of Petitioner-Appellant at 27, *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2011) (No. 12-99001). He developed depression and a chemical dependency. *Id.* at 28. By the time he was eighteen, Lopez was sniffing paint chronically. *Id.*

191. The trial court judge in Mann’s case found that he suffered from psychotic depression and substance abuse. *Mann v. State*, 603 So. 2d 1141, 1142 (Fla. 1992). He was later diagnosed as a polysubstance abuser. *Mann v. State*, 770 So. 2d 1158, 1162 (Fla. 2000).

192. The judge who sentenced Mason to death later fought to stop his execution, telling the Alabama Governor that Mason’s lawyers failed to present evidence that Mason was under the influence of hallucinogenic and psychosis-inducing drugs at the time of the crime, and that he had a drug addiction and mental health problems. *Alabama Executions*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/deathpenalty/alabamaexecutions> (last visited June 1, 2014).

193. Mitchell suffered both auditory and visual hallucinations and had a substance abuse disorder. *Mitchell v. Epps*, No. 1:04-0865, 2010 BL 312883, at \*16 (S.D. Miss. Mar. 19, 2010). He was diagnosed a borderline schizophrenic with symptoms of paranoia and psychosis. *Id.* at \*28; *Mitchell v. Epps*, 641 F.3d 134, 147 (5th Cir. 2011).

194. Moeller was abusing alcohol consistently by age eight; by age eleven he was smoking marijuana and huffing gasoline. *Death Penalty: Life of a Child Killer*, ARGUS LEADER, Oct. 28, 2012, at A.

195. Moormann was diagnosed as schizophrenic with possible psychosis by hospital physicians after he was institutionalized at the age of fifteen. Opening Brief of Petitioner-Appellant at 9–12, *Moormann v. Schriro*, No. 08-99035 (9th Cir. May 29, 2009), ECF No. 5. Psychologists and psychiatrists concluded that he suffered from organic delusional syndrome, pedophilia, schizoid personality disorder and anti-social personality disorder. *Moormann v. Schiro*, 426 F.3d 1044, 1052 (9th Cir. 2005).

196. Motts had major depressive disorder throughout his life and suffered from a substance abuse disorder. *State v. Motts*, 707 S.E.2d 804, 812 (S.C. 2011). See Jeffrey Collins, *Inmate Jeffrey Motts First to Die in SC with New Combo of Drugs*, ASSOCIATED PRESS, May 6, 2011.

197. Ochoa had a history of mental health problems and drug and alcohol dependencies. *Ochoa v. State*, 963 P.2d 583, 603–04 (Okla. Crim. App. 1998).

198. Palmer suffered from a borderline personality disorder. *State v. Palmer*, No. 89-B-28, 1996 WL 495576, at \*20 (Ohio Ct. App. Aug. 29, 1996).

199. The trial court found that Pardo was under extreme mental or emotional disturbance at the time of the crime. *Pardo v. State*, 563 So. 2d 77, 79 (Fla. 1990).

200. Powell suffered from childhood depression and began drinking and taking drugs at a young age. *Powell v. Allen*, 602 F.3d 1263, 1275 (11th Cir. 2010).

201. A “working assessment” of Rhoades by a mental health expert listed diagnoses of PTSD, cognitive disorder, substance-induced mood disorder, and substance-induced psychotic disorder.

Donnie Lee Roberts <sup>202</sup>	Steven Smith <sup>203</sup>	Benny Joe Stevens <sup>204</sup>
Richard Stokley <sup>205</sup>	Mark Anthony Stroman <sup>206</sup>	Frederick Treesh <sup>207</sup>
Steven Ray Thacker <sup>208</sup>	Edwin “Hart” Turner <sup>209</sup>	Robert Waterhouse <sup>210</sup>
Gary Welch <sup>211</sup>	Thomas Paul West <sup>212</sup>	Mark Wayne Wiles <sup>213</sup>
Jason Oric Williams <sup>214</sup>	Steven Michael Woods <sup>215</sup>	

Rhoades was addicted to methamphetamine. *Rhoades v. Arave*, No. 93-0156, 2007 WL 951897, at \*38 (D. Idaho Mar. 28, 2007).

202. Roberts was diagnosed with alcohol dependence and cocaine dependence. *Roberts v. State*, 220 S.W.3d 521, 528 (Tex. Crim. App. 2007).

203. Testing revealed that Smith had depression, dysthymic disorder, and a substance abuse disorder. *State v. Smith*, 780 N.E.2d 221, 237 (Ohio 2002).

204. Stevens was suffering from depression and substance abuse. *Stevens v. State*, 867 So. 2d. 219, 223 (Miss. 2003).

205. Stokley had a history of depression and substance abuse, and a diagnosis of borderline personality disorder. *State v. Stokley*, 898 P.2d 454, 469–71 (Ariz. 1995).

206. Stroman had an “untreated behavioral disorder” and a drug addiction. *Stroman v. Thaler*, No. 3:05-1616, 2009 WL 3075168, at \*13 (N.D. Tex. Sept. 28, 2009).

207. Treesh was diagnosed with attention deficit/hyperactivity syndrome and a substance abuse disorder. *Treesh v. Bagley*, No. 1:02 CV 462, 2007 U.S. Dist. LEXIS 28985, at \*130, \*159–60 (N.D. Ohio Mar. 31, 2007).

208. Thacker was diagnosed with bipolar disorder. *Thacker v. Workman*, No. 06-0028, 2010 U.S. Dist. LEXIS 92322, at \*6 (N.D. Okla. Sept. 2, 2010).

