No. 10-37

IN THE

Supreme Court of the United States

MICHAEL WAYNE HALL,
Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Hall, found guilty of capital murder and sentenced to death, alleges that because he is mentally retarded, he is exempt from the death penalty. Mental-retardation evidence was presented at the punishment phase of trial and in state and federal habeas proceedings. Where the state and federal courts decide the issue relying upon the definition recited by this Court in *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002), do those courts' decisions violate the Constitution?

TABLE OF CONTENTS

TABLE OF CONTENTS, con't.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, con't.

TABLE OF AUTHORITIES, con't.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Hall was convicted of capital murder and sentenced to death for the kidnapping-related murder of 19-year-old Amy Robinson. He alleges that he is exempt from the death penalty because he is mentally retarded. The jurors at trial heard evidence supporting his claim. After the state court in habeas proceedings took affidavits and reports in connection with his claim, the court determined he did not show that he was retarded. The federal district court conducted a live evidentiary hearing on the matter and determined that the state court's adjudication was reasonable and in the alternative that Hall did not prove that he was retarded. Now Hall alleges that the state and federal courts strayed from the principles set out by this Court in *Atkins*. Hall, however, mischaracterizes the actions of this Court and of the state and federal courts. Those lower courts relied upon those definitions and principles recited in *Atkins*.

STATEMENT OF THE CASE

I. Facts Related To The Offense

The facts of the offense are taken from the original opinion of the Court of Criminal Appeals on direct review:

> Eighteen-year-old Hall and his friend Robert Neville decided to kill someone because Hall was angry that he had a "sucky-ass" life. They started searching for the right victim and preparing for their crime by obtaining rifles, pellet guns, a crossbow, and ammunition. After much

looking, Hall and Neville finally chose nineteen-year-old Amy Robinson, a friend and former coworker, because she trusted them and they "didn't have to put bruises on her to get her in the car." The evidence also revealed that Amy had a genetic disorder that made her small and mentally and physically slow. She stood four feet five inches tall and had the mental capacity of a third or fourth grader.

On February 15, 1998, Hall and Neville went looking for Amy in order to carry out their murderous plan. They checked her schedule at the Kroger grocery store and then lay in wait for her to ride by on her bicycle on her way to work. When the pair saw Amy, they coaxed her into the car, promising to drop her at work after they circled around in the country. As Neville drove, Amy complained that she did not want to be late for work.

Neville then pretended to have a flat tire and pulled the car over on a dirt road by a remote field. Hall and Neville got out of the car and walked into the field carrying their weapons while an unsuspecting Amy waited in the car listening to the radio. At some point, Hall persuaded Amy to get out of the car, telling her she needed to go talk to Neville near a tree. As Amy walked toward Neville, he fired a crossbow at her several times. Neville missed each shot, but Amy became angry when the last arrow grazed

her hair. When Amy started walking back to the car, Hall shot her in the back of her leg with his pellet gun. Hall and Neville laughed while Amy cried in pain.

Meanwhile, Neville returned to the car and got his .22 caliber rifle. When Hall managed to maneuver Amy back into the field, Neville shot her in the chest. Hall then shot her in the chest "three or four or six times"with the pellet gun. Amy fell to the ground making loud noises and shaking. Hall then stood over her and stared for five to ten minutes. The pair worried that someone would hear Amy, so Neville shot her in the head, killing her instantly. Hall and Neville then left Amy and her bicycle in an area where they would not be easily discovered.

A few days later, they returned to the scene. Neville fired shots into Amy's dead body, and Hall took keys and money from her pocket. When Amy's family and coworkers realized she was missing, a massive search ensued. More than two weeks later, authorities focused on Hall and Neville. Fearing they would be caught, the pair fled Arlington but were soon arrested when they attempted to cross the border into Mexico. The authorities found Amy's body on the day of the arrest.

Hall v. State, 67 S.W.3d 870, 873 (2002).

II. Facts Relating To Punishment

Although the punishment phase of trial was conducted before this Court handed down *Atkins*, Hall as part of his general mitigation case presented retardation-related evidence, which will be detailed below in section I.A.1. In accordance with the jurors' answers to the sentencing-phase questions (3 CR[1] 237–38), the court sentenced Hall to death. (36 RR[2] 63–64; 3 CR 251–53.)

III. State Appeal And This Court's Remand

On appeal, Hall argued that because he was retarded, his execution would constitute cruel and unusual punishment. (Br. of Appellant at 29–33, *Hall v. State*, No. 73,787 (Tex. Crim. App. March 7, 2001).) The court rejected his argument and affirmed the judgment. *Hall v. State*, 67 S.W.3d at 877–79. In his state habeas application, he again raised the issue. (1 SHCR[3] 8–20.) While Hall's case was before this Court on appeal, this Court handed down *Atkins*, holding that the execution of the retarded constituted cruel and unusual punishment. 536 U.S. at 321. This Court vacated Hall's judgment and sentence and remanded the case to the Court of Criminal Appeals for reconsideration. *Hall v. Texas*, 537 U.S. 802.

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[1] "CR" refers to the clerk's record of papers filed in the trial court, preceded by the volume number and followed by the page number.

[2] "RR" refers to the reporter's record of the trial testimony, preceded with the volume number and followed by the page number.

[3] "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court, preceded by the volume number and followed by the page number.

IV. State Habeas Proceedings

While the appeal was on remand, the convicting court in state habeas proceedings, in response to *Atkins*, took additional retardation-related evidence through affidavits and reports. That evidence will be detailed below in section I.A.2. The Court of Criminal Appeals denied relief. *Ex parte Hall*, No. 53,668-01 (Feb. 26, 2003) (not designated for publication).

V. Appeal On Remand To The State Court

The Court of Criminal Appeals then turned to the appeal, before it on remand. *See Hall v. Texas*, 537 U.S. 802. The state court, taking judicial notice of the evidence from the trial and state habeas proceedings, affirmed the conviction and sentence. *Hall v. State*, 160 S.W.3d at 37–40. This Court denied certiorari review. *Hall v. Texas*, 545 U.S. 1141 (2005).

