No. 15-

IN THE

Supreme Court of the United States

JUAN LIZCANO,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether Texas's standard for determining if a capital defendant meets the second prong of the definition of intellectual disability ("deficits in adaptive functioning") violates the Eighth Amendment in light of *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and *Hall* v. *Florida*, 134 S. Ct. 1986 (2014).

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PETITION FOR A WRIT OF CERTIORARI

Juan Lizcano respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals denying Lizcano's application for a writ of habeas corpus is unpublished. App. 1a-5a. The opinion of the 282nd Judicial District Court, Dallas County, Texas denying relief is unpublished. App. 7a-117a.

JURISDICTION

The Court of Criminal Appeals entered judgment on April 15, 2015. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Under *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibits the execution of intellectually disabled persons. Because such individuals have limitations "in areas of reasoning, judgment, and control of their impulses," they "do not act with the level of moral culpability" required for the death penalty. *Id.* at 306. Those impairments "also make it less likely" that execution would "measurably further the goal of deterrence," *id.* at 320, and "can jeopardize the reliability and fairness" of the trial process, *id.* at 306-307.

In delineating the constitutional prohibition, *Atkins* cited clinical definitions of intellectual disability developed by leading organizations of medical professionals. 536 U.S. at 308 n.3. And it emphasized that, in the States that had already prohibited the execution of intellectually disabled persons, "[t]he statutory definitions … are not identical, but generally conform to the clinical definitions." *Id.* at 317 n.22.

Hall v. *Florida*, 134 S. Ct. 1986, 1999 (2014), confirmed that "clinical definitions of intellectual disability … were a fundamental premise of *Atkins*." There, Florida's standard for evaluating the first prong of the diagnostic framework—"significantly subaverage general intellectual functioning"—departed from clinical

practice by using IQ scores as a cut-off even though experts in the field would consider the standard error of measurement and other evidence. *Id.* at 1993-1996. The Court rejected that approach, holding that States do not have "complete autonomy to define intellectual disability as they wish[]." *Id.* at 1999. Under *Atkins*, "persons who meet the 'clinical definitions' of intellectual disability" cannot be executed consistent with the Eighth Amendment because—"'by definition'"—they "bear 'diminish[ed] … personal culpability.'" *Id.* By "disregard[ing] established medical practice," *id.* at 1995, Florida's approach "risk[ed] executing a person who suffers from intellectual disability," *id.* at 2001.

Like Florida, Texas rejects clinical criteria for evaluating intellectual disability—in Texas's case, at the second prong of the definition: deficits in adaptive functioning. In *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals criticized "[t]he adaptive behavior criteria" as "exceedingly subjective" and identified nonclinical factors to be considered in evaluating intellectual disability. Unlike the diagnostic criteria applied by other States and endorsed by this Court, Texas's nonclinical approach focuses on a defendant's apparent adaptive strengths and on lay witnesses' impressions of the defendant, which often reflect stereotypical beliefs of how intellectually disabled persons should seem or behave.

In this case as in others, the Texas courts sustained a death sentence that could not be imposed if clinical standards applied. From an early age, Juan Lizcano's family and teachers recognized that he had problems "in his mind." He could not learn like other children, had trouble dressing himself, and would laugh in inappropriate circumstances or for no reason at all. He could not complete simple chores expected of children

in his rural Mexican community. As an adult, Lizcano never mastered basic skills like grooming himself; could handle only the simplest tasks at his various manual jobs; needed help managing money; and could not learn to use a VCR, program numbers into a cell phone, identify a house by its address, or read a clock.

When Lizcano was arrested and charged with capital murder for shooting a Dallas police officer, Lizcano's counsel recognized his impairments and sought relief under *Atkins*. Expert testimony and other evidence submitted at trial and in state habeas proceedings showed that on several IQ tests, Lizcano never scored above 69. His lowest score was 48. Five medical professionals applying clinical criteria diagnosed Lizcano as intellectually disabled based on deficits in multiple areas of adaptive functioning.

Applying *Briseno*, Texas courts upheld Lizcano's death sentence, citing evidence that he could hold a job, made regular payments for his truck, and had a girlfriend who thought he seemed "bright." Lizcano's counsel repeatedly argued that Texas's nonclinical approach, like Florida's, could not survive *Hall*, but the state courts steadfastly ignored this Court's decision. Indeed, state and federal courts applying Texas law have consistently disregarded *Hall*, either ignoring this Court's decision or dismissing it as irrelevant. As one court put it, "the word 'Texas' nowhere appears in the [*Hall*] opinion." *Mays* v. *Stephens*, 757 F.3d 211, 218 (5th Cir. 2014). This Court should grant review to prevent Texas courts from continuing to defy *Hall* and to prevent the execution of an intellectually disabled defendant.

A. Background

In the early morning of November 13, 2005, Dallas Police Officer Brian Jackson was fatally shot while responding to a 911 call from Marta Cruz. Lizcano, Cruz's boyfriend at the time, was arrested and charged with capital murder.

The trial evidence showed that Lizcano had spent the previous evening with a friend, Jose Fernandez, at a Dallas dance club. App. 11a, 120a. Fernandez testified that as they drove home, he overheard Lizcano on the phone telling Cruz that "'if she was with another person, he was going to kill her.'" App. 120a. Lizcano drove to the apartment he shared with his uncle and brother, retrieved his uncle's revolver, and continued to Cruz's house. *Id.*

Cruz testified that Lizcano arrived at her house around 2:00 a.m. App. 11a. After Cruz let him inside, Lizcano aimed his gun at Cruz, fired a shot at the ceiling, and demanded to know if anyone else was there. App. 11a, 120a. Cruz said Lizcano told her that the "'next shot was for [her].'" App. 120a. Lizcano left the house after about ten minutes, and Cruz called 911. *Id.* Two officers responded to Cruz's call and searched the area, but did not find Lizcano or his truck. App. 12a, 121a. Cruz said she did not need anyone to wait with her, and the officers left. App. 121a.

A few minutes later, Lizcano reappeared at Cruz's house and started kicking in the door. App. 12a. Cruz hid and called 911 again. *Id.* Several officers responded to Cruz's second call, including Officer Jackson, and engaged in a manhunt for Lizcano on foot, by car, and by helicopter. App. 121a. According to the trial evidence, Lizcano fired his gun at them several times as they pursued him across yards and a nearby alley.

App. 12a, 121a. While other officers combed the alley, Officer Jackson took position near Cruz's house with an AR-15 rifle. App. 121a. Lizcano fled from the alley toward the house. *Id.* Officers heard shots from Lizcano's revolver and Jackson's rifle. App. 13a, 121a. They found Jackson fatally wounded. App. 121a-122a. According to the medical examiner, a bullet had traveled through Jackson's arm and into his heart, killing him almost immediately. App. 122a.

Officers found Lizcano face-down behind a trash can near Jackson's body. App. 122a. An officer handcuffed Lizcano and placed him in a squad car, noting a strong odor of alcohol on his breath. App. 13a; 43 RR 213-220. Five minutes later, Cruz's neighbor saw Lizcano in the squad car, asleep. 44 RR 178-179.[1]

B. Lizcano's *Atkins* Claim

In April 2007, several months before trial, Lizcano's counsel certified her belief that Lizcano was intellectually disabled and sought a determination that he was ineligible for the death penalty under *Atkins*. 1 CR 43, 68-75. The court denied that motion, and trial proceeded. A jury convicted Lizcano of capital murder. App. 119a. At the punishment phase, the defense renewed the claim that Lizcano's execution would violate the Eighth Amendment.

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[1] Citations to the state court records are by volume and page number of the following: Reporter's Record from trial and sentencing ("RR"); Clerk's Record from direct appeal ("CR"); Reporter's Record from habeas proceedings ("Habeas RR"); and Clerk's Record from habeas proceedings ("Habeas CR").

1. Texas's intellectual-disability standard

Litigation of Lizcano's claim proceeded under the framework established in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). In *Briseno*, the Court of Criminal Appeals held that Texas courts addressing *Atkins* claims should apply the three-prong definition of the American Association on Mental Retardation (AAMR), under which intellectual disability is "characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Id.* at 7 (footnote omitted).[2] As *Atkins* explained, the clinical criteria for assessing the second prong of that standard turn on whether a defendant demonstrates "'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.[3]

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[2] The AAMR changed its name to the American Association of Intellectual and Developmental Disabilities (AAIDD), reflecting the change in terminology from "mental retardation" to "intellectual disability." *See Hall*, 134 S. Ct. at 1990, 2003 n.1.

[3] The American Psychiatric Association (APA) used substantially the same definition. *Atkins*, 536 U.S. at 308 n.3. Since *Atkins*, the AAIDD and APA have reformulated the adaptive-functioning analysis to require significant deficits in "one of the following three types of adaptive behavior: conceptual, social, or practical." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 43 (11th ed. 2010) ("*AAIDD Manual*"); *see also* APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("*DSM-5*"). As courts have recognized, this change in terminology did not alter the definition's substance, which has "not changed substantially" for 50 years. *AAIDD Manual* 7; *see Chase* v. *State*, 2015 WL 1848126, at *5-6 (Miss. Apr. 23, 2015).

In *Briseno*, the court deemed those adaptive-functioning criteria "exceedingly subjective." 135 S.W.3d at 8. It therefore devised "some other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation," *id.*:

> 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 court explained that "[a]lthough experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation," the "ultimate issue" in evaluating an *Atkins* claim should be "one for the

finder of fact, based upon all of the evidence and determinations of credibility." *Id.* at 9.

2. Evidence of intellectual disability

At the punishment phase, the defense called Lizcano's schoolteacher, mother, and other family members to testify about his upbringing in rural Mexico and the disabilities that were apparent when he was a child. App. 15a-20a. According to those witnesses, Lizcano grew up in a remote one-bedroom house with no electricity or running water in which the children slept together on a dirt floor. App. 16a; 52 RR 31-33. Sometimes they ate only one meal of corn tortillas a day, App. 16a; 52 RR 34, and Lizcano's brother often hunted mice to eat, 52 RR 58. Lizcano's teacher testified that his "learning was very slow" compared to his younger classmates; he still could not read at age 14 or 15. App. 135a; *see also* 49 RR 122-125, 129. Lizcano's schooling ended at sixth grade because, at 15, he was too old to remain in school. App. 135a; 49 RR 124.

Other witnesses described Lizcano's inability as a child to interact appropriately with others or to perform chores expected of children in his community. Witnesses testified that Lizcano rarely spoke in school, could not make change, was very shy even around his family, did not appear to understand when someone would tell a funny story, and often laughed at inappropriate times. App. 16a, 136a-138a; *see also* 49 RR 129; 52 RR 59-60, 72; 54 RR 31.

When he was 23, Lizcano accompanied a group entering the United States without authorization. Def. Tr. Ex. 117, at 1, 4. He never lived on his own, staying instead with family or a girlfriend. *Id.* at 4. Lizcano never mastered basic adult skills, like grooming him-

self. Marta Cruz testified that when Lizcano showered, for example, he would emerge with grass still on him and put on dirty clothes. App. 17a, 167a; 53 RR 28-29. Cruz had to teach Lizcano how to clean his nails and ears, App. 17a, and he had to be prompted to brush his teeth, App. 167a. Cruz testified that Lizcano often wore inappropriate clothing that did not fit. On one occasion, Lizcano wore a woman's blouse without appearing to realize it. App. 137a-138a, 167a; *see also* 53 RR 33-37.

Cruz and other witnesses testified that Lizcano had difficulty learning or retaining instructions. For example, Lizcano could not read a clock even after Cruz tried to teach him, could not operate a VCR or program numbers into a cell phone even after Cruz tried to explain it, and could not identify a house by its address. App. 17a, 137a; 54 RR 77-78. Lizcano worked hard at a series of manual jobs, but his employers testified that he could be assigned only the simplest tasks. App. 138a-139a. One coworker remembered Lizcano as the only person he had ever trained who could not learn to use a tape measure or saw. App. 138a. It was a joke around the landscaping company where Lizcano worked that he could not be trusted to mow the correct yard unless coworkers placed flags around it. App. 139a. Another coworker had to teach him repeatedly how many inches were in a foot and how to measure fractions of an inch. 54 RR 55-58.

The defense also called two experts to testify about Lizcano's intellectual disability, based on the AAIDD diagnostic criteria, and introduced their reports into evidence. Dr. Kristi Compton, a clinical and forensic psychologist, presented evidence that Lizcano had obtained IQ scores of 48, 53, 60, and 62 on tests administered by two different psychologists. App. 162a; 56 RR

111; Def. Tr. Ex. 117, at 8 ("Compton Report"). Her report identified adaptive deficits in at least six areas. App. 162a-163a; Compton Report 5-7. In four of those areas—communication, self-care, use of community resources, and functional academic skills—Dr. Compton found no countervailing evidence. App. 163a; Compton Report 6. Dr. Compton also determined that Lizcano's adaptive deficits arose "in his childhood." 56 RR 117. Applying clinical criteria, Dr. Compton diagnosed Lizcano with mild intellectual disability. *Id.* at 117-119; Compton Report 9.

Dr. Antonio Puente, a clinical neuropsychologist and expert in evaluating native Spanish speakers, App. 161a, evaluated Lizcano's adaptive deficits based on his own clinical interview with Lizcano and information compiled by a mitigation investigator, including school and health records and interviews with dozens of Lizcano's family and friends, 56 RR 38. Dr. Puente identified adaptive deficits in communication, self-care, home living, self-direction, work, and functional academic skills, and diagnosed Lizcano with mild intellectual disability. App. 161a; 56 RR 40-48.

Although the prosecution had a psychologist interview Lizcano who disagreed with that diagnosis, the prosecution did not introduce that psychologist's testimony or report at trial. Instead, the prosecution called a used-car salesman. 56 RR 162. He testified that he had sold a truck to Lizcano and a co-buyer, *id.*, and that he did not "feel like [Lizcano] was slow" or incapable of paying for a truck, *id.* at 165; *see also* App. 170a.

The prosecution also elicited defense witnesses' impressions of Lizcano through cross-examination. For example, one of Lizcano's former girlfriends—who believed she would "be able to tell if someone's mentally

retarded"—testified that Lizcano was "bright" and did not seem slow or disabled compared to her "severely mentally retarded" aunt who could not speak. 49 RR 166-167. And a prison guard who said he did not "know anything about the definition of mental retardation" testified that he did not believe Lizcano to be intellectually disabled compared to inmates whom he "believed by [his] observation" to have "serious mental issues." 55 RR 65-66; *see* App. 139a. The prosecution introduced no other evidence to rebut Lizcano's demonstration of intellectual disability.

3. Verdict and appeal

On November 1, 2007, the jury delivered a unanimous verdict against Lizcano on the special sentencing issues, including intellectual disability. 59 RR 5. The court sentenced Lizcano to death. *Id.* at 7.

A jury poll showed that the verdict rested "primarily on evidence of [Lizcano's] adaptive strengths and daily functioning," rather than a lack of evidence of adaptive deficits. App. 63a. For example, several jurors decided that Lizcano was not intellectually disabled because he could drive, had girlfriends, held a job, and paid bills. *See, e.g.*, State Habeas Ex. 6 (responses of jurors Mitchell, Jackson, and Perez). As one juror put it, Lizcano "could function without someone to hold his hand." *Id.* (response of juror Mitchell).

The Court of Criminal Appeals affirmed the conviction and sentence. App. 119a-146a. Based on IQ scores, the court held that Lizcano "clearly satisfied the first prong of the mental retardation definition." App. 134a. As to the second prong, the court acknowledged the "significant evidence showing limitations in adaptive

functioning." App. 140a. But the court also noted evidence that Lizcano had certain strengths:

> (i) [Lizcano] maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) [Lizcano] made regular payments on a vehicle he purchased as a co-buyer; (iii) [Lizcano] maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be "bright"; and (iv) [Lizcano] reliably sent significant amounts of money and other items to assist his family.

App. 140a-141a. The court held that the jury could consider that evidence as "relevant to the factors laid out in *Briseno*" to determine whether Lizcano was intellectually disabled. App. 140a; *see also* App. 131a n.44. And based on that evidence, the court held that Lizcano meets "standards of personal independence and social responsibility" and is not intellectually disabled. App. 141a. The court did not address the third prong. *Id.*

Judge Price, joined by Judges Johnson and Holcomb, dissented on the ground that Lizcano's adaptive functioning should have been assessed against clinical diagnostic criteria. App. 147a-160a. Criticizing the majority's belief that the jury is "not … bound by the diagnostic criteria," App. 151a, Judge Price argued that by adopting "non-diagnostic criteria of [its] own," App. 155a, the court had "granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes," App. 156a. In his view, the court's failure to apply "the specific crite-

ria that diagnosticians in the field routinely use to make that determination" violated *Atkins*'s "comprehen[sion] [of] mental retardation in essentially … 'clinical' terms." App. 157a, 158a. Under the clinical standard, Judge Price concluded, the jury would have had "no rational basis to reject" a finding of intellectual disability. App. 169a.

This Court denied certiorari. 131 S. Ct. 999 (2011).

C. State Habeas Proceedings

1. New evidence of intellectual disability

Lizcano presented further evidence of intellectual disability in support of his application to the Texas trial court for a writ of habeas corpus. Additional IQ tests confirmed Lizcano's significant limitations in intellectual functioning. In total, he scored between 48 and 69 on six different tests, never scoring at or above 70. *See* Pet. Habeas Ex. 128.

Lizcano also presented evidence from two additional clinical neuropsychologists, Dr. Antolin Llorente and Dr. Gilbert Martinez, who each diagnosed Lizcano with intellectual disability. Dr. Llorente employed a Spanish version of the Adaptive Behavior Assessment System-Second Edition ("*ABAS-II*") to rate Lizcano's adaptive skills based on his behavior as a minor and as an adult. Pet. Habeas Ex. 115, at 17 ("Llorente Report"). He assessed Lizcano's overall adaptive skills in the "Extremely Low (impaired) range," the first percentile. *Id.*[4] After traveling to Mexico to interview Lizcano's

[4] Dr. Llorente advised caution in interpreting these results because the test assessed Lizcano's limitations retrospectively and because the instrument had to be read to Lizcano's aunt, but he found the data "quite consistent with each other" and with other "more ecologically valid and concurrent indices of adaptation

family, Dr. Llorente found that "several family members suffer from significant neurological impediments," including mental retardation, "suggesting the presence of hereditary factors that … at the very least represent increased risk for the development of mental deficiency." Llorente Report 22. Dr. Llorente also testified that many intellectually disabled people drive, date or marry, and hold jobs, such that Lizcano's abilities in these areas would not contradict a diagnosis of intellectual disability. 6 Habeas RR 214-217.

Dr. Martinez independently found deficits in home living, functional academic skills, and safety. 6 Habeas RR 52, 55-56, 60. He explained that many of Lizcano's apparent strengths were not things Lizcano could do by himself. *Id.* at 54. For instance, although Lizcano divided his earnings to make payments on his truck, send money to his family, and support himself—an apparent adaptive strength—Dr. Martinez noted that Cruz had to "make sure that he was taking the right amount of money to pay his truck bill." *Id.* at 55. And although "hav[ing] a girlfriend and maintain[ing] a relationship that's healthy … would be a[n] [adaptive] skill," in Lizcano's case, Cruz "felt like she was more of his mother than his girlfriend sometimes," which "point[ed] to social deficits." *Id.* at 51, 63.

A psychiatrist, Dr. Pablo Stewart, agreed with the conclusions of Drs. Llorente and Martinez. Pet. Habeas Ex. 116, at 2. Lizcano also presented further evidence from family members about his background and the problems they had long recognized "in [Lizcano's] mind." Llorente Report 6. For example, Lizcano's brother testified that, despite instruction, Lizcano

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achieved by [Lizcano] throughout his lifetime." Llorente Report 17.

could not learn to use a slingshot or mattock to hunt for mice, a source of food for his family. Pet. Habeas Ex. 137, J. Reyes Lizcano Ruiz Aff. ¶¶ 8-9. As he got older, Lizcano was unable to care for livestock, prepare the horses for plowing, or guide the horses in a straight line. *Id.* ¶¶ 11-12, 20. Lizcano's brother gave up trying to teach him and instructed him to cast seeds instead with the younger children, but Lizcano would drop the seeds unevenly and exhaust his supply before completing the field. *Id.* ¶ 21. Lizcano's family earned money by selling fibers scraped from cactus, but Lizcano could not remember how to scrape the cactus. *Id.* ¶ 9. Eventually, his family gave him only the simplest responsibilities, such as carrying firewood. Pet. Habeas Ex. 137, Florencio Lizcano Ruiz Aff. ¶ 37.

The State conceded that Lizcano met the first prong of the intellectual-disability standard. Writ Arg. Tr. 24. As to adaptive functioning, the State relied on a psychologist, Dr. Price, who opined that Lizcano "d[id] not appear to have the adaptive behavior deficits required for a diagnosis of mental retardation." State Habeas Ex. 31, at 3. Dr. Price acknowledged that he relied almost exclusively on Lizcano's self-assessment of his own abilities, even though he admitted that doing so was viewed with skepticism in the field of psychology, 8 Habeas RR 111, and even though those self-assessments contradicted assessments made by Cruz and others, *id.* at 112-116.

2. *Hall* and the decisions below

Based on the habeas evidence and trial record, Lizcano's counsel argued that the *Briseno* factors were satisfied. Applicant's Proposed Findings of Fact and Conclusions of Law ¶¶ 167-177 ("Proposed Findings"). But counsel also argued that *Briseno* "ha[d] defined

mental retardation in a manner impossible to reconcile with accepted clinical definitions relied upon … in *Atkins*," and thus "created a constitutionally intolerable risk that offenders with mental retardation in Texas will be subject to execution notwithstanding the national consensus to the contrary." Applicant's *Atkins* Br. 6; *see also* Proposed Findings ¶ 167. And counsel alerted the trial court to the pendency of *Hall*, noting that the decision might confirm the requirement to apply clinical standards. Writ Arg. Tr. 18-19.

Before the trial court ruled, this Court decided *Hall*. Lizcano filed a notice of additional authority and asked to present further briefing, arguing that *Hall* "emphasize[d] the importance of reliance on the clinical definition of intellectual disability," which was a "marked change" from the Texas courts' use of the "non-clinical *Briseno* factors." 7 Habeas CR 2012. Three weeks later, the trial court adopted the State's proposed findings of fact and conclusions of law denying relief. App. 7a-117a. The court did not address Lizcano's request for further briefing in light of *Hall* and did not acknowledge that decision.

The court held that Lizcano had not proven intellectual disability by a preponderance of the evidence. App. 93a-98a.[5] The court deferred to the Court of Criminal Appeals' previous determination that Lizcano met the first prong of the definition. App. 95a. As to the second prong, the court acknowledged "significant evidence" of limitations in adaptive functioning. App. 96a. In particular, the court cited Lizcano's trouble following instructions and performing simple tasks at

[5] The court alternatively found the *Atkins* claim procedurally barred, App. 91a-93a, but the Court of Criminal Appeals rejected that holding, App. 2a.

work; his limited vocabulary and inability to understand humor; his inability to read a clock, follow directions, or operate a VCR; and his difficulty learning and socializing. *Id.* But the court also noted that Lizcano maintained employment; made regular payments on his truck; had two girlfriends, neither of whom considered him to be intellectually disabled; and sent money to his family. *Id.*[6]

Lizcano filed a brief in the Court of Criminal Appeals arguing again that *Hall* requires application of clinical diagnostic criteria in determining intellectual disability. Applicant's Br. in Support of Post Conviction Writ of Habeas Corpus 1. But the Court of Criminal Appeals agreed with the trial court and denied relief. App. 1a-2a. The court ignored *Hall*.

Judge Alcala dissented, joined by Judge Johnson. App. 2a-5a. Judge Alcala noted that the court had already found Lizcano's IQ to be below 70 and that there "appear[ed] to be no dispute that the onset of that subaverage IQ occurred before he was eighteen years of age." App. 3a. The dispositive question was whether Lizcano had proven adaptive deficits. *Id.* Citing *Hall*, Judge Alcala criticized the majority's continued reliance on "unscientific" criteria in resolving that question. App. 3a-4a. He concluded that if "minimal" evidence that Lizcano seemed "'bright'" and made car payments sufficed under *Briseno* to defeat an *Atkins* claim, it was "clearly time" to "reconsider that standard." App. 4a.

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[6] The court rejected Dr. Llorente's use of the *ABAS-II* test as unreliable and found the evidence of risk factors irrelevant. App. 97a-98a. The court did not credit or address the opinion of the State's expert.

REASONS FOR GRANTING THE PETITION

Texas routinely applies the *Briseno* factors instead of clinical diagnostic criteria to evaluate intellectual disability. As *Hall* v. *Florida* confirmed, however, clinical standards "were a fundamental premise of *Atkins*." 134 S. Ct. 1986, 1999 (2014). Like Florida, Texas departs from those standards in several respects, including by disregarding a defendant's adaptive deficits if the defendant also exhibits adaptive strengths and by giving effect to lay stereotypes of how intellectually disabled persons ought to appear or behave. Even after *Hall*, Texas courts have relied on that nonclinical approach to uphold death sentences when defendants concededly meet the clinical definition of intellectual disability.

In contrast to Texas, the vast majority of death-penalty States have made clear that clinical standards should govern the determination of the second prong of the definition of intellectual disability, just as *Hall* confirmed they should apply at the first prong. In cases presenting facts very similar to this one, courts in those States have held that the Eighth Amendment forecloses the death penalty.

Despite this outlier status, state and federal courts applying Texas law continue to defy this Court's holding that "persons who meet the 'clinical definitions' of intellectual disability 'by definition'" are ineligible for the death penalty. 134 S. Ct. at 1999. This Court should not allow Texas's practice to continue unchecked at the price of Juan Lizcano's life.

I. EVEN AFTER *HALL*, TEXAS COURTS FAIL TO APPLY CLINICAL STANDARDS TO EVALUATE DEFICITS IN ADAPTIVE FUNCTIONING

The Texas Court of Criminal Appeals invented the *Briseno* factors because it deemed the clinical diagnostic criteria too "subjective." *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). *Briseno* cited no authority for these factors—scientific or otherwise—and offered no guidance on how they should be weighed. *Id.* at 8-9. No clinical authority supports them. Yet *Briseno*'s standard governs all *Atkins* claims in Texas, even after *Hall*. *E.g.*, *In re Allen*, 2015 WL 2265128, at *3-4 (Tex. Crim. App. May 13, 2015). Applying that standard, Texas courts have sustained death sentences even where defendants meet clinical definitions.

1. The *Briseno* factors do not merely "flesh out the AAMR definition" of intellectual disability. *Chester* v. *Thaler*, 666 F.3d 340, 346 (5th Cir. 2011). They supplant it. Texas's approach presents "an array of divergences from the clinical definitions." Blume et al., *Of* Atkins *and Men*, 18 Cornell J.L. & Pub. Pol'y 689, 712 (2009). It is concededly "non-diagnostic." *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007) (per curiam). It "bear[s] no resemblance to the AAMR or APA adaptive functioning criteria." *Chester*, 666 F.3d at 361 (Dennis, J., dissenting). And it invites "factfinders in Texas to adjust the clinical criteria … to conform to their own normative judgments with respect to which mentally retarded offenders are deserving of the death penalty and which are not." App. 158a (Price, J., concurring and dissenting).

Strengths and weaknesses. Clinicians recognize that "adaptive skill limitations often coexist with

strengths." *AAIDD Manual* 45. Observed limitations in one area therefore cannot be "outweighed" by potential strengths in others. *Id.* at 47. Under clinical standards, meeting minimum thresholds for deficits yields a diagnosis of intellectual disability, regardless whether a defendant is "competent in other adaptive domains." Greenspan, *The Briseño Factors*, *in The Death Penalty and Intellectual Disability* 219, 221 (Polloway ed., 2015).[7] There are no "prong 2 deficits that 'make or break' an [intellectual-disability] diagnosis." *Id.*; *see also Brumfield* v. *Cain*, 135 S. Ct. 2269, 2281 (2015) (acknowledging clinical guidance explaining that "intellectually disabled persons may have 'strengths in … some adaptive skill areas'").[8]

Texas courts, in contrast, have dismissed serious deficits in adaptive skills as "insignificant" when weighed against evidence of skills in unrelated areas,

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[7] Strengths in an area in which the defendant claims to have limitations are clinically relevant. *Clark* v. *Quarterman*, 457 F.3d 441, 447 (5th Cir. 2006). But "[b]ecause limitations define mental retardation, adaptive strengths are relevant only insofar as they offset particular adaptive weaknesses." Blume, 18 Cornell J.L. & Pub. Pol'y at 707. "Unless a defendant's evidence of particular limitations is specifically contradicted by evidence that he does not have those limitations, then the defendant's burden is met no matter what evidence the State might offer that he has no deficits in other skill areas." *Lambert* v. *State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005).

[8] In *Brumfield*, the Court held that the state court had reached an unreasonable determination of the facts in light of "substantial grounds" in the record to "question [the petitioner's] adaptive functioning," and that the petitioner was entitled to an evidentiary hearing on the issue in federal court. 135 S. Ct. at 2281-2282. The Court "assume[d]" without deciding the adequacy of Louisiana's adaptive-functioning standard. *Id.* at 2279; *see also id.* at 2277 n.3.

such as renting an apartment, purchasing a car, or washing clothing. *Williams* v. *Quarterman*, 293 F. App'x 298, 312-314 (5th Cir. 2008) (per curiam) (describing these as "substantial adaptive strengths"); *see also Wilson* v. *Thaler*, 450 F. App'x 369, 376 (5th Cir. 2011) (per curiam); *Ex parte Cathey*, 451 S.W.3d 1, 27 (Tex. Crim. App. 2014); App. 162a-170a (Price, J., concurring and dissenting). Under Texas law, if a factfinder "concludes that the [defendant] met one of the *Briseno* factors even in a limited period of time or situation, the factfinder may then overlook the [defendant's] limitations and conclude that the [defendant] is not mentally retarded." *Chester*, 666 F.3d at 367 (Dennis, J., dissenting).

Lay stereotypes. Contrary to objective clinical criteria, Texas encourages the factfinder to treat lay stereotypes as dispositive of intellectual disability. The first *Briseno* factor, for instance, asks whether family or friends who knew the defendant during his developmental stage "th[ought]" he was "mentally retarded." 135 S.W.3d at 8. *Atkins* cases in Texas consequently often turn on testimony from individuals with no clinical training about whether they personally considered the defendant "retarded." *E.g.*, *Hunter* v. *State*, 243 S.W.3d 664, 668, 671 (Tex. Crim. App. 2007) (defendant's "former neighbor … did not think there was anything wrong with [him] mentally"); *Williams*, 293 F. App'x at 309 (lay witnesses "did not believe that [defendant] was mentally retarded"); *Wilson*, 450 F. App'x at 376 (defendant's family and acquaintances "at most" "considered him slow").

Other *Briseno* factors also permit factfinders to reject an *Atkins* claim based on "stereotypes of what persons with intellectual disability can (and cannot) do," Blume et al., *A Tale of Two (and Possibly Three)* At-

kins, 23 Wm. & Mary Bill Rts. J. 393, 405 (2014), particularly "lay stereotype[s] of … *moderate* or *severe*" intellectual disability, Greenspan 219. Whether a defendant has "formulated plans," "respond[s] coherently" to questions, or can "hide facts or lie effectively," *Briseno*, 135 S.W.3d at 8, are not factors considered in any known clinical assessments. But in Texas, a court can simply "identify [intellectual disability] when it sees it." *Ex parte Henderson*, 2006 WL 167836, at *4 (Tex. Crim. App. Jan. 25, 2006) (Cochran, J., concurring).

Typical performance. "Adaptive behavior … is the collection of conceptual, social, and practical skills that have been learned and are performed by people *in their everyday lives*." *AAIDD Manual* 45 (emphasis added); *see also DSM-5*, at 33. The clinical diagnosis of deficits in adaptive functioning therefore "focuses on the individual's typical performance," often assessed using a standardized diagnostic test, rather than the individual's "best or assumed ability or maximum performance." *AAIDD Manual* 47.

Texas courts, in contrast, encourage the factfinder to focus on a particular event—the commission of the offense—regardless of whether it exemplifies behavior that is typical of the individual's functioning in everyday life. *See, e.g.*, *Gallo* v. *State*, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007) ("[M]any of the *Briseno* factors pertain to the facts of the offense and the defendant's behavior before and after the commission of the offense."); *Ex parte Taylor*, 2006 WL 234854, at *3-6 (Tex. Crim. App. Feb. 1, 2006) (Johnson, J., concurring) (focusing on the facts of the crime to deny *Atkins* claim); *Hines* v. *Thaler*, 456 F. App'x 357, 372 (5th Cir. 2011) (similar).

Personality disorders. Texas's approach also invites a clinically unfounded distinction between intellectual disability and personality disorders. The Court of Criminal Appeals treats the *Briseno* factors as "indicative of mental retardation *or* of a personality disorder." 135 S.W. 3d at 8 (emphasis added). Some courts have applied them to conclude that adaptive deficits merely reflect personality disorder "as opposed to" intellectual disability. *Ladd* v. *Thaler*, 2013 WL 593927, at *8 (E.D. Tex. Feb. 15, 2013), *aff'd*, 748 F.3d 637 (5th Cir. 2014). Yet clinical guidance indicates that a person can have both. "Co-occurring mental … conditions are frequent in intellectual disability[.]" *DSM-5*, at 40; *see also Brumfield*, 135 S. Ct. at 2280.