209. Turner began exhibiting symptoms of mental illness during early adolescence. *Turner v. Epps*, No. 4:07-0077, 2010 WL 653880, at \*12 (N.D. Miss. Feb. 19, 2010). His mother took him to the hospital twice for his “abnormal behavior” and after the second visit, Turner tried to commit suicide by shooting himself in the head with a rifle. *Id.* For the following four years he was in and out of hospital until his second suicide attempt, when he tried to slit his wrists. *Id.* He was diagnosed with major depressive disorder and borderline personality disorder. *Id.*

210. Waterhouse did not permit his lawyers to present mitigation evidence during the penalty phase of his trial. Nonetheless, the trial record contains (and the state habeas court recounted) a statement from Waterhouse to the police suggesting his intoxication on the night of the crime. *Waterhouse v. State*, 82 So. 3d 84, 95 (Fla. 2012) (“Waterhouse advised the police that on the night of the murder he consumed eight or nine beers before arriving at the ABC lounge and four or five white Russians while at the lounge.”). Waterhouse acknowledged in a later jailhouse interview with an investigative reporter that he had abused alcohol beginning at age fifteen and eventually drank as many as three six-packs of beer a day. *See* Troy Gustavson, *From the Archives: What Went Wrong with Robert Waterhouse?*, RIVERHEAD NEWS-REVIEW (Feb. 15, 2012, 7:00 AM), <http://riverheadnewsreview.timesreview.com/2012/02/34260/from-the-archives-what-went-wrong-with-robert-waterhouse>.

211. Welch became chemically dependent on drugs at the age of thirteen. Witnesses at trial testified that his violent behavior was the result of drug abuse and a brain injury that caused blackouts. Brief of Appellant at 34, *Welch v. Workman*, 607 F.3d 674 (10th Cir. 2010) (No. 07-5061).

212. West became addicted to drugs at the age of ten. *State v. West*, 862 P.2d. 192, 210 (Ariz. 1993).

213. Wiles had a history of drug and alcohol abuse, and suffered from depression and anxiety. *State v. Wiles*, No. 1675, 1988 WL 59838, at \*3 (Ohio Ct. App. June 3, 1998).

214. Williams was diagnosed with borderline personality disorder and substance abuse, and attempted suicide. *Williams v. Allen*, 598 F.3d 778, 785–86 (11th Cir. 2010). A state psychologist testified that Williams probably wouldn’t have killed the victim if his intoxication hadn’t exacerbated his borderline personality disorder. *Id.* at 786.

Over half (fifty-four) of the last one hundred executed offenders had been diagnosed with or displayed symptoms of a severe mental illness.<sup>216</sup> Six defendants were diagnosed with schizophrenia,<sup>217</sup> three with bipolar disorder,<sup>218</sup> and nine with post-traumatic stress disorder.<sup>219</sup> Six defendants attempted suicide during their lifetimes.<sup>220</sup> These mental illnesses impair the ability to think clearly, manage emotions, make decisions, relate to others, and cause unpredictable and disorganized behavior.<sup>221</sup>

The most prevalent mental illness among defendants in our sample was chronic drug addiction. Thirty-four executed offenders had histories of addiction, which began as early as age eight.<sup>222</sup> Consider Richard Lynn Bible, a chronic drug user who was experiencing a four-day withdrawal at the time that he committed murder.<sup>223</sup> A state expert attributed Bible's violent behavior to his drug addiction, which began in his early teens.<sup>224</sup> Consider also Derrick Mason.<sup>225</sup> The judge who sentenced Mason to death later fought to stop his execution, telling the Alabama Governor that Mason's lawyers failed to present evidence that Mason was under the influence of hallucinogenic and psychosis-inducing drugs at the time of the crime and also had drug addiction and mental health problems.<sup>226</sup>

People tend to associate drug addiction with a lack of character or willpower.<sup>227</sup> However, as David Sheff has underscored, “[m]ost problematic drug use is related to stress, trauma, genetic predisposition, mild or serious mental illness, use at an early age, or some combination of

215. Woods was institutionalized four times as a teenager for mental health and drug-related problems, and engaged in self-injurious behavior like cutting. *Woods v. Thaler*, 339 F. App'x 884, 886–87 (5th Cir. 2010). He was also addicted to drugs. *Woods v. Quarterman*, No. 6:06cv344, 2009 WL 2757181, at \*4 (E.D. Tex. Aug. 26, 2009).

216. *See infra* Table 1.

217. Gary Allen, Reginald Brooks, John Ferguson, Jonathan Green, William Gerald Mitchell, and Robert Moorman. *See supra* Table 4.

218. Johnnie Baston, Douglas Alan Feldman, and Steven Ray Thacker. *See supra* Table 4.

219. Jan Michael Brawner, Reginald Brooks, Andrew Cook, Daniel Wayne Cook, Cleve Foster, Robert Wayne Harris, Ramon Hernandez, Eric John King, and Paul Rhoades. *See supra* Table 4.

220. Gary Allen, Andrew Cook, Daniel Wayne Cook, Andrew Lackey, Edwin “Hart” Turner, and Jason Oric Williams. *See supra* Table 4.

221. Our results dovetail with calls from other scholars to extend categorical exemptions to mentally ill offenders. Professor Christopher Slobogin has argued that “if . . . 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.” Christopher Slobogin, *What Atkins Could Mean for People With Mental Illness*, 33 N.M. L. REV. 293, 293 (2003).

222. Donald Moeller began abusing alcohol when he was eight years old. *Death Penalty*, *supra* note 194, at A.

223. *Bible v. Ryan*, 571 F.3d 860, 864–66. (9th Cir. 2009).

224. *Id.* at 866.

225. *Alabama Executions*, *supra* note 192.

