No. 15-65

IN THE

Supreme Court of the United States

JUAN LIZCANO,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

The petitioner was convicted in a Texas district court of capital murder and his punishment was assessed at death. The petitioner presents one question for review:

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Lizcano was convicted and sentenced to death in 2007 for the capital murder of Dallas Police Office Brian Jackson. Lizcano seeks certiorari review of the Texas Court of Criminal Appeals' denial of habeas relief. In particular, because he disagrees with the court's findings, he asks this Court to declare Texas's framework for evaluating intellectual disability claims in capital cases unconstitutional.

There is no compelling reason to review Lizcano's case. In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), this Court specifically left to the individual states the task of developing appropriate ways to enforce the constitutional restriction against executing intellectually disabled offenders. Texas has done so, and the Texas Court of Criminal Appeals properly decided Lizcano's intellectual disability claim based on this state precedent. That ruling does not conflict with this Court's holdings in *Atkins* or *Hall v. Florida*, 134 S. Ct. 1986 (2014). Further, the opinion of the court below is not published and is of no precedential value. For these reasons, this Court should deny the instant petition for writ of certiorari.

STATEMENT OF THE CASE

I. Procedural History

In November 2007, a Dallas County jury convicted Lizcano of capital murder and, in accordance with the jury's answers to the special issues, the trial court

sentenced him to death. CR: 268-70, 271;[1] Tex. Code Crim. Proc. Ann. art. 37.071, § 2 (West Supp. 2014).

Lizcano's conviction and sentence were affirmed by the Texas Court of Criminal Appeals on direct appeal in 2010. *Lizcano v. State*, No. AP-75,879, 2010 Tex. Crim. App. Unpub. LEXIS 270 (Tex. Crim. App. May 5, 2010) (not designated for publication)[2]. He petitioned this Court for certiorari review of that decision and was denied. *Lizcano v. Texas*, 562 U.S. 1182 (2011).

On December 23, 2009, Lizcano sought habeas relief from the Texas Court of Criminal Appeals under article 11.071 of the Texas Code of Criminal Procedure. The Court of Criminal Appeals denied relief on April 15, 2015. *See* Pet. App. 1a-2a. Three months later, on July 14, 2015, Lizcano petitioned this Court for certiorari review of the state court's opinion.

The State files this brief opposing Lizcano's petition.

II. Trial Evidence

a. The Facts of Lizcano's Capital Murder

In the early morning hours of Sunday, November 14, 2005, Lizcano instigated a police manhunt that resulted in the capital murder of Dallas Police Officer Brian Jackson.

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1. Citations to "CR" refer to the Clerk's Record from Lizcano's trial, and citations to "RR__" refer to a particular volume of the Reporter's Record from the trial.

2. A portion of this opinion is attached to Lizcano's Petition as Appendix C.

Lizcano believed that Marta Cruz, an older woman with whom he had been romantically involved but who had recently encouraged him to find a more age-appropriate girlfriend, was seeing another man. As he drove home from a nightclub with his friend, Jose Fernandez, on the morning of the offense, he told Cruz over the phone that if she was with another person, he was going to kill her and him. Lizcano went to his apartment, retrieved his uncle's revolver, and then drove to Marta's house, arriving around 2:00 a.m. He cornered Cruz in her bedroom and pointed the gun at her head, demanding to know if anyone else was at her home. He fired a gunshot into the bedroom ceiling, announcing that his next shot was for her. He left shortly thereafter. After she was sure he was gone, she called the police. She also called Fernandez to let him know that Lizcano had a gun. When Fernandez answered the phone, she realized that Lizcano was with him, and she asked him to tell Lizcano not to return to her house because the police were looking for him. Lizcano called her back and said he was coming back and that he "didn't give a damn" about the police. *See* Pet. App. 120a; RR42: 174-178, 180-185, 186-187, 207; RR43: 40.

