IN THE

Supreme Court of the United States

MICHAEL HALL,
Petitioner,

v.

RICK THALER,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

BRYCE BENJET
HULL HENRICKS LLP
221 W. 6th Street,
Suite 960
Austin, Texas 78701
(512) 494-8097

DAVID P. SHELDON
Counsel of Record
LAW OFFICE OF
DAVID P. SHELDON, PLLC
512 8th Street, SE
Washington, DC 20003
(202) 546-9575
davidsheldon@militarydefense.com

ELAINE J. GOLDENBERG
MATTHEW S. HELLMAN
MATTHEW J. DUNNE
JENNIFER V. YEH*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000

**Admitted only in NY; supervised by principals of the Firm.*

June 30, 2010

Blank Page

CAPITAL CASE

QUESTIONS PRESENTED

Petitioner was sentenced to death in Texas state court despite the fact that even the state's expert refused to opine that Petitioner was not mentally retarded. The federal district court then denied Petitioner's request for habeas relief, but the Fifth Circuit vacated and required the district court to hold an evidentiary hearing. At the hearing, the State's expert opined that Petitioner, who scored a 67 on an IQ test administered at the time of his trial, and who exhibited substantial adaptive deficiencies, was not mentally retarded. That opinion was based on the belief that Petitioner's limitations were at least in part due to environmental factors, such as Petitioner's troubled home life. The district court credited this testimony, as well as lay testimony from prison officials that Petitioner was "normal," and dismissed the habeas petition. The Fifth Circuit denied a certificate of appealability.

This Petition presents the following questions:

1. Whether a sub-70 IQ and substantial adaptive limitations that satisfy the clinical definition of mental retardation nevertheless fail to bring a defendant within the scope of *Atkins v. Virginia*, which bars execution of the mentally retarded, where those limitations may have been caused, even in part, by "environmental" factors.

2. Whether Texas's approach to assessing adaptive limitations violates *Atkins* by departing from clinical standards.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

Michael Hall was the appellant below.

Rick Thaler, director of the Texas Department of Criminal Justice, Correctional Institutes Division, was the appellee below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

Blank Page

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, reported at 597 F.3d 746 (5th Cir. 2010), is reprinted at Pet. App. 1a. The decision of the United States District Court for the Northern District of Texas is reprinted at Pet. App. 4a.

JURISDICTION

The Court of Appeals' judgment was entered on February 22, 2010. A timely petition for rehearing and rehearing *en banc* was denied on April 1, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Texas's Implementation of the *Atkins v. Virginia* Framework

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits as cruel and unusual the execution of persons who are mentally retarded. *See id.* at 321. Such punishment is excessive both because the mentally retarded are less able to assist counsel in their defense at trial and because they are less morally culpable due to their diminished capacity for moral and logical reasoning and impulse control. *Id.* at 320-21; *see also id.* at 310, 313-17 (pointing to a "dramatic shift in the state legislative landscape," given the large number of states that had recently prohibited such executions).

Although the Court left to the states "the task of developing appropriate ways to enforce" the constitutional protections, it explained that existing "statutory definitions of mental retardation... generally conform to" two similar clinical definitions of mental retardation from the American Psychiatric Association ("APA") and the American Association on Mental Retardation ("AAMR"). *Id.* at 317 & n.22 (internal quotation marks omitted). The APA definition cited in *Atkins* defines mental retardation as: (1) "significantly subaverage general intellectual functioning," (2) "accompanied by significant limitations in adaptive functioning in at least two of [eleven] skill areas,"[1] and (3) "onset ... before age

---

[1] Those areas are "communication, self-care, home living, social/interpersonal skills, use of community resources, self-

18." *Id.* at 308 n.3 (internal quotation marks omitted). The AAMR definition cited in *Atkins* is essentially identical, except that it combines two of the adaptive skill areas into one, for a total of ten.[2] *Id.* The Court thus defined mental retardation in clinical terms based on the consensus among the states to use a clinical definition.

Texas was one of the few states that still executed the mentally retarded at the time of *Atkins*, *id.* at 316 n.20, and Texas still has not enacted a statute to guarantee the protections *Atkins* describes. In *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), however, the Texas Court of Criminal Appeals defined mental retardation under Texas law for the purpose of assessing *Atkins* claims. The *Briseno* court stated that it would "follow the AAMR ... criteria," but characterized the adaptive functioning criteria under that definition as "exceedingly

---

direction, functional academic skills, work, leisure, health, and safety." *Id.* at 308 n.3.

[2] The AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities ("AAID"). *See* Am. Ass'n on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) ("*AAIDD 2010 Definition*"). The current AAIDD definition of mental retardation differs from the pre-2002 AAMR definition referenced in *Atkins* in two minor ways. First, the AAIDD definition uses the term "intellectual disability" rather than "mental retardation," though the term intellectual disability "covers the same population of individuals who were diagnosed previously with mental retardation." *Id.* at 12. Second, it assesses adaptive deficiencies, requiring only one limitation in three broad adaptive skill categories (conceptual, social, and practical), rather than two of ten. *Id.* at 1.

subjective," forecasting that experts would "undoubtedly ... be found to offer opinions on both sides of the issue in most cases." *Id.* at 8. The court therefore described "other evidentiary factors" that factfinders should weigh, listing seven questions such as "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?" and "Does his conduct show leadership or does it show that he is led around by others?" *Id.* Finally, *Briseno* cautioned that while "experts may offer insightful opinions" on whether a person meets clinical criteria, "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." *Id.* at 9.

B. Criminal Trial

Hall was convicted of capital murder in Texas in 2000, two years prior to this Court's decision in *Atkins v. Virginia*. He and another defendant were found guilty for the murder of Hall's co-worker. Hall was eighteen years old at the time of the crime. Because Texas did not bar the execution of the mentally retarded, the jury considered evidence that Hall was mentally retarded only in connection with a mitigation special issue during the sentencing phase of trial.[3] Pet. App. at 230a-31a.