226. *Id.*

227. DAVID SHEFF, *CLEAN: OVERCOMING ADDICTION AND ENDING AMERICA'S GREATEST TRAGEDY* x (2013).

those.”<sup>228</sup> Addiction is a grave illness—those who suffer from it are “afflicted with a chronic, progressive, and often terminal disease.”<sup>229</sup> Addiction is associated with different physiological responses in different people, including genetic differences in how long the “drug will remain active in a users’ bloodstream, how many dopamine receptors will be displayed on the surface of a neuron, the proper balance of mood-controlling chemicals in the brain, and [how] they also influence basic temperament and personality traits, such as stress sensitivity, impulsivity, and risk taking.”<sup>230</sup> Thus, like juvenile status or intellectual disability, addiction reduces the moral blameworthiness of the offense.

In *Simmons*, the Court explained that in addition to their diminished culpability, juveniles also are difficult to classify as death-worthy because the “reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”<sup>231</sup> Judgments of irreparable depravity are equally irresponsible when rendered upon an addicted offender. Just as a seventeen-year-old offender can develop into a responsible adult, with proper treatment a drug-addicted offender can also be redeemed. “Addicts,” writes David Sheff, “can lead full lives free from the pain that plagued them and the disease that controlled them.”<sup>232</sup> In this sense, then, states often execute addicted offenders who are in many respects not the same person that a jury sentenced to death years—or decades—earlier.

#### D. CHILDHOOD TRAUMA

As a child, Daniel Cook consistently endured physical and sexual abuse at the hands of his immediate family, including his mother, father, and grandparents.<sup>233</sup> His manic-depressive mother abused drugs and alcohol during her pregnancy with Cook.<sup>234</sup> As a young boy, Cook suffered rapes and molestations by his mother and grandparents.<sup>235</sup> He was also physically abused and beaten.<sup>236</sup> On one occasion, his father burned Cook’s penis with a lit cigarette.<sup>237</sup>

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228. *Id.*

229. *Id.*

230. *Id.* at 40.

231. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

232. SHEFF, *supra* note 227, at XXII.

233. *See Cook v. Ryan*, No. 97-0146, 2012 WL 2798789, at \*9 (N.D. Ariz. July 9, 2012); *see also Lewis, supra* note 71.

234. *Lewis, supra* note 71.

235. *Id.*

236. *Cook*, 2012 WL 2798789, at \*9.

237. *Lewis, supra* note 71.

Cook lived in various foster and group homes during his childhood.<sup>238</sup> The house parent in one of these homes used Cook and other boys in the home in sadistic rituals to provide sexual entertainment for adults.<sup>239</sup> Records show that Cook would be chained to a bed naked in a room with a one-way mirror, and adults would watch from the other side as the foster parent raped him.<sup>240</sup> At the age of fifteen, the same house leader forcibly circumcised Cook.<sup>241</sup> That same year, he was gang raped by other boys in the home.<sup>242</sup> On another occasion, he was sexually molested at a bus station.<sup>243</sup> Cook developed a substance-abuse disorder at a young age, drinking alcohol at fourteen and taking barbiturates and hallucinogens at sixteen and seventeen.<sup>244</sup> As a teenager, Cook was repeatedly hospitalized for depression and suicidal tendencies after trying to kill himself.<sup>245</sup> At his clemency hearing, the prosecutor who had Cook convicted and sentenced to death supported his clemency petition, declaring that he would not have sought the death penalty against Cook if he had known of his traumatic upbringing.<sup>246</sup>

Fifty percent (fifty) of the last hundred executed defendants around the country suffered from complex trauma like Daniel Cook—severe physical abuse, sexual molestations, domestic violence, the violent loss of immediate family and chronic homelessness.<sup>247</sup>

Table 5: Defendants Whose Mitigation Histories Included Evidence of Childhood Trauma:

Gary Allen <sup>248</sup>	Johnnie Baston <sup>249</sup>	Daniel Lee Bedford <sup>250</sup>
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238. *Cook*, 2012 WL 2798789, at \*10.

239. *Lewis*, *supra* note 71.

240. *Id.*

241. *Id.*

242. *Cook*, 2012 WL 2798789, at \*9.

243. *Id.* at \*10.

244. *Id.*

245. *Id.*

246. *Id.* at \*11.

247. *See supra* Table 5.

248. Allen was raised in poverty in an unstable family with an alcoholic mother who rejected him. *Allen v. State*, 923 P.2d 613, 617 (Okla. 1996), *vacated*, *Allen v. Oklahoma*, 520 U.S. 1195 (1997).

249. Baston was abandoned by his mentally ill mother and raised by his abusive and neglectful father until he was two years old, at which time he went to live with his aunt. STATE OF OHIO ADULT PAROLE AUTH., IN RE: JOHNNIE R. BASTON, OSP #A308-174: DEATH PENALTY CLEMENCY REPORT 10 (2011). Baston's behavior spiraled out of control after a failed attempt to reconnect with his father, who told Baston he couldn't live with him because he would "contaminate" his other children. *Id.* at 11.

250. Bedford's father was an alcoholic and a drug user who abandoned Bedford when he was nine years old. *Bedford v. Collins*, No. C-1-92-547, 2007 WL 3046443, at \*29 (S.D. Ohio May 3, 2007). Bedford's mother also abandoned her children and died of brain cancer shortly after reuniting with them. *Id.* at \*26. Bedford's father was later murdered by a girlfriend. *Id.* at \*27.