Dallas Police Officers Lori Rangel and Jan Fagan responded to Cruz's 911 call. Cruz described what happened and provided a physical description of Lizcano. The officers searched the surrounding area and, once they had ensured that he was not still on the property, they left. After the officers left, Lizcano called and accused Cruz of lying because he could see that there were no police at her home. A couple of minutes later, he reappeared at her duplex and started kicking in the side door. Cruz panicked. It was now approximately 2:40 a.m., and she hid in the closet and called police again. She reported that Lizcano

had a gun. The banging and kicking stopped when police arrived. *See* Pet. App. 121a; RR42: 189-91, 191-193, 196; RR43: 41-38.

In response to Cruz's second 911 call, several officers dressed in full police uniform arrived at the scene, including officers Rangel, Fagan, William Hedges, Mike Nunez, Dung Pham, David Gilmore, Richard Rivas, Raymond McClain, Francis Crump, Brad Ellis, and the victim, Brian Jackson. They engaged in a multi-block manhunt for Lizcano, combing the alley, nearby homes, and the street behind Cruz's home. Despite the number of officers and their tactical approach of pursuing Lizcano on foot, by car and by helicopter, Lizcano managed to hide and elude the officers for quite some time. During the search, Lizcano fired three shots at Officers Rivas, Crump, and McClain from behind a tree in the alley, and the officers had to scramble for cover to avoid being hit. After firing, Lizcano ran from the alley toward the front of the house. While officers continued to search the alley, Officer Jackson moved toward the front of the house. Moments later, the officers heard Lizcano's revolver fire, followed by Officer Jackson's rifle. *See* Pet. App. 121a; RR43: 46, 49-50, 60, 81-82, 89, 93-94, 134, 159, 182; RR44: 18, 31.

The officers moved toward the front of the house and found Officer Jackson fatally wounded. Lizcano was found lying on the ground behind a trash can and his revolver was lying empty on the ground. According to Chief Medical Examiner Dr. Jeffrey Barnard, Lizcano's shot traveled through Officer Jackson's right arm and then into his heart, killing him within ten to fifteen seconds. Officer Rivas captured and handcuffed Lizcano and, as he

was placing him in the squad car, he noted a strong smell of alcohol on his breath. A few minutes later, Lizcano was asleep in the squad car. *See* Pet. App. 122a; RR43: 78, 138-39, 196, 198, 205, 213-220; RR44: 31, 95, 124, 178-79; RR46: 12.

b. Evidence Presented at Punishment

During the punishment phase, the State presented evidence of other criminal offenses committed by Lizcano, as well as evidence of his aggression and violence toward law enforcement. This evidence showed the following: Lizcano was facing three charges of aggravated assault on a public servant for shooting at Dallas Police Officers Rivas, Crump, and McClain the night of the offense; Lizcano was arrested for driving while intoxicated two months before the capital murder; while waiting in the book-in line following his arrest for driving while intoxicated, Lizcano threatened to kill a police officer after he got out of jail; a month before the capital murder, when Cruz's neighbor threatened to call the police following a scuffle he heard between Lizcano and Cruz, Lizcano told the neighbor: "You call the damn police. I'll take them down, too, with me;" and about a year before the capital murder, Lizcano was arrested on one occasion for public intoxication and almost arrested on another occasion for public intoxication following a bar fight. *See* Pet. App. 13a-15a; RR48: 87-92, 93-97, 98-103, 104-122, 123-127, 136-159, 161-175, 175-183, 184-191; RR49: 36-42, 43-51, 52-59.

The State also presented testimony from Warden Melodye Nelson about Texas's prison classification system, how inmates are housed, the availability of weapons and alcohol in prison, and assaults committed by inmates

in various classification levels. *See* Pet. App. 15a, 102a; RR49: 75-107.