2. Relying on *Briseno*, the Court of Criminal Appeals has rejected *Atkins* claims even where—as here—the defendant appears to satisfy the clinical criteria for a diagnosis of intellectual disability.

In *Ex parte Sosa*, the Court of Criminal Appeals relied on a single *Briseno* factor to reverse a finding of intellectual disability. 364 S.W.3d 889, 895-896 (Tex. Crim. App. 2012). An expert clinician had testified in state habeas proceedings that the petitioner's "adaptive functioning was within the lowest 1% of individuals." *Id.* at 892. The trial court credited and adopted that testimony. *Id.* at 893.

The Court of Criminal Appeals reversed, relying solely on the expert's failure to consider one *Briseno* factor: the facts of the underlying offense. *Sosa*, 364 S.W.3d at 894-895; *see also id.* at 896 (remanding with instructions to consider that factor). In the court's view, a defendant who satisfies clinical standards for deficits in adaptive functioning nonetheless might not be "less morally culpable, less responsive to deterrence,

and less capable of assisting in his own defense, such that it would violate the Eighth Amendment to execute him." *Id.* at 892. The court explained that the *Briseno* factors address this "concern" by ensuring that, in Texas, clinical standards will not be dispositive. *Id.*

In *Ex parte Chester*, the Court of Criminal Appeals denied *Atkins* relief based solely on *Briseno*. 2007 WL 602607, at *4 (Tex. Crim. App. Feb. 28, 2007). The court acknowledged that the petitioner had "demonstrat[ed] significant limitations in intellectual functioning." *Id.* at *3. Both parties' experts agreed that he "would be correctly diagnosed as mildly mentally retarded" based on the results of a recognized test of adaptive functioning, the Vineland Adaptive Behavior Survey. *Id.* Despite this clinical assessment, the court denied relief based on the "seven evidentiary factors listed in *Briseno*." *Id.* at *4. The court emphasized the facts of the crime, the defendant's ability to converse coherently, and the defendant's classification during his school years as merely "learning disabled." *Id.* at *4-9; *see also Chester*, 666 F.3d at 365 (Dennis, J., dissenting) (*Atkins* claim denied where "the seventh *Briseno* factor, and nothing else" was found to be "sufficient by itself to uphold a denial of relief").

Texas courts have similarly denied *Atkins* relief based in part on the *Briseno* factors in numerous other cases despite clinical evidence of intellectual disability.[9]

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[9] *See, e.g.*, *Ex parte Clark*, 2004 WL 885583, at *3 (Tex. Crim. App. Mar. 3, 2004) (per curiam); *Taylor*, 2006 WL 234854, at *4-5 (Johnson, J., concurring); *Gallo*, 239 S.W.3d at 774; *Williams* v. *State*, 270 S.W.3d 112, 114-132 (Tex. Crim. App. 2008); *Ex parte Woods*, 296 S.W.3d 587, 610-613 (Tex. Crim. App. 2009); *Ex parte Butler*, 416 S.W.3d 863, 875-876 (Tex. Crim. App. 2012) (Cochran, J., concurring); *Ex parte Weathers*, 2014 WL 1758977, at *8-10

3. State and federal courts in Texas have refused to reconsider this approach in light of *Hall*.

In *Hall*, this Court confronted a Florida law that "define[d] intellectual disability to require an IQ test score of 70 or less," without regard to the measurement error inherent in such scores. 134 S. Ct. at 1990, 1995-1996. Florida argued that *Atkins* gave the States "leeway" to enact "substantive definitions of mental retardation" that did not conform to clinical definitions. Resp. Br. 15, *Hall*, No. 12-10882 (U.S. Jan. 27, 2014). *Hall* thus addressed not simply how to interpret IQ scores, but rather "how intellectual disability must be defined in order to implement … the holding of *Atkins*." 134 S. Ct. at 1993. Observing that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection," *id.* at 1998, the Court held that Florida's unscientific rule "create[d] an unacceptable risk that persons with intellectual disability will be executed, and thus [wa]s unconstitutional," *id.* at 1990; *see also, e.g.*, *Van Tran* v. *Colson*, 764 F.3d 594, 612 (6th Cir. 2014) ("In *Hall*, the Court reasoned that the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability.").

Judge Price of the Texas Court of Criminal Appeals predicted soon after *Hall* that "the writing is on the

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(Tex. Crim. App. Apr. 30, 2014) (Alcala, J., concurring); *Cathey*, 451 S.W.3d at 26-28. Federal courts in Texas have denied collateral relief on similar grounds. *See, e.g.*, *Wilson*, 450 F. App'x at 376-377; *Rodriguez* v. *Quarterman*, 2006 WL 1900630, at *13-14 (W.D. Tex. July 11, 2006); *Matamoros* v. *Thaler*, 2010 WL 1404368, at *10-15 (S.D. Tex. Mar. 31, 2010), *modified*, 2012 WL 394597 (S.D. Tex. Feb. 6, 2012), *aff'd*, 783 F.3d 212 (5th Cir. 2015); *Hernandez* v. *Thaler*, 2011 WL 4437091, at *20, *22-24 (W.D. Tex. Sept. 23, 2011), *aff'd*, 537 F. App'x 531 (5th Cir. 2013) (per curiam).

wall for the future viability of *Ex parte Briseno*." *Cathey*, 451 S.W.3d at 28 (concurring). Nonetheless, in this case, the state courts ignored Lizcano's repeated pleas to reconsider *Briseno* in light of *Hall*'s renewed emphasis on the importance of clinical norms. *See supra* pp. 16-18. The Court of Criminal Appeals refused to do so in *Cathey* as well. 451 S.W.3d at 19-20, 26-27.[10]

The Fifth Circuit has also refused to reconsider the continued validity of Texas's approach in light of *Hall*, declaring that *Hall* "in no way affects … application of *Briseno*." *Mays* v. *Stephens*, 757 F.3d 211, 218 (5th Cir. 2014).[11] The court reasoned that *Hall* "does not implicate Texas" because "the word 'Texas' nowhere appears in the opinion" and because "no reasonable jurist could theorize that the reasoning animating *Hall* could

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[10] This Court denied certiorari in *Cathey*, 83 U.S.L.W. 3912 (U.S. June 22, 2015), but that case did not squarely present the question whether *Hall* forecloses continued use of the *Briseno* factors because the petitioner had also failed to meet the first prong of the definition of intellectual disability, 451 S.W.3d at 19. Moreover, according to the State, the Court of Criminal Appeals "relied on and credited [expert] testimony—not the *Briseno* factors" to deny relief. Br. in Opp. 40, *Cathey*, No. 14-8305 (U.S. May 15, 2015). The same cannot be said here. *See supra* pp. 12-13, 17-18 & n.6. Cases decided by the Fifth Circuit after *Hall* similarly provide poor vehicles for this Court to address Texas's continued rejection of clinical criteria because they raise the issue only through AEDPA's deferential lens. *E.g.*, *Mays* v. *Stephens*, 757 F.3d 211, 217-218 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 951 (2015). This case presents an ideal vehicle to address Texas's outlier approach without the complications of AEDPA deference.

[11] The Fifth Circuit had endorsed *Briseno* against Eighth Amendment challenge on several occasions before *Hall*. *See*, *e.g.*, *Chester*, 666 F.3d at 346-347 ("on their face, nothing about [the *Briseno* factors] contradicts *Atkins*"); *Woods* v. *Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007) ("nothing in *Briseno*" is "inconsistent with *Atkins*").

possibly be extended to *Briseno*." *Id.* at 218; *see also Guevera* v. *Stephens*, 577 F. App'x 364, 372-373 (5th Cir. 2014) (per curiam) (following *Mays*); *Matamoros* v. *Stephens*, 783 F.3d 212, 218-219 (5th Cir. 2015) (applying *Mays* to "reject[] the argument that *Hall* renders *Briseno* unconstitutional"); *Henderson* v. *Stephens*, 2015 WL 3965828, at *16 (5th Cir. June 30, 2015) (*Hall* "does not call into question the constitutionality of the *Briseno* standard").

Texas continues to apply factors that have no basis in clinical practice to allow the execution of defendants whom medical professionals would diagnose with intellectual disability. And it has demonstrated that it will not conform to *Hall* unless this Court intervenes.

II. TEXAS STANDS VIRTUALLY ALONE IN ITS APPROACH

Texas "has clearly taken a path that differs from the other states" on this issue. Tobolowsky, *A Different Path Taken*, 39 Hastings Const. L.Q. 1, 142 (2011). No other state legislature or court has devised its own nonclinical evidentiary factors to govern the evaluation of adaptive functioning for *Atkins* purposes. Only two States' courts have even suggested approval of Texas's approach.[12] Texas's departure from clinical standards all but guarantees disparate outcomes across States.

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[12] An intermediate appellate court in Tennessee has cited *Briseno* approvingly, *Van Tran* v. *State*, 2006 WL 3327828, at *23-24 (Tenn. Crim. App. Nov. 9, 2006), but Tennessee's highest court has not, *see Coleman* v. *State*, 341 S.W.3d 221, 248 (Tenn. 2011). The Pennsylvania Supreme Court has "adopted the clinical definitions of mental retardation," but has also "approve[d] the[] use" of the *Briseno* factors at the factfinder's discretion. *Commonwealth* v. *DeJesus*, 58 A.3d 62, 82, 86 (Pa. 2012); *see also Commonwealth* v. *Bracey*, 2015 WL 3751733, at *15-16 (Pa. June 16, 2015).

1. Many States have enacted statutory definitions of intellectual disability that incorporate established clinical definitions, including the adaptive-functioning prong. *See, e.g.*, Idaho Code Ann. § 19-2515A(1)(a); Mo. Rev. Stat. § 565.030(6); N.C. Gen. Stat. § 15A-2005(a)(1)(b), (2); Okla. Stat. tit. 21, § 701.10b(A)(2); *Ybarra* v. *State*, 247 P.3d 269, 273-275 & n.6 (Nev. 2011) (discussing Nev. Rev. Stat. § 174.098(7)); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 369-370 & n.8 (Ky. 2005) (discussing Ky. Rev. Stat. Ann. § 532.130(2)). Other States have adopted clinical standards by judicial decision. *See, e.g.*, *Chase* v. *State*, 2015 WL 1848126, at *2-3 (Miss. Apr. 23, 2015); *State* v. *White*, 885 N.E.2d 905, 907-908 (Ohio 2008). Virginia requires not only a clinical definition, but also—where feasible—the use of a standardized clinical assessment to evaluate adaptive functioning. Va. Code Ann. § 19.2-264.3:1.1(B)(2).

State and federal courts outside of Texas have stressed the importance of adhering to clinical guidance on adaptive functioning to reach accurate conclusions. For example, contrary to Texas's approach, courts have recognized that a defendant's possession of some adaptive skills is "in no way inconsistent with" a diagnosis of intellectual disability, *White*, 885 N.E.2d at 914, because adaptive deficits often coexist with strengths, *see supra* pp. 20-21. These courts have explained that the factfinder "'must therefore look at [the defendant's] weaknesses instead of at his strengths.'" *Van Tran*, 764 F.3d at 609; *see also, e.g.*, *Sasser* v. *Hobbs*, 735 F.3d 833, 845 (8th Cir. 2013) ("Consistent with nationally accepted clinical definitions of mental retardation, the Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations."); *Holladay* v. *Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) ("Individuals with mental retarda-

tion have strengths and weaknesses …. Indeed, the criteria for diagnosis recognizes this by requiring a showing of deficits in only two of ten identified areas of adaptive functioning."); *White*, 885 N.E.2d at 914 ("The mentally retarded are not necessarily devoid of all adaptive skills. Indeed, 'they may look relatively normal in some areas and have certain significant limitations in other areas.'"); *Lambert* v. *State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005) ("[T]he State need not present any evidence that a capital defendant can function in areas other than those in which a deficit is claimed.").

Courts outside of Texas have also rejected reliance on the lay stereotypes that Texas encourages factfinders to consider. *See supra* pp. 22-23. In *Thomas* v. *Allen*, 607 F.3d 749, 759 (11th Cir. 2010), the Eleventh Circuit rejected the State's argument that an *Atkins* claimant's ability to "drive cars and hold menial jobs" weighed against a finding of intellectual disability. And courts have emphasized the importance of expert clinical judgment in evaluating an *Atkins* claim. *See, e.g.*, *Van Tran*, 764 F.3d at 605 ("The reliable and professionally vetted methods presented by … experts, from which the legal standards draw their substance, must guide the court's inquiry."); *id.* at 612 ("Tennessee law does not permit the state trial court to use its independent judgment to disregard uncontroverted expert analyses, consider factors that the experts have testified are unreliable, or declare to be dispositive a factor irrelevant to the clinical definitions employed by the experts."). Factfinders in these States "may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court's own expectations of how a mentally retarded person would behave." *White*, 885 N.E.2d at 915.

2. The distinction between Texas's approach and that of most other death-penalty States can make the difference between life and death in factually similar cases. In particular, defendants situated similarly to Lizcano have succeeded on *Atkins* claims in other States. In *White*, the Supreme Court of Ohio held that the trial court abused its discretion when it denied White's *Atkins* claim on the basis of lay testimony and perceived strengths. 885 N.E.2d at 915-916. Both experts at trial concluded that White met all three prongs of the clinical definition of intellectual disability. *Id.* at 909-910. To rebut evidence of adaptive deficits, the State cited testimony from White's ex-girlfriend that, like Lizcano, he "possessed … adaptive skills inconsistent with retardation" and "was not perceived by those who knew him as having significant adaptive disorders." *Id.* at 911. White, like Lizcano, had bought a truck, could drive, held a job, and dated; he also had other "skills" including playing games involving coordination and lying to his landlord. *Id.* at 910, 914. On that basis, the trial court concluded that White did not satisfy the adaptive-functioning prong.

Applying clinical standards, the state supreme court reversed. 885 N.E.2d at 908, 915-916. The court admonished that "rejecting the uncontradicted testimony of two qualified expert witnesses in the field of psychology" based on lay perceptions of intellectual disability is "arbitrary [and] unreasonable." *Id.* at 915-916. Because "[t]he mentally retarded are not necessarily devoid of all adaptive skills," "one must focus on those adaptive skills the person lacks, not on those he possesses." *Id.* at 914. The court cautioned that "laymen cannot easily recognize" intellectual disability. *Id.* at 915.

In *State* v. *Lombardi*, the Supreme Court of Missouri prohibited the execution of an *Atkins* claimant after holding that he met the adaptive-functioning prong based on evidence of adaptive deficits, without considering his strengths. 303 S.W.3d 523, 526-527 (Mo. 2010) (per curiam). Like Lizcano, the defendant, Lyons, presented evidence that he had trouble communicating and was quiet and withdrawn. *Id.* And school records indicated that Lyons had repeated tenth grade for three consecutive years. *Id.* at 527. Missouri's statutory definition of adaptive behavior mirrors the previous APA standard and requires a claimant to demonstrate deficits in at least two of ten skill areas. *Id.* at 526; *see also Goodwin* v. *State*, 191 S.W.3d 20, 30-32 (Mo. 2006). Applying this standard to Lyons's case, the court concluded that the evidence of "deficits and limitations in two or more adaptive behaviors"—communications and functional academics—sufficed to demonstrate Lyons's intellectual disability regardless of any strengths in adaptive functioning. 303 S.W.3d at 527.

No two *Atkins* claimants are identical. But Texas courts systematically depart from the clinical norms that govern *Atkins* claims in the vast majority of other States by giving dispositive weight to factors that have no scientific grounding. Had *White* or *Lombardi* arisen in Texas, their outcomes would almost certainly have been different, as shown by the Texas courts' failure in this case to grant Lizcano relief despite similarly compelling clinical evidence of intellectual disability.

III. But For Texas's Nonclinical Approach, Lizcano Would Be Ineligible For The Death Penalty

This case underscores the risk Texas law creates of "executing a person who suffers from intellectual disa-

bility." *Hall*, 134 S. Ct. at 2001. There is no dispute Lizcano has "'significantly subaverage general intellectual functioning'" and meets the first clinical prong. *Id.* at 1994; *see* App. 95a, 134a. His IQ scores all fall within the range of intellectual disability, including scores as low as 53 and 48. *See supra* pp. 10, 14.

The clinical evidence of Lizcano's significant deficits in adaptive behavior is overwhelming. Both clinical psychologists who testified at trial diagnosed Lizcano with intellectual disability. 56 RR 48, 116-119; Compton Report 9. Between them, they identified deficits "in at least six of the eleven APA categories." App. 161a. Dr. Puente found that Lizcano "function[ed] between eight and ten years of age" in his ability to communicate with others, could not care for himself independently, and failed in formal schooling. App. 166a-169a. In state habeas proceedings, two additional clinical psychologists and a psychiatrist agreed that Lizcano is intellectually disabled. *See supra* pp. 14-16. Dr. Llorente measured Lizcano's adaptive skills using a widely accepted standardized assessment and found them to be in the "Extremely Low (impaired) range," in the first percentile. Llorente Report 17.

Lay witnesses confirmed the experts' diagnosis. Family members recalled Lizcano's inability to socialize appropriately or to retain simple instructions "for more than ten or fifteen minutes." App. 138a. He had trouble with basic personal hygiene. He could not make change, calculate tips, or manage the money he earned without help from others. And he failed at even simple tasks at work, like mowing the correct lawn or using a tape measure. *See supra* pp. 9-10, 15-16.

Texas's departure from clinical standards made the difference in this case. Against the defense evidence,

the Texas courts sustained Lizcano's death sentence *solely* on the grounds that Lizcano held a job and worked hard, paid for his truck and sent money to his family (with help), and dated two women who did not consider him disabled. App. 96a. That evidence would not pass muster absent the Texas courts' open defiance of this Court's endorsement of clinical standards in *Atkins* and *Hall*. Because of *Briseno*, Texas stands ready to execute a defendant who fully satisfies the clinical criteria for a diagnosis of intellectual disability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2015

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-68,348-03

EX PARTE JUAN LIZCANO

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. W05-59563-S(A) IN THE 282ND DISTRICT COURT DALLAS COUNTY

Per curiam. **ALCALA, J., filed a dissenting statement in which JOHNSON, J., joined. NEWELL, J., dissents.**

ORDER

This is an initial application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.1.[1]

In October 2007, a jury found applicant guilty of the offense of capital murder committed on November 14, 2005. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's

[1] *Ex parte Lizcano*, No. WR-63,348-01, was an application for a writ of prohibition. We denied leave to file on September, 11, 2007. *Ex parte Lizcano*, No. WR-63,348-02, was an application for a writ of mandamus. We denied leave to file on October 5, 2011.

conviction and sentence on direct appeal. *Lizcano v. State*, No. AP-75,879 (Tex. Crim. App. May 5, 2010).

Applicant presents nine allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing. The trial court entered findings of fact and conclusions of law recommending that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions except for Findings and Conclusions nos. 78 through 82 and 261 through 269. Based upon the trial court's findings and conclusions and our own independent review, we deny relief.

IT IS SO ORDERED THIS THE 15th DAY OF APRIL, 2015.

DO NOT PUBLISH

ALCALA, J., filed a dissenting statement in which JOHNSON, J., joined.

DISSENTING STATEMENT

I respectfully dissent from this Court's cursory order denying relief to Juan Lizcano, applicant, who presents nine allegations in his application for a post-conviction writ of habeas corpus challenging his death sentence for capital murder. Although I agree with this Court's order as to its denial of eight of the nine allegations, I dissent with respect to its denial of applicant's ground number six, entitled, "Mental Retardation," which I will refer to as his intellectual-disability claim. This Court's order determines that applicant's

present intellectual-disability claim is not procedurally barred and denies his claim on its merits. Rather than deny his allegation without explanation, I would instead file and set this ground and issue a full opinion addressing whether applicant's evidence shows that his execution would violate the Eighth and Fourteenth Amendments' prohibition against executing an intellectually disabled person. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002); U.S. CONST. amend. VIII; XIV. Because this Court has already determined that applicant's IQ is below seventy and there appears to be no dispute that the onset of that subaverage IQ occurred before he was eighteen years of age, the dispositive question in this case is whether applicant has proven through this entire record, including the new evidence presented in this application for a writ of habeas corpus, that he has adaptive deficits establishing his intellectual disability. *See Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

In rejecting applicant's intellectual-disability claim on direct appeal and in this habeas application, this Court and the habeas court have each applied the standard this Court outlined in *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004) (applicant must demonstrate by a preponderance of the evidence that he possesses (1) significantly subaverage general intellectual functioning (an IQ of about 70 or below) and (2) related limitations in adaptive functioning (3) commencing before the age of eighteen); *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772, at *12 (Tex. Crim. App. 2010) (not designated for publication). This Court rejected applicant's claim on direct appeal based on its assessment of the second *Briseno* criterion following a review of the evidence of the limitations in his adaptive

functioning due to his intellectual disability. *Lizcano*, 2010 WL 1817772, at *15.

In its opinion on direct appeal denying applicant's intellectual-disability claim based on its assessment as to the adaptive-functioning prong, this Court determined that "there was significant evidence admitted that supported [applicant's] effectiveness in meeting standards of personal independence and social responsibility." *Id.* This "significant" evidence, however, merely consisted of evidence that a former girlfriend of six months called applicant "very bright"; that a deputy at the jail did not think that applicant was mentally impaired and that applicant had no problems with personal hygiene while being held in jail pending trial; and that applicant had the ability to make timely car payments. *Id.* at *13. If this minimal evidence based on two lay-witness opinions and evidence of ability to maintain personal hygiene while incarcerated and to make car payments is considered to be "significant" under the *Briseno* standard, then it is clearly time for this Court to reconsider that standard, which was judicially created in the absence of any statute to define intellectual disability. *See Briseno*, 135 S.W.3d at 8 ("Until the Texas Legislature provides an alternate statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR or section 591.003(13) criteria in addressing *Atkins* mental retardation claims.").

The *Briseno* standard for determining whether a particular defendant possesses significant adaptive deficits, however, has been repeatedly criticized as unscientific. *See, e.g.*, *Hall v. Quarterman*, 534 F.3d 365, 393 (5th Cir. 2008) (Higginbotham, J., concurring in part and dissenting in part) (using quotation marks to modify "scientific" regarding *Briseno* factors); *Chester v.*

Thaler, 666 F.3d 340, 372 (5th Cir. 2011) (Dennis, J., dissenting) (sharply criticizing the *Briseno* factors as unscientific, stating that "the *Briseno* factors turn on its head the consensus's approach to determining whether the petitioner has significant limitations in adaptive functioning"); *see also* 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, 711-712 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."). This Court should take this opportunity to examine each of those *Briseno* factors and determine whether applicant's evidence establishes adaptive deficits under an appropriate test. *See Briseno*, 135 S.W.3d at 8-9. The judicially created test in *Briseno* is now a decade old, and the time has come to reassess whether it remains viable in its entirety.

It may be that applicant's new evidence is inadequate to establish his claim of intellectual disability based on an appropriate examination of adaptive deficits in light of the totality of the record. But, at a minimum, this Court should reexamine the *Briseno* standard to decide whether it has set forth an appropriate test for evaluating evidence of adaptive deficits and issue an opinion that explains whether applicant's evidence meets that test. Because this Court refuses to explain in an opinion why it concludes that applicant, whose IQ this Court has already decided is below 70, does not possess significant adaptive deficits, I respectfully dissent.

Filed: April 15, 2015

Do Not Publish

APPENDIX B

IN THE 282ND JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

No. W05-59563-S(A)

EX PARTE JUAN LIZCANO

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having considered (1) the allegations contained in Juan Lizcano's Application for writ of Habeas Corpus and additional pleadings, (2) the State's Response and additional pleadings, (3) testimony and documentary evidence offered at writ hearings conducted on November 6-9 and December 13, 2012, (4) official court documents and records, and (5) the Court's personal experience and knowledge, makes the following findings of fact and conclusions of law:

I.

HISTORY OF THE CASE

Applicant is confined pursuant to the judgment and sentence of the 282nd Judicial District Court of Dallas County, Texas, in cause number F05-59563-S, in which applicant was convicted by a jury of the capital murder of Dallas Police Officer Brian Jackson. On November 2, 2007, the jury answered the special issues in a manner requiring the imposition of the death sentence. (CR:

271);[1] Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(l), (e)(l) (West Supp. 2012). On May 5, 2010, the Court of Criminal Appeals affirmed applicant's conviction on direct appeal. *Lizcano v. State*, No. AP-75,879, 2010 Tex. Crim. App. Unpub. LEXIS 270 (Tex. Crim. App. May 5, 2010) (not designated for publication).

On December 23, 2009, applicant timely filed his original application for writ of habeas corpus. *See* Tex. Code Crim. Proc. Ann. art. 11.071 (West Supp. 2012). The State received a statutorily-authorized extension and filed a timely general denial on June 21, 2010. On October 5, 2010, the Court signed and entered an order designating applicant's claims of ineffective assistance of counsel as issues to be resolved outside of the official transcript and court documents and set the case for a live evidentiary hearing on October 21-22, 2010.

The October hearing was postponed due to a number of requests for change in counsel and motions for continuance made by applicant. Up to this point in the writ proceedings, all of the pleadings filed by applicant were signed by first-chair appointed writ counsel, David Dow of Texas Defender Service ("TDS"), and by Alma Lagarda, a staff attorney at TDS. In October of 2010, Lagarda accepted employment with the Office of Capital Writs ("OCW") and requested to bring applicant's case with her. On November 1, 2010, this Court granted Dow's request to withdraw as counsel and appointed OCW as writ counsel. From November 2010 to February 2011, OCW Director Brad Levenson served

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[1] The Court will refer to the Clerk's Record as "CR;" to the Reporter's Record from trial as "RR;" to the Reporter's Record from the writ hearing as "WRR;" to the Applicant's writ exhibits as "AWE;" and to the State's writ exhibits as "SWE."

as first-chair writ counsel for applicant and signed all the pleadings.

In February of 2011, Lagarda left OCW and resumed employment with TDS. On February 17, 2011, OCW and Dow filed a joint motion in which OCW requested to withdraw and Dow moved to be appointed again as writ counsel. On March 31, 2011, the Court held a hearing and denied the motion. At the hearing, the Court also signed the State's Proposed Discovery Order, ordering applicant to turn over to the State any trial files, including information protected from disclosure by statutory or constitutional law, that relate to applicant's claims of ineffective assistance of counsel designated in the ODI.

On April 18, 2011, Dow and Lagarda filed a notice of appearance, informing the Court they had been retained by applicant. On April 21, 2011, the Court signed an order granting OCW's motion to withdraw and ordering Dow and Lagarda to comply with the discovery order by May 16, 2011. On May 11, 2011, writ counsel filed an objection to and motion to withdraw the Court's discovery order. On May 13, 2011, the Court held a meeting in chambers and notified the parties it was denying applicant's motion and upholding the discovery order. On May 20, 2011, writ counsel filed a motion for leave to file a petition for writ of mandamus in the Court of Criminal Appeals. After allowing this Court and the State the opportunity to respond, the Court of Criminal Appeals denied the application on October 5, 2011.

Following the denial of applicant's mandamus, the writ hearing was rescheduled for May 8-11, 2012. However, the hearing was once again postponed due to applicant's request for a change of counsel. In February of 2012, Dow left his employment with TDS and

filed a motion to withdraw as counsel. The Court held a hearing on the motion on February 17, 2012. Lagarda informed the Court that she was now on the list of counsel competent for appointment to a death penalty writ and that she would remain on the case as first-chair; nonetheless, she requested that the Court allow her to substitute Wm. Alan Wright and Debbie McComas of Haynes and Boone, LLP as co-counsel in place of Dow. The Court granted Dow's request to withdraw and permitted the substitution of counsel.

On March 23, 2012, writ counsel requested that the May hearing be continued until November or December of 2012 to allow the new writ attorneys time to prepare. The Court indicated to the parties it was only willing to continue the case until August, and the parties agreed on a new hearing date of August 21-24, 2012. On August 3, 2012, the parties attended a status meeting in chambers. At the meeting, applicant requested a 90-day continuance of the writ hearing. The Court granted applicant's request, but indicated that it would not grant any further extensions.

A live evidentiary hearing was held on November 6-9, 2012 and December 13, 2012. Applicant presented the following witnesses at the hearing: (1) Brook Busbee, (2) Juan Carlos Sanchez, (3) J. Reyes Lizcano Ruiz, (4) John Tatum, (5) Dr. Antonio Puente, (6) Dr. Gilbert Martinez, (7) Debra Lynn Davis, (8) Dr. Antolin Llorente, (9) Deborah Nathan, and (10) Dr. Pablo Stewart. Applicant planned to call several other witnesses who had travelled from Mexico to testify at the writ hearing, but, at the Court's suggestion, their testimony was submitted via affidavit instead of live tes-

timony.[2] (WRR5: 126-33; WRR7: 5-7, 149-50; WRR8: 5). The State called one witness, Dr. J. Randall Price. After the record from the writ hearing was completed and filed, this Court ordered the parties to file proposed findings of fact by August 1, 2013, and any responses or objections and related briefing by September 1, 2013.

II.

FACTUAL SUMMARY

Guilt phase

In the early morning hours of Sunday, November 13, 2005, applicant Juan Lizcano instigated a police manhunt that resulted in the capital murder of Dallas Police Officer Brian Jackson. The guilt-phase record reveals that on the night of the offense, he repeatedly called and appeared at the home of Marta Cruz, an older woman with whom he had been romantically involved but who had encouraged him to find a more age-appropriate girlfriend. (RR42: 166-67, 169). He first arrived, armed with a handgun, around 2:00 a.m. and cornered her in her bedroom. (RR42: 174-78; RR43: 40). He demanded to know if anyone else was at her home and fired a gunshot into the bedroom ceiling. (RR42: 174-178; RR43: 40). He then asked her if she thought he was playing, announcing that his next shot was for her. (RR42: 180, 207; RR43: 40). He left shortly thereafter. (RR42: 180). After she was sure he was gone, she called the police and applicant's friend, Jose Fernandez, to let him know that applicant had a gun. (RR42: 181, 183-85). When Fernandez answered the

[2] Specifically, testimony via affidavit was obtained from the following individuals: (1) Lucia Lizcano Ruiz, (2) Jose Cruz Zuniga Gonzalez, (3) Juana Lopez Rangel, (4) Veronica Llanas Banda, (5) Florencio Lizcano Ruiz, and (6) J. Reyes Lizcano Ruiz. (AWE 137).

phone, she realized that applicant was with him, and she asked him to tell applicant not to return because the police were coming. (RR42: 186). Applicant called her back and said he was coming back and that he "didn't give a damn" about the police. (RR42: 187).

Officers Lori Rangel and Jan Fagan responded to the first call. (RR42: 189-90; RR43: 38). Cruz provided a physical description of applicant, and they ensured that he was not still on the property and then left. (RR42: 189-91; RR43: 41). After the officers left, applicant called and accused Cruz of lying because there were no police around. (RR42: 191). A couple of minutes later, he reappeared at her duplex and started kicking in the side door. (RR42: 191-92). Cruz panicked. (RR42: 193). It was now approximately 2:40 a.m., and she hid in the closet and called police again. (RR42: 193). She reported that applicant had a gun. (RR42: 193). The banging and kicking stopped when police arrived. (RR42: 196).

In response to her second call, several officers dressed in full police uniform arrived at the scene, including officers Rangel, Fagan, William Hedges, Mike Nunez, Dung Pham, David Gilmore, Richard Rivas, Raymond McClain, Francis Crump, Brad Ellis, and the victim, Officer Brian Jackson. (RR43: 46, 60, 81-82, 89, 159; RR44: 31). They engaged in a multi-block manhunt for applicant, combing the alley, homes, and street behind Cruz's home. (RR43:49-50) During the manhunt, applicant aimed his weapon and/or shot at officers on three separate occasions. He appeared to point his gun threateningly from a neighboring yard at Officers Gilmore and Pham and fired three times at Officers Rivas, Crump, and McClain while they were sweeping the alley. (RR43: 93-94, 182; RR44: 18). Those shots hit a tree above Officer Ellis's head, and bark fell on him. (RR43: 134).

Applicant ambushed and killed Officer Jackson in the front yard of 2415 Madera, behind Cruz's home. (RR46: 12). At the time of the murder, a bright mercury light from the corner of the house lit up the front yard of 2415 Madera. (RR43: 78, 138-39, 196, 198; RR44: 31, 95, 124). Officer Jackson was looking and aiming his rifle elsewhere when applicant shot him. (RR45: 42-44; RR47: 68). According to officers who could differentiate between the weapons firing shots, applicant fired a series of shots with his .357 revolver, and then Officer Jackson returned fire with his AR-15 rifle. (RR43: 78; RR44: 28-29, 91-92). A neighbor also testified that he heard shots fired from a very loud gun and then an even louder gun, which is consistent with the officers' description of events. (RR44: 167). Officer Rivas ultimately captured and handcuffed applicant, and applicant resisted arrest. (RR43: 205, 218).

