No. 10-37

In The

Supreme Court of the United States

MICHAEL HALL,
Petitioner,
v.
RICK THALER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TEXAS STATE SENATOR RODNEY ELLIS; TEXAS STATE REPRESENTATIVE ELLIOTT NAISHTAT; CAPACITY FOR JUSTICE, INC.; ADVOCACY, INC.; TEXAS APPLESEED; & THE ARC OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICI CURIAE*[1]

Texas State Senator Rodney Ellis (Ellis) was elected to the Texas Senate in 1990. Senator Ellis is the current Chairman of the Senate Committee on Government Organization, and serves on the Senate State Affairs, Criminal Justice, and Transportation and Homeland Security Committees. During his tenure, Senator Ellis has introduced six bills that sought constitutional compliance for assessing mental retardation in capital cases.

Texas State Representative Elliott Naishtat (Naishtat) was elected to the Texas House of Representatives in 1990. He has been re-elected nine times and serves as a member of the Human Services Committee and Vice Chair of the Public Health Committee. In ten sessions, Rep. Naishtat has passed over 200 bills, including bills that expanded protective services for elderly and disabled people, created a statewide guardianship program, and enhanced crime victims' rights. In addition, he co-sponsored bills that protect patients in managed care organizations and psychiatric, substance abuse and rehabilitation facilities.

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[1] The parties were notified prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

Funding of $200.00 for the printing of this brief was provided by Harry Whittington, of Austin, Texas. All other expenses and fees for the preparation and submission of the brief were borne by the *amici curiae*. No counsel for any party authored this brief.

Capacity for Justice (C4J) was founded in 1995 with a mission to increase the objectivity and validity of psycho-legal elements in juvenile and criminal forensic evaluations. C4J's work focuses on respondents and defendants with mental illness, intellectual disability or concurrent mental and substance use disorders. C4J conducts research, training, and compiles a registry of professionals whose credentials are consistent with the Texas statutory requirements for evaluating incompetency to stand trial and the insanity defense.

Advocacy, Inc. is a nonprofit corporation funded by the United States Congress to protect and advocate for the legal rights of people with disabilities in Texas. It is not a part of state or local government. It has offices throughout Texas and a Board of Directors appointed mainly by disability organizations. The mission of Advocacy, Inc. is to advocate for, protect, and advance the legal, human, and service rights of people with disabilities, including those suffering from intellectual disability.

Texas Appleseed is a 501(c)(3) public interest law center whose mission is to promote social and economic justice for all Texans by leveraging the skills and resources of volunteer lawyers to identify practical solutions to difficult systemic problems. It has been a leader in the effort to assure that persons who have a mental illness or an intellectual disability receive fair, appropriate treatment in the Texas criminal justice system. It has published a handbook for attorneys, OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION, that has been replicated in several other states.

The Arc of Texas is the oldest and largest nonprofit, volunteer organization in the state committed to creating opportunities for people with intellectual and developmental disabilities to be included in their communities and to make the choices which affect their lives. Since its founding in 1950, The Arc has been instrumental in the creation of virtually every program, service, right, and benefit now available to the hundreds of thousands of Texans with intellectual and other developmental disabilities.

SUMMARY OF THE ARGUMENT

Nearly forty years ago, this Court held that imposition of the death penalty violates an individual's protections under the Eighth Amendment to the United States Constitution when sentencing juries do not receive meaningful guidance to channel their discretion. *Gregg v. Georgia*, 428 U.S. 153, 189, 195 (1976); *Furman v. Georgia*, 408 U.S. 238, 248, 253 (1972) (Douglas, J., concurring). History demonstrates that when juries are not guided with proper evaluative criteria for assessing evidence, the death sentence is imposed in a "freakish" manner. *Gregg*, 428 U.S. at 189.

This essential constitutional principle guides the present appeal. When this Court held that execution is not a suitable punishment for an offender with mental retardation,[2] it left the responsibility with the States to implement substantive and procedural mechanisms to ensure that these individuals would not be executed. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). Since *Atkins*, though, the Legislature of the State of Texas has been either unable or unwilling to enact any legislation that responds to Court's mandate.

