No. 12-5349

In The
Supreme Court of the United States

MARVIN L. WILSON,

Petitioner,

– v. –

RICK THALER, Director, Texas Department of Criminal Justice (Institutional Division),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Association on Intellectual and Developmental Disabilities ("AAIDD"), formerly the American Association of Mental Retardation ("AAMR"), is the nation's oldest and largest interdisciplinary professional organization in the field of intellectual and developmental disabilities. Founded in 1876, the AAIDD publishes and promotes scientific research and assessment of mental retardation and educates the public about the scientific consensus regarding mental retardation. Professionals in every state use the AAIDD's manuals and diagnostic methodology to assess intellectual disabilities.

The AAIDD has appeared as *amicus curiae* in numerous cases involving the meaning and definition of mental retardation,[2] its diagnosis in criminal proceedings, and the legal rights of individuals with

[1] Consistent with Supreme Court Rule 37.2, counsel for all parties received at least 10-days notice of the AAIDD's intent to file this *amicus curiae* brief and gave their consent. Pursuant to Rule 37.6, the AAIDD confirms that no counsel for any party authored this brief in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief other than the AAIDD, its members, or its counselors.

[2] The AAIDD, as well as many clinicians, now use the term "intellectual disability," rather than "mental retardation." See generally R. Schalock, et al., The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007). This brief refers to "mental retardation" because that is the term used in *Atkins* and by the courts below.

intellectual disabilities. The AAIDD appeared as *amicus curiae* in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), one of several cases where this Court employed the AAIDD's definition of mental retardation in adjudicating legal issues. See also *Penry* v. *Lynaugh*, 492 U.S. 302, 308, n.1 (1989); *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442, n.9 (1985).

The AAIDD has a vital interest in ensuring that (1) all individuals with mental retardation receive the rights and protections required by law; and (2) courts employ established scientific and clinical principles to assess mental retardation.

SUMMARY OF ARGUMENT

Mr. Wilson stands on the brink of execution because Texas uses, and the Fifth Circuit has sanctioned, a mental retardation test that is based on false stereotypes and tethered to no scientific criteria. Mr. Wilson—who has a full-scale IQ of 61 and sucked his thumb through adulthood—was diagnosed with mild mental retardation by a court-appointed specialist, the only expert in the case. While all mentally retarded individuals are exempt from capital punishment under *Atkins* v. *Virginia*, 536 U.S. 304 (2002), Texas courts' departure from clinical standards has negated the constitutional protection for all but the most severely retarded offenders in Texas.

This case is a particularly appropriate vehicle to instruct courts that states cannot circumvent the

Atkins mandate by employing contra-clinical tests predicated on stereotypes. The mental retardation diagnosis is a bright line that delineates a category of people constitutionally ineligible for the death penalty. Texas courts' use of aclinical factors to narrow the category of protected defendants is especially troubling because Texas regularly executes far more offenders than does any other state. In the decade since this Court decided *Atkins*, only six of 76 *Atkins* claimants in contested cases in Texas have been found to be mentally retarded.

The *Atkins* Court explained that a national consensus against the execution of mentally retarded offenders had arisen, prompting the constitutional prohibition. The Court referred to the clinical definition of mental retardation, as set forth by the AAMR/AAIDD and the American Psychiatric Association ("APA"), as the basis for the statutory definitions enacted by the states, and in turn the national consensus at the heart of *Atkins*. Those clinical definitions consistently have been used to diagnose mental retardation for nearly 100 years.

Nevertheless, the Texas Court of Criminal Appeals has responded to the *Atkins* rule by devising a lay test to identify whether a claimant suffers such a "level and degree of mental retardation" that "a consensus of Texas citizens" would agree that the individual should be exempt from execution. *Ex parte Briseño*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). The inquiry departs from the scientific definition of mental retardation and supplants clinical criteria

with non-scientific factors, resulting in a grossly underinclusive definition of mental retardation. The *Briseño* factors, which consider strengths to the exclusion of limitations and focus on the particulars of the crime itself, have no basis in research and capitalize on entrenched prejudices. Texas is the only state to supplement or supplant the clinical definition of mental retardation in applying the death penalty ban.

