No. 11-1391

In the Supreme Court of the United States

ELROY CHESTER,
Petitioner,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

BETH KLUSMANN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711
(512) 936-1700
beth.klusmann@texasattorneygeneral.gov

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

When the Court in *Atkins v. Virginia* held that the Eighth Amendment prohibits the execution of mentally retarded offenders, it explicitly left to the States the task of developing appropriate ways to enforce the restriction. 536 U.S. 304, 317 (2002). Applying *Atkins*, the Texas Court of Criminal Appeals decided to consider claims of mental retardation under the three-part test used by a majority of the States, which requires proof of significantly subaverage general intellectual functioning, related deficits in adaptive functioning, and onset before age eighteen. *Ex parte Briseno*, 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004).

When assessing the adaptive-functioning element, Texas courts use seven factors, identified in *Briseno*, to assist in analyzing the evidence and testimony. These factors are consistent with *Atkins* and reflect the characteristics of the mentally retarded that caused the Court to categorically prohibit their execution in the first place.

Is Texas required to consider only clinical standards when analyzing adaptive-functioning deficits, or may it consider all of the evidence and testimony presented?

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BRIEF IN OPPOSITION

Atkins established that the mentally retarded may not be executed. But it did not establish *who* is mentally retarded, leaving that decision to the States. Given that mental health professionals consistently differ on the diagnosis of mental retardation, it cannot be said that the matter has been clearly established in the courtroom.

The state trial court was presented with testimony from experts who disagreed whether Chester was mentally retarded. The trial court considered all of the evidence and found that Chester had not proven mental retardation by a preponderance of the evidence. That decision was affirmed by the Texas Court of Criminal Appeals. The Fifth Circuit, likewise, properly held that the state court's decision did not violate the high standard set by the relitigation bar in AEDPA. The state court's decision is entirely consistent with *Atkins*. Chester's petition should be denied.

STATEMENT

I. CHESTER'S CRIMES AND TRIAL

In March 1997, Chester was released from prison, where he had been serving time for burglary. 19.RR.141, 23.RR.Ex.2.[1] In the next eleven months,

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1. References to the reporter's record from Chester's criminal trial will be __.RR.__, with the first number referring to the volume and the second to the page number or exhibit number. References to the clerk's record from Chester's criminal trial will be __.CR.__, with the first number referring to the volume and the second to the page number. References to the reporter's record from Chester's post-*Atkins* state habeas hearing will be __.SHRR.__, with the first number referring to the volume and the

Chester estimates that he committed twenty-five burglaries in the Port Arthur area. 19.RR.141. During the summer of 1997, the Port Arthur Police Department developed a Burglary Investigation Detail to investigate the large number of burglaries and look for patterns that might lead to the perpetrator. 16.RR.34-35, 93-94. In early August 1997, Chester stole a gun during one of his burglaries, 16.RR.40, 19.RR.109-10, and his crimes began to turn violent.

On August 9, Chester broke into the home of Desire Johnson and anally raped her ten-year old daughter, who was home alone. 16.RR.44, 53-55, 20.RR.9, 11-12. One week later, Chester shot two individuals in separate incidents while attempting to burglarize their houses. 16.RR.72-90, 19.RR.138-40. Neither victim died.

On September 20, Chester broke into the home of John Henry Sepeda, who was asleep in a room with his wife and grandson. 16.RR.95-97, 101-03, 19.RR.70-73. When Sepeda heard Chester, he began to get up. 16.RR.101-02. Chester shot him, and Sepeda died of his injuries. 16.RR.105-06. Chester's next victim was 87-year old Etta Stallings, who Chester killed in November 1997 while burglarizing the house where she lived with her bed-ridden husband. 16.RR.107-10, 17.RR.10. She was attempting to pull a gun out of a drawer to defend herself when Chester shot and killed

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second to the page number. References to the clerk's record from Chester's post-*Atkins* federal habeas petitions will be USCA5 __, with the number indicating the page of the USCA5 volume.

her. 19.RR.124. He stole her gun and used it to shoot two women at another house that evening, neither of whom died from their injuries. 17.RR.14-17, 19.RR.125-26.

At this time, the Port Arthur Police Department formed the Violent Crime Task Force in an attempt to capture the individual behind the violence that had shaken the community. 17.RR.22,24. But they had little evidence to go on. 17.RR.25.

On November 20, Chester attempted to rob Cheryl DeLeon, his former coworker from Luby's Cafeteria. 17.RR.25-27, 19.RR.132-33. He unscrewed the light bulb outside her house and waited for her to come home. 19.RR.133. She was shot and killed in the ensuing struggle. 19.RR.134. On December 7, Chester shot, but did not kill Larenzo Coronado. 17.RR.52-55, 19.RR.99.

Albert Bolden's death in December was part of a plan of revenge for Chester. Bolden was the common-law husband of one of Chester's sisters. 17.RR.69-70. According to Chester, Bolden wanted to burglarize a house together, but Chester decided to kill Bolden instead.[2] 19.RR.107. Chester went along with Bolden's plan, but after the two broke into the house they intended to burglarize, Chester shot Bolden in the back of the head. 19.RR.108.

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2. Chester alternately asserted that he wanted to kill Bolden because Bolden set him up with a transvestite and because Bolden abused his sister. 19.RR.107-08.

On February 6, Chester committed the capital murder for which he pleaded guilty in this case. After watching 17-year-old Erin DeLeon, who was home alone with her 1-year-old son, Chester cut the phone lines and walked through an unlocked door. 18.RR.4-6, 19.RR.111. He held Erin at gunpoint and took her through the house looking for items to steal. 18.RR.13-21, 19.RR.111-12. When Erin's 14-year-old sister Claire and her boyfriend Tim arrived, Chester also held them at gunpoint. 18.RR.26-29, 19.RR.113. He forced all of them to strip, blind-folded each of them with duct tape, and duct taped Tim's wrists and ankles. 18.RR.30-35, 19.RR.114. Chester then raped Erin and forced both girls to perform oral sex on him. 18.RR.38-41, 19.RR.114-15.