Punishment: State's case

At the punishment phase, the State called several officers and a neighbor to testify to applicant's prior extraneous offenses. Officers Rivas, Crump, and McClain testified that they filed cases of aggravated assault on a public servant against applicant after he fired at them on November 13, 2005. (RR48: 88, 94, 98-99). Officer Eric Morales testified that around 10:00 p.m. on September 16, 2005, two months before the instant offense, applicant drove up behind Morales in a pickup truck, blinding the officer with his headlights. (RR48: 109). Officer Morales waited until the truck passed him and then pulled applicant over for following too close. (RR48: 111). Applicant could not produce a driver's license or insurance, and Officer Morales could smell alcohol on his breath. (RR48: 112). Officer Morales called Officer Robert Wilcox to administer field sobriety tests, and Officer Morales ultimately arrested applicant

for driving while intoxicated. (RR48: 107-16, 124-145). Officer Wilcox testified that while he and applicant waited in the book-in line, applicant became very uncooperative and belligerent and threatened Wilcox. (RR48: 146-47). Applicant was speaking English and said he was going to kill Wilcox when he got out of jail. (RR48: 148). Officer Wilcox testified that he wished he had filed a retaliation charge against applicant for threatening him and would think about it for the rest of his career. (RR48: 174). Several officers witnessed the exchange, including Officer Anthony Foster who testified that applicant declared in English that the next time he came into contact with a police officer, he was going to kill him. (RR48: 163, 168, 179, 187). Officer Thomas Fortner heard applicant say to Wilcox, "I'll kill you. I'll fucking kill you." (RR48: 179).

Marta Cruz's neighbor, David Huerta, testified that on one night in the same month, he heard a scuffle at Cruz's house around 1:30 or 2:00 a.m., went outside, and saw that applicant was very intoxicated. (RR49: 56, 57). Huerta threatened to call the police, to which applicant responded, "You call the damn police. I'll take them down, too, with me." (RR49: 58).

Officer Melquiades Irizarry testified that a year earlier, on June 6, 2004 at 10:25 p.m., he arrested applicant for public intoxication. (RR49: 37-39). And Officer Brandy Kramer testified that on December 25, 2004 at 2:20 a.m., she nearly arrested applicant for public intoxication. She had responded to a disturbance call involving seven Latin males, including applicant, fighting. (RR49: 44). Applicant was bleeding, and Kramer believed he had been drinking and would be a danger to himself and others. (RR49: 48, 49). She released him to his aunt; although but for the availability of his aunt,

she would have arrested him for public intoxication. (RR49: 50).

As its final witness, the State presented testimony from Warden Melodye Nelson about the prison classification system, the availability of weapons and alcohol in prison, and guard assaults on death row. (RR49: 75, 88, 93, 98).

Punishment: Defense case

The defense explicated the impoverished living conditions of applicant's youth and attempted to flesh out a claim of mental retardation. Applicant's sixth grade teacher, Professor Aleida Reyes Lucio, testified that in his small rural Mexican town, applicant attended a one-room school, in which the teachers had no more than a junior high school education. (RR49: 118-19, 122). The school had mud walls and no bathroom, chairs, or schoolyard. (RR49: 118, 120). She remembered applicant as a good boy who dressed very humbly and often came to school without breakfast. (RR49: 121). She testified that applicant was serious, quiet, and a slow-learner and that she taught him to read when he was fourteen or fifteen years old. (RR49: 122, 129). Rosa Maria Rodriguez Rico, a nurse and Lizcano family acquaintance, testified that women in rural Mexico did not have good prenatal care and that nutrition for everyone was totally deficient. (RR49: 132, 134-35).

Applicant's mother, Alejandro Ruiz Campos, testified that she did not remember when applicant was born or giving birth to him and that he was one of eight children. (RR52: 27-28). Her husband, who died when applicant was three, could not work because of a debilitating stroke, and she and the children scraped "stalk" which they then sold to buy corn. (RR52: 28, 31). She had to give two of her children away because she could

not feed them. (RR52: 29). She and her family lived in a one-bedroom house in which the children slept on a dirt floor, interlaced for warmth. (RR52: 31-32). The house had no electricity or running water; they used water from a tank that collected rain water. (RR52: 32). They cooked in a small kitchen with a hole for the smoke to escape, and the children ate on the floor. (RR52: 33). Sometimes they ate only one meal a day, a corn tortilla before bed, and she admitted that she often sent applicant to school without breakfast. (RR52: 34).

She and several other family members remembered applicant as a good boy who helped water the plants and garden and enjoyed the children's play "Pastorela." (RR52: 34-35, 63-68, 70-74). He loved animals and took care of goats and horses, and of all of her sons, he was the only son reliable enough to send money back from the United States. (RR52: 35-38).

Applicant's brother, Reyes Lizcano Ruiz, testified to the impoverished conditions of their youth and that applicant worked in the community store when he was nine or ten years old and could not make change. (RR52: 60-62). Ruiz admitted that their younger sister could not make change either. (RR52: 62). Applicant's cousin, Juan Lizcano Reyes, also testified about their impoverished youth and that applicant was very shy, did not understand when someone told a funny story, and was sometimes timid. (RR53: 31-32). He testified that none of applicant's other brothers helped the family financially; only applicant helped his family in Mexico. (RR53: 36). It was his impression that applicant was a little slower than the other kids. (RR53: 51). Veronica Llanas Banda, a cousin through marriage, testified about several months she and her family lived with applicant in the United States and how well he treated her young daughter. (RR52: 76-79).

Applicant's ex-girlfriend, Jessica Baron, testified that they dated in the spring of 2005, during a break in his relationship with Marta Cruz, and carried on a long distance relationship between Wichita Falls, where she lived, and Dallas. (RR49: 143-45). She testified that he got lost the first time he drove from Dallas to Wichita Falls. (RR49: 144). She also testified that he did not talk much and was not very sociable. (RR49: 146-47). She never heard him speak English. (RR49: 148). When he drank, he would get tipsy and sometimes drink a lot, but he would control his drinking. (RR49: 148). He was in love with Cruz but was trying to get on with his life. (RR49: 152). On cross-examination, she testified that applicant is very bright and that he did not have any problems understanding her. (RR49: 165-66).

Marta Cruz testified about the inception of their relationship and that applicant had become increasingly unhappy living with his hard-drinking relatives. (RR53: 21-24). She testified that he could not read a clock, that he had trouble programming numbers into a cell phone, that he did not speak English, that she had explained a VCR to him and he could not use it, that he would watch TV but did not understand it, and that when he was alone, he would watch Spanish Galavision or El Chavo de Ocha, a children's program. (RR53: 27-28). When he showered at her house, he showered for only five minutes and still had grass on him. (RR53: 28-29). She taught him how to clean his ears with Q-tips and noted that his hands were always rough and that he needed to trim his nails. (RR53: 29). His clothes were always too big and uncoordinated. (RR53: 33). His shoes were also too big. (RR53: 33). When he was not drinking, he was very nice and quiet. (RR53: 38). She suggested that he settle down and get married. (RR53: 38).

She recalled an incident on September 11, 2005 when he pulled a kitchen knife on her during their break-up. (RR53: 39-40). She assumed he was drunk. (RR53: 39-40). On cross examination, she testified that on September 11, 2005, applicant had left several messages threatening to "fuck you up" and that a week before this knife incident, he had pushed her into an exercise machine and bruised her. (RR53: 53-54). On Labor Day 2005, he became very angry over their breakup and Cruz's refusal to allow him to stay overnight and had to be restrained. (RR53: 55). Anytime police arrested him, he would call and ask that her brother and friends get him out of jail before immigration intervened. (RR53: 74). On October 20, 2005, he left a message on her cell phone that he was not going to beg anymore and that he did not give a damn: "I'm not begging you anymore, fucking bitch [in Spanish]." (RR53: 74). She also admitted that he paid his cell phone bill every month. (RR53: 53).

Quenton Edward Thomas testified that he lived next door to Marta Cruz and tried to get to know applicant. (RR52: 13). He testified that applicant was more friendly when he was alone and that he would not acknowledge Thomas when Cruz was around. (RR52: 13). He noticed that applicant was living in Cruz's duplex at the end of October and beginning of November 2005. (RR52: 15). He also noticed, at the same time, another man visiting the duplex during the day. (RR52: 15). Around 3:00 or 4:00 a.m. on the night of the offense, he saw police dragging something that they were kicking and punching. (RR52: 17). On cross-examination, he admitted that before he testified, he had never told anyone that he saw a beating. (RR52: 24).

Deputy Deveesh Amin, a jail detention officer, testified that he had observed applicant for two years and

that he had behaved normally and followed the jail rules. (RR53: 9) On cross-examination, he testified that it was not unusual that a person in a single cell would not be a behavioral problem. (RR53: 13). He also did not observe any mental problems or that applicant was mentally retarded; applicant kept a neat, orderly cell and maintained his personal hygiene. (RR53: 17). Detention officer Jeffrey Gartrell also testified that applicant had "fine" behavior and that he maintained a very tidy cell and organized his reading materials and personal hygiene products. (RR55: 63-67). He had not noticed any mental health or mental retardation issues. (RR55: 65).

Two employers testified that applicant was slow to learn their trades and had difficulty retaining training but that he was a reliable, responsible, and hard worker. (RR53: 52-62; 74-83). One of them testified that applicant did not always understand jokes and that when he watched TV, he usually watched children's programs. (RR54: 59-60).

The defense called Jennifer Gutierrez who testified that David Huerta, Marta Cruz's neighbor, was a family friend and that his reputation for truth and veracity is bad. (RR52: 8).

Dr. John Sorenson testified to several methodologies he applied to determine whether applicant would pose a future danger in prison and determined that applicant's risk factor for future dangerousness would be 8.1 percent. (RR55: 68-90, 89). Psychologist Mark Vigen agreed that, based on his experience with and knowledge of the prison system, "the likelihood that [applicant] will continue to commit violent behavior which would be a threat to the prison society is very low." (RR55: 142).

As its final witnesses, the defense called psychologists Antonio Puente and Kristi Compton. Dr. Puente testified that, based on numerous records he had reviewed and personal interviews and tests he conducted, in his opinion the data showed applicant to be mildly mentally retarded. (RR56: 48). He quoted IQ test scores of 48, 60, and 62 and listed what he considered to be evidence of deficient adaptive skills. (RR56: 36, 40-44). On cross-examination, he admitted that State's consulting expert Dr. J. Randall Price disagreed with his diagnosis. (RR56: 99). Dr. Compton testified that she could not make a diagnosis based solely on the non-verbal intelligence and effort tests she administered and the reports of Dr. Puente, Dr. Gilbert Martinez, and investigator Debbie Nathan: "[e]thically psychologists cannot diagnose unless they administer tests themselves or evaluate the person themselves." (RR56: 104-05). She testified that he scored a 62 on the non-verbal IQ test she administered. (RR56: 111).

Punishment: State's rebuttal

In rebuttal, the State called five more witnesses. Marta Cruz testified that applicant admitted to retrieving a knife from his car when he saw an ex-girlfriend at a club and she would not speak to him. (RR56: 159-60). Mariano Valdivia testified that applicant and co-signer Jose Zarate purchased a truck from him and that applicant timely paid him $120 per week. (RR56: 164). Officer Michael Nunez, who rode with applicant from the crime scene to police headquarters, testified that applicant slept during the ride. (RR56: 172). And finally, Officer Jackson's parents, Valerie and John Jackson, testified to the wreckage of their lives since losing their son. (RR57: 4-11).

III.

GENERAL FINDINGS OF FACT

(1) The Court takes judicial notice of the entire contents of the Court's trial file in cause number F05-59563-S.

(2) The Court takes judicial notice of the clerk's record, supplemental clerk's record and all sixty-two (62) volumes of the reporter's record from the trial in cause number F05-59563-S.

(3) The Court takes judicial notice of the entire contents of the Court's writ file in cause number W05-59563-S(A).

(4) The Court takes judicial notice of all twelve (12) volumes of the reporter's record from the writ hearings held November 2, 5-9 and December 13, 2012, in cause number W05-59563-S(A).

IV.

SPECIFIC FINDINGS OF FACT

Grounds 1, 3 and 7: Ineffective Assistance of Counsel

(5) In his first, third and seventh grounds for relief, applicant alleges that he was denied his Sixth Amendment right to effective assistance of counsel during various stages of his capital murder trial. (*See* Writ Application at 25-34, 39-40, 49, 67-81).

(6) An applicant asserting a claim of ineffective assistance of counsel has the burden to prove by a preponderance of the evidence some deficiency in counsel's performance that prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex.

Crim. App. 1999). To prove deficiency, applicant must show that counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms and according to the necessity of the case. *Strickland*, 466 U.S. at 689; *Ex Parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013). To prove prejudice, applicant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Thompson*, 9 S.W.3d at 812-13.

(7) In evaluating the performance prong, reviewing courts must not second-guess informed strategic or tactical decisions made by trial counsel in the midst of trial, but instead must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Reviewing courts are obliged to defer to strategic and tactical decisions of trial counsel, so long as those decisions are informed by adequate investigation of the facts of the case and the governing law. *Frangias v. State*, 392 S.W.3d 642, 653 (Tex. Crim. App. 2013).

(8) An accused is not entitled to representation that is wholly errorless, and a reviewing court must look to the totality of the representation in gauging the adequacy of counsel's performance. *Frangias*, 392 S.W.3d at 653.

(9) Although a reviewing court may refer to standards published by the American Bar Association and other similar sources as guides to determine prevailing professional norms, publications of that sort are only guides because no set of detailed rules can completely dictate how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-89.

(10) Ineffectiveness claims may not be built on retrospective speculation; the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, in a habeas proceeding, the applicant bears the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

(11) When the record is silent on the motivations underlying counsel's tactical decisions, an applicant alleging ineffective assistance usually cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). In the absence of direct evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation, if one can be imagined. *Garcia v. State*, 57 S.W.3d 432, 441 (Tex. Crim. App. 2001).

(12) Moreover, if a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence. *Bone*, 77 S.W.3d at 835-36.

(13) The Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct in making trial strategy and instead has emphasized that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 688).

(14) A claim of ineffective assistance of counsel is insupportable on the basis that another attorney may have pursued a different tactic at trial. *McFarland v. State*, 845 S.W.2d 824, 844 (Tex. Crim. App. 1992).

(15) Because a reviewing court will indulge a strong presumption that counsel's performance was reasonable, a strategic choice made after thorough investigation is practically unassailable. *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

(16) A strategic choice made after less than thorough investigation is reasonable to the extent reasonable professional judgment supports the limitation. *Wiggins*, 539 U.S. at 533; *Strickland*, 466 U.S. at 686-691.

(17) The Court finds applicant fails to rebut the presumption that his trial counsel acted consistent with reasonable trial strategy.

(18) The Court finds that applicant also fails to prove that any alleged deficiency prejudiced his defense.

(19) Therefore, the Court concludes that applicant fails to prove his trial counsel rendered ineffective assistance.

I. Qualifications of Counsel

(20) The Court finds that applicant was represented at trial by lead counsel Brook Busbee, and co-counsel Juan Carlos Sanchez and John Tatum. (CR: 17; WRR4: 14, 29-30, 151; WRR5: 9). Tatum, who was also applicant's counsel on direct appeal, served largely in an advisory capacity at trial. (WRR5: 9, 13-15).

(21) The Court finds that applicant is contesting the strategic choices of three experienced and highly qualified death-penalty counsel.

(22) The Court takes judicial notice and finds that, at the time of applicant's trial, counsel were qualified and approved for appointment to death penalty

cases in the First Administrative Judicial District as required by article 26.052 of the criminal procedure code. *See* Tex. Code Crim. Proc. Ann. art. 26.052 (West Supp. 2006). Furthermore, counsel are currently qualified and approved for appointment to death penalty cases in the First Administrative Judicial District as required by the current version of article 26.052. *Id.* art. 26052 (West Supp. 2012).

(23) The Court notes that to qualify for appointment to a death penalty case at the time of applicant's trial, counsel had to meet the following standards:

(a) both first and second-chair counsel were required to be members of the State Bar of Texas;

(b) the first-chair counsel was required to exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases, including five years' experience in litigation of serious felony matters and experience in at least one capital case;

(c) the second-chair counsel was required to have experience in felony matters;

(d) the first-chair counsel was required to have tried to a verdict as lead defense counsel a significant number of felony cases, including homicide trials and other trials for offenses punishable as first or second degree felonies or capital felonies;

(e) the first-chair counsel was required to have trial experience in the use of and challenge to mental health or forensic expert witnesses and in investigating and presenting mitigating evidence at the penalty stage of a death penalty trial; and

(f) counsel was required to have successfully completed the minimum continuing legal education requirements of the State Bar of Texas and must have participated in courses or other training relating to criminal defense in death penalty cases.

(24) The Court finds that Brook Busbee has been licensed to practice law in the State of Texas since 1979 and has been board-certified in criminal law since 1985. Busbee has tried numerous criminal cases during her career and has been handling death-penalty cases since 1990. Prior to being appointed as lead counsel in applicant's case in 2005, she had previously represented three other capital murder defendants where the State sought death, including one of the "Texas Seven." In 2006, prior to applicant's trial, Busbee was invited to attend the death-penalty college in Santa Clara, CA, a conference taught and attended by other highly-trained criminal attorneys from across the country who handle death-penalty cases. This conference educated the attendees on many aspects of capital litigation, including how to investigate and prepare a mitigation case. Busbee brought applicant's case file and brainstormed the issues in the case with the faculty and other attendees. After applicant's trial, Busbee represented Jose Castro, another capital murder defendant facing death-penalty prosecution, and successfully negotiated a life sentence for him. She is currently representing Kenneth Wayne Thomas, a capital murder defendant facing death-penalty prosecution on retrial, along with Sanchez and Tatum. (WRR4: 11, 14-16, 91-93, 98-100, 111; WRR5: 11-12).

(25) The Court finds that Juan Carlos Sanchez has been licensed to practice law in the State of Texas since 1994. He began his legal career as a prosecutor from 1994 to 1996, and has been practicing solely criminal law since moving into private practice in 1996. Sanchez has tried numerous criminal cases, including many non-death capital cases. Sanchez began working in death-penalty litigation around 2000, when he was appointed as Busbee's co-counsel in the "Texas Seven" capital murder trial of Patrick Murphy. He also represented Moises Mendoza, a capital murder defendant facing death-penalty prosecution in Collin County, prior to being appointed in applicant's case. After being appointed in applicant's case, Sanchez attended a seminar in Santa Monica, CA, hosted by the Mexican Capital Legal Assistance Program (hereinafter "MCLAP"), which provided guidance on representing Mexican nationals in capital murder cases. (WRR4: 197). He is currently representing Kenneth Wayne Thomas, a capital murder defendant facing death-penalty prosecution on retrial, along with Busbee and Tatum. (WRR4: 151-52, 194-95; WRR5: 11-12).

(26) The Court finds that John Tatum has been licensed to practice law in the State of Texas since 1974 and has been in private practice since that time. Tatum initially handled both criminal and civil matters, but now his practice focuses primarily on criminal law. Tatum began working in death-penalty litigation around 2000, when he also was appointed as co-counsel in the "Texas Seven" capital murder trial of Patrick Murphy. Tatum worked with Sanchez on the Moises Mendoza capital murder case in Collin County prior to being appointed in applicant's case. Tatum has also represented capital murder defend-

ants Mark Robertson, Donald Bess and Tyrone Cade. He is also currently representing Kenneth Wayne Thomas on retrial, along with Busbee and Sanchez. (WRR5: 9-11, 24-25).

(27) The Court finds that based on their credentials and extensive experience, trial counsel were qualified to formulate and execute an effective trial strategy.

II. Competency

(28) Applicant contends that trial counsel were ineffective for failing to pursue a competency hearing despite an expert's professional opinion that he was incompetent to stand trial. He also contends that trial counsel failed to discover available information about applicant that would have further supported a finding of incompetency. (*See* Writ Application at 25-34).

(29) Under Texas law, a person is presumed to be competent, and the burden is on a criminal defendant to prove incompetency by a preponderance of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 46B.003(b) (West 2006).

(30) A person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against the person. Tex. Code Crim. Proc. Ann. art. 46B.003(a). Evidence relevant to these issues includes whether a defendant can (1) understand the charges against him and the potential consequences of the pending criminal proceedings; (2) disclose to counsel pertinent facts, events, and states of mind; (3) engage in a reasoned choice of

legal strategies and options; (4) understand the adversarial nature of criminal proceedings; (5) exhibit appropriate courtroom behavior; and (6) testify. *See* Tex. Code Crim. Proc. Ann. art. 46B.024 (listing factors to be considered by an expert during a competency exam).

(31) On suggestion by either party or the trial court that the defendant may be incompetent to stand trial, the trial court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent. Tex. Code Crim. Proc. Ann. art. 46B.004(a),(c). If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order a competency examination and empanel a jury to conduct a competency trial. *Id.* art. 46B.005(a), (b).

(32) A competency trial is not required unless the evidence is sufficient to create a bona fide doubt in the mind of the judge whether the defendant met the test of legal competence. *Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999). Generally, a bona fide doubt about a defendant's legal competence is raised only if the evidence indicates recent severe mental illness, moderate mental retardation, or truly bizarre acts by the defendant. *Montoya v. State*, 291 S.W.3d 420, 425 (Tex. Crim. App. 2009); *Moore*, 999 S.W.2d at 395.

(33) The trial court is not required to hold a competency trial if neither party requests a trial on that issue, neither party opposes a finding of incompetency, or the court does not, on its own motion, determine that a trial is necessary. Tex. Code Crim. Proc. Ann. art. 46B.005(b), (c).

(a) Factual Background

(34) The Court finds that on September 14, 2007, applicant's trial counsel filed a motion suggesting that applicant was incompetent to stand trial and requesting an examination of him. (CR: 110-11; AWE 1). Attached to the motion was an affidavit from one of applicant's attorneys, Juan Carlos Sanchez, stating his belief that applicant was not competent to stand trial based on applicant's inability to provide input regarding the defense team's strategy during individual voir dire or their use of peremptory strikes. (CR: 112-13; AWE 1). Also attached to the motion was a Neuropsychology Evaluation Summary from Dr. Antonio Puente, an expert had who evaluated applicant for mental retardation. (CR: 114-15; AWE 1). In the report, Dr. Puente concluded that applicant's neuropsychological test performances ranged from mildly impaired to normal and that his intellectual quotients were in the mild mental impairment range; however, Dr. Puente's report did not address applicant's competency to stand trial. (CR: 114-15; AWE 1).

(35) The Court finds that on September 17, 2007, the Court held a hearing on the motion and conducted an informal inquiry into applicant's competence. Mr. Sanchez reiterated the concerns he expressed in his affidavit. (RR38: 18-19). Ms. Busbee informed the Court that the issue of competence arose and was brought to the Court's attention upon the advice of her expert after she found a criminal case where a defendant with an IQ of 64 was found *per se* incompetent to stand trial. (RR38: 23-24; WRR4: 70). The Court inquired whether they believed applicant was incompetent due to his alleged mental retardation, and Ms. Busbee agreed

with that characterization of the issue. (RR38: 24-25). The Court ruled that it would appoint a neutral expert to examine applicant for competence and advised the parties of its intention to empanel a jury for a competency trial on September 25, 2007. (RR38: 25-26).

(36) The Court finds that on September 19, 2007, the Court appointed Dr. Toni McGarrahan as its neutral expert to conduct a competency examination of applicant. (WRR4: 71, 127, 161, 220; SWE 2).

(37) The Court finds that on September 20, 2007, Dr. McGarrahan examined applicant and found him competent to stand trial. She conveyed her findings to the Court orally via telephone. (WRR4: 219). Later that day, the Court discovered a potential conflict of interest between Dr. McGarrahan and the State's expert, Dr. Price. (WRR4: 219-20). In an abundance of caution, the Court appointed Dr. William Flynn as its neutral expert to replace Dr. McGarrahan and conduct a competency examination of applicant. (CR: 132-33; WRR4: 71, 127, 161, 220-21).

(38) The Court finds that on September 21, 2007, the Court inquired whether the defense wished to supplement its competency motion with any additional evidence. (RR39: 4). Trial counsel indicated that she did have an additional report she intended to file, but it was not with her at that time, so she stated she would let the motion stand "as it is." (RR39: 4-5). The Court requested to continue its informal inquiry by asking applicant some questions, but trial counsel objected to the Court doing so in the State's presence. (RR39: 5). The Court

then ruled that there was insufficient basis to proceed with a competency trial. (RR39: 5-6; RR40: 4).

(39) The Court finds that on September 24, 2007, Dr. Flynn examined applicant and found him competent to stand trial. (CR: 141-43; RR40: 4-5; WRR4: 71). Dr. Flynn found that applicant (1) was able to understand the proceedings in the courtroom and the possible consequences of penalties, legal defenses, and possible outcomes, (2) understood the role of key personnel in the courtroom, (3) understood the severity of the charges against him and his legal defenses, (4) was able to communicate with his counsel, and (5) had the capacity to plan legal strategy. (CR: 142-43). In addition, Dr. Flynn found that applicant did not qualify for a diagnosis of mental retardation because he did not have significant limitations in adaptive functioning. (CR: 142-43).

(40) The Court finds that after the hearing on September 21, 2007, trial counsel tendered to the Court an additional letter from Dr. Gilbert Martinez in support of the competency motion. (CR: 139; RR40: 4). In the letter, Dr. Martinez stated his professional opinion that applicant "does not have sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding, nor does he have a rational or a factual understanding of the proceedings against him." (CR: 139; RR40: 4). Dr. Martinez's opinion was based on a neuropsychological evaluation of applicant conducted on September 10, 2007. (CR: 139; AWE 3). Prior to performing this evaluation, Dr. Martinez reviewed and relied on information contained in a neuropsychological evaluation by Dr. Antonio Puente and several mitigation reports prepared by Debbie Nathan. (*See* AWE 3).

(41) The Court finds that on September 25, 2007, the parties met with the Court in chambers to discuss how to proceed with the competency issue in light of the additional evidence tendered by applicant. During this time, Dr. Flynn called and orally reported his findings to the Court and the parties via speakerphone. (RR40: 4-6. WRR4: 161). His written report was sent to the Court via facsimile later that day. (CR: 141-43).

(42) The Court finds that during the meeting in chambers, the Court advised defense counsel that if they proceeded with a competency trial and planned to offer the testimony of Dr. Martinez, they would have to turn over all the reports and data he relied on in making his conclusions, which would necessarily include Dr. Puente's evaluation and Nathan's mitigation reports. (WRR4: 89-90, 162-64).

(43) The Court finds that following the meeting in chambers, the parties went into the courtroom and conducted proceedings on the record. The Court noted its previous ruling, but stated that the additional evidence provided by the defense was sufficient to proceed with a competency trial if the defense wished to do so. (RR40: 4). Ms. Busbee stated that, after learning of Dr. Flynn's findings and conferring with both her client and her experts, the defense now believed that applicant was competent to stand trial and was withdrawing their request for a competency trial. (RR40: 4-6).

(b) Trial counsel were not deficient for withdrawing their request for a competency trial

(44) Applicant asserts that counsel's decision to withdraw the competency motion was unreasonable because Dr. Martinez could have testified at a compe-

tency hearing to his belief that applicant was incompetent. (*See* Writ Application at 29-30).

(45) The Court finds that counsel withdrew the request for a competency trial based on many factors, including their belief that applicant was competent to stand trial. (RR40: 4-5). Because the motion suggesting incompetency was based partly on co-counsel's assertions that applicant was incompetent, it was not unreasonable for them to withdraw the request when that opinion changed.

(46) The Court finds that applicant fails to cite any authority that counsel can be ineffective for failing to pursue a competency hearing despite her carefully considered opinion that her client is competent.

(47) The Court finds that counsel also exercised sound strategy in withdrawing their request for a competency trial.

(48) At the writ hearing, Ms. Busbee testified that Dr. Martinez communicated to her that his opinion regarding applicant's competency was based on his clinical observations rather than the Texas statutory competency examination and, as such, he did not feel comfortable testifying regarding applicant's competency.[3] (WRR4: 71, 80-81, 90-91, 127-28). In addition, Ms. Busbee testified that the competency requirements in Texas are minimal and she did not

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[3] Dr. Martinez did not deny this assertion at the writ hearing; rather, he testified that he did "not recall … telling her that." (WRR6: 14). Dr. Martinez did concede, however, that he did not conduct the statutorily required competency examination and instead based his opinion regarding applicant's competency on his clinical observations. (WRR6: 81-83, 85, 87, 90-92).

believe a competency trial would have been successful. (WRR4: 70, 90, 128).

(49) Mr. Sanchez testified that withdrawing the competency motion was a strategic decision. (WRR4: 164). He explained that in light of Dr. Flynn's and Dr. McGarrahan's conclusions that applicant was competent, and their expert, Dr. Martinez, providing only a "shaky" conclusion on competency based on his clinical observations, they did not think a competency trial would be successful and it was too dangerous in the long run to reveal their data and mitigation information to the prosecution. (WRR4: 162-64).

(50) Mr. Sanchez's characterization of Dr. Martinez's opinion as "shaky" is supported by Dr. Martinez's testimony at a 705 hearing during the trial, where he stated that he never labeled Lizcano as being incompetent, but rather had stated that "his competency was questionable." (RR55: 241-42; WRR6: 89-90).

(51) The Court finds that, after being informed of Dr. Flynn's findings and learning that Dr. Martinez was reluctant or unwilling to testify, it was reasonable for counsel to form the professional opinion that a competency trial would not be successful and to make the strategic decision to forego a competency trial.[4]

(52) The Court finds that, even if Dr. Martinez would have testified, it was reasonable for counsel to decide to forego a competency trial in order to pre-

[4] The soundness of this strategic decision is further supported by the findings of the Court's previously appointed expert, Dr. McGarrahan, who also found applicant competent to stand trial. (WRR4: 219-21).

clude the State from obtaining all of the underlying data essential to their mental retardation case.[5] Although the State would have eventually obtained the reports of Dr. Martinez and Dr. Puente and any mitigation reports they relied on in reaching their conclusions, they would not have done so until immediately before the doctors' testimony at trial. Counsel made the sound, strategic decision not to give the State a two-month head start to review their entire defense and prepare cross-examination and/or rebuttal evidence. (WRR4: 90-91, 128, 164-65, 210; WRR5: 35-36).

(53) The Court finds that it was also reasonable for counsel to decide to forego a competency trial because there is no indication that Dr. Martinez would have been a more persuasive expert than Dr. Flynn.

(54) The Court finds that Dr. Martinez's conclusions regarding competency were based on his clinical observations in examining applicant for mental retardation, not the competency exam required by Texas statute. (WRR6: 16-18, 81-83, 85, 87, 90-92; *See* AWE 3 at p. 1, stating: "Reason for referral: Juan Lizcano was referred for an independent neuropsychological assessment to evaluate his cognitive and intellectual disabilities.").

(55) The Court finds that Dr. Flynn did perform the statutorily-mandated competency examination which contains questions designed to explore a defendant's understanding of the proceedings against

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[5] Although this information was already in the possession of the State's expert, Dr. Price, the Court specifically prohibited Dr. Price from disclosing this information to the prosecutors until the Court gave him permission to do so. (CR: 90).

him and his ability to assist in his defense. Based on his examination, Dr. Flynn concluded that applicant (1) was able to understand the proceedings in the courtroom the possible consequences of penalties, legal defenses, and possible outcomes, (2) understood the role of key personnel in the courtroom, (3) understood the severity of the charges against him and his legal defenses, (4) was able to communicate with his counsel, and (5) had the capacity to plan legal strategy. Nothing in Dr. Martinez's report specifically controverted any of the aforementioned findings.

(56) The Court finds that Dr. Martinez was a retained defense expert with potential bias, whereas Dr. Flynn was the Court's appointed, neutral expert.

(57) The Court finds that, in light of these considerations, it was reasonably probable that the jury would have viewed Dr. Flynn as more credible than Dr. Martinez.

(58) The Court finds no merit to applicant's contention that Dr. Flynn's conclusion should be discounted because he examined applicant via a translator. The concepts discussed during a competency evaluation are not complex and can be effectively conveyed through an interpreter. It is clear from Dr. Flynn's notes and report that applicant was able to understand and respond to his questions.

(59) The Court finds that, considering the totality of the circumstances, applicant's trial counsel's strategic decision to withdraw the motion suggesting incompetency did not fall outside the wide range of reasonable professional assistance.

(c) Trial counsel were not deficient for failing to discover additional information regarding applicant's competency to stand trial

(60) Applicant also contends that trial counsel failed to discover available information about Lizcano that would have further supported a finding of incompetency. (*See* Writ Application at 33-34).

(61) In support of his claim, applicant attaches an affidavit from Luis Lara Escobedo, a protection officer with the Mexican Consulate of Dallas who was assigned to applicant's case. Mr. Lara visited applicant in the Dallas County Jail days after his arrest in November 2005 and then approximately every two months in 2006 and 2007. In his affidavit, Mr. Lara states that (1) he found it difficult to communicate with applicant, (2) applicant did not understand the legal concepts he tried to explain, and (3) the only question applicant would ask Mr. Lara was when he thought he would get out of jail. Mr. Lara stated that he had contact with Ms. Busbee, but that she did not ask him about his visits with applicant. Mr. Lara made no suggestions to Ms. Busbee about applicant's legal competence. Mr. Lara left for Albuquerque, New Mexico in August 2007 and was no longer in Dallas at the time of applicant's trial. (*See* AWE 6).