Reliance on *Briseño* inevitably sanctions the execution of offenders who should be classified as mentally retarded under the clinical definitions at the core of *Atkins*. In practice, the *Briseño* inquiry consistently has resulted in the rejection of *Atkins* claims in Texas, even in the face of uncontroverted expert testimony, as here. Use of the *Briseño* factors has rendered the constitutional ban on execution a virtual nullity for mildly retarded offenders like Mr. Wilson.

ARGUMENT

I. TEXAS CIRCUMVENTS THE *ATKINS* MANDATE BY AFFORDING EIGHTH AMENDMENT PROTECTION TO ONLY A FRACTION OF THE MENTALLY RETARDED POPULATION.

A. *Atkins* Imposed a Categorical Ban on the Execution of Offenders Diagnosed as Mentally Retarded.

Atkins announced a "categorical rule" prohibiting the execution of mentally retarded individuals, in light of the "national consensus" that had arisen

against such punishment. 536 U.S., at 316, 320. The Court reasoned that mental retardation "diminish[es] . . . personal culpability" and undercuts the retributive and deterrent goals of capital punishment. *Id.*, at 318-319. The defendants' impairments "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.*, at 317. With a reduced ability to "make a persuasive showing of mitigation" or provide "meaningful assistance to their counsel," mentally retarded defendants "face a special risk of wrongful execution." *Id.*, at 320-321. The Court concluded that condemning mentally retarded individuals to death violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Id.*, at 321.

To spare the lives of the most vulnerable offenders, the Court "enunciated a constitutional rule that turns explicitly and entirely on a clinical diagnosis."[3] It permitted states to devise procedures

[3] R. Bonnie & K. Gustafson, The Challenge of Implementing *Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 813 (2007). Other circuits have recognized that the *Atkins* inquiry employs a clinical standard. See, *e.g.*, *Ochoa* v. *Workman*, 669 F.3d 1130, 1135 (CA10 2012) (noting that *Atkins* "referenced two generally accepted clinical definitions"); *In re Turner*, 637 F.3d 1200, 1205 (CA11 2011) ("Florida's definition of mental retardation substantially parallels the clinical definitions discussed by the Supreme Court in *Atkins*."); *Jackson* v. *Norris*, 615 F.3d 959, 961 (CA8 2010) (noting that the district court "correctly defined adaptive functioning according to" the clinical

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for enforcing the constitutional ban, provided that they do so within the parameters of substantive clinical standards. *Atkins*, 536 U.S., at 317. The Court approved states' use of definitions of mental retardation that "generally conform to the clinical definitions set forth" by the AAMR (now the AAIDD) and the APA. *Id.*, at 317, n.22. These definitions have been used consistently for nearly 100 years to diagnose mental retardation. See generally R.C. Scheerenberger, A History of Mental Retardation: A Quarter Century of Progress (1983). The clinical definitions incorporate three prongs: (1) significantly subaverage intellectual functioning; (2) significant limitations in adaptive behavior; and (3) manifestation before age 18.[4] *Atkins*, 536 U.S., at 308, n.3. The tripartite clinical test is the hallmark of the

definition for mental retardation); *Bies* v. *Bagley*, 535 F.3d 520, 524-525 (CA6 2008) ("a person who is mentally retarded under the clinical definition of that term cannot constitutional [*sic*] be executed in the State of Ohio"); *Rohan ex rel. Gates* v. *Woodford*, 334 F.3d 803, 810, n.3 (CA9 2003) (citing *Atkins* and noting that a "mental defect" must "manifest itself by age 18 in order to satisfy the clinical (and apparently constitutional) definition of retardation").

[4] See American Assn. on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 1 (11th ed. 2010) ("AAMR 2010"); AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 5 (10th ed. 2002) ("AAMR 2002"); AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) ("AAMR 1992"); American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed., text rev. 2000) ("APA 2000").

constitutional definition by which an offender is deemed exempt from the death sentence.