At this point, Willie Ryman, the girls' uncle and local fire fighter, came to check on them. 18.RR.62. Chester shot and killed him after Ryman entered the house. 19.RR.115-16. Chester then ran out, and Claire got up and locked the door. 19.RR.116. Ryman's girlfriend was waiting in the car. 18.RR.62-64. She managed to lock Chester out of the car when he tried to get in, and he shot at the locks several times before running off. 18.RR.69-73, 19.RR.116.

Chester was implicated in the ensuing investigation, as the police discovered a mask and the stolen items at Chester's father's house. 18.RR.89-98. Chester confessed to the murder of Ryman after learning that his DNA was going to be taken. 19.RR.90-91. Chester offered to lead the police to the gun, which was at his father's house. 19.RR.91-92. He informed the police it was unloaded and hidden in an open area of the

ceiling. 19.RR.93-94. While an officer was searching for it, Chester attempted to reach for the gun opposite to where he told officers it was. 19.RR.94-96. He was removed from the area, and the police recovered the loaded weapon. 19.RR.95-96.

Over the next several weeks, Chester confessed to each of the crimes described above—five murders, five other shootings, and three sexual assaults. 25.RR.Exs.117-21. DNA and ballistics confirmed his confessions. 18.RR.159-63, 19.RR.28-29, 47. Chester's crimes also showed a similar pattern. He frequently cut the phone lines to the house, wore gloves and a mask, and tampered with several outdoor lights. 16.RR.39, 98, 17.RR.117-18, 18.RR.11, 19.RR.111; *see also* 19.RR.71 (describing Chester's black bag that contained his pistol, flashlight, wire cutters, and mask).

Chester was charged with the capital murder of Ryman, which took place in the course of a burglary. 1.CR.2-3. After voir dire, Chester chose to plead guilty to capital murder, 15.RR.4-5, leaving the jury to decide only whether he would receive the death penalty. The prosecution presented the evidence of Chester's crime spree described above.

Against the advice of counsel, Chester took the stand. 20.RR.4-6. He repeated his desire to kill "white folks" and asserted that, if he had not been arrested, he would still be killing them. 20.RR.10, 40. He said that his 10-year old rape victim was lucky he did not kill her and expressed regret that he had not killed Erin and Claire DeLeon, as well as Erin's 1-year old son. 20.RR.13, 49. He spoke of his desire to kill the police

officer who initially arrested him for burglary. 20.RR.34. He said that if he was given the death penalty, his "homeboys" knew to kill a police officer, but if he was given life in prison, he would kill a prison guard. 20.RR.45-46.

Chester's counsel offered mitigation evidence in the form of testimony from Dr. Dan Roberts, who diagnosed Chester as mentally retarded.[3] 20.RR.61. The State did not present contrary testimony, but questioned the bases for Dr. Roberts's diagnosis. 20.RR.109-49. Dr. Roberts admitted that Chester was "incredibly dangerous and violent." 20.RR.149. The jury sentenced Chester to death, 21.RR.50-51, 1.CR.87, and his sentence was affirmed on appeal, *Chester v. State*, No. 73,193 (Tex. Crim. App. Jan. 26, 2000) (unpublished).[4]

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3. The Director recognizes the shift in terminology from "mental retardation" to "intellectual disability." Because the cases and briefing refer to mental retardation, the Director will follow Chester's lead in continuing to use that terminology. The Director will, likewise, refer to the American Association on Intellectual and Developmental Disabilities (AAIDD) by its former name, the American Association on Mental Retardation (AAMR).

4. At the time, the controlling law was *Penry v. Lynaugh*, which held that mental retardation did not prohibit the imposition of the death penalty. 492 U.S. 302, 340 (1989), *abrogated by Atkins*, 536 U.S. 304. For that reason, it was not improper for the prosecutor to inform the jurors, in a single sentence in his closing argument, that they were permitted to view Dr. Roberts's evidence as mitigating against a life sentence. 21.RR.36-37. Although referencing this statement several times in his petition, Pet. i, 5, Chester is not asserting that this amounts to a constitutional violation.

II. CHESTER'S POST-*ATKINS* HABEAS PETITION

Chester proceeded through state habeas without success. *Ex parte Chester*, No. WR-45,249-01 (Tex. Crim. App. May 31, 2000) (unpublished). The federal district court granted habeas relief following the *Atkins* decision, but the Fifth Circuit vacated the judgment so the state courts could hear Chester's claim in the first instance. *Chester v. Cockrell*, 62 F. App'x 556, at *1 (5th Cir. 2003) (per curiam). Chester received leave from the CCA to pursue a successive habeas petition on the issue of mental retardation, *Ex parte Chester*, No. WR-45,249-02 (Tex. Crim. App. Sept. 10, 2003) (unpublished).

The state court held a four-day hearing during which Chester and the State offered evidence on the issue of mental retardation. Chester began with the testimony of Dr. David Ott, a psychologist licensed for six years, who diagnosed Chester as mentally retarded. 2.SHRR.39. He testified to the AAMR and the American Psychiatric Association's definitions of mental retardation, both of which require significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset before age eighteen. 2.SHRR.43-45. Dr. Ott testified to several methods to measure adaptive functioning. Under the 2002 AAMR standards, there must be substantial deficits in one of three areas: conceptual, social, or practical. 3.SHRR.6-7. Under the 1992 AAMR standards, the adaptive-functioning prong is met with deficits in two of ten areas: communication, self-care, home living, social skills, community use, self-direction, health and safety,

functional academics, leisure, and work. 3.SHRR.24; *Atkins*, 536 U.S. at 309 n.3.