The main theme of the defense's punishment case was that Lizcano was intellectually disabled and should not be executed. In addition, the defense also presented general mitigation evidence of Lizcano's impoverished upbringing in rural Mexico, his status as an illegitimate child, and his good character and generosity toward his family and friends. To prove that Lizcano was intellectually disabled, the defense presented evidence of Lizcano's low IQ and extensive testimony about his limitations in adaptive functioning, as observed during childhood and as an adult. This evidence was presented through thirteen witnesses, including Lizcano's sixth grade teacher, a nurse in the region where he was raised, several family members, two former girlfriends, two previous employers, and two psychologists. This evidence showed that Lizcano was administered several IQ tests that resulted in scores of 69, 62, 60, 53 and 48. With regard to adaptive deficits, testimony from family and friends showed that Lizcano (i) had trouble following instructions and performing fairly simple tasks in the work environment; (ii) used limited vocabulary and did not seem to understand humor; (iii) could not perform certain simple personal tasks such as reading an analog clock, following directions to a location, or operating a VCR; and (iv) had difficulty learning and socializing. *See* Pet. App. 15a-17a, 19a-20a, 132a-140a; RR52: 25-55, 56-62, 63-69, 70-75, 76-82; RR53: 21-42, 75-82; RR54: 27-37, 47-51, 52-62, 70-73, 74-80, 86; RR56: 19-48, 88-96, 100-101, 103-119, 132-134.

The defense also presented evidence that Lizcano was not a future danger through the testimony of two jailers

and two prison experts, Dr. John Sorenson and Dr. Mark Vigen. *See* Pet. App. 19a; RR55: 68-90, 125-143.

During cross-examination and in rebuttal, the State presented evidence of Lizcano's other incidents of violence toward Cruz and another former girlfriend. The State also elicited evidence of Lizcano's adaptive strengths, including evidence that (i) he maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) he made regular payments on a vehicle he purchased as a co-buyer; (iii) he maintained romantic relationships with at least two women, neither of whom considered him to be intellectually disabled and one of whom considered him to be "bright"; and (iv) he reliably sent significant amounts of money and other items to assist his family in Mexico. The State did not present an expert of its own regarding intellectual disability, but instead used cross-examination of Lizcano's experts to highlight bias and call into question several of their conclusions regarding Lizcano's claim of intellectual disability. *See* Pet. App. 18a-20a, 135a-141a; RR49: 124-28, 157-167; RR52: 51-53, 80-81; RR53: 10-15, 17, 42-63, 68-75; RR54: 37-47, 63-70, 80-85; RR55: 64-65; RR56: 51-88, 97-99, 119-132.

Lizcano's intellectual-disability claim was submitted to the jury as special issue number one.[3] *See* Pet. App. 92a;

3. No statute exists in Texas dictating when and by whom intellectual disability determinations must be made. When the issue is raised prior to trial, the most common practice is submission of a "special issue" on intellectual disability to the jury during the punishment phase of trial. The Court of Criminal Appeals has endorsed this practice and held that this mechanism sufficiently protects a defendant's Eighth Amendment rights. *See In re Allen*, 462 S.W.3d 47, 52 (Tex. Crim. App. 2015).

CR: 261-63. The statutorily mandated issues regarding future dangerousness and mitigation were submitted as special issues number two and three. CR: 261-62, 263-64; Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(b)(1),(e)(1). The jury returned a negative finding on the intellectual disability special issue, an affirmative finding on the future danger special issue, and a negative finding on the mitigation special issue. *See* Pet. App. 92a, CR: 268-70. Accordingly, the trial court sentenced Lizcano to death. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g).

III. Post-Conviction Litigation

a. Intellectual Disability Claims on Direct Appeal

Appeal of Lizcano's conviction and death sentence to the Texas Court of Criminal Appeals was automatic. *See* Pet. App. 119a. Lizcano raised seventy-nine points of error on direct appeal. *See* Pet. App. 119a. He raised three points specifically related to the jury's rejection of his intellectual disability claim: (1) that the jury's answer to the intellectual disability special issue was against the great weight and preponderance of the evidence; (2) that the trial court erred in failing to disregard the jury's answer to the intellectual disability special issue; and (3) that the trial court erred in denying his motion for judgment notwithstanding the verdict. *See* Pet. App. 130a.