B. Texas Relies on a Purported Statewide Consensus to Determine Who Among the Mentally Retarded Deserves *Atkins* Relief.

The Texas legislature, for five consecutive sessions since *Atkins*, has neglected to define mental retardation statutorily for capital sentencing purposes. In the "legislative interregnum," the Texas Court of Criminal Appeals has filled the void by enunciating "temporary judicial guidelines." *Briseño*, 135 S.W.3d, at 4-5 (noting that "'justice delayed is justice denied' to the inmate, to the victims and their families, and to society at large"). These "temporary" guidelines have become the decisive standard in Texas *Atkins* litigation. The resulting judicial construct is a life-or-death inquiry, unmoored to scientific or legislative dictates, that diverges from *Atkins*.

Instead of acknowledging that the salient *Atkins* question is whether the claimant is "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus," *Atkins*, 536 U.S., at 317, the *Briseño* court recast the issue as whether the claimant suffers the "*level and degree of mental retardation* at which a consensus of *Texas citizens* would agree that a person should be exempted from the death penalty." 135 S.W.3d, at 6 (emphases added). Evoking stereotypes of mental

retardation, the court stated that "[m]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt." *Ibid.* (citing J. Steinbeck, Of Mice and Men (1937)). The *Briseño* court further observed that "[s]ome 85% of those officially categorized as mentally retarded" are just "mildly mentally retarded," which the court believed stemmed from a desire "in the mental health profession [to] define mental retardation broadly to provide an adequate safety net for those who are at the margin." *Id.*, at 5-6. The court distinguished the clinical perspective from the Texan outlook for purposes of determining who merits Eighth Amendment protection. *Ibid.*

Briseño introduced seven non-clinical factors to the *Atkins* inquiry to reflect the subjective consensus in Texas about who *among* the mentally retarded should be subject to the death penalty. *Id.*, at 6, 8-9. Notwithstanding *Atkins*'s wholesale ban on capital punishment for the mentally retarded—and that *Atkins* itself concerned the sentence of a mildly retarded offender, 536 U.S., at 308-309, *Briseño* reasoned that only a subset of individuals clinically deemed mentally retarded merit constitutional protection. In so doing, *Briseño* introduced a false dichotomy between the *Atkins* prohibition for the mildly and profoundly mentally retarded and between Eighth Amendment protection in Texas and nationwide.

II. *BRISEÑO*'S NON-CLINICAL TEST UNDERCUTS THE CONSTITUTIONAL INQUIRY.

Briseño does and has subverted standardized measures of adaptive behavior and uncontroverted expert opinions, in contravention of the Constitution. Its contra-clinical factors narrow the category of less culpable individuals identified in *Atkins*, thereby negating the Court's mandate.

A. *Briseño* Devised Seven Lay Factors to Identify Mental Retardation.

The *Briseño* court employed the AAMR/AAIDD clinical definition of mental retardation, used in *Atkins*, and the substantially similar Texas Health and Safety Code §591.003(13) definition.[5] 135 S.W.3d, at 8. The court also imported the APA definition of "significantly subaverage intellectual functioning" used in *Atkins*, 536 U.S., at 308, n.3, to define the AAMR/AAIDD's use of the same phrase.[6] *Briseño*, 135 S.W.3d, at 7 & n.24. As *Briseño* at least nominally recognized, these are the formal definitions of mental retardation.

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[5] Mental retardation "means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." Tex. Health & Safety Code §591.003(7-a),(13).

[6] "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." *Briseño*, 135 S.W.3d, at 7, n.24 (quoting APA 2000, at 39).

However, despite its acknowledgment of clinical definitions, *Briseño* criticized—and ultimately supplanted—the adaptive functioning criteria, characterizing them as "exceedingly subjective" and prone to dueling expert testimony. *Id.*, at 8. The court instead directed factfinders to seven "evidentiary factors," that it purported to be "indicative of mental retardation or of a personality disorder," *ibid.*, as follows:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? *Id.*, at 8-9.