Under the 2002 AAMR standards, Dr. Ott stated that Chester exhibited deficits in conceptual and practical areas. 3.SHRR.7. Dr. Ott also asserted that Chester exhibited adaptive-functioning deficits in the areas of communication, functional academics, and work under the 1992 standards. 3.SHRR.24. In addition, Dr. Ott relied on a test Chester took while in prison, the Vineland Adaptive Behavior Scales, that measures adaptive functioning from an objective standpoint. 3.SHRR.20-22 (noting Chester's score of 57).

When describing mental retardation, Dr. Ott stated that it affects "decision making, impulse control, planning ability . . . communication abilities [and] occupational skills." 2.SHRR.60. At the prompting of counsel, Dr. Ott also addressed whether Chester exhibited various characteristics of the mentally retarded that came from the *Atkins* decision—answering questions on Chester's ability to understand and process information, communicate, learn from experience, engage in logical reasoning, exercise impulse control, and understand the reactions of others. 3.SHRR.43-46; *Atkins*, 536 U.S. at 318.

Dr. Edward Gripon, a psychiatrist with over 30 years' experience, testified as an expert for the State and concluded that Chester was not mentally retarded. 4.SHRR.272. He disagreed with the deficits described by Dr. Ott. Instead, he found Chester's communication skills "impressive to some extent." 4.SHRR.281. He also believed Chester's poor academic skills were a

failure of the education system or of motivation on Chester's part. 4.SHRR.288. And he stated that Chester could work up to the capacity that his intellect allowed. 4.SHRR.290. At the prompting of counsel, Dr. Gripon provided testimony on each of the seven *Briseno* factors.[5] He explained that the factors "basically expand upon what we use in the mental health field for diagnosis." 4.SHRR.309. He also explained that the facts surrounding Chester's crimes were relevant, as he wanted to have as much

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

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

information as he could about Chester in order to thoroughly analyze his mental state. 4.SHRR.278-79.

Several others, including two of Chester's sisters, testified at the hearing. Unlike what was stated in Chester's petition, Pet. i, Chester was never formally diagnosed as mentally retarded until he was charged with capital murder. Although there was evidence that Chester's low IQ scores in grade school put him in the range of mental retardation on the general intellectual functioning prong, he was instead always classified as learning disabled. 2:SHRR.95-102, 4.SHRR.197. There is no evidence he was assessed for deficits in adaptive functioning at that time, so no diagnosis could have been made.

Chester was also placed in the Mentally Retarded Offenders Program when he was imprisoned for his prior burglaries, but not because he had been diagnosed as mentally retarded. 4.SHRR.54. Rather, he was diagnosed as borderline intellectual functioning, which, although different from mental retardation, still resulted in placement in the MROP.[6] 4.SHRR.45-47.

After hearing all of the evidence, the state court issued a decision finding that Chester had not proved mental retardation by a preponderance of the evidence. Pet. App'x E-30. The court identified the three-part

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6. The Director of the MROP testified that, although he does not remember ever meeting Chester, he now believes Chester's diagnosis should have been mentally retarded, not borderline intellectual functioning. 4.SHRR.45-47. The state trial court did not find him credible. Pet. App'x E-28.

test used by Texas and the AAMR and considered the evidence as to the first two elements.[7] *Id.* With respect to adaptive functioning, the court analyzed the evidence through the *Briseno* factors. *Id.* at 12-26. The court focused on Chester's early years—how he was perceived and treated in the school system—and his communication skills, identifying in great detail the many topics on which Chester was able to converse. *Id.* at 12-21. The court also described Chester's various crimes and the extent to which they included planning and complex execution. *Id.* at 21-26. The court ultimately concluded that Chester did not have the necessary deficits in adaptive functioning to demonstrate mental retardation.

The CCA affirmed the judgment of the trial court. The CCA noted that the *Briseno* factors had been offered to "*assist* factfinders in weighing evidence tending to support or refute a finding of adaptive behavior deficits." Pet. App'x D-9-10 (emphasis added). The CCA then noted the care with which the state court had gone through all of the evidence for each factor. *Id.* at 11. Ultimately, the CCA concluded that the state court's credibility determinations could not be overturned and affirmed the judgment. *Id.* at 1, 11-13.

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7. The state trial court concluded that Chester did not have significantly subaverage general intellectual skills based on his IQ scores. Pet. App'x E-4-12. The CCA, however, recognized that the state trial court's discussion of IQ scores contained incorrect and higher scores than were shown by the evidence. Pet. App'x D-6-9. Using the correct scores, the CCA concluded that Chester met the first prong of the mental-retardation test. *Id.* at 9.

His petition for certiorari was denied. *Chester v. Texas*, 552 U.S. 947 (2007).

Chester filed for federal habeas relief, in part, on the ground that the CCA erred in relying on the *Briseno* factors instead of the AAMR's clinical standards. USCA5 224-26. The federal district court denied Chester's request for habeas relief, but granted him a certificate of appealability. Pet. App'x C-1-17; USCA5 626-27.

The Fifth Circuit majority, Chief Judge Jones and Judge Stewart, concluded that Chester was not entitled to habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996. Pet. App'x A-23. The court first held that *Atkins* did not clearly establish who was mentally retarded, delegating that decision to the States. *Id.* at 15. The court then held that Chester had not shown that the *Briseno* factors were contrary to or an unreasonable application of *Atkins*. *Id.* at 13-15. Rather, the factors were consistent with *Atkins*. *Id.* at 14 n.1. The majority, therefore, affirmed the denial of Chester's habeas petition. Judge Dennis dissented, opining that *Atkins* permitted the States to decide only procedural matters, but required them to apply the AAMR's standards when determining mental retardation. *Id.* at 23-30

REASONS TO DENY THE PETITION

I. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH THE COURT'S PRECEDENT.