---

[3] That statutorily mandated special issue asks the broad question "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the

The expert witness for the defense, Dr. Cunningham, stated unequivocally that Hall was mildly mentally retarded. He based his conclusion on the fact that Hall's IQ was measured at 67, and that he exhibited adaptive functioning deficits in several respects. *Id.* at 213a-15a. The state's expert, Dr. Price, declined to opine whether Hall was mentally retarded. Instead, he testified that Hall was either mildly mentally retarded or borderline and that it was a clinical "judgment call." *Id.* at 216a.

Hall also presented substantial testimony from family members and teachers.[4] *Id.* at 23a-41a. His mother testified that as a teenager Hall "did not fit in with people his age. He played as if he were eight years of age, and attracted kids eight, nine, or ten years old." *Id.* at 25a. She said "children his own age would call him stupid or retarded, which would cause Hall to cry. Younger children accepted him." *Id.* Hall's older brother testified that Hall could not read an analog clock. *Id.* at 29a.

Cheryl Conner, Hall's high school reading, English, and math teacher, who "probably knew more about him than any other school employee," testified that he read at the first-grade level, and

---

Defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment [without parole] rather than a death sentence be imposed." Pet. App. 172a-73a; *see also* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1).

[4] Quotations in the section are taken from the federal district court's recounting of the testimony.

that he was incapable of remembering the second step of a two-step instruction. *Id.* at 34a. In class, she would "check[] his progress every five minutes to keep him on task; otherwise, he would drift off, either begin to sleep or stare." *Id.* She noted that although "Hall was susceptible to being manipulated by other students," he would "attempt[] to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously." *Id.* at 35a. She said that "[m]ost of the time when he would try to interact, the things he would say were so bizarre that the other students became upset, and perhaps even angry, but after awhile they just ignored him." *Id.*

These witnesses also spoke to Hall's traumatic home life. Hall lived in twelve different places before his eighteenth birthday. His mother had numerous sexual partners over to their home, which was also the scene of violence and drug abuse. Hall witnessed one of his mother's boyfriends attempt to commit suicide. *See id.* at 23a-24a. Hall's brother left the home after his mother's alcohol abuse worsened.

In school, Ms. Conner was concerned that Hall was severely depressed. She had several conversations with Hall's father, who told her that "he had washed his hands of Hall and did not want to know anything else." *Id.* at 36a. Hall was absent from school for about six weeks in the spring of 1996. Hall told Ms. Conner that he had a fight with his mother because he had been drinking too much and that his father was ignoring him. She recounted that

> [w]hen he returned, his hair was rarely washed, he rarely washed his hands, his clothes were always rumpled and never seemed to be clean, and Hall was very, very depressed. Hall almost looked drugged – he could barely keep his head up and his eyes focused when he was spoken to.

Id.

The state presented testimony from a co-worker at the grocery store where Hall worked, who testified that Hall was able to learn how to bag groceries and repeat back the co-worker's instructions. *Id.* at 41a-42a. The state also presented testimony from the police officer who gave Hall his *Miranda* warning upon being arrested. The officer testified that Hall subsequently made a statement and appeared to understand what was being said to him. *Id.* at 43a.

After a closing statement from Hall's defense attorney that discussed Hall's mental capacity in light of his inability to understand the wrongness of his crime, *see id.* at 44a,[5] and a rebuttal from the state arguing that mental retardation was irrelevant to the mitigation question, *id.*, the jury answered "no" to the special issue and Hall was sentenced to death, *id.* at 45a. At no time was the jury given a definition of mental retardation or asked to decide whether Hall was in fact mentally retarded. *See id.*

---

[5] *Cf. Atkins*, 536 U.S. at 318 ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.").

C. Initial Direct Appeal Proceedings

The Texas Court of Criminal Appeals ("CCA") decided Hall's direct appeal in 2002 while *Atkins* was pending before this Court. *See id.* at 313a. The CCA rejected Hall's argument that executing the mentally retarded was unconstitutional. *Id.* at 325a-26a. Pointing out Dr. Cunningham's "concession" that Hall was "only" mildly mentally retarded, the court affirmed Hall's death sentence on the ground that jurors could have relied upon Dr. Price's testimony, the testimony of Hall's co-worker, and a videotaped interview with Hall. *Id.* at 327a.

Six months later, this Court held in *Atkins* that the execution of mentally retarded defendants is unconstitutional. 536 U.S. at 308-09. Hall sought certiorari. This Court granted certiorari, vacated the decision below, and remanded for further consideration in light of *Atkins*. *Hall v. Texas,* 537 U.S. 802 (2002).

D. State Post-Conviction Proceedings

At the same time he was filing his petition for certiorari, Hall also applied for state habeas relief, requesting a live evidentiary hearing to determine whether he was mentally retarded. In support of his application, he offered affidavits from (1) a psychologist who diagnosed Hall as mentally retarded and noted that his physical appearance was consistent with fetal alcohol syndrome, (2) a fellow death row inmate who averred that Hall was known as "Half-Deck" by guards and other inmates, (3) a former teacher who described Hall's extremely poor classroom performance and demeanor, and (4) two of

Hall's previous attorneys, who described the difficulty Hall had in understanding the basic legal concepts involved in his case and the way he would parrot phrases he had heard in order to mask his low intelligence. *See id.* at 46a-56a.

The state offered opposing affidavits from three prison guards and two prison employees (who wrote that Hall "seemed pretty normal," pointed out that he had no trouble following prison rules, and contrasted Hall with children who have Down Syndrome), as well as from Dr. Price (who repeated his equivocal trial testimony) and the psychiatrist who had determined Hall's competency to stand trial (who offered no opinion as to whether Hall was mentally retarded). *Id.* at 56a-57a.