VI. Federal Habeas Petition

A. Proceedings in federal district court

Hall again raised the claim in his federal habeas petition. (*Hall v. Quarterman*, No. 4:06-cv-436 (N.D. Tex. June 20, 2006) (First Pet. for Writ of Habeas Corpus by a Person in State Custody at 4–33). The district court held no hearing and denied relief. *Hall v. Quarterman*, 443 F. Supp. 2d 815, 821–22 (N.D. Tex. 2006).

B. Proceedings in the court below

On appeal, the Fifth Circuit determined that the district court had abused its discretion by failing to hold

an evidentiary hearing and remanded the case. *Hall v. Quarterman*, 534 F.3d 365, 372 (2008).

C. Proceedings upon remand

Upon remand, the parties agreed that the district court would consider, in addition to the live testimony at the hearing, the witnesses' trial testimony. *Hall v. Quarterman*, No. 4:06-CV-436-A, 2009 WL 612559, at *32 (N.D. Tex. Mar. 9, 2009) (Docket # 85; *see* 4 FHRR[4] 19–20; 8 R 19–20.) The court then heard live testimony, to be detailed below in section I.A.3. The court denied relief, *Hall v. Quarterman*, No. 4:06-CV-436-A, 2009 WL 612559, at *46 (N.D. Tex. March 9, 2009), and denied Hall's application for a certificate of appealability (COA) (Docket # 88).

D. Decision of the court below

The court below also rejected Hall's application for a COA. *Hall v. Thaler*, 597 F.3d 746 (5th Cir. 2010).

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right but of discretion, and this Court will grant review for compelling reasons only. *See* Sup. Ct. R. 10. Here, the decision reached by the court below does not conflict with decisions reached by other federal appellate courts, does not require this Court to use its supervisory powers, and does not require this Court to resolve an important federal

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[4] "4 FHRR" refers to the reporter's record of the testimony at the federal evidentiary hearing held December 10, 2008, followed by the page number.

issue. *See* Rule 10(a). This petition presents no question to justify the Court's exercise of its certiorari jurisdiction.

I. Reasonable Jurists Would Agree With The District Court's Resolution.

A. The district court found that Hall had not rebutted the state-court findings.

When this Court in *Atkins* barred the execution of the retarded, it did not dictate the means to enforce its bar. The Court left that job to the states. *See* 536 U.S. at 317 (citing *Ford v. Wainwright*, 477 U.S. 399, 405, 416–417 (1986)). Indeed, this Court has said that a federal court may not require a state court to use a particular method in making its finding. *See Schriro v. Smith*, 546 U.S. 6, 8–9 (2005) (holding that circuit court exceeded its authority when it ordered a state court to conduct a jury trial on issue of retardation)).

Texas courts have defined retardation to be (1) significantly subaverage general intellectual functioning, usually evidence by an IQ score below 70, that is accompanied by, (2) related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18. *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004); *see also* Tex. Health & Safety Code § 591.003(13) (West 2010).

1. Punishment phase evidence

At the punishment phase of trial, the jurors heard retardation-related evidence. Dr. Mark Cunningham, a psychologist testifying for the defense, said that on the Wechsler Adult Intelligence Scale, third edition (WAIS-

III), Hall received a full-scale Intelligence Quotient score of 67. (34 RR 175.) With a three-point standard error of measurement, Dr. Cunningham said, such a score yielded a 90 percent likelihood that Hall's IQ fell between 64 and 71. (34 RR 188.) When Hall was 12, on the Wechsler Intelligence Scale for Children—Revised (WISC-R), he scored a 71. (34 RR 189.) With a three-point standard error of measurement, the score showed a 90 percent likelihood that Hall's IQ fell between 68 and 74. (35 RR 231.) As for Hall's adaptive abilities, Dr. Cunningham interviewed Hall's math teacher, Chris Bybee; his school counselor, Cheryl Connor; and his stepmother, Tina Dodson. (34 RR 196.) He found that Hall had deficits in (1) independent functioning (eating, dressing, transportation), (2) economic activity (handling money), (3) language development, (4) self-direction (excessive passivity), (5) socialization (ability to interact with others), (6) social engagement, and (7) functional academics. (34 RR 197–200.) *See Atkins*, 536 U.S. at 308 n.3. Dr. Cunningham said that Hall could not play cards, give directions to homes, identify nearby streets, or travel to his workplace on his own. (34 RR 200–02.) Hall would not brush his teeth or use a table knife, had no peer-age girlfriends beyond brief relationships, could not name artists in the music groups to which he listened and was amazed that others could do so, was gullible and easy to cheat in trades, required specific concrete instructions, and took little interest in the world around him. (34 RR 201–03.)

A psychologist testifying for the State, Dr. J. Randall Price, differed. After administering the Street Skills Survival Questionnaire (SSSQ) (35 RR 202) and the Kaufman Functional Academic Skills Test (K-FAST) (1 SHCR 122), Dr. Price said that Hall had borderline

adaptive skills in the areas of telling time, using money, and understanding measurements (35 RR 201–02). But Hall was average in the areas of tools, domestics, health and safety, personal services, and use of functional signs. (35 RR 201.) In a subcategory, the use of appliances, kitchen tools, and utensils, Hall also was average, Dr. Price said. (35 RR 208–10.) During the interview, Dr. Price said, Hall acted and talked like an adolescent or young adult. (35 RR 212.) Dr. Price agreed that in talking about the crime Hall was fluent and articulate and related events coherently and logically. (35 RR 219.) Hall's thought processes, Dr. Price said, were on-topic, logical and goal-oriented. (35 RR 193–94.) His thoughts flowed "pretty normally," Dr. Price said, and the interview was like a normal conversation. (35 RR 193–94.)

As for Hall's family life, his mother and his older brother testified that Hall could not count change or read an analog clock. (33 RR 131–32, 208–09, 224–25.) His mother said that her son became lost easily, could not read a menu, use a vacuum cleaner, make his bed, wash dishes, or use a table knife. (33 RR 131–32.) His brother said that Hall had difficulty understanding instructions and understanding the rules of pool. (33 RR 224–25.)

But Hall's mother acknowledged that her son could read and write at a fourth-grade level (33 RR 145), use a phone (33 RR 182), operate a microwave (33 RR 190), load and unload a dishwasher (33 RR 148), use a pencil and pen (33 RR 191), make a sandwich, brush his teeth, dress himself, read from children's books and the Bible (33 RR 145), and, after failing a computerized driver's test, read well enough to pass the written test (33 RR 149–50). Hall had at least one, perhaps two, age-appropriate girlfriends. (33 RR 182.)

