No. 11-1391

IN THE

Supreme Court of the United States

ELROY CHESTER,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JORDAN M. STEIKER
Counsel of Record
GRETCHEN S. SWEEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1346
jsteiker@law.utexas.edu

Counsel for Amicus Curiae

242462

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*[1]

The American Association on Intellectual and Developmental Disabilities ("AAIDD"), formerly the American Association on Mental Retardation ("AAMR"), has appeared as *amicus curiae* in numerous cases involving the meaning of mental retardation,[2] its diagnosis in criminal proceedings, and the legal rights of those with intellectual disabilities. The AAIDD/AAMR appeared as *amicus curiae* in *Atkins v. Virginia*, 536 U.S. 304 (2002), one of several cases where this Court employed the AAIDD's definition of mental retardation in adjudicating legal issues. *See also Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 n.9 (1985).

Founded in 1876, the AAIDD is the nation's oldest and largest interdisciplinary professional organization in the

1. Consistent with Supreme Court Rule 37.2, counsel for all parties received proper notice of the AAIDD's intent to file this *amicus curiae* brief and gave their consent. Pursuant to Rule 37.6, the AAIDD confirms that no counsel for any party authored this brief in whole or in part; and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief other than the AAIDD, its members, or its counsel.

2. Many clinicians, following the AAIDD's lead, now use the term "intellectual disability" rather than "mental retardation." *See* Robert L. Schalock, *et al.*, *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007) (explaining why the AAIDD changed its name from the "American Association of Mental Retardation" and shifted from "mental retardation" to "intellectual disability"). This brief refers to "mental retardation" because that is the term used in *Atkins* and by the courts below.

field of intellectual and developmental disabilities. The AAIDD educates the public about the scientific consensus regarding mental retardation. Professionals in every state use the AAIDD's manuals and diagnostic methodology to assess intellectual disability. The AAIDD has a vital interest in ensuring that (1) all individuals with mental retardation receive the rights and protections required by law; and (2) courts and administrative agencies employ established scientific principles to assess mental retardation. Therefore, the AAIDD has a strong interest in this case.

SUMMARY OF ARGUMENT

Texas's criminal court of last resort, the Court of Criminal Appeals ("CCA"), insists that *Atkins v. Virginia* authorizes states to decide which offenders with mental retardation to spare from execution. Yet *Atkins* announced a categorical ban on ***all*** such executions. The CCA has misread this Court's invitation to design ***procedures*** for implementing the ban as a license to invent its own ***substantive*** definition of mental retardation. *Atkins* did not, however, grant states the right to define the scope of the protected class. In discerning a national consensus prohibiting the execution of persons with mental retardation, *Atkins* relied on a national clinical consensus. *Atkins* directed states to adopt procedures that would exempt those individuals fairly characterized as having mental retardation under the AAIDD/AAMR's and the American Psychiatric Association's ("APA") definitions. But the CCA's impressionistic "test" directs fact-finders in Texas to use "factors" that are based on false stereotypes about mental retardation that effectively exclude all but the most severely incapacitated.

Texas's approach is fundamentally incompatible with the scientific and clinical understanding of intellectual disability—particularly in assessing adaptive behavior. The approach intentionally under-protects individuals with mental retardation and operates in a way that will continue to evade correction through the political process.

Texas's idiosyncratic, contra-clinical approach was used to deny Petitioner's *Atkins* claim despite virtually uncontested evidence that he has mental retardation as defined by generally accepted clinical standards. This case is a strong vehicle for deciding whether the Eighth Amendment prohibits the execution of ***all*** persons with mental retardation, or only those offenders whom states choose to exempt based on their own local standards.

REASONS THE PETITION SHOULD BE GRANTED

I. WITHOUT THIS COURT'S INTERVENTION, TEXAS AND OTHER STATES WILL CONTINUE TO UNDER-PROTECT CAPITAL OFFENDERS WITH MENTAL RETARDATION

A. Texas's Approach To *Atkins* Claims Is At Odds With The Consensus Approach Endorsed In *Atkins*

1. *Atkins* Announced A Categorical Ban That Applies To All Offenders Who Satisfy The Generally Accepted Clinical Definition Of Mental Retardation

Atkins v. Virginia announced a categorical ban: individuals with mental retardation cannot be executed

without offending the Eighth Amendment. 536 U.S. 304, 321 (2002). Petitioner's *Atkins* claim was rejected below based on the CCA's now entrenched misunderstanding of that holding.