A. Chester Must Show the State Court's Decision Was Contrary to or an Unreasonable Application of Clearly Established Federal Law.

Although originally filing for habeas relief in the district court under 28 U.S.C. §2254(d)(1) and (2), Chester limits the arguments in his petition to §2254(d)(1). Pet. i, 2. Because his claim was "adjudicated on the merits in State court proceedings," relitigation of his claim in federal court is barred unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

"[C]learly established Federal law" refers to "the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012). Absent clearly established federal law, the habeas petition must be denied. *See* 28 U.S.C. §2254(d)(1).

A state-court decision is "contrary to" clearly established federal law if it arrives at a conclusion "opposite to that reached by th[e] Court on a question of law or if the state court decides a case differently than th[e] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13;

see also id. at 406 (defining "contrary to" as "diametrically different," "opposite in character or nature," and "mutually opposed").

To establish that a state court "unreasonably appli[ed]" clearly established federal law, "it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied [Supreme Court precedent] incorrectly." *Bell v. Cone*, 535 U.S. 685, 699 (2002). Instead, the petitioner must prove that the state court's application of clearly established federal law was *unreasonable*. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). If fairminded jurists could disagree on the issue, habeas relief must be denied. *Id.* at 786. The specificity of the Court precedent relied on is key, as "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). It is not, therefore, unreasonable under AEDPA for a state court to decline to apply a specific legal rule that has not been "squarely established" by the Court. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Chester has not demonstrated any of these elements. The law regarding who is mentally retarded under the Eighth Amendment is not clearly established, and the state court's decision is consistent with *Atkins*. The petition should be denied.

B. *Atkins* Did Not Clearly Establish Who Is Mentally Retarded.

1. Chester's claim fails at the outset because there is no "clearly established Federal law" that would

preclude the state court's use of the *Briseno* factors to determine whether Chester met the adaptive-functioning prong of mental retardation. Although the Court in *Atkins* held that the Eighth Amendment prohibits the execution of mentally retarded offenders, 536 U.S. at 321, it stopped short of clearly establishing which offenders are "mentally retarded." Instead, the Court recognized that there was "serious disagreement" when it came to "determining which offenders are in fact retarded." *Id.* at 317 ("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."). The Court, therefore, "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* (citation and internal quotation marks omitted). This is consistent with the Court's prior precedent that it has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997) (concerning when someone may be civilly committed due to mental illness).

The amicus from the AAIDD echoes Judge Dennis's dissent in arguing that the *Atkins* Court delegated to the State only *procedural* matters regarding mental retardation. Amicus Br. 2-3; Pet. App'x A-27. But the Court rejected that construction of *Atkins* in *Bobby v. Bies*, 556 U.S. 825, 831 (2009). There, the Court stated that "[o]ur opinion [in *Atkins*] did not provide definitive procedural or *substantive* guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'" *Id.*

(emphasis added) (citation omitted). Thus, the States are tasked with defining mental retardation.

Chester's argument is more subtle, but nonetheless incorrect. He posits that, because the mental retardation definitions in the States that formed the "national consensus" in *Atkins* "generally conform[ed]" to the clinical definitions, 536 U.S. at 317 n.22, Texas must adopt a similar definition, otherwise it is out of step with the national consensus and the Eighth Amendment. Pet. 15-16. Chester does not explain, however, why the Court failed to adopt the clinical standards when it had the opportunity to do so or why the Court stated that it had not provided a definitive substantive guide in *Bobby v. Bies*.

More importantly, though, the question presented by Chester's petition is much narrower than the "national consensus" on which he relies. The national consensus in *Atkins* was, at most, at the general level—using the three-part definition that requires significantly subaverage general intellectual functioning, deficits in adaptive functioning, and onset before age eighteen.[8]

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8. The statutes cited by the Court are as follows: ARIZ. REV. STAT. ANN. §13-703.02 (now located at ARIZ. REV. STAT. ANN. §13-753); ARK. CODE ANN. §5-4-618; COLO. REV. STAT. §16-9-401 (now located at COLO. REV. STAT. §§18-1.3-1101, -1103); CONN. GEN. STAT. §§1-1g(a), 53a-46a (death penalty abolished in 2012); FLA. STAT. §921.137; GA. CODE ANN. §17-7-131; IND. CODE §§35-36-9-2, -6 (requiring onset by age 22); KAN. STAT. ANN. §21-4623 (now located at KAN. STAT. ANN. §§21-6622, 76-12b01); KY. REV. STAT. ANN. §§532.130, .140; MD. CODE ANN., art. 27, §412 (now located at MD. CODE ANN., CRIM. LAW, §2-202(b) (requiring onset by age 22)); MO. REV. STAT. §565.030; NEB. REV. STAT. §28-105.01 (no age-of-onset requirement); N.Y.CRIM. PROC. LAW §400.27 (death

Chester has not demonstrated, however, that there was a national consensus regarding how to measure deficits in adaptive functioning, which is the focus of his argument in this case. Out of the eighteen states that formed the national consensus, only two of them specifically included the AAMR's clinical test for deficits in adaptive functioning, requiring proof of deficits in two of ten areas.[9] Five used a more general standard from the narrative section of the DSM-IV-TR, looking at "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group."[10] Pet. 31.

The rest provided no specific test for adaptive functioning. Chester suggests that many of those States interpret their standards in line with the AAMR criteria, as described in Chester's appendix. Pet. 31. But court cases using the clinical standards issued years after *Atkins* was decided do not establish a national consensus in *Atkins*. In fact, at the time of *Atkins*, at least two courts had rejected strict

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penalty declared unconstitutional in 2004); N.C. GEN. STAT. §15A-2005; N.M. STAT. ANN. §31-20A-21(A) (death penalty abolished in 2009); S.D. CODIFIED LAWS §§23A-27A-26.1 to -26.2; TENN. CODE ANN. §39-13-203; WASH. REV. CODE §10.95.030.