At school, some teachers and administrators found Hall mentally deficient; others found him only lazy. His math teacher during the 1995–96 school year, Chris Bybee, said that Hall could not perform multiplication or division. (34 RR 65–66.) But he said that Hall was slow and difficult to motivate, lazy, and sometimes slept in class. (34 RR 64, 73.)

The wood-shop teacher, Ken Trainer, said that Hall lacked intelligence, could not perform simple tasks, had trouble with multiplication and division, and that a task that should have taken two weeks, took instead eight weeks. (33 RR 274–75, 277–78, 279–80.) But he acknowledged that Hall was unmotivated in class and that he would sometimes just stay in one place and sit. (33 RR 278.) And when Hall was motivated, such as in building a video game console, Trainer said, Hall even stayed late to work on it. (33 RR 284–85.) Nor did Hall have difficulty responding verbally. (33 RR 300–01.)

The school counselor, Cheryl Connor, said that Hall had the reading comprehension of a first-grader and the math ability of a third-grader. (34 RR 25–26.) He could add and subtract on paper but not in his head. (34 RR 25–26.) And he would not write in complete sentences or paragraphs unless prompted. (34 RR 27.) Some teachers, she said, reported that he drooled in class. (34 RR 38.) But she said that she believed that Hall was depressed and that sometimes he just tuned out. (34 RR 31.) And, she said, he was good at video games. (34 RR 43.)

Through the eighth grade, Hall was in special education classes. But school records listed him not as retarded but as learning disabled. (33 RR 123–24, 34 RR 47.) The defense presented some evidence suggesting that

Hall was labeled "learning disabled," rather than "mentally handicapped" as the insistence of his mother. (4 SHCR 944–45.)

Two coworkers testified that Hall did not appear to be mentally slow or challenged. (31 RR 209–10 (Tamara Campbell); 35 RR 272 (Alan Boles).) One said that he was lazy. (31 RR 209–10 (Campbell).) A waitress who served Hall testified that he ordered a meal and used utensils in the customary manner. (35 RR 285–86.) And before trial, Hall drafted and argued motions pro se. (4A[5] RR 7–31.) Indeed, the judge commented favorably upon Hall's drafting skill. (4A RR 23–24.)

2. State habeas evidence

After this Court handed down *Atkins*, the convicting court, in habeas proceedings, took evidence in the form of affidavits and reports. Testifying for Hall was Dr. George Denkowski, a psychologist. (3 SHCR 603–21.) Dr. Denkowski said that Hall's scores of 67 on the WAIS-III and of 71 on the WISC-R showed significantly subaverage intellectual functioning. (3 SHCR 612.) The psychologist took issue with some of the testing instruments upon which the State had relied, for example, the Test of Non-Verbal Intelligence, or the TONI, which Dr. Denkowski said did not measure general intelligence. (3 SHCR 612–13.) As for Hall's adaptive behavior, Dr. Denkowski acknowledged that he had not interviewed Hall but reviewed the evaluations of Drs. Cunningham and Price. (3 SHCR 613.) Dr. Denkowski noted that Dr. Cunningham used the Adaptive Behavior Scale—School

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[5] Volume 4A of the reporter's record, formerly sealed, records the ex parte proceedings of Hall before the court.

and the Adaptive Behavior Scale—Residential and Community, while Dr. Price used the SSSQ and the K-FAST. (3 SHCR 613.) The psychologist said the SSSQ was not suitable for diagnosis and the findings on the K-FAST were consistent with the academic achievement of mildly retarded adults. (3 SHCR 616.) Dr. Denkowski said that Hall was retarded. (3 SHCR 621.)

Hall presented affidavits from trial counsel, investigators, an inmate, and a former teacher stating that in their opinions, he was retarded. (4 SHCR 950–51 (attorney William Harris), 948–49 (attorney Paul Conner), 153–54 (death-row inmate Bill Coble), 941 (private investigator Joseph Ward), 953 (former teacher Stephen Dollar).)

The State introduced an affidavit from Dr. Price, who noted Hall's 1991 WISC-R score of 71 and the Dr. Cunningham-administered WAIS-III, on which Hall scored a 67. Dr. Price said that the record did not "clearly indicate that [Hall] is mentally retarded." (1 SHCR 121.) Also, Dr. Price said, based upon the record and the results of the SSSQ and the K-FAST, Hall did not have "significant adaptive deficits." (1 SHCR 122.) And the State introduced affidavits from prison guards stating that based on Hall's behavior, they did not think he was retarded. (1 SHCR 190–91 (Brandon Daniel), 194–95 (Julie Perego), 127–29 (Suzanne Prosperie), 187–88 (Todd Tatum), 192–93 (Darrell White).)

The state habeas court, relying upon the evidence offered both in habeas proceedings and at trial (6 SHCR 1570), issued findings of fact and conclusions of law (6 SHCR 1569–98, 1678). The same judge acted both as trial judge and habeas judge. (6 SHCR 1678, 1683.)

The state court determined that when the IQ scores were considered with the standard error of measurement, Hall's intellectual functioning was in the upper end of mild mental retardation or in the borderline range. (6 SHCR 1576.)

As for Hall's "adaptive behavior," the court recounted the findings of the State's psychologist (6 SHCR 1577–78), Hall's pro se motions and his ex parte hearing (6 SHCR 1579–81), his behavior on death row (6 SHCR 1581–82), his media interview (6 SHCR 1582), the facts of the crime (6 SHCR 1582–85), his school career (6 SHCR 1585–86), his jail and prison records (6 SHCR 1587–88), and other evidence both supporting and controverting a finding of retardation (6 SHCR 1586–87, 1588–91).

Regarding the third element of the standard, that the retardation must manifest itself before the age of 18, *see Atkins*, 536 U.S. at 309 n.3 (6 SHCR 1591), the court noted that Hall committed the murder when he was 18 (6 SHCR 1592).

The court found that Hall's IQ scores and adaptive behavior did not place him clearly within the definition of retarded (6 SHCR 1592), and because he did not meet that standard, he did not fall within that set of defendants who are exempt from the death penalty (6 SHCR 1592). The Court of Criminal Appeals adopted the findings and conclusions and denied relief. *Ex parte Hall*, No. 53,668-01.

