No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ELROY CHESTER,
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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Question Presented

Texas assesses mental retardation using the seven *Briseno* factors invented by the state court, which rely heavily on the facts of the crime, have no basis in the scientific literature, and conflict with the nationally-accepted clinical definition of mental retardation relied on in *Atkins v. Virginia.*

Petitioner was diagnosed as mentally retarded in elementary school and twice placed by the Texas Department of Criminal Justice in its Mentally Retarded Offenders Program. At the capital trial, pre-*Atkins*, the prosecutor argued that petitioner's mental retardation could be the basis for imposing a death sentence. When petitioner applied, post-*Atkins*, to be exempted from execution because he is mentally retarded, Texas did not refute his showing that he is mentally retarded under the recognized clinical definitions. Instead, the Texas courts applied the *Briseno* factors and on that basis alone determined that petitioner is not mentally retarded and is subject to execution.

Is Texas's use of the *Briseno* factors contrary to or an unreasonable application of *Atkins*, where these non-clinical criteria depart from the national consensus definition of mental retardation, are unrelated to a reliable determination of mental retardation, and permit the execution of mentally retarded offenders?

Parties to the Proceeding and Corporate Disclosure Statement

The parties to the proceeding are listed in the caption. Petitioner is Elroy Chester. Respondent is Rick Thaler, Director of the Texas Department of Criminal Justice.

No party to the proceeding is a corporation.

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The Fifth Circuit decision [Appendix ("App.") A] is reported at 666 F.3d 340. The order denying rehearing [App.B] is unreported.

The district court decision [App.C] is unreported but available at 2008 WL 1924245. The opinion of the Texas Court of Criminal Appeals [App.D] is unreported but available at 2007 WL 602607. The opinion of the state trial court [App.E] is unreported.

JURISDICTION

The final judgment of the Fifth Circuit was entered on December 30, 2011. [App.A] The petition for rehearing was denied on February 13, 2012. [App.B] The petition to this Court was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Eighth Amendment to the United States Constitution and § 2254(d) of the Anti-Terrorism and Effective Death Penalty Act.

The Eighth Amendment provides that "cruel and unusual punishment [shall not be] inflicted."

In pertinent part, 28 U.S.C. § 2254 provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

INTRODUCTION

Atkins v. Virginia, 536 U.S. 304 (2002), held that the Eighth Amendment bars execution of the mentally retarded. *Atkins* is founded on the national consensus reflected in state statutes in effect in 2002 and on this Court's independent judgment that the death penalty is cruel and unusual punishment for mentally retarded offenders. The national consensus on which *Atkins* relied rests on the established clinical definitions of mental retardation developed by the American Psychiatric Association ("APA") and the American Association on Mental Retardation ("AAMR").[1]

When Elroy Chester applied to be exempt from execution because he is mentally retarded, Texas rejected his claim. The Texas Court of Criminal Appeals ("TCCA") held that, although Chester proved his intellectual deficits and the onset of his disabilities before age 18, he did not prove sufficient adaptive deficits to be found mentally retarded. The TCCA analyzed Chester's adaptive functioning entirely under what have come to be known as the *Briseno* factors,[2] which were invented by the TCCA, are not rooted in the clinical standards, have no basis in the scientific literature, and do not reliably

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[1] After *Atkins* was decided, the AAMR changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD"). This petition uses "AAMR" for consistency with *Atkins*.

[2] *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004).

distinguish between those who are and are not mentally retarded.

The Fifth Circuit, in a 2-1 decision, upheld the TCCA's *Briseno*-based determination, believing that *Atkins* set no meaningful limits on the way states may determine mental retardation. Judge Dennis authored a powerful dissent, stating that the *Atkins* mandate to protect mentally retarded offenders would be meaningless if states could determine mental retardation using criteria unrelated to the national consensus on which *Atkins* is based.

The Court should grant this petition to clarify that *Atkins* substantively limits states' authority to rely on criteria to determine mental retardation that are unscientific, unreliable, and have no relevance to the national consensus definition of mental retardation. Reliance on such criteria is contrary to and an unreasonable application of *Atkins*.

STATEMENT OF THE CASE

A. State Court Proceedings

1. Pre-*Atkins*

Chester was charged with capital murder in February 1998. He pled guilty and received a jury trial on punishment. [App.A-1]

Substantial evidence was presented that Chester is mentally retarded, including records from his early childhood, when he scored below 70 on

school-administered IQ tests; records from the Texas Department of Criminal Justice, which tested Chester and admitted him into its Mentally Retarded Offenders Program ("MROP") when he was incarcerated at ages 18 and 20; and testimony from a psychologist who interviewed him, tested him, and diagnosed him as mentally retarded soon after his arrest on the capital charge at age 29. [PenaltyRR20:61-64, 69-76, 81-82, 92, 95[3]]

The prosecutor did not vigorously contest Chester's retardation. He argued that jurors could consider retardation a factor favoring a death sentence. [PenaltyRR21:36-40] The jury sentenced Chester to death. The TCCA denied Chester's sentence appeal.[4]

Chester filed a state habeas corpus application asserting that he is mentally retarded and his execution would violate the Eighth Amendment; the state courts denied relief.[5] Chester renewed his arguments in a timely-filed federal habeas petition, which was pending when *Atkins* was decided. The Fifth Circuit dismissed the petition without prejudice

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[3] Cites in the form "PenaltyRRV:pp" refer to the Reporter's Record from the penalty-phase trial by Volume (V) and page numbers (pp).