The factors were dictated without reference to scientific or professional authority and instead appear to be based entirely on the judges' own impressions and assumptions. The contra-clinical inquiry circumvents *Atkins* and subjects to capital punishment those who are death-ineligible under AAMR/AAIDD and APA standards—the same standards that underlay the finding of a "national consensus" in *Atkins*. 536 U.S., at 316-317 & n.22.

B. The *Briseño* Factors Contradict Controlling Clinical Criteria.

The *Briseño* factors provide untrammeled discretion to the factfinder to substitute personal sensibilities for clinical criteria. The judicial overlay sharply diverges from professional standards, denying death-ineligible individuals crucial constitutional protection.

The *Briseño* factors permit the factfinder to work backwards from the crime to a "diagnosis" of mental retardation or, much more typically, the absence thereof. Whereas clinical assessments encompass a

comprehensive evaluation of an individual in diverse settings, six of the seven *Briseño* factors examine the crime in question. Cf. *Gallo* v. *State*, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007) ("many of the *Briseño* factors pertain to the facts of the offense and the defendant's behavior before and after the commission of the offense"). An individual that is clinically retarded can be deemed not mentally retarded under *Briseño* if, in committing his crime, he "formulated plans and carried them through"; he demonstrated "leadership" by committing the crime with someone else; he "respond[ed] coherently, rationally, and on point" when questioned by the police; he lied to the police demonstrating his ability to "hide facts or lie effectively in his own . . . interests"; or the crime required "forethought." 135 S.W.3d, at 8-9.

The focus on the execution of a crime is practically irrelevant, however, in light of *Atkins*'s recognition that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial." 536 U.S., at 318. This Court has emphasized that "[n]othing in [*Atkins*] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered." *Tennard* v. *Dretke*, 542 U.S. 274, 287 (2004). A mental retardation inquiry should consider typical, daily behavior in an individual's community environment, rather than myopically focus on an isolated event. AAMR 2010, at 47-48. See also C.

Everington & J.G. Olley, Implications of *Atkins v. Virginia*: Issues in Defining and Diagnosing Mental Retardation, 8 J. Forensic Psychol. Prac., no. 1, 2008, at 1, 11 ("[P]erhaps most important, adaptive behavior is the individual's typical performance in his/her community setting. The details of the crime cannot be considered to be a sample of typical behavior."). Moreover, diverting the inquiry to the particulars of a brutal offense invites emphasis on highly prejudicial facts.

The *Briseño* factors undermine the role of, and allow determinations in spite of, uncontroverted expert opinion. For example, the first factor considers the opinions of "family, friends, teachers, employers, [and] authorities" regarding the individual's condition. 135 S.W.3d, at 8. Aside from their lack of qualifications to make such a determination, some of these people naturally may be reluctant to label their child, sibling, or student as mentally retarded, given the stigma that accompanies such a label. Indeed, any characterization likely would be predicated on stereotypes.[7]

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[7] Many people have misconceptions about mental retardation, which frequently leads to a presumption of malingering when anticipated stereotypes are not present. See D. Keyes, et al., Mitigating Mental Retardation in Capital Cases: Finding the 'Invisible' Defendant, 22 Mental & Physical Disability L. Rep. 529, 536 (1998).

The fourth *Briseño* factor contradicts the AAMR/ AAIDD and APA standards by asking the factfinder to consider the individual's reaction to external stimuli without regard for the social appropriateness of the reaction. *Ibid.* Prevailing clinical research defines "[i]mpairments in adaptive behavior" as "significant limitations in an individual's effectiveness in meeting the standards of . . . social responsibility that are expected for his or her age level and cultural group." *Id.*, at 7, n.25 (quoting American Association on Mental Deficiency, Classification in Mental Retardation 11 (Grossman ed. 1983)). Moreover, "about 85%" of mentally retarded individuals "typically develop social and communication skills." APA 2000, at 43. Likewise, the fifth factor asks whether the individual can "hide facts or lie effectively," but individuals with mental retardation, like most people, are able to hide facts, especially when experiencing high anxiety.