The same judge who had heard the criminal trial presided over the habeas proceedings. Because *Ex parte Briseno* had not yet been decided, the court proceeded without the benefit of a formal definition for mental retardation for the purpose of deciding *Atkins* claims in Texas. Relying on the affidavits and her personal recollections from trial – and without hearing any live testimony – the court adopted without alteration the state's proposed findings of fact and conclusions of law, *see id.* at 255a, one of which was to give "no weight" to a defense expert's affidavit because she was a licensed psychologist in Oklahoma and not Texas, *id.* at 266a. In turn, the Texas Court of Criminal Appeals adopted the trial court's findings and denied habeas relief. *Id.* at 253a-54a.

E. Proceeding on Remand in Direct Appeal

The Texas Court of Criminal Appeals then heard Hall's direct appeal on remand from this Court. *Id.* at 205a. Emphasizing that Hall had not requested a separate finding on the question of mental retardation at his criminal trial (despite the fact that the trial had taken place two years prior to *Atkins*), *id.* at 206a & n.2, 233a & n.38, the court recited the evidence offered by both sides at trial and in the habeas affidavits. By then, *Ex parte Briseno* had been decided and required the court to adopt a posture of "almost total deference" toward the trial court's findings on mental retardation. *Id.* at 229a, 235a. But rather than acknowledge that Hall's pre-*Atkins* trial court had made no determination on the issue, the divided court deferred instead to the habeas finding that Hall was not mentally retarded. *Id.* at 236a-37a.

Out of "an abundance of caution," the court also conducted a three-sentence review of the evidence, concluding that "the result of that review is that our conclusion has not changed." *Id.* at 237a-38a. As two concurring justices and two dissenting justices noted, there had still been no live testimony on whether Hall was mentally retarded. *Id.* at 239a (Price, J., concurring); *id.* at 250a (Holcombe, J., dissenting).

F. Federal Habeas Proceedings

Hall next filed a petition seeking habeas corpus relief in federal court, again requesting a full and fair hearing to determine whether he was mentally retarded and thus ineligible for the death penalty under *Atkins*. *See id.* at 119a. The district court

denied relief without holding a hearing, finding that Hall's request for a live hearing was procedurally defaulted because it was not raised in the state proceedings. *Id.* at 196a-97a. After "independently review[ing]" the record, the court concluded that "while there is evidence indicative of mental retardation, arguably only of mild mental retardation, there is ample evidence that Hall is not mentally retarded." *Id.* at 195a.

The Fifth Circuit granted a certificate of appealability and reviewed the district court's refusal to hold an evidentiary hearing for abuse of discretion. *Id.* at 114a. Noting that "the facts before us are a core manifestation of a case where the state failed to provide a full and fair hearing," *id.* at 117a, the court strongly criticized the error-ridden opinions of the district and state courts. Among other errors, the Fifth Circuit found that the district court's holding that the live hearing claim was procedurally defaulted was "incorrect," and that the state trial court's decision not to credit an expert witness because she was licensed as a psychologist in Oklahoma rather than Texas was "in the *Atkins* context ... clearly erroneous." *Id.* at 119a-22a.

The court also observed that the state had asserted in its reply to Hall's state habeas petition that Hall had written the following note from prison: "You have to get me out of here because there's no call button. The sink is stopped up. Also there are roaches and a small ass bed. My feet go all the way to the wall because I'm six feet four." *Id.* at 137a. In fact, Hall's note read: "you half to get out of here because there is No call button, the senk is stopd up

also rauch's and small as bed by feet go all the way to the wall because I am 6f4 [sic]." *Id.*

The court held that the district court's denial of an evidentiary hearing was an abuse of discretion and vacated and remanded for further proceedings. *Id.* at 124a.

G. Federal Habeas Proceedings on Remand

On remand from the Fifth Circuit, the district court held a one-day hearing at which witnesses were precluded from testifying on matters that were repetitive of their state testimony.[6]

Immediately prior to the hearing, and more than eight years after Hall's initial criminal trial, the state's expert, Dr. Price, administered an IQ test to Hall, who received a score of 85. *Id.* at 83a. On direct examination, however, Dr. Price definitively stated that the "best indication we have of [Hall's] measured IQ at the time of the crime is 67, plus or minus the confidence interval," and that the same score was also Hall's measured IQ between the date of the crime and Hall's trial. *Id.* at 333a.

Proceeding to the adaptive deficits prong – and in response to the court's questioning about whether Hall had adaptive limitations caused only by his low intelligence – Dr. Price testified that Hall had

---

[6] The parties disputed whether the district court was obligated to defer to the state court findings given that they were made without the benefit of a live hearing. As discussed below, the trial court determined that Hall had failed to show that he was mentally retarded both as a matter of first impression and under AEDPA's deferential "clear and convincing" standard. *See infra* at 20 note 8.

adaptive limitations with regard to "home, school, and work" from 1998 to 2000,[7] and that such deficits were related to both low intelligence and "adjustment problems." *Id.* at 335a-36a. The expert testified that there is no way to separate out adaptive deficits caused by low intelligence from those caused by a difficult home life or similar stressors since "all of those things are causes." *Id.* at 338a. During this line of questioning, the district court coined the term "environmental factors," encompassing any factor other than low intellect that may have caused Hall's deficits. *Id.* at 336a.

The district court then questioned Dr. Price further regarding Hall's IQ. The district court asked about the difference between Hall's IQ of 67 at the time of the trial and Dr. Price's subsequent measurement of 85. Dr. Price opined that the earlier scores "were underestimates due to all the external factors going on in [Hall's] life," which included a chaotic home environment. *Id.* at 347a; *see also id.* 349a-50a (acknowledging that depression, abuse, and a poor family life could have affected Hall's IQ score). He further posited that Hall could have intentionally performed poorly on the IQ test given at the time of his trial. *Id.* at 338a. Nevertheless, Dr. Price agreed that the 2000 test was properly administered and scored, and that Hall had put forth good effort on testing that Dr. Price had administered shortly after the 2000 IQ test. *See id.* at 343a.