3. Federal habeas evidence

After the Fifth Circuit remanded the case to the federal district court for an evidentiary hearing, the

parties agreed that the district court would consider, in addition to the live testimony at the hearing, the witnesses' trial testimony. *Hall v. Quarterman*, 2009 WL 612559, at *32. The court took testimony from the petitioner's witnesses—Karen Gray, his mother (4 FHRR[6] 26–29); Cheryl Conner, the school counselor (4 FHRR 30–45); Stephen Dollar, a teacher (4 FHRR 46–50); Paul Conner, one of Hall's defense attorneys (4 FHRR 50–51); and Dr. Cunningham (4 FHRR 52–137)—and from the Director's witnesses—Steve Hillman, the commissary manager at the Polunsky Unit, where Hall is housed (4 FHRR 139–46); Melissa Byley, librarian at the Polunsky Unit (4 FHRR 147–52); Robert Woodrow, a minister (4 FHRR 154–60); Russell Bartholome, a church worker (4 FHRR 162–68); Linda Haynes, a school psychologist (4 FHRR 168–89); Kenneth Trainer, the wood-shop teacher (4 FHRR 189–97); and Dr. Price (4 FHRR 198–254).

Dr. Cunningham testified that Hall was mildly retarded. (4 FHRR 53). In 1991 Hall was tested with the WISC—R and scored a 71. (4 FHRR 57.) When in 2000 Dr. Cunningham tested Hall with the WAIS-III, he scored a 67, "with a true range of 64 to 71." (4 FHRR 54–55, 58.) Dr. Cunningham said that there was a 90 percent likelihood that Hall's true IQ fell in the range of 64 to 71. (4 FHRR 59.)

When in 2008 Hall was again tested with the WAIS-III, Dr. Cunningham acknowledged, he received a score of 85, with a 90 percent likelihood that his IQ fell within the range of 82 to 89. (4 FHRR 60.) Dr.

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[6] "4 FHRR" refers to the reporter's record of the testimony at the federal evidentiary hearing held December 10, 2008, followed by the page number.

Cunningham did not assess Hall's IQ after 2000. (4 FHRR 61.)

As for Hall's adaptive behavior, Dr. Cunningham in 2000 reviewed the academic functional literacy test given Hall in school and one given by Dr. Sally Church and conducted third-person interviews. (4 FHRR 69–70.) The tests Dr. Cunningham used to assess Hall's adaptive behavior did not determine any deficit's cause. (4 FHRR 64.) Dr. Cunningham said, "Hall's adaptive deficits put him in the mild mental retardation range." (4 FHRR 66–67.)

Dr. Cunningham also discussed the Flynn Effect.[7] Taking the effect into account, Dr. Cunningham said that Hall's score on WISC-R, given in 1991, would be adjusted to 65. (4 FHRR 80, 83, 88.) Dr. Cunningham said that other than Hall's November 2008 evaluation, the petitioner met the standard for an IQ score below 75, "in the zone of eligibility for mental retardation." (4 FHRR 89.) And after applying the Flynn Effect, the scores were "well into the 60s." (4 FHRR 89.) He agreed, though, that in the educational or professional community, the correction of scores using the Flynn Effect is not broadly practiced.[8] (4 FHRR 112.)

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[7] The Flynn Effect, which has not been accepted in Fifth Circuit as scientifically valid, *In re Salazar*, 443 F.3d 430, 433 n.1 (2006), posits that, over time, the IQ scores of a population rise without corresponding increases in intelligence and thus the test must be re-normalized over time. *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007).

[8] Courts are not uniform in whether to apply the effect. *See Thomas v. Allen*, 607 F.3d 749, 757–58 (11th Cir. 2010) (cases there cited). Hence, applying the effect does not constitute this Court's

He acknowledged that he had never been employed by the prosecution in a capital case but that he had been employed by the defense about 135 times. (4 FHRR 95.) When asked whether the score of 85 that Hall received in November 2008 was consistent with his own opinion about Hall's retardation, Dr. Cunningham could answer neither "yes" nor "no." (4 FHRR 108.)

As for why Hall may have tested higher in November 2008, Dr. Cunningham said Hall could have gotten smarter in the past eight years or other factors were at work. (4 FHRR 110.) For example, he said, the higher score might be the result of the standard error of measurement, or the Flynn Effect, or with the administration or scoring of the 2008 test. (4 FHRR 110–11.)

He said that were Hall's IQ score of 85 from the November 2008 testing to be adjusted for the Flynn Effect, the range of the score, with a 95 percent confidence level, would have a low point of 72. (4 FHRR 127–28.)

Dr. Cunningham noted that a person's score on an IQ test can be lowered by depression, sleep deprivation, anxiety, behavioral disorders, and attention deficit disorder. (4 FHRR 128–29.) The score also can be affected by the relationship between the tester and the subject. (4 FHRR 130.)

Testifying for the State, Dr. Price said that he had been involved in 232 capital cases since 1986, had testified in 24 cases in the past 11 years, 54 percent of the time for the prosecution and 46 percent of the time for the defense.

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clearly established precedent. *See* 28 U.S.C. §2254(d)(1) (West 2010).

(4 FHRR 198–99.) He said that Hall's "measured IQ" at the time of the hearing was 85 and at the time of the murder was about 67, plus or minus 5 points. (4 FHRR 199–200.)

Dr. Price said that Hall had adaptive deficits related both to his low intelligence and his adjustment problems, that is, his difficulties with his family and school. (4 FHRR 201–02.) Dr. Price knew of no way to distinguish between adaptive deficits caused by low intelligence and those caused by the environment. (4 FHRR 202.) He said that because of Hall's imprisonment, the psychologist could not now measure his adaptive behavior. (4 FHRR 202.)

Dr. Price could not say that Dr. Cunningham's WAIS-III score of 67 in 2000 accurately reflected Hall's IQ. (4 FHRR 203–04.) Dr. Price said, "There were a lot of things going on in Mr. Hall's life, even at the time of the trial, that could have had an effect on his measured IQ, and that may have lowered it." (4 FHRR 204.) Dr. Price agreed that if a defendant knows that a low score will aid his defense, the defendant can rig the outcome, appearing to have a lower intelligence. (4 FHRR 204.) But, he said, in his experience, capital defendants try to fake low intelligence more at the trial level than after conviction. (4 FHRR 205–06.)