Roy Willard Blankenship <sup>251</sup>	William Boyd <sup>252</sup>	Jan Michael Brawner <sup>253</sup>
Elmer Leon Carroll <sup>254</sup>	Richard Cobb <sup>255</sup>	Andrew Allen Cook <sup>256</sup>
Daniel Wayne Cook <sup>257</sup>	James DeRosa <sup>258</sup>	Guadalupe Esparza <sup>259</sup>

251. Blankenship's family had a history of mental illness: his father was an alcoholic, his uncle was institutionalized for the better part of his life, and his twin sisters suffered from chronic paranoid schizophrenia. *Blankenship v. Terry*, No. 405-0194, 2007 WL 4404972, at \*10-12 (S.D. Ga. Dec. 13, 2007). Blankenship's father was extremely abusive—he would beat Blankenship's mother on a regular basis, including when she was pregnant with Blankenship. *Id.* at \*10. On one occasion while he was still in the womb, Blankenship's father choked his mother within inches of her life. *Id.* Blankenship was also raised in poverty. *Id.* at \*9. As a newborn he slept in a dresser drawer because his parents could not afford a crib. *Id.* at \*10. When Blankenship was only days old, his father came home drunk and slammed the dresser draw shut with Blankenship inside so that the whole dresser fell backward and he was nearly killed. *Id.* His mother had a nervous breakdown and was hospitalized after his father and his aunt died of carbon monoxide poisoning in a hotel room. *Id.* When Blankenship was eight or nine years old, an older neighbor sodomized him. *Id.* at \*11. Someone who witnessed the assault told Blankenship's mother, who proceeded to "whip the daylights out of him." *Id.* Blankenship's mother remarried three times—one of her husbands beat Blankenship and brutalized and killed his pets in front of him. *Id.* During his childhood, the family moved between ten and fifteen times. *Id.* at \*12. Eventually, his mother abandoned her children, and Blankenship dropped out of high school to join the military. *Id.*

252. Boyd's father was a violent alcoholic who was incarcerated numerous times during Boyd's childhood. *Boyd v. Allen*, 592 F.3d 1274, 1287-88 (11th Cir. 2010). Boyd's mother remarried when he was eight years old. *Id.* at 1287. Boyd's stepfather brutally beat him and his siblings, locking his mentally disabled sister in her room for days and weeks. *Id.* She was ultimately removed from the home by social services. *Id.* Boyd's mother and sister both attempted suicide during his childhood. *Id.* He lived in poverty, eating dirt for nutrients when there wasn't enough food in the home. *Id.*

253. Brawner's father repeatedly raped Brawner's younger sister in front of him and then beat him afterward to keep him silent. *Brawner v. Epps*, No. CIV.A207CV16MPM, 2010 WL 383734, at \*6 (N.D. Miss. Jan. 27, 2010). Brawner's family engaged in drug and alcohol abuse, and as a result they had financial struggles that caused them to move numerous times during Brawner's childhood. *Id.*

254. A mental health expert found evidence that Carroll was subjected to physical and sexual abuse. *Carroll v. State*, 815 So. 2d 601, 615 (Fla. 2002).

255. Cobb and two of his brothers were placed in foster care because their mother was an alcoholic and drug addict who abused and neglected her children. *Cobb v. Thaler*, No. 2:08-0123, 2011 WL 672333, at \*6 (E.D. Tex. Feb. 15, 2011).

256. Cook suffered verbal, physical and sexual abuse at the hands of his stepfather, sister and possibly another relative. *Cook v. Upton*, No. 5:09-0025, 2010 WL 1050404, at \*12 (M.D. Ga. Mar. 18, 2010).

257. Cook suffered extreme sexual and physical abuse at the hands of his mother, father and grandparents, and was placed in a group home where he was raped and tortured. *See Cook v. Ryan*, No. 97-0146, 2012 WL 2798789, at \*9 (N.D. Ariz. July 9, 2012); *see also Lewis, supra* note 71.

258. Derosa was abandoned by his father at the time of his birth, and his mother enrolled in the military and abandoned him soon thereafter. *Derosa v. Workman*, 679 F.3d 1196, 1209 (10th Cir. 2012). He was returned to his father's care as a toddler after being left in a daycare center for two weeks. *Id.* at 1215-16. His father was a heavy drinker and violent. *Id.* at 1216. He sexually abused Derosa's sister and possibly Derosa. *Id.* at 1211, 1217. Derosa's father and stepmother whipped him for wetting the bed, threw plates at him, and otherwise physically abused him. *Id.* at 1211. Eventually, he was returned to his mother's care, who moved him to Germany with her new husband. *Id.* at 1210. His mother suffered from alcoholism, paranoia, aggression and other symptoms of mental illness. *Id.* at 1216. While in Germany, Derosa had to be returned to the U.S. to receive inpatient psychiatric treatment. *Id.* at 1218. In all, DeRosa was abandoned by significant attachment figures more than seven times during his childhood. *Id.* at 1212.

John Ferguson <sup>260</sup>	Cleve Foster <sup>261</sup>	Robert Alton Harris <sup>262</sup>
Brett Hartman <sup>263</sup>	Ramon Hernandez <sup>264</sup>	Rodrigo Hernandez <sup>265</sup>
Bobby Hines <sup>266</sup>	Michael Edward Hooper <sup>267</sup>	Preston Hughes <sup>268</sup>
Jerry Terrell Jackson <sup>269</sup>	Robert Jackson <sup>270</sup>	Christopher Johnson <sup>271</sup>

259. Esparza was placed in an orphanage at the age of six and remained there for several years while his mother was hospitalized for mental illness. See *Crime & Courts: [Metro Edition]*, SAN ANTONIO EXPRESS-NEWS, Mar. 15, 2001, at 2B.