---

[7] The expert testified that there was no way to consider Hall's adaptive deficits after this point in time because of the prison environment, which allows for better adaptation as there is "very little that's required of him." Pet. App at 336a.

Hall's expert, Dr. Cunningham, explained that the test score obtained by Dr. Price was an outlier significantly higher than other scores. The discrepancy, as Dr. Price explained, may have been caused by "problems in the administration or scoring of th[e] test that caused it to depart from standardization and that resulted in inflated scores." Dec. 10, 2008 Hr'g Tr. 110:20-25, 111:1-2. Although expressing his respect for Dr. Price's integrity, Dr. Cunningham stated that "expectancy effects [of the tester] and experimental bias" could contribute to an "inflated score." *Id.* at 118:2-8. Dr. Cunningham also explained that the Flynn Effect – a "well-established finding that IQ scores on full scale tests ... are slowly inflating over time" because "the population as a whole is getting better at the task that these IQ scores test" – could have affected Hall's IQ score in 2008. *Id.* at 79-80.

The district court denied relief, finding that Hall had not shown that he was mentally retarded by a preponderance of the evidence, or that the state court's determination was wrong by clear and convincing evidence. It stated that "[t]he court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons." Pet. App. at 105a. Nonetheless, "the court has not been persuaded by the evidence that Hall's intellectual functioning goes beyond the dividing line between mental retardation ... and less significant forms of learning disability ... or that the limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning." *Id.*

The district court denied a certificate of appealability sua sponte and, in a brief opinion, the Fifth Circuit did the same. Hall's petition for rehearing and rehearing *en banc* was denied on April 1, 2010.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an important opportunity to reaffirm in the face of substantial lower court confusion that *Atkins v. Virginia* requires states to adopt standards for mental retardation that are consistent with clinical standards.

Petitioner Hall was found not to be mentally retarded by the Texas state courts despite the fact that even the state's expert was unwilling to say that Hall was not mentally retarded. And in fact, the evidence of Hall's mental retardation was powerful. Hall's IQ was measured at 67 at the time of his trial, and there was compelling testimony concerning his adaptive deficiencies.

Hall never had a live hearing on the issue of mental retardation in the state courts, so when the federal district court initially denied his habeas petition, the Fifth Circuit remanded for an evidentiary hearing, pointing to the substantial evidence supporting Hall's *Atkins* claim and to errors in the state courts' determination, including the wrongful exclusion of the testimony of one of Hall's expert witnesses. The Fifth Circuit emphasized that if "Hall can prove the facts that he has consistently alleged on appeal, he will be entitled to habeas relief." Pet. App. at 123a.

Under questioning from the district court on remand, the state's expert testified that Hall's IQ score of 67 and his adaptive deficiencies did not demonstrate mental retardation because they could have been due to "environmental factors," such as Hall's traumatic upbringing.

In denying habeas relief, the federal district court repeatedly emphasized that although "Hall's intelligence was low," the court could not determine the extent to which Hall's seeming mental retardation was actually the product of "what [the state's expert] referred to as adjustment problems," such as "the undesirable home and social environments to which Hall was subjected and his emotional problems." *Id.* at 104a-05a. The district court relied on this supposed ambiguity along with lay testimony about Hall's demeanor, largely from prison personnel, to conclude that Hall had failed to carry his burden to show that he was mentally retarded. After the Fifth Circuit denied a certificate of appealability in a brief opinion, this petition followed.

Review is warranted here on two clusters of issues.

1. The lower courts' conclusion that evidence of retardation is insufficient if a low IQ or adaptive deficiencies could possibly be due to environmental factors is contrary to the holdings of other courts and flatly inconsistent with the clinical definition of mental retardation this Court employed in *Atkins*. At least three other courts have recognized that mental retardation has multiple etiologies, and is no less debilitating when it has trauma as one of its

roots. *E.g., Holladay v. Allen*, 555 F.3d 1346, 1358 n.15 (11th Cir. 2009) (discrediting state expert who "seems to ignore the fact that poor home environment is a recognized contributor to mental retardation"). And *Atkins* emphasized that mental retardation must be assessed in accordance with its clinical definition, under which factors such as abusive parenting and domestic violence are recognized *contributors* to mental retardation, so that it is scientifically incoherent to determine mental retardation in isolation from such factors.

Review is especially necessary here because the approach employed below is so sweeping in character. Hall, like many other capital offenders, had a traumatic upbringing, and the lower courts denied relief simply because there was a mere "potential" that his limitations could have had an environmental component. Defendants like Hall will thus be incapable of demonstrating mental retardation because their disability will often, if not always, be arguably related to such environmental factors. Only this Court can correct the Fifth Circuit's error on this important point.

2. The lower courts compounded their environmental factor error with another one regarding Hall's adaptive deficiencies. Under Texas law, adaptive deficiencies are not measured with respect to the categories prescribed in the clinical definition of mental retardation. Instead, Texas courts are instructed to look to a series of questions, typically the subject of lay testimony, that are intended to assess whether the defendant has certain strengths. *See Ex parte Briseno*, 135 S.W.3d at 8-9.

For example, the *Briseno* framework asks whether the defendant has exhibited leadership, and whether he is capable of following through on plans. *See id.*

The *Briseno* questions stand in stark contrast to the clinical approach, which recognizes that the mentally retarded are often capable of showing cognitive strengths in certain areas, and that those strengths will co-exist with adaptive deficiencies. The clinical approach also requires expert evaluation of adaptive deficiency, while the *Briseno* factors are expressly intended to allow lay witnesses to answer the pertinent questions. *Id.* at 8 (proposing factors because "undoubtedly experts will be found to offer opinions on both sides of the issue in most cases").