Further, by articulating "evidentiary factors" that may suggest "mental retardation *or* . . . a personality disorder," 135 S.W.3d, at 8 (emphasis added), *Briseño* establishes an artificial distinction between two often overlapping medical conditions. The factors essentially have morphed into a standalone, dispositive inquiry that exclusively attributes any adaptive deficit to a personality disorder.

C. *Briseño* Improperly Considers Strengths to the Exclusion of Limitations.

Adaptive limitations lie at the core of a clinical diagnosis of mental retardation. Nevertheless, *Briseño* focuses on perceived strengths to the exclusion of limitations, dangerously restricting the class of persons eligible for constitutionally mandated protection.

The AAMR/AAIDD recognizes that "[w]ithin an individual, limitations often coexist with strengths." AAMR 2010, at 1; AAMR 2002, at 1. Such an assumption is "essential to the application" of the mental retardation definition. AAMR 2010, at 1. Individuals "with mental retardation are complex human beings who likely have certain gifts as well as limitations," such as "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAMR 2002, at 8. "Thus, in the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills." AAMR 2010, at 47; see also *Holladay* v. *Allen*, 555 F.3d 1346, 1363 (CA11 2009) ("the criteria for diagnosis recognizes" that "[i]ndividuals with mental retardation have strengths and weaknesses, like all individuals").

Whereas the AAMR/AAIDD and APA define significantly limited adaptive function as limitations

in two or more of ten and eleven areas, respectively, *Atkins*, 536 U.S., at 308, n.3,[8] *Briseño* provides no guidance on the relative weight to accord to various factors. The omission creates an analytical chasm whereby a factfinder can conclude that an individual is mentally retarded only if that individual is practically nonfunctioning. If a factfinder "concludes that the petitioner met one of the *Briseño* factors even in a limited period of time or situation, the factfinder may then overlook the petitioner's limitations and conclude that the petitioner is not mentally retarded."

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[8] The AAMR revised the adaptive deficit criterion in 2002, but *Atkins* quotes the 1992 criterion:

> "'*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.'" 536 U.S., at 308, n.3 (quoting AAMR 1992).

The 2002 assessment requires significant limitations in one of three "skill domains." AAMR 2002, at 73. Each of the ten 1992 areas is included within one of the three "skill domains." AAMR 2002 Table 5.2. Accordingly, courts have not distinguished between the 1992 and 2002 assessments of adaptive limitations. See *Moore* v. *Quarterman*, 342 Fed. Appx. 65, 71, n.6 (CA5 2009) (unpublished). The APA similarly requires "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Atkins*, 536 U.S., at 308, n.3 (quoting APA 2000).

Chester v. *Thaler*, 666 F.3d 340, 367 (CA5 2011) (Dennis, J., dissenting).

This Court has long recognized "the wide variation in the abilities and needs" of mentally retarded individuals. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 445 (1985). *Briseño*'s "scattershot approach to adaptive deficits—letting the fact-finder hunt and peck among adaptive deficits, unfettered by the specific diagnostic criteria that inform the expert opinion—will allow some capital offenders whom every rational diagnostician would find meets the clinical definition of mental retardation to be executed." *Lizcano* v. *State*, 2010 WL 1817772, at *40 (Tex. Crim. App. 2010) (unpublished) (Price, J., dissenting).

According dispositive weight to perceived strengths divorces the inquiry from actual limitations, leading to findings that "reflect the stereotypical view that mentally retarded individuals must be utterly incapable of caring for themselves, potentially dangerous, and 'unfit' to reproduce, as was once believed."[9]

[9] P. White, Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After *Atkins v. Virginia*, 76 Tenn. L. Rev. 685, 703 (2009) (internal cites, quotes omitted).