260. Ferguson grew up in poverty. *Ferguson v. State*, 593 So. 2d 508, 510 (Fla. 1992). His father was an alcoholic who died when he was thirteen, which triggered major depression and delusions in Ferguson. *Id.* He witnessed his mother being physically abused by subsequent boyfriends. *Id.*

261. Foster was physically abused as a child. *Foster v. Thaler*, 369 F. App'x 598, 605 (5th Cir. 2010). He was hit with belts and tree branches. *Id.* His father was an alcoholic who sexually abused his brother on multiple occasions, which Foster witnessed. *Id.* He later learned that his father also sexually abused his sisters. *Id.* Foster was traumatized when he discovered the decomposing body parts of his murdered brother. *Id.*

262. Harris suffered extreme abuse as a child at the hands of his father. *Harris v. Vasquez*, 943 F.2d 930, 939 (9th Cir. 1990). When Harris was two years old, his father hit him so that he fell out of his high chair, began to convulse and bleed profusely from his nose, mouth, and ears. *Id.* Harris's father then tried to choke him with a table cloth. *Id.* His sister testified that Harris's father beat Harris and his other children into unconsciousness several times. *Id.* Eventually, Harris's father was sent to prison for child abuse and molestation. *Id.*

263. Hartman's stepfather was physically abusive to him and his mother sent him away to live with an aunt, fearing for his safety. Report or Affidavit of James W. Siddal, Ph.D., *State v. Hartmann*, No. CR97091987 (Ohio C.P. May 13, 1998), 1998 WL 35249306. During his teenage years, he developed a drug and alcohol problem and was placed in a youth home. *Id.*

264. When Hernandez was a teenager, his father was shot and died in his arms. *Hernandez v. Thaler*, 787 F. Supp. 2d 504, 558 n.143 (W.D. Tex. 2011), cert. denied, 463 F. App'x 349 (5th Cir. 2012). The trauma of this event onset depression, anxiety and PTSD in Hernandez. See *id.*; see also *Gonzales*, *supra* note 183.

265. Hernandez never met his father, and his mother was a drug addict who was incarcerated intermittently during his childhood. Appellant's Brief at 18, *Hernandez v. Texas*, No. AP-74,931, 2006 WL 367271 (Tex. Crim. App. Feb. 15, 2006). He was raised by poor relatives who were on public welfare. *Id.* at 18.

266. Hines had a "nightmarish" childhood due to chronic abuse at the hands of his alcoholic father and, later, foster parents. Smith, *supra* note 78. He was abandoned as a young child by his mother. *Id.*

267. Hooper had "a stormy and troubled childhood" in which he was frequently separated from his mother. *Hooper v. State*, 947 P.2d 1090, 1116 (Okla. Crim. App. 1997). Hooper was kidnapped when he was an infant. *Id.*

268. Hughes and his sister were sexually abused as children by their uncle. Allan Turner, *Killer's Lawyer Says Police Lied About Teen's Dying Accusation*, HOUSTON CHRON. (Nov. 13, 2013, 10:04 PM), <http://www.chron.com/news/houston-texas/houston/article/Killer-s-lawyer-says-police-lied-about-teen-s-4031052.php>.

269. Jackson endured physical and sexual abuse as a child. *Jackson v. Kelly*, 650 F.3d 477, 486 n.6 (4th Cir. 2011). Reports suggest that Jackson was molested for years during his childhood, including when he raped at the age of seven by a visitor to his grandmother's house. *Id.* On other occasions he witnessed his brother being raped by an uncle while he hid in the closet. *Id.*

270. At trial, the court accepted Jackson's abusive family life as a mitigating factor. *Jackson v. State*, 684 A.2d 745, 754 (Del. 1996).

271. Johnson reported that he was sexually molested by an uncle from the ages of seven through twelve. *Johnson v. State*, 40 So.3d 753, 761 (Ala. Crim. App. 2009). He was first hospitalized for behavior and conduct issues when he was twelve years old. *Id.* at 762.

Shannon Johnson <sup>272</sup>	Cary Kerr <sup>273</sup>	Eric John King <sup>274</sup>
Rickey Lynn Lewis <sup>275</sup>	Samuel Villegas Lopez <sup>276</sup>	Derrick Mason <sup>277</sup>
Donald Moeller <sup>278</sup>	Robert Moorman <sup>279</sup>	Jeffrey Motts <sup>280</sup>
John Quintanilla, Jr. <sup>281</sup>	Paul Rhoades <sup>282</sup>	Gary Carl Simmons <sup>283</sup>

272. Johnson suffered neglect and a “chaotic and self-directed lifestyle” from an early age. *State v. Johnson*, No. 0609017045, 2008 WL 4140596, at \*5–6 (Del. Super. Ct. Sep. 5, 2008).

273. Kerr’s youth was “riddled with poverty” and he and his siblings often went without food. Brandi Grissom, *Execution Challenge is First for Texas Appeals Office*, TEXAS TRIB. (May 3, 2011), <http://www.texastribune.org/2011/05/03/execution-challenge-first-for-texas-appeals-office>. His parents were both alcoholics, and his mother abandoned him when he was young. *Id.* Kerr was sexually assaulted at age five and again at age twelve. *Id.* He experienced homelessness from a young age. *Id.*

274. King had a traumatic childhood and a dysfunctional family which caused him to suffer from mental illness as an adult. *State v. King*, 883 P.2d 1024, 1037 (Ariz. 1994).

275. Lewis’s father abused him and he was forced to shoot his father in order to protect his mother when he was ten years old. *Texas Executes Man for 1990 Fatal Shooting, Rape*, CBS LOCAL DFW (Apr. 9, 2013), <http://dfw.cbslocal.com/2013/04/09/texas-executes-man-for-1990-fatal-shooting-rape>.

276. Lopez suffered “chronic and horrific violence,” witnessed physical and sexual assaults against his mother, and was repeatedly abandoned and neglected by his attachment figures. Brief of Petitioner-Appellant at 238, *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2011) (No. 12-99001). His family was “extraordinarily poor” and his alcoholic father was “cruel and vicious.” *Id.*

277. The judge who sentenced Mason to death later fought against his execution because Mason’s lawyers failed to present evidence that Mason was a victim of physical and sexual abuse. Petition for Writ of Cert. at 31–32, *Ex Parte Mason*, No. 1971489 (Ala. 2011); *Alabama Executions*, *supra* note 192.