Briseno's focus on lay testimony and adaptive strengths allowed the lower courts to credit the lay testimony of state prison guards who testified that Hall seemed "normal" to them. It also allowed the trial court to discredit expert testimony that Hall suffered from adaptive deficiencies despite the fact that he may have seemed normal to his guards. (And, of course, the state's expert did testify that Hall had adaptive deficiencies, but that he believed that they may have been caused in part by environmental factors, and thus did not actually indicate mental retardation.)

Briseno is out of step with the ten other states that have by statute or case law expressly adopted clinical categories for assessing adaptive deficiencies, and has been widely criticized on that basis. This Court should grant review to reaffirm that states may not depart from what clinical standards require.

I. This Court Should Review The Determination Below That A Sub-70 IQ And Adaptive Limitations Do Not Satisfy *Atkins* Where Those Deficiencies May Have Been Caused, Even In Part, By "Environmental" Factors.

A. Review Is Warranted Because There Is A Substantial Split of Authority On This Issue.

The question whether – and to what extent – traumatic environmental factors, such as abusive home life, "count" in assessing a person's IQ and adaptive limitations is one that has divided courts around the country. In Hall's case, the potential effect of environmental factors was decisive in the decision to allow his death sentence to stand.

Specifically, the record below showed that Hall had an IQ of 67 at the time of the crime. The lower courts nevertheless discounted that score in favor of a higher score on an IQ test administered by the state's expert eight years later, on the ground that the earlier score "could have [been] artificially lowered" by "Hall's home and social environments," a reference to Hall's traumatic upbringing. Pet. App. at 103a-04a.

Likewise, although the record further showed that even the state's expert agreed that Hall suffered from significant adaptive behavior deficits, including deficits in "home, school, and work," *id.* at 337a, the lower courts concluded that those deficits did not demonstrate mental retardation because they could have been caused by "the undesirable home and social environments to which Hall was subjected and

his emotional problems," *id.* at 104a. As the trial court summed up, "[t]he court is satisfied that Hall's intelligence is low, and that in certain respects his behavior does not conform to the behavior of most persons." *Id.* at 105a. But it went on to conclude that it "has not been persuaded by the evidence that Hall's intellectual functioning goes beyond the dividing line between mental retardation ... and less significant forms of learning disability ... or that the limitations he has in adaptive functioning are significantly related to whatever limitations he has in general intellectual functioning."[8] *Id.* In short,

---

[8] To be sure, the district court purported to find other flaws in Hall's showing of mental retardation, but those asserted flaws do not change the dispositive character of its treatment of environmental factors. For example, although the district court found Hall's expert to be less credible than the State's expert, that was largely with respect to the state expert's testimony that environmental factors could influence measures of mental retardation. And while the district court speculated that Hall's IQ score of 67 could have been the result of intentional malingering, that speculation did not form a substantial basis for the district court's conclusion.

Likewise, while the district court found Hall not mentally retarded both as a matter of first impression and as a matter of AEDPA deference, the dual grounds for the decision do not impose a barrier to review. The trial court relied almost entirely on the state's expert's *federal* habeas testimony to support its de novo conclusion. That expert's prior state court testimony was that he could *not* say that Hall was not mentally retarded. Pet. App. at 216a ("Q: Were you able to determine whether or not Michael Hall was mentally retarded? A: Well, I'm not as convinced that he is as Dr. Cunningham is. He is at that level where it's either borderline, right at the level of mild mental retardation, or he's mildly mentally retarded. It's – it's sort of a judgment call." (trial proceedings)); *see also id.* at 228a ("My review of this case does not clearly indicate that Michael

because the lower courts found that they could not separate Hall's "true" intelligence from the effects of his traumatic upbringing, they concluded that he failed to demonstrate mental retardation.

The Mississippi Supreme Court has adopted a similar approach to environmental factors, while the Eleventh Circuit and high courts in Oklahoma and Alabama have refused to discount facially sufficient evidence of mental retardation on the ground that it could have been influenced by a traumatic home environment. In *Doss v. State*, 19 So. 3d 690 (Miss. 2009), a divided Mississippi Supreme Court affirmed the trial court's determination that the defendant was not mentally retarded when the trial court relied, in part, on an expert's opinion that the defendant's "problems in areas such as functional academics, work, self-direction, health, and safety were better explained by his chaotic upbringing than by intellectual deficits." *Id.* The dissent in *Doss* criticized the majority's holding, asserting that "there is no requirement in the [clinical] definitions ... that the deficits in adaptive

---

Hall is mentally retarded." (state habeas proceedings)). It was only during the federal hearing that the state's expert changed his opinion to say that Hall's disabilities did not qualify as mental retardation because they may have in part been due to environmental factors. Had the district court discounted this testimony, there would have been no basis to find Hall not mentally retarded, either as a matter of first impression or after applying AEDPA deference. And this Court need not decide the question of whether the state proceedings were entitled to any deference at all in light of the fact that they failed to provide Hall with a live hearing and the opportunity to cross-examine the state's witnesses.

functioning must be 'due to the effects of subaverage intellectual functioning,' much less that the adaptive deficits 'stem from severe intellectual deficits.'" *Id.* at 734 (Graves, J., dissenting).

On the other end of the spectrum – and in direct contrast to the position taken by the lower courts in Hall's case – the Oklahoma Court of Criminal Appeals has recognized that adaptive "limitations may also be caused by other mental *or social conditions*" and that a defendant therefore need not "show that mental retardation is the cause of his limitations in [adaptive functioning]." *Lambert v. State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005) (emphasis added). The court held that the state could not undercut evidence showing adaptive limitations by claiming that those limitations were caused by environment rather than by organic neurological problems. *Id.* at 653.