9. MO. REV. STAT. §565.030; N.C. GEN. STAT. §15A-2005.

10. ARIZ. REV. STAT. ANN. §13–703.02 (now located at ARIZ. REV. STAT. ANN. §13-753); CONN. GEN. STAT. §53a–46a (death penalty abolished in 2012); FLA. STAT. §921.137; KAN. STAT. ANN. §21-4623 (now located at KAN. STAT. ANN. §§21-6622, 76-12b01); WASH. REV. CODE §10.95.030.

adherence to the clinical standards. The Tennessee Supreme Court held that the statutory phrase "deficits in adaptive behavior" should be given its ordinary, non-technical meaning. *State v. Smith*, 893 S.W.2d 908, 917 (Tenn. 1994). And the Indiana Supreme Court refused to adopt the DSM-IV's definition of adaptive functioning. *Rondon v. State*, 711 N.E.2d 506, 516 n.14 (Ind. 1999). There was, therefore, no national consensus in *Atkins* regarding how to measure deficits in adaptive functioning. Because Chester has not identified clearly established federal law, habeas relief was properly denied.

2. Underlying his petition is Chester's belief that the legal definition of mental retardation for Eighth Amendment purposes should match the clinical definition. *See* Pet. 16-17 (citing, with approval, Judge Dennis's conclusion that mental retardation is a clinical diagnosis). But that assertion is undermined by Court precedent explicitly recognizing that legal and clinical standards are not always the same. *See, e.g.*, *Hendricks*, 521 U.S. at 359 (noting that legal definitions of "insanity" and "competency" "vary substantially from their psychiatric counterparts"). "Legal definitions . . . which must 'take into account such issues as individual responsibility . . . and competency,' need not mirror those advanced by the medical profession." *Id.* (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii, xxvii (4th ed. 1994)).[11]

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11. Scholars have recognized the different purposes of psychiatry and the legal system, too. *See, e.g.*, Jules B. Gerard,

The Court has held that the "ever-advancing science" of psychiatry "informs but does not control ultimate legal determinations" and that psychiatry's "distinctions do not seek precisely to mirror those of the law." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The Court has also noted the reality that "psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (noting that psychiatry is "not . . . an exact science"). For this reason, it is left to judges and juries to decide mental retardation based on the facts presented by the parties. *Id.* They are not bound by a clinical diagnosis from an expert. *See Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (per curiam) ("But expert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that *the jurors* were entitled to consider the tension between Dr. Chutkow's testimony and their own common-sense understanding of emotional disturbance.").

The two footnotes in the *Atkins* decision on which Chester relies do not demonstrate that the Court, contrary to its usual practice, adopted the clinical standards as the constitutional test for mental retardation. Rather, the Court explicitly left that task

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The Usefulness of the Medical Model to the Legal System, 39 RUTGERS L. REV. 377, 391-394 (1987) (discussing the different purposes of legal system and the medical profession in recognizing mental illness).

to the States. The CCA did not err, then, by refusing to rely solely on the clinical test proffered by Chester. *See Knowles*, 556 U.S. at 122.

C. The *Briseno* Factors Are Consistent with *Atkins*.

The heart of Chester's argument is that the *Briseno* factors, which were announced eight years ago and used by the state court in this case, are not an accurate reflection of mental retardation. But that misses the point entirely. Under AEDPA, the question is whether the state court's decision is consistent with the Court's precedent—not whether it matches up with clinical definitions used by outside medical groups. 28 U.S.C. §2254(d)(1). While the Director agrees with Chester's general principle that Texas cannot define mental retardation so narrowly that no one would ever qualify for it, this is not what Texas has done.

When the Court held in *Atkins* that the mentally retarded may not be given the death penalty, it identified several characteristics of the mentally retarded that make them less culpable than other individuals convicted of capital crimes: "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 318; *see also id.* (noting that, in groups, they are followers, not leaders). Chester's arguments now suggest that those characteristics, taken into account in the *Briseno* factors, are not actually indicative of mental retardation—or at least occur so rarely that the Court's consideration of them

will inevitably lead to the execution of the mentally retarded.

1. Prior to *Atkins*, the Texas Legislature passed a bill banning the execution of the mentally retarded that defined mental retardation with the general three-part AAMR definition. Tex. H.B. 236, 77th Leg., R.S. (2001). The bill, however, was vetoed, *Briseno*, 135 S.W.3d at 6, and the CCA was left in *Briseno* to decide how to define mental retardation. The CCA adopted the general three-part AAMR definition, requiring the defendant to prove, by a preponderance of the evidence, significantly subaverage general intellectual functioning, related limitations in adaptive functioning, and onset before age eighteen.[12] 135 S.W.3d at 7-8.

The CCA then had the foresight to recognize that the question of mental retardation would soon become a battle of experts, especially with respect to the adaptive-functioning element.[13] *Id.* at 8. To assist the fact-finder in considering divergent expert opinions on adaptive functioning, the Court provided seven factors

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12. Chester faults *Briseno* for asking how Texans might define mental retardation. Pet. 26-27. But the Court specifically made that task the States' responsibility. *Atkins*, 536 U.S. at 317. Therefore, it was appropriate for the CCA to consider what Texans might do.