When Dr. Price tested Hall in November 2008, the three tests he used to measure the petitioner's level of effort and motivation showed Hall put forth good effort and was motivated. (4 FHRR 206–07.) Dr. Price used two IQ tests, the WAIS-III and the Reynolds Intelligence Assessment System, or RIAS. (4 FHRR 207.) On each, Hall scored an 85. (4 FHRR 208.) He said that Hall's

intelligence functioning was low average, and considering the standard of error measurement, would be from the borderline level, a range between 70 and 85, to the low average level. (4 FHRR 210.)

Asked why Hall's score was higher in 2008 than in 2000, Dr. Price said the result could arise from his own, Dr. Price's, bias or from Hall's having become more intelligent. (4 FHRR 211.) Or, the psychologist said, the scores that Hall received in 1991 and at the trial stage were underestimates arising from external factors: "the emotional turmoil, the chaotic home, the failure in school, and the resulting problems he had with self-esteem and with motivation and with effort." (4 FHRR 211.)

Dr. Price said that a person's "intellect" or "intelligence" can improve over time. (4 FHRR 212.) People have been known to progress from being mildly mentally retarded to later not meeting the retardation criteria. (4 FHRR 212.) But, he said, the increase arises usually from a increase in adaptive skills rather than an increase in the person's IQ score. (4 FHRR 212.) As for the test scores in the early 1990s and in early 2000, Dr. Price said, "I think it's likely that those are not accurate, that they are somewhat of an underestimate because of the external factors, and I don't know about his efforts and his motivation on those tests." (4 FHRR 212.)

Dr. Price acknowledged that at trial he did not offer an unqualified opinion that Hall was not mentally retarded. (4 FHRR 217.) He said that now, though, he thinks that at the time of trial Hall was not retarded and now believes that the earlier IQ testing did not reflect Hall's intelligence accurately. (4 FHRR 217–18.)

As for the Flynn Effect, Dr. Price disagreed with Dr. Cunningham about the level of reduction required to take into account the effect. (4 FHRR 219.) And he said it was not standard practice in the scientific community to adjust an IQ score for the effect. (4 FHRR 219–20.)

Dr. Price acknowledged that he had no reason to believe that the 1991 IQ test was given and scored incorrectly and believed that the 2000 test given by Dr. Cunningham was given and scored correctly. (4 FHRR 236–37.)

Dr. Price said that the 71 score that Hall received in 1991 put him in the borderline but not mentally retarded range. (4 FHRR 249.) At the time of the 1991 test, Hall's parents had recently divorced, and Hall and his mother were living with an abusive man. (4 FHRR 249.) When Hall was tested in 2000, he had recently committed a murder and was on trial for that murder. (4 FHRR 350.)

As for the IQ test given by Dr. Church in 2002, both Drs. Price and Cunningham agreed that the test had been improperly scored originally and that the correct score was 72. (4 FHRR 59, 250–51.)

Hall's recorded IQ scores can be summarized as follows:

- Score: >71; test: WISC-R; date taken: unknown; test administrator: unknown; Hall's age: unknown.

- Score: 71; test: WISC-R; date taken: October 1991; test administrator: Garland Independent School District; Hall's age: 11.

- Score: 84; test: TONI-2; date taken: November 1994; test administrator: Garland Independent School District; Hall's age: 15.

- Score: 67; test: WAIS-3; date taken: January 2000; test administrator: Dr. Cunningham; Hall's age: 20.

- Score: 77; test: TONI-3; date taken: March 6, 2000; test administrator: Texas Department of Criminal Justice; Hall's age: 20.

- Score: 72; test: WAIS-R; date taken: January 2002; test administrator: Dr. Church; Hall's age: 22.

- Score: 85; test: WAIS-3; date taken: November 2008; test administrator: Dr. Price; Hall's age: 29.

- Score: 85; test: RIAS; date taken: November 2008; test administrator: Dr. Price; Hall's age: 29. (Respondent Quarterman's Post-Hearing Br. at 33; Docket # 84.)

4. Federal district court opinion

The district court found Dr. Price's evidence more persuasive than that of Hall's experts. *Hall v. Quarterman*, 2009 WL 612558, at *42. It found that Hall's experts served more as advocates for Hall than as objective witnesses. *Id.* Dr. Price, on the other hand, impressed the court as being objective, with a goal not of serving as an advocate but of informing the court. *Id.* The court found that Hall's November 2008 IQ test score of 85 was the best measure of his general intellectual functioning. *Id.* Hence, the court could not find that Hall satisfied the first element of the retardation definition,

that is, a significantly subaverage general intellectual functioning, defined as an IQ of 70 or below. *Id.* The court considered all the test scores in the record and concluded that none showed that Hall has had at any relevant time significantly subaverage general intellectual functioning as contemplated by the state standard. *Id.* School records reflected that Hall was not retarded but was, rather, learning disabled. *Id.*

The court said that given the "margin of error" involved in measuring IQ scores and the uncertainties surrounding the reliability of intelligence testing, it was not willing to accept any of the reported scores as showing that Hall had significantly subaverage general intellectual functioning. *Id.* The court noted that Hall's social environment and emotional state could have lowered his test scores. *Id.*

Nor, the court said, was it impressed with Dr. Cunningham's testimony regarding the use of the Flynn Effect. *Id.* at *43.