(62) Applicant also submits an affidavit from Debbie Nathan, the mitigation investigator, in support of this claim. According to Ms. Nathan, applicant did not seem to understand what was happening in the case. Ms. Nathan stated that applicant would call her during jury selection and when she asked him what happened, he could not tell her. Ms. Nathan also states that applicant did not remember the

questions his lawyers were asking to potential jurors in *voir dire*, and that he told her he was bored in court and did not know what was going on most of the time. (*See* AWE 7).

(63) The Court finds that neither Mr. Lara nor Ms. Nathan's affidavits are credible. Neither took any action until now and neither offered any explanation for the delay. They each had access to applicant's trial counsel prior to trial. Thus, they had prior opportunities to share the information they attested to in their affidavits and/or testimony and as part of applicant's defense team. They should have been motivated to disclose any potentially helpful information in a timely fashion. Therefore, the Court finds that they are not credible.

(64) In any event, the Court finds that Mr. Lara's affidavit is insufficient evidence of incompetency. Mr. Lara does not explicate which alleged legal concepts applicant failed to grasp.

(65) The Court also finds that Ms. Nathan's affidavit is insufficient evidence of incompetency. The only specific examples she provides to indicate that applicant did not understand the legal proceedings were that he could not tell her what happened in the *voir dire* phase of the trial and that he did not remember which questions his attorneys asked in *voir dire*. Competency has never been defined in terms of a defendant's ability to fully comprehend the process of jury selection in a capital trial. Any misconceptions or misunderstandings or even limited comprehension of that stage of trial does not mean that the defendant is incompetent. Further, this information is cumulative of the information contained in Mr. Sanchez's affidavit, which was attached to the

motion suggesting incompetency. Therefore, Ms. Nathan does not provide any additional information regarding competency that was not already before the Court at the time of the motion.

(66) The Court finds that counsel's failure to "discover" what Mr. Lara and Ms. Nathan had to say about applicant's competency did not render counsel's investigation into the issue constitutionally inadequate.

(67) The Court finds that, as his trial lawyers, Ms. Busbee and Mr. Sanchez would have known better than anyone whether applicant was capable of assisting in his defense and understanding the proceedings against him. *See Medina v. California*, 505 U.S. 437, 450 (1992) (stating that "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense").

(68) The Court finds that applicant's trial counsel, who had a front row seat from which to assess applicant's competency themselves and who heard the opinions of two experts regarding applicant's competency, reasonably could have determined that the accounts of Mr. Lara and Ms. Nathan would not have been materially helpful. *See Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989) (noting that counsel's decision to limit her investigation may be reasonable under the circumstances); *Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986) (same).

(69) The Court concludes that applicant fails to show any deficiency in counsel's investigation of his competency to stand trial.

(d) Applicant was not prejudiced because he has not shown there was a reasonable probability he would have been found incompetent to stand trial

(70) The Court finds that even assuming *arguendo* that applicant's trial counsel were deficient in their investigation or pursuit of a competency hearing, applicant cannot show prejudice.

(71) The Court finds that applicant fails to meet his burden to show that, absent counsel's alleged unprofessional errors, it was reasonably likely he would have been found incompetent to stand trial. *See Ex parte Lahood*, Nos. AP-76,873 & AP-76,874, 2013 Tex. Crim. App. LEXIS 938, at *20 (Tex. Crim. App. June 26, 2013) (citing *Strickland*, 466 U.S. at 695).

(72) The Court finds there was no evidence demonstrating that applicant did not understand the proceedings or could not rationally confer with his counsel. Counsel's statements on the record, as well as Dr. Flynn's findings, show the opposite. (RR40: 4-6).

(73) The Court finds that, even if counsel had not withdrawn their motion, it was not reasonably likely applicant would have been found incompetent to stand trial. The record reflects that the Court's expert, Dr. Flynn, and applicant's counsel believed that applicant was competent. (CR: 141-43; RR40: 4-6). Although Dr. Martinez did provide a letter to the Court raising this issue of competency, he told counsel that he was uncomfortable testifying. Because the defense had no evidence to offer to rebut Dr. Flynn's findings, it was not likely a competency trial would have been successful.

(74) The Court finds that, even with the testimony of Dr. Martinez, it is still unlikely applicant would

have been found incompetent to stand trial. Dr. Martinez was a retained and presumably biased defense expert whose opinion was based on his clinical findings that applicant was mildly retarded and had low intellectual capacity, not based on the Texas statutory requirements for evaluating competency. In contrast, Dr. Flynn was a neutral court expert and his exam was conducted in accordance with Texas law. Dr. Flynn's conclusion was based on specific findings regarding what applicant knew about the trial and events in the courtroom.

(75) The Court finds there was no evidence that applicant had a recent severe mental illness, was at least moderately retarded, or had committed truly bizarre acts. As such, applicant did not have evidence sufficient to have triggered this Court's *sua sponte* duty to hold a competency hearing, much less evidence that would have led a rational jury to have found him incompetent. *See Moore*, 999 S.W.2d at 393 (a competency trial is not required unless the evidence is sufficient to create a bona fide doubt in the mind of the judge whether the defendant met the test of legal competence; generally, a bona fide doubt about a defendant's legal competence is raised only if the evidence indicates recent severe mental illness, moderate mental retardation, or truly bizarre acts by the defendant).

(76) Based on the foregoing, the Court concludes that applicant was not prejudiced by counsel's decision to withdraw the request for a competency trial because he has not shown there was a reasonable probability he would have been found incompetent to stand trial.

III. Jury Selection

(77) Applicant contends that trial counsel were ineffective during voir dire for failing to make a meaningful inquiry about whether the venire persons could giving meaningful consideration to mental retardation, mental illness or other mitigating evidence. He argues that the "result of defense counsel's failure to ask meaningful questions about the prospective juror's thoughts, feelings and beliefs about the death penalty, resulted in seating twelve jurors whose thoughts and feelings about the death penalty was [sic] unknown." (*See* Writ Application at 39-40). In support of his claim, applicant refers to the "Affidavit of David Lane," which was not attached as an exhibit to the writ application.

(a) Procedural Bar

(78) The Court finds that applicant has based this claim of ineffective assistance entirely on matters contained within the appellate record, failing to rely on any substantively new evidence derived from the habeas corpus process.

(79) The Court finds that although the record on direct appeal does not usually provide enough evidence to evaluate claims of ineffective assistance of counsel, applicant has expressly limited his claim to matters that the court could evaluate solely from the record and therefore could have raised this claim on direct appeal. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997), *cited with approval in Ex parte Nailor*, 125 S.W.3d 125, 130-31 (Tex. Crim. App. 2004).

(80) The Court concludes that because applicant failed to raise this claim on direct appeal, he is procedurally barred from raising it on habeas review.

(81) Further, the Court finds that applicant did raise several issues pertaining to the jury on direct appeal, specifically whether the trial court erroneously denied several *Batson* challenges and his challenges for cause. Despite claiming that his jury was unlawfully constituted, applicant failed to name either at trial or on appeal a single objectionable juror who sat on his jury. In its opinion on direct appeal, the Court of Criminal Appeals noted applicant's omission. *See Lizcano*, 2010 Tex. Crim. App. Unpub. LEXIS 270 at *15. The Court further overruled all of his jury claims as well as his claim that he was denied a lawfully constituted jury. *Id.* at *23.

(82) The Court finds that, to the extent applicant is claiming that an objectionable juror sat on his panel or that his jury was not lawfully constituted, the Court has already heard and rejected his claims on direct appeal and, therefore, they are not cognizable in this habeas proceeding.

(b) Applicant Fails to Show That Counsel Were Ineffective During Voir Dire

(83) The Court finds that applicant fails to allege sufficient facts in support of his claim that trial counsel were ineffective during voir dire.

(84) Applicant does not assert what jurors were not properly questioned or what questions counsel should have asked. Nor does applicant show that any of the seated jurors could not give meaningful consideration to mental retardation, mental illness or other mitigating evidence. In a habeas proceed-

ing, the applicant must allege sufficient facts, which if true, would entitle him to relief. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Applicant has failed to meet this burden.

(85) In any event, the Court finds that both the State and defense counsel meaningfully inquired into whether the venire could consider mental retardation, mental illness and other mitigating evidence, as well as into the venire's thoughts, feelings and beliefs about the death penalty.

(86) At the outset, the record reflects that the questionnaires posed several questions relevant to mental retardation, mental illness and mitigating evidence:

(a) The law in Texas further provides that evidence of intoxication may be considered in mitigation of punishment. Do you agree with this law?

(b) Would a person's use of drugs or alcohol at the time of the offense automatically prevent you from assessing the death penalty if you found him guilty of capital murder?

(c) Have you, any family member or close personal friend ever undergone counseling or treatment for emotional, psychiatric, behavioral or substance abuse (alcohol or drug) problems?

(d) What are your feelings, either positive or negative, about psychiatrists, psychologists or other mental health professionals?

(e) How would you feel about a psychiatrist, psychologist, or other mental health professional testifying in a capital murder case as an expert witness?

(f) Do you know anyone who has been diagnosed as a person with mental retardation?

(g) Some people feel genetics, circumstances of birth, upbringing and environment should be considered when determining the proper punishment of someone convicted of a crime. What do you think? (Attach juror questionnaire?)

(87) In addition, the first four pages of the questionnaire, under the heading "DEATH PENALTY," fully vetted the prospective jurors' thoughts, feelings, and beliefs about the death penalty, posing questions including, but not limited to:

(a) If you are in favor of the death penalty in some cases, do you agree that a life sentence, rather than the death penalty, would be appropriate under the proper circumstances in some cases?

(b) Do you have any moral, religious or personal beliefs that would prevent you from returning a verdict which would result in the execution of another human being?

(c) The best argument for the death penalty is …

(d) The best argument against the death penalty is …

(e) For what crimes do you think the death penalty should be available in Texas?

(f) Do you agree with the law in the State of Texas that says a murder (taking a life intentionally or knowingly without justification) of a police officer who is acting in the lawful discharge of an official duty is a capital offense for which the death penalty may be imposed?

(g) Do you think there are some crimes which call for the death penalty solely because of their severe facts and circumstances, regardless of whether or not the guilty person has committed prior violent acts?

(h) If you believe in the death penalty, how strongly, on a scale of 1-10 do you hold that belief? (1 being least and 10 being the most)

(i) Do you think the death penalty is a deterrent to other criminals?

(j) Do you feel the death penalty in Texas is used too often or too seldom? Please explain.

(k) Do you think the death penalty is ever misused?

(l) Are your views on the death penalty different from your spouse or a close family member's views?

(m) Have you or your spouse's or close family member's views on the death penalty changed in the past five years?

(n) Have you ever watched any TV shows or movies or read any books or articles dealing with the death penalty or life on death row?

(o) How did those shows, movies, books, or articles influence your opinion about the death penalty?

(p) Do you believe in "an eye for an eye"?

(88) During individual voir dire, the State questioned every venire person regarding whether they could give meaningful consideration to mental retardation, mental illness or other mitigating evidence. Therefore, every juror was questioned on these topics. (WRR4: 117).

(89) The record reflects that defense counsel also questioned every juror who was seated on these topics except for two jurors—jurors Timothy Rau (Juror #252) and Thomas Cheatham (Juror #570)—who were not questioned regarding mental retardation. (RR15: 125-28; RR29: 160-70).

(90) At the writ hearing, defense counsel testified that she had reviewed the individual voir dire of these two jurors. (WRR4: 13, 116). She explained that they did not question them on this topic because (1) they liked the jurors and did not need any further information regarding their views on this issue, (2) they felt the State had already covered the topic in enough detail, and (3) they did not want to irritate the juror by spending needless time going over the same topic again. (WRR4: 116-17).

(91) The Court finds that counsel's decision not to question these two jurors regarding mental retardation was reasonable.

(92) The Court finds that counsel's questioning of all twelve jurors was not deficient and that it did not prejudice applicant's defense.

(93) The Court concludes that applicant received effective assistance of counsel during jury selection.

IV. Change of Venue

(94) Applicant contends that trial counsel were ineffective for failing to move for a change of venue due to prejudicial pretrial publicity. This allegation is raised solely in a footnote in relation to applicant's fourth ground for relief. (*See* Writ Application at 49, n.12).

(95) Failure to file pretrial motions, in itself, does not result in ineffective assistance of counsel. Counsel's failure to file a pretrial motion does not render coun-

sel ineffective unless applicant shows that the motion had merit and that a ruling on the motion would have changed the outcome of the case. *See Roberson v. State*, 852 S.W.2d 508, 510-12 (Tex. Crim. App. 1993).

(96) Applicant does not brief this claim, cite any relevant case law, or offer any proof in support of his allegations. As such, he fails to allege sufficient facts, which if true, would entitle him to relief on his claim that trial counsel were ineffective for failing to move for a change of venue. *Maldonado*, 688 S.W.2d at 116.

(97) In any event, the Court finds that counsel were not ineffective for not requesting a change of venue.

(98) The Court finds that counsel were not deficient because a motion for change of venue had no merit. The pretrial publicity in this case was not so pervasive, prejudicial or inflammatory to warrant a change of venue. *See Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007) (the mere existence of media attention or publicity is not enough, by itself, to merit a change of venue; a defendant must show that the publicity was pervasive, prejudicial, and inflammatory). Moreover, the jury questionnaires canvassed the jury on this topic before the parties began individual voir dire. Counsel testified at the writ hearing that the vast majority of venire persons summoned for jury duty in this case did not remember the facts of the offense or the prior media attention. (WRR4: 117-19). Counsel's assertions are supported by the record. Therefore, the Court finds there were no grounds for requesting a change of venue.

(99) Furthermore, the Court finds that such a request would have been rightfully denied. Therefore, counsel's decision not to file such a motion did not prejudice applicant's defense.

(100) The Court concludes that counsel were not ineffective for failing to request a change of venue.

V. Punishment Phase

(101) Applicant contends that he was denied the effective assistance of counsel during the punishment phase. (*See* Writ Application at 67-81).

(102) Under both current Supreme Court standards and Texas statutes, defense counsel has a constitutional duty to seek out all of the circumstances of the offense, the defendant's character and background, and any evidence that lessens the personal moral culpability of the defendant. *See Ex parte Gonzales*, 204 S.W.3d 391, 400 (Tex. Crim. App. 2006) (Cochran, J., concurring) (citing *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), *Wiggins*, 539 U.S. at 521, and Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(l) (West Supp. 2012)).

(103) Because counsel is hamstrung by finite resources and time, reviewing courts should give great deference to capital counsel's strategic and tactical decisions regarding the further investigation, development, and use of potential mitigating evidence. *Gonzales*, 204 S.W.3d at 401.

(104) When defense counsel realizes the possible issues regarding his client's mental capacity and the need for expert assistance, and if counsel employs an expert at trial, counsel is not ineffective for failing to canvass the field to find a more favorable expert. *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). Defense counsel is also not required to pursue every

path until it bears fruit or until all conceivable hope withers. *Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999).

(105) Determining whether prejudice exists in the context of a failure-to investigate claim relating to the punishment phase requires courts to evaluate the totality of the evidence in determining whether, if the jury had been confronted with the uninvestigated evidence, there is a reasonable probability it would have returned a different sentence. *Ex parte Briggs*, 187 S.W.3d 458, 470 n.37 (Tex. Crim. App. 2005) (citing *Wiggins*, 539 U.S. at 536).

(a) Trial Counsel's Strategy for Mitigation

(106) The Court finds that applicant fails to present evidence sufficient to rebut the presumption that counsel's strategy during the punishment phase was reasonable.

(107) Defense counsel hired Debbie Nathan to work as the mitigation investigator in applicant's case. (WRR4: 101, 154-55; WRR7: 11). Ms. Nathan was highly recommended by MCLAP and received support and guidance from them throughout her investigation of applicant's case. (WRR4: 102, 196; WRR7: 8-9). Ms. Nathan speaks Spanish and has an extensive background in Mexican culture, which made her particularly qualified for applicant's case. (WRR7: 8-9). Prior to and during her employment in applicant's case, Ms. Nathan attended three separate training seminars on mitigation investigation. (*See* AWE 85; WRR7: 9-10).

(108) Ms. Nathan worked closely with the defense team prior to and during trial, and her work on the case was extensive. Ms. Nathan travelled to Mexico several times, interviewed numerous people, and generated mitigation reports exhaustive in both number and content. (*See* AWE 99). Her investigation covered every facet of applicant's life, including his background, character, family, childhood, poverty, malnutrition, education, child abuse and neglect, depression, substance abuse, ostracism for being illegitimate, immigration and its related stressors, employment both in Mexico and the United States, mental retardation (intellectual functioning and adaptive skills and deficits), medical history, family mental health history, social skills and romantic relationships. (*See* AWE 99). Essentially, Ms. Nathan left no stone unturned. Defense counsel, as well as many of the experts, characterized Ms. Nathan's work as very thorough. (WRR4: 102, 105, 204; WRR6: 47; WRR8: 80-81).

(109) The Court finds that Ms. Nathan was qualified to work as applicant's mitigation investigator and that her investigation was more than adequate. Based on the record before it, the Court finds that Ms. Nathan's assertions that the mitigation investigation was inadequate or lacking are not credible.

(110) The Court finds the defense punishment phase themes at trial included mental retardation, applicant's impoverished upbringing in rural Mexico, applicant's status as an illegitimate child, and evidence that applicant would not be a future danger.

(111) The defense presented evidence of applicant's mental retardation through the testimony of several witnesses, including: Aleida Reyes Lucio (applicant's childhood teacher), Jessica Barron (applicant's ex-girlfriend), Reyes Lizcano Ruiz (applicant's brother), Veronica Llanas Bandas (applicant's cousin by marriage), Marta Cruz (applicant's ex-girlfriend), Juan Lizcano Aguirre (applicant's cousin), Mario Alvarez (applicant's former co-worker), Jose Luis Uribi (applicant's boss), Dr. Antonio Puente and Dr. Kristi Compton.[6] (RR49: 115-130, 141-68; RR52: 56-62, 76-82; RR53: 19-80; RR54: 27-86; RR56: 19-134).

(112) The defense presented evidence of applicant's impoverished childhood, lack of education, malnutrition, and deplorable living conditions during his upbringing in rural Mexico through several witnesses, including: Rosa Maria Rodriguez Rico (a nurse and family acquaintance), Alejandra Ruiz Campos (applicant's mother), Reyes Lizcano Ruiz (applicant's brother), Josefina Sandoval Aguirre (applicant's aunt), and Juan Lizcano Aguirre (applicant's cousin). (RR49: 131-139; RR52: 25-55, 70-75).

(113) The defense presented evidence of applicant's status as an illegitimate child through testimony from his sister, Lucia Lizcano Ruiz. (RR52: 63-69).

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[6] Although the defense's additional mental retardation expert, Dr. Gilbert Martinez, was unavailable to testify at trial, his findings were thoroughly discussed by the other doctors and made known to the jury. (*See* Applicant's Trial Exhibit 114; AWE 3).

(114) Finally, the defense presented evidence that applicant was not a future danger through testimony from Detention Officer Deveesh Amin and experts Dr. Jonathan Sorenson and Dr. Mark Vigen. (RR53: 7-18; RR55: 68-182).

(115) The Court finds these themes were sound, well-investigated, and well-developed at trial.

(116) The Court finds that the defense team's investigation, strategy and presentation of punishment evidence was not deficient and did not prejudice applicant's defense.

(b) Mental Retardation

Adaptive Deficits

(117) Applicant claims that counsel did not discover and present critical and readily available evidence of adaptive deficits from some of the witnesses who were brought from Mexico. (*See* Writ Application at 72-76).

(118) Ms. Nathan prepared memos outlining a number of individuals who could offer testimony during the punishment phase of applicant's trial. Counsel testified at the writ hearing that they met and extensively discussed what evidence each of these individuals could offer and which ones they should call as witnesses. Once the witnesses were brought from Mexico, counsel talked to each one of them at the hotel to make the final decision on who they would call as witnesses. They then met with each witness individually to prepare and thoroughly discuss the topics they would be covering in their trial testimony. (WRR4: 54-55, 62, 97-98, 183, 199-201). This process is evidenced by the work

product generated by defense counsel. (*See* SWE's 1, 4).

(119) Counsel testified at the writ hearing that there were some delays during the trial and they got the sense that the jurors were getting tired, so they had to change their strategy and shorten their presentation of some of their witnesses mid-trial. (WRR4: 206-08). The Court finds, based on their extensive experience as trial attorneys, it was reasonable for counsel to adjust their strategy in this regard.

(120) The Court finds that counsel's investigation into applicant's adaptive deficits was not deficient. The sufficiency of the defense team's investigation into applicant's adaptive behavior is evidenced by the voluminous mitigation reports and the fact that three defense experts found this evidence sufficient to diagnose applicant as mentally retarded.

(121) The Court finds that applicant fails to show that counsel's preparation and strategy for calling lay witnesses to testify regarding applicant's adaptive deficits was deficient.

(122) The Court also finds that applicant has not shown there is a reasonable probability that, absent counsel's failure to present additional adaptive deficit evidence, the jury would have answered the special issues differently.

(i) Jose Reyes Lizcano Ruiz

(123) Applicant complains that counsel failed to elicit during the trial testimony of his brother, Jose Reyes Lizcano Ruiz ("Reyes"), information regarding his adaptive deficits such as his diffi-

culties in caring for animals, his inability to plow on a horse, his inability to fix a bicycle and his lack of knowledge about the rules of volleyball. (*See* Writ Application at 73-74, AWE 45).

(124) The Court finds that applicant fails to show that counsel's presentation of Reyes' testimony was deficient or that it prejudiced applicant's defense.

(125) While counsel did not elicit this particular evidence from Reyes, the record reflects that counsel did elicit other relevant adaptive deficit information from him. Of extreme importance was Reyes' testimony regarding applicant's inability to make correct change when working at the community store in their village.

(126) The record is silent as to whether Reyes is one of the witnesses whose direct examination was shortened as a matter of trial strategy after counsel's observation of the jury and their reaction to the testimony. (WRR4: 206-08). To the extent that this information was not elicited due to counsel's strategic decision to shorten Reyes' testimony, the Court finds that this strategy was reasonable.

(127) Even if counsel's failure to elicit such information from Reyes could be viewed as deficient, applicant's defense was not prejudiced because the jury heard ample other evidence of applicant's adaptive deficits and it is highly unlikely that such information would have made a difference in their resolution of special issue number one.

(128) Additionally, the Court observed the testimony of Reyes at the writ hearing. His testimony was slow, offered through the use of a translator, and took a great deal of time to elicit even the smallest amount of information. The Court recalls that it took over an hour to present only one-third of the testimony that writ counsel planned to so offer from him. Based on its observations and its recollection of the testimony, both at trial and at the writ hearing, the Court finds that counsel's strategy in presenting Reyes' testimony at trial was reasonable and did not prejudice the defense.

(129) Therefore, the Court finds that counsel was not ineffective in their presentation of Reyes' testimony during the punishment phase.

(ii) Florencio Lizcano Ruiz

(130) Applicant next complains that counsel failed to call as a witness his brother, Florencio Lizcano Ruiz, who could have testified regarding his adaptive deficits such has his struggles with controlling the animals, his inability to lay cement, and his lack of knowledge of the rules of volleyball. (*See* Writ Application at 74-75, AWE 42).

(131) The Court finds that applicant fails to show that counsel's decision not to call Florencio as a witness was deficient or that it prejudiced applicant's defense.

(132) The Court finds that Florencio was one of the potential witnesses brought to Texas from Mexico for the trial. During counsel's interactions and trial preparation with Florencio at

the hotel, he was intoxicated, and counsel decided that he would not make a good punishment witness. (WRR4: 53-55, 201-02). This assessment is supported by the mitigation reports prepared by Ms. Nathan, which discuss applicant's brothers' drinking problems. (*See* AWE 99).

(133) The Court finds that counsel's decision not to call Florencio as a witness based on their observations and concerns was reasonable. Further, the Court finds that applicant was not prejudiced by counsel's decision not to call Florencio because, if he had been intoxicated or out of control during his testimony as counsel feared, his testimony would not have benefitted applicant.

(134) Even if counsel's decision not to call Florencio as a witness could be viewed as deficient, applicant's defense was not prejudiced. Florencio's testimony was cumulative of the other evidence of applicant's adaptive deficits offered. Additionally, the defense would have faced the same struggles in presenting Florencio's testimony as it did in presenting Reyes' testimony. It is highly unlikely that such information would have made a difference in the jury's resolution of special issue number one.

(135) Accordingly, the Court finds that counsel were not ineffective for deciding not to call Florencio as a witness.

(iii) Aleida Reyes Lucio

(136) Applicant also complains that counsel failed to elicit from applicant's teacher, Aleida Reyes

Lucio, during her trial testimony that a student could have attended her school and graduated without being identified as mentally retarded. (*See* Writ Application at 75-76).

(137) The Court finds that applicant fails to prove that counsel's failure to elicit this particular testimony from Ms. Lucio was deficient or prejudiced his defense. It was obvious from Ms. Lucio's testimony describing the primitive nature of applicant's school that they did not have the resources or procedures in place to diagnose a student with mental retardation. Counsel recognized this very fact during closing argument. (RR58: 29). Further, Ms. Lucio's testimony established that, even absent such a formal diagnosis, applicant's cognitive deficits existed during his childhood, as she testified that his learning was "very slow" compared to the other children and that he only graduated because he was too old.

(138) The Court finds that counsel's presentation of Ms. Lucio's testimony was not deficient and did not prejudice applicant's defense.

(iv) Truck Payments

(139) Last, applicant complains that counsel failed to present evidence that he needed assistance from Marta Cruz in making his truck payments each week. (*See* Writ Application at 76-77, AWE 46).

(140) The record does not contain any information regarding applicant's adaptive deficits in making his truck payments. However, even assuming trial counsel were deficient for failing to

present such evidence, this deficiency did not prejudice applicant's defense.

(141) Both sides presented evidence regarding applicant's adaptive strengths and deficits in handling money. Evidence of his adaptive deficits included: Reyes' testimony that applicant could not make correct change when working at the community store; Jessica Barron's testimony that applicant never counted his change after paying for dinner; Marta Cruz's testimony that applicant paid too much for his truck; and Mario Alvarez's testimony that one of applicant's cousins helped him each week divide up his paycheck and figure out how much money to send home. Evidence of applicant's adaptive strengths in handling money included: testimony showing that he reliably sent significant amounts of money and other items to assist his family; Marta's testimony that he paid his cell phone bill every month; and Jose Uribi's testimony that applicant knew exactly how many hours he had worked each week and how much he was going to get paid.

(142) In light of the evidence showing both skills and deficits in handling money, the Court finds that applicant was not prejudiced by counsel's failure to present evidence that Marta helped applicant make his truck payments because it is unlikely that such information would have tipped the scale and made a difference in the jury's resolution of special issue number one.

(143) Therefore, the Court finds that counsel were not ineffective for failing to present evidence

that applicant needed assistance from Marta Cruz in making his truck payments each week.

(144) Based on the foregoing, the Court concludes that counsel's preparation and strategy for calling lay witnesses to testify regarding applicant's adaptive deficits was not deficient and did not prejudice applicant's defense.

Evidence of MR in Paternal Family

(145) Applicant also claims that counsel did not investigate evidence of cognitive deficits and possible mental retardation in applicant's paternal family. (*See* Writ Application at 77-79).

(146) Applicant claims that his biological father was Alberto Salazar, not Sabino Lizcano Lopez.

(147) The Court finds that applicant has failed to prove by a preponderance of the evidence that his father was Alberto Salazar. Applicant hired the DNA Diagnostics Center ("DDC") to perform siblingship DNA testing in this case.[7] (WRR6: 118-21). At best, the DNA testing submitted by applicant only shows that applicant and his younger sister, Lucia, share the same father and that their father is not the same man who fathered applicant's older brothers, Florencio and Reyes. (WRR6: 121, 131-36; AWE 113). The testing does not affirmatively show who applicant's father is.

(148) The Court finds that, even if Alberto Salazar was applicant's father, applicant fails to prove

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[7] Applicant was not able to have a paternity test performed because both Sabino Lizcano Lopez and Alberto Salazar are deceased. (WRR6: 121).

that evidence of MR existed in the Salazar family or show how such evidence is relevant to applicant's claim of MR. Applicant does not show that his alleged father, Alberto Salazar, suffered from MR. Applicant does offer evidence that some individuals in the extended Salazar family suffer from cognitive and neurological impairments; however, this evidence was obtained primarily by interviewing family members and examining photographs, not by medical diagnosis or review of medical records. (WRR6: 170-75). Additionally, even assuming that such impairments do exist in applicant's extended paternal family, he has not shown the relevance of this evidence. Applicant offers no scientific research or evidence demonstrating that the fact that individuals in his extended paternal family may have cognitive or neurological impairments make it more likely that he is a person that suffers from MR. He wholly fails to establish a genetic link between the alleged impairments and his alleged MR.

(149) Further, even assuming *arguendo* both the veracity and relevance of this evidence, the Court finds that applicant has not shown that counsel's failure to present such evidence was deficient.

(150) The record reflects that the defense conducted an extensive investigation in this case and offered a tremendous amount of evidence in support of their MR claim. The record is silent as to counsel's reasons for not presenting additional evidence of cognitive deficits and possible MR in applicant's extended paternal family. In light of the silent record and counsel's thorough investigation, applicant has not overcome

the presumption that counsel's decision not to present such evidence was reasonable. *See Gonzales*, 204 S.W.3d at 401 (because counsel is hamstrung by finite resources and time, reviewing courts should give great deference to counsel's strategic and tactical decisions regarding further investigation, development and use of potentially mitigating evidence); *Patrick*, 906 S.W.2d at 495 (because a reviewing court will indulge a strong presumption that counsel's performance was reasonable, a strategic choice made after a thorough investigation is practically unassailable).

(151) The Court also finds that applicant has not shown there is a reasonable probability that, absent counsel's failure to present this additional evidence, the jury would have answered the special issues differently.

(152) A jury canvas conducted at the direction of appellate counsel reflects that the jury's decision regarding the mental retardation special issue was based primarily on evidence of applicant's adaptive strengths and daily functioning. (*See* SWE6). As such, additional evidence of cognitive deficits or possible MR in applicant's paternal family would not have changed their decision.

(153) The Court finds that the evidence defense counsel presented a trial was directly relevant to and indicative of applicant's cognitive deficits and daily living skills, whereas the proposed evidence of cognitive deficits and possible MR in his extended paternal family was not as relevant and specific to applicant as what

was presented to the jury. As such, nothing about this evidence indicates it would have altered the jury's answers to the special issues.

(154) Applicant contends that Cruz Jose Zuniga Gonzalez could have testified about several family members on applicant's paternal side with cognitive deficits and possible mental retardation. The defense team planned to call Cruz as a witness and attempted to bring him to the U.S. for applicant's trial, but he was not allowed to enter the U.S. because he had failed to disclose to the defense team that he had been previously deported. (WRR7: 56-58). Because Cruz was unavailable to testify due to no fault of the defense, counsel was not ineffective for not calling him as a witness.

(155) The Court finds that counsel's failure to present additional MR evidence was not deficient and did not prejudice the defense.

(c) Alcohol Abuse

(156) Applicant contends that trial counsel failed to investigate and present evidence that applicant suffered from "alcohol abuse" at the time of the crime, a condition which further compounded his cognitive deficits. (*See* Writ Application at 79-81).

(157) The Court finds that applicant fails to show that trial counsel were deficient in their investigation or presentation of evidence of applicant's alcohol use or that it prejudiced applicant's defense.

(158) The Court finds that there was no evidence at the time of trial that applicant met the criteria

to be diagnosed as an alcoholic or person suffering from alcohol abuse. Counsel retained numerous experts, including four psychologists, who all thoroughly examined applicant. None of these experts diagnosed applicant as an alcoholic. (RR4: 68, 108, 124, 199). In fact, Dr. Martinez specifically found that applicant did not qualify for a diagnosis of alcohol abuse and that the reported duration of alcohol use was insufficient to contribute to his cognitive or intellectual impairments. (*See* AWE 3 at 15; WRR4: 109).

(159) Ms. Busbee testified at the writ hearing that if any of her experts believed that applicant suffered from any disorder listed in the DSM-IV, they would have included that in their report. (WRR4: 108-09). She also stated if one of her experts would have diagnosed applicant as an alcoholic, she would have pursued that evidence. (RR4: 68, 108-09).

(160) The Court finds that trial counsel cannot be deemed ineffective for failing to present evidence that did not exist.

(161) The Court finds that counsel did present evidence of applicant's "binge drinking" or frequent alcohol use throughout the trial. Counsel presented this evidence in a way that was truthful and most useful to their defensive strategy. (WRR4: 109).

(162) The Court finds that counsel's strategic decision not to make applicant's alcohol use a major theme of their mitigation case was reasonable.