With regard to the latter two claims, Lizcano argued that because he introduced expert witnesses to demonstrate intellectual disability and the State did not introduce its own expert witnesses in rebuttal, the trial court should have disregarded the jury's answer to the intellectual disability special issue or granted his motion

for judgment notwithstanding the verdict. *See* Pet. App. 130a. In rejecting these claims, the Court of Criminal Appeals made clear that expert testimony is not the only means of proving or disproving intellectual disability, and that the State has no burden of production to introduce expert witnesses. *See* Pet. App. 130a.

In analyzing Lizcano's first claim, the court thoroughly examined all of the evidence presented at trial. Based on the IQ scores presented, the court held that Lizcano satisfied the first prong of the intellectual disability definition. *See* Pet. App. 134a. In examining the second prong, the court summarized the relevant testimony of several lay and expert witnesses. *See* Pet. App. 134a-140a. The court noted that the evidence related to Lizcano's adaptive behavior was "extensive," and it showed that Lizcano had both strengths and deficits in adaptive functioning. *See* Pet. App. 140a. After its review of the evidence, the court found that the jury's resolution of Lizcano's intellectual disability claim was not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* Pet. App. 141a. The court afforded great deference to the jury's finding and reiterated that, where evidence is both in favor of and against a finding of intellectual disability, the jury is in the best position to make credibility determinations and evaluate this conflicting evidence. *See* Pet. App. 141a.

b. Intellectual Disability Claims on Habeas

During the pendency of his direct appeal, Lizcano filed an initial application for writ of habeas corpus in the trial court in which he presented nine allegations challenging the validity of his conviction and sentence. *See* Pet. App. 2a. In this application, Lizcano raised two claims relating to intellectual disability: (1) that counsel were ineffective for failing to investigate and present additional evidence in support of Lizcano's claim of intellectual disability during the punishment phase of his trial, and (2) that he is intellectually disabled and therefore his execution would violate the Eighth and Fourteenth Amendments' prohibition against executing the intellectually disabled. *See* Pet. App. 54a, 91a. In support of his ineffective assistance of counsel claim, Lizcano presented "new" evidence of intellectual disability that he claims counsel should have discovered and presented during his trial. *See* Pet. App. 54a-64a. In support of the latter claim, Lizcano relied solely on the evidence presented at trial to argue that he satisfies the definition of intellectual disability and therefore should be exempt from the death penalty. *See* Pet. App. 91a, 95a.

The trial court held a live evidentiary hearing that lasted five days, and it allowed Lizcano to present any and all evidence he desired in support of his claims. Lizcano presented live testimony from ten witnesses and testimony via affidavit from six additional witnesses. *See* Pet. App. 10a-11a. The State presented testimony from one witness. *See* Pet. App. 11a. After considering the pleadings and the evidence presented at trial and on habeas, the trial court entered 343 findings of fact and conclusions of law recommending that relief be denied.

See Pet. App. 7a, 115a. The court found that Lizcano failed to prove by a preponderance of the evidence that counsel were deficient in their investigation, preparation and presentation of intellectual disability evidence at trial, or that presentation of additional evidence would have changed the jury's answers to the special issues. *See* Pet. App. 54a-64a. With regard to his other claim, the court acknowledged that Lizcano met the first prong of intellectual disability; however, it found that in light of the evidence showing both strengths and deficits in adaptive functioning, he had not proven the second prong of intellectual disability by a preponderance of the evidence and, therefore, he is not exempt from the death penalty. *See* Pet. App. 93a-98a.

Following the trial court's entry of findings of fact and conclusions of law recommending that relief be denied, the entire record was transmitted to the Texas Court of Criminal Appeals.[4] *See* Tex. Code. Crim. Proc. Ann. art. 11.071, §§ 9(f)(1), 11. The Court of Criminal Appeals reviewed the entire record with respect to the allegations raised by Lizcano and adopted all but fourteen of the trial court's findings and conclusions. *See* Pet. App. 2a. Based upon the trial court's findings and conclusions and its own independent review, the Court of Criminal Appeals denied

4. In Texas, the trial court is the "original factfinder" in habeas corpus proceedings and the Court of Criminal Appeals is the "ultimate factfinder." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (per curiam). As a matter of course, the Court of Criminal Appeals pays great deference to the trial court's recommended findings of fact and conclusions of law, as long as they are supported by the record, particularly in those matters with regard to the weight and credibility of the witnesses and, in the case of expert witnesses, the level and scope of their expertise. *Id.*

relief. *See* Pet. App. 2a. Lizcano seeks certiorari review of this decision.