Likewise, in *Holladay v. Allen*, 553 F.3d 1346, the Eleventh Circuit concluded that the district court did not err in rejecting an expert's opinion that evidence of low IQ should be dismissed because the low IQ was caused by a poor home environment and learning disability, rather than mental retardation. *Id.* at 1358. Significantly, the court observed that the expert "seems to ignore the fact that poor home environment is a recognized contributor to mental retardation." *Id.* at 1358 n.15. The Eleventh Circuit also favorably cited district court's rejection of the state expert's testimony for "a number of reasons," including the expert's reasoning that the defendant's adaptive deficiencies were explained by "his home

environment." *Id.* at 1352, 1362 (citing district court opinion).

And in *Morrow v. State*, 928 So. 2d 318 (Ala. Crim. App. 2004), the Alabama Criminal Court of Appeals found that the defendant had raised an inference of mental retardation and was entitled to an evidentiary hearing based, in part, on evidence that the defendant suffered from adaptive deficits due to low intellectual functioning *and* his home environment. *Id.* at 320.

The division among the courts is substantial and important, and it can be resolved only by this Court. Had Hall's case come up through the Oklahoma courts, rather than the Texas courts, he would have been found mentally retarded within the meaning of *Atkins*, because those courts would have recognized Hall's traumatic upbringing as a bona fide cause of mental retardation.

B. Review is Warranted Because The Fifth Circuit Erred In Denying the Certificate Of Appealability.

Review is also warranted because the decision below is incorrect. Hall was entitled to the certificate of appealability he sought if he could show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Hall's contention – that an otherwise sufficient showing of mental retardation is not impeached because some portion of the disability is due to environmental factors – is not just "debatable," it is correct.

In *Atkins*, this Court repeatedly referenced *clinical* definitions of mental retardation. The Court began by fully quoting the two primary medical definitions of mental retardation from the AAMR and APA, 536 U.S. at 308 n.3, and then proceeded to describe the findings of a forensic psychologist, including his testing methodology and clinical conclusions. *Id.* at 308-09 & nn.4-5. The Court also noted that statutory definitions of mental retardation generally track the clinical definitions, *id.* at 317 n.22, and reiterated that "clinical definitions of mental retardation require" the establishment of these three elements, *id.* at 318. In short, the *Atkins* Court made clear that mental retardation is a medical condition, and that the implementation of the protection set forth in *Atkins* must be firmly grounded in a clinical definition of mental retardation. Indeed, unlike other areas of the law in which a medical diagnosis is relevant to but not dispositive of the legal standard, e.g. insanity or competence to stand trial, *Atkins* makes clear that here the medical diagnosis *is* the legal standard.

That the Court – quoting *Ford v. Wainwright*, 477 U.S. 399 (1986) – "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" 536 U.S. at 317 (first bracket added), does not invalidate the significance of the clinical definitions. To the contrary, *Ford* itself stood for the proposition that even where states have latitude in implementing their own procedures to secure constitutional guarantees, those procedures cannot alter or compromise the substance of those guarantees. *Ford*, 477 U.S. at 405 ("[T]he adequacy

of the procedures chosen by a State to determine sanity ... will depend upon ... whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner."). Indeed, in *Ford* the Court found state procedures inadequate because they did not sufficiently safeguard the constitutional prohibition on the execution of the insane. *Id.* at 416-17. Thus, the delegation to the states of procedures for implementing *Atkins* must not be read to undermine the constitutional prohibition on the execution of the mentally retarded, or the clinical definition of mental retardation in which the prohibition is rooted.

With these principles in mind, it is clear that the lower courts here strayed far from the clinical grounding set forth in *Atkins*, because the leading clinical definitions of mental retardation recognize the role environmental factors play in causing retardation. The APA's definition recognizes that there is no one cause of mental retardation: "Mental retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." *Atkins*, 536 U.S. 308 n.3 (internal quotation marks omitted). Similarly, the AAIDD expressly identifies numerous non-biological risk factors that are recognized as causes of mental retardation, including "[i]mpaired child care-giver," "[f]amily poverty," and "[d]omestic violence." *AAIDD 2010 Definition* 60; *see also id.* 58-59 ("Etiology is conceptualized as a multifactorial construct composed of four categories of risk factors (biomedical, social, behavioral, and educational) that

interact across time, including across the life of the individual and across generations from parent to child."). Accordingly, the AAIDD has stated that "genetics cannot explain the cause of [mental retardation] in every case," as an individual "may be born with perfectly normal DNA and still develop [mental retardation] due to a birth injury, malnutrition, child abuse, or extreme social deprivation." *Id.* at 59; *see also id.* at 61 ("Because [mental retardation] is characterized by impaired functioning, its etiology is whatever causes this impairment in functioning. A biomedical risk factor may be present but by itself may not cause [mental retardation].").

It is nearly impossible to identify which of the many possible causes of mental retardation is most salient in a given case. *See id.* at 59-60. Indeed, even the state's expert recognized as much when pressed by the court to distinguish between deficits caused by innate intellectual limitations and those caused by environmental factors. Pet. App at 337a ("[A]ll of those things are causes.").

Against this backdrop, the district court imposed an insurmountable barrier by requiring that Hall demonstrate that his deficiencies were *not* caused by environmental factors. This requirement flies in the face of clinical understandings of mental retardation. Indeed, it entirely precluded Hall from demonstrating that he is, in fact, mentally retarded, because his "undesirable home environment" undoubtedly had some effect on his capabilities. The state's expert testified that "[t]here is evidence that [Hall] had adaptive behavior deficits that in my

opinion were related to both his low intelligence and his adjustment problems," and that there was no way to separate out the causes. *Id.* at 335a-36a. Rather than crediting this testimony as evidence that Hall had adaptive behavior deficits, the court instead concluded that Hall was not mentally retarded because, while "[t]here is a possibility that Hall has adaptive functioning deficits that are related to low intelligence, ... the court is unable to find from the evidence the degree to which that is so as distinguished from the degree to which whatever deficits Hall might have are related to adjustment problems." *Id.* at 104a-05a; *see also id.* at 105a. Likewise, the court discounted Hall's earlier IQ scores as being artificially lowered by environmental factors, notwithstanding the state expert's testimony that 67 was the best indication of Hall's IQ at the time of the crime and trial. Under the district court's analysis, so long as any environmental risk factors are present, a defendant will be unable to prove mental retardation.