278. Moeller’s father left his mother before Moeller was born. *Death Penalty*, *supra* note 194. He experienced “pervasive and open rejection” from his mother, who would leave him with a neighbor while she travelled with her boyfriend. *Id.* Moeller’s mother and her boyfriend would tether Moeller to a bus with a rope while they went partying. *Id.* His mother beat him and once slammed his head with a hot frying pan. *Id.* At other times, she would bring men home from the bar and perform sexual acts with them in front of her children. *Id.* Moeller was abusing alcohol by the time he was eight years old, and drugs by the time he was eleven. *Id.*

279. Moorman was sexually abused by his adoptive mother since he was a child. Opening Brief of Petitioner-Appellant at 4, *Moormann v. Schriro*, No. 08-99035 (9th Cir. May 29, 2009), ECF No. 5. A parole officer who worked with Moorman when he was a teenager said his mother’s abuse was exploitative and had gone on for many years. *Id.* at 13. Moorman was institutionalized throughout his childhood in a facility that was known for “brutal beatings, sexual misconduct and verbal humiliation.” *Id.* at 10.

280. At trial, Motts’ attorneys put on evidence that Motts grew up witnessing abuse at the hands of his alcoholic father. Collins, *supra* note 196.

281. Quintanilla was raised in a fatherless home and developed a drug addiction and became suicidal in his teenage years. *Quintanilla v. Thaler*, No. 09-0039, 2011 WL 284353, at \*9 (S.D. Tex. Jan. 25, 2011).

282. Rhoades’s family was plagued by mental health and substance abuse disorders. *Rhoades v. Henry*, 596 F.3d 1170, 1191 (9th Cir. 2010). Rhoades’ father beat his children, and his father and mother’s relationship was emotionally and physically abusive. *Id.* The family was also fraught with unhealthy sexual behaviors. *Id.* Rhoades’s sister was sexually abused by cousins and an uncle, and Rhoades and another sister had a sexual relationship, as did Rhoades with his aunt after her husband committed suicide. *Id.* Multiple members of Rhoades’s family were institutionalized, determined to have sub-average intelligence, or committed suicide. *Id.*

283. Simmons and his brothers were beaten by Simmons’s stepfather on a daily basis. *Simmons v. State*, 869 So. 2d 995, 1001 (Miss. 2004). He received the worst of the violence because he was the eldest son. *Id.* His stepfather also beat Simmons’s mother and once shot at Simmons when he tried to defend her. *Id.*

Steven Smith <sup>284</sup>	Mark Anthony Stroman <sup>285</sup>	Mario Swain <sup>286</sup>
Steven Ray Thacker <sup>287</sup>	Ronnie Paul Threadgill <sup>288</sup>	Keith Steven Thurmond <sup>289</sup>
Robert Charles Towery <sup>290</sup>	Edwin Hart Turner <sup>291</sup>	Manuel Valle <sup>292</sup>
Robert Waterhouse <sup>293</sup>	Thomas Paul West <sup>294</sup>	Steven Michael Woods <sup>295</sup>

284. Smith's biological father had no contact with him while he was growing up, and his mother's husband was a violent alcoholic. *State v. Smith*, 780 N.E.2d 221, 236 (Ohio 2002). Smith's stepfather drank and used drugs, whipped Smith with a belt, and threatened the family that he would burn their house down. *Id.*

285. Stroman had a "troubled" and "deprived" youth. *Stroman v. Thaler*, No. 3:05-1616, 2009 WL 3075168, at \*12 (N.D. Tex. Sept. 28, 2009). He ran away from an abusive home upward of eleven times, and endured an abusive and neglectful environment under his parents' care. *Id.*

286. Swain was raised in an abusive household where his alcoholic and drug-addicted father would beat his mother. Brief for Petitioner at 46-47, *Swain v. Thaler*, No. 10-70011 (5th Cir. Nov. 12, 2010), 2010 WL 5558278. Swain was locked in a closet while this took place. *Id.* On one occasion, Swain's father threatened his mother by dangling Swain over an upstairs banister by his foot. *Id.*

287. Thacker's mother testified that she drank when he was a child and that his sister, who was two years older than him, was his primary caretaker. *Thacker v. Workman*, No. 06-0028, 2010 WL 3466707, at \*30 (N.D. Okla. Sept. 2, 2010). She also testified that one of her boyfriends was "mean" to her children. *Id.*

288. Threadgill suffered from childhood hunger and neglect, a disruptive childhood occasioned by fifteen to sixteen moves from the time of Threadgill's birth to his eighteenth birthday, a highly dangerous neighborhood environment, and the coming and going of at least eleven men in the family home, some of whom were violent. *See generally* Brief for Petitioner, *Threadgill v. Thaler*, No. 13-1138 (N.D. Tex. Mar. 18, 2013).

289. Thurmond experienced child abuse at the hands of his father, who was an abusive alcoholic. Brief for Appellant at 24, *Thurmond v. Thaler*, No. 08-70008 (5th Cir. Oct. 7, 2009). He witnessed his father beating his mother and his brother. *Id.* Thurmond's father also used psychological abuse against his family, preventing his wife and children from communicating with their extended family. *See* Petition for Writ of Habeas Corpus at 5, *Thurmond v. Dretke*, No. H-05-384 (S.D. Tex. Sept. 1, 2006). This abuse was reported to have a dramatic effect on all the children in the family, engendering violent tendencies and drug abuse disorders in each of them, including Thurmond. *See id.* at 7-8.

290. Towery was physically and mentally abused by his mother. *Towery v. Ryan*, 673 F.3d 933, 936 (9th Cir. 2012). His sisters testified that this abuse included forcing Towery to kneel in a box of rice when he complained that his leg hurt after falling from a wagon, and gagging him with a sock and binding his hands in the back of the car while on a family trip. *Id.* at 938.

