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 DIVISION,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court should grant certiorari to clarify that *Atkins v. Virginia*, 536 U.S. 304 (2002), is founded on a national consensus definition of the mentally retarded. *Atkins*' decision to exempt a class of offenders from execution would be meaningless if there were no common understanding of the perimeters of the class.

This case is not a simple dispute among experts over whether a particular offender is mentally retarded. This case addresses Texas's systematic evasion of *Atkins* through use of criteria that do not validly and reliably identify the mentally retarded and protect them from execution.

The Director contends that, in applying *Atkins*, Texas may depart from the national consensus and define a narrower state consensus concerning who should not be executed. [Opp.21 n.12] The *Briseno* factors were developed expressly "for determining whether a defendant had 'that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.'" *Ex parte Sosa*, 364 S.W.3d 889, 891 (Tex. Crim. App. 2012) (quoting *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004)). Texas's reliance on the *Briseno* factors to determine mental retardation uses idiosyncratic, non-scientific criteria unrelated to the national consensus on diagnosing mental retardation. Texas's approach is contrary to and an unreasonable

application of *Atkins* because it permits mentally retarded individuals to be executed.

STATEMENT OF THE CASE

The Director emphasizes the crimes that Chester admitted committing.[1] The not-so-subtle message is that someone who could commit this string of crimes must not be mentally retarded – or else that Chester is a dangerous man who should be executed regardless of his intellectual deficits.

Mentally retarded people can and do commit horrific offenses, evade detection, and lie about their activities. *Atkins* would not have been necessary if mentally retarded offenders were not capable of planning and carrying out crimes so awful that jurors determine that death is an appropriate penalty. After *Atkins*, dozens of such defendants have been exempted from execution because they are mentally retarded. Many committed not just a capital offense that involved some planning, but other serious crimes as well. Appendix 1 lists examples.

In any event, the Director's summary of facts reinforces that Chester is mentally retarded. None of Chester's crimes was sophisticated.[2] His attempt to

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[1] Not all of Chester's admissions were supported by corroborating evidence tying Chester to the crime. The Port Arthur police seemingly used Chester's willingness to confess to resolve a list of unsolved offenses. Chester did not write or dictate his "confessions." [PenaltyRR19:146-48]

[2] Chester's attempted robberies involved pointing a gun through a window and unsuccessfully demanding money.

lie about where he hid the gun was quickly exposed. [PenaltyRR19:93-95] His decision to testify against the advice of counsel and the threatening rant that followed convincingly displayed his "diminished capacities to understand and process information, ... to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318.

The Director mistakenly suggests there is a dispute over whether Chester proved his intellectual and adaptive deficits were manifest before age 18. [Opp.22 n.14] The TCCA found no such dispute. [App.A-4; App.D-6] Below, the Director conceded the only dispute concerns Chester's adaptive functioning. [5thCir.R.456][3]

[PenaltyRR16:75-76, 88-90] His capital offense was entirely impulsive: he was in the midst of an ineptly planned rape when he was interrupted a second time by a family member coming to the door; lacking any ability to reason out a different solution, he shot the new arrival. [PenaltyRR18:24, 61-64] He fled the scene to his father's house and was discovered there hours later. [PenaltyRR18:79-81] Chester was the immediate prime suspect. [PenaltyRR18:97] His feeble attempt to bluff his way out was easily rebuffed, and the police led him through a series of confessions. [PenaltyRR19:90-91, 96-144]

[3] The evidence that Chester displayed both intellectual and adaptive deficits in his developmental years is substantial. [Pet.6-7; App.A-52-53] Chester scored below 70 on IQ tests; he was *labeled* "learning disabled" but did not meet the criteria because his low achievement skills matched his low IQ. [App.A-53 n.19; App.D-8-9] At age 18 – right at the end of the developmental period – Chester scored 69 on an IQ test and 57 on a Vineland test of adaptive functioning administered by the Texas Department of Criminal Justice. [App.D-10] Based on these scores, clinical interviews, and a month of observation,

REASONS FOR GRANTING THE WRIT

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

Atkins rests on the national consensus that defines the mentally retarded as those having substantial deficits in both intellectual and adaptive functioning, with an onset before age 18. 536 U.S. at 308 n.3, 317 n.22, 318. The Director acknowledges this. [Opp.16] From there, it should follow that the Director also would recognize a consensus on what adaptive functioning is and how it is measured, for it is meaningless to recognize a consensus that significant adaptive deficits are a component of mental retardation if there is no consensus on what "significant adaptive deficits" means.