D. Texas Courts Routinely Use *Briseño* to Supplant Clinical Assessment.

Although application of the *Briseño* factors is "discretionary," *Moore*, 342 Fed. Appx., at 72, n.7, the factors have attained preeminence as Texas courts have used them to supplant scientific definitions. As in the case of Mr. Wilson, the subjective nature of the *Briseño* inquiry can transform the assessment into a smokescreen for perfunctory clinical review and dismissal of uncontroverted expert opinion.

For example, in *Hines* v. *Thaler*, 456 Fed. Appx. 357, 370 (CA5 2011) (unpublished), the state district court considered "all of the evidence . . . in light of the seven 'evidentiary factors' given in *Briseño*." The Fifth Circuit affirmed this approach without any discussion of standardized or clinical measures. *Id.*, at 372. Similarly, in *Ex parte Chester*, 2007 WL 602607, at *3-*5 (Tex. Crim. App. 2007) (unpublished), the Texas Court of Criminal Appeals ignored the clinical measure of adaptive behavior—a score of 57, well below the threshold, on the Vineland Adaptive Behavior Survey administered by the Texas Department of Criminal Justice—in favor of the trial court's analysis of the *Briseño* factors. Based on that analysis, and contrary to the State's own clinical assessment, the court determined that Mr. Chester did not have significant deficits in adaptive behavior and therefore was not mentally retarded. *Ibid.* The Fifth Circuit affirmed the district court's denial of habeas relief, holding that "the application of the *Briseño* factors, even in the absence of specific employment of the AAMR's methodology for

determining deficiencies in adaptive behavior," is consistent with *Atkins*. *Chester*, 666 F.3d, at 347.[10]

In *Hall* v. *State*, 160 S.W.3d 24 (Tex. Crim. App. 2004), the court dismissed the standardized assessments of adaptive limitations and relied on the lay testimony of an 18-year-old co-worker and several prison guards, each of whom opined that Mr. Hall was not mentally retarded. *Id.*, at 42 (Johnson, J., dissenting). The co-worker compared Mr. Hall to mentally challenged children to whom he taught sports. *Id.*, at 31. One guard compared Mr. Hall to "'some kids [he knew] in school with Down's syndrome.'" *Id.*, at 43 (Johnson, J., dissenting). Another guard used a neighbor's daughter who was allegedly mentally retarded as the basis for comparison. *Ibid.* The third guard had an uncle who was allegedly mentally retarded and reasoned that Hall "was nothing like his uncle." *Id.*, at 35. Lay testimony based on such a random collection of individuals cannot serve as the basis for the diagnosis of mental retardation in accord with the national consensus identified in *Atkins*. Yet that is precisely what *Briseño* self-consciously promotes.

The Texas Court of Criminal Appeals's recent remand order in *Ex parte Sosa* reflects the primacy

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[10] On May 14, 2012, Mr. Chester filed a Petition for Writ of Certiorari with the Court, presenting a substantially similar question concerning Texas's use of the *Briseño* factors. See Brief for the Petitioner, *Chester* v. *Thaler*, No. 11-1391, at i. Mr. Chester's petition remains pending before the Court.

given to the *Briseño* factors as a tool for denying relief. *Ex parte Sosa*, 364 S.W.3d 889 (Tex. Crim. App. 2007). There, the district court granted *Atkins* relief based on clinical measures and expert testimony but declined to consider the seventh *Briseño* factor about commission of the offense. *Id.*, at 892-893 & n.17. Notwithstanding the tremendous deference granted district courts denying *Atkins* relief, the Court of Criminal Appeals remanded with instructions to "gather information and provide findings" related to the last *Briseño* factor and "whether, considering the facts of the offense and the applicant's role in the offense, the judge still finds that the applicant is mentally retarded." *Id.*, at 896. In short, the Texas Court of Criminal Appeals pays lip service to the clinical definition, but the *Briseño* factors can—and usually do—trump a clinical diagnosis of mental retardation.