[4] *Chester v. State*, No. 73,193 (Tex. Crim. App. Jan. 26, 2000) (unpublished).

[5] *Ex parte Chester*, No. WR-45,249-01 (Tex. Crim. App. May 31, 2000) (unpublished).

to permit Chester to pursue his *Atkins* claim in state court.[6]

2. Post-*Atkins*

Chester applied to the TCCA and received leave to file a successive state habeas application.[7]

The state trial court conducted an evidentiary hearing in April 2004. Chester presented a series of sub-70 IQ scores, starting in elementary school when he was first labeled mentally retarded.[8]

Chester also "presented a substantial amount of evidence that tended to prove that he does have significant limitations in adaptive functioning, under the standard clinical definitions of mental retardation to which the national consensus generally conforms." [App.A-50] Evidence established that:

- he was placed in special education classes from second grade onward;

- as an adult, he tested at a third-grade level or lower in math and reading;

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[6] *Chester v. Cockrell*, 62 Fed. Appx. 556 (5th Cir. 2003).

[7] *Ex parte Chester*, No. WR-45,249-02 (Tex. Crim. App. Sept. 10, 2003) (unpublished).

[8] Reporter's Record ("RR") from the *Atkins* hearing at 2:95-120, 6:TrialEx.3-229, 7:TrialEx.42-051, 064, 312.

- he required extensive speech therapy as a child, displayed severe deficits in language formation as an adult, and could not communicate effectively through reading or writing;

- as an adult he never lived independently but always lived with a family member who took care of him;

- he relied on friends and family to help him make decisions;

- he could not shop for groceries or clothes by himself;

- he never opened a bank account, or had a driver's license; and

- he could not fill out an employment application by himself and held only menial jobs.[9]

None of this evidence was contested.

The Texas prison system evaluated Chester's adaptive functioning when he was 18. Chester scored 57 on the Vineland Adaptive Behavior Scales, a well-recognized standardized test of adaptive functioning, which is scored on the same scale as a

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[9] App.A-52-53; RR2:98, 3:16-18, 30-38, 251-52, 268-80, 4:33-39, 49-51, 58-61, 123-65, 6:TrialEx.3-224-33, 7:TrialEx.42-039-43, 311, 8:Ex.2-992.

standard IQ test.[10] [RR4:52-53, 6:TrialEx.3-280; App.A-19] Based on Chester's Vineland score, his contemporaneous IQ score of 69, psychological interviews, and a 30-day observation period, Texas placed Chester in the MROP. [RR4:22-28, 68] After nine months, Chester was released from prison, then re-incarcerated at the age of 20. When he was reassessed by prison staff, his adaptive functioning had not changed, and he was readmitted to the MROP. [RR4:54-62]

Chester's expert witness diagnosed Chester as mentally retarded based on his IQ scores, his Vineland score, and the diagnostic methodology recommended by both the APA and the AAMR. [RR3:5-50] Evidence established that Chester has significant deficits in at least three of the ten skill areas listed in the APA's Diagnostic and Statistical Manual (communications, functional academics, and work), where deficits in just two areas support a diagnosis of mental retardation.[11] [RR3:23-28] Chester has significant deficits in two of the three domains defined by the AAMR in the 2002 edition of its manual (conceptual and practical), as well as a score more than two standard deviations below the

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[10] AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 42 (10th ed. 2002) ["AAMR-10"].

[11] APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at 49 (4th ed. Text Revision 2000) ["DSM-IV-TR"]. The 1992 edition of the AAMR manual, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 1 (9th ed. 1992) ["AAMR-9"] uses the same diagnostic criteria as the DSM-IV-TR.

norm on a standardized test of adaptive functioning; having significant deficits in one domain alone or a significantly subaverage score on a standardized test of adaptive functioning indicates mental retardation.[12] [RR3:6-20]

The former director of the MROP testified based on his review of Chester's prison records, including test scores and clinical interview notes, that Chester was mentally retarded when he was 18 and 20. [RR4:61-62, 68, 110]

Texas's expert acknowledged that Chester showed "pretty poor adaptive functioning" when he was 18 and 20 and that someone with an IQ of 69 and a contemporaneous Vineland score of 57 is properly diagnosed with "mild mental retardation." [RR5:32, 83-84] However, he concluded – based on the *Briseno*[13] factors – that Chester does not have

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[12] AAMR-10 at 78. *See also* AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 43 (11th ed. 2010) (recommending same diagnostic approach).