And the court found questionable the reliability much of the evidence supporting Hall's adaptive-deficit argument. *Id.* Hall relied upon witnesses with natural tendencies to help prove his retardation, witnesses such as his mother, his brother, his two trial attorneys, and a fellow death-row inmate. *Id.* School officials offered conflicting information. *Id.* Testimony from prison officials, from Hall's minister, and others contradicted much of the testimony of Hall's witnesses. *Id.* The court noted that Hall's home and social life had the potential to harm his adaptive abilities. *Id.*

The court was not persuaded by Hall's adaptive-functioning experts. *Id.* It found the testimony of Dr. Price more persuasive. *Id.*

The court said that from the evidence presented, it could not determine that the adaptive deficits arose from low intelligence rather than from other adjustment problems. *Id.*

The court determined that is was to apply the federal habeas corpus standard of review and was to presume correct the state court finding that Hall had not met the standard for retardation set out in *Ex parte Briseno*. *Hall v. Quarterman*, 2099 WL 612558, at *44; *see* 28 U.S.C. § 2254(d) (West 2010). The court said its task was to determine whether Hall had rebutted that presumption with clear and convincing evidence. *Id.*; *see* § 2254(e)(1). The court determined that Hall had, in fact, failed to do so. *Hall v. Quarterman*, 2099 WL 612558, at *45. And the court said that even if the state court's finding had been an affirmative finding that Hall was not retarded, Hall had not presented evidence showing that the finding was incorrect. *Id.* The court below denied relief, *id.* at *46, and denied Hall's application for a COA (Docket # 88). The circuit court found no fault with the district court's decision. *See Hall v. Thaler*, 597 F.3d at 746.

5. Analysis

The federal district court reviewed the state court decision using the deferential standard set out in the federal statute. *Hall v. Quarterman*, 2009 WL 612558, at *44; *see* § 2254(d). The district court determined that Hall

was not entitled to relief. *Hall v. Quarterman*, 2009 WL 612558, at * 45.

The state court noted that before trial, Hall received an IQ score of 67 on the WAIS-III given by Dr. Cunningham and after trial a 72, again on the WAIS-III, given by Dr. Church. (6 SHCR 1575.) Coupled with the IQ score of 71 Hall received in 1991 on the WISC-R, the state court said the scores did not clearly place Hall in the range of mild mental retardation. (6 SHCR 1575–76.)

In determining whether Hall had rebutted the presumption that the state-court finding was correct, the district court found the testimony of Dr. Price more persuasive than that of Dr. Cunningham. *Hall v. Quarterman*, 2009 WL 612559, at *42. And the court found that the IQ score of 85 that Hall received on the testing Dr. Price conducted in November 2008 the best measure of Hall's general intellectual functioning. *Id.* The district court determined that Hall had not provided persuasive evidence that he met the significantly subaverage general intellectual functioning requirement set out in state law. *Id.* The court below also rejected Dr. Cunningham's suggestion that the IQ score be adjusted for the Flynn Effect. *Id.* at *43. Indeed, the Fifth Circuit has never required that score be modified for the Flynn Effect, *see In re Salazar*, 443 F.3d at 433 n.1, and this Court has never required such modification, *see* § 2254(d)(1).

As for adaptive functioning, the state court noted that Dr. Price tested Hall with the SSSQ and the K-FAST. (6 SHCR 1578–79; 35 RR 192; 1 SHCR 122.) The state court also reviewed Hall's school, employment, and imprisonment records and determined that he had not

shown adaptive deficits sufficient to support a finding of retardation. (6 SHCR 1577–91.)

The federal district court, in determining whether Hall had rebutted that state-court finding, noted that much of the evidence upon which Hall relied was questionable. *Hall v. Quarterman*, 2009 WL 612559, at *43. Hall relied upon witnesses who were not objective but who had rather a "natural tendency" or interest in helping prove Hall retarded. *Id.* And, the court said, Hall had a home and social environment and emotional problems that could have harmed his adaptive abilities in ways not related to his general intellectual functioning. *Id.*

The district court noted Hall bore the state-law burden of proving by a preponderance of the evidence his retardation. *Id.* at *45. After the state court determined that Hall had not carried that burden, the federal district court determined that Hall had not rebutted the presumption of correctness of the state-court finding with clear and convincing evidence. *Id.* And the court said even if the state-court finding were construed as an affirmative finding that Hall was not retarded, Hall had not rebutted that presumption. *Id.* at *45.

B. In the alternative, the evidence did not show that Hall was retarded.

In the alternative, the district court determined that if it reviewed the evidence without the deferential standard of review, *see* § 2254(d), it would not find that the evidence showed that Hall's intellectual functioning fell below the dividing line between retardation and other "less significant forms of learning disability." *Id.* at *43.

Nor was the court persuaded that Hall's adaptive limitations were related to any intellectual limits. *Id.*

Again, the district court reviewed the state-court evidence and the live federal-court testimony. *Id.* at *41–42, *45. It applied the proper standard of review and in the alternative reviewed the evidence anew. *Id.* at *41–42, *45. It made and explained its credibility determinations. *Id.* at *42–43. To the extent that Hall disagrees with those credibility determination, such determinations should be left to the judge who heard the testimony and saw each witness's demeanor. *See Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir. 2001). Hall does not show that the federal district court or the court below erred.

II. The Courts Agree That Environmental Factors Can Cause Mental Retardation.

Hall argues that this Court should review the circuit court's decision because that district court determined that intellectual and adaptive deficits do not satisfy the *Atkins* standard where those deficits have been caused by environmental factors. (Cert. Pet. at 19–241.) The record does not support Hall's claim. In fact, Hall mischaracterizes this Court's opinion in *Atkins* and the opinions of the courts below.

This Court in *Atkins* noted that mental retardation could have "many different etiologies" or causes. 536 U.S. at 308 n.3 (quoting Diagnostic and Statistical Manual 41 (4th ed. 2000) (DSM-IV). Indeed, the DSM-IV (Text Revision) 45–46 (DSM-IV-TR), published by the American Psychiatric Association, lists as predisposing factors heredity, early alterations of embryonic development,

mental disorders, pregnancy and perinatal problems, general medical conditions acquired in infancy or childhood, and environmental influences, such as "deprivation of nurturance or of social, linguistic, and other stimulation." The American Association on Intellectual and Developmental Disabilities (AAIDD)[9] cites as risk factors (a) biomedical factors relating to biological processes such as genetic disorders and nutrition, (b) social factors relating to social and family interactions such as stimulation and adult responsiveness; © behavioral factors relating to dangerous activities or substance abuse; and (d) educational factors relating to the availability of educational supports that promote mental and adaptive ability development. *See* AAIDD, *User's Guide: Mental Retardation/ Definition, Classification, and Systems of Supports* 6 (10th ed. 2007). Mental retardation is seen as a condition that is largely immutable. *See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 424 (1985) ("Many forms of mental illness are temporary, cyclical, or episodic. Mental retardation, by contrast, involves a mental impairment that is permanent."). Although adequate social and education support may alter an individual's adaptive abilities, such supports do not usually change his general intellectual abilities. *See* DSM-IV-TR 42 ("Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute."); Ellis, *supra*, 424 n.54.