The CCA's misunderstanding stems from a single sentence in *Atkins*: "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. The CCA misread this sentence as suggesting that the *Atkins* rule does not necessarily apply to all, but only to ***some*** persons with mental retardation. *See Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Based on its misreading of *Atkins*' mandate, the CCA speculated that not all Texans would necessarily agree that those "legitimately" diagnosed with mental retardation under prevailing professional standards should be exempt from execution: "does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation [should] be exempt from an otherwise constitutional penalty?" *Id.* at 6. The CCA then erroneously suggested that the question whether there should be "a 'mental retardation' bright-line exemption from our state's maximum statutory punishment" remained unresolved. *Id.* The CCA "decline[d]" to answer this rhetorical question because it felt that, while "[m]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt" from execution, the CCA was not sure that others with less severe mental retardation should be exempt as well. *Id.* (citing John Steinbeck, *Of Mice and Men* (1937)).

The sentence from *Atkins* at issue plainly does not mean that states retain the right to decide which subset of persons with mental retardation are included within *Atkins*' categorical ban. Rather, the sentence makes the uncontroversial point that not all persons who ***claim*** to have mental retardation actually ***have*** the disorder as defined by professional standards. To fall "within the range of mentally retarded offenders about whom there is a national consensus" ***is*** to have mental retardation in accordance with generally accepted clinical standards, which the Court referenced on the same page of the decision. *See* 536 U.S. at 317 n.22. The passage does not mean to exclude from protection persons with mental retardation whom some states might nonetheless deem execution-worthy.

In announcing a national consensus against executing persons with mental retardation, this Court recognized the stable meaning of mental retardation. *See Atkins*, 536 U.S. at 317 n. 22 (noting that state statutory definitions of mental retardation "generally conform to the clinical definitions" promulgated by the AAMR (now the AAIDD) and the APA). Indeed, the elements of the current clinical definition have been consistent for nearly 100 years. *See generally* R.C. Scheerenberger, *A History of Mental Retardation: A Quarter Century of Progress* (1983). Further, the Court directed states to implement procedures for screening *Atkins* claims that reflect the contemporary scientific consensus. *See Atkins*, 536 U.S. at 308 n.3 (quoting AAMR, *Mental Retardation: Definition, Classification and Systems Supports* 5 (9th ed. 1992) [hereafter AAMR 1992] and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000) [hereafter DSM-IV-TR]). Quite

sensibly, the Court directed the states to the authoritative medical manuals because mental retardation is a medical condition, properly assessed in accordance with the national medical consensus.

Atkins cannot properly be read as suggesting that states retain the right to create sub-classes of offenders with mental retardation based on whether a state believes individual claimants are as impaired as a fictional character (Steinbeck's Lennie). Instead, the Court drew a bright line, protecting ***all*** offenders who satisfy the widely accepted clinical definition of mental retardation and excluding those who could not satisfy that clinical standard.

If the state statutes before the Court in *Atkins* had defined mental retardation in terms of different levels or classes, the Court would have had difficulty discerning a common commitment to sparing "the mentally retarded" from execution. *See* 536 U.S. at 321 ("[D]eath is not a suitable punishment for a mentally retarded criminal."). The Court did, however, identify a national consensus against executing ***all*** offenders with mental retardation based on a consensus definition of mental retardation—which captures individuals with a range of impairment. *Id.* at 354 n.3.[3]

3. Justice Scalia's dissent in *Atkins* is premised on the correct conclusion that the Court announced "a categorical rule" that applies to ***all*** persons with mental retardation whether the impairment is mild, moderate, or severe. 536 U.S. at 350 (Scalia, J. dissenting). While he disagreed with the outcome, Justice Scalia recognized that *Atkins*' holding is clear in that "***all*** executions of the mentally retarded" means "all." *See, e.g., id.* at 342 (emphasis retained).

Nor can the CCA's approach to *Atkins* claims, as reflected in Petitioner's case, be justified by the language in *Atkins* that "leave[s] to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317 (internal quotation marks and citations omitted). That language empowers states to address the many complicated ***procedural*** questions surrounding the exemption, such as the appropriate means of litigating the proportionality guarantee for persons already sentenced to death versus those who have yet to be tried as well as decisions about who should serve as fact-finder (judge or jury), how various burdens should be allocated, and so forth. *Atkins* manifestly did not "leave to the States" the right to decide which sub-class of offenders with legitimate mental retardation diagnoses may rely on *Atkins*' categorical ban.

2. Texas's Contra-Clinical Approach Is Informed by False Stereotypes and Unsound Assumptions Expressly Disavowed by the Clinical Community

The CCA's fundamental misunderstanding regarding what *Atkins* delegated to the states prompted that court to improvise its own "test" for mental retardation in *Ex parte Briseno*. That test, which was applied in this case, is not only contra-clinical, but also designed to exclude those who "legitimately qualify" as having mental retardation under professional standards. 135 S.W.3d at 6.

What it means to "legitimately qualify" as having mental retardation is readily ascertained by consulting the authorities cited in *Atkins*. *See* 536 U.S. at 318. Mental

retardation is a disability characterized by (1) significant deficits in intellectual functioning, (2) significant deficits in adaptive behavior as expressed in conceptual, social, and practical adaptive skills, and (3) onset before the age of eighteen. *See* AAMR 1992 at 1; DSM-IV-TR at 41. The authoritative definition in the AAIDD's most recent manual is unchanged except that it substitutes "intellectual disability" for the term "mental retardation." *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) [hereafter AAIDD 2010].[4]

The second prong of the standard clinical definition for mental retardation requires that an individual have significant deficits in adaptive behavior. *Id.* at 1. There is, however, no list of strengths or abilities that preclude a diagnosis of mental retardation. Instead, significant deficits in adaptive behavior should be evaluated through standardized measures normed to the general population, including people with and without disabilities. *Id.* at 43. "Significant deficits in adaptive behavior" is defined as "performance that is approximately two or more standard deviations below the mean." *Id.* Clinicians must examine evidence of deficits in three discernible skill areas: (1) conceptual skills, including language skills, the use of money, and time and number concepts; (2) social skills, including interpersonal relationships, self-esteem, gullibility, naïveté, and the ability to follow rules; and (3) practical skills, including independent living skills, such

4. In its 2010 manual, the AAIDD explains that "intellectual disability" covers the same population previously diagnosed with "mental retardation," thus the basic authoritative diagnostic definition upon which *Atkins* relies is unchanged. *See* AAIDD 2010 at xiii-xvi.

as personal hygiene, eating, housekeeping, transportation, and occupational skills. *Id.* at 43-44.

Because stereotypes and lay misassumptions about people with mental retardation can distort individual assessment, the clinical community recommends using standardized instruments whenever possible. One effective objective instrument for assessing adaptive behavior is the Vineland Adaptive Behavior Scale ("VABS")—which the state of Texas administered to the Petitioner in this case. Standardized instruments, such as the VABS, are more reliable because they possess "good psychometric properties and are standardized on a large sample of individuals with and without those disabilities." Giulia Balboni, *et al.*, *Discriminant Validity of the Vineland Scales: Score Profiles of Individuals with Mental Retardation and a Specific Disorder*, 106 Am. J. on Mental Retardation 162, 163 (2001). The AAIDD also advises that test results be considered in tandem with other relevant sources—such as school records, employment history, and previous evaluations. AAIDD 2010 at 48-49. Different sources of data are "essential to provide corroborating information that provides a comprehensive picture of the individual's functioning." *Id.*

If circumstances are such that a standardized assessment instrument, like the VABS, cannot be used, the AAIDD describes precisely the methodology to employ to ensure an accurate assessment of adaptive behavior. *See id.* at 48-49.

Both the AAIDD and the DSM-IV-TR direct clinicians to focus on adaptive ***deficits*** because, as a leading expert in the field has explained, "[t]he skills possessed by

individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 21 n.29 (2003). Moreover, as the AAIDD diagnostic manual explains, a fundamental assumption in the field is that "limitations often co-exist with strengths" in individuals with mental retardation. AAIDD 2010 at 7, 11. From a definitional perspective, an individual's particular strengths are relevant only to assess corresponding weaknesses. DSM-IV-TR at 47. Therefore, the AAIDD instructs that significant deficits in adaptive skills are "***not*** outweighed by the potential strengths in some adaptive skills." AAIDD 2010 at 47 (emphasis added).

The AAIDD/AAMR has also long instructed that adaptive behavior must be assessed in the context of the individual's community environment. *See* AAMR 1992 at 48. *Atkins* evaluations should, therefore, focus on information regarding the individual's adaptive skills in ordinary, not extraordinary, circumstances. *Id.* at 53. The context is critical because "[a]daptive behavior is conceptually different from maladaptive or problem behavior[.]" *Id.* at 49.

By contrast, Texas's approach to adaptive behavior is contra-clinical, impressionistic, and under-inclusive. This approach was developed based on the CCA's mistaken conclusion that the second component of a mental retardation diagnosis, as defined by the AAIDD and Texas

statutory law,[5] is "exceedingly subjective." *Briseno*, 135 S.W.3d at 8. The CCA reached this conclusion by operating in a vacuum, eschewing the substantial, long-standing clinical guidance as to the meaning of "adaptive behavior" and the ***objective*** methodology clinicians use to assess it. *See, e.g.*, AAIDD 2010 (the 11th edition of the definitional manual) at 43-57. Instead, the CCA crafted a series of questions that fact-finders are directed to consider, each of which is treated as potentially dispositive and none of which is grounded in the relevant science. *See Briseno*, 135 S.W.3d at 8.

The seven *Briseno* factors are fundamentally at odds with the widely held understanding of the proper means for assessing adaptive behavior.[6] As even some members of the CCA have forcefully noted: "[W]e seem to have granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment—to say, in essence, what mental retardation ***means*** in Texas (and, indeed, in the individual case) for Eighth Amendment purposes." *Lizcano v. State*, No. AP-75879,

5. *See* Tex. Health & Safety Code § 591.003(13) & (7-a) (West 2010) (defining mental retardation as "intellectual disability," which is defined as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."). "Adaptive behavior" is defined as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." *Id.* § 591.003(1).

6. In *Briseno* itself, the CCA acknowledged that adaptive behavior deficits are supposed to be "determined by clinical assessment and, usually, standardized scales." 135 S.W.3d at 7, n.25.

2010 WL 181772, *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting, joined by Johnson and Holcomb, JJ.) (emphasis retained). The now-entrenched *Briseno* approach gives Texas fact-finders permission "to substitute [their] normative caprice ... for the comparative scientific objectivity inherent in the diagnostic criteria"—which is an "arbitrary approach" to mental retardation that "is unfaithful to—it does not even 'generally conform' with—the criteria for mental retardation that [were] the basis for the national consensus the Supreme Court found in *Atkins*." *Id.* at *39 (citing *Atkins*, 556 U.S. at 308 n.3, 317 n.22).

The first *Briseno* factor places great weight on whether the defendant's friends, family, or acquaintances "think he was mentally retarded." *Id.* This factor implies that laypeople can easily discern whether someone has mental retardation. Therefore, the inquiry invites excluding persons with mild retardation from *Atkins*' protection because their disability is not patently obvious to non-professionals. Further, since intellectual disabilities can have a genetic component, family members asked to make this assessment may themselves be impaired.

The second factor, which asks about a defendant's ability to form and carry out plans, focuses improperly on a general skill instead of deficits in three discrete areas: conceptual, social, and practical. *Id.* A false premise underlying this factor is that, if evidence shows that a person has ***any*** skills, he or she cannot have mental retardation. The scientific community roundly rejects such a concept.

Similarly, the fourth factor, which asks whether a defendant can "respond coherently, rationally, and on point to oral or written questions" assumes, incorrectly, that a person cannot have mental retardation and communicate coherently. *Id.* This inquiry also seems designed to exclude all but the most exceptionally impaired.

The fifth factor asks if the defendant's behavior is "rational and appropriate," which incorrectly presupposes that persons with mental retardation can never reason or act "appropriately." *Id.* This factor assumes, without explaining, the normative notion of "appropriate" that is supposed to guide the fact-finder and leads to under-inclusion by falsely suggesting that any "appropriate" behavior precludes a mental retardation diagnosis.

The sixth factor, which asks if the defendant is capable of lying to further his self-interest, is based on the arcane myth of the "holy innocent" who is so mentally debilitated as to be incapable of dishonesty. That false stereotype effectively excludes the vast majority of those with the disability.

The seventh factor, which invites the fact-finder to look at how the capital crime was perpetrated, is the most problematic. *Id.* Instead of a systematic, holistic review of the individual's ***typical*** performance and what such performance reveals about adaptive deficits within three specific domains, this factor dwells on the highly aberrant details of the crime that made the offender death-eligible in the first place. This inquiry is especially concerning to the clinical community, as it invites an emotional, rather than a reasoned, assessment—skewing the inquiry toward ineligibility by focusing the fact-finder on the murder in deciding an offender's mental retardation claim.

Briseno Factor	How the Factor Is Contra-Clinical[7]
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?	The AAIDD warns against using impressionistic lay opinion and instead directs clinicians to use objective instruments, like the VABS, to assess adaptive behavior.
Has the person formulated plans and carried them through or is his conduct impulsive?	The AAIDD directs clinicians to focus on adaptive deficits—what a person cannot do—not on abilities.
Does his conduct show leadership or does it show that he is led around by others?	Although some persons with mental retardation tend to be followers, the AAIDD explains that "leadership" skills—and indeed any discrete skill—would not automatically preclude a mental retardation diagnosis.

7. *See* AAIDD 2010 at 43-55; *see also* DSM-IV-TR at 43 (explaining that "about 85%" of those with mental retardation "typically develop social and communication skills" and "usually achieve social and vocational skills adequate for minimum self-support").

Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?	As the APA reports, the largest segment of people with mental retardation (about 85%) can communicate and behave rationally.
Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?	Because most people with mental retardation are capable of rational thought, they can provide coherent responses to questions.
Can the person hide facts or lie effectively in his own or others' interests?	The AAIDD explains that persons with mental retardation, like most human beings, are capable of hiding facts—especially when experiencing high anxiety.
Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?	The AAIDD directs clinicians to assess adaptive behavior in the typical community context, not by looking to extraordinary circumstances.

The *Briseno* factors invite fact-finders to engage in a highly subjective inquiry based on scientifically unsound presumptions about people with mental retardation. Many people with mental retardation are capable of rational thought, planning, and verbal coherence; they can have romantic relationships, obtain a license, drive, and secure employment; suggesting otherwise is a matter of prejudice and conjecture.[8] This Court should grant the writ to curtail use of an impressionistic and extraordinarily restrictive understanding of mental retardation that deprives persons of *Atkins*' protection who plainly meet the clinical definition.

B. Texas's Approach Creates An Excessive Risk Of Under-Protecting Capital Offenders With Mental Retardation

The CCA itself has acknowledged that the "*Briseno* factors" are "non-diagnostic criteria." *See Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2004). Yet in Texas those factors have supplanted the objective, consensus-based, clinical inquiry upon which *Atkins* rests. As a result, individuals who would be deemed to have mental retardation in any other jurisdiction are eligible for execution in Texas. *See, e.g., Peggy M. Tobolowsky, A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 71 & nn.203-04, 373-74 (2011) (citing John H. Blume, *et al.*, *An Empirical Look at* Atkins v. Virginia

8. *See, e.g.*, Alliance for Full Participation, non-profit organization founded by AAIDD and thirteen other leading national associations committed to integrating people with intellectual disability fully into the community, website *available at* http://www.allianceforfullparticipation.org/index.php?start=5.

and Its Application in Capital Cases, 76 Tenn. L. Rev. 625, 628-29, 637 (2009)) (demonstrating that Texas, with one of the nation's largest death rows, has denied far more *Atkins* claims than the national average).

Most troubling are those *Atkins* claims where recourse to the *Briseno* factors provided the sole basis for denying relief. In this case, qualified clinicians, at various points in Elroy Chester's life, used the accepted diagnostic criteria and determined that he has mental retardation. The CCA, however, relied not only on the contra-clinical *Briseno* approach, but primarily on the most suspect seventh factor—letting its subjective impressions of the crime trump the results of Chester's performance on a standardized test of adaptive behavior skills. *See Ex parte Chester*, No. AP-75037, 2007 WL 602607, *4-*5, *9 (Tex. Crim. App. Feb. 28, 2007). Chester's VABS score of 57—obtained years before the crime—showed that he has adaptive behavior deficits measuring more than two standard deviations below the mean. *Id.* at *3. Moreover, the CCA noted that "even the State's expert witness at the hearing acknowledged that a person with a [VABS] score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." *Id.* The CCA also recognized that Chester had been identified as mentally retarded starting in elementary school and that Texas itself had previously identified him as a "mentally retarded offender." *Id.* Nevertheless, the CCA (and then the federal courts conducting habeas review) found that Chester had not satisfied *Briseno*'s anomalous adaptive behavior analysis—a conclusion that hinged on the clinically irrelevant details of the crime and its aftermath. *Id.* at *4-*9.

Chester's case follows others where the CCA has denied *Atkins* protection to offenders who easily satisfied the clinical definition of mental retardation. In *Lizcano v. State*, for example, the CCA acknowledged that Lizcano—with recorded IQ scores ranging from 48 to 69—"satisfied the first prong of the mental retardation definition[.]" 2010 WL 181772 at *12. But the CCA found Lizcano had not satisfied the adaptive behavior prong despite evidence that Lizcano had "trouble following instructions and performing fairly simple tasks [at] work" and that he had "difficulty learning and socializing." *Id.* at *15. A straightforward application of clinical criteria would have compelled the conclusion that Lizcano had mental retardation. Nonetheless, the CCA rejected such a diagnosis on the dubious grounds that Lizcano had been able to hold a job, that a used-car salesman had been willing to sell Lizcano a car, and that he had had two girlfriends "neither of whom considered him to be mentally retarded." *Id.*

Similarly, the *Atkins* claim of John Reyes Matamoros was rejected by both state and federal habeas courts based primarily on the *Briseno* factors. *See Matamoros v. Thaler*, H-07-2613, 2010 WL 1404368 (S.D. Tex. Mar. 31, 2010). The CCA found that Matamoros had demonstrated significant sub-average intellectual functioning; but the court then dismissed the clinical approach to adaptive behavior, stating its belief regarding "the unreliability of using traditional adaptive behavior scales on the adult, criminal applicant[.]" *Id.* at *12. Instead, the CCA focused on evidence that tracked the impressionistic *Briseno* factors—Matamoros's reputed ability to communicate with counsel, to testify "coherently," and to "manufactur[e] a rational story explaining evidence linking him to the murder." *Id.*[9]

Recently, the CCA reversed a trial court's finding that an offender had mental retardation despite compelling clinical evidence supporting that diagnosis. *See Ex parte Sosa*, No. AP-76674, 2012 WL 1414121, *4 (Apr. 25, 2012). The trial court, crediting the testimony of a qualified

9. The only expert testimony related to adaptive behavior that the CCA heeded was provided by the state's expert, George Denkowski. *Id.* at *14-*15. Matamoros raised serious concerns about Denkowski's methodology before the CCA and in his habeas petition and pointed to both objective testing and ample evidence dating back to childhood demonstrating his significant adaptive deficits; yet the CCA concluded that, "[e]ven if Denkowski's opinion is disregarded," the conclusion that Matamoros had not satisfied the adaptive behavior prong was "reasonable" in light of *Briseno*. *Id.* at *15. After the CCA denied Matamoros's *Atkins* claim, and after a federal district court denied habeas relief based on the CCA's reasoning, Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists, such that his license was "reprimanded" and he agreed not to accept engagements to evaluate individuals for mental retardation or intellectual disability in criminal proceedings. *See Ex parte Matamoros*, No. WR-50791-02, 2011 WL 6241295, *1 (Tex. Crim. App. Dec. 14, 2011); *see also* Brandi Grissom, *Texas Psychologist Punished in Death Penalty Cases*, Texas Tribune, Apr. 15, 2011, *available at* http://www.texastribune.org/texas-dept-criminal-justice/death-penalty/texas-psychologist-punished-in-death-penalty-cases/ (quoting intellectual-disability expert who criticized Denkowski's methods as having "absolutely no scientific basis"). Only after the CCA was confronted with this development did it remand Matamoros's mental retardation claim for further proceedings. *See id.* The CCA did not, however, acknowledge that its *Briseno* factors had been used to ***buttress*** the testimony of this now thoroughly discredited "expert."

expert, had refused to place weight on the seventh *Briseno* factor because such an approach "conflicts with the AAIDD," which rejects making assumptions about adaptive behavior based on the circumstances of the crime. *Id.* The CCA admitted that its *Briseno* approach is ***not*** the AAIDD's but reaffirmed its intentionally under-inclusive approach: "Answering questions about whether the defendant is mentally retarded for particular clinical purposes is instructive, ... but it will not always provide a conclusive answer to that ultimate legal question." *Id.* (expressing "concern" about relying on the AAIDD's guidelines "in isolation").

These cases demonstrate a calculated refusal to accept the true nature of mental retardation and the generally accepted approach to diagnosing the disability; they also illustrate that individuals with the disability are routinely being denied the constitutional protection recognized in *Atkins*. This Court must affirm that, in leaving to the states responsibility for devising appropriate ***procedures*** for assessing *Atkins* claims, this Court did not license them to improvise subjective, contra-clinical ***substantive*** standards that are designed to, and do in fact, permit "some capital offenders whom every rational diagnostician would find [to meet] the clinical definition of mental retardation to be executed." *Lizcano*, 2010 WL 181772 at *40 (Price, J., concurring and dissenting). That result, evident here, cannot be squared with *Atkins*' categorical ban.

C. Texas's Approach Will Continue To Evade Correction Through The Political Process

Before *Atkins*, states had steadily enacted legislation to protect persons with mental retardation from execution.

Georgia was the first to forbid the practice in 1986, and seventeen additional states and the federal government adopted similar bans over the next sixteen years. *See Atkins*, 536 U.S. at 314-15 (describing state legislative activity). All of the states enacting the ban embraced a version of the established clinical approach to mental retardation, defining the condition as significantly subaverage intellectual functioning concurrent with substantial limitations in adaptive functioning during the developmental period.[10] In discerning a national consensus against such executions, this Court relied on this groundswell of legislative activity, noting the uniform legislative movement toward exempting persons with mental retardation from the death penalty and the noteworthiness of such a trend given the general difficulty of passing legislation protecting persons guilty of violent crimes. *Id.* at 315.

After *Atkins*, state legislative activity slowed as political leaders looked to the courts to implement the constitutionally mandated ban. Of the twenty death penalty states with no legislative ban in place at the time of *Atkins*, a majority—including Texas—chose not to legislate in the wake of this Court's decision.[11] In these jurisdictions, political leaders and policymakers likely believe that persons with mental retardation are fully exempt from execution and thus no further steps need be taken.

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10. *See* Death Penalty Information Center ("DPIC") report, *available at* http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation.

11. *See* DPIC report, *available at* http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia.

Because of the common perception that, post-*Atkins*, persons with mental retardation are exempt from the death penalty, the Texas courts' failure to exempt ***all*** persons with mental retardation from execution is unlikely to be corrected through the political process. This Court's widely publicized declaration that the Eighth Amendment forbids such executions undercut any political momentum to protect this category of people. The CCA's much less visible unwillingness to read this Court's decision as requiring a complete ban on such executions, coupled with its effort to limit the protection to a small subclass, will not be addressed through the political process given the widespread assumption that this Court has already resolved the issue and will, therefore, enforce the categorical ban. Without this Court's intervention, offenders with mental retardation seem to be in a worse position than if the political process had run its course, as the Texas legislature supported such a ban just before *Atkins* issued.[12]

Moreover, the Court of Appeals for the Fifth Circuit has acquiesced in the CCA's ungrounded approach, notwithstanding its recognition that the *Briseno* factors amount to "definitions of mental retardation" unique to Texas law. *Moreno v. Dretke*, 450 F.3d 158, 164 (5th Cir. 2006); *see also Wilson v. Thaler*, 450 F. App'x 369, 377 (5th Cir. 2011) ("the *Briseno* factors, whether standing alone or as incorporated into its conclusions on the clinical factors of adaptive deficits and age of onset, is not an unreasonable application of *Atkins*"). The Fifth Circuit

12. As noted in *Atkins*, the Texas legislature unanimously supported a bill exempting persons with mental retardation from execution, but the Governor vetoed the legislation citing concerns about the lack of a public hearing for the bill during the legislative process. 536 U.S. at 315 n.16.

has accepted the notion that Texas is free to decide—not only the ***procedures*** for assessing mental retardation claims—but what mental retardation ***is***. In this case, the Fifth Circuit adamantly reaffirmed that view as follows:

- The *Briseno* approach differs from the AAIDD's approach. *Chester v. Thaler*, -- F.3d --, 2011 WL 6846746, *6 (5th Cir. 2011).

- Those differences are not problematic because the AAIDD definition incorporated into Texas statutory law "was designed for the purpose of providing social services, not for the purposes of determining whether a person was 'so impaired as to fall within the range of mentally retarded offenders about whom there is national consensus;'" besides, the AAIDD's approach is "highly subjective" with "weaknesses." *Id.* (citations omitted).

- In any event, the *Briseno* approach is acceptable because Texas courts need not "apply the approach articulated by the [AAIDD]" in assessing mental retardation. *Id.*

- More specifically, it is "senseless to think Texas must follow [AAIDD] procedures when determining deficits in adaptive behavior" as the state does not otherwise have to comport with clinical directives. *Id.*

In other words, the Fifth Circuit has slammed the door: no habeas challenges to the admittedly contra-clinical *Briseno* approach can hope to prevail in the circuit where the largest number of executions is carried out.

If Texas can decide that mental retardation means something different within its borders than it does elsewhere in the nation, then *Atkins* stands for very little. And if the Fifth Circuit's perception that Texas is entitled to its own idiosyncratic approach to mental retardation persists, then federal habeas review of *Atkins* claims brought by Texas death-row inmates will generally elude correction, as it did here. As the dissenting judge from the panel below correctly noted, "the states retain substantial discretion to create appropriate ***procedures***, but they may not ***substantively*** redefine mental retardation so as to permit the execution of those who 'fall within the range of mentally retarded offenders about whom there is a national consensus.'" *Id.* at *11 (Dennis, J., dissenting) (quoting *Atkins*, 536 U.S. at 317) (emphasis retained).

D. This Case Is A Particularly Good Vehicle For Curtailing Texas's Departure From The Generally Accepted Clinical Approach To Assessing *Atkins* Claims

In this case, the CCA's departure from the clinical definition of mental retardation was dispositive. The CCA concluded that Chester satisfied the intellectual functioning prong given his sub-70 IQ scores. *Id.* at *3. Chester also offered persuasive evidence of his deficits in adaptive functioning, including his 57 score on the VABS, a well-established standardized test of adaptive functioning. *Id.*; *see also* Petition at 7-8. Additionally, Chester offered evidence of his placement in Texas's Mentally Retarded Offenders Program, his difficulties in school, and his inability to carry out basic tasks, such as shopping for groceries and clothes, opening a bank account, or filling out employment applications. *Id.* at 7-10. Indeed, the state's

own expert conceded that someone with Chester's IQ and VABS scores "would be correctly diagnosed as mildly mentally retarded." *Chester*, 2007 WL 602607 at *3.

Because the sole basis for denying Chester relief was the CCA's recourse to the *Briseno* factors, the constitutional question presented here—whether states may depart from the national consensus definition of mental retardation—is squarely before the Court.

CONCLUSION

Turning the clock back on significant progress for persons with mental retardation, to whom the AAIDD has long been committed, is at stake here. Therefore, the AAIDD urges the Court to grant Petitioner's petition for a writ of *certiorari*.

Respectfully submitted,

JORDAN M. STEIKER
Counsel of Record
GRETCHEN S. SWEEN
CAPITAL PUNISHMENT CENTER
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, TX 78705
(512) 232-1346
jsteiker@law.utexas.edu

Counsel for Amicus Curiae