The Director, however, disputes that the national consensus includes a common understanding of how to define significant adaptive deficits. This is both illogical and factually incorrect. "Limitations in adaptive skills" is a clinical concept. *Atkins* quoted the nearly identical definitions from

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TDCJ placed Chester in its Mentally Retarded Offenders Program. [Pet.8] TDCJ *labeled* Chester "borderline intellectual functioning," but Texas's expert joined the defense experts in testifying that the proper diagnosis, given Chester's IQ and Vineland scores, was "mental retardation." [Pet.8-9]

the APA and AAMR. 536 U.S. at 308 n.3. *Atkins* did not quote any lay dictionary. *Atkins*' recognition of "limitations in adaptive skills" as a component of the consensus definition of mental retardation, *id.* at 318, necessarily requires that states applying this concept must measure "limitations in adaptive skills" consistently with the clinical concept.

The Director's attempt to portray a professional debate over what "limitations in adaptive functioning" means or how it should be measured is inaccurate. [Opp.30-31] Professional disagreements sometimes exist regarding how best to assess a particular individual, but the consensus of the mental health profession regarding acceptable ways to determine mental retardation plainly is reflected in the APA's and AAMR's published, peer-reviewed standards, not in *Briseno*. The Director points to no expert opinion affirming that the *Briseno* factors offer a valid and reliable way to measure deficits in adaptive functioning for purposes of diagnosing mental retardation. If the *Briseno* factors had professional support, the AAIDD (the current name of the former AAMR) would have supported the Director, not Chester, in its amicus brief.

Indeed, the Director does not claim that the *Briseno* factors measure "limitations in adaptive functioning" in a way consistent with the clinical standards. [Opp.20][4] Certainly, they do not. First, contrary to the professional understanding of

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[4] Earlier the Director admitted that two of the factors are *not* good tests for identifying the mentally retarded. [5thCir.R.451]

"adaptive deficits," *Briseno* directs the fact-finder to catalogue an offender's strengths, not his limitations.[5] Second, *Briseno* permits a defendant to be classified "not mentally retarded" whenever he has *some* capacity, without looking for *diminished* capacities.[6] Third, *Briseno* improperly focuses on isolated instances of behavior, rather than typical functioning.[7] Fourth, *Briseno* addresses capabilities that have no necessary connection to mental retardation.[8] Even the TCCA admitted that the *Briseno* factors are "non-diagnostic."[9]

The Director contends that inconsistency with the clinical standards is not legally relevant. [Opp.20] The issue, he argues, is only whether the *Briseno* factors are consistent with *Atkins*. Yet consistency with *Atkins* cannot be divorced from consistency with the clinical standards. *Atkins*' substantive ban on executing the mentally retarded rests on the clinical definitions. A test for mental

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[5] Pet.17; App.A-58-59.

[6] Pet.25; *Atkins*, 536 U.S. at 318 ("by definition [the mentally retarded] have *diminished* capacities") (emphasis added).

[7] Pet.17-18 & nn.20-21; App.A-61-62.

[8] Pet.21-25; App.A-60-61. Contradicting *Briseno*'s tests for mental retardation, Texas's expert testified that mentally retarded people are usually rational and communicate coherently; they can lie and put forth other deceptive behaviors; they can hold a job, travel, get a driver's license, learn academic skills, and live independently; and laypeople cannot always recognize mental retardation. [RR5:16-25]

[9] *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007).

retardation that is inconsistent with the AAMR and APA definitions is also inconsistent with *Atkins*.

The Director's showing that the *Briseno* factors relate loosely to language in *Atkins* describing the mentally retarded [Opp.21-24] does not make the use of these factors to determine mental retardation consistent with *Atkins*. A description of the characteristics commonly associated with a group cannot substitute for diagnostic criteria, since not all members of a group display those characteristics. For example, the mentally retarded are more likely to be male than female,[10] yet plainly a set of factors that evaluated adaptive functioning by looking at gender would be inconsistent with both *Atkins* and the clinical standards because it would exclude people who are mentally retarded. In relying on *Atkins*' descriptive language, the Director confuses description and diagnosis.

Atkins moved beyond *Penry v. Lynaugh*, 492 U.S. 302 (1989), by not looking at descriptive factors that may justify exempting an individual from the death penalty but instead mandating that an entire class of people is ineligible for execution. 536 U.S. at 320. *Atkins*' categorical bar means the exemption applies even to a particular member of the class who does not share all the descriptive factors that support exemption of the class.