(163) Lead counsel, Ms. Busbee, testified at the writ hearing that, if they would have emphasized applicant's alcohol use at punishment, the State could have used this information to explain or negate their presentation of adaptive deficits. (WRR4: 108). She explained, for example, that applicant's inability to read a clock or remember the yard he was assigned to mow could have been attributed to his drunkenness rather than adaptive deficits. (WRR4: 108).

(164) Co-counsel, Mr. Sanchez, testified regarding the same concerns and stated that, in light of mental retardation, evidence of applicant's alcohol use was a "double-edged sword" and they had to "balance" their use of such evidence. (WRR4: 178, 199).

(165) The Court finds that, because mental retardation was the centerpiece of the defense's punishment case, it was reasonable for counsel to forego presenting any evidence that would minimize, explain or negate their evidence of adaptive deficits.

(166) The Court finds that counsel's investigation and presentation of evidence of applicant's alcohol use was not deficient and did not prejudice applicant's defense.

(167) In his writ application, applicant has presented new evidence showing that applicant suffers from "alcohol abuse." Dr. Pablo Stewart, a clinical and forensic psychiatrist, reviewed mitigation reports, trial testimony and affidavits from family members and formed the opinion that, at the time of the offense, applicant suffered from Cognitive Disorder NOS, Mental Retardation,

and Alcohol Abuse. According to Dr. Stewart, applicant defaulted to the use of alcohol to deal with the stresses of his life after immigrating to the United States, which only further compounded his documented cognitive deficits. (*See* AWE 52 at pp.18-19). Subsequent to the filing of the writ application, Dr. Stewart interviewed applicant in-person to conduct a more comprehensive forensic mental health evaluation. After his in-person evaluation of applicant, Dr. Stewart also opined that applicant was very likely suffering from Major Depressive Disorder and Posttraumatic Stress Disorder (PTSD) at the time of the offense. At the writ hearing, Dr. Stewart testified that applicant's depressive and traumatic disorders, coupled with alcohol dependence, all contributed to a further deterioration of his underlying cognitive impairment. (WRR7: 165, 176-77; *See* AWE 116 at pp.25-26). Dr. Stewart's diagnoses of Cognitive Disorder NOS, Depressive Disorder and Mental Retardation are the same as defense experts who evaluated applicant prior to trial; thus, the only new evidence he offers is his diagnoses of alcohol abuse and PTSD.

(168) The Court finds that counsel were not deficient for failing to discover a doctor, such as Dr. Stewart, who could or would diagnose applicant with alcohol abuse after one of their experts, Dr. Martinez, told them that applicant did not qualify for a diagnosis of alcohol abuse. (*See* AWE 3). Counsel were not required to canvass the field for a more favorable opinion on alcohol abuse. *See Dowthitt*, 230 F.3d at 748 (when defense counsel realizes the possible issues re-

garding his client's mental capacity and the need for expert assistance, and if counsel employs an expert at trial, counsel is not ineffective for failing to canvass the field to find a more favorable expert).

(169) The Court also finds that applicant's defense was not prejudiced by the failure to present evidence that applicant suffered from alcohol abuse. Had counsel obtained an expert, such as Dr. Stewart, to present such testimony, this would have created a credibility issue because it would have conflicted with the opinions of their other experts who did not diagnosis applicant with alcohol abuse or who specifically stated that he did not qualify for such a diagnosis. Further, as counsel acknowledged during the writ hearing, evidence of alcohol or substance abuse "cuts both ways" and could have been viewed by the jury as aggravating rather than mitigating. *See, e.g.*, *Callins v. Collins*, 998 F.2d 269, 278 (5th Cir. 1993) (evidence of drug use cuts both ways and could appear to be more aggravating than mitigating).

(170) The Court concludes that counsel's failure to present expert testimony about alcohol abuse was not deficient and did not prejudice applicant's defense.

(171) The Court limits its findings of fact and conclusions of law to the issues and allegations actually alleged in applicant's original writ application filed on December 23, 2009. To the extent applicant attempted to raise additional claims of ineffective assistance of counsel during the writ hearing or in subsequent pleadings filed in

this matter, the Court does not consider those claims.

VI. Conclusion

(172) The Court finds that applicant's trial counsel acted consistent with reasonable trial strategy.

(173) The Court finds no deficiency on the part of counsel that prejudiced the defense.

(174) The Court finds that counsel rendered effective assistance of counsel.

(175) Based on the foregoing, applicant's first, third and seventh grounds for relief are without merit and are denied.

Ground 2: Court's Failure to Hold Competency Trial

(176) In ground two, applicant claims that he was denied due process of law in violation of the Fifth and Fourteenth Amendments by the Court's failure to *sua sponte* hold a competency hearing. (*See* Writ Application at 35-39).

(177) The conviction of an accused person while he is legally incompetent violates due process. *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *McDaniel v. State*, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003). To protect a defendant's constitutional rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised. *Pate*, 383 U.S. at 378; *McDaniel*, 98 S.W.3d at 709. These due process standards are built into the Texas Code of Criminal Procedure. *McDaniel*, 98 S.W.3d at 709; *see also generally* Tex. Code Crim. Proc. Ann. art. 46B (West 2006).

(178) As previously discussed, once the issue of competency is raised, the trial court shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent. Tex. Code Crim. Proc. art. 46B.004(a),(c). If after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order a competency examination and empanel a jury to conduct a competency trial. Tex. Code Crim. Proc. Ann. art. 46B.005(a), (b).

(179) A competency trial is not required unless the evidence is sufficient to create a bona fide doubt in the mind of the judge whether the defendant meets the test of legal competence. *Moore*, 999 S.W.2d at 393. Generally, a bona fide doubt about a defendant's legal competence is raised only if the evidence indicates recent severe mental illness, moderate mental retardation, or truly bizarre acts by the defendant. *Id.* at 395.

(180) The trial court is not required to hold a competency trial if neither party requests a trial on that issue, neither party opposes a finding of incompetency, or the court does not, on its own motion, determine that a trial is necessary. Tex. Code Crim. Proc. Ann. art. 46B.005(b), (c).

(a) Procedural Bar

(181) It is well settled that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal. *Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1996) (op. on reh'g) (quoting *Ex parte*

Goodman, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991)); *see also Ex parte Groves*, 571 S.W.2d 888, 890 (Tex. Crim. App. 1978) (noting that habeas corpus does not lie as a substitute for a direct appeal).

(182) The Court finds that applicant could have raised his due process claim on direct appeal because it is based solely upon facts and evidence contained in the trial record. Specifically, applicant's claim is based on the facts that (1) applicant's trial counsel raised the issue of his competency prior to trial and sought a jury determination on the issue, and (2) a defense expert who examined applicant wrote a letter to defense counsel expressing his opinion that applicant did not have "sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding, nor does he have a rational or factual understanding of the proceedings against him." Each of the foregoing was in the record on appeal. (CR: 110-15, 139-40; RR40: 4). Also contained in the record on appeal is the report of the examination of the expert appointed by this Court—Dr. William Flynn. (CR: 141-43).

(183) There is no valid reason why applicant could not have raised this claim on direct appeal. Indeed, the Court of Criminal Appeals has shown that it is rather capable of examining procedural incompetency claims on direct appeal. *See, e.g.*, *Fuller v. State*, 253 S.W.3d 220, 228-29 (Tex. Crim. App. 2008); *McDaniel*, 98 S.W.3d at 711-13; *Moore*, 999 S.W.2d at 392-97.

(184) Because applicant could and should have raised his due process claim on direct appeal, but did not, the claim is procedurally barred from being raised on habeas. *Gardner*, 959 S.W.2d at 199.

(b) The trial court did not violate applicant's due process rights by failing to sua sponte hold a competency trial

(185) The Court finds that applicant fails to show the Court violated his due process rights by not holding a competency trial.

(186) The record shows that, once the issue of competency was raised by counsel's motion, the Court conducted an informal inquiry into applicant's competency. (RR38: 18-25). The court also appointed an expert to examine applicant and informed the parties that it planned to have a competency trial by jury on September 25, 2007. (CR: 132-33; RR38: 25-26).

(187) The Court finds that applicant's due process rights were protected by the Court's inquiry into applicant's competency. *See Pate*, 383 U.S. at 378 (to protect a criminal defendant's constitutional rights, a trial court must inquire into the accused's mental competence once the issue is sufficiently raised).

(188) The Court finds that applicant's due process rights were also protected by the Court's compliance with Texas' statutory requirements. *See* Tex. Code Crim. Proc. Ann. arts. 46B.004(a),(c), 46B.005(a),(b); *McDaniel*, 98 S.W.3d at 709 (the due process standards explained by the Supreme Court in *Pate* are built into the Texas Code of Criminal Procedure).

(189) The Court finds that no competency trial was ultimately held because counsel made a strategic decision not to proceed with a competency trial. The record reflects that, the day the competency trial was scheduled, Ms. Busbee stated on the record her belief that applicant was competent to stand trial and withdrew her request for a competency trial. (RR40: 4-5). Because Ms. Busbee was applicant's lead counsel and would know better than anyone whether applicant was capable of assisting in his defense and understanding the proceedings, it was reasonable for the Court to rely on counsel's opinion regarding applicant's competency. *See Medina*, 505 U.S. at 450. In addition, counsel's assertions were supported by the Court's own observations. *See Luna v. State*, 268 S.W.3d 594, 598-600 (Tex. Crim. App. 2008) (after an informal inquiry, the defendant was not denied due process by the court's determination that he was competent to stand trial based on his own personal observation of the defendant, as well as counsel's statements to the court that the defendant had a rational and factual understanding of the proceedings, was able to assist in his defense, and was mentally competent to enter a guilty plea).

(190) The Court incorporates the fact findings and conclusions made above in paragraphs 29 through 76, where they are relevant to this inquiry.

(191) The Court finds that the facts and evidence known to the Court were insufficient to create a bona fide doubt regarding applicant's competence to stand trial. The Court, applicant's at-

torneys, Dr. Flynn and Dr. McGarrahan all believed that applicant was competent to stand trial. There was no evidence that applicant had a recent severe mental illness, that he was moderately to severely mentally retarded, or that he had committed truly bizarre acts. *See Moore*, 999 S.W.2d at 395. As such, due process did not require any further action from the Court. *Id.* at 397 (citing *Drape v. Missouri*, 420 U.S. 162, 173, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975) and *Pate*, 383 U.S. at 385) (trial court not required to conduct a competency hearing where the record supports the trial judge's conclusion that there was no bona fide doubt as to the defendant's competency to stand trial).

(192) Accordingly, this Court concludes that it did not violate applicant's constitutional due process rights by not *sua sponte* conducting a competency hearing.

(193) The Court finds that applicant's second ground for relief is without merit and is denied.

Ground 4: Pretrial Publicity

(194) In his fourth ground for relief, applicant claims that he was denied his Sixth and Fourteenth Amendment right to a fair trial because extensive pretrial publicity rendered it impossible for an impartial jury to be seated in Dallas County. (*See* Writ Application at 40-49).

(195) In support of his claim, applicant has submitted twenty-eight news articles. Twenty-one of these articles were published within the two months following Officer Jackson's death, from November 14, 2005 to January 10, 2006. (*See*

AWE 4, 8, 9-24, 32, 34-35). Three articles from 2006 and one from 2007 pertained to different topics altogether and merely referenced Officer Jackson's murder. (*See* AWE 25-28). The final three articles from September of 2007 provide an accurate and objective account of the competency litigation that occurred just prior to trial. (*See* AWE 29-31).

(196) Applicant has also submitted an affidavit from his Mexican consular protection officer, who recalled seeing a billboard depicting the victim near the courthouse. He could not remember exactly when he saw the billboard, but estimated it was sometime between August 2006 and May 2007. (*See* AWE 6).

(197) On January 9, 2006, applicant requested that the Court issue a gag order due to the media attention the case was receiving. The Court denied this request, noting that it was reluctant to grant a gag order where there was no evidence the media attention had "gone wrong so far." (RR2: 4-7). The Court also noted that the trial would not be starting for some time and the media coverage would likely die down between now and then. (RR2: 6-7). The Court advised applicant that, if any problems with the media did arise at a later time, he should bring it to the Court's immediate attention and reurge his motion. (RR2: 6-7).

(198) The Court finds that there was a considerable delay between this pretrial hearing on January 9, 2006, and the start of trial. The record reflects that jury selection was conducted June

15, 2007 to September 6, 2007, and applicant's trial began on October 1, 2007.

(199) The record reflects that the second page of the juror questionnaire contained a "media question" agreed upon by the parties. Specifically, it provided detailed information about the offense, the applicable law regarding media coverage, and asked the prospective jurors whether they remembered the case. (WRR4: 117-18; *See* juror questionnaires at p. 2).

(200) Defense Counsel testified at the writ hearing that, by the time they held the big panel in this case in June of 2007, the vast majority of the panel did not remember the case. (WRR4: 117-18).

(a) Procedural Bar

(201) A change of venue is the remedy to jury prejudice resulting from widespread inflammatory news coverage and is available to assure an accused a fair trial when extensive news coverage has raised substantial doubts about obtaining an impartial jury. *See Phillips v. State*, 701 S.W.2d 875, 879 (Tex. Crim. App. 1985); *Henley v. State*, 576 S.W.2d 66, 71 (Tex. Crim. App. 1978); *see also* Tex. Code Crim. Proc. Ann. art. 31.03(a)(l) (West 2006) (providing that a change of venue may be granted if the defendant establishes that there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial).

(202) The Court finds that applicant did not file a motion to change venue in this case, nor did he

raise his complaint regarding inflammatory news coverage at any time during jury selection or trial.

(203) Under Texas law, the failure to object at trial generally waives the error for collateral review. *See* Tex. R. App. P. 33.1(a) (requiring a specific objection and a ruling from the trial judge to preserve error for appellate purposes); *see also Ex parte Pena*, 71 S.W.3d 336, 338, n.7 (Tex. Crim. App. 2002); *Ex parte Bagley*, 509 S.W.2d 332, 333-34 (Tex. Crim. App. 1974) (holding that the appellate rule requiring a trial objection also applies in habeas cases).

(204) Because applicant did not avail himself of the prior opportunity to present his claim to this Court, the Court concludes that collateral review of applicant's fourth ground for relief is procedurally barred and the claim is dismissed.

(h) Pretrial publicity was not pervasive, prejudicial and inflammatory

(205) The Court finds that, even if reviewable, applicant's complaints regarding pretrial publicity are meritless.

(206) When pretrial publicity is at issue, the defendant must show that the publicity was pervasive, prejudicial, and inflammatory. *Salazar v. State*, 38 S.W.3d 141, 149-50 (Tex. Crim. App. 2001). Widespread publicity by itself is not considered inherently prejudicial. *Gonzalez v. State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007). Indeed, even extensive knowledge of the case or defendant in the community as a result of pretrial publicity is not sufficient if there

is not also some showing of prejudicial or inflammatory coverage. *Id.*

(207) News stories, be it from print, radio, or television, that are accurate and objective in their coverage, are generally considered by the Court of Criminal Appeals not to be prejudicial or inflammatory. *See Bell v. State*, 938 S.W.2d 35, 46 (Tex. Crim. App. 1996); *Willingham v. State*, 897 S.W.2d. 351, 357 (Tex. Crim. App. 1995); *Johnson v. State*, 773 S.W.2d 322, 324-25 (Tex. Crim. App. 1989); *see also Patton v. Yount*, 467 U.S. 1025, 1033-1034, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

(i) Billboard of Victim

(208) Counsel testified at the writ hearing that the billboard depicting the victim was not displayed during jury selection or trial. Counsel stated that if it was, that "would have been something [they] would have a problem with." (WRR4: 211).

(209) The Court finds that this information is corroborated by applicant's own witness, Luis Lara, who estimated that the latest he could have seen the billboard was May of 2007, which was prior to the start of jury selection. (*See* AWE 6).

(210) The Court finds that applicant has not alleged or proven that the billboard depicting the victim was displayed at a time where it was visible by prospective jurors, much less that it was actually seen by any of the jurors.

(211) The Court finds that applicant also fails to allege or prove that the billboard's message was prejudicial or inflammatory.

(212) The news article cited by applicant states that the purpose of the billboard, which featured a picture of Jackson wearing his favorite cowboy hat, was to offer thanks to Officer Jackson for his service and offer condolences to the Dallas Police Department, who had not had a fatality on-the-job in four years. (*See* AWE 8). The billboard made no mention of applicant or a murder.

(213) The Court finds that the billboard was not prejudicial or inflammatory.

(214) The Court concludes that the presence of the billboard did not deny applicant a fair trial.

(ii) Media Coverage

(215) The articles attached to applicant's writ application show that the case primarily received coverage in the two months following the murder, from November 14, 2005 to January 10, 2006. (*See* AWE 4, 8, 9-24, 32, 34-35). Applicant's trial was not until October of 2007, nineteen months after that time. Only four of the twenty-eight articles attached to the writ application were published in the same year as the trial.

(216) Applicant presents no evidence of how many people actually saw or read the newspaper coverage of the case. He has produced no Dallas County newspaper circulation figures or any other evidence of the scope of the county's exposure to the news articles. *See, e.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1131-32 (5th Cir. 1980) (failure to adduce newspaper circulation statistics instrumental in court's rejec-

tion of appellant's pretrial publicity claims). In the absence of such proof, applicant has failed to demonstrate the pervasiveness or saturation level of publicity necessary to entitle him to relief.

(217) The Court finds that applicant fails to show that the pretrial publicity in this case so pervaded or saturated the community as to render virtually impossible a fair trial by an impartial jury drawn from Dallas County.

(218) Moreover, even if this coverage could be considered pervasive, the Court finds that applicant has not shown how the nature of the media coverage in his case was prejudicial and inflammatory.

(219) Applicant seems to suggest that this Court should find that coverage was inherently prejudicial based solely on the number of articles he attaches to his writ application. However, that a case or a defendant has been the subject of media attention, even to the point where it is pervasive, is not inherently prejudicial. *See Gonzalez*, 222 S.W.3d at 449.

(220) The Court finds that the media coverage the case received was accurate and objective, and thus not prejudicial or inflammatory. *See Bell*, 938 S.W.2d at 46; *Willingham*, 897 S.W.2d. at 357; *Johnson*, 773 S.W.2d at 324-25.

(221) The Court concludes that applicant has not shown the pretrial publicity in his case was pervasive, prejudicial or inflammatory.

(c) Applicant was not prejudiced by pretrial publicity because the jurors did not remember the publicity or were not influenced by it

(222) One seeking to have his conviction nullified on the ground that he was denied a fair trial to an impartial jury due to adverse pretrial publicity ordinarily must demonstrate an actual, identifiable prejudice attributable to that publicity on the part of members of his jury. *See Mayola v. Alabama*, 623 F.2d 992, 996 (5th Cir. 1980); *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961).

(223) The Court finds that applicant was not prejudiced by pretrial publicity because the record shows that the jury members either did not remember the coverage, or if they did, they indicated they had not formed any opinion about the case on the basis of that publicity.

(224) Counsel testified that the vast majority of venire persons summoned for jury duty in this case did not remember the facts of the offense or the prior media attention. (WRR4: 117-19). Counsel's assertions are supported by the record.

(225) The jury questionnaires canvassed the jury on this topic before the parties began individual voir dire. Specifically, the questionnaires contained the following agreed instruction regarding media coverage of applicant's case:

> It is alleged that on November 13, 2005, Dallas police officer Brian Jackson was shot to death in East Dallas.
>
> There has been news media coverage regarding this case. If chosen as a ju-

ror you will have taken an oath that requires you to return a verdict, whatever that verdict is, on the basis of the evidence that you hear in the courtroom and not from some outside source. Therefore, there is nothing wrong with a prospective juror, such as you, having heard of this case, or having heard of this defendant. However, it is not permissible if what you have heard causes you to have a preconceived conclusive opinion that the defendant is guilty or not guilty, or a preconceived conclusive opinion as to what punishment the defendant should receive, if found guilty. A juror is not qualified to serve if there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror's action(s) in reaching a verdict.

All defendants are presumed to be innocent. This presumption requires the State to prove a defendant's guilt beyond a reasonable doubt before a jury would be authorized in finding the defendant guilty of an offense. Only evidence presented in court, under oath, and subject to cross examination is to be considered by a jury in determining whether the State has satisfied its burden of proof in a particular case. A juror, to be qualified, must set aside any opinion held concerning a defendant's guilt that was formed by the reading of

> newspaper accounts, by seeing or hearing other media reports, or through rumor or hearsay.
>
> Do you think you have heard about this case?
>
> [ ] YES [ ] NO
>
> If yes, please give details (including how you heard—radio, TV, newspaper, word of mouth).
>
> _____
> _____
> _____

See Jury Questionnaire, p. 2.

(226) Applicant fails to identify the seated jurors and show that their answers to this question demonstrate that they remembered the case and were prejudiced by the publicity.

(227) Nonetheless, an independent review of the juror questionnaires shows that applicant was not prejudiced by the publicity.

(228) The record reflects that the seated jurors were Lee Kendall (Juror #3, RR8: 94); David Silva (Juror #20, RR12: 74), Nikki Mitchell (Juror #164, RR13: 166), Lanetia Gayden (Juror #165, RR13: 238), Timothy Rau (Juror #252, RR15: 129), Allyson Scarber (Juror #357, RR20: 70), Jason Koshimahi (Juror #485, RR25: 228), Teresa Martinez (Juror #501, RR26: 83), Thomas Cheatham (Juror #570, RR29: 170), Larry Morris (Juror #657, RR32: 296), Leonard Jackson (Juror #667, RR32: 393), and Albert Perez (Juror #679, RR32: 221).

(229) The Court finds that eleven of the twelve jurors did not recall any of the details of the media coverage or had not heard about the case at all. Specifically, eight jurors checked "No" on their questionnaire, indicating that they had not heard about the case. These were jurors Kendall, Rau, Scarber, Koshimahi, Martinez, Cheatham, Jackson and Perez. One juror, Gayden, checked neither box and indicated that she is a person who watches the news but did not recall this case. Two of the jurors, Silva and Morris, checked "Yes" on their questionnaire because they recalled hearing about the case at the time of the offense, but they could not recall any of the details.

(230) Only one juror, Mitchell, actually remembered the media coverage. During individual voir dire, juror Mitchell explained that she remembered hearing about the offense on the news when it happened, but stated she had not formed any opinion about the case based on what she heard. (RR13: 145-46).

(231) The jurors' answers reflect that (1) they had not seen any publicity on the case, or (2) that the publicity had not influenced them to the point that they could not deliver a fair verdict. The Court was within its discretion to believe the jurors' assurances.

(232) The Court finds that applicant fails to establish by a preponderance of the evidence that he suffered any actual prejudice as a result of pretrial publicity.

(233) To the extent that applicant is arguing that prejudice should be presumed under *Rideau v.*

Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), the Court finds that this claim is wholly without merit because applicant has not demonstrated an extreme situation of inflammatory pretrial publicity that saturated Dallas County. *See Mayola*, 623 F .2d at 997 (given that virtually every case of any consequence will be the subject of some press attention, the *Rideau* principle of presumptive prejudice is only rarely applicable, and is confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held).

(234) The Court concludes the pretrial publicity in applicant's case did not deprive him of his constitutional right to a fair trial.

(235) Accordingly, the Court finds that applicant's fourth ground for relief is without merit and is denied.

Ground 5: Presence of Uniformed Police Officers in Courtroom

(236) In his fifth ground for relief, applicant contends that the presence of uniformed police officers in the courtroom during his trial constituted an external influence on the jury which was inherently prejudicial and deprived him of a fair trial. He also makes a "totality of the circumstances" argument that the presence of the uniformed officers, in conjunction with the pretrial publicity, his immigration status and the presence of the mannequin used for demonstrative purposes during trial, denied him a fair trial. (*See* Writ Application at 49-57).

(237) The record reflects that applicant did not file a pretrial motion to limit the number of uniformed officers who could be present in the courtroom during the trial.

(238) The record reflects that applicant did not object to the State's use of the mannequin for demonstrative purposes during trial.

(239) Although applicant claims numerous officers were present throughout the trial, the record reflects that he only made one objection to their presence on the day of closing arguments during the guilt-innocence phase. (RR48: 8-9). The trial judge stated that it did not appear to him that there was an extraordinary number or "anything that would appear to be oppressive." (RR48: 8). The Court asked all the uniformed officers to stand and defense counsel noted that there were twenty-five uniformed officers present. (RR48: 9). The Court noted that this number makes up less than one-third of the seats available in the courtroom and overruled applicant's objection. (RR48: 9).

(a) Procedural Bar

(240) Applicant's complaint regarding the number of officers in the courtroom on the day of closing arguments at the guilt-innocence phase has been waived because applicant failed to raise this issue on direct appeal.

(241) It is well-settled that habeas corpus will not lie as a substitute for direct appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). Even a constitutional claim is forfeited if applicant had the opportunity to raise it on ap-

peal and did not. *Id.* The writ of habeas corpus is an extraordinary remedy that is available only when there is no other adequate remedy at law. *Id.*

(242) Applicant preserved this complaint for direct appeal by making a timely trial objection. (RR48: 8-9). Nothing prevented applicant from litigating this claim on direct appeal. He forfeited his complaint by failing to do so.

(243) To the extent that applicant is complaining about the presence of officers during any other portion of the trial, this claim has been waived due to applicant's failure to object. *See* Tex. R. App. P. 33.l(a) (requiring a specific objection and a ruling from the trial judge to preserve error for appellate purposes); *Pena*, 71 S.W.3d at 338, n.7; *Bagley*, 509 S.W.2d at 333-34 (holding that the appellate rule requiring a trial objection also applies in habeas cases).

(244) Likewise, applicant's "totality" complaint that he was denied due process due to the combined effect of the presence of the uniformed officers, the pretrial publicity, his immigration status and the presence of the mannequin has been waived due to applicant's failure to object at trial. *See* Tex. R. App. P. 33.1(a); *Pena*, 71 S.W.3d at 338, n.7; *Bagley*, 509 S.W.2d at 333-34.

(245) Because applicant (1) did not raise on direct appeal his preserved complaint regarding the number of uniformed officers in the courtroom during closing argument of the guilt-innocence phase, and (2) did not preserve his complaint regarding the presence of uniformed officers during any other portion of the trial or his "to-

tality" complaint by a timely trial objection, the Court concludes that collateral review of applicant's fifth ground for relief is procedurally barred and the claim should be dismissed.

(b) The presence of uniformed officers in the courtroom did not deny applicant a fair trial

(246) Even if this claim is reviewable, the Court finds that the presence of uniformed officers in the courtroom did not deny applicant a fair trial.

(247) A criminal defendant has the constitutional right to be tried by impartial jurors whose verdict is based upon the evidence developed at trial rather than elicited by external influences. *See* U.S. Const. amends. VI, XIV; *Howard v. State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996) (citing *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)).

(248) A defendant claiming that his jury was prejudiced by external juror influence must show actual or inherent prejudice. *Howard*, 941 S.W.2d at 117. A showing of actual prejudice is made when jurors actually articulate being aware of a prejudicial effect. *Id.* Inherent prejudice is shown by a reasonable probability that the influence interfered with the jury's verdict and is a rarity reserved for extreme situations. *Id.*

(249) The Court finds that applicant has not shown actual prejudice, and the Court finds there is no actual prejudice. Applicant fails to offer statements from jurors alleging that the presence of police officers actually influenced their verdict. Indeed, applicant did obtain an affidavit from

one juror, and while she does acknowledge the presence of the officers during the day of closing arguments, she does not state that their presence influenced the jury's verdict in any way. (*See* AWE 36). Accordingly, there is no evidence of actual prejudice.

(250) The Court finds that applicant also has not shown inherent prejudice, and the Court finds there is no inherent prejudice. The record does not demonstrate a reasonable probability that the presence of the officers interfered with the jury's verdict.

(251) There is no evidence in the record of how many officers regularly attended applicant's trial; however, Mr. Sanchez testified at the writ hearing that he did not find the presence of police officers in the courtroom during applicant's trial abnormal or excessive. (WRR4: 211). Counsel's assertions are supported by the fact that the defense only objected one time over the course of a month-long trial to the presence of uniformed officers.

(252) Applicant's sole objection to the presence of uniformed officers was on the day of closing arguments during the guilt-innocence phase, a day that routinely has the highest attendance of any day during a criminal trial, especially a capital murder trial. Following applicant's objection, the Court noted that there were twenty-five officers present and they constituted less than one-third of the courtroom. Thus, the police officers' attendance appears limited and their presence did not overwhelm the composition of the spectator gallery.

(253) There is no evidence that the officers engaged in any conduct or expression that caused confusion, distracted the attention of the jurors, or would have interfered with the jury's verdict. Rather, their mute presence merely showed their solidarity and support for a fellow, slain officer.

(254) Furthermore, trials are open to the public, including to police officers. *See Lambert v. McBride*, 365 F.3d 557, 563-64 (7th Cir. 2004).

(255) The jurors were aware that the trial focused on the murder of a police officer and likely would have expected the victim's fellow officers to follow the trial. *See, e.g.*, *Smith v. Farley*, 59 F.3d 659, 664 (7th Cir. 1995) ("Of course if you kill a policemen and are put on trial for the crime, you must expect the courtroom audience to include policemen … ."); *Brown v. State*, 269 N.E.2d 377, 378 (1971) ("All citizens are well aware of the fact that many officers wear uniforms and carry arms. Their presence in courtrooms is a common occurrence. We know of no manner in which it could be determined whether the fact they are in uniform helps, hinders or is of no consequence to the State's case.").

(256) The Court finds that this case is distinguishable from applicant's cited case of *Woods v. Dugger* because, among other things, there is no evidence that the juror's sympathies were susceptible to being swayed by the police presence, such as it would, for instance, if the jurors had close ties to law enforcement. *See Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991) (presence in courtroom of spectator prison guards in

case where defendant was charged with murdering a prison guard was inherently prejudicial in part because some of the jurors "had either worked in the prison system or had relatives currently working in the prison system"); *Howard*, 941 S.W.2d at 118 n.15 (also distinguishing *Dugger*).

(257) Based on the foregoing, the Court finds that there is not a reasonable probability that the presence of the officers interfered with the jury's verdict.

(258) The Court concludes that the presence of uniformed police officers during applicant's trial was not inherently prejudicial and, therefore, did not violate his right to trial by an impartial jury.

(259) Further, taking into consideration the totality of the circumstances—including the presence of uniformed officers, the pretrial publicity, applicant's immigration status, and the mannequin used as a demonstrative exhibit during trial—the Court finds that applicant was not denied his constitutional right to a fair trial.

Ground 6: Mental Retardation

(260) In his sixth ground for relief, applicant argues that he is mentally retarded and therefore his execution would violate the Eighth and Fourteenth Amendments' prohibition against executing the mentally retarded. (*See* Writ Application at 57-67).

(a) Procedural Bar

(261) During the punishment phase of his trial, applicant presented a significant amount of evidence

suggesting that he is mentally retarded and therefore exempt from the death penalty. This issue was fully litigated by the parties and presented as the first special issue in the punishment charge. (CR: 261-63). Ultimately, this issue was decided against applicant by the jury. (CR: 268).

(262) In this ground, applicant is essentially challenging the sufficiency of the evidence supporting the jury's rejection of the mental retardation special issue.

(263) The Court finds that this claim is not cognizable in this habeas proceeding. It is well-settled that the sufficiency of the evidence cannot be attacked collaterally on a writ of habeas corpus. *See Ex parte McClain*, 869 S.W.2d 349, 350 (Tex. Crim. App. 1994); *Ex parte Williams*, 703 S.W.2d 674, 677 (Tex. Crim. App. 1986).

(264) Additionally, the Court finds that this claim is procedurally barred because it was raised and rejected on appeal.

(265) On direct appeal, applicant challenged the sufficiency of the evidence to support the jury's finding that he was not mentally retarded. The Texas Court of Criminal Appeals sifted through the voluminous record evidence presented at trial on the issue and summarized the testimony of experts and lay persons, ultimately holding that the jury's conclusion that applicant was not mentally retarded is not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Lizcano*, 2010 Tex. Crim. App. Unpub. LEXIS 270, at *49-50.

(266) The Court of Criminal Appeals' judgment has not been rendered void; nor has the Court of Criminal Appeals decided to apply relief retroactively after a subsequent change in the law.

(267) The Court of Criminal Appeals does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal. *See Ex parte Hood*, 304 S.W.3d 397, 403 n.21 (Tex. Crim. App. 2010) (citing *Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex. Crim. App. 2008) (also holding that a claim that was raised and rejected on direct appeal is not cognizable on habeas review under art. 11.071) and *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)).

(268) The record on direct appeal was adequate to conduct a review of the claim. None of applicant's additional evidence sheds more light on whether he is mentally retarded; it is simply cumulative of evidence that the jury heard regarding his low IQ and adaptive deficits. Therefore, any aspect of his claims involving a determination of whether he is mentally retarded is procedurally barred.

(269) Based on the forgoing, the Court finds that applicant's sixth ground for relief is procedurally barred and is dismissed.

(b) Applicant does not have sufficient limitations in adaptive functioning to meet the definition of mental retardation

(270) Alternatively, the Court finds that applicant has not proven by a preponderance of the evidence that he is mentally retarded.