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[2] Consistent with more modern definitions that have replaced the use of the term "mental retardation," *amici* prefer use of the term "intellectual disability." However, given that the Court's decision in *Atkins* uses the term mental retardation, *amici* use that term in this brief.

The Texas Court of Criminal Appeals, the highest court in Texas for matters of criminal law, therefore "creat[ed] law" to fill the legislative lacuna. *Ex Parte Briseno*, 135 S.W.3d 1, 4-5 (Tex. Crim. App. 2004). These standards and procedures deviate from a well-established clinical understanding of what constitutes mental retardation, and more critically, inject consideration of "other evidentiary factors" that serve no meaningful guidance in a fact-finder's determination of whether an individual shall be entitled to the Eighth Amendment protections mandated in *Atkins*. Absent meaningful guidance and effective judicial review, the Texas-imposed standards for ascertaining mental retardation create a constitutionally impermissible risk of arbitrary and capricious imposition of the death penalty.

REASONS THE WRIT SHOULD BE GRANTED

I. THE STATE OF TEXAS HAS BEEN UNABLE OR UNWILLING TO ENACT LEGISLATION TO COMPLY WITH THIS COURT'S MANDATE IN *ATKINS*.

At the time this Court decided *Atkins*, the Texas Legislature had enacted a law[3] prohibiting the execution of offenders with mental retardation. This law was vetoed by the State's governor.[4] Since that time, little has changed in the Texas Legislature to ensure that the rights of individuals with mental

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[3] H.B. 236, 77th Leg., Reg. Sess. (Tex. 2001).

[4] *Atkins*, 506 U.S. at 315; *Ex Parte Briseno*, 135 S.W.3d 1, 6-7 (Tex. Crim. App. 2004).

retardation are protected. After *Atkins*, the Texas Legislature has met at least 12 times[5] and considered 13 bills addressing procedures for assessing whether a capital defendant suffers from mental retardation.[6] Every bill has failed.

In 2003, a bill by State Representative Terry Keel, a former sheriff and prosecutor, proceeded the furthest through the Texas legislative process of any *Atkins*-related bill. House Bill 614,[7] along with companion Senate Bill 332, filed by State Senator Todd Staples, sought a process for assessing a capital defendant's mental retardation in the punishment phase of a capital trial by asking jurors

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[5] The Texas Legislature meets for its regular session every other year, and during special sessions as may be convened by the governor. TEX. CONST. ART. 3, Sec. 5. There have been four regular sessions and eight special sessions since the passage of *Atkins*. After the 78th regular session of the Texas Legislature, there were four special sessions of the 78th Texas Legislature. After the 79th regular session of the Texas Legislature, there were three special sessions. There were no special sessions of the 80th Texas Legislature and only one special session of the 81st Texas Legislature, so far. The 81st Texas Legislature ends when the new session is convened in January 2011.

[6] H.B. 614, 78th Leg., Reg. Sess. (Tex. 2003); H.B. 664, 78th Leg., Reg. Sess. (Tex. 2003); S.B. 163, 78th Leg., Reg. Sess. (Tex. 2003); S.B. 332, 78th Leg., Reg. Sess. (Tex. 2003);S.B. 389, 78th Leg., Reg. Sess. (Tex. 2003); H.B. 419, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 65, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 85, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 231, 79th Leg., Reg. Sess. (Tex. 2005); S.B. 249, 80th Leg., Reg. Sess. (Tex. 2007); H.B. 1152, 81st Leg., Reg. Sess. (Tex. 2009); H.B. 4466, 81st Leg., Reg. Sess. (Tex. 2009); S.B. 167, 81st Leg., Reg. Sess. (Tex. 2009).

[7] H.B. 614, 78th Leg., Reg. Sess. (Tex. 2003).

whether the defendant is a person with mental retardation. The proposed law required the defendant to present objective evidence of potential mental retardation at least sixty days before the beginning of *voir dire*.