Not only does that analysis flatly contradict the clinical understandings of mental retardation, but – by making the presence of environmental factors determinative in the mental retardation assessment – the lower court has essentially disqualified an entire category of individuals from *Atkins* relief. Ironically, these are the very same individuals, according to clinical understanding, that are most likely to be mentally retarded.[9]

---

[9] This analysis also means that defendants who introduce evidence of a detrimental environment as a mitigating factor

II. Texas's Contra-Clinical Approach To Assessing Adaptive Limitations Also Warrants Review.

A. Under the *Briseno* framework, Texas courts depart from clinical standards by using misleading questions to gauge adaptive limitations.

The decision below also implicates – and wrongly decides – another set of important issues bearing on adaptive deficiency. The lower courts applied Texas's *Briseno* framework for assessing adaptive deficiencies. In *Briseno*, the Texas Court of Criminal Appeals created a list of factors, without reference to scientific or other authority, for the trier of fact to "focus on" when considering if a criminal defendant has adaptive limitations:

- 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?

---

thereby undercut any claim of mental retardation. *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989) (sentencer must be able to give effect to mitigating evidence of defendant's disadvantaged background).

- 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?

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

These subjective factors depart from the clinical definition of adaptive deficiencies in two important ways. First, the factors are entirely different in form and focus from the factors specified in the clinical definition of adaptive deficiency. The APA and pre-2002 AAMR definitions require a significant limitation in two of eleven or ten areas (respectively) of adaptive functioning, *see supra* n.1, while the present AAIDD definition requires a limitation in one of three general areas – conceptual, social, and practical. *AAIDD 2010 Definition* at 43. Thus, a

clinical assessment recognizes that, contrary to conventional wisdom, a mentally retarded person need not, and likely will not, exhibit deficiencies in all aspects of life. Instead, "[a]daptive skill limitations often coexist with strengths" in other adaptive skill areas. *AAIDD 2010 Definition* at 45; *see also id.* at 7 ("[P]eople with [mental retardation] are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their [mental retardation] (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation."), *id.* at 47 ("[I]n the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills."). This clinical perspective stands in stark contrast to the *Briseno* focus on what a defendant *can* do, such as formulate plans, act appropriately, or respond coherently to questions.

Second, the *Briseno* factors are intended to allow the factfinder to avoid reliance on expert testimony. In adopting these factors, the Texas Court of Criminal Appeals stated that they were necessary because "undoubtedly experts will be found to offer opinions on both sides of the issue in most cases." 135 S.W.3d at 8. The *Briseno* factors thus allow a finding of adaptive deficiency based not on a clinical diagnosis, but rather lay testimony about how the individual appears in his daily life. In contrast, the

clinical definition makes clear that "[c]linical judgment is a key component" which "emerges directly from extensive data and is based on training, experiences, and specific knowledge of the person and his or her environment." *AAIDD 2010 Definition* 85. Such clinical judgment is especially important when assessing the mildly mentally retarded, because lay persons are likely to be misled by the "'cloak of competence,' ... the powerful tendency of mildly mentally retarded people to mask or compensate for their deficits," for example by parroting back phrases or otherwise simulating comprehension. *United States v. Davis*, 611 F. Supp. 2d 472, 494 (D. Md. 2009). *Briseno* sidesteps this clinical diagnostic approach, instead asking whether lay persons considered the defendant mentally retarded.

The decision below reflects both of *Briseno*'s shortcomings by focusing on lay testimony on areas of adaptive competence. The court credited lay testimony – primarily from state prison guards and other government personnel – who testified that Hall seemed "normal" to them. Pet. App. at 57a (prison guard had been exposed to other mentally retarded persons and opined that "Hall acted as normal as anyone in his pod"); *id.* at 58a (prison guard "never saw anything that would make her think Hall was mentally retarded"); *id.* (prison guard "did not see any sign of mental retardation"); *id.* at 59a (prison employee had been exposed to persons with Down Syndrome and "had not seen anything at all that indicated Hall was mentally retarded"). These witnesses could not and did not provide a holistic

assessment of Hall; instead, they focused on episodic aspects of his behavior. *Id.* at 43a (Hall "looked Officer Nutt in the eye and told him he understood" his *Miranda* warning, and later "appeared to understand what was being said" in interview with officer); *id.* at 57a (prison guard testified Hall played basketball, listened to rock and roll music, and apparently understood how to obey orders and follow the rules); *id.* at 59a (prison guard testified Hall traded property with another prisoner in violation of the rules and desisted when ordered to do so).

The lower courts credited this testimony over testimony by other individuals who knew Hall well and who testified that Hall often sought to mask his deficiencies. For example, Hall's appointed attorney at trial testified in Hall's state habeas proceedings that Hall "would attempt to 'mask' his retardation by not asking questions," because he "bitterly did not want people to think him 'dumb.'" *Id.* at 53a. Furthermore, Hall "would sometimes appear to be surprisingly well informed on a topic, but as the discussion would continue, it would become apparent to [his attorney] that [Hall] was 'parroting' words and phrases that he had heard, with little or no grasp on the terms he was using." *Id.*; *see also id.* at 32a-33a (high school shop class instructor stated that "[w]hen he gave Hall instructions, Hall would say that he understood, but he really did not"); *id.* at 35a (high school teacher with extensive contact stated, "Hall attempted to conceal his shortcomings by bragging and boasting. It sounded as if he was repeating things that he had heard previously ... ."); *id.* at 51a (court-appointed attorney stated Hall was

unable to grasp legal concepts applicable to his case, but in order to mask his retardation would say he understood "and then immediately call and ask the same questions over and over again").