This point is perhaps most obviously made by analogy to juveniles. *Roper v. Simmons*, 543 U.S.

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[10] DSM-IV-TR at 46.

551, 569-71 (2005), exempted all juveniles from execution after observing that juveniles as a class tend to be impetuous, irresponsible, and susceptible to negative influences and outside pressures. Having offered these descriptions, this Court would not tolerate Texas adopting a *Briseno*-equivalent for juveniles that looked not at an offender's chronological age but made him eligible for execution absent a finding that he in particular was impetuous, irresponsible, and subject to negative influences and pressures. But that is parallel to what the Director defends here.

The Director's comparisons to the broad leeway granted to states to define "insanity" and "incompetence" or the grounds for civil commitment are misplaced. Those are all *legal* concepts. The DSM contains no definition of "insanity," "incompetence," or "grounds for civil commitment." By contrast, mental retardation is a medical term; it has no meaning apart from the meaning supplied by the mental health profession. In incorporating this medical term into its Eighth Amendment jurisprudence, *Atkins* required states to assess mental retardation in capital cases consistently with the medical definition.[11] In relying on the *Briseno* factors, Texas does not do this.

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[11] *Bobby v. Bies*, 556 U.S. 825, 831 (2009), does not hold otherwise. Its statement that *Atkins* did not adopt "definitive procedural or substantive grounds" for determining whether an offender is mentally retarded did not authorize states to adopt standards contradictory to the consensus definition of mental retardation on which *Atkins* is based.

In another attempt to counter the idea that the national consensus embraces the clinical definition of "adaptive functioning deficits," the Director asserts that not all states that banned executing the mentally retarded pre-*Atkins* incorporated the APA or AAMR criteria into their definitions of mental retardation. In fact, virtually all the pre-*Atkins* statutes used the three-pronged definition of mental retardation developed by the medical profession – which makes sense, as no non-medical definition of mental retardation exists. The earliest statutes did not elaborate on the definition of adaptive functioning.[12] Reflecting increasing sophistication and understanding of mental retardation – and perhaps hoping to prevent reliance on stereotypes and misinformation – four of the next nine statutes added a definition drawn from the narrative in the DSM's treatment of mental retardation.[13] The last two states to adopt a definition pre-*Atkins* specifically adopted the DSM-IV-TR definition of adaptive functioning.[14] Post-*Atkins*, five courts applying pre-existing statutes that contain just the three prongs interpreted them to require following the AAMR and APA criteria when assessing a defendant's adaptive functioning.[15]

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[12] App.F (Georgia, Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado).

[13] *Id.* (Washington, Arizona, Connecticut, Florida)

[14] *Id.* (Missouri, North Carolina).

[15] *Id.* (Georgia, Kentucky, Tennessee, Arkansas, Nebraska); *see id.* (Indiana (requiring statute to be applied consistently with the clinical standards)).

Reflecting most states' understanding of *Atkins*, 12 of the 15 states that have adopted definitions of mental retardation post-*Atkins* expressly follow the clinical definition, either by statute[16] or case law,[17] often indicating they believe *Atkins* requires this. The California Supreme Court held that, because the three-pronged definition derives from the mental health profession, courts must apply the APA and AAMR criteria when evaluating adaptive functioning for an *Atkins* claim.[18] Texas, however, directs its fact-finders to use any of seven vague, invented, non-clinical factors and provides that these trump the consensus definition of adaptive deficits.

To refute the claim that the problems posed by *Briseno* are widespread, the Director disingenuously minimizes the significance that Texas gives to the *Briseno* factors, quoting the passage in *Briseno* that states that these factors might "assist" a fact-finder. [Opp.11] That description does not portray how the *Briseno* factors actually are used.

In *Ex parte Sosa*, which the Director does not mention, the TCCA explicitly rejected the clinical standards as the determinant of mental retardation in Texas and required fact-finders to give controlling

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[16] *Id.* (Delaware, Idaho, Illinois, Louisiana, Oklahoma, Virginia).

[17] *Id.* (Alabama, California, Mississippi, New Jersey, Ohio, Pennsylvania).