(271) While the Eighth Amendment prohibits the execution of the mentally retarded, the task of developing appropriate ways to enforce this constitutional restriction belongs to the states. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). The Texas Legislature has yet to enact provisions implementing the Atkins holding, but the Texas Court of Criminal Appeals has adopted "temporary guidelines, to be used during the legislative interregnum." *Neal v. State*, 256 S.W.3d 264, 271 (Tex. Crim. App. 2008) (citing *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)).

(272) The State does not have the burden of disproving applicant's retardation claim. As with any other claim for habeas relief, applicant bears the burden of proving he is mentally retarded. *Gallo v. State*, 239 S.W.3d 757, 778 (Tex. Crim. App. 2007); *Briseno*, 135 S.W.3d at 12 (holding habeas applicant bears the burden of proving his mental retardation claim by a preponderance of the evidence); *see also Ex parte Chappell*, 959 S.W.2d 627, 628 (Tex. Crim. App. 1998) (habeas applicant bears burden of proving facts entitling him to habeas relief).

(273) To satisfy his burden, applicant must demonstrate by a preponderance of the evidence that he possesses (1) significantly subaverage general intellectual functioning (an IQ of about 70 or below) and (2) related limitations in adaptive functioning (3) commencing before the age of eighteen. *Williams v. State*, 270 S.W.3d 112, 113 (Tex. Crim. App. 2008); *Briseno*, 135 S.W.3d at 7-8, 12 (defining mental retardation as set out by the AAMR, APA, and Texas

Health and Safety Code); *see also* Tex. Health & Safety Code § 591.003(13) (West 2003) (defining mental retardation).

(274) The Court recognizes that the Court of Criminal Appeals has already determined that applicant meets the first prong of the definition of mental retardation. *See Lizcano*, 2010 Tex. Crim. App. Unpub. LEXIS 270, at *40. The Court defers to the Court of Criminal Appeals' determination that applicant possesses significantly subaverage intellectual functioning. *Id.*

(275) The Court finds that applicant fails to show that he has sufficient adaptive deficits to meet the definition of mental retardation.

(276) Adaptive behavior is defined as the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. Tex. Health & Safety Code Ann. § 591.003(1).

(277) In his writ application, applicant does not allege or discuss any new evidence of adaptive deficits in support of this claim.[8] He merely relies on the testimony offered at trial to assert that the jury's finding was incorrect. (*See* Writ Application at 62-64).

(278) At trial, a substantial number of witnesses provided testimony relevant to applicant's adaptive functioning. The testimony of many of the

[8] In the writ application, applicant presents new evidence of adaptive deficits only in the context of his ineffective assistance of counsel claim. (*See* Writ Application at 72-77).

witnesses, however, provided evidence both for and against applicant's claim. Some of the more significant evidence showing limitations in adaptive functioning was the following: (i) the applicant had trouble following instructions and performing fairly simple tasks in the work environment; (ii) the applicant used limited vocabulary and did not seem to understand humor; (iii) the applicant could not perform certain simple personal tasks such as reading an analog clock, following directions to a location, or operating a VCR; and (iv) the applicant had difficulty learning and socializing. On the other hand, the following evidence suggested that the applicant did not exhibit limitations in adaptive functioning: (i) the applicant maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) the applicant made regular payments on a vehicle he purchased as a co-buyer; (iii) the applicant maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be bright; and (iv) the applicant reliably sent significant amounts of money and other items to assist his family. *See Lizcano*, 2010 Tex. Crim. App. Unpub. LEXIS 270, at *40-49.

(279) The Court finds there was significant evidence in the record demonstrating applicant's effectiveness in meeting standards of personal independence and social responsibility.

(280) Therefore, the Court finds that applicant does not have sufficient limitations in adaptive func-

tioning to meet the definition of mental retardation. (*See* SWE 30; WRR8: 87-89).

(281) At the writ hearing, applicant presented additional evidence in support of his mental retardation claim from Dr. Antolin Llorente. In reaching his conclusion that applicant suffers from mild mental retardation, Dr. Llorente conducted additional IQ testing and performed a retrospective evaluation of applicant's adaptive behavior through clinical interviews and by using the Adaptive Behavior Assessment System, 2nd Edition, Spanish Version ("ABAS-II"), an adaptive behavior assessment tool. (WRR6: 225, 227-29; *See* AWE 115).

(282) The Court finds that adaptive behavior assessment tools are not designed to be used retrospectively. (WRR8: 90-91). Dr. Llorente acknowledged such during his testimony on direct and cross-examination. (WRR6: 200; WRR8: 39-41).[9] Therefore, the Court finds that Dr. Llorente's findings using the ABAS-II are not credible.

(283) The Court finds that, even if it were to consider the opinion of Dr. Llorente as credible, his opinion that applicant suffers from mild mental retardation and the basis of that opinion is cumulative of the evidence presented at trial through the testimony of lay witnesses and de-

[9] *See also* AWE 115 at p.17 ("Because [applicant's] aunt's reports about his adaptive skills is retrospective and the instrument had to be read to her, these data should be interpreted with caution").

fense experts and is therefore not new evidence of mental retardation.

(284) The Court finds that the evidence of risk factors presented by applicant has no bearing on whether he suffers from mental retardation. While evidence of risk factors can be useful in understanding an individual and the cause of the problems they may have, these risk factors are not relevant to making a determination about whether or not the individual qualifies for a diagnosis of mental retardation. (WRR8: 117-18, 119).

(285) The Court finds that applicant has not proven by a preponderance of the evidence that he is mentally retarded.

(286) To the extent that applicant's claim can be construed as a claim of actual innocence based on newly discovered evidence of mental retardation, the Court finds that this claim is without merit. Specifically, the Court finds that, based on the cumulative nature of applicant's "new" evidence of mental retardation, applicant has not proven by clear and convincing evidence that no reasonable juror would have found that he was not mentally retarded in light of the new evidence.

(287) The Court finds that applicant is not mentally retarded and, therefore, there is no violation of the Eighth Amendment in this case.

Ground 8: Mental Illness

(288) In his eighth ground for relief, applicant argues that the rationale of *Atkins* should be extended

to the mentally ill and should bar his execution. (*See* Writ Application at 81-84).

(289) The Court finds that applicant forfeited his claim by failing to raise it at trial. Under Texas law, the failure to object at trial generally waives the error for collateral review. *See Pena*, 71 S.W.3d at 338, n.7; *Bagley*, 509 S.W.2d at 333-34.

(290) Because applicant did not avail himself of the prior opportunity to present his claim to this Court, the Court concludes that applicant's eighth ground for relief is procedurally barred and should be dismissed.

(291) In any event, the Court finds that applicant's claim is without merit based on existing state and federal law. The highest criminal court in Texas has expressly declined to extend the *Atkins* ruling to the mentally ill. *See Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 1606, 179 L. Ed. 2d 506 (2011). In so holding, the court specifically noted there is no authority from the Supreme Court suggesting that mental illness is enough to render one exempt from execution under the Eighth Amendment. *Id.* at 379. The Fifth Circuit has also refused to extend *Atkins* to claims of mental illness. *See ShisInday v. Quarterman*, 511 F.3d 514, 521-22 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005).

(292) The Court finds that applicant has not cited any case from any United States jurisdiction that has held that the *Atkins* rationale applies to the

mentally ill. Indeed, to the contrary, numerous federal and state courts have expressly declined to extend *Atkins* to the mentally ill in published opinions. *See Carroll v. Secretary, DOC, FL*, 574 F.3d 1354, 1369 (11th Cir. 2009); *Baird v. Davis*, 388 F.3d 1110, 1114-15 (7th Cir. 2004); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010); *Commonwealth v. Baumhammers*, 960 A.2d 59, 96-97 (Penn. 2008); *State v. Ketterer*, 855 N.E.2d 48 (Ohio 2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 670 S.E.2d 87 (Ga. 2008); *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006).[10] Thus, the Texas holding is harmonious with the rationale of other jurisdictions.

(293) Applicant does not apply the framework employed by the Supreme Court in *Atkins* to explain why its ruling should be extended to the mentally ill. Most notably, he does not allege or prove that there is a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally ill offenders. *See Atkins*, 536 U.S. at 312 (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (stating that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures). Currently, Connecticut is the only death penalty

[10] Others have done so in unpublished opinions. *See, e.g.*, *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 36, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010) (not designated for publication); *Johnson v. Comm.*, No. 2006-SC-000548-MR, 2008 Ky. Unpub. LEXIS 13, 2008 WL 4270731 (Ky. Sept. 18, 2008) (not designated for publication).

state that has legislatively prohibited execution of the mentally ill. This single state statute shielding the mentally ill from the death penalty stands in stark contrast to the legislative landscape of the states when *Atkins* was decided.

(294) Even if this Court were to examine whether execution of a mentally ill person violates the Eighth Amendment's ban on cruel and unusual punishment, this case presents a poor vehicle for this Court to decide that issue. Applicant has failed to demonstrate that, if he did suffer from some mental impairment at the time of the murder as he claims, that impairment was so severe that he is less morally culpable than those who are not mentally ill.

(295) An individualized sentencing determination is the bedrock of the Eighth Amendment. *See Jurek v. Texas*, 428 U.S. 262, 271 (1976). Because no two mentally-ill capital defendants are alike, their individual culpability and eligibility for the death penalty should continue to be assessed on a case-by-case basis. Article 37.071 of the Texas Code of Criminal Procedure permits the jury in a capital case to consider a defendant's mental illness as a mitigating factor, thus providing the individualized determination that the Eighth Amendment requires in capital cases. *See* Tex. Code Crim. Proc. Ann. art 37.071, §§ (2)(d)(1), (2)(e)(1) (West Supp. 2012).

(296) Applicant asks this Court to establish a new category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specif-

ic case. Applicant fails to make any persuasive or compelling argument which would justify such a significant extension of the Supreme Court's ruling in *Atkins*. As such, this Court declines to do so.

(297) For the foregoing reasons, the Court finds there is no Eighth Amendment violation in this case.

(298) Accordingly, the Court concludes that applicant's eighth ground for relief is without merit and is denied.

Ground 9: False Testimony

(299) In his ninth ground for relief, applicant contends that he was denied his Fifth and Fourteenth Amendment rights to due process because the State knowingly presented false and misleading testimony during the punishment phase. (*See* Writ Application at 84-91).

(a) Factual Background

(300) During the punishment phase of trial, the State presented testimony from Assistant Warden Melodye Nelson. Warden Nelson testified generally about the Texas prison system, classification of inmates within the prison system, how inmates are housed, the availability of weapons and alcohol in prison, and assaults committed by inmates in various classification levels. (RR49: 75-107). During her eighteen years with TDCJ, Warden Nelson testified that she has seen weapons and alcohol confiscated from every unit and from inmates in every level of classification. (RR49: 94). Warden Nelson testified that they work very hard to maintain the

highest level of security on death row, but assaults on guards still occur on death row even with that high level of security. (RR49: 97-98).

(301) Applicant's complaint revolves around Warden Nelson's testimony regarding how a capital murder defendant sentenced to life without parole ("LWOP") would be classified upon entering the prison system. Specifically, the complained-of testimony was as follows:

> Q. (By Mr. Kirlin) But in—in regards to classifications, Warden, if—if someone comes into the system, let's say they—they've been convicted of a capital murder and they get a life sentence instead of the death sentence. What—tell the jury what classification they come into your prison system as based on—on that, and then on—they did not have any affiliation with a gang.
>
> A. (By Warden Nelson) As long as they have no affiliation, they would come in as a general population three, G-3, offender for a period of 10 years, where he's, at that point, depending on his behavior and institutional record, he could progress from there. He could never be an outside trusty [sic] with a capital murder case, but he could be a G-2 offender depending on his—his history if he just came in with a life sentence.
>
> (RR49: 83).

(302) Applicant did not object to this testimony. Applicant also did not ask any questions of Warden Nelson on cross-examination. (RR49: 83, 107).

(303) An addendum to TDCJ's Unit Classification Procedure dated July 2005 reflects that the portion of Warden Nelson's testimony regarding classification of a capital murder defendant sentenced to LWOP was incorrect. Specifically, the addendum provides that "[e]ffective 9/1/05, offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G3 throughout their incarceration." (*See* AWE 53).

(304) At the time Warden Nelson testified on October 10, 2007, neither the State nor Warden Nelson knew that this testimony was false. The State discovered the error almost two years later on August 17, 2009, while preparing for the punishment phase of another capital murder trial. (*See* AWE 55). The State notified Lizcano's appellate counsel of this issue on August 28, 2009, and memorialized their discussion of this issue on the record during a motion for new trial hearing in *State v. Mark Robertson*. (*See* SWE 30).

(b) Applicant has not shown a due-process violation because Warden Nelson's testimony was not material

(305) The Court finds that even if applicant's claim is reviewable, he has not shown a due-process violation.

(306) The Due Process Clause of the Fourteenth Amendment can be violated when the State uses false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012); *Ex parte Robbins*, 360 S.W.3d 446, 459-460 (Tex. Crim. App. 2011). Testimony need not be perjured to constitute a due-process violation; rather, it is sufficient that the testimony was "false." *Robbins*, 360 S.W.3d at 459-60. To constitute a due process violation, the record must show that the false testimony was material, meaning "there is a reasonable likelihood" that the false testimony affected the judgment of the jury. *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011).

(307) The Court finds that the complained-of portion of Warden Nelson's testimony was false. (*See* AWE 53, 55).

(308) The Court finds, however, that applicant fails to show that this false testimony was material.

(309) The State's punishment evidence demonstrated that no matter how applicant would be classified or where he would be housed within the prison system, applicant would always be a future danger.

(310) In light of the evidence emphasized by the parties during the punishment phase, the Court finds there is no reasonable likelihood that the jury was affected by Warden Nelson's false testimony in assessing applicant's punishment.

See Chavez, 371 S.W.3d at 209-210; *Ghahremani*, 332 S.W.3d at 481.

(311) Because the complained-of portion of Warden Nelson's testimony was not material, the Court finds that applicant's due-process rights were not violated.

(c) Applicant was not harmed by Warden Nelson's testimony because it did not contribute to his punishment

(312) To obtain relief on habeas, in addition to showing that a due-process violation occurred, a habeas applicant must also show harm. *See Ex parte Chabot*, 300 S.W.3d 768, 770-771 (Tex. Crim. App. 2009). Applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment. *Id.*

(313) The Court finds that applicant has not met his burden of proving by a preponderance of the evidence that Warden Nelson's false testimony contributed to his punishment.

(314) The Court finds that the evidence of applicant's guilt for capital murder was overwhelming. Additionally, the Court finds that the evidence presented at punishment supported the jury's resolution of the special issues.

(315) During its punishment case, the State highlighted applicant's violent tendencies in the months preceding the offense and repeated threats against law enforcement to prove that he was a future danger. The State also emphasized the facts of applicant's crime and argued

no mitigating circumstances existed to warrant a life sentence.

(316) The defense presented general mitigation evidence to go along with their evidence of mental retardation, including evidence of applicant's impoverished upbringing in rural Mexico, his status as an illegitimate child, and his good character and love for his family. The defense presented this evidence through several witnesses, including applicant's former teacher, a nurse and family-friend, previous girlfriends, family members, co-workers, and two experts, Dr. Puente and Dr. Compton. The defense also presented evidence that applicant was not a future danger through the testimony of two jailers and two prison experts, Dr. Vigen and Dr. Sorenson.

(317) Neither party emphasized or even addressed Warden Nelson's false testimony in their argument to the jury. The emphasis of applicant's closing argument was mental retardation. Defense counsel argued that the jury's answer to the first special issue on mental retardation should end their deliberations. (RR58: 38). Alternatively, the defense argued that the mitigating circumstances of applicant's upbringing warranted sparing his life, and that Texas prisons are well-run and can control applicant if he were to receive a life sentence. The State never remarked on what particular level applicant would be classified at or the difference in security for the various levels. The State's argument focused on applicant's anger, violence and disrespect for police officers. The State's punishment evidence showed that alco-

hol and violence could be found in all classification levels of Texas prisons, from general population to death row. The State argued that, because of applicant's violent tendencies and aggression toward anyone wearing a uniform, he would always be a future danger.

(318) The Court finds that the fact that applicant killed a police officer was a factor heavily considered by the jury in answering the special issues.

(319) In light of all the evidence presented, the Court finds that it is more probable than not that the outcome of the punishment phase of applicant's trial would have been the same absent the false statements by Warden Nelson.

(320) The Court finds that the applicant has failed to carry his burden of proving harm by a preponderance of the evidence. *See Chabot*, 300 S.W.3d at 771.

(321) Accordingly, the Court finds that Warden Nelson's false testimony did not contribute to applicant's punishment.

(d) Applicant's case is distinguishable from Estrada v. State

(322) Testimony similar to Warden Nelson's testimony in this case was found to be reversible error in *Estrada v. State* . 313 S.W.3d at 286-88.

(323) In *Estrada*, the defendant presented the testimony of Larry Fitzgerald to discuss the classification system within TDCJ. *Id.* at 286. Fitzgerald testified that the least restrictive G status that a capital murderer sentenced to life-without-parole could obtain is a G-3 classifica-

tion. *Id.* The State presented A.P. Merillat as a rebuttal witness. Merillat testified, without objection, that after 10 years of G-3 status, a capital murderer sentenced to life-without-parole could achieve a lower and less-restrictive G classification status than a G-3 status. *Id.* During the jury's punishment-phase deliberations, the jury sent out two notes at separate times. *Id.* at 286-87. The first note asked what would happen if the jury could not "come to a decision" on the future-dangerousness special issue. *Id.* The second note asked, "Based on the testimony of Fitzgerald and Merillat is there a possibility that the defendant would be eligible for a less restrictive status after 10 years (or some other period of time)." *Id.* The trial court responded to both of these notes by responding, "You have the law and the evidence. Please continue your deliberations." *Id.*

(324) After trial, the parties learned that Merillat's testimony was incorrect based on an addendum to the TDCJ Unit Classification Procedure. *Id.* at 287. On appeal, the State asserted that the jury's questions suggest that Merillat's mistaken testimony may have contributed to the jury's decision on punishment and recommended that, in the interest of justice, Estrada should receive a new trial on punishment. *Id.*

(325) The Court finds that applicant's case is distinguishable from *Estrada.*

(326) The Court finds that the import of A.P. Merillat's testimony in *Estrada* was very different from Warden Nelson's in this case. Merillat

testified that prison is a very violent place and that respect in prison comes as a result from an inmate's reputation for dangerousness or violence. His testimony strongly suggested that Estrada's possible placement in a less-restrictive classification made him that much more of a future danger. The purpose of Warden Nelson's testimony was different in applicant's case. She presented an overview of the Texas prison system and how it works. She provided information about classifications, violence, and the inmates' accessibility to contraband such as weapons or alcohol. Most importantly, she testified that inmates have the opportunity to commit acts of violence in all classification levels and all units of Texas prisons, from general population to death row. Her testimony suggested that the opportunity for violence was present throughout the prison system, and whether an inmate would continue to commit criminal acts of violence was based solely on his decisions and actions, not on where he was housed or how he was classified.

(327) In addition, the Court finds that *Estrada* did not contain the same type of future danger evidence as was presented in applicant's case. The State emphasized that applicant posed a future danger due to the fact that he would have constant exposure and access to guards in prison, both in general population and on death row. The jury had no reason to believe that applicant would change this behavior upon entering prison; therefore, he posed a continuing threat to anyone wearing a uniform. In *Estrada*, the defendant's victims were young women with

whom he had been romantically involved and impregnated. Merillat's testimony suggested that Estrada's access to this type of victim would increase if received a less-restrictive classification.

(328) The Court also finds that the notes sent by Estrada's jury during their punishment-phase deliberations directly pertained to Merillat's false testimony and the conflict between his testimony and that of the defense expert, Fitzgerald. The jury notes provided direct evidence that Merillat's incorrect testimony may have contributed to the jury's punishment in Estrada's case. There is no such evidence in this case.

(e) Applicant's case is distinguishable from Velez v. State

(329) Similar testimony was also found to be reversible error in *Velez v. State*, No. AP-76,051, 2012 Tex. Crim. App. Unpub. LEXIS 607, at *87-94 (Tex. Crim. App. June 13, 2012) (not designated for publication).

(330) In *Velez*, A.P. Merillat testified: "When a person is convicted of capital murder and given a life sentence or anything less than death, he's classified immediately upon arrival [in the] prison system as what they call a G 3. A G 3 classification is a middle range classification, it's not the tightest they have, it's not the easiest they have. That G system begins at the number one, that means very light, like a trustee type status. Then it goes to number two, number three, number four, number five. Five being the worst inmates. A convicted capital

murderer with a life sentence will go in automatically as a G 3 right in the middle … You can promote up to better classification if you behave, you can go down to more strict classification." *Id.* at *88. Merillat was the only witness to testify regarding the TDCJ classification system and about the environment a defendant might encounter if sentenced to life without parole. *Id.*

(331) After trial, the parties learned that Merillat's testimony was false.

(332) Because this case is unpublished, it has no precedential value. *See* Tex. R. App. P. 77.3.

(333) Nonetheless, the Court finds that applicant's case is distinguishable from *Velez*.

(334) Just as in *Estrada*, the import of A.P. Merillat's testimony in *Velez* was very different from Warden Nelson's in this case. In *Velez*, Merillat emphasized that prison is a very dangerous place, and he testified about a variety of prison "horribles," including: escapes; smuggled cell phones; corrupt guards and wardens; inmates "raping and extorting" other inmates; 156 murders within the prison system since 1984; violent felony crimes committed by 94 convicted capital murders in the previous three to four years; five murders "this year," two in high security areas; two murders on death row and many attacks on guards; and two capital murderers from Cameron County (the venue of the trial) who were sentenced to life without parole instead of death and killed again in prison. *Id.* at *91-92. His testimony strongly suggested that Velez would have the opportunity to com-

mit any of the aforementioned "horribles" if not given a death sentence.

(335) The purpose and tone of Warden Nelson's testimony was entirely different in applicant's case. She presented an overview of the Texas prison system and provided information about classifications, violence, and the inmates' accessibility to contraband such as weapons or alcohol. She emphasized that Texas prisons do the best they can to control inmate behavior; however, she admitted that she has seen violence and contraband in all classification levels and all units of Texas prisons, from general population to death row. Contrary to Merillat's testimony in *Velez*, her testimony demonstrated that whether a particular inmate would continue to commit criminal acts of violence was based solely on his decisions and actions.

(336) Another major difference between this case and *Velez* is the nature of the evidence at guilt and punishment. In *Velez*, the evidence of the defendant's guilt for capital murder was entirely circumstantial. *Id.* at *92-93. The cause of death was clear, but the testimony about the manner and means of death showed that two adults and several small children were in the home, an 11-month-old child died, and each adult pointed at the other as the perpetrator. *Id.* Additionally, the State's evidence showing Velez would be a future danger was weak. At the time of his trial in 2008, Velez's criminal record consisted of one bar fight in 1991 and a few other non-violent offenses. *Id.* at *93-94. With the exception of one conviction for forgery, all were misdemeanors. *Id.* Velez had

been in custody for some period of time before trial with no disciplinary incidents. *Id.* The State presented no psychiatric evidence that Velez presented a future danger, nor did it attempt to rebut the defense's psychiatric evidence that he would not be a danger in the future. *Id.*

(337) Here, in contrast, the evidence supporting applicant's guilt for capital murder of a police officer was overwhelming. Additionally, the State presented evidence that applicant posed a future danger. The State presented evidence that applicant repeatedly was violent prior to the shooting of Officer Jackson and that the possibility for alcohol and violence was possible in all classification levels of Texas prisons, therefore, applicant would be a future danger. The State's theme in the punishment phase was not dependent on any particular G-level status.

(338) In *Velez*, Merillat also insinuated that the current rules could change to allow for LWOP offenders to work as outside trustees. Specifically, he testified that inmates sentenced to LWOP are not allowed outside prison walls on work detail without an armed guard, but then stated rules "change all the time." *Id.* at *92. He also testified that, since the escapes of the Texas Seven, the authorities "don't want them working outside the fence, but it could happen." *Id.* His testimony suggested to the jurors that if they sentenced Velez to LWOP, there was no guarantee that he would not someday be allowed outside the prison walls without an armed guard. Warden Nelson made no such insinuation in this case.

(339) Based on the foregoing, the Court finds while the testimony of Warden Nelson was false, that false testimony was not material and harmful to the applicant. Accordingly, applicant's ninth ground for relief is denied.

Other Grounds

(340) The Court finds that all grounds for relief not specifically addressed herein, if any, are without merit and are denied.

V.

CONCLUSION

(341) The Court finds that applicant has not been denied any rights guaranteed him by the United States and Texas Constitutions.

(342) The Court concludes that applicant is lawfully restrained.

(343) The Court concludes that applicant's Application for Writ of Habeas Corpus is denied.

ORDER

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W05-59563-S(A) and to transmit same to the Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. The Application for Writ of Habeas Corpus filed by applicant, Juan Lizcano, in cause number W05-59563-S(A), including any exhibits;
2. The State's Original Answer to the Application for Writ of Habeas Corpus;

3. This Court's signed Order Designating The Issues To Be Resolved By Affidavits, Depositions, Interrogatories, or Evidentiary Hearing, dated October 5, 2010;
4. All other motions and pleadings filed by the State and applicant;
5. The State's original and amended proposed findings of fact and conclusions of law;
6. Applicant's original proposed findings of fact and conclusions of law and amended proposed findings of fact and conclusions of law, if any were filed;
7. This Court's signed findings of fact and conclusions of law, and order;
8. Any and all other orders issued by the Court in cause number W05-59563-S(A);
9. Any and all documentary evidence filed with the Court, including affidavits and the reporter's record of the Writ hearings held November 2, 6-9, and December 13, 2012;
10. Any sealed materials, such as applicant's ex parte requests for investigative expenses;
11. Any other matters used by the trial court in resolving issues of fact; and
12. The indictment, judgment, sentence, docket sheet, and appellate record in cause number F05-59563, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to applicant's counsel, Alma

Lagarda, Texas Defender Service, 510 S. Congress, Ste. 304, Austin, Texas 78704, and Wm. Alan Wright, Haynes & Boone, LLP, 2323 Victory Ave., Ste. 700, Dallas, Texas 75219, and to counsel for the State, Dallas County Assistant District Attorney Jaclyn O'Connor Lambert, at Frank Crowley Courts Bldg., 133 N. Riverfront Blvd., LB-19, Dallas, TX 75207-4399.

SIGNED the 16 day of 6, 2014.

/s/ Andy Chatham
Judge Andy Chatham
282nd Judicial District Court
Dallas County, TX

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. AP-75,879

JUAN LIZCANO, *Appellant*,

v.

THE STATE OF TEXAS

Appeal from Case F05-5963-QS of the
282nd Judicial District Court of
Dallas County

WOMACK, J., delivered the opinion of the Court, in which KELLER, P.J., and MEYERS, KEASLER, HERVEY, and COCHRAN, JJ., joined. PRICE, J., filed a concurring and dissenting opinion, in which HOLCOMB and JOHNSON, JJ., joined.

A jury convicted Juan Lizcano of capital murder on October 9, 2007. Pursuant to the jury's findings on special issues about future-dangerousness, mitigation, and mental-retardation, the trial court sentenced the appellant to death. The appellant now raises seventy-nine points of error on direct appeal to this Court.[1] Finding

[1] See CODE CRIM. PROC. art 37.071, § 2(h) ("The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.").

no reversible error, we affirm the judgment and sentence of the trial court.

I. Background

The appellant and Jose Fernandez, a friend, spent the evening of Saturday, November 13, 2005, at a dance club in Dallas. Fernandez testified at the appellant's trial that they arrived around 10:00 or 11:00 p.m. and consumed three beers each, leaving around 1:00 a.m. on Sunday morning. As the appellant drove them home in his truck, Fernandez overheard the appellant talking on his cell phone to Marta Cruz, his girlfriend. The appellant told Cruz "if she was with another person, he was going to kill her. He's going to kill her and him." The appellant then drove with Fernandez to the apartment the appellant shared with his uncle and brother. The appellant took his uncle's revolver and continued to Cruz's house. Fernandez stayed in the truck while the appellant went inside.

Marta Cruz testified that the appellant knocked on her door around 2:00 a.m. on Sunday morning. After she let him inside, the appellant pointed the revolver at her head. Then he fired one shot into the ceiling. Cruz said the appellant told her that "[t]he next shot was for me. That I was next. The next one was for me." The appellant left the house after about ten minutes. Cruz immediately called 911.

Before the police arrived, Cruz called Fernandez to find out if he knew that the appellant had a gun. When Fernandez answered, Cruz learned that he was with the appellant. She asked Fernandez to tell the appellant not to come back to her house because the police were looking for him. But the appellant called Cruz and told her that he "didn't give a damn. He just didn't care."

Officer Lori Rangel was one of the officers who responded to Cruz's first 911 call. Officer Rangel testified that after Cruz described the incident with the appellant, Officer Rangel searched the surrounding area, but did not find the appellant or his truck. Following the unsuccessful search, Cruz told Officer Rangel that she did not need anyone to continue waiting with her, so Officer Rangel left the house.

Cruz received another call from the appellant after Officer Rangel left. The appellant said "that he could see that there was no police. That I was lying." A couple of minutes later, the appellant began kicking her side door to gain entry. Cruz hid in a closet. She called 911 while the appellant continued trying to kick through the door. Eventually, police officers arrived at Cruz's house and the appellant's kicking stopped.

Several police officers testified about the events following Cruz's second 911 call. Officer David Gilmore saw the appellant run from the back yard into an alley behind the house. Several officers then searched the alley. A marked police vehicle led officers on foot, and a police helicopter hovered above. Officers Brad Ellis, Richard Rivas, Francis Crump, and Raymond McClain described scrambling for cover as the appellant fired at least three shots at them from behind a tree in the alley. The appellant then ran from the alley, toward the front of the house.

While other officers searched the back alley, Officer Brian Jackson took an AR-15 rifle from his police vehicle and moved into a position at the front of the house. After the appellant ran to the front of the house, officers heard the appellant's revolver fire one shot, followed by Officer Jackson's rifle firing three shots. As the officers converged on the front yard, they found Of-

ficer Jackson fatally wounded and the appellant lying on the ground behind a trash can. His revolver lay empty on the ground two or three feet from his head. According to Chief Medical Examiner Dr. Jeffrey Barnard, the appellant's shot traveled through Officer Jackson's right arm and then into his heart, killing him within ten to fifteen seconds.

At trial, the appellant did not contest that he had fired the fatal shot. He did, however, challenge the State's theory that he fired first and that he knew Officer Jackson was a police officer.

* * *

III. MENTAL RETARDATION

A. Psychological Examination

In points of error twenty and twenty-one, the appellant argues that he was compelled to submit to a psychological examination conducted by the State in violation of the Fifth Amendment to the United States Constitution and Article I, Sections 9 and 10 of the Texas Constitution. The appellant fails to provide any distinction between his state and federal constitutional arguments. Therefore, we will analyze only his federal claims.[27]

In *Lagrone v. State*, we held that "when the defense demonstrates the intent to put on future dangerousness expert testimony, trial courts may order defendants to submit to an independent, state-sponsored

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[27] *See, e.g.*, *Lagrone v. State*, 942 S.W.2d 602, 612 (Tex. Cr. App. 1997) (declining to address state constitutional error where appellant "failed to provide us with any distinction or reason that the Texas Constitution provides greater protection than the Fifth Amendment").

psychiatric exam prior to the actual presentation of the defense's expert testimony."[28] Then in *Chamberlain v. State*,[29] we discussed the broader principle of *Lagrone*:

> [I]f a defendant breaks his silence to speak to his own psychiatric expert and introduces that testimony which is based on such interview, he has constructively taken the stand and waived his fifth amendment right to refuse to submit to the State's psychiatric experts.... Appellant cannot claim a fifth amendment privilege in refusing to submit to the State's psychiatric examinations and then introduce evidence gained through his participation in his own psychiatric examination.[30]

The immediate question before us is whether the holding in *Lagrone* may be extended to psychological examinations to determine mental retardation. We hold that when the defense demonstrates the intent to introduce evidence of the defendant's mental retarda-

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[28] 942 S.W.2d, at 612. In *Lagrone*, we first discussed our holding in *Soria v. State*, 933 S.W.2d 46 (Tex. Cr. App. 1996), that testimony by an expert witness could be interpreted as a waiver of Fifth Amendment protections: "[O]ur decision in *Soria* stands for the proposition that once a defendant has executed a limited waiver of the Fifth Amendment's protection by constructively testifying through an expert on the issue of future dangerousness, the trial court may order that defendant to submit to a state-sponsored future dangerousness examination." We then extended *Soria* "to allow trial courts to order criminal defendants to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces, or plans to introduce, its own future dangerousness expert testimony."

[29] 998 S.W.2d 230 (Tex. Cr. App. 1999).