[13] The seven "*Briseno* factors," first listed by the TCCA as "additional evidentiary factors" that courts "might" consider in assessing adaptive functioning, are:

> Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> Has the person formulated plans and carried them through or is his conduct impulsive?

significantly subaverage adaptive functioning or a significantly subaverage IQ. [RR4:301-10, 5:37-40]

The trial court signed the prosecutor's proposed findings of fact and conclusions of law. [App.E-34] These findings state that Chester did not meet his burden of proving either that he has an IQ below 70 [App.E-6-12] or that he has significantly subaverage adaptive functioning. [App.E-12-26, 31-32] The findings on adaptive functioning address *only* the *Briseno* factors and do not refer in any way to the criteria of the AAMR or APA. The court did not reject the testimony that Chester has significantly subaverage adaptive functioning under the AAMR and APA definitions; it ignored this testimony. [*Id.*]

> Does his conduct show leadership or does it show that he is led around by others?
>
> Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?
>
> Can the person hide facts or lie effectively in his own or others' interests?
>
> Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

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

The TCCA accepted the trial court's findings in part, but not completely. The TCCA *rejected* the trial court's determination on IQ and concluded that Chester proved his "significant limitations in intellectual functioning." [App.D-9] The TCCA accepted that evidence of mental retardation was observed and recorded before Chester was 18. [App.D-5] On the question of adaptive functioning, the TCCA accepted as "persuasive" the evidence that Chester scored 57 on the Vineland and the testimony of Texas's expert that "a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." [App.D-10-11][14] But the TCCA deferred to the trial court's conclusion that Chester did not demonstrate he has significantly subaverage adaptive functioning. As with the trial court, the TCCA's analysis of adaptive functioning focused entirely on the *Briseno* factors and did not address the APA or AAMR criteria at all. [App.D-11-22]

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[14] Reliance on standardized test results is favored by many clinicians because the tests remove the distorting effects of stereotypes and erroneous assumptions about what mentally retarded offenders are like and what they cannot do. Texas and the Fifth Circuit consider a subaverage score on the Vineland as persuasive evidence of mental retardation. *E.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 n.12 (Tex. Crim. App. 2007) ("The Vineland Adaptive Behavior Test is one of the recognized standardized scales for measuring adaptive deficits."); *In re Salazar*, 443 F.3d 430, 433-34 (5th Cir. 2006) (unexplained rejection of a Vineland score indicating mental retardation could be "troubling").

In the state courts, Chester expressly challenged use of the *Briseno* factors as contrary to and inconsistent with *Atkins*, because the *Briseno* factors do not validly and reliably distinguish between people who are mentally retarded and those who are not.[15] He argued that he proved by a preponderance of the evidence that he is mentally retarded under any definition consistent with *Atkins*. The Texas courts did not address these challenges. [Apps.D, E]

B. Federal Court Proceedings

Chester timely filed a petition for habeas corpus. He asserted that the Texas courts' reliance on *Briseno* is contrary to and an unreasonable application of *Atkins* because determining mental retardation based on the *Briseno* factors permits the execution of offenders (like himself) that *Atkins* protects. [App.C-13-17]

The district court denied Chester's habeas application. [App.C] The court found that Chester's crime reflected planning that satisfied the seventh *Briseno* factor and concluded it was unnecessary to consider any other factors in determining whether the state courts unreasonably determined that

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[15] Applicant's Proposed Findings of Fact and Conclusions of Law (filed in the trial court June 23, 2004); Applicant's Objections to Findings of Fact and Conclusions of Law (filed with the TCCA Aug. 23, 2004); Brief of Applicant/Appellant (filed with the TCCA Dec. 6, 2004).

Chester is not mentally retarded. [App.C-16-17][16]

The district court granted a certificate of appealability. Chester appealed to the Fifth Circuit, renewing the arguments he made in the district court.

The Fifth Circuit, in a 2-1 decision, affirmed the district court. [App.A] The majority concluded that *Atkins* did not adopt a single definition of mental retardation that all states must follow, so using the *Briseno* factors rather than the AAMR and APA criteria to determine adaptive functioning cannot be contrary to or an unreasonable application of *Atkins*. [App.A-15]

Judge Dennis dissented. He reasoned that, when *Atkins* banned the execution of mentally retarded offenders, it defined mental retardation as generally conforming to the clinical definitions set forth by the AAMR and APA. [App.A-23] Therefore, Texas's decision to evaluate mental retardation using factors that are unconnected to the national consensus's definition of mental retardation is contrary to *Atkins*. [App.A-29-30]

Judge Dennis did not interpret *Atkins* as establishing a single definition of mental retardation

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[16] *See* App.A-56 (Fifth Circuit dissenting opinion) ("not only did the federal district court disregard the AAMR and APA clinical criteria that were used by the *Atkins* Court to define mental retardation, but it disregarded six of the seven *Briseno* factors as well").

that all states must apply; rather, the question is

> whether a court must apply a definition that generally conforms to those clinical definitions [of the AAMR and APA], or whether a court can disregard or depart freely from them and make up its own unscientific and non-clinical definition of mental retardation that contradicts the definitions to which the national consensus generally conforms.