[18] *In re Hawthorne*, 105 P.3d 552, 556-57 (Cal. 2005).

weight to the *Briseno* factors. 364 S.W.3d at 892.[19] In Chester's case, prefiguring *Sosa*, the TCCA used solely the *Briseno* factors to evaluate adaptive functioning. No witness ever questioned Chester's Vineland score [App.A-52], testified that Chester did not have significant adaptive deficits under the APA and AAMR criteria, or claimed that the psychologist who diagnosed Chester mentally retarded following the capital offense was mistaken. After Texas's expert testified that the proper diagnosis for someone with Chester's IQ and Vineland scores is "mental retardation," and after Texas's expert endorsed the competence and ethics of the psychologist who diagnosed Chester's mental retardation pre-*Atkins* [RR5:44, 83-84; PenaltyRR20:61-64], the TCCA relied *exclusively* on the *Briseno* factors to find that Chester is not mentally retarded. [App.D-11-22][20]

Allowing the *Briseno* factors to supersede the clinical standards makes mentally retarded offenders eligible for execution. Even before *Sosa*, Texas defendants prevailed in proportionately fewer *Atkins* claims than petitioners nationwide. [Pet.32 n.43] The Director's citation to five Texas defendants who were found mentally retarded [Opp.25] does not

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[19] *Sosa* termed the clinical standards "instructive" but held they do not "conclusive[ly] answer" whether a defendant is exempt from execution in Texas. 364 S.W.3d at 892.

[20] Belying the Director's assertion that *Briseno* does not authorize denying an *Atkins* claim based on just one of the factors [Opp.25], the district court in this case upheld the state courts' determination based on *only* the seventh factor. [App.C-16]

refute that use of *Briseno* enables the execution of mentally retarded offenders. All those cases precede *Chester* and *Sosa*. Three of the opinions contain no indication whether *Briseno* factors were considered.[21] In the two other cases, *Briseno* factors played a minor role in the TCCA's decisions to uphold the trial courts' retardation findings.[22] The Director cites no case where a court emphasizing *Briseno* factors found an offender mentally retarded.

Contrary to the Director's claim, using *Briseno* factors to determine adaptive limitations makes Texas an outlier. The state courts whose opinions the Director cites [Opp.26-30] merely reiterate that *Atkins* allowed states to develop "appropriate" criteria for assessing mental retardation. With the arguable exception of Utah, *all* the states the Director discusses have adopted standards consistent with the APA and AAMR definitions.[23] None besides

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[21] *Ex parte Valdez*, 158 S.W.3d 438 (Tex. Crim. App. 2004); *Ex parte DeBlanc*, 2005 WL 768441 (Tex. Crim. App. March 16, 2005); *Ex parte Bell*, 152 S.W.3d 103 (Tex. Crim. App. 2004)

[22] *Van Alstyne*, 239 S.W.3d at 819-23; *Ex parte Modden*, 147 S.W.3d 293, 295-99 (Tex. Crim. App. 2004). In *Van Alstyne*, 239 S.W.3d at 825-26, dissenters argued that, even if the defendant is mentally retarded under the APA and AAMR tests, he is eligible for execution in Texas. In *Modden*, 147 S.W.3d at 301, dissenters argued defendant did not establish his retardation under *Briseno*.

[23] App.F (Alabama (by case law applies the clinical definitions), Arizona (*State v. Grell*, 135 P.3d 696, 705 (Ariz. 2006), holds that states "must ensure that those about whom there is national consensus are protected from execution"), Florida (case holds statutory definition is consistent with APA definition), Kansas (statutory definition of adaptive behavior is

Texas has held that a state may rely on the consensus of attitudes in that state about who should be spared execution instead of relying on the national consensus.

Atkins directed states to "develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). *Panetti v. Quarterman*, 551 U.S. 930, 935, 948-62 (2007), makes clear that, even when this Court declines to adopt "definitive" standards and leaves the states to adopt "appropriate" ways to implement a new constitutional standard, a state's chosen definition and procedure can be found contrary to and an unreasonable application of clearly established Supreme Court precedent. The need for an accurate determination of facts is especially compelling when a fact establishes eligibility for execution. *Id.* at 948-49. A test for mental retardation that does not reliably and validly determine mental retardation is not an appropriate way of implementing *Atkins* but is contrary to and an unreasonable application of *Atkins*.

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based on APA's commentary), Louisiana (statute follows AAMR-10 definition of adaptive deficits), Mississippi (case adopts APA definition), Missouri (statute tracks APA's criteria on adaptive deficits), Oklahoma (statute tracks APA's criteria on adaptive deficits), Tennessee (cases follow clinical definitions), Virginia (statute tracks AAMR-10 criteria on adaptive deficits)).

CONCLUSION

This Court should grant certiorari to enforce *Atkins*.