The lower courts also discounted testimony from Hall's expert, who opined that Hall had adaptive deficiencies and explained that "you typically can't tell that somebody is mildly mentally retarded by simply having a conversation with them. They may be able to express themselves. They have reading ability through about sixth grade. They may be able to do many things." Hr'g Tr. 68:3-7 (Cunningham).[10]

Under *Briseno*, this evidence could and did allow the lower courts to conclude that Hall did not suffer from adaptive deficiencies. Because Hall appeared "normal" to some, the lower courts did not investigate, as the clinical understanding of adaptive deficiencies requires, whether Hall's seeming competency in some areas masked deficiencies in others. Instead, the lower court simply credited testimony of the state's witnesses on the ground that they were supposedly more objective (a doubtful proposition given that most of them were prison guards or law enforcement officials employed by the state) without looking into whether that testimony established a clinical showing of adaptive deficiency.

---

[10] The State's expert of course testified that Hall *did* have adaptive deficiencies, but that he was uncertain to what extent they were caused by Hall's home environment – a distinction that is untenable. *See supra* at 19-20.

B. Review is Warranted Because The *Briseno* Framework Is Invalid Under *Atkins*' Clinical Approach, and Because There Is Substantial Confusion in The Lower Courts In This Area.

The district court's impermissible focus on lay testimony highlights Texas's problematic deviation from clinical understandings of mental retardation. Texas's *Briseno* framework and the importance of lay testimony within it warrants review by this Court, both because it is incorrect and clinically unsound, and because it is emblematic of growing confusion around the country about the definition of adaptive deficiency.

In *Atkins*, this Court mandated the use of clinical definitions of mental retardation. *See supra*. While states are free to use a variety of approaches to implement those clinical definitions, at bottom mental retardation must be determined by a definition and process that is consistent with the national consensus that defines mental retardation in "general[] conform[ity with] the clinical definitions" of the condition. 536 U.S. at 317 n.22. The *Briseno* approach is at odds with the clinical definition. Indeed, the Texas Court of Criminal Appeals has itself described the *Briseno* questions as "non-diagnostic criteria." *Ex parte Van Alstyne*, 239 S.W.3d. 815, 820 (Tex. Crim App. 2007) (per curiam). And Judge Price of that court has recently noted in dissent that *Briseno* has been roundly criticized by commentators because it sidesteps the required clinical framework to mandate consideration of factors that may easily coexist with significant

adaptive deficiencies. *See Lizcano v. State*, No. AP-75,879, 2010 WL 1817772 at *35 & n.23 (Tex. Crim. App. May 5, 2010) (Price, J., dissenting); *see also, e.g.*, 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, 714 (2009) ("[T]he *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."); 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) (*Briseno* factors deviate from the methodology of "professionals in the field, [who] use standardized criteria to detect significantly subaverage adaptive functioning. [T]he court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines." (footnotes omitted)). Texas thus wrongly allows the factfinder to look to misleading, non-clinically grounded evidence to determine the presence of adaptive deficiencies.

Briseno also contributes to growing confusion around the country about the definition of adaptive deficiencies. At least one other state, like Texas, has created its own non-clinically based categories for assessing adaptive deficiencies. *See State v. Dunn*, NO. 2001-KA-1635, --- So. 3d ---, 2010 WL 2011565, at *8 (La. May 11, 2010) (citing clinical definition,

but assessing skill in "self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living"). In contrast, at least ten states, either by statute or case law, directly incorporate clinical categories for assessing adaptive deficiencies. *See* Del. Code tit. 11, § 4209 (d)(3)d.1; Idaho Code Ann. § 19-2515A(1)(a); 725 Ill. Comp. Stat. 5/114-15(d); *Hughes v. State*, 892 So. 2d 203, 216 (Miss. 2004); *Wiley v. State*, 890 So. 2d 892, 895 (Miss. 2004); Mo. Ann. Stat. § 565.030(6); N.C. Gen. Stat. Ann. § 15A-2005(a)(1)b; *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002); *Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006); *Commonwealth v. Miller*, 888 A.2d 624, 630-31 (Pa. 2005); Va. Code Ann. § 9.2-264.3:1.1(A).

And even apart from the precise categories themselves, there is substantial confusion concerning the way evidence is to be interpreted within them. As noted above, *Briseno* allowed the lower courts here to credit testimony of prison officials over compelling expert testimony that Hall had adaptive deficiencies even though they might not be apparent from casual conversations. Other states, consistent with clinical practices, have recognized the dangers in that approach. For example, the Oklahoma high court in *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005), credited expert testimony that a defendant's seeming competency in prison can be misleading because "mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings." *Id.* at 652; *see also State v. Arellano*, 143 P.3d 1015, 1020 n.3 (Ariz.

2006) ("[N]on-expert observations 'receive little or no weight from clinical experts if they are made in the context of atypical environments (such as prison))." (citation omitted)).

Thus, in assessing adaptive limitations, some states maintain the clinical focus required by *Atkins*, while some states, like Texas, have crafted new tests based on misleading stereotypes of mental retardation and uninformed lay testimony. As a result, whether a mentally retarded defendant can effectively evoke the protections described in *Atkins* depends on the accident of the jurisdiction in which he is tried.

CONCLUSION

The petition for a writ of certiorari should be granted.

June 30, 2010

Respectfully submitted,

BRYCE BENJET
HULL HENRICKS LLP
221 W. 6th Street,
Suite 960
Austin, Texas 78701
(512)-494-8097

DAVID P. SHELDON
Counsel of Record
LAW OFFICE OF
DAVID P. SHELDON, PLLC
512 8th Street, SE
Washington, DC 20003
(202) 546-9575
davidsheldon@militarydefense.com

ELAINE J. GOLDENBERG
MATTHEW S. HELLMAN
MATTHEW J. DUNNE
JENNIFER V. YEH*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000

**Admitted only in NY; supervised by principals of the Firm.*