[30] *Id.*, at 234.

tion through psychological examinations conducted by defense experts, the trial court may order the defendant to submit to an independent, state-sponsored psychological examination on the issue of mental retardation. As we stated in *Lagrone*, "[o]ur sense of justice will not tolerate allowing criminal defendants to testify through the defense expert and then use the Fifth Amendment privilege against self-incrimination to shield themselves from cross-examination on the issues which they have put in dispute."[31] The precise nature of the psychological testimony to be presented is immaterial; that it is being presented by the defendant is enough to trigger the rule.[32]

The trial in this case began on October 1, 2007. On April 20, 2007, by order of the trial court, the appellant had filed a declaration of his intent to claim mental retardation as a bar to the death penalty. On the same day, the State filed a motion to compel the appellant to submit to an examination by the State's expert to determine whether he was mentally retarded. The trial court granted the State's motion, and further ordered that (i) the appellant's and State's experts make the raw test data and notes from their evaluations available to the opposing expert, and (ii) neither expert disclose the underlying facts or data to the attorneys without prior judicial authorization. At a pretrial hearing on June 1, 2007, the appellant objected to the examination primarily on the grounds that it should be conducted

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[31] 942 S.W.2d, at 611.

[32] While unpublished opinions cannot be cited by parties as legal authority, our unpublished opinion in *Ward v. State*, No. AP 74695, 2007 WL 1492080 (Tex. Cr. App. May 23, 2007), provides an example of how *Lagrone* was applied with respect to mitigation issues.

only after the appellant had actually introduced expert testimony on the issue of mental retardation at trial. In response, the trial court revised its order to prohibit the State's expert from talking with the appellant about the facts of the underlying offense. The appellant now argues that the examination was unconstitutional, but does not discuss the timing of the examination.[33]

We conclude that the trial court's order did not violate the appellant's Fifth Amendment rights, particularly where the trial court adopted the prophylactic measures of ordering the experts not to disclose underlying facts or data to the attorneys without prior judicial authorization, and ordering the state's expert not to question the appellant regarding the offense. Points of error twenty and twenty-one are overruled.

B. Pretrial Determination of Mental Retardation

In point of error twenty-two, the appellant argues that the trial court denied him due process of law by refusing to empanel a separate jury to make the mental-retardation determination before trial. In point of error twenty-three, the appellant argues that the trial court denied him due process of law by refusing to make the mental-retardation determination itself before trial. In point of error twenty-four, the appellant states that the trial court denied him due process of law by refusing to allow him to offer evidence of mental re-

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[33] To support his argument on appeal, the appellant simply cites to *Sanchez v. State*, 707 S.W.2d 575 (Tex. Cr. App. 1980), without explaining how it applies. In *Sanchez*, we held that pursuant to Article I, Section 10 of the Texas Constitution, when a defendant is arrested, he has the right to remain silent and the right not to have that silence used against him, even for impeachment purposes, regardless of when he is advised of those rights.

tardation before the trial. Point of error twenty-four is not briefed and is therefore overruled.[34]

In *Atkins v. Virginia*,[35] the United States Supreme Court held that the execution of mentally retarded persons violates the Eighth Amendment's prohibition of cruel and unusual punishment, but left to the states the task of developing appropriate ways to enforce this constitutional restriction. This Court has consistently held that a determination of mental retardation during the punishment phase of trial is sufficient to protect a defendant's Eighth Amendment rights.[36] In *Neal v. State*, we explained that "the nature of the offense itself may be relevant to a determination of mental retardation; thus, a jury already familiar with the evidence presented at the guilt stage might be especially well prepared to determine mental retardation."[37]

The appellant fails to cite any binding authority for the proposition that punishment-phase determinations of mental retardation are a violation of due process. While his policy arguments could be considered by the legislature if it chooses to enact a statutory response to *Atkins*, we decline to overturn established precedent.

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[34] TEX. R. APP. P. 38.1(i) (The appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

[35] 536 U.S. 304, 317 (2002).

[36] *See, e.g., Neal v. State*, 256 S.W.3d 264, 272 (Tex. Cr. App. 2008), *cert. denied*, 129 S. Ct. 1037 (2009); *Williams v. State*, 270 S.W.3d 112, 132 (Tex. Cr. App. 2008) ("A defendant, asserting a mental retardation claim in a death penalty case, is entitled to the process of a 'full and fair hearing' to establish this claim.") (quoting *Hall v. Quarterman*, 534 F.3d 365, 371 (5th Cir. 2008)).

[37] 256 S.W.3d, at 272.

Points of error twenty-two and twenty-three are overruled.

C. Mitigation Report Underlying Expert Opinions

In point of error thirty, the appellant argues that the trial court erred in requiring the appellant to produce the facts and data underlying the opinions of his mental-retardation experts approximately ten days before the appellant called the experts to testify. The appellant also argues that the facts and data were "work product and not subject to discovery."

Rule of Evidence 705(a) controls disclosure of facts or data underlying an expert opinion:

> The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, *unless the court requires otherwise*. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data. [Emphasis added.]

A trial court is vested generally with broad discretion to conduct a trial.[38] The emphasized clause "unless the court requires otherwise" provides the trial court with specific discretion to require the disclosure of facts or data underlying expert opinions prior to the testimony of the expert.

The record shows that the appellant's defense counsel hired an investigator, Debbie Nathan, to conduct interviews to assemble mitigation evidence. Based on these interviews, Nathan compiled a "mitiga-

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[38] *Sapata v. State*, 574 S.W.38 2d 770, 771 (Tex. Cr. App. 1978).

tion report." When defense counsel decided to pursue a mental-retardation claim, they sent the mitigation report to their mental-retardation experts. The experts used the mitigation report to form their opinions, and the mitigation report was sent to the State's expert pursuant to the trial court order discussed above in Section III-A.

On Wednesday, October 10, the jury heard testimony from several of the appellant's punishment witnesses. The trial court then dismissed the jury for the weekend, reminding the jurors that the trial would break again after the Tuesday of the next week. On Thursday, October 11, the trial court ordered defense counsel to disclose facts or data, including the mitigation report, underlying the opinions of their experts. Defense counsel objected on the grounds that the State should get the mitigation report only "at the time that the witness is on *voir dire* preparing to testify in front of the jury." The trial court overruled the defense objection and explained that it wanted to avoid further delays in the trial:

> [H]ere's the rule. 705 says, "Prior to the expert giving the expert's opinion that the State is entitled to take this person on *voir dire*." It doesn't talk about time frame or anything else like that.
>
> This case has been delayed, delayed, delayed. I'm not going to run up to October 22nd or 29th now when you plan to call this witness and delay this case any further, because they're going to want a continuance. They will be entitled to a continuance to review the information. They simply will be.

> The data is what it is. And … [Defense Counsel], if you do not create or enhance the substance of information, it ain't work product. So, at this time, I'm ordering the Defense to turn over the disclosure of facts or data underlying your expert's opinion that you will be calling to testify.

On Monday, October 15, the trial resumed. In the afternoon of Tuesday, October 16, the jury was again excused until Monday, October 29. The State conducted a *voir dire* examination of the appellant's experts on Wednesday, October 31, and the experts completed their testimony that day. The trial finally concluded on Thursday, November 1.

As a preliminary matter, the appellant argues on appeal that the mitigation report was "work product and not subject to discovery." At trial, however, the appellant conceded that the mitigation report would have to be disclosed; he argued only that he should not be required to disclose the mitigation report *before* the experts were called to testify. The contention that the mitigation report was "work product and not subject to discovery" was not argued to the trial court and is not preserved for review.[39]

The record shows that the trial court ordered the disclosure before the defense experts were called to testify, but during the presentation of defense witnesses at the punishment phase, so that the State could review the information while the jury was excused. The trial court could thereby avoid granting another continuance that would extend the trial further. Under the facts described above, the trial court did not abuse

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[39] R. APP. P. 33.1(a).

the discretion provided under Rule 705(a). Furthermore, the appellant fails to allege any specific harm arising from the State's possession of the mitigation report prior to *voir dire* of the expert witnesses. Point of error thirty is overruled.

D. Mental Retardation Finding

In point of error forty-nine, the appellant argues that the jury's answer to the mental-retardation special issue is against the great weight and preponderance of the evidence. In points of error fifty and fifty-one, he argues that the trial court erred in failing to disregard the jury's answer to the mental-retardation special issue and in denying the appellant's motion for judgment notwithstanding the verdict. We will address the latter two points first.

In points of error fifty and fifty-one, the appellant argues that because he introduced expert witnesses to demonstrate mental retardation and the State did not introduce its own expert witnesses in rebuttal, the trial court should have disregarded the jury's answer to the mental-retardation special issue or granted his motion for judgment notwithstanding the verdict.[40] In *Gallo v. State*, we held that when an affirmative defense of mental retardation is asserted at trial, a defendant bears the burden of proof, by a preponderance of the evi-

[40] To support this assertion, the appellant encourages us to draw an analogy to *Alexander v. Turtur & Associates*, 146 S.W.3d 113 (Tex. 2004). In *Alexander*, the Texas Supreme Court concluded that expert testimony was necessary, under the complex facts of that case, for the plaintiffs to prove the proximate-cause element of a legal malpractice claim. *Id.*, at 120. We find the discussion of the plaintiffs' burden to prove legal malpractice in *Alexander* to have little relevance to the State's rebuttal of mental-retardation evidence in the present case.

dence, to establish that he is mentally retarded.[41] We find no authority, however, to support the appellant's contention that only expert testimony can be used to prove or disprove mental retardation, or that the State had a burden of production to introduce expert witnesses. In fact, in *Ex parte Briseno*, we cautioned that "[a]lthough experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility."[42] Points of error fifty and fifty-one are overruled.

We now proceed to point of error forty-nine. As noted above, at trial the appellant bore the burden of proof, by a preponderance of the evidence, to establish that he is mentally retarded.[43] This Court defines "mental retardation" according to a three-prong test: (i) significantly sub-average general intellectual functioning, usually evidenced by an IQ score of about 70 or below, (ii) accompanied by related limitations in adaptive functioning, and (iii) the onset of which occurs prior to the age of eighteen.[44] In reviewing the jury's finding

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[41] 239 S.W.3d 757, 770 (Tex. Cr. App. 2007).

[42] 135 S.W.3d 1, 9 (Tex. Cr. App. 2004).

[43] *Gallo*, 239 S.W.3d, at 770.

[44] *Briseno*, 135 S.W.3d, at 7-8; *see also Neal*, 256 S.W.2d, at 272-73; *Gallo*, 239 S.W.3d, at 769. Because the adaptive functioning criteria can be "exceedingly subjective," in *Briseno* we also identified several other evidentiary factors which factfinders might also focus upon in weighing evidence of mental retardation:

that the appellant is not mentally retarded, we must consider all of the evidence relevant to the mental-retardation special issue and determine, with great deference to the jury's finding, whether this finding is so against the great weight and preponderance of the evidence as to be manifestly unjust.[45]

1. Significantly Sub-Average General Intellectual Functioning

The appellant's evidence on the first prong of the mental retardation test came from two expert witnesses who testified that his IQ scores are consistently below 70. Dr. Antonio Puente, a clinical neuropsychologist and professor of psychology at the University of North Carolina, administered three IQ tests and re-

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- 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?

[45] *Gallo*, 239 S.W.3d, at 770.

ported scores of 62, 60, and 48. Dr. Puente gave his opinion that the appellant was mildly mentally retarded. He also noted an IQ test performed by defense expert Dr. Gilbert Martinez that resulted in a score of 69.

Dr. Kristi Compton, a psychologist in private practice in Dallas, administered one IQ test and reported a score of 53. In her opinion, the appellant suffered from mild mental retardation. Dr. Compton further testified that IQ tests have a standard error of measure of plus or minus five points. On cross-examination, Dr. Compton confirmed that Hispanic test subjects historically score 7.5 points lower on IQ tests than Caucasian subjects. She explained, "That doesn't mean they're less intelligent, it has to do with culture and influence." Dr. Compton indicated that there was no standard protocol for whether to simply add back 7.5 points to the scores of Hispanic subjects. She agreed with the State that if the 7.5 points were added, the appellant's IQ scores would be 55.5, 59.5, 69.5, 67.5, and 76.5. If five additional points were added to reflect the upper limit of the error of measure, the scores would be 60.5, 64.5, 74.5, 72.5, and 79.5.[46] Dr. Compton testified on redirect examination, however, that having multiple scores within the same range gave her additional confidence that the scores were correct and that it would not be proper to simply add 7.5 and 5 points to each score.

The State contends on appeal that three considerations should increase the IQ scores reported by Drs. Puente and Compton. First, "Dr. Compton testified that Spanish speakers tend to score one-half standard deviation below Caucasians, or 7.5 points, because of

[46] There appear to be arithmetical errors in this testimony. They do not affect our decision.

'culture and influence,' not cognitive deficiency." Second, the standard error of measurement was plus or minus five points. Third, "case law and the theory of regression to the mean further support interpreting the results, in this case, so that they trend upward to the mean IQ of 100."

The State's contentions have little merit. Whether or not "Spanish speakers" as a group tend to score below "Caucasians" on IQ tests, has little relevance for the proposition that, on the tests administered to him, the appellant's scores were somehow inaccurate due to his particular culture and influences.[47] Furthermore, the State presented no evidence showing why the standard error of measure of five points should be added to the appellant's score rather than subtracted from it or even ignored, particularly in light of the testimony from Dr. Compton that the multiple scores below 70 increased her confidence in the validity of the scores. Finally, the theory of "regression to the mean" was not presented to the jury, and the State does not indicate how that theory would logically apply in this case.

The appellant clearly satisfied the first prong of the mental retardation definition by a preponderance of the evidence.

2. Related Limitations in Adaptive Functioning

To aid our analysis of an appellant's limitations in adaptive functioning, we look to the definition of "adap-

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[47] *See, e.g., Maldanado v. Thaler,* No. H-07-2984, 2009 WL 3074330 (N.D.Tex. September 24, 2009) (describing expert disagreement about whether a defendant's "cultural differences" artificially lowered his IQ scores).

tive behavior" in the Health and Safety Code.[48] Section 591.003(1) of the Health and Safety Code defines adaptive behavior as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." The appellant was approximately twenty-eight years old at the time of the offense, and because neither party presented evidence or argument concerning the appellant's cultural group, we will consider his cultural group to be simply the people of the State of Texas.

A significant number of witnesses provided testimony relevant to the appellant's adaptive functioning. The testimony of many of the witnesses, however, provided evidence both for and against the appellant's claim. The following is a summary of the more relevant testimony:

- Aleida Reyes Lucio taught the appellant for one year in the sixth grade in Mexico. She described the primitive nature of the appellant's school and testified that the appellant's "learning was very slow" compared to the other children. The school went up to only the sixth grade, and she graduated the appellant from the sixth grade because he was 15 years old, even though the maximum age for a sixth-grade student at that time was between 12 and 13 years of age. During cross-examination, Lucio indicated that her education, similar to that of other teachers in small schools, extended only through the ninth grade. She taught the appellant for one year between 1992 and 1993.

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[48] *Briseno*, 135 S.W.3d, at 7 n.25. The trial court also used the Health and Safety Code definition in its punishment charge to the jury in the present case.

- Rosa Maria Rodriguez Rico was a nurse in the region where the appellant was raised. She testified that women in that region often did not have prenatal care and that the appellant's nutrition as a child was "totally deficient." On cross-examination, she conceded that she first met the appellant approximately ten years prior to the trial when he was around the age of 21, and that she treated him for the flu.

- Jessica Baron dated the appellant for five or six months in 2005. She testified that on several occasions the appellant drove to visit her in Wichita Falls. Before the first such trip, she gave the appellant explicit directions from Dallas to her house, but the appellant had to call her several times because he got lost. She also came to visit the appellant in Dallas, where he lived with his uncle and brother. Baron testified that the appellant was shy. When asked a question, "[h]e would answer simply, but that's probably it." She and the appellant would talk almost every night; he had a basic Spanish vocabulary, but she never heard him speak in English. The appellant would always pay for meals when they went out to eat, but she never recalled seeing him count any change after paying. On cross-examination, Baron testified that the appellant did not need directions after his first trip to Wichita Falls. She did not consider him to be slow or mentally retarded, but rather to be shy around crowds. She said, "He was very bright. He didn't have any problems understanding me."

- Alejandra Ruiz Campos is the appellant's mother. She described the appellant's childhood home in Mexico and testified that the appellant left Mexico and came to the United States so that he could send

money home. The appellant would typically send money home every 15 days.

- Reyes Lizcano Ruiz is one of the appellant's older brothers. He testified that he and the appellant worked at a community store when the appellant was nine or ten years old. Ruiz did not allow the appellant to continue working at the store because the appellant could not make correct change.
- Deputy Deveesh Amin was a detention officer in the jail where the appellant was held for nearly two years pending trial. Deputy Amin testified that the appellant had behaved well in the administrative custody area of the jail. On cross-examination, Deputy Amin also testified that he had seen a lot of inmates with mental problems or mental illnesses, but from his experience, the appellant did not exhibit any mental issues. The appellant kept a neat and orderly cell and did not have any problems with his hygiene.
- Marta Cruz testified that the appellant could read digital clocks, but not analog ones. Cruz bought the appellant a cell phone and added the line to her plan; the appellant paid for the additional cost of the line, but she had to enter in his contacts and telephone numbers. Cruz had a VCR that the appellant was unable to operate. The appellant could not understand English-language television and liked to watch a particular Spanish-language children's television show. He lacked certain grooming and hygiene habits such as cleaning his ears and cutting his fingernails. The appellant purchased a used pick-up truck for which he paid too much, in Cruz's opinion. The appellant bought clothes and shoes that were too large for him. In one instance,

the appellant wore a plain white blouse belonging to Cruz and did not realize that it was a woman's blouse. On cross-examination, Cruz testified that she never told defense counsel that the appellant was mentally retarded. The appellant called her on several occasions when he had been arrested on DWI or public intoxication charges; he requested that she raise money from his brother and friends to help him bond out "before Immigration got ahold of him."

- Juan Lizcano Aguirre is one of the appellant's cousins. He testified that the appellant was very shy as a child. The appellant also did not seem to understand when someone in the family told a funny story and would occasionally begin laughing when no one else was laughing. He also testified, however, that the appellant was the only one of his four brothers who could be depended on to send money home to his family.

- Mario Alvarez was tasked with training the appellant to perform certain road-construction work for an employer in Houston. He testified that the appellant had trouble placing cones and using a tape measure and saw, and was the only person that he had ever trained who was unable to master these skills. The appellant could do a task when it was explained to him, but he could not retain instructions for more than ten or fifteen minutes. Alvarez occasionally interacted with the appellant socially and testified that the appellant did not always understand jokes and was "almost childish." One of the appellant's cousins, who worked at the same company, helped the appellant figure out how much money to send home. On cross-examination, Alvarez testified that the appellant told him he was

leaving Houston for Dallas because he was in love with Marta Cruz. Alvarez and his supervisor asked him not to go because he was doing a good job. At that time the appellant made between $360 and $400 per week.

- Jose Luis Uribi was the appellant's supervisor at a landscaping company in Grand Prarie, Texas. He testified that the appellant would sometimes mow or cut the wrong yard. The appellant was quick to do a job, but was slow to learn things. It was a joke around the company that the appellant could not be sent to mow a yard unless the yards were flagged to indicate which ones to mow. But, he was not slower to learn than other people who came from Mexico. Uribi also testified that the appellant would laugh at appropriate times, and that the appellant knew exactly how many hours he had worked each week and exactly how much he should be paid.

- Jeffrey Gartrell was a detention officer in the jail where the appellant was held pending trial. Gartrell testified that the appellant had caused no problems. On cross-examination, he testified that the appellant maintained his hygiene and an orderly cell. Gartrell had worked for the sheriff's department for over ten years, and in his experience with thousands of inmates, he did not believe the appellant was mentally retarded. But, Gartrell did not know the definition of mental retardation.

- Mariano Valdivia owned a used-car lot and testified that he sold a used pick-up truck to the appellant and Jose Zarate as co-buyers. Valdivia's records showed that the appellant made weekly payments of $120 from September 2004 to November 2005.

> Valdivia testified that the appellant would make the payments in person and was usually on time with his weekly payments. Valdivia did not notice anything mentally wrong with the appellant that would prevent Valdivia from selling him the vehicle.

As noted above, "adaptive behavior" was defined for the jury as "the effectiveness with which a person meets standards of personal independence and social responsibility expected of the person's age and cultural group."[49] The jury could consider relevant evidence presented at both the guilt or innocence and the punishment phases of trial, and could also focus on evidence relevant to the factors laid out in *Briseno*.[50]

The evidence relevant to adaptive functioning was extensive, and we need not assign a weight to each piece of evidence. Some of the more significant evidence showing limitations in adaptive functioning was the following: (i) the appellant had trouble following instructions and performing fairly simple tasks in the work environment; (ii) the appellant used limited vocabulary and did not seem to understand humor; (iii) the appellant could not perform certain simple personal tasks such as reading an analog clock, following directions to a location, or operating a VCR; and (iv) the appellant had difficulty learning and socializing. On the other hand, the following evidence suggested that the appellant did not exhibit limitations in adaptive functioning: (i) the appellant maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) the appellant made regu-

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[49] TEX. HEALTH & SAFETY CODE 49 § 591.003(1).

[50] 135 S.W.3d, at 8-9.

lar payments on a vehicle he purchased as a co-buyer; (iii) the appellant maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be "bright"; and (iv) the appellant reliably sent significant amounts of money and other items to assist his family.

To prove mental retardation, the appellant had to show by a preponderance of the evidence that he was not effective in meeting standards of personal independence and social responsibility expected of his age and cultural group. On review, we must give great deference to the jury's finding that the appellant was not mentally retarded. Because there was significant evidence admitted that supported the appellant's effectiveness in meeting standards of personal independence and social responsibility, we find that the jury's conclusion that the appellant was not mentally retarded is not so against the great weight and preponderance of the evidence as to be manifestly unjust.[51] Therefore, we need not consider the third prong, onset before the age of eighteen. Point of error forty-nine is overruled.

E. Motion to Open and Close the Argument

In point of error fifty-two, the appellant argues that the trial court erred in denying his motion to open and close the arguments at the punishment phase with respect to the issue of mental retardation. The appellant argues that because he had the burden of proof on the issue of mental retardation, he should have been

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[51] *See, e.g.*, *Gallo*, 239 S.W.3d at 774 (where evidence was both in favor of and against a finding of mental retardation, "the jury was ultimately in the best position to make credibility determinations and evaluate this conflicting evidence").

permitted to offer a rebuttal after the State's argument. The appellant would have us apply Rule 269(a) of the Rules of Civil Procedure, which provides that "the party having the burden of proof on the whole case, or on all matters which are submitted by the charge, shall be entitled to open and conclude the argument."

Article 36.07 of the Code of Criminal Procedure governs the order of closing arguments in criminal trials: "The order of argument may be regulated by the presiding judge; but the State's counsel shall have the right to make the concluding address to the jury." We dealt with an argument similar to the appellant's in *Martinez v. State*,[52] in which the appellant contended that the civil rules should apply and a defendant should have the right to open and close the argument when only the issue of insanity is raised, because the defendant bears the burden of proof as to that affirmative defense. We found no error in denying the appellant's request to open and close the argument: "Though it may be true that appellant has the burden of proving his affirmative defense, it is still the State's burden to overcome the defendant's evidence and to prove beyond a reasonable doubt all the elements of the offense charged, including the intent and culpability of the defendant."[53]

More recently in *Masterton v. State*, we held that Article 36.07—not the civil rules—applies to the punishment phase of a capital trial.[54] We stated, "Nothing in the Code of Criminal Procedure limits the application

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[52] 501 S.W.2d 130 (Tex. Cr. App. 1973).

[53] *Id.*, at 132.

[54] 155 S.W.3d 167, 175 (Tex. Cr. App. 2005).

of Article 36.07 to non-capital cases and we see no reason to do so."[55] Masterton claimed trial court error in refusing to give him the concluding argument on the mitigation special issue, but we ultimately found "nothing about the mitigation special issue, which imposes a burden of proof on neither party, that distinguishes appellant's situation from our prior holdings."[56]

Article 36.07 of the Code of Criminal Procedure continues to apply to the punishment phase of capital trials.[57] At the punishment phase, the State bears the ultimate burden of proof required by Article 37.071(c) of the Code of Criminal Procedure to prove future dangerousness beyond a reasonable doubt. The State's statutory right to make the concluding address to the jury at punishment reflects that burden. We find no authority for creating an exception from Article 36.07 when the affirmative defense of mental retardation is raised. Point of error fifty-two is overruled.

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VI. MOTION FOR NEW TRIAL

In point of error forty-seven, the appellant argues that the trial court erred in denying his request for an evidentiary hearing on his Motion for New Trial. In point of error forty-eight, the appellant argues that the trial court erred in denying his Motion for New Trial.

On November 30, 2007, the appellant filed a Motion for New Trial pursuant to Rule of Appellate Procedure

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[55] *Id.*

[56] *Id.*

[57] *See, e.g., Luna v. State*, 268 S.W.3d 594, 608 (Tex. Cr. App. 2008), *cert. denied* 130 S. Ct. 72 (2009).

21. The motion contained the following grounds for a new trial: (i) the evidence was legally and factually insufficient to support the jury's verdict on each of the special issues; (ii) consideration of mental retardation during the punishment phase was unconstitutional; (iii) the delay in trial during the defense presentation of punishment evidence denied the appellant a fair trial; (iv) the delays during punishment while the trial court simultaneously administered another case denied the appellant a fair trial; (v) the requirement that the defense disclose underlying evidence that would form the basis of expert witness opinions gave the State an unfair advantage; and (vi) the denial of a continuance to secure the testimony of Dr. Martinez prejudiced the appellant's defensive strategy.

On January 3, 2008, the trial court held a hearing on the Motion for New Trial. Because the appellant had already been transported to the custody of the Texas Department of Criminal Justice, the trial court decided not to take live testimony, but rather to consider sworn affidavits from defense counsel as evidence in support of the motion. The trial court explained that it "[did] not see any evidence in the affidavits that would require any live testimony, and the Court is of the opinion the Court can … make a ruling on that motion based solely on the affidavits, which were incorporated into the record and are evidence."

Rule of Appellate Procedure 21.7 provides a trial court with discretion in considering a motion for new trial: "The court may receive evidence by affidavit or otherwise." A trial court may rule based on sworn pleadings and affidavits without oral testimony. Live testimony is not required.[83] A trial court abuses its dis-

[83] *Holden v. State*, 201 S.W. 3d 761, 763 (Tex. Cr. App. 2006).

cretion in failing to hold a hearing only when a defendant presents a motion for new trial raising matters not determinable from the record.[84] From our review of the record, we agree with the trial court that the matters raised by the appellant in his Motion for New Trial could be adequately determined from the record and the affidavits of defense counsel. Point of error forty-seven is overruled.

In point of error forty-eight, we review the trial court's denial of the Motion for New Trial under an abuse-of-discretion standard.[85] We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling.[86]

Each of the matters raised in the Motion for New Trial has been raised again as a point of error on appeal. Based on our review of the record and the arguments of the parties, we have affirmed the trial court's ruling on the merits of each matter with the exception of the sixth, the denial of a continuance to secure the testimony of Dr. Martinez. With respect to this matter, a reasonable view of the record supports the trial court's reasoning that the testimony of Dr. Martinez would have been substantially similar to the two other mental-retardation experts that were introduced by the appellant, and Dr. Martinez had been available to

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[84] *Id.*

[85] *Id.*

[86] *Id.*

testify at other times during the defense presentation of evidence. We therefore find that the trial court's decision was not arbitrary or unreasonable, and the trial court did not abuse its discretion in denying the appellant's Motion for New Trial. Point of error forty-eight is overruled.

* * *

We affirm the judgment of the trial court.

Delivered: May 5, 2010

Do not publish.

PRICE, J., filed a concurring and dissenting opinion in which JOHNSON and HOLCOMB, JJ., joined.

CONCURRING AND DISSENTING OPINION

I agree that there is no reversible error affecting the guilt phase of the appellant's trial, and I concur in the result of those portions of the Court's opinion. But I dissent to the Court's disposition of the appellant's forty-ninth point of error, challenging the jury's finding that he is not mentally retarded. At issue in this case is not simply whether the jury could rationally find that the appellant is not mentally retarded for purposes of the Eighth Amendment ban on executing mentally retarded offenders. At issue is the more fundamental question whether it is the jury that gets to say *what the Eighth Amendment standard for determining mental retardation is in the first place*. Because I do not believe that question is properly delegated to the jury to decide, I am compelled to dissent.

I.

In his forty-ninth point of error, the appellant argues that the jury's verdict finding that he did not establish his mental retardation by a preponderance of the evidence is against the great weight and preponderance of the evidence. This is, in essence, a claim of factual insufficiency, since it is an issue upon which, we have said, the appellant shoulders the burden of proof.[1] As such, it is subject to our rule that evidentiary sufficiency should be measured against a hypothetically correct jury charge.[2] In capital-murder cases, this Court has jurisdiction to review factual-sufficiency claims.[3] The Court therefore rightly takes up the appellant's forty-ninth claim. In doing so, the Court measures the evidence of mental retardation against the definition that was submitted in the court's charge at the conclusion of the punishment phase of trial. But the Court undertakes no analysis of whether that jury charge definition was hypothetically correct. It makes a difference.

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[1] *See Meraz v. State*, 785 S.W.2d 146, 154-55 (Tex. Crim. App. 1990) (with respect to issues upon which the defendant is assigned the burden of proof, direct-appeal courts in Texas may review factual sufficiency of the evidence, asking whether jury's verdict was against the great weight and preponderance of the evidence); *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007) (burden of proof in capital murder punishment proceeding is on the defendant to establish mental retardation by a preponderance of the evidence).

[2] *See Wooley v. State*, 273 S.W.3d 260, 268 (Tex. Crim. App. 2008) (factual sufficiency review entails use of hypothetically correct jury charge); *Grotti v. State*, 273 S.W.3d 273, 281 (Tex. Crim. App. 2008) (same).

[3] *Grotti*, *supra*, at 279; *Watson v. State*, 204 S.W.3d 404, 413 (Tex. Crim. App. 2006); *Bigby v. State*, 892 S.W.2d 864, 874-75 (Tex. Crim. App. 1994).

The jury's verdict with respect to mental retardation was a general one, in the sense that it did not explicitly indicate in what respect the jury found the appellant's evidence of mental retardation lacking. The Court today concludes that to the extent that this general verdict might have reflected the jury's rejection of the appellant's evidence of significantly sub-average intellectual functioning as measured by standardized IQ testing,[4] it was against the great weight and preponderance of the evidence.[5] I agree with this assessment. It is with respect to the second prong of the definition of mental retardation—the related-deficits-in-adaptive-functioning prong—that the Court today finds the appellant's evidence to be not so compelling that it must conclude that the jury's verdict was against the great weight and preponderance of the evidence.

In coming to this conclusion, the Court measures the evidence of the appellant's level of adaptive functioning against the definition of "adaptive behavior" (not, it should be noted, "adaptive functioning") that the trial court supplied to the jury in the charge. That definition comes from Section 591.003(1) of the Texas

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[4] In *Ex parte Briseno*, we defined "mental retardation" for purposes of the Eighth Amendment's categorical prohibition against executing mentally retarded offenders embodied in *Atkins v. Virginia*, 536 U.S. 304 (2002), in the absence of any legislative proclamation on the subject, to constitute "a disability characterized by: (1) significantly subaverage general intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." 135 S.W.3d 1, at 7 (Tex. Crim. App. 2004) (footnotes and internal quotation marks omitted). The trial court's charge to the jury at the conclusion of the punishment phase in this case defined mental retardation in precisely these terms.

[5] Majority opinion, at 23-25.

Health and Safety Code: "'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."[6] Presumably, the trial court chose this definition because this Court implicitly endorsed it in a footnote in *Ex parte Briseno*.[7] The appellant did not object to this definition, and I agree that it is hypothetically correct—insofar as it goes.

But this was not the only definition of adaptive functioning that we mentioned in our footnote in *Briseno*. We also noted the definition of "limitations in adaptive functioning" that was endorsed by the American Association on Mental Retardation (AAMR, now the American Association on Intellectual and Developmental Disabilities, or AAIDD), *viz*: "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, *as determined by clinical assessment and, usually, standardized scales*."[8] In *Atkins*,[9] both definitions of adaptive deficits noted by the Supreme Court included specific clinical criteria for measuring adaptive deficits.[10] The AAMR defined adaptive deficits to be "limitations *in two or more of the following applicable adaptive skill areas*: communica-

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[6] TEX. HEALTH & SAFETY CODE, § 591.003(1).

[7] 135 S.W.3d at 7 n.25.

[8] *Id.* (emphasis added).

[9] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[10] *Id.* at 308 n.3.

tion, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work."[11] Similarly, the American Psychiatric Association (APA) defined (then and now) adaptive limitations to be "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."[12]

Today the Court fails to take these diagnostic criteria into account in gauging whether the jury's rejection of mental retardation is against the great weight and preponderance of the evidence. It is not entirely clear to me why. In *Briseno*, we noted that the

> definitional question is not before us in this case because applicant, the State, and the trial court all used the AAMR definition. Until the

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[11] *Id.* (emphasis added), *citing* the AAMR publication, Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992). In 2002, in its tenth edition of this publication, the AAMR modified the criteria somewhat, consolidating some of the skill areas and requiring significant limitations in only one of the three to justify a diagnosis of mental retardation. *See* AAMR, Mental Retardation: Definition, Classification, and Systems of Support 20-23 (10th ed. 2002). These various definitions, "while following developments in consensus in the clinical field, have retained a consistent core meaning." John H. Blume, Sheri Lynn Johnson and Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 696 n.28 (Summer 2009).