[App.A-69] After analyzing the *Briseno* factors, Judge Dennis determined that exclusive reliance on these factors to assess adaptive functioning

> inevitably leads to anomalous and unreliable results, including the execution of offenders who should be classified as mentally retarded and shielded from execution under *Atkins* . . . .
>
> [B]y affirming the Texas courts' erroneous use of the *Briseno* factors in place of the adaptive skills prong of the substantive three-part rule defining mental retardation, the majority allows those state courts to circumvent the constitutional rule of *Atkins* and to use their more constricted definition of mental retardation to exclude substantial numbers of mentally retarded offenders from protection from execution under the Eighth Amendment.

[App.A-29-30; *see also id.* at 72 ("The [*Briseno*] factors are unmoored from the national consensus's general understanding of what constitutes mental retardation. Used alone, these factors may determine that a subclass of persons protected by *Atkins*'s holding are, indeed, death eligible in Texas.")]

The Fifth Circuit denied rehearing without comment. [App.B]

REASONS FOR GRANTING THE WRIT

ATKINS DOES NOT AUTHORIZE THE STATES TO DETERMINE MENTAL RETARDATION USING CRITERIA THAT EXCLUDE PEOPLE WHO ARE MENTALLY RETARDED UNDER THE CONSENSUS DEFINITION THAT SUPPORTS THE EIGHTH AMENDMENT PROHIBITION ESTABLISHED IN *ATKINS*.

A. The Definition Of Mental Retardation For Purposes Of The Eighth Amendment Is A Matter Of Law Clearly Established In *Atkins*.

Atkins held that the Eighth Amendment prohibits execution of mentally retarded offenders who commit capital crimes. 536 U.S. at 321. *Atkins* rests on a national consensus regarding how to treat the entire category of criminal defendants who suffer mental retardation. *Id.* at 314-17. That consensus necessarily is built on a shared understanding of what mental retardation is. The national consensus, *Atkins* recognized, is based on the definitions and

criteria established by the national experts on mental retardation, the APA and AAMR, whose definitions are incorporated into the statutes of states that, even before *Atkins*, banned execution of mentally retarded offenders. *Id.* at 308 n.3, 314-17 & n.22.

Atkins quoted the APA and AAMR definitions, which recognize three essential components of mental retardation: (1) significantly subaverage intellectual functioning; (2) significantly subaverage adaptive functioning; and (3) onset before the age of 18.[17]

Atkins also quoted the APA and AAMR's explanations of the criteria by which adaptive functioning should be assessed. Both define "significant limitations in adaptive functioning" as having significant limitations in two of ten or eleven defined skill areas.[18]

Judge Dennis recognized what the Fifth Circuit panel majority did not: "Mental retardation"

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[17] *Atkins*, 536 U.S. at 308 n.3 (quoting AAMR-9 at 5 and DSM-IV-TR at 42-43).

[18] *Id.*; *see* App.A-27, 38-39, 54; *see also supra* at 9 & n.12 (explaining that recent editions of the AAMR Manual consolidate the skill areas into three domains, and provide that significantly subaverage adaptive functioning is established if the individual has significant deficits in one domain or scores two standard deviations below the norm on a standardized test of adaptive functioning).

is a clinical diagnosis.[19] "Adaptive functioning" is a clinical term that refers to *typical* daily functioning; adaptive functioning cannot be assessed by examining behavior in isolated instances.[20] To find that someone does not have significantly subaverage adaptive functioning based on conduct in one or a few situations is inconsistent with the APA and AAMR definitions. Those definitions make clear that for mentally retarded individuals, just like other people, limitations co-exist with strengths. Mental retardation is properly diagnosed whenever the individual has significant limitations in the requisite number of skill areas, even if the individual has strengths in other areas.[21] The diversity of abilities within those properly diagnosed as mentally retarded factored into this Court's pre-*Atkins* decision not to

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[19] It differs from "insanity," which is a legal concept and thus may be defined differently in different states.

[20] AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION AND SYSTEMS OF SUPPORTS—10TH EDITION ["USER'S GUIDE"] at 4 (2007) ("the assessment of adaptive behavior should relate to an individual's typical performance during daily routines and changing circumstances, not to maximum performance"); DSM-IV-TR at 42 ("[a]*daptive functioning* refers to how effectively individuals cope with common life demands"); App.A-58-62.

[21] AAMR-10 at 8; DSM-IV-TR at 47 ("The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met."); App.A-58-60. Sample cases thoughtfully applying this principle include *Black v. Bell*, 664 F.3d 81, 99 (6th Cir. 2011); *Wiley v. Epps*, 625 F.3d 199, 217-21 (5th Cir. 2010); *Holladay v. Allen*, 555 F.3d 1346, 1363-64 (11th Cir. 2009); and *State v. White*, 885 N.E.2d 905, 914 (Ohio 2008).

adopt a categorical bar to the execution of the mentally retarded,[22] and cannot have been forgotten by this Court when it reversed *Penry* and held that the Eighth Amendment requires *all* mentally retarded offenders to be excluded from the death penalty.[23]

In adopting a categorical, federal constitution-based rule against executing the mentally retarded, *Atkins* unsurprisingly embraced and relied on the established clinical definitions of mental retardation. No other nationally recognized definition of mental retardation exists. This Court consistently relies on the APA and AAMR definitions when it requires a definition of mental retardation.[24]

To justify reliance on the *Briseno* factors instead of the APA and AAMR criteria, the TCCA and the Fifth Circuit majority latched onto language in *Atkins* granting the states certain discretion in exactly how to implement the prohibition on executing the mentally retarded.[25] But they took

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[22] *Penry v. Lynaugh*, 492 U.S. 302, 338-39 (1989).