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[9] The American Association on Intellectual and Developmental Disabilities, or AAIDD, is the successor to the American Association on Mental Retardation, or AAMR.

The Texas definition of retardation tracks that of the AAMR that was referenced by this Court in *Atkins* in requiring that the adaptive deficits be "related" to the intellectual deficit. *See Atkins*, 536 U.S. at 308 n.3. The adaptive deficits must arise from the subaverage intelligence rather than from other sources. "The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment, measured by an intelligence test, have some practical impact on the individual's life." Ellis, *supra*, 422; *see also Williams v. Quarterman*, 293 F. App'x 298, 309 (5th Cir. 2008) (finding no retardation where petitioner's problems at school could have been related to alcohol and drug abuse not to low intelligence); *In re Salazar*, 443 F.3d 430, 433–34 (5th Cir. 2006) (noting that expert found no retardation where petitioner's adaptive difficulties coexisted with average intelligence); *Maldonado v. Thaler*, 662 F. Supp. 2d 684, 726 n.47 (S.D. Tex. 2009) (stating that approach "recognizes that a subaverage IQ will manifest itself in the way that people adapt to the world around them."). The adaptive deficit is seen as proof that the subaverage intelligence has an effect on the individual's life. *See* Ellis, *supra*; *Maldonado*, 662 F. Supp. 2d at 726 n.47; *see also Hill v. Schofield*, No. 08-15444, 2010 WL 2427092, at *3 (11th Cir. June 18, 2010) (noting that Georgia statutory definition of retardation requires low intelligence "resulting in or associated with" adaptive deficit); *Murphy v. Ohio*, 551 F.3d 485, 509 (6th Cir. 2009) (noting that expert said that individual's adaptive deficits could be attributed to something other than retardation).

In fact, the AAIDD says:

> To meet the requirement for a significant limitation in adaptive behavior, the individual's intellectual impairment must have produced real-world disabling effects in his/her life. The purpose of this component is to ensure that the individual is not merely a poor test-taker, but rather is a truly disabled individual in everyday life functioning.

AAIDD, *supra*, 24–25 (italics added).

The DSM-IV-TR 42 says, "Adaptive functioning may be influence by various factors, including education, motivation, personality characteristics, social and vocation opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation." Hence, adaptive deficits may arise from factors other than mental retardation. But *Atkins* protects only those individuals with retardation.

So the AAMR, the APA, and Texas law require that the adaptive deficits arise from the intellectual impairment rather than from other, perhaps environmental, factors. But retardation itself—which comprises both the intellectual and adaptive deficits—can arise from environmental factors, such as "deprivation of nuturance and of social, linguistic and other stimulation." DSM-IV-TR 26. And such retardation may lead to low intelligence and thence to a low IQ test score. It does not follow, however, that every low test score arises from low intelligence or retardation. A low score could arise from malingering, poor test-taking skills, or inattention

resulting from chaos in the home. These factors can lead to a low score not related to low intelligence. In Hall's case, the district court found not that environmental factors led to low intelligence but found that environmental factors led to low scores, which did not reflect low intelligence. The court said:

> The record makes clear that Hall's environment could undermine the validity of his IQ test scores, and the court is not persuaded from the evidence that his environment did not so undermine Hall's pre-2008 test scores as to cause them to be unreliable as evidentiary support for his mental retardation claim.

Hall v. Quarterman, 2009 WL 612559, at *43. Hence, the district court determined that environmental factors lowered not Hall's intelligence but his test scores and made the scores unreliable as gauges of his intelligence.

As for the adaptive-deficit issue,

> [t]he [district] court also has considered on the adaptive functioning issue the undesirable home and social environments to which Hall was subjected and his emotional problems, all of which had the potential to adversely affect his adaptive functioning in ways that are unrelated to general intellectual functioning.

Id. Hence, the court determined that Hall's adaptive deficits arose not from his low intelligence but from the undesirable home and social environment. *See id.* Put

another way, the adaptive deficits were proof of the chaos in Hall's home and social life not proof of his low intelligence. *See Atkins*, 536 U.S. at 308 n.3.; *Ex parte Briseno*, 135 S.W.3d at 7; Ellis, *supra*, 422.

Again, the district court did not hold that mental retardation arising from environmental factors was not worthy of Eighth Amendment protection. (Cert. Pet. at 19–21.) The district court said rather that where environmental factors lead to lowered IQ test scores or to adaptive deficits, such low test scores and adaptive deficits may not be proof of or arise from mental retardation. Where the low IQ test scores and the adaptive deficits arise not from retardation but from environmental factors, a change in those environmental factors likely would lead to an improvement in the individual's intellectual and adaptive abilities. Such mutability is not the hallmark of retardation. *See* DSM-IV-TR 42; Ellis, *supra*, 424 n.54.

To the extent that Hall argues that the state court proceedings are entitled to no deference because the state-court witnesses were not subject to cross-examination, he errs. The presumption of correctness, *see* § 2254(e)(1), and statutory deference arises not after the witnesses' cross-examination, but after an adjudication on the merits. *See* 28 U.S.C. § 2254(d) (West 2010); *Valdez v. Cockrell*, 274 F.3d 941, 948 (5th Cir. 2001); *see also Wilson v. Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (suggesting that an "adjudication on the merits that would warrant deferential review"); *Lambert v. Blackwell*, 387 F.3d 210, 238 (3d Cir. 2004) (stating that AEDPA[10] "no longer explicitly conditions federal deference to state court factual findings

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[10] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

on whether the state court held a hearing."); *Mendiola v. Schomig*, 224 F.3d 589, 592 (7th Cir. 2000) (stating that presumption of correctness, § 2254(e)(1), does not require state-court findings to be based on evidentiary hearings).

To the extent that Hall alleges that the district court required him to prove that his adaptive deficits were not caused by environmental factors (Cert. Pet. at 26), Hall attempts to shift the burden of proof. Under state law, he had the burden of proving that he is retarded. *See Ex parte Briseno*, 135 S.W.3d at 12. One of the elements of retardation was that the adaptive deficits be "related to" the intellectual deficits. *See id.* at 7; *also see Atkins*, 536 U.S. at 308 n.3.; Ellis, *supra*, 422. The state court, and the federal district court, required only that Hall meet his state-law burden.