[12] *Id.* (emphasis added), *citing* Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) 41 (4th ed. 2000). It was this latter APA definition and clinical diagnostic criteria that the parties in this case seem to have agreed upon.

> Texas Legislature provides an alternate statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or Section 51.003(13) criteria in addressing *Atkins* mental retardation claims.[13]

We ultimately adopted the findings of fact of the convicting court in *Briseno*, which expressly found that the applicant had failed to satisfy the "diagnostic criteria" for the adaptive deficits "prong" of the standard for mental retardation.[14]

The Texas Legislature has still not acted to define mental retardation in the capital context, either for purposes of post-conviction habeas corpus review (as in *Briseno*), or, more critically today, for purposes of a jury's assessment of mental retardation at the punishment phase of a capital-murder trial. So, consistent with the "temporary judicial guidelines" that we announced in *Briseno* to fill in "during this legislative interregnum,"[15] should we not hold that the hypothetically correct jury charge embraces the diagnostic criteria for mental retardation? Why today does the Court fail to measure the appellant's sufficiency claim specifically against those diagnostic criteria? The Court does not say.

Presumably, the Court does not believe that the jury is bound by the diagnostic criteria. There is certain-

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[13] 135 S.W.3d at 8, *citing* TEX. HEALTH & SAFETY CODE § 591.003(13), which reads: "'Mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." The Health and Safety Code nowhere incorporates the specific diagnostic criteria of the AAMR or the APA.

[14] *Id.* at 18.

[15] *Id.* at 5.

ly fodder for such a belief in our *Briseno* opinion. In asking ourselves how we should go about defining mental retardation in the wake of *Atkins*, we noted that the Supreme Court had "left 'to the States the task of developing appropriate ways to enforce the constitutional restriction [against executing the mentally retarded] upon [their] execution of sentences.'"[16] We apparently took this to mean that we were free to tinker not only with the procedural mechanisms for enforcing the Eighth Amendment prohibition, but also with the substantive definition of mental retardation.[17] Observing

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[16] *Id.*, *quoting Atkins*, *supra*, at 317, which in turn quoted *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

[17] Legal commentators exhibit stark disagreement as to whether *Atkins* contemplated that the various states would have significant latitude to define mental retardation for themselves. *Compare, e.g.*, Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 J. LEGIS. 77, 85 (2003) ("Rather than dictating the definitional … attributes of the death penalty exclusion, the Court entrusted this responsibility to the states utilizing capital punishment[.] * * * The manner in which capital punishment states define mental retardation for purposes of the exclusion from the death penalty will obviously have the greatest impact on the actual scope of the Court's holding." However, the various states "should ensure that the definitional provisions in their capital punishment exclusion provisions are at least as comprehensive as the clinical definitions referenced by the Court in *Penry* and *Atkins*."); Judith M. Barger, *Avoiding Atkins v. Virginia: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 226 (Fall 2008) ("the Atkins Court left it to the states to define the term 'mental retardation'"); and Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Intellectually Disabled After Atkins v. Virginia*, 76 TENN. L. REV. 685 (Spring 2009) (Supreme Court in *Atkins* "declined to establish … a uniform definition of mental retardation …, instead deferring the matter to the individual states. The Court's deferral has resulted in an incongruity with a perverse result: The

Eighth Amendment takes on different meanings in different states."), *with* Richard J. Bonnie & Katherine 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, 818 & n.26 (May 2007) ("Although the Supreme Court left it to the states to enforce the new constitutional rule, Atkins did not leave each state free to define mental retardation. * * * Any definition of mental retardation used to implement Atkins must not cover a smaller group of individuals than the definition adopted by the American Association of [sic] Mental Retardation.").

In leaving to the states "the task of developing appropriate ways to enforce" the Eighth Amendment ban on execution of mentally retarded offenders, 536 U.S. at 317, the Court in *Atkins* expressly borrowed from the approach it had taken to implementation of the constitutional ban on executing the insane in *Ford v. Wainwright*, 477 U.S. 399 (1986). But any contention that this approach confers unfettered discretion on the states to substantively define mental retardation in any way they see fit is belied by the Supreme Court's subsequent decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007). *Panetti* makes it clear that the states are not completely free to define insanity for Eighth Amendment purposes, notwithstanding the wide latitude that *Ford* afforded them to fashion various procedures that would satisfy due process. *Id.* at 954-60 ("It is … error to derive from *Ford*, and the substantive standard for incompetency [to be executed] its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted."). I seriously doubt that, in conferring upon the states the discretion to prescribe procedural mechanisms to implement the Eighth Amendment ban on executing the mentally retarded, the Supreme Court intended to permit the states to define mental retardation less comprehensively than the clinical definitions it cited approvingly in *Atkins*. After all, it was largely on the basis of recent statutory enactments that at least "generally conform" to those clinical definitions that the Supreme Court was able to discern the emerging national consensus necessary to recognize the constitutional ban in the first place under Eighth Amendment jurisprudence. 536 U.S. at 317 n.22.

that the clinical definition of mental retardation is deliberately broad so as to ensure inclusiveness in order to "provide an adequate safety net" in the form of social services "for those who are at the margin," we questioned whether such a definition was necessarily appropriate to the "normative" judgment of which capital offenders are sufficiently less culpable than the run of capital offenders as to justify a categorical exemption from execution.[18] In this context, we further asked ourselves whether there is "a consensus of Texas citizens [who] agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty?"[19] Ultimately, we "decline[d] to

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It is true that, in a post-*Atkins* opinion, the Supreme Court itself explained that *Atkins* "did not provide definitive procedural *or substantive* guides for determining" mental retardation for Eighth Amendment purposes. *Bobby v. Bies*, ___ U.S. ___, 129 S.Ct. 2145, 2150 (2009) (emphasis added). But in that same opinion the Supreme Court noted that a prior proceeding had not resolved the issue of mental retardation for purposes of *Atkins* because no Ohio court had yet "found, for example, that Bies suffered 'significant limitations in two or more adaptive skills.'" *Id.* at 2152, quoting *State v. Lott*, 97 Ohio St.3d 303, 305, 779 N.E.2d 1011, 1014 (2002). In *Lott*, the Ohio Supreme Court adopted a definition of mental retardation that fully embraced the diagnostic criteria recognized in footnote 3 of *Atkins*, thus "generally conforming" to the clinical definitions that informed the Supreme Court's ascertainment of the national consensus.

[18] *Id.* at 6.

[19] *Id.* Query whether, for purposes of construing the Eighth Amendment, the relevant consensus would be that of the citizens of Texas. In *Atkins*, the Supreme Court looked for a national consensus, which is in keeping with a construction of the Eighth Amendment to the United States Constitution—and even then, the Court's "own judgment [was] brought to bear by asking whether there is reason to disagree with the judgment reached by

answer that normative question without significantly greater assistance from the citizenry acting through its Legislature."[20]

As noted above, we filled the legislative void by (at least provisionally) adopting the AAMR and Texas Health and Safety Code definitions—without, however, expressly embracing the specific diagnostic criteria included in the AAMR definition. Instead, we promulgated certain non-diagnostic criteria of our own—the so-called "*Briseno*" factors[21]—and proclaimed:

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the citizenry and its legislators." 536 U.S. at 313 (internal citations and quotations omitted). Were we construing the "cruel or unusual punishment" clause of Article I, Section 13, of the Texas Constitution, then we might be looking for a consensus among the citizens of Texas. *See, e.g.*, *Van Tran v. State*, 66 S.W.3d 790, 804-05 (Tenn. 2001) (looking to the "societal view in our own state" in determining that execution of the mentally retarded violated article I, § 16, of the Tennessee Constitution).

[20] *Id.*

[21] Those factors are:

- 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?

> Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.[22]

In failing thus to anchor the fact-finder's decision on the specific diagnostic criteria, we seem to have granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes.

Or, stated another way (in terms of the actual jury instruction that was submitted in this case), *Briseno* would seem to authorize the fact finder to decide just what "the standard" is in Texas for "personal independence and social responsibility expected of the person's age and cultural group"—without necessarily tak-

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- 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?

135 S.W.3d at 8-9.

[22] *Id.* at 9.

ing into account the specific criteria that diagnosticians in the field routinely use to make that determination. Is the Texas fact-finder at liberty to define mental retardation differently than a consensus of Americans would define it for Eighth Amendment purposes? May a particular Texas jury, for example, given the definition of mental retardation that was submitted in the jury charge in this case, simply decide that an offender whom the jury believes fits the diagnostic criteria for mild mental retardation nevertheless meets "the standard" the jury deems appropriate for "personal independence and social responsibility" relative to his age and cultural milieu?

Many commentators have construed *Briseno* to allow just such an untethered fact finding, and we have been roundly criticized in some quarters for it.[23] Per-

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[23] *See, e.g.*, Blume, Johnson & Seeds, *supra*, at 714 ("the Briseno factors focus on a few facts, which portray stereotype, strength-first or strength-only reasoning, at best a handful of itemized weaknesses, and are satisfied by answers to those questions alone," thus inviting the fact-finder to determine mental retardation, *vel non*, on a basis both less than and different from a full assessment of all the diagnostic criteria); White, *supra*, at 705 (criticizing *Briseno* factors as exemplifying a "circularity" of reasoning that operates to "evade" *Atkins*); Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons From Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 727-28 (Spring 2008) (The *Briseno* factors deviate from the methodology of "professionals in the field, [who] use standardized criteria to detect significantly subaverage adaptive functioning. Although Texas embraces the standard test for mental retardation in its health and safety statute, the court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines."); Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice For the Mentally Retarded*, 27 LAW & INEQ. J. 241, 254 (Winter 2009) ("The Briseno opinion made it clear that in Texas, the ultimate determination of a defendant's mental retardation

haps justifiably so. I agree, of course, that whether a capital offender is mentally retarded is a fact issue, and that it should be left to the fact-finder to resolve in an adversarial context. It should not be an issue for experts to debate and determine in some inquisitorial process that is alien to our system of criminal justice. But this does not justify our apparent grant of latitude to factfinders in Texas to adjust the clinical criteria for adaptive deficits to conform to their own normative judgments with respect to which mentally retarded offenders are deserving of the death penalty and which are not. *Atkins* adopted a categorical prohibition. It was founded upon the Supreme Court's ratification of the prevalent legislative judgment that it is inappropriate to execute mentally retarded offenders. That legislative judgment comprehended mental retardation in essentially the same "clinical" terms as the AAMR's and APA's diagnostic criteria.[24] Even if the Supreme Court in *Atkins* "did not mandate the application of a particular mental health standard for mental retardation, … it did recognize the significance of professional standards and framed the constitutional prohibition in

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should be made by the factfinder, not by experts in the field. Amazingly, the court held that psychological diagnostic criteria do not necessarily determine whether the defendant is mentally retarded for purposes of the Eighth Amendment's ban on excessive punishment. * * * Instead, it instructs finders of fact to examine additional factors—which were invented by the court without any basis in scientific literature or evidence regarding mental retardation—in order to determine if the evidence indicates that the defendant is mentally retarded.").

[24] *See Atkins*, *supra*, at 317 n.22 ("The statutory definitions of mental retardation [contained in the statutes of those states that had expressly outlawed the death penalty for mentally retarded capital offenders] are not identical, but generally conform to the clinical definitions" supplied by the AAMR and APA).

medical rather than legal terms."[25] It would be anomalous to allow the fiat of a fact-finder to undermine the essentially diagnostic character of the inquiry.[26] We

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[25] *White*, *supra*, at 706.

[26] Assuming that *Atkins* did leave to the states the option of defining mental retardation for themselves, *see* n.17, *ante*, the post-*Atkins* response of a majority of the states that impose the death penalty has been to include either the APA or the AAMR/AAIDD diagnostic criteria within that definition—either expressly by statute, *see* 11 Del. C. § 4209(d)(1); *Pizzuto v. State*, 146 Idaho 720, 728, 202 P.3d 642, 650 (2008); *Bowling v. Commonwealth*, 163 S.W.3d 361, 370 n.8 (Ky. 2005); *State ex rel. Lyons v. Lombardi*, ___ S.W.3d ___ , 2010 WL 290391 (Mo., delivered Jan. 26, 2010) (slip op. at *2); *State v. Locklear*, 363 N.C. 438, 462, 681 S.E.2d 293, 311 (2009); by judicial construction of the relevant statute, *see In re Hawthorne*, 35 Cal.4th 40, 47-48, 105 P.3d 552, 556-57, 24 Cal.Rptr.3d 189, 195 (2005); *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008); *State v. McManus*, 868 N.E.2d 778, 787-88 (Ind. 2007); *State v. Williams*, 22 So.3d 867, 880-81 (La. 2009); *State v. Vela*, 279 Neb. 94, 151 777 N.W.2d 266, 308 (2010); *State v. White*, 118 Ohio St.3d 12, 14, 885 N.E.2d 905, 908 (2008); *Howell v. State*, 151 S.W.3d 450, 457 (Tenn. 2004); or, in those states lacking a statute (as does Texas), by judicial directive, *see Chase v. State*, 873 So.2d 1013, 1027-28 (Miss. 2004); *Lambert v. State*, 126 P.3d 646, 650 (Okla. Crim. App. 2005). Oklahoma has expressly included the diagnostic criteria into its jury instructions. *See Murphy v. State*, 54 P.3d 556, 568 & 570 (Okla. Crim. App. 2002) (adopting Appendix "A," requiring jury to determine: "Does the defendant have significant limitations in adaptive functions in at least two of the following skills areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work."). As far as I can tell, a minority of states, including Alabama (*In re Smith v. State*, ___ So.2d ___, 2007 WL 1519869 (Ala., delivered May 25, 2007)), Arizona (*State v. Grell*, 212 Ariz. 516, 135 P.3d 696 (2006)), Arkansas (*Miller v. State*, ___ S.W.3d ___, 2010 WL 129708 (Ark., delivered Jan. 7, 2010)), New Mexico (which has since repealed its death penalty) (*State v. Trujillo*, 146 N.M. 14, 206 P.3d 125 (2009)), Pennsylvania (*Commonwealth v. Vandivner*, 599 Pa. 617, 962 A.2d 1170 (2009)), South Carolina (*Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604

should not sanction incomplete jury instructions that would permit a jury, in the guise of "fact-finder," capriciously to deviate from the specific diagnostic criteria in order to conform to its own normative, necessarily subjective, and certainly unscientific judgment regarding who deserves the death penalty.[27] I would hold that the hypothetically correct jury charge, against which we measure the weight and preponderance of the evidence with respect to mental retardation, should incorporate the diagnostic criteria. In this case, the difference really matters.

II.

I agree with the Court that the appellant was not entitled to a judgment notwithstanding the verdict with respect to the mental-retardation issue just because the appellant presented experts while the State did not.[28] Lay testimony with respect to adaptive behavior is not categorically incompetent to refute expert testimony. Moreover, the Court does a good job of

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(2003)), Virginia (*Atkins v. Commonwealth*, 272 Va. 144, 631 S.E.2d 93 (2006)), and Utah (Utah Code Ann. § 77-15a-102(1) (Supp. 2003)), while embracing the concept of adaptive deficits, have not (or, in some cases, at least not *yet*) incorporated the specific diagnostic criteria into their post-*Atkins* definitions of mental retardation.

[27] The jury in a capital-punishment proceeding in Texas exercises *that* normative judgment in answering the third special issue with respect to mitigating circumstances. TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1). But *Atkins* established that mental retardation is categorically mitigating—as a matter of law. While the fact-finder in an adversarial system should, of course, decide whether a capital offender is mentally retarded, it should not be allowed to determine for itself what constitutes mental retardation for Eighth Amendment purposes.

[28] Majority opinion, at 21-22.

summarizing the lay testimony—both pro and con—relevant to adaptive deficits.[29] But, curiously, in assessing the weight of the evidence as it relates to adaptive deficits, the Court does not even mention the appellant's expert testimony.

The appellant called two experts to the witness stand who testified about his adaptive deficits. The first was Dr. Antonio Puente, a clinical neuropsychologist and university professor, and an expert on evaluating mental retardation in native Spanish speakers. Puente explained that he did not administer any of the standardized instruments for assessing adaptive deficits, such as "the *Vineland* or the *ABAS* test," because "[t]here is no scale available in Spanish that's normed to these people, that is, Spanish-speakers."[30] Utilizing the APA's diagnostic criteria, Dr. Puente was able to identify significant adaptive deficits in at least six of the eleven APA categories: communication, self-care, home living, self-direction, functional academic skills, and work. The information in support of Puente's opinion derived from reports provided by the appellant's mitigation investigator and Puente's own clinical interview with the appellant. Puente admitted on cross-

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[29] *Id.* at 25-28.

[30] According to the DSM-IV-TR:

> Several scales have … been designed to measure adaptive functioning or behavior (e.g., the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptive Behavior Scale). * * * As in the assessment of intellectual functioning, consideration should be given to the suitability of the instrument to the person's socio-cultural background, education, associated handicaps, motivation, and cooperation.

DSM-IV-TR, at 42.

examination that he did not factor in the circumstances of the instant offense as described to him by the prosecutor, but opined that, had he done so, he would have regarded them as further evidence of the appellant's adaptive deficits.

The appellant's second expert witness was Dr. Kristi Compton, a clinical and forensic psychologist. By and large, her testimony focused more on the appellant's IQ scores than on his adaptive deficits. But she did testify that the evidence she had reviewed—the same information that Dr. Puente had reviewed, plus her own clinical interview—indicated that "there were adaptive deficits in [the appellant's] childhood" that "seem to dovetail" with his low IQ scores. Her written report was admitted into evidence for its substantive content, and so was before the jury. Like Dr. Puente, Dr. Compton utilized the diagnostic criteria for adaptive deficits set out by the APA in the DSM-IV-TR. She provided a chart in her report of the appellant's adaptive strengths and deficits, as gleaned from the mitigation investigator's report.[31] Over the course of

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[31] From her clinical interview with the appellant, Dr. Compton also learned that the appellant:

> reports that he has never lived alone, he has always lived with a family member. * * * He has never managed a checking account or had a credit card. * * * [He] has not paid bills independently or on his own. * * * [He] reported that he did not fill out the forms at Western Union, rather the clerk would complete the form for him. * * * He reports navigating by familiar buildings and sites, not by road signs. * * * He reports being unable to read a map. * * * [He] was asked to tell the time on a watch. He was unable to do so, stating that he needs a "number clock." [He] reported that he always got to work on time, but that his brother, not he, set the alarm clock. * * * [He] obtained a cell phone which was pur-

the appellant's life, including his childhood and adolescence, he exhibited adaptive deficits, in her estimation, in at least six of the eleven APA categories. For four of those six categories, she was unable to identify evidence of any countervailing adaptive strength: communications, self-care, functional academic skills, and use of community resources. In concluding that the appellant "shows adaptive deficits in more than two areas" (which is more areas than is required for a diagnosis of mental retardation under the APA diagnostic criteria), Dr. Compton observed that, "[w]hile [the appellant] possesses some adaptive strengths, this does not negate the evidence of his possessing adaptive deficits since childhood." Moreover, and critically, she observed that "strengths often co-exist with deficits as [in] all people whether they are mentally retarded or are of normal intelligence."

The reason this last observation is critical is because of its bearing on the question of the weight of the

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> chased by his girlfriend. He reports being able to dial the phone, but did not understand how "to put names in."

However, Dr. Compton testified that she does not "personally rely on self-reports on adaptive deficits because there's no guarantee that they're reporting accurately to me." The reason for this unreliability, she explained, is that typically a mildly mentally retarded individual will attempt "to fake not being retarded[.]" *See Ex parte Van Alstyne*, 239 S.W.3d 815, 822-23 & n.23 (Tex. Crim. App. 2007) ("mildly mentally retarded individuals often learn to disguise their disabilities in a so-called 'cloak of competence.'"). Of course, the opposite could conceivably be true here—at the time that he spoke with Dr. Compton, the appellant had a motive to exaggerate his disabilities in an attempt to avoid the death penalty. Still, his self-reporting is corroborated by the lay testimony regarding his adaptive deficits as cataloged by the Court's opinion. Majority opinion, at 25-28.

evidence in this case. As one legal commentator has emphasized:

> [O]ne of the key assumptions to be utilized in the application of the AAMR's mental retardation definition [is] that limitations often coexist with strengths within an individual. Therefore, the presence of a strength in a particular area does not negate the coexistence of a limitation in another area of sufficient significance to establish the adaptive behavior component of the mental retardation definition.[32]

For this reason, as the Oklahoma Court of Criminal Appeals has recognized, "[u]nless a defendant's evidence of particular limitations is specifically contradicted by evidence that he does not have those limitations, then the defendant's burden is met no matter what evidence the State might offer that he has no deficits in other skill areas."[33] Accordingly, in gauging the appel-

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[32] Tobolowsky, *supra*, at 97, *citing* AAMR, 10th ed., *supra* note 53, at 48 (listing among five assumptions deemed essential to the application of its clinical definition of mental retardation, "Within an individual, limitations coexist with strengths."). Presumably this essential assumption applies equally to the APA's clinical definition of mental retardation, with its functionally similar diagnostic criteria. *See Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) ("Individuals with mental retardation have strengths and weaknesses, like all individuals. Indeed, the criteria for diagnosis recognizes this by requiring a showing of deficits in only two of ten identified areas [in the DSM-IV-TR] of adaptive functioning.").

[33] *Lambert v. State*, *supra*, at 651. The court went on to observe: "In fact, the State need not present any evidence that a capital defendant can function in areas other than those in which a deficit is claimed. In capital mental retardation proceedings, the State's first response must always be to counter the evidence presented by the defendant." *Id.* In other words, the State's evidence

lant's case for mental retardation, we should examine the strength of his evidence to show adaptive deficits in at least two of the diagnostic categories, as well as the strength of the State's evidence (if any) to refute the appellant's evidence of adaptive deficits in (at least all but one of) the particular diagnostic categories upon which he relies.

The State presented no expert testimony of its own, with respect to adaptive deficits or any other of the three prongs of the definition of mental retardation.[34] The appellant's own evidence of adaptive deficits in *at least two* of the diagnostic areas is compelling; Drs. Puente and Compton agreed that the appellant was deficient in the areas of communication, self-care, and functional academic skills.[35] Lacking expert tes-

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should be designed specifically to rebut the defendant's evidence of deficits in specific categories of the AAMR/APA diagnostic criteria. Evidence of adaptive strength in any of the *other* areas will not impugn the defendant's case for mental retardation.

[34] Dr. Puente did admit that "Dr. [Randall] Price, the State's expert, disagrees with [Puente's] opinion about the mental retardation" of the appellant. Dr. Puente was not asked, however, and did not volunteer, whether Dr. Price's rejection of his conclusion was based upon the adaptive deficits component of the clinical standard for mental retardation. Dr. Puente did testify, however, that Dr. Price had not had the benefit of all of the underlying data that had been collected to support Puente's assessment of the appellant's adaptive deficits. He also testified that it was not "scientifically sound to base a diagnosis of mental retardation only on a clinical interview[,]" thereby implying that Dr. Price's disagreement with Puente's conclusion may have been based purely on a clinical interview alone. Dr. Price himself did not testify.

[35] They also agreed that the appellant displayed adaptive deficits in the area of work, but because Dr. Compton believed the appellant demonstrated some concomitant strengths in this particular area, I do not list it here.

timony to counter these opinions, the State resorted to cross-examination and lay testimony in an effort to undermine them. In my view, the State's effort fell woefully short.

Communication: With respect to the appellant's communication skills, Dr. Puente testified:

> On the two tests that measure ability to communicate, he's functioning between eight and ten years of age.[36] And the historical information, there's some data to suggest that he's very poor at delivering jokes, unable to understand work instructions. In the past, I've heard from him that he has had difficulty understanding what his supervisors have told him.

The lay testimony, as summarized by the Court, certainly corroborates this account. It showed that the appellant was a slow learner, both at school and in the workplace, that he was reticent to speak, that his vocabulary, even in his native Spanish, was "basic" and his communications, "simple," that his demeanor was "childish," and that he had substantial difficultly comprehending jokes and following or retaining instructional information. The best that the State could muster in response was the testimony of one co-worker that, in his experience, the appellant was no slower to learn than other workers from Mexico, and that he sometimes *did* laugh at the appropriate times. This hardly seems enough rationally to justify discounting Dr. Puente's reliance upon the preponderance of the

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[36] Dr. Puente also determined from the testing that the appellant was not malingering.

evidence indicating a substantial deficit in communication skills.

Self-Care: Dr. Puente cataloged the appellant's apparent deficits in this area as follows:

> A few things to note, and there's several. I don't know if you've ever seen pictures of them, and where he's purchased his own clothes. He wears clothes that are very large. He has a picture of himself, which actually is a pretty nice, handsome picture, but he wears basically bathroom slippers in this picture. So it's like he's wearing blue jeans and a nice shirt, but bathroom slippers to go out. This is inapp—inappropriate. He puts on dirty clothes after—after taking a shower. And in addition to that, he does brush his teeth, but he needs prompting.

Mara Cruz testified that the appellant could not be taught to read an analog clock or to program a cell phone. He did not take thorough showers and did not clean his ears or clip his nails. He had no concept of coordinating his clothes, and wore both clothing and shoes that were too big. He wore shirts with missing buttons and once put on one of Cruz's blouses to go out. On cross-examination, Cruz conceded that the appellant had not had clocks growing up in Mexico, but this does not explain the appellant's inability to be *taught* to read an analog clock. The State presented several detention officers to testify that in the institutional setting of the jail, the appellant could maintain his hygiene and keep his cell orderly. But evidence of apparent adaptive strengths displayed in an institutional context are of limited probative value. "A mentally retarded person is … likely to show stronger adaptive behavior in the structured environment of a correctional facility than in

society[.]"[37] "[C]ertain adaptive behaviors (e.g., grooming) may appear better due to the structure" of the institutional setting.[38] Moreover, it is common knowledge that inmates awaiting trial in jail are issued standard apparel. Perhaps this explains why the detention officers were not asked to refute the testimony that the appellant inappropriately dressed himself. Again, the jury was presented with little compelling reason to reject Dr. Puente's reliance on the data underlying his assessment of the appellant's ability to take care of his personal needs.

Functional Academic Skills: Dr. Puente summarized:

> Let me go into a little bit more detail in—in academics. He graduated from 6th grade at slightly less than 16 years-of-age. He flunked the third grade. Was out [of school] probably a total of two, maybe a little longer, three years possibly. His average score was 7.5. Seven point five, according to the grading system, is essentially barely passing. In essence, this is not an individual who did very well even at the grammar school level.

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[37] Richard J. Bonnie & Katherine 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, 848 (May 2007).

[38] Blume & Johnson, *supra*, at 720, *quoting* James R. Patton & Denis W. Keyes, Death Penalty Issues Following Atkins, 14(4) Exceptionality 237, 249 (2006). Cruz testified that it was after doing yard work that the appellant would fail to notice he needed to clean grass from his ears. Obviously the appellant would have no occasion to get grass in his ears while incarcerated pending prosecution for a capital murder.

The appellant's sixth grade teacher testified that the appellant still could not read when he was in her class. To a certain extent, all of the children she taught were behind in their learning. But the appellant was a particularly slow learner even compared to the other disadvantaged children he went to school with in an area that was considered remote even by Mexican standards. She graduated him from sixth grade only because of his age. On cross-examination of the appellant's cousin, the State established that the appellant had sometimes missed school in order to work to help support his family. While this may partly explain why the appellant was so old when he finished the sixth grade, it does not rebut the teacher's testimony that the appellant was a slow learner even compared to the other underprivileged students he went to school with. Again, the State offered no convincing reason for the jury to disregard the information upon which Dr. Puente based his evaluation of the appellant's academic abilities.

Perhaps the jury might rationally have disbelieved the experts' opinions with respect to *some* of the many diagnostic areas in which, collectively, Drs. Puente and Compton were able to identify adaptive deficits on the appellant's part. But every mildly mentally retarded person will exhibit a different assortment of adaptive strengths and deficits, and the jury had no rational basis to reject *any* of the three areas in which the appellant's experts agreed he suffered substantial deficits, much less two out of three of them. That is enough to satisfy the diagnostic criteria for mental retardation—the standard upon which the jury *should* have been instructed in this cause. This conclusion is unaffected by the State's lay testimony from (1) the detention officer who testified that he had seen a lot of mental *illness* in his time, and the appellant did not exhibit any "mental

issues"; (2) the other detention officer, whose personal experience led him to conclude that the appellant was not mentally retarded, but who could offer no definition of mental retardation; and (3) the used car salesman who saw nothing "mentally wrong" about the appellant that would dissuade him from selling the appellant a used truck.

The Court is correct, of course, that a reviewing court should pay great deference to a jury in assessing whether its verdict was against the great weight and preponderance of the evidence. But measuring the evidence against the hypothetically correct jury instruction that the jury should have received in this cause, I can only conclude that its finding that the appellant did not prove that he is mentally retarded is, indeed, against the great weight and preponderance of the evidence. On this state of the record, the appellant cannot be executed consonant with the Eighth Amendment. I would therefore vacate the jury's finding and remand the cause to the trial court to conduct another punishment proceeding.[39]

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[39] An appellate finding that a jury's verdict on an issue for which the defendant shoulders the burden of proof is against the great weight and preponderance of the evidence carries no double-jeopardy consequences. *Meraz v. State*, *supra*, at 156. The appellant would not, therefore, be entitled by virtue of such a finding to have his punishment reformed to a sentence of confinement to life under Article 44.2511(b) of the Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 44.2511(b). Instead, I presume the jury's verdict would essentially constitute trial "error affecting punishment only," in contemplation of Articles 44.2511(d) and 44.29 (c) of the Code, necessitating a new punishment proceeding unless "the prosecuting attorney files a motion requesting that the sentence be reformed to confinement for life" under Article 44.2511(c)(2). TEX. CODE CRIM. PROC. arts. 44.2511(c) & (d) and 44.29(c).

III.

In *Briseno*, we decried the "exceedingly subjective" nature of the adaptive-behavior criteria.[40] And it may well be true that determining mental retardation under those criteria is as much an art as a science. But it is no solution to this lamentable subjectivity to substitute the normative caprice of the fact-finder for the comparative scientific objectivity inherent in the diagnostic criteria. It is not enough that individual jurors might choose to be guided by the diagnostic criteria, as depicted to them by the testifying experts. The jury should be explicitly bound to those criteria by the hypothetically correct jury instruction as the best available scientific basis for distinguishing the mildly mentally retarded offenders from those who are merely borderline intelligent. Perhaps the diagnostic criteria are designedly over-inclusive in order to avoid leaving any deserving individuals out of the social services net.[41] But it seems to me that to err on the side of over-inclusiveness is no less a virtue in the Eighth Amendment context.

I am put in mind of the familiar due-process adage that "it is far worse to convict an innocent man than to let a guilty man go free."[42] The Court'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 defini-

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[40] 135 S.W.3d at 8.

[41] *Id.*

[42] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

tion of mental retardation to be executed simply because they demonstrate a few pronounced adaptive strengths along with their manifest adaptive deficits. Better, I think, to be over-inclusive and mistakenly sentence some borderline intelligent capital offenders to the not-inconsiderable penalty of life imprisonment without the possibility of parole than to inadvertently execute even a single mildly mentally retarded offender in violation of the strictures of the Eighth Amendment.[43] The Court's arbitrary approach today is unfaithful to—it does not even "generally conform"

[43] In an opinion issued just last week, we expressly declined to deviate from the specific diagnostic criteria for the *first* prong of the clinical standard for mental retardation. *Ex parte Hearn*, ___ S.W.3d ___ (Tex. Crim. App., No. AP-76,237, delivered April 28, 2010). The applicant in that case was unable to satisfy the significant-subaverage-intellectual-functioning prong of the AAIDD and APA standards (and the definition in TEX. HEALTH & SAFETY CODE § 591.003(20)), in that he could not produce evidence of an IQ score that was at least two standard deviations below the mean for his age group. He therefore resorted to an argument that we should instead accept, for Eighth Amendment purposes, an alternative measure for significant subaverage intellectual functioning based upon the results of certain "neuropsychological measures" related to a diagnosis of Fetal Alcohol Spectrum Disorder. *Hearn*, *supra*, slip op. at 8 & 10. I joined the Court's opinion because the applicant provided no proof of a national consensus for defining mental retardation in this way so as to establish an Eighth Amendment impediment to execution. While I suppose this Court or the Legislature could someday choose a definition of mental retardation as a matter of state law that is *more* protective than the Eighth Amendment presently dictates, we cannot do so in a post-conviction writ context, wherein we are essentially limited to reviewing claims of federal constitutional import. Having adhered to the present national consensus for purposes of *denying* habeas corpus relief in *Hearn*, the Court should likewise insist on adhering to it today and apply the specific diagnostic criteria for adaptive deficits to *grant* this appellant a new punishment hearing on direct appeal.

with—the criteria for mental retardation that was the basis for the national consensus the Supreme Court found in *Atkins*.[44]

To affirming the appellant's death sentence in this case, I respectfully dissent.

Filed: May 5, 2010

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[44] 556 U.S. at 308 n.3 & 317 n.22