III. TEXAS STANDS ALONE IN SUBJECTING MILDLY MENTALLY RETARDED OFFENDERS TO EXECUTION.

States throughout the nation overwhelmingly have responded to *Atkins* by utilizing the clinical inquiry. In addition to the federal government and 18 states that had done so before *Atkins*, nine states subsequently have adopted statutory definitions of mental retardation.[11] Every state with a statutory

[11] See Death Penalty Info. Ctr., States That Have Changed Their Statutes to Comply With the Supreme Court's Decision in *Atkins v. Virginia*, http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited August 6, 2012); Death Penalty Info. Ctr.,

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definition has incorporated the three-pronged test.[12] Even states that have defined mental retardation judicially have imposed a variant of the same three-pronged inquiry.[13] While the definitions vary in

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State Statutes Prohibiting the Death Penalty for People with Mental Retardation, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited August 6, 2012); see also Okla. Stat. tit. 21, §701.10b.

[12] Twenty-six of the 34 death penalty states have codified statutory definitions of mental retardation. See Ala. Code §15-24-2(3) (adopted for social services purposes, not for criminal law purposes); Ariz. Rev. Stat. §13-753(K)(3); Ark. Code Ann. §5-4-618(a)(1); Cal. Penal Code §1376(a); Colo. Rev. Stat. §18-1.3-1101(2); Conn. Gen. Stat. §1-1g; Del. Code Ann. tit. 11, §4209(d)(3)(a); Fla. Stat. §921.137; Ga. Code Ann. §17-7-131(a)(3); Idaho Code Ann. §19-2515A; Ind. Code §35-36-9-1; Kan. Stat. Ann. §21-4623; Ky. Rev. Stat. Ann. §532.130(2); La. Code Crim. Proc. Ann. art. 905.5.1(H)(1); Md. Code Ann., Crim. Law §2-202(b)(1); Mo. Ann. Stat. §565.030(6); Neb. Rev. Stat. §28-105.01(3); Nev. Rev. Stat. §174.098(7); N.M. Stat. Ann. §31-20A-2.1(A) (New Mexico abolished the death penalty in 2009, but this action was not retroactive); N.C. Gen. Stat. §15A-2005(a)(1)(a); Okla. Stat. tit. 21, §701.10b; S.C. Code Ann. §16-3-20(C)(b)(10); S.D. Codified Laws §23A-27A-26.2; Tenn. Code Ann. §39-13-203(a); Utah Code Ann. §77-15a-102; Va. Code Ann. §19.2-264.3:1.1(A); Wash. Rev. Code Ann. 10.95.030(2)(a).

[13] See *Ex parte Perkins*, 851 So. 2d 453, 456 & n.2 (Ala. 2002); *Chase* v. *State*, 873 So. 2d 1013, 1027-1028 (Miss. 2004); *State* v. *Harris*, 181 N.J. 391, 528-529, 859 A.2d 364, 445-446 (2004); *State* v. *Lott*, 97 Ohio St. 3d 303, 305, 2002-Ohio-6625, ¶¶11-12, 779 N.E.2d 1011, 1014 (2002); *Commonwealth* v. *Miller*, 585 Pa. 144, 152-155, 888 A.2d 624, 629-631 (2005); *Franklin* v. *Maynard*, 356 S.C. 276, 278-279, 588 S.E.2d 604, 605 (2003). Montana, New Hampshire, Oregon, and Wyoming do not appear to have had the opportunity to rule on a definition.

certain respects—such as the cutoff level for IQ impairment[14]—all replicate the same clinical formula.

Texas is the only state to offer a supplement or substitute for the clinical definition or assessment of mental retardation. P. Tobolowsky, A Different Path Taken: Texas Capital Offenders' Post-*Atkins* Claims of Mental Retardation, 39 Hastings Const. L.Q. 1, 142 (2011). Likewise, Texas is the only state to attempt to define mental retardation based on a *statewide* consensus rather than the *nationwide* consensus found in the definitions of the AAMR/AAIDD and APA. See *Sosa*, 364 S.W.3d, at 891.