REASONS FOR DENYING THE PETITION

Lizcano fails to advance a compelling reason for this Court to review his case, and none exists. *See* SUP. CT. R. 10 (providing that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons). In *Atkins*, this Court specifically left to the individual states the task of developing appropriate ways to enforce the constitutional restriction against executing intellectually disabled offenders. In accordance with *Atkins*, Texas adopted the three-pronged definition of intellectual disability used by the medical community and established guidelines to assist the factfinder in determining whether a particular defendant is, in fact, intellectually disabled for purposes of the Eighth Amendment ban on excessive punishment. Texas's standard wholly comports with this Court's holdings in *Atkins* and *Hall*. Lizcano has been given the opportunity to fully litigate his claim of intellectual disability and it has been properly decided based on this state precedent. Further, the opinion of the Texas Court of Criminal Appeals in this case is not published and is of no precedential value. For these reasons, this Court should not grant review in this case.

ARGUMENT

I. The Texas Court of Criminal Appeals correctly decided Lizcano's intellectual disability claim under established state precedent, and that ruling does not conflict with *Atkins* or *Hall*

a. *Atkins*

In 2002, this Court determined that the execution of intellectually disabled individuals violates the Eighth Amendment. *Atkins*, 536 U.S. at 321. While the Court found that there was a national consensus opposing the execution of the intellectually disabled, the Court acknowledged that there existed disagreement in determining which offenders are in fact intellectually disabled. *Id.* at 317. In addition, it observed that not all people who claim to be intellectually disabled will be so impaired as to fall within the range of intellectually disabled offenders about whom there is a national consensus. *Id.*

In providing guidance regarding the definition of intellectual disability, the Court cited with approval the American Association on Mental Retardation (AAMR)[5] and American Psychological Association (APA) definitions of intellectual disability, which require (1) significantly sub-average general intellectual functioning, (2) concurrent

5. The AAMR is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *Ex parte Cathey*, 451 S.W.3d 1, 15 n.40 (Tex. Crim. App. 2014). In 2007, it changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD), reflecting the change in terminology from "mental retardation" to "intellectual disability." *Hall*, 134 S. Ct. at 1990, 2003 n.1.

significant limitations in adaptive functioning, and (3) onset before age eighteen. *Id*. at 309 n.3. However, rather than formulating a rule for what subset of those who claimed to be intellectually disabled would be ineligible for the death penalty, the Court left to the individual states the task of developing appropriate ways to enforce the constitutional restriction. *Id*. at 317.

b. Texas's Standard for Evaluating *Atkins* Claims

In 2004, in the absence of legislation to carry out the *Atkins* mandate, the Texas Court of Criminal Appeals established guidelines in *Ex parte Briseno* for determining whether a defendant has "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004).[6] The court adopted the definition of intellectual disability then in use by the AAMR and the similar definition of intellectual disability contained in the Texas Health and Safety Code. *See Briseno*, 135 S.W.3d at 5-8; Tex. Health & Safety Code §§ 591.003(7-a),(13). Under this definition, a defendant must prove by a preponderance of the evidence the following three-prongs: (1) significantly subaverage general intellectual functioning, generally shown by an IQ of about 70 or below (approximately 2 standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of eighteen. *Briseno*, 135 S.W.3d at 6-7, n.24.

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6. In its most recent opinion addressing an *Atkins* claim, the court reiterated that *Ex parte Briseno* remains the legal standard for intellectual disability claims in Texas unless and until the legislature acts. *See Ex parte Moore*, No. WR-13,374, 2015 Tex. Crim. App. LEXIS 922, at *8-9 (Tex. Crim. App. Sept. 16, 2015).