291. Turner endured severe abuse and neglect during his childhood. Petitioner Edwin Hart Turner's Memorandum in Support of Petition for Issuance of the Writ of Habeas Corpus at 33, *Turner v. Epps*, No. 4:07-0077 (N.D. Miss. 2007). Turner's parents were alcoholics who were involved in violent domestic disputes. *Id.* at 2 n.1. His father died in an explosion when Turner was twelve years old (possibly suicide), and Turner's mother remarried the following year. *Id.* at 38-40. She cut off contact with her extended family, and her new husband abused Turner and his brother. *Id.* at 40, 42. After he tried to kill himself by shooting himself in the face with a rifle, his mother and stepfather threw him out of the house and he was forced to live in a tent. *Id.* at 45, 51.

292. Valle had a "traumatic relationship" with his family. *Valle v. Crosby*, No. 03-20387, 2005 WL 3273754, at \*72 n.23 (S.D. Fla. Sept. 13 2005). His parents were "very strict" and detached, engaging in harsh discipline. *Id.* at \*72 n.26.

293. Waterhouse said he was the victim of homosexual rape when he was nine years old, but at the time of trial he would not allow his defense attorney to put on any mitigating evidence. *Gustavson, supra* note 210.

Children who have been exposed to one or more such traumas over the course of their lives may develop physiological reactions that persist and affect the development of their brains and bodies, including post-traumatic stress disorder.<sup>296</sup> Traumatic stress can negatively impact school performance, change the way children view the world and their futures, and cause psychological and physiological problems that persist into adulthood.<sup>297</sup>

Based on data collected for the National Longitudinal Study of Adolescent Health, Janet Currie and Erdal Tekin found that childhood maltreatment nearly doubles the likelihood that a person engages in a variety of different crimes, including hard and soft drug crimes, assault, and armed robbery.<sup>298</sup> This finding holds even among twins when one sibling suffered maltreatment and the other did not.<sup>299</sup> The study found that impoverished children are both more likely to be maltreated and more likely to commit a crime after being maltreated than other children.<sup>300</sup> The study also found that increased severity of abuse is related to increased criminality.<sup>301</sup> Sexual abuse is the single type of maltreatment most associated with increased criminality.<sup>302</sup> In addition to the severity of the offense, multiple types of abuse in one child (such as physical and sexual) also are associated with increased criminality.<sup>303</sup> These findings

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294. West's father was an alcoholic and West witnessed physical violence in the home from an early age. *West v. Ryan*, 608 F.3d 477, 482 (9th Cir. 2010). He had an unstable and abusive home environment and a "deprived childhood." *State v. West*, 862 P.2d. 192, 211 (Ariz. 1993).

295. Woods had an alcoholic and physically abusive father. *Ex Parte Woods*, 176 S.W.3d 224, 227 (Tex. Crim. App. 2005). He suffered neglect and was hospitalized four times between the ages of thirteen and eighteen for mental and drug-related problems. *Id.*; *Woods v. Thaler*, 339 F. App'x 884, 886 (5th Cir. 2010).

296. Janet Currie & Erdal Tekin, *Does Child Abuse Cause Crimes?* at 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 12171, 2006).

297. *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 689 (2008) (listing aspects of the defendant's character and history that defense counsel must investigate as a basis for a sentence less than death in Guideline 10.11(B)). Other examples include chronic poverty, homelessness, exposure to violence, substance-abuse or self-harm, and abandonment. *See id.*; *see also* *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding trial counsel ineffective for failing to investigate and present at trial Taylor's history of criminal neglect and abuse at the hands of his parents and foster carers); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (finding that defense counsel ought to have discovered and presented evidence of severe privation and abuse at the hands of an alcoholic and absentee mother; physical torment, sexual molestation and repeated rapes in foster care; and finally, homelessness).

298. *See* Currie & Tekin, *supra* note 296, at 27–28. Another study found that child abuse increases risk of committing a violent crime by thirty percent. NAT'L INST. OF JUSTICE, *Impact of Child Abuse and Maltreatment on Delinquency, Arrest and Victimization* (Mar. 14, 2011), <http://www.nij.gov/topics/crime/child-abuse/pages/impact-on-arrest-victimization.aspx>.

299. *See* Currie & Tekin, *supra* note 296, at 24–25.

300. *Id.* at 9.

301. *Id.* at 31.

302. *Id.* at 25.

303. *Id.* at 27.

support a cumulative trauma—or compounded stress—theory, which is based on the idea that resiliency decreases and functional deficits increase in response to multiple or chronic stressors.<sup>304</sup> Finally, the link between maltreatment and future criminal conduct also appears to have gender and socioeconomic dimensions. First, increased probability of crime commission is steeper among maltreated boys.<sup>305</sup> Second, maltreatment and poverty, when combined, are associated with functional deficits that exceed either maltreatment or poverty separately.<sup>306</sup> These gender and socioeconomic dimensions are relevant here because most executed offenders are male and many of those offenders who suffered childhood trauma also faced poverty.

Nearly nine of every ten executed offenders possessed an intellectual impairment, had not yet reached their twenty-first birthday, suffered from a severe mental illness, or endured marked childhood trauma. Each of these mitigation areas involves functional deficits that rival—and in some respects outpace—those associated with intellectual disability and juvenile status. Over half of these offenders fell into multiple mitigation categories, which further increases the risk of wrongful executions as the culpability of these offenders is diminished across multiple non-overlapping dimensions.<sup>307</sup>

The next Part grapples with the reality that these mitigation histories suggest: existing mitigation-facilitating procedures fail to ensure that only offenders with extreme culpability are executed.<sup>308</sup>

### III. DO EXISTING PROCEDURES ENSURE THAT ONLY MURDERERS WITH EXTREME CULPABILITY ARE EXECUTED?

Drawing upon our examination of the mitigation histories of the last hundred offenders, this Part offers a few preliminary thoughts on why both individualized sentencing and categorical exemption might fail in practice to enforce the extreme culpability requirement.

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304. *Id.*

305. *Id.* at 3.