13. The CCA's foresight has proven accurate, as many mental retardation claims involve expert testimony on both sides of the issue. *See, e.g.*, *Ortiz v. United States*, 664 F.3d 1151, 1158-60 (8th Cir. 2011); *Walker v. Kelly*, 593 F.3d 319, 324-29 (4th Cir. 2010); *Larry v. Branker*, 552 F.3d 356, 370 (4th Cir. 2009); *Ybarra v. State*, 247 P.3d 269, 277-81 (Nev. 2011).

to apply. *Id.* at 8-9. These factors focus on the characteristics of the mentally retarded that convinced the *Atkins* Court to categorically ban their execution. Thus, if *Briseno* is inconsistent with the AAMR, so is *Atkins*.

The first factor—whether those who knew the defendant at a young age believed he was mentally retarded and acted accordingly—actually reflects the AAMR definition, which requires the presence of adaptive-functioning deficits before age eighteen. *Atkins*, 536 U.S. at 308 n.3; *Briseno*, 135 S.W.3d at 7-8. While Chester argues that lay persons do not know how to diagnose mental retardation, Pet. 22, they can certainly testify to behaviors and abilities that they witnessed when the defendant was young. And whether those individuals acted in accordance with their belief in the defendant's limitations simply adds or detracts from their credibility.[14]

The next three factors—impulsiveness, leadership, and rational responses to external stimuli—all come

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14. Chester suggests that this position is "intellectually dishonest" because the age-of-onset requirement is separate from the adaptive-functioning requirement. Pet. 28 n.35. But the adaptive-functioning deficits must occur prior to age eighteen. 2.SHRR.124. Thus, although relevant to two parts of the test, Chester's abilities prior to eighteen are certainly at issue, and both sides presented testimony on his school years. 14.SHRR.114-68, 181-216. Moreover, the CCA did not find that Chester satisfied the age-of-onset requirement, as Chester states, Pet. 28 n.35, but noted only that "the evidence in favor" of mental retardation occurred prior to age eighteen. Pet. App'x at D-6. That evidence was ultimately insufficient to meet the adaptive-functioning prong at any age.

from *Atkins*. *Briseno*, 135 S.W.3d at 8. The diminished capacity to control impulses is mentioned repeatedly by the Court as reducing the culpability of the mentally retarded. *Atkins*, 536 U.S. at 306, 318, 320. The Court also stated that, in group settings, the mentally retarded are typically followers, not leaders. *Id.* at 318. And the question whether an individual has rational responses to external stimuli can be seen in the Court's focus on the mentally retarded's capacity to understand the reactions of others, to engage in logical reasoning, and to process information, all of which are referenced throughout the Court's opinion. *Id.* at 306, 318, 320. Indeed, Chester's own expert mentioned decision-making and impulse control as areas in which the mentally retarded struggle. 2.SHRR.60.

The fifth factor of communication is especially relevant, as it is part of the AAMR and APA definitions of adaptive functioning. *Atkins*, 536 U.S. at 308 n.3; *Briseno*, 135 S.W.3d at 8. The diminished capacity to communicate was relied on in *Atkins* to justify a categorical ban, as the Court noted that mentally retarded defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses." *Id.* at 318, 320-21. Chester's communication skills were a point of contention in the state habeas hearing, as Dr. Ott believed Chester displayed deficits in communication, while Dr. Gripon believed Chester was not substantially deficient. 3.SHRR.24, 4.SHRR.281, 288.

The final two factors—the ability to lie and whether the capital offense required forethought and complex execution—reflect the Court's desire to draw a line

between the "cold calculus" of premeditated murder and the more impulsive nature of the mentally retarded. *Atkins*, 536 U.S. at 319; *Briseno*, 135 S.W.3d at 8-9. As in Chester's case, the first diagnosis of mental retardation may come after an offender has been charged with or convicted of capital murder, in other words, when he has an incentive to demonstrate a diminished capacity. Examining specific events in his life, while not necessarily determinative, will provide the jury with a basis on which to judge the offender's current claim of retardation. 4.SHRR.278-79 (State's expert explaining that he considers the facts of the crime because he wants the full picture of Chester's abilities); *see also* 2.SHRR.60 (Chester's expert listing the ability to plan as an area of diminished capacity for the mentally retarded).

It is no answer to say, as Chester does, that *Briseno* did not cite *Atkins* for its seven factors. Pet. 28-29. AEDPA does not permit reversal because a state-court decision fails to cite Court precedent. Rather, the decision itself must be contrary to or an unreasonable application of clearly established federal law. 28 U.S.C. §2254(d)(1). *Briseno* is fully consistent with *Atkins*. It is of no moment that it did not cite *Atkins* as frequently as it could have.

If the defendant disagrees with the facts and the characterizations presented by the prosecution, he may put on contrary evidence and experts. But it is an evidentiary argument—not a constitutional question.

2. Chester's concerns regarding the impact and purpose of *Briseno* do not match what the cases have shown. Multiple individuals in Texas have been

determined to be mentally retarded following the *Briseno* decision. *See, e.g.*, *Ex parte Van Alstyne*, 239 S.W.3d 815, 823-24 (Tex. Crim. App. 2007) (per curiam); *Ex parte DeBlanc*, No. AP-75113, 2005 WL 768441, at *1 (Tex. Crim. App. Mar. 16, 2005) (per curiam); *Ex parte Valdez*, 158 S.W.3d 438, 438 (Tex. Crim. App. 2004) (per curiam); *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (per curiam); *Ex parte Modden*, 147 S.W.3d 293, 299 (Tex. Crim. App. 2004). The *Briseno* factors, thus, permit a finding of mental retardation. And given that the mentally retarded comprise less than 3% of the population, *Atkins*, 536 U.S. at 309 n.5, it is not unusual that many offenders who claim mental retardation are determined not to warrant that diagnosis. *See id.* at 316 (noting that, in the thirteen years prior to *Atkins*, only five States had executed offenders with IQs below 70).