"General intellectual functioning" is defined by the IQ and obtained by assessment with a standardized, individually administered intelligence test. *Ex parte Hearn*, 310 S.W.3d 424, 428 n.7 (Tex. Crim. App. 2010). Texas courts recognize that mental health professionals are flexible in their assessment of intellectual disability; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as intellectually disabled while a person whose IQ tests below 70 may not be disabled. *See Cathey*, 451 S.W.3d at 10; *Briseno*, 135 S.W.3dat 7 n.24. Texas courts also acknowledge that there is a measurement error of approximately five points in assessing IQ, which may vary from instrument to instrument, and therefore any IQ score could actually represent a score that is five points higher or five points lower than the score that a defendant actually obtained. *See Hearn*, 310 S.W.3d at 428.

"Adaptive behavior" generally refers to the ordinary skills that are required for people to function in their everyday lives. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *11-12; *Cathey*, 451 S.W.3d at 19. Similarly, the Texas Health and Safety Code defines adaptive behavior as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." Tex. Health & Safety Code § 591.003(1). In assessing the adaptive behavior prong, Texas courts consider many of the same tools and guidelines used by mental health professionals in making a clinical diagnosis of intellectual disability. For example, courts accept and apply the AAIDD's and the APA's grouping of adaptive behavior into three areas – conceptual skills, social skills,

and practical skills.[7] *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *11-12; *Hearn*, 310 S.W.3d at 428. They also accept and apply the APA's definition of what constitutes a "significant limitation" in adaptive functioning. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *12; *Hearn*, 310 S.W.3d at 428. Texas courts also recognize that standardized tests can be used to determine limitations in adaptive behavior and such tests may be helpful to the factfinder in their analysis.[8] *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *12; *Hearn*, 310 S.W.3d at 428. *Briseno*, 135 S.W.3d at 7 n.25.

It is not sufficient for a defendant to establish that he has significantly subaverage general intellectual functioning and significant limitations in adaptive functioning. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *13; *Hearn*, 310 S.W.3d at 428. A defendant must also demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related to significantly subaverage general intellectual functioning rather than some other cause, such as a personality disorder. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *13; *Hearn*, 310 S.W.3d at 428; *Briseno*, 135 S.W.3d at 8.

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7. *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 43 (11th ed. 2010) ("AAIDD Manual"); APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("DSM-V").

8. Vineland Adaptive Behavior Scales, the AAMR Adaptive Behavior Scale, the Scales of Independent Behavior, and the Adaptive Behavior Assessment System are examples of scales commonly used to measure adaptive functioning. *Hearn*, 310 S.W.3d at 428 n.10.

Recognizing that the adaptive behavior criteria are "exceedingly subjective," the court in *Briseno* provided seven additional evidentiary factors that factfinders might also use in determining whether an individual is intellectually disabled:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?

- Does his conduct show leadership or does it show that he is led around by others?

- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

- Can the person hide facts or lie effectively in his own or others' interests?

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8-9. The court did not make consideration of any or all of the *Briseno* factors mandatory. *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012); *Cathey*, 451 S.W.3d at 11 n.22.

The *Briseno* factors were designed to assist factfinders in making the "relatedness" determination – that is, whether a defendant's adaptive limitations are related to a deficit in intellectual functioning or some other cause. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *14; *Hearn*, 310 S.W.3d at 428; *Briseno*, 135 S.W.3d at 8. They also reflect the court's concern that the guidelines used by mental health professionals and advocacy groups should not be considered in isolation, but rather in the context of the concerns expressed by this Court in *Atkins*. *See Sosa*, 364 S.W.3d at 892; *Cathey*, 451 S.W.3d at 11 n.22.