The scope of the Eighth Amendment protection is crucial, especially in Texas, which executes far more inmates than does any other state.[15] The success rate for Texas *Atkins* claimants is less than half the national average. In the ten years following *Atkins*, only 14 of 81 *Atkins* claimants in Texas have been

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[14] For example, several states do not require an IQ cut-off, although many require "significantly subaverage" intellectual functioning. See Death Penalty Info. Ctr., State Statutes Prohibiting the Death Penalty for People with Mental Retardation, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited August 6, 2011).

[15] See Death Penalty Info. Ctr., Number of Executions by State and Region Since 1976, http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited August 6, 2011) (Texas executed more than twice as many inmates, 13 in 2011 and 17 in 2010, as any other state in 2011 and 2010.); see also Tobolowsky, *supra*, at 1-2.

successful, and eight of those followed stipulated findings of mental retardation—so that only six of 76 claimants in contested cases have been found to be mentally retarded. Tobolowsky, *supra*, at 65-71. Only one claimant has been found mentally retarded when the *Briseño* factors were used to determine adaptive limitations. See *id.*, at 161; *Ex parte Van Alstyne*, 239 S.W.3d 815, 820-821 & nn.15-18 (Tex. Crim. App. 2007).

IV. THIS CASE IS AN IDEAL VEHICLE FOR PREVENTING TEXAS COURTS FROM CIRCUMVENTING THE *ATKINS* RULE.

This case demonstrates the grave dangers of Texas courts' application of *Briseño* to displace clinical factors. Mr. Wilson's court-appointed expert neuropsychologist found him to be mildly mentally retarded with an IQ score of 61, placing him in the bottom one percentile of intellectual functioning. See Pet. App. F8. The assessment showed that Mr. Wilson, who sucked his thumb through adulthood, is unable to perform even the simplest tasks without assistance and that his intellectual capacity is equivalent to that of a first- or second-grader. See *id.*, at F1-2, F5, F8. The State presented no expert to refute the mental retardation diagnosis. See *Wilson* v. *Quarterman*, 2009 WL 900807, at *5 (ED Tex. 2009) (unpublished), aff'd *sub nom. Wilson* v. *Thaler*, 450 Fed. Appx. 369 (CA5 2011) (unpublished).

Nevertheless, the state district court concluded that Mr. Wilson is not mentally retarded. As the

federal district court noted, "the state court relied on the *Briseño* factors alone, rather than as a supplement to clinical factors, in determining whether [Mr. Wilson] had related, significant deficits in adaptive functioning." *Id.*, at *7. Rejecting the application for a writ of habeas corpus, the federal district court explained that in Texas, "the *Briseño* factors can be used by themselves to establish whether a person has significant deficits in adaptive functioning, even if evidence is submitted which is relevant to the AAMR definition of adaptive deficits." *Id.*, at *8. The Fifth Circuit affirmed, reasoning that "the *Briseño* factors, whether standing alone or as incorporated into [the] conclusions on the clinical factors of adaptive deficits and age of onset," are consistent with *Atkins*. *Wilson*, 450 Fed. Appx., at 377.

Despite *Briseño*'s reference to Steinbeck's Lennie as paradigmatic of the mentally retarded individual that Texas citizens would exempt from execution, 135 S.W.3d, at 6, the Constitution imposes a categorical "'restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S., at 321 (quoting *Ford* v. *Wainwright*, 477 U.S. 399, 405 (1986)). If that categorical prohibition is to have any force in Texas, courts must not use the *Briseño* factors to exclude mildly retarded individuals like Mr. Wilson from constitutional protection.

Conclusion

Texas courts' employment of the contra-clinical *Briseño* factors renders the Eighth Amendment protection from execution a nullity for all but the most severely mentally retarded in Texas. *Briseño*'s definition of mental retardation caters to entrenched stereotypes held by Texas citizens and the judges they elect, while evading the national consensus identified by *Atkins*, subjecting mildly retarded individuals like Mr. Wilson to the death penalty. The AAIDD urges the Court to grant Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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