A representative of the Polk County Criminal District Attorney's Office, several individuals and a representative of "Justice for All," a pro-death penalty and victim's rights group,[8] testified in support of H.B. 614. Opposed to the bill included a representative of the Texas Criminal Defense Lawyers Association; representatives of several advocacy organizations for mentally disabled persons;[9] a member of the Board of Directors of the National Academy of Neuropsychology; a representative of the Texas Psychological Association; and several others. House Bill 614 received a favorable vote in committee and was passed by the house, but S.B. 332 was never assigned to a committee in the senate.

There were three other bills filed in 2003 that sought to comply with *Atkins.* State Representative Pete Gallego authored House Bill 664.[10] Senator

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[8] Justice for All, http://jfa.net/index.html (last visited July 26, 2010).

[9] The Arc of Texas, http://www.thearcoftexas.org/ (last visited July 26, 2010); Justice for Defendants With Mental Impairments, http://www.texasappleseed.net/ (follow hyperlink for "Justice for Defendants With Mental Impairments") (last visited July 26, 2010); Texas Advocates, http://www.thearcoftexas.org/ta/ (last visited July 26, 2010).

[10] H.B. 664, 78th Leg., Reg. Sess. (Tex. 2003).

Ellis filed Senate Bills 163[11] and 389.[12] All three bills included additional due process provisions for capital defendants, including the requirement that disinterested, experienced, and qualified experts be appointed to assess the mental retardation of the defendant. None of the bills received action by the legislative committees to which they were referred.[13]

In 2004 and 2005, four bills addressing *Atkins'* mandates were filed. House Bill 419[14] by State Representative Keel, along with companion bill, S.B. 65[15] by State Senator Todd Staples, contained similar substance with the bills filed by these legislators during the 78th Legislature. Senator Ellis also authored two bills: S.B. 85[16] and S.B. 231.[17]

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[11] S.B. 163, 78th Leg., Reg. Sess. (Tex. 2003).

[12] S.B. 389, 78th Leg., Reg. Sess. (Tex. 2003).

[13] Committee action is the first crucial step in the process by which a bill becomes a law in Texas. Guide to Texas Legislative Information: Process for a Bill, "The role of committees," http://www.tlc.state.tx.us/gtli/legproc/process_-role.html (last visited July 26, 2010). Once a bill is filed, it is referred by the speaker of the house or lieutenant governor to a committee. Guide to Texas Legislative Information: Process for a Bill, "Referral to a committee," http://www.tlc.state.tx.us-/gtli/legproc/process_referral.html (last visited July 26, 2010). After a bill is referred to a committee, it may fail simply because the committee chooses to take no action. Guide to Texas Legislative Information: Process for a Bill, "Committee reports," http://www.tlc.state.tx.us/gtli/legproc/process_com-report.html (last visited July 26, 2010).

[14] H.B. 419, 79th Leg., Reg. Sess. (Tex. 2005).

[15] S.B. 65, 79th Leg., Reg. Sess. (Tex. 2005).

[16] S.B. 85, 79th Leg., Reg. Sess. (Tex. 2005).

[17] S.B. 231, 79th Leg., Reg. Sess. (Tex. 2005).

Senate Bill 85 was intended to implement a pre-trial process for assessing whether a capital defendant suffers from mental retardation. Senate Bill 231 sought to assess whether certain convicted and sentenced capital offenders with mental retardation. All four bills failed to receive committee hearings.

In 2007, Senator Ellis authored Senate Bill 249[18] in an effort to implement a pre-trial process to assess the intellectual disability of a capital defendant before the guilt-innocence phase of a capital trial, and to assess capital offenders post-conviction. Like the prior efforts to comply with *Atkins*, Senate Bill 249 did not receive support in committee.

During the most recent regular legislative session, three bills to implement *Atkins* were filed. House Bill 1152,[19] by State Representative Senfronia Thompson, along with companion S.B. 167[20] by Senator Ellis, sought to ensure a pre-trial hearing for assessing the mental retardation, if any, of a capital offender. The House Committee on Criminal Jurisprudence heard live testimony in support of H.B. 1152 from one individual and three organizations. In addition, at least seven organizations and religious entities provided written testimony in support of H.B. 1152.