In considering a claim of intellectual disability, the factfinder is allowed to look at all the evidence before them. *Cathey*, 451 S.W.3d at 26-27 (stating that factfinders should consider all possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or free world community). In addition, the factfinder should consider all of the person's functional abilities, including those that show strength as well as those that show weakness. *Id.* at 27. Although the mental-health fields and opinions of mental-health experts inform the factual decision, they do not determine whether an individual is exempt from execution under *Atkins*; that decision is left to the factfinder, based upon all of the evidence and determinations of credibility. *See Moore*, 2015 Tex. Crim App. LEXIS 922 at *8; *Cathey*, 451 S.W.3d at 9; *Briseno*, 135 S.W.3d at 9.

c. Texas's consideration of the *Briseno* factors, along with clinical standards, is entirely consistent with this Court's precedent

In his petition, Lizcano does not take issue with Texas's definition of intellectual disability or its framework for analyzing the first and third prongs. He challenges only the way in which Texas courts assess the second prong, adaptive functioning. Specifically, he takes issue with factfinders in Texas being allowed to consider all evidence – including the *Briseno* factors, the defendant's adaptive strengths as well as his weaknesses, and the facts of the offense – in determining whether a particular defendant has significant limitations in adaptive functioning to meet the legal definition of intellectual disability.

Lizcano fails to recognize that the *Briseno* factors are not part of the definition of intellectual disability in Texas, nor is consideration of any or all of the *Briseno* factors mandatory. *See Sosa*, 364 S.W.3d at 892; *Cathey*, 451 S.W.3d at 11 n. 22. They are simply one of many tools that can be utilized by the factfinder in determining whether a particular defendant is intellectually disabled for purposes of the Eighth Amendment ban on excessive punishment. Indeed, the trial court and Court of Criminal Appeals did not specifically cite to or rely on any *Briseno* factors in denying relief in Lizcano's case. *See* Pet. App. 1a-2a, 95a-98a.

Lizcano also fails to recognize that consideration of the *Briseno* factors does not replace or exclude consideration of the diagnostic criteria used by mental health professionals in diagnosing intellectual disability. The guidelines and tools used by the AAIDD and APA

in assessing adaptive functioning are also accepted and applied by Texas courts. *See Moore*, 2015 Tex. Crim App. LEXIS 922 at *12; *Hearn*, 310 S.W.3d at 428; *Briseno*, 135 S.W.3d at 7 n.25.

Lizcano criticizes the *Briseno* factors as lacking any basis in scientific standards concerning intellectual disability. But Lizcano's approach would take the decision of whether a defendant is intellectually disabled out of the hands of the factfinder and place it into the hands of medical professionals – a result that was not required by this Court in *Hall*. *Hall*, 134 S. Ct. at 2000.

Further, Lizcano's concerns regarding the impact and purpose of *Briseno* are unfounded. Multiple prisoners in Texas have been determined to be intellectually disabled following the *Briseno* decision. *See, e.g., Van Alstyne*, 239 S.W. 3d at 823-24; *Ex parte Valdez*, 158 S.W.3d 438 (Tex. Crim. App. 2004) (per curiam); *Ex parte Bell*, 152 S.W. 3d 103, 104 (Tex. Crim. App. 2004) (per curiam); *Ex parte Modden*, 147 S.W.3d 293, 399 (Tex. Crim. App. 2004); *Ex parte DeBlanc*, No. AP-75,113, 2005 Tex. Crim. App. Unpub. LEXIS 46 (Tex. Crim. App. March 16, 2005) (per curiam). Given that the intellectually disabled comprise less than 3% of the population, it is not unusual that many offenders who claim intellectual disability are determined not to warrant that diagnosis. *See Atkins*, 536 U.S. at 309 n.5.