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October 1, 2012

Cases Illustrating The Ability Of Mentally Retarded Offenders To Plan And Execute Crimes

In re Coleman, No.SCR-10143 (stipulation of Aug. 27, 2008) (state, after testing and investigation, stipulated defendant is mentally retarded);
People v. Coleman, 768 P.2d 32 (Cal. 1989) (defendant sought out people he had known before, murdered two and raped a third; criminal record included a prior rape and robbery where defendant forced victim to cash a check for him)

Wells v. State, 903 So.2d 739 (Miss. 2005) (finding defendant mentally retarded);
Wells v. State, 698 So.2d 497 (Miss. 1997) (defendant planned and executed murder of his stepson, then hid the body and evidence and cleaned up the scene; defendant was discovered only after he confessed; record included other violent crimes after the capital offense)

In re Parkus, 219 S.W.3d 250 (Mo. 2007) (finding defendant mentally retarded);
State v. Parkus, 753 S.W.2d 881 (Mo. 1988) (defendant tied up and strangled inmate in prison, then denied involvement and tried to escape; prior record included two rapes and three attempted stranglings similar to the capital offense)

State v. Gumm, 864 N.E.2d 133 (Ohio App. 2006) (finding defendant mentally retarded);

State v. Gumm, 653 N.E.2d 253 (Ohio 1995) (defendant deceived child victim to lure him to a basement, then assaulted, raped, and killed him, and evaded detection for weeks; record included other violent acts including attempted rape)

Pickens v. State, 126 P.3d 612 (Okla. Crim. App. 2005) (finding defendant mentally retarded);
Pickens v. State, 19 P.3d 866 (Okla. Crim. App. 2001) (defendant committed robbery and murdered clerk at a convenience store to avoid leaving witnesses; committed a similar robbery-murder four days later, and attempted another robbery and murder on the following day; had prior criminal record as well)

Lambert v. State, 126 P.3d 646 (Okla. Crim. App. 2005) (finding defendant mentally retarded);
Lambert v. State, 984 P.2d 221 (Okla. Crim. App. 1999) (defendant stalked victims and committed robbery, kidnap, and murder of two victims, then evaded authorities for weeks; record included crimes committed before and after the capital offense, including home invasion, kidnapping, and planning robberies; defendant was the leader in previous crimes)

Commonwealth v. Gibson, 925 A.2d 167 (Pa. 2007) (finding defendant mentally retarded);
Commonwealth v. Gibson, 720 A.2d 473 (Pa. 1998) (defendant committed premeditated robbery and murder to obtain money to buy a vehicle, then hid evidence, and lied to the police; record included at

least six prior felonies including robberies and burglaries)

Commonwealth v. Miller, 951 A.2d 322 (Pa. 2008) (finding defendant mentally retarded);
Commonwealth v. Miller, 664 A.2d 1310 (Pa. 1995) (defendant abducted and raped one woman, lied to police when arrested, then confessed to two separate rapes and murders 3 and 5 years earlier; in one, he had been questioned and released, and in the other he had never been suspected; record included at least 10 other criminal convictions)

Ex parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004) (finding defendant mentally retarded after state's expert agreed on mental retardation; defendant planned and carried out robbery of convenience store, stabbing victim to death to avoid leaving a witness, then hid evidence, and when confronted "dodged" police questions and avoided arrest for over a month; in a separate robbery he required victim-witness to strip in order to delay going to police; defendant made a weapon in prison as part of planning and carrying out an assault, and he planned his escape; prior offenses over at least 16 years including a series of burglaries; expert called his acts complex and manipulative)

Ex parte Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004) (finding defendant mentally retarded);
Bell v. State, 582 S.W.2d 800 (Tex. Crim. App. 1979) (defendant planned and executed murder of his

former employer and his wife, bringing with him handcuffs and an extension cord to tie victims)

Ex parte Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004) (finding defendant mentally retarded);
Valdez v. State, 776 S.W.2d 162 (Tex. Crim. App. 1989) (defendant shot traffic officer who stopped his car, fled police, hid the weapon, lied about being the shooter; court described it as a cold-blooded, deliberate killing; defendant was involved in drug dealing and had a record of at least five prior felonies and admitted other burglaries)

Ex parte DeBlanc, 2005 WL 768441 (Tex. Crim. App. Mar. 16, 2005) (finding defendant mentally retarded);
DeBlanc v. State, 799 S.W.2d 701 (Tex. Crim. App. 1990) (capital offense followed planned burglary of church, to which defendant brought a weapon)

Ex parte Van Alstyne, 239 S.W.3d 815 (Tex. Crim. App. 2007) (finding defendant mentally retarded);
Van Alstyne v. State, No. 71,510 (