[23] 536 U.S. at 320-21; *see generally Roper v. Simmons*, 543 U.S. 551, 572-75 (2005) (discussing why the Eighth Amendment may demand a ban on executing every member of a category).

[24] *E.g.*, *Heller v. Doe*, 509 U.S. 312, 321-22 (1993); *Penry*, 492 U.S. at 333; *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 n.9 (1985).

[25] *See Atkins*, 536 U.S. at 317 ("As was our approach in *Ford v. Wainwright* [477 U.S. 399 (1986)], with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (quoting *Ford*, 477 U.S. at 416-17)).

that language too far. *Atkins* did not authorize states to adopt and apply idiosyncratic definitions of mental retardation that disregard the national understanding of mental retardation. Once this Court determines that the Eighth Amendment bars execution of a category of defendants, "[t]he bounds of that category are necessarily governed by federal constitutional law." *Ford*, 477 U.S. at 419 (Powell, J., concurring).

Panetti v. Quarterman, 551 U.S. 930, 957 (2007), made clear that this Court need not enunciate a "precise standard" in order for a constitutional standard to be clearly established. *Panetti* observed that *Ford* did "not set forth a precise standard for competency," yet the Court held that, when the Fifth Circuit adopted very narrow criteria for incompetency to be executed, it reached a decision "inconsistent with *Ford*" and put at risk "[t]he principles set forth in *Ford*." 551 U.S. at 959. And even though *Ford* established no one set of procedures that all states must follow when evaluating incompetency, *Panetti* held that the procedures Texas followed failed to give effect to *Ford*'s holding. *Id.* at 948-52. "That the standard is stated in general terms does not mean the application was reasonable. . . . [E]ven a general standard may be applied in an unreasonable manner." *Id.* at 953.

Similarly, although *Atkins* "did not provide definitive procedural or substantive grounds" for determining whether a person is mentally retarded, *Bobby v. Bies*, 556 U.S. 825, 831 (2009), *Atkins* set

forth principles that are put at risk by the TCCA's too-narrow criteria for assessing mental retardation. As in *Panetti*, this Court should make clear that, when it grants discretion to adopt standards, this does not authorize a state to adopt standards that undermine the fundamental protections this Court established.

To be sure, *Atkins* does not require that all states adopt definitions that precisely track the language used by the AAMR or APA. But, as Judge Dennis recognized, *Atkins* necessarily requires that all jurisdictions that impose a death penalty determine mental retardation in a manner that "generally conform[s]" to these established definitions. 536 U.S. at 317 n.22.[26] The prohibition on executing the mentally retarded "becomes meaningless unless it is moored to a generally agreed upon definition of 'mental retardation.'" [App.A-70] If a state too narrowly defines who is classified as mentally retarded, it acts contrary to *Atkins*'s mandate to protect against execution the entire category of people who are included within the national consensus against execution of the mentally retarded.

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[26] *See* App.A-57, 65-71 (dissenting opinion); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (*Atkins* "presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim to be retarded"); *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005) ("Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum. The Eighth Amendment must have the same content in all United States jurisdictions.").

B. Reliance On The *Briseno* Factors Allows Texas To Execute Mentally Retarded Offenders.

In inventing the *Briseno* factors, the TCCA cited no expert testimony or scientific publication as authority that these factors validly or reliably assist in identifying mentally retarded offenders. 135 S.W.3d at 8-9.[27] Nor has such an article subsequently been published. To the contrary, numerous legal scholars have critiqued the *Briseno* factors as an unreasonable way to determine mental retardation because they do not protect the entire category of people that *Atkins* requires states to protect.[28]

The evidentiary record in this case shows conclusively that the *Briseno* factors bear no relationship to the clinical understanding of mental

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[27] Initially, the TCCA conceived of the factors as a way to distinguish between those who are mentally retarded and those who have an anti-social personality disorder. 135 S.W.3d at 8. This purpose was misguided, because it relies on a false dichotomy; dual diagnoses are not just possible but common. AAMR-10 at 172; DSM-IV-TR at 45; App.A-46 n.13 (citing additional authority).

[28] *E.g.*, John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. LAW & PUB. POLICY 689, 710-17, 721-29 (2009); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 727-28 (2008); Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 149-66, 173-74 (2011).

retardation on which *Atkins* is grounded. For example:

- Laypeople, for many reasons, may be either unaware of or unwilling to acknowledge a child's intellectual disabilities. [RR2:63, 86-88, 5:17-19, 34-35] USER'S GUIDE at 18, 21; AAMR-10 at 31-32.[29]

- Impulsivity is not characteristic of all mentally retarded individuals. DSM-IV-TR at 44. Texas's expert testified that mentally retarded people are capable of performing many activities that require formulating and carrying out plans. [RR5:23-26]

- Most mentally retarded people are rational and can converse coherently. Irrationality characterizes the mentally ill. Incoherence characterizes those incompetent to stand trial. [RR4:62-63, 5:16-17] DSM-IV-TR at 43.[30]

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[29] Elsewhere, Texas has recognized the "cloak of competence" that mentally retarded people use to disguise their disability. *Van Alstyne*, 239 S.W.3d at 822-23.