Lizcano wholly fails to demonstrate how Texas's standard for evaluating claims of intellectual disability contravenes *Atkins* or *Hall*. In accordance with *Atkins*, Texas has instituted a framework by which juries and judges can determine whether a particular defendant is,

in fact, intellectually disabled for purposes of the Eighth Amendment ban on excessive punishment. *Briseno*, 135 S.W.3d at 9. Texas's legal definition of intellectual disability was derived from a medical definition that the AAIDD had previously advocated, and it remains consistent with the current definition of intellectual disability used by the medical community and the AAIDD.[9] *See Moore*, 2015 Tex. Crim App. LEXIS 922 at *9 n.5. The requirement under Texas law that adaptive deficits be "related" to significantly subaverage general intellectual functioning is consistent with the APA's current position on the issue. *See* DSM-V 38 (emphasizing that an individual's deficits in adaptive functioning must be directly related to his intellectual impairments to meet the diagnostic criteria for intellectual disability). *Atkins* says nothing about what kind of evidence should or must be considered when determining whether a defendant's subaverage general intellectual functioning meaningfully limits his adaptive functioning. *See Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014) (citing *Atkins*, 536 U.S. at 308 n. 3, 318). That question was explicitly left to the states, and the framework adopted by Texas in *Briseno* in no way departs

9. As noted in *Hall*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset of these deficits during the developmental period. *See Hall*, 134 S. Ct. at 1994 (citing *Atkins*, 536 U.S. at 308 n.3 and DSM-V at 33). The AAIDD currently defines intellectual disability as follows: "*Intellectual disability* is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18." *See* AAIDD Manual at 5. Both of these definitions contain the same three prongs as the Texas definition.

from any of this Court's precedent. *Id.* As such, Texas's standard for the "legal determination of intellectual disability" remains adequately "informed by the medical community's diagnostic framework" as required in *Hall*. *See Moore,* 2015 Tex. Crim. App. LEXIS 922 at *9 (citing *Hall*, 134 S. Ct. at 2000).

d. Lizcano's intellectual disability claim has been fully litigated and properly decided based on this state precedent

Unlike in *Hall*, Lizcano was afforded the opportunity to fully litigate his claim of intellectual disability at trial and in post-conviction proceedings.

First, the issue of intellectual disability was fully presented during the punishment phase of trial and submitted to the jury as the first special issue in the punishment charge, wherein they were instructed on the medical definition of intellectual disability. *See* Pet. App. 92a; CR: 261-63. The jury resolved this issue against Lizcano. *See* Pet. App. 92a, CR: 268-70. On direct appeal, after a thorough examination of the evidence both for and against a finding of intellectual disability, the Court of Criminal Appeals upheld the jury's resolution of this issue, finding it was not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* Pet. App. 130a-141a.

During the habeas proceedings, Lizcano was given yet another opportunity to litigate his claim of intellectual disability, and the trial court did not restrict his presentation of evidence in any way. After presiding over a five-day hearing and sifting through copious amounts

of evidence, the trial court found that Lizcano had not proven the second prong of intellectual disability by a preponderance of the evidence. *See* Pet. App. 93a-98a. The trial court's decision was properly guided by Texas's standard for evaluating claims of intellectual disability as set out in *Briseno*, based on all of the evidence and determinations of credibility. The Court of Criminal Appeals agreed with the trial court's finding and denied relief. *See* Pet. App. 1a-2a.

Lizcano affords no deference to the state courts' findings that he is not exempt from the death penalty due to intellectual disability. He does so notwithstanding substantial record support for the courts' determination. Essentially, he asks this Court to view his expert and lay testimony regarding adaptive deficits in a vacuum and conclude that the state courts' findings were erroneous. However, a petition for writ certiorari is not the appropriate forum for asserting a claim of erroneous factual findings. Moreover, his request flies in the face of this Court's decision in *Atkins*, which specifically left to the individual states the task of developing appropriate ways to enforce the constitutional restriction. *Atkins*, 536 U.S. at 317.

II. The opinion of the Texas Court of Criminal Appeals in this case is not published and is of no precedential value

The fact that the state court issued an unpublished opinion on this matter further weighs against granting certiorari because the decision has no precedential value. Rule 77.3 of the Texas Rule of Appellate Procedure states that "unpublished opinions have no precedential value and

must not be cited as authority by counsel or by a court." *See* Tex. R. App. P. 77.3. Therefore, certiorari is unnecessary because the opinion cannot be used to affect any future Texas defendants.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that Juan Lizcano's petition for writ of certiorari be denied.

Respectfully submitted,

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