306. *Id.*

307. Note that our findings almost certainly underestimate the number of people who fall into one or more of these categories, as the appellate records in many cases—especially in those of the thirteen offenders without discernable mitigation—suggest markedly incomplete mitigation investigations.

308. Our study does not adjust for aggravating circumstances. A number of studies demonstrate that arbitrariness still exists in the sorting of capital defendants based on the amount of aggravation present in a case. *See, e.g.*, Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 *CARDOZO L. REV.* 1227, 1261 (2013). For our purposes, however, we assume substantial aggravation is present in every case, as there was in both *Atkins* and *Simmons*. Our proposition, which is the same as the one relied upon in *Atkins* and *Simmons*, is that the presence of substantial intellectual and psychological deficits can render the defendant insufficiently culpable regardless of the aggravating circumstances available in the case.

#### A. THE INADEQUACY OF INDIVIDUALIZED SENTENCING?

We located extensive and pervasive mitigating characteristics for the vast majority of executed offenders. In the face of these mitigating factors, is it nonetheless possible that individualized sentencing *does* adequately enforce the extreme culpability? Some might argue that the juries that decided the fate of these executed offenders performed informed selectivity; that is, they adequately accounted for the mitigation evidence but nonetheless found the offenders to possess the requisite extreme culpability. Justice O'Connor articulated this view in her *Simmons* dissent: "Whatever can be said about the comparative moral culpability of 17-year-olds as a general matter, Simmons' actions unquestionably reflect a consciousness materially more depraved than that of the average murderer."<sup>309</sup>

There are, however, several reasons to reject the informed selectivity explanation. First, the sheer percentage of executed offenders that fall into one (eighty-seven percent) or multiple (fifty-five percent) mitigation categories belies the suggestion that executed offenders possess the extreme culpability contemplated by the Court. The fact that almost one in ten executed offenders had an IQ score in the intellectually disabled range further diminishes the informed selectivity argument. The informed selectivity explanation becomes less likely still after considering that a significant number of executed offenders did not present (or adequately present) the mitigation evidence found in their post-conviction claims at the trial level.<sup>310</sup> Indeed, a better hypothesis is that many executed offenders received insufficient lawyering, which obscured the culpability determination by preventing full jury consideration of the mitigation evidence. Finally, there is the so-called "double edged sword" problem, which is the concern that inherently mitigating circumstances (e.g., mental illness or youthfulness) are treated as aggravating factors due to their association with increased dangerousness of the offender.<sup>311</sup> This mistreatment of important mitigation evidence is not certain to occur, but it nonetheless does contribute to an "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . even where [those factors] should require a sentence less severe than death."<sup>312</sup> When viewed as a whole, then, there is little reason to champion the informed selectivity argument.

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309. See *Roper v. Simmons*, 543 U.S. 551, 601 (2005) (O'Connor, J., dissenting).

310. See notes 242–246 and accompanying text.

311. *Simmons*, 543 U.S. at 573–74.

312. *Id.* at 553–54.

## B. THE ARBITRARINESS OF CATEGORICAL EXEMPTIONS

Unfortunately, there is also little reason to believe that categorical exemptions are an adequate supplement to individualized sentencing. Existing exemptions do not protect all of the offenders likely to possess intellectual and psychological deficits akin to those of intellectually disabled and juvenile offenders. As evidenced by the nine percent of executed offenders with a sub-70 IQ score, existing exemptions are not even adequate to protect intellectually disabled offenders. Nor is there an adequate basis for treating intellectually disabled offenders differently than those with borderline intellectual functioning. Borderline intellectual functioning differs (often slightly) in degree, but people with it possess similarly diminished capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand the reactions of others.<sup>313</sup> It is one thing to point out that a line needs to be drawn somewhere along the intellectual function spectrum and a different thing altogether to draw that line smack in the middle of the borderline mental deficiency range—especially when the features that define the range tend to be the opposite of those associated with the calculating nature of the prototypical death-eligible offender.

The same problems are evidenced in the distinction between the seventeen-year-old offender ineligible for the death penalty and the twenty percent of offenders under the age of twenty-one—and thirty-six percent under twenty-five.<sup>314</sup> Though seventeen-year-olds might possess more severe deficits than twenty-five-year-olds, each point along the youthfulness spectrum is associated with the type of impulsivity (among other functional deficits) associated with culpability that is diminished relative to the typical adult.<sup>315</sup>

Even if the Court created categorical exemptions for intellectual impairments and youthfulness, these categorizations would generally arbitrarily exclude offenders who suffer from severe mental illness, childhood trauma, or both. What would happen if the Court created categorical exemptions for all defendants that belong to a class of offenders characterized by the type of diminished culpability possessed by intellectually disabled and juvenile offenders? At most, thirteen of the last one hundred executed offenders would remain; a number which suggests that the problems with capital punishment in America run far deeper than the creation of more categorical exemptions can repair.

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313. *See supra* note 50 and accompanying text (discussing the characteristics of borderline intellectual functioning).

314. *See supra* Tables 2, 3.

315. *See supra* Table 4.

### CONCLUSION

This Article detailed the available social histories of the hundred most recently executed offenders. We found that the overwhelming majority of executed offenders suffered from intellectual impairments, were barely into adulthood, wrestled with severe mental illness, or endured profound childhood trauma. Most executed offenders fell into two or three of these core mitigation areas, all which are characterized by significant intellectual and psychological deficits. This ubiquity of mitigation evidence present in the social histories of executed offenders should give pause to those charged with assessing the proper functioning of the death penalty in America. Though we aimed only to take a first step toward correcting for the dearth of knowledge about the social histories of the people whom states execute, our project suggests the need for other scholars to conduct more comprehensive examinations of both the failings of the Court's mitigation-facilitating doctrines as well as the implication for these deficits on the continued constitutionality of the death penalty.