[30] In the district court, Texas conceded that the fourth and fifth *Briseno* factors "perhaps are not the best tests for sussing out the mentally retarded and if used exclusively would be problematic." [5thCir.R.451]

- Mentally retarded adults can lie to protect themselves, just like a child can – as Texas's expert agreed. [RR5:23, 25-26]

- Mentally retarded people can commit crimes that require planning and forethought. Texas's expert concurred that the ability to plan a crime does not establish that a person is not mentally retarded. [RR5:56-57] There is "no standard for level of sophistication." [RR5:65][31]

- Focusing on isolated, rather than typical, behavior – particularly criminal behavior that may be non-adaptive – contradicts the essential meaning of adaptive functioning. USER'S GUIDE at 22.[32]

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[31] *Penry* recognized that a defendant could be mentally retarded and have sufficient insight and planning ability to deliberately kill a rape victim to avoid detection; such acts, rather than undermining the mental retardation diagnosis, may exemplify a reduced ability to control one's impulses and evaluate the consequences of one's conduct. 492 U.S. at 322.

[32] *See, e.g.*, *Holladay*, 555 F.3d at 1363 & n.19 (recognizing that facts of the crime did not foreclose a finding of mental retardation); *United States v. Nelson*, 419 F. Supp. 2d 891, 902 (E.D. La. 2006) ("behavior in these isolated instances has limited relevance to the mental retardation diagnosis because it is isolated, in contrast to the recurring patterns . . . which indicate a low level of adaptive functioning"); *Lambert v. State*, 126 P.3d 646, 655-59 (Okla. App. 2005) (emphasizing facts of the crime over evidence of adaptive functioning in the defendant's daily life does not comply with "either the spirit or letter of the law prohibiting the execution of the mentally retarded"); *see generally* Blume, *supra* n.28, at 721-25; Stephen

In short, an individual may have the "wrong" answers with respect to the *Briseno* factors *and* be mentally retarded under every recognized definition. As Judge Dennis stated, the "*Briseno* factors are more constricted than, unrelated to, and substantively contrary to the adaptive deficits criteria identified in the second prong of the AAMR and APA clinical definitions of mental retardation." [App.A-29] Reliance on the *Briseno* factors to determine whether someone is eligible for the death penalty is contrary to and an unreasonable application of *Atkins*, because it permits execution of mentally retarded offenders such as Chester.

The seventh *Briseno* factor in particular threatens to nullify *Atkins*'s protection of the mentally retarded. *Atkins*'s premise is that mentally retarded individuals may commit the kinds of heinous, gruesome crimes that otherwise would condemn them to death. If mentally retarded individuals could not plan and carry out death-worthy crimes, *Atkins* would protect an empty set of individuals. *Atkins*, like *Roper v. Simmons*, barred execution of an entire class of offenders in part because of the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . as a matter of course." *Roper*, 543 U.S. at 573.

Greenspan & Harvey N. Switzky, *Lessons from the* Atkins *Decision for the Next AAMR Manual*, in AAMR, WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 291 (2006).

Fundamentally, as to all the factors, the TCCA and the *Chester* Fifth Circuit majority ignored that mental retardation is not defined by the *absence* of an ability, such as to communicate or to plan, but, as *Atkins* explained, by *diminished* capacities. 536 U.S. at 318. Because the *Briseno* factors are phrased as yes/no questions, having *any* capacity disqualifies one from being found mentally retarded in Texas. The *Briseno* factors thus fail to protect the mildly mentally retarded, who comprise about 85% of all mentally retarded individuals. DSM-IV-TR at 43. This is contrary to *Atkins*'s mandate to exempt from execution *all* people with mental retardation.

The TCCA intended this result. *Briseno* reflects Texas's discomfort with *Atkins*'s categorical rule and a preference for using a Texas consensus rather than a national consensus about who should be exempt from execution.[33] Soon after deciding *Briseno*, four of the nine TCCA judges expressed their continuing dissatisfaction with the constitutional rule announced in *Atkins*. In *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004), the presiding judge and three others, dissenting in part, wrote: "*Atkins* forces us to intrude upon the will of the people of Texas, as expressed by our Legislature[.]"

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[33] 135 S.W.3d at 6 (a consensus of Texans may not agree that all persons who meet the clinical definition of mental retardation should be exempt from the death penalty).

Texas's resistance to following national standards is not new. *E.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Tennard v. Dretke*, 542 U.S. 274 (2004).

A recent TCCA decision confirms that *Briseno*'s goal was *not* to implement the national consensus:

> [W]e established guidelines in *Ex parte Briseno* for determining whether a defendant had "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty."

Ex parte Sosa, __ S.W.3d __, 2012 WL 1414121 at *1 (Tex. Crim. App. Apr. 25, 2012) (quoting *Briseno*, 135 S.W.3d at 6). Further, the TCCA confirmed that it intended to reject the clinical standards of the APA and AAMR as the bases for deciding who may not be executed:

> Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive as to whether the defendant falls into the "range of mentally retarded offenders" protected by the Eighth Amendment, but it will not always provide a conclusive answer to that ultimate legal question.

2012 WL 1414121 at *2.

Sosa and the TCCA's decision in *Chester* also confirm that the TCCA no longer intends or permits the *Briseno* factors to be optional "additional factors" that trial courts "might consider," as the TCCA

originally described them. 135 S.W.3d at 8. These cases illustrate the TCCA's intent to rely on the *Briseno* factors *instead* of the clinical standards.

Texas is blatantly defying *Atkins*'s holding that the Eighth Amendment compels "that the mentally retarded should be categorically excluded from execution." 536 U.S. at 318. Texas has adopted a scheme to protect just some mentally retarded defendants; *Atkins* protects the entire category. Three TCCA judges have publicly recognized that following *Briseno* and disregarding the APA and AAMR's clinical standards conflicts with *Atkins* because this permits the Texas courts to circumvent the *national* consensus.[34] The deliberate implementation of a scheme that permits execution of mentally retarded offenders merits this Court's scrutiny.

In presuming to have authority to adopt and rely upon its own idiosyncratic, narrowed definition of mental retardation, Texas willfully misread the sentences in *Atkins* that refer to the debate being not about how to treat mentally retarded offenders but how to determine whether individual offenders are retarded. *Id.* at 317. That passage recognizes that not all who claim to be mentally retarded really are retarded. It does not say that states may make eligible for execution a subcategory of offenders who *are* retarded under the generally accepted clinical

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[34] *Lizcano v. State*, 2010 WL 1817772 at *34-35 (Tex. Crim. App. May 5, 2010) (unpublished) (three judges dissenting).

definition. Yet the *Chester* Fifth Circuit majority allowed the misreading to stand.

Rather than recognize what the TCCA has done to defy *Atkins*, the Fifth Circuit majority tried to excuse it. In a footnote, the panel majority attempted to justify reliance on the *Briseno* factors by improvising links between them and two sentences in *Atkins*. [App.A-14 n.1 (citing 536 U.S. at 318)] That the majority felt compelled to try to link the *Briseno* factors to *Atkins* indicates that even those judges doubted that a state may adopt any definition of mental retardation it devises.

The majority's effort to legitimize the *Briseno* factors fails to withstand scrutiny. The factors bear at best superficial connection to the sentences in *Atkins* that the majority quoted out of context; some of the words are the same, but the concepts expressed in *Atkins* and *Briseno* are not. Most critically, *Atkins* wrote of offenders with "diminished capacities." 536 U.S. at 318. *Briseno* by contrast sets up yes/no tests that only the most severely mentally retarded can pass.[35]

More important, the sentences that the panel majority excerpted are not intended to be diagnostic.

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[35] Also, the Fifth Circuit majority linked the first *Briseno* factor to the requirement to demonstrate that the individual's deficits had their onset in the developmental years. [App.A-14 n.1] This is intellectually dishonest. The age-of-onset element is distinct from the adaptive functioning element. Even as the TCCA found that Chester failed all the *Briseno* tests, it found that Chester satisfied the age-of-onset requirement. [App.D-5]

Rather, they describe some of the attributes that place mentally retarded defendants as a group outside of the class for whom a death sentence is authorized: those who are "most deserving" of that ultimate penalty. *Atkins*, 536 U.S. at 319. *Roper v. Simmons* offered a similar discussion as a precursor to holding that all juvenile murderers are exempt from execution. 543 U.S. at 569-74. *Roper* plainly did not intend its discussion of reasons for protecting the whole class to be distorted into a set of factors for deciding which juvenile defendants are eligible for execution. To use the similar descriptors in *Atkins* to narrow the category of mentally retarded defendants who may not be executed contradicts *Atkins*'s essential holding that *all* mentally retarded defendants are ineligible for a death sentence.

No other court, including the TCCA, ever has suggested that *Atkins* was the source of the *Briseno* factors – and clearly it was not. Judge Dennis is correct: *Briseno* "redefined the adaptive functioning element in such a way that it clearly contradicts and fails to carry out *Atkins*'s mandate to protect from execution all offenders who fall within the national consensus's understanding of mental retardation." [App.A-57-58]

Separately and together, the *Briseno* factors fail to provide a reliable way to measure adaptive functioning for purposes of determining whether a defendant is mentally retarded. The discretion *Atkins* grants states to "develop[] appropriate ways to enforce" the bar on executing mentally retarded offenders, 536 U.S. at 317, does not extend to relying

on factors that guarantee that individuals, such as Chester, who are mentally retarded under any reasonable definition will be found eligible for execution. As Judge Dennis recognized, relying on the *Briseno* factors to ascertain mental retardation is contrary to *Atkins*. [App.A-64-66, 68-69, 73]

C. Relying On The *Briseno* Factors To Evaluate Adaptive Functioning Makes Texas An Outlier And Fails To Conform To The National Consensus On Which *Atkins* Is Based.

By now, ten years after *Atkins* was decided, most states with a death penalty have adopted, by statute or case law, a definition of mental retardation for courts to use when deciding whether an offender is exempt from execution. Reflecting the national consensus identified in *Atkins*, all states with definitions (including Texas) use the three-prong definition of the APA and AAMR.[36]

Of the 29 current death penalty states that have expressly adopted this three-part definition, 24 also have adopted more detailed definitions or standards explaining how to assess adaptive functioning. Of these, 22 follow the APA and AAMR criteria:

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[36] *See Atkins*, 536 U.S. at 317 n.22 (noting that state definitions "generally conform" to the clinical standards); App.F (containing citations from the statutes and case law of death penalty jurisdictions that define mental retardation, including the state's guidance, if any, on determining adaptive deficits).

- five by statute define the requisite deficit in adaptive functioning as having significant limitations in at least two of ten enumerated skill areas;[37]

- four others by statute use a definition of adaptive functioning drawn from the narrative section of the DSM-IV-TR,[38] and one uses a definition based on the AAMR-10 skill domains;[39]

- in eight states without a statutory definition of adaptive functioning, the state's high court has treated the APA and AAMR criteria as the proper way to assess subaverage adaptive functioning;[40] and

- the courts in four other states have read the general language of their statutes to require assessment of adaptive functioning in accordance with the clinical definitions.[41]

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[37] App.F (Delaware, Idaho, Missouri, North Carolina, Oklahoma); *see also id.* (Illinois (statute in effect before death penalty was abolished)).

[38] *Id.* (Arizona, Florida, Kansas, Washington); *see also id.* (Connecticut (statute in effect before death penalty was abolished)); DSM-IV-TR at 42.

[39] App.F (Virginia).

[40] *Id.* (Alabama, California, Georgia, Louisiana, Mississippi, Nevada, Ohio, Pennsylvania); *see also id.* (Arkansas (federal court applying state law), New Jersey (describing law in effect before death penalty was abolished)).

[41] *Id.* (Indiana, Kentucky, Nebraska, Tennessee).

Courts applying the federal death penalty statute assess adaptive functioning using the AAMR and APA criteria.[42]

None of the state statutes that *Atkins* examined to determine the national consensus used criteria to evaluate adaptive functioning that remotely resemble the *Briseno* factors. In adopting the *Briseno* standards, Texas chose a course far outside the national consensus.

D. Chester's Case Offers An Excellent Vehicle For Enforcing *Atkins*.

Chester is not alone in being found eligible for a death sentence despite strong evidence that he is mentally retarded under the national consensus definition. Due to Texas's reliance on the *Briseno* factors, other mentally retarded defendants also have been found subject to execution.[43]

Of all the Texas cases, Chester's offers an excellent vehicle for addressing reliance on the *Briseno* factors, because the *Briseno* analysis alone doomed Chester's application to avoid the death

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[42] App.F-17-18 (listing example cases).

[43] Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 352-53 (2010) (Texas state courts have rejected almost every contested *Atkins* case in post-conviction review); Tobolowsky, *supra* n.28, at 37-38 & nn.203-04, 71 & nn.373-74 (in Texas fewer than half as many applicants for post-conviction *Atkins* relief succeed as compared to the national average).

penalty – not his IQ scores or an APA or AAMR-compliant analysis of adaptive functioning.[44]

That Chester satisfies the clinical criteria for "significantly subaverage adaptive functioning" has never been contested. Texas never denied that Chester has significant deficits in at least two of the ten skill areas identified by the APA and AAMR-9, and in at least one of the three domains identified by the AAMR-10. Nor has Texas ever disputed that Chester achieved a significantly subaverage adaptive functioning score of 57 on a Vineland test properly administered by a Texas state agency.

Ten years after *Atkins*, this Court should intervene to ensure that all mentally retarded defendants receive the protection that *Atkins* intended. Chester's case offers the ideal opportunity to clarify that *Atkins* demands that, in assessing mental retardation, courts must evaluate adaptive functioning using criteria that generally conform to the national consensus. This Court should make clear that *Atkins* does not tolerate relying on idiosyncratic standards, unmoored from the clinical definitions, that permit the execution of individuals who fall within the national consensus on who is mentally retarded.

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[44] The Fifth Circuit majority baldly mischaracterized the record in asserting that the TCCA did not rely "solely" on the *Briseno* factors. [App.A-20 n.3] In fact, the TCCA devoted its *entire* adaptive functioning analysis to the *Briseno* factors; ten of twelve pages address exclusively the details of Chester's crimes. [App.D-11-22] The *Briseno* factors were not supplements to the clinical criteria. They were substitutes.

CONCLUSION

Although *Atkins* requires states to protect the mentally retarded against execution, the Fifth Circuit has authorized Texas to use criteria to assess mental retardation that permit the execution of mentally retarded offenders, such as Chester. This Court should grant certiorari to enforce *Atkins*.

Respectfully submitted,

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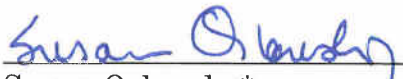

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