Chester also claims that a single "yes" to one of the *Briseno* factors would result in a finding of no mental retardation. Pet. 25. His argument ignores that the CCA described the *Briseno* factors as "evidentiary factors," not dispositive tests. *Briseno*, 135 S.W.3d at 8. Moreover, Chester has not identified any case in which a Texas court has determined a single *Briseno* factor to be dispositive. Arguments about what a Texas court might hypothetically do are not sufficient to overturn what the court actually did in Chester's case.

Texas is not "blatantly defying" or "willfully misread[ing]" *Atkins*, nor is it "deliberat[ly] implement[ing]" a "scheme that permits execution of

mentally retarded offenders." Pet. 27. Its decisions remain faithful to the principles identified in *Atkins*. For that reason, this case is not comparable to *Panetti v. Quarterman*, which held that the Fifth Circuit had misapplied the principles behind a general standard set by the Court. 551 U.S. 930, 957 (2007). Pet. 19-20. Further, as discussed below, the state court's reading of *Atkins* is in line with the majority of other States that have considered the issue.

II. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH OTHER STATES' DECISIONS.

A. Other States Recognize That *Atkins* Did Not Define Mental Retardation.

Chester also suggests that Texas is out of step with other States when it comes to determining who is mentally retarded. Pet. 30-32. But the case law and statutes from other States do not support his assertion. Other States, like Texas, recognize that *Atkins* provides flexibility in defining mental retardation. And other States, like Texas, consider evidence that does not strictly align with the clinical standards for testing deficits in adaptive functioning. Texas is not an outlier, but part of the majority in considering all of the evidence and leaving the fact-finding to the judge and jury.

Even before the Court made clear in *Bobby v. Bies* that it had not provided a substantive definition of mental retardation, States across the country recognized that they were not bound by the AAMR definition quoted in footnote three of *Atkins*. *Franqui v. State*, 59 So. 3d 82, 94 (Fla. 2011) (noting the "the

broad authority given in *Atkins* to the states to enact their own laws to determine who is mentally retarded, without any requirement that the states adhere to one definition over another"); *Gray v. State*, 887 So. 2d 158, 168 (Miss. 2004) ("Determining who is mentally retarded for purposes of this prohibition has been left to the individual States."); *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. 2003) (stating that "*Atkins* did not define the perimeters of mental retardation, but left 'to the States the task of'" enforcing the restriction); *Winston v. Commonwealth*, 604 S.E.2d 21, 50 (Va. 2004) ("The Supreme Court in *Atkins* did not define mental retardation, nor did it prescribe procedures for determining it.").[15]

As a result, some States have adopted definitions of mental retardation that do not follow the AAMR's definition. For example, Utah limits the deficits in adaptive functioning to "primarily . . . the areas of reasoning or impulse control, or in both of these areas." *State v. Maestas*, No. 20080508, 2012 WL 3176383, at *39 (Utah July 27, 2012) (quoting UTAH CODE §77-15a-102). Mississippi's test includes a fourth prong which requires a defendant to prove that he is not malingering. *Thorson v. State*, 76 So. 3d 667, 670 (Miss. 2011). And Kansas, which was part of the national consensus identified in *Atkins*, requires the defendant to prove that he has significantly subaverage general intellectual functioning "to an extent which substantially impairs one's capacity to

15. *See also Howell v. State*, 151 S.W.3d 450, 457 (Tenn. 2004); *Head v. Hill*, 587 S.E.2d 613, 621 (Ga. 2003).

appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." KAN. STAT. ANN. §21-6622(h); *see also Atkins*, 536 U.S. at 342-43 & n.2 (Scalia, J., dissenting) (noting that Kansas would exempt only the severely mentally retarded from execution).[16]

The Arizona Supreme Court has specifically held that the DSM-IV definition of mental retardation "is not the same as the statutory definition." *State v. Grell*, 135 P.3d 696, 709 (Ariz. 2006). The court drew the distinction between the clinical definition, which permitted a finding of deficits in adaptive functioning "based solely on proof of specific deficits or deficits in only two areas," and the statutory definition, which required an "overall assessment of the defendant's ability to meet society's expectations of him." *Id.*

Thus, many States have recognized that the definition of mental retardation need not exactly match the AAMR's clinical standards or those used by other medical professionals. Even though Texas uses the three-part definition, Texas is not alone in holding that it is not bound by clinical definitions.

B. Other States Rely on Evidence That May Not Be Part of the Clinical Standards.

Chester's appendix, describing the mental retardation definitions of other States, reflects the

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16. *See also Miller v. State*, 362 S.W.3d 264, 278 (Ark. 2010) (citing ARK. CODE ANN. §5-4-618(a)(2), which creates a rebuttable presumption of mental retardation only if the defendant's IQ is below 65).

problem with his argument. Texas joins the majority of States that have defined mental retardation with the general three-part test. But many States do not strictly adhere to the clinical standards when considering deficits in adaptive functioning. Review of other States' adaptive-functioning decisions makes clear that the characteristics in *Atkins* are key—not the AAMR's test.

The Louisiana Supreme Court has recognized the "factors" used by the Court in *Atkins*. *State v. Williams*, 22 So. 3d 867, 881 (La. 2009) (quoting *Atkins*' reference to "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"). In *Williams*, the court considered the defendant's ability to communicate, to recall past events, to understand and anticipate the reactions of others, and his ability to learn from experience to determine that he had not proven his mental retardation. *Id.* at 886. Likewise, the Oklahoma Court of Criminal Appeals also listed the defendant's ability to communicate, socialize, understand others, and plan as facts indicating he was not mentally retarded. *Myers v. State*, 130 P.3d 262, 268 (Okla. Crim. App. 2005).