III. Halls Shows No Circuit Split.

Hall alleges that the circuits are split on the issue of whether mental retardation worthy of Eighth Amendment protection can arise from environmental factors. (Cert. pet. at 21–23.) No case cited by Hall supports his argument.

First, it should be assumed that Texas law, which drew its definition of retardation from that used by the AAMR, recognizes that mental retardation can arise from environmental factors, including lack of nurturance. AAIDD, *supra*, 6; *also see* DSM-IV-TR 45–46. A case cited by Hall, *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005), does not hold otherwise. There, the Oklahoma court said only that under that state's definition of mental retardation, an individual's adaptive deficits need not arise from or be related to his intellectual deficits. See *id.*

at 651 ("A defendant must show he has significant limitations in adaptive functioning, but is not required to show that mental retardation is the cause of his limitations in these skill areas."). It is worth noting that the definition of retardation set out by the APA, cited in *Atkins*, also does not state expressly that the individual's adaptive deficits be related to his intellectual deficits but states that the intellectual deficits be "accompanied by" the adaptive deficits. 536 U.S. at 308 n.3. But the DSM-IV-TR, published by the association, does suggest that adaptive deficits arising from causes other than low intelligence will not support a finding of retardation. DSM-IV-TR at 42 (stating that adaptive failures can arise from factors co-existing with mental retardation).

Nor does *Holladay v. Allan*, 555 F.3d 1346 (11th Cir. 2009), support Hall's allegation of a circuit split. There, the state's expert expressed the opinion that something other than retardation, perhaps a learning disability or poor home environment, led to the petitioner's low IQ test score. *Id.* at 1351 ("[The state's expert] testified that she believed that the score would be low but that she thought it was the result of other factors, such as a learning disability and his chaotic home life."). The majority seemed to infer that the expert held the opinion that poor home environment led not to a mere low IQ score but to a low IQ. *Id.* at 1358 ("[The expert] nevertheless assumed that Holladay's IQ would be low, but postulated that it was low for reasons other than mental retardation—i.e. a learning disability and a poor home environment."). The majority seemed also to infer that the expert was expressing the opinion that a poor home environment could not contribute to mental retardation. *Id.* at 1358 n.15. First, from the face of the *Holladay* opinion, it is not clear that the expert said that a poor

environment could not cause retardation. Second, even if the expert had expressed such an opinion, the panel did not adopt that opinion. The panel, instead, in agreement with the DSM-IV-TR, the AAIDD, and, presumably, Texas law, suggested that mental retardation can arise from environmental factors.

And both *Doss v. State*, 19 So. 3d 690 (Miss 2009), and *Morrow v. State*, 928 So. 2d 318 (Ala. Crim. App. 2004), recognize that mental retardation can arise from environmental factors.

IV. Neither The State Court Nor The District Court Relied Upon The *Briseno* Factors.

Hall complains the Texas retardation analysis runs afoul of *Atkins* by incorporating into its definition the so-called *Briseno* factors. (Cert. Pet. at 28–37.) Hall argues that this Court requires the states to use a definition of retardation that tracks the clinical definition and that the *Briseno* factors have no clinical support. (*Id.* at 34–37.)

Hall's argument fails. First, no where in *Atkins* did this Court require the states to adopt a clinical definition of "mental retardation." Indeed, this Court left to the states expressly the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317. And this Court did so knowing that primary disagreement would lie in "determining which offenders are in fact retarded." *Id.* This Court noted also that while state definitions for mental retardation varied, the definitions conformed generally to the clinical definition set out by the AAMR and the APA. *Id.* at 317 n.22. And the definition used by Texas conforms expressly to the definition set out by the

AAMR. *See Ex parte Briseno*, 135 S.W.3d at 7. In fact, Hall does not criticize the definition used by the State but criticizes the State's use of the *Briseno* factors determining whether an individual meets the state standard.

Second, the *Briseno* factors do not contradict *Atkins*. *See Woods v. Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007). This Court did not dictate that the approach and the analysis of the state inquiry must track the approach of the AAMR or the APA exactly. *Clark v. Quarterman*, 457 F.3d 441, 445 (5th Cir. 2006). The Court of Criminal Appeals, recognizing that the evaluation of adaptive behavior can be subjective, set out additional factors[11] that the factfinder may consider in weighing the evidence. *Gallo v. State*, 239 S.W.3d 757, 776 (2007). "Although these factors incorporate lay-witness testimony, they do not exclude or downplay the importance of expert testimony or other evidence. In fact, we stated that 'experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation.'" *Id.* at 776–77. The factors are rather aids for the assessing court. They are not the sole scale for measuring adaptive abilities.

Third, in Hall's case, the *Briseno* factors played no part in either the state court's or the federal court's

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[11] The factors allow the factfinding to consider whether, when the individual was growing up, his family and friends considered him retarded; whether he made plans and carried them our or was merely impulsive; whether he showed leadership; whether his reactions to events were rational and appropriate; whether he responded to questions coherently and rationally; whether he could lie and mislead in his own or others' interests; and whether the crime required forethought, planning, and complex execution of purpose. *See Ex parte Briseno*, 135 S.W.3d at 8–9.

decision. The findings of fact issued by the convicting court in state habeas proceedings were dated December 3, 2002 (6 SHCR 1678), more than a year before the Court of Criminal Appeals issued *Briseno*, 135 S.W.3d 1 (Feb. 11, 2004). Hence, the *Briseno* factors could have played no part in the state court's decision. And nothing in the federal district court's opinion suggests that it applied or referred to the factors. *See Hall v. Quarterman*, 2009 WL 612559 at *43.

RECAPITULATION

Hall alleges that the federal district court determined that mental retardation could not arise from environmental factors. He alleges also that the lower court's decision runs afoul of this Court's precedent by relying upon the state-law *Briseno* factors in determining whether Hall is entitled to Eighth Amendment protection. The record in this case does not support either claim. The record shows that the state court reasonably applied *Atkins*, that the federal district court reasonably applied the AEDPA, and that the court below agreed with the lower court's decision. Nor is there a circuit split on any relevant issue.

CONCLUSION

Hall's petition for writ of certiorari should be denied.

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