The committee also heard testimony opposed to H.B. 1152 from various district attorneys offices and one individual. House Bill 1152 received a favorable vote in committee, but was never scheduled for a

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[18] S.B. 249, 80th Leg., Reg. Sess. (Tex. 2007).

[19] H.B. 1152, 81st Leg., Reg. Sess. (Tex. 2009).

[20] S.B. 167, 81st Leg., Reg. Sess. (Tex. 2009).

vote of the full house.[21] Senate Bill 167 received no hearing in its committee.

During the same legislative session, Representative Gallego authored House Bill 4466.[22] The bill, among other things, proposed a post-sentencing hearing wherein the court would receive testimony from two disinterested and qualified experts regarding whether the capital offender suffered from mental retardation. House Bill 4466 bill never received a committee vote.

The State of Texas' ineffective attempts to legislatively implement this Court's holding in *Atkins* shows why the Court should grant the petition for certiorari. States that desire to continue their practices of capital punishment should not be permitted to neglect their Eighth Amendment responsibilities by failing or refusing to enact legislation that adopts a consistent clinical definition of mental retardation. As shown below, an evaluative framework that deviates from the established clinical definition encourages speculation by the finder of fact is contrary to the evolving standard of decency in the United States.

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[21] After a house committee hears testimony on a bill, the bill must be placed on a calendar before the full house may consider it. Guide to Texas Legislative Information: http://www.tlc.state.tx.us/gtli/legproc/process_comreport.html (last visited July 26, 2010). "Calendars committees are given wide discretion in scheduling bills for floor consideration." *Id.* If a bill is not timely placed on the calendar for full house consideration, the bill will never become law. *Id.*

[22] H.B. 4466, 81st Leg., Reg. Sess. (Tex. 2009).

II. TEXAS' COMMON LAW DEFINITION OF MENTAL RETARDATION FOR CAPITAL CASES PERMITS FACT-FINDERS TO CAPRICIOUSLY DEVIATE FROM THE CLINICAL STANDARDS ARTICULATED IN *ATKINS*, AND EFFECTIVELY DEPRIVES CAPITAL DEFENDANTS OF MEANINGFUL JUDICIAL REVIEW.

In the midst of the Texas Legislature's inability to fashion a statutory framework to ensure – consistent with *Atkins* – that capital defendants with mental retardation are not executed, the courts in Texas have struggled to find their own answer. This conflict has been particularly felt in the Texas Court of Criminal Appeals, the highest court in Texas for matters of criminal law. Recognizing the need for a judicial patch until the legislature could enact law that complies with *Atkins*, the court of criminal appeals "creat[ed] law" to provide the bench and bar with "temporary" judicial guidelines in addressing *Atkins* claims. *Briseno*, 135 S.W.3d at 4-5.

A. The Definition of Mental Retardation Was Articulated in *Briseno*, which Originally Purported to Apply the *Atkins* Diagnostic Criteria, Plus Other "Evidentiary Factors."

In 2004, the Texas Court of Criminal Appeals acknowledged this Court's mandates in *Atkins* and attempted to fashion a constitutional remedy to fill the legislative gap. *Id.* After it observed that "the mentally retarded are not 'all cut from the same

pattern"'[23] and that it does not possess the legislative knowledge sufficient to determine whether any consensus exists in Texas about the level and degree of mental retardation that should exempt a capital defendant from execution,[24] however, the court declined to announce a bright line definition.

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[23] *Briseno*, 135 S.W.3d at 5 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985)); *Atkins*, 536 U.S. at 317).

[24] The *Briseno* court queried:

> Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens 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? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a "mental retardation" bright-line exemption from our state's maximum statutory punishment? As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.

135 S.W.3d at 6 (citing JOHN STEINBECK, OF MICE AND MEN (1937)).

Instead, the court fashioned its own hybrid remedy. The court in *Briseno* originally parrots the clinical definitions of mental retardation as expressly recognized in *Atkins* and set out by the American Association on Mental Retardation[25] and

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[25] The American Association on Mental Retardation (AAMR) is now known as the American Association on Intellectual and Developmental Disabilities (AAIDD). The organization's widely-accepted definition of mental retardation contains three factors:

> [Mental Retardation] is characterized by [1] significant limitations both in intellectual functioning and [2] in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. [3] This disability originates before age 18.

AAID, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 6 (11th ed. 2010).

This Court observed that the first factor is typically assessed through an intelligence test: "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. at 309 n.5 (citing 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000).

Mental retardation's second assessment factor requires a limitation in two or more adaptive skill areas:

> communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.

Atkins, 536 U.S. at 309 n.3 (citing AAIDD, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)). These criteria are virtually identical to those proposed by the American Psychological Association's assessment of adaptive functioning for defining mental retardation:

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the Texas Health & Safety Code.[26] The court then foisted upon the clinical test a list of seven "evidentiary factors" that factfinders "*might*" also use to weigh evidence regarding whether a capital defendant suffers from mental retardation:

> 1. "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?
>
> 2. "Has the person formulated plans and carried them through or is his conduct impulsive?

> communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Id.

[26] Section 591.003(13) of the Texas Health and Safety Code defines mental retardation to mean:

> significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

Under the 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." TEX. HEALTH & SAFETY CODE § 591.003(1) (Vernon 2010).

> 3. "Does his conduct show leadership or does it show that he is led around by others?"
>
> 4. "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?"
>
> 5. "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?"
>
> 6. "Can the person hide facts or lie effectively in his own or others' interests?"
>
> 7. "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. Evidence to assist the finder-of-fact in answering these questions may be presented through testimony of both lay and expert witnesses. *Id.* Ultimately, the *Briseno* court denied habeas relief because it agreed that ample evidence existed to support the trial court's findings that the applicant failed to show by a preponderance of the evidence "that he has such 'limitations in adaptive functioning' *as would meet that prong of the diagnostic criteria for mental retardation*." *Id.* at 18 (emphasis added).

Although the Texas Court of Criminal Appeals' holding in *Briseno* attempted to meld the additional factors into the diagnostic criteria recognized in *Atkins*, the court has failed to show how these additional factors find actual support in the clinical definition of mental retardation or are otherwise determinative by experienced professionals in the field. The court appears to have adopted the test because it believes the clinical criteria used by professionals "are exceedingly subjective, [as] undoubtedly experts will be found to offer opinions on both sides of the issue in most cases." *Id.* at 8 (alteration added). By fashioning a test that may be answered through non-experienced witnesses and is irrelevant to any clinically-adopted definition of mental retardation, these "*Briseno* factors" result in a far more subjective determination of mental retardation and undermine the constitutional guarantee that a capital defendant's life or death will be decided by factfinders who are subject to consistent standards that guide their discretion.

1. Permitting witnesses to speculate about whether a defendant suffers from mental retardation improperly creates "evidence" based on little other than assumptions and stereotypes.

The first *Briseno* factor demonstrates the enhanced subjectivity that undermines the constitutional protections guaranteed by the Eighth Amendment: lay witnesses who personally know the defendant are permitted to speculate whether *they believed* the defendant was mentally retarded during the developmental period.

The Texas Court of Criminal Appeals offers no explanation of how permitting lay witnesses to opine whether a defendant was "mentally retarded" or "normal" provides any meaningful information to assist a factfinder in reaching its critical life-or-death decision. Individuals with mental retardation suffer a lengthy history of unfounded stereotypes and discrimination.[27] Most lay witnesses possess no training or understanding of mental retardation other than notions and assumptions. This cannot be a proper criterion for classifying mental retardation, especially in a capital case.

In addition, a factfinding process that seeks testimonial assumptions about mental retardation eviscerates any meaningful process for judicial review. What is the evaluative lens for reviewing a finding of no mental retardation when the evidence consists of testimony from a lay witness that the defendant looked "normal" to them?[28] Should a court give weight if the witness' conclusion was based only on his experience with *Down's* syndrome patients, as occurred in the present case? Seeking conclusory testimony to serve as "evidence" from the witness box provides no more constitutional protection than if factfinders were permitted to speculate about the same question from the jury box.

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[27] *See* Michael S. Sorgen, *The Classification Process and its Consequences,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 215-16 (Michael Kindred et al., eds., 1976).

[28] In *Briseno*, the court found it "highly significant" to its habeas corpus analysis that no lay witness thought the applicant might be mentally retarded. 135 S.W.3d at 17.

2. Evidence of leadership skills is irrelevant to a meaningful Atkins *analysis.*

The third *Briseno* factor – whether the defendant's conduct shows "leadership" or is led by others – suffers a similar evaluative malady. The unarticulated assumption from the court of criminal appeals appears to be that evidence of leadership suggests a defendant is mentally retarded. This factor is not consistent with this Court's holding in *Atkins* or in the clinically-reviewed adaptive functioning criteria adopted by this Court. Assuming, *arguendo*, however, that leadership (or being led) plays any role in determining whether an individual suffers from mental retardation, then the evidence must accompany an assessment of the person *being led*. A person should not be characterized as less mentally retarded simply because he has a follower. Without an evaluative test that considers evidence of all parties and a clinical relationship to the individual's adaptive functioning, speculation about leadership skills serves no place in a mental retardation analysis in capital cases.

3. Evidence of any "rational and appropriate" response to stimuli is inconsistent with the factors in Atkins *and confounds elements of mental illness.*

The fourth "evidentiary factor" articulated in the additional *Briseno* analysis examines whether the defendant's response to external stimuli reaches the level of "rational and appropriate [conduct]," regardless of whether it would be "socially

acceptable." Significant fundamental problems exist with this "non-diagnostic" factor.[29]

First, focus on a simple reference to "rational and appropriate" stimulus responses is inconsistent with the clinical tests adopted in *Atkins*, which find an individual shows limited adaptive functioning if he demonstrates limitations in at least two of the ten adaptive skill areas. *Atkins*, 536 U.S. at 309 n.3.[30] The *Briseno* test guides jurors that individual who rationally and appropriately responds to stimuli in a single area may support a *non-finding* of mental retardation. Accordingly, the factor flatly misstates the relevant clinical testing criteria.

Second, a test questioning whether the defendant's actions are "rational and appropriate" confounds mental retardation with mental illness.[31]

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[29] See *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007) (depicting its earlier *Briseno* factors as "non-diagnostic" criteria).

[30] Two of the adaptive skill areas adopted by this Court – home living and self-care – are ignored in the *Briseno* analysis altogether. The Texas test thus fails to consider adaptive functioning from any meaningful or comprehensive perspective; it merely picks-and-chooses a subjective list of matters that would permit a factfinder to replace established clinical data and the opinion of trained professionals with unsupported speculation from lay witnesses.

[31] Mental illness has been defined as "any of various conditions characterized by impairment of an individual's normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic or other factors." Stephanie Zywein, *Executing the Insane: A Look at the Death Penalty Schemes in Arkansas, Georgia, and Texas*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 113 (2007).

There is no support for the conclusion that individuals with mental retardation are incapable of responding to life's situations rationally. While these individuals may also have mental disorders,[32] there is no support for the court of criminal appeals' unsupported suggestion that a finding of rational activity should permit the factfinder to rule-out a finding of mental retardation. This poorly-devised evidentiary construct requires correction.

4. Consideration of a defendant's response to oral or written questions is an ineffective means to rule out mental retardation.

Equally ineffective in assessing whether a capital defendant is mentally retarded is the fifth factor of *Briseno*: inquiring whether the defendant "respond[s] coherently, rationally, and on point to oral or written questions or [whether] his responses wander from subject to subject." The test is defective because it fails to take into account the form of the question: yes-no questions are by-and-large much easier to address than those asking for a narrative answer or the expression of an opinion.[33]

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[32] *See* John H. Blume, Sheri Lynn Johnson & 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 (2009); 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 (2007).

[33] Carol K. Sigelman, *et al.*, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING

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In a related vein is the problem of "biased responding": individuals with mental retardation often provide answers they believe another wants to hear.[34] The failure to ascertain whether the answer to a question is actually correct is further troubling. At least one psychological study demonstrates that individuals with mental retardation often possess the ability to provide an answer that is coherent, rational, and on-point, but is simply incorrect.[35] Because a focus on the ability to efficiently provide clear answers to questions provides no meaningful assessment, this *Briseno* factor is wholly deficient. The Court should grant certiorari to ensure consistent application of the Eighth Amendment in capital cases involving the individuals with mental retardation.

MENTALLY RETARDED 120, 123 (1982); Edward C. Budd, Carol K. Sigelman & Lee Sigelman, *Exploring the Outer Limits of Response Bias*, 14 SOCIOLOGICAL FOCUS 297, 305-06 (1981).

[34] James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Defendants*, 53 GEO. WASH. L. REV. 414, 428 (1988) (citing M. Rosen, L. Floor & L. Zisfein, *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped. 1 Theoretical Model, Test Development and Normative Data*, 20 BRIT. J. MENTAL SUBNORMALITY 58, 58-68 (1974); Sigdman, Budd, Stankel & Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1980)).

[35] Ellis & Luckasson, *supra* at 34 (citing Kernan & Sabsay, *Getting There: Directions Given by Mildly Retarded and Nonretarded Adults*, in LIVES IN PROCESS: MILDLY RETARDED ADULTS IN A LARGE CITY (R. Edgerton ed. 1984)) (discussing a study in which more than half of mentally retarded persons provided complete directions to their homes, but that the directions were incorrect).

5. Examining the capacity to tell a lie reveals no meaningful insight into mental retardation, and its application in capital cases is short-circuiting.

The sixth *Briseno* factor – "[c]an the person hide facts or lie effectively in his own or others' interests" – does not provide any meaningful indicia for determining whether an individual is mentally retarded. The most obvious flaw in the *Briseno* analysis is the fact that – like many people without a disability – individuals with mental retardation often respond in manners that will place them in the best light with their peers.[36]

Further, simple application of the factor demonstrates the manner in which its underlying assumptions short-circuit. Applying a capability-to-lie analysis, in-court testimony that no lies have

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[36] Ellis & Luckasson, *supra* at 34. Moreover, Ellis and Luckasson observed:

> It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities or out of defensiveness about their handicap. This tendency is evident in estimates by retarded people of their academic achievement, physical skill, and intellectual level. It is therefore not surprising when a mentally retarded person brags about how tough he is or how he outsmarted a victim, when in fact, he accomplished neither feat. Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.

Id. at 430 (internal footnotes omitted).

been discovered could simultaneously serve as evidence that the defendant (1) is mentally retarded, *or* (2) elects to tell the truth, *or* (3) is actually very effective at lying. *Briseno* provides no instructions, and the factfinder is left to guess whether an individual's propensity to tell a lie weighs in favor of – or against – a finding of mental retardation.

6. Considerations of forethought, planning, and execution are unnecessarily duplicative, and are irrelevant to a determination of mental retardation.

The final factor articulated in *Briseno* actually comprises two virtually identical tests:

> 2. "Has the person formulated plans and carried them through or is his conduct impulsive?" and,
>
> 7. "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?"

Briseno, 135 S.W.3d at *8. Because the Texas Court of Criminal Appeals has not restricted use of any factor, testimony about a defendant's criminal "plans" effectively permits the State to double-dip two of its seven factors.

Since *Briseno*, the Texas Court of Criminal Appeals has reaffirmed these plan formulation tests by holding that a defendant presents no adaptive behavior deficits when his criminal acts show "that he was capable of planning elaborate criminal ventures and attempting, albeit unsuccessfully, to

conceal the evidence."[37] Given that *Atkins*-related issues necessarily involve individuals with mental retardation and convicted of capital offenses, the State of Texas' formulation risks trumping any finding of mental retardation merely by showing the defendant's involvement. The Eighth Amendment does not contain such a hollow purpose.

Further, research shows that with training, adults with mental retardation possess the capacity to set goals, carry out plans, maintain jobs, hold bank accounts, and make decisions about finances and other life situations.[38] Consistent with the clinical research, other courts in the United States have flatly rejected *Briseno's* assumptions that planning to commit a crime should rule-out a finding that the individual is mentally retarded. *Holladay v. Campbell*, 555 F.3d 1346, 1364 (11th Cir. 2009); *Lambert v. State*, 126 P.3d 646, 659 (Okla. Crim. App. 2005). Because planning and execution are not mutually exclusive with mental retardation, the assertion that evidence of forethought and planning disqualifies mental retardation is constitutionally and rationally infirm.

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[37] *Neal v. State*, 256 S.W.3d 264, 275 (Tex. Crim. App. 2008).

[38] Michael L. Wehmeyer & Susan B. Palmer, ADULT O*utcomes for Students with Cognitive Disabilities Three-Years After High School: The Impact of Self-Determination*, 38 EDU. & TRAIN. IN DEV. DISABILITIES 131-44 (2003); Michael L. Wehmeyer, Martin Agran, & Carolyn Hughes, TEACHING SELF-DETERMINATION TO STUDENTS WITH DISABILITIES: BASIC SKILLS FOR SUCCESSFUL TRANSITION (1998).

B. Since *Briseno*, Texas has Severed Its Evidentiary Factors from the Diagnostic Critieria Adopted in *Atkins*.

To the extent that any question existed about the evidentiary weight of *Briseno's* judicially-created test, these seven factors recently lost any moorings held to the clinical data that supports the Court's Eighth Amendment jurisprudence. In *Lizcano v. State*, No. AP-75879, 2010 WL 1817772 *1 (Tex. Crim. App. May 5, 2010), the Texas Court of Criminal Appeals affirmed via an unpublished opinion the death sentence of Juan Lizcano, despite the fact that the evidence conclusively proved the clinical factors adopted in *Atkins*. The State did not even elicit testimony from an expert regarding Lizcano's mental retardation. Nevertheless, the court of criminal appeals observed that the jury *could have* considered other evidence, including the *Briseno* factors; it deferred to the finding that Lizcano was not mentally retarded. *Id.* at *15. Absent in the opinion was any review of the clinical criteria; the jury was permitted to reject the clinical evidence and choose the *Briseno* test instead. Lizcano's petition for certiorari is due in September.

Judge Price, who previously voted for adoption of the *Briseno* evidentiary factors, wrote a dissent joined by two other judges. *Id.* at *32. He criticized the majority's application of a test that is contrary to *Atkins*, and which permits factfinders to deny a finding of mental retardation on account of their subjective viewpoints. As Judge Price pointed out:

> 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.
>
> … It would be anomalous to allow the fiat of a fact-finder to undermine the essentially diagnostic character of the inquiry. We 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. 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.

Id. at *35.

The problems inherent in application of the *Briseno* test demonstrate why this Court should grant certiorari. While failing or refusing to enact appropriate statutory implementation of *Atkins*, the State of Texas has instead formulated a common law stopgap that paves an alternative path to denying mental retardation, regardless of what the clinical criteria says.

Despite *Briseno's* lip service to the diagnostic criteria adopted in *Atkins*, the State's application of "evidentiary factors" permit findings that confirm long-held stereotypes, deviate from definitions consistently supported by clinical mental health data, and effectively deprive individuals from being permitted to successfully prove their mental retardation with data and learned expert testimony. In the end, the judge or jury is left with virtually unfettered discretion to apply the *Briseno* test in any desired manner, even to the exclusion of all other considerations. Because the Eighth Amendment requires more, certiorari should be granted, and the Court should instruct the lower courts to clearly review the clinical definitions of mental retardation that were announced in *Atkins*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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