Other States have also relied on the defendant's criminal conduct and ability to lie as evidence that he fails to meet the adaptive-functioning prong. The Florida Supreme Court has noted that "[t]he experts also agreed that the planning of the murder and cover-up in this case are inconsistent with a finding

that [the defendant] suffers from mental retardation." *Phillips v. State*, 984 So. 2d 503, 512 (Fla. 2008) (per curiam). The Oklahoma Court of Criminal Appeals in *Myers* relied on a defendant's ability "to mislead people and, when confronted with inconsistencies in his stories, he could conform his story to fit the facts." 130 P.3d at 268. Alabama has also found a defendant's complex criminal activity to be "insightful." *See Smith v. State*, No. 1060427, 2007 WL 1519869, at *9 (Ala. May 25, 2007) ("More insightful into Smith's adaptive behavior is the fact that Smith was involved in an interstate illegal-drug enterprise."); *see also Morris v. State*, 60 So. 3d 326, 347 (Ala. Crim. App. 2010) (relying on evidence that Morris had "engaged in drug dealing and gambling").

The Fourth Circuit, applying the AAMR's clinical definition, held that the defendant's "conceal[ment] [of] much of his criminal activity from his family" was evidence that he did not have deficits in the conceptual area of adaptive functioning, and his distribution of drugs and manipulation were evidence that he did not have deficits in the social area. *Green v. Johnson*, 515 F.3d 290, 302 (4th Cir. 2008).

As noted by the Mississippi Supreme Court, "there is considerable, sincere disagreement among professionals and scholars in the field as to the best method for measuring adaptive functioning. The concept and measurement of adaptive functioning is an unsettled area without consensus among experts." *Doss v. State*, 19 So. 3d 690, 714 (Miss. 2009); *see also* Symposium, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L. J. 1203, 1209-12,

1218-22 (2008) (discussing the evolution of the AAMR's definition of mental retardation and the variety of ways to measure adaptive functioning); Note, *Implementing* Atkins, 116 HARV. L. REV. 2565, 2575-76 (2003) (describing difficulty in assessing adaptive functioning). While generally following the three-part test, many States do not rely solely on clinical standards to determine who is mentally retarded. There is, therefore, no split among the States that requires this Court's intervention to resolve.

C. The Determination of Mental Retardation Is a Fact Question That Is Decided on a Case-by-Case Basis.

At bottom, Chester's argument would take the decision of whether a defendant is mentally retarded out of the hands of the fact-finder and place it into the hands of medical professionals. The Court has not required this result and, for the reasons noted above, such a ruling would be at odds with how the Court has treated other areas where mental health and the law intersect.

In other areas of law, the Court has recognized the role of the fact-finder. For example, given that there "often is no single, accurate psychiatric conclusion on legal insanity in a given case," fact-finders must "resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." *Ake*, 470 U.S. at 81. And just this past term, the Court held that a jury was allowed to use its own common sense understanding of "extreme emotional disturbance" to reject the expert opinion proffered by

the defendant. *Parker*, 132 S. Ct. at 2153.[17] The States have followed suit.

The California Supreme Court followed Georgia's practice—that the jury is not "bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation." *In re Hawthorne*, 105 P.3d 552, 559 (Cal. 2005) (citation and internal quotation marks omitted). The California court further stated that "mental retardation is a question of fact. It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." *Id.* at 558 (citations omitted). Arkansas has permitted a jury use lay testimony to reject that of an expert. *Morris*, 60 So. 3d at 346-47.

Similarly, Pennsylvania has permitted the lay opinions of the defendant's family and friends to contradict the conclusions of an expert witness. *Commonwealth v. Keaton*, 45 A.3d 1050, 1082 (Pa. 2012). And Louisiana has warned that "the trial court

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17. In an analogous situation, the Court has recently disapproved of a court of appeals's reliance on standards set by the American Bar Association to determine whether counsel's representation fell below Sixth Amendment standards. *Bobby v. Van Hook*, 558 U.S. 4, 16-17 (2009) (per curiam). Although the Court had referenced the ABA standards in prior decisions, they were only "guides" to what was reasonable, not the definition itself. *Id.* The Court held that the only question is what the Constitution requires, regardless of what a private organization might desire. *Id.*

must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts." *State v. Williams*, 831 So. 2d 835, 859 (La. 2002).[18]

Expert opinions on mental health issues are undoubtedly helpful, but they are not dispositive. The fact-finder is still free to consider all of the evidence and reach his own conclusion.

III. FIFTH CIRCUIT CORRECTLY HELD THAT AEDPA DID NOT PERMIT REVERSAL.

Finally, the Fifth Circuit properly applied AEDPA's relitigation bar when affirming the denial of habeas relief. The court identified the relevant AEDPA standards and turned to a discussion of *Atkins*. Pet. App'x A-8-11. It noted *Atkins*'s recognition of the disagreement over determining which offenders are, in fact, mentally retarded and the Court's decision to leave that matter to the States. *Id.* at 9-10. Considering the *Briseno* factors, the court stated that "nothing about them contradicts *Atkins*, as they were developed explicitly to comply with *Atkins*." *Id.* at 13-14. Given that background, the court, then, found nothing about the state court's decision that was contrary to or an unreasonable application of *Atkins*. *Id.* at 14-16.

The state trial court was faced with experts who reviewed the same evidence and reached different

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18. For this reason, the state court was not bound by Chester's score on the Vineland assessment of his adaptive functioning. 3.SHRR.20-22.

conclusions. The state court found the State's witnesses and evidence more credible and ruled accordingly. Try as he might, Chester cannot turn this into a constitutional question. It is simply a matter of evidence and credibility. The Fifth Circuit properly affirmed the denial of habeas relief. There is no reason for the Court to intervene.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General
of Texas

DANIEL T. HODGE
First Assistant
Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

JONATHAN F. MITCHELL
Solicitor General

BETH KLUSMANN
Assistant Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700
Beth.Klusmann@
texasattorneygeneral.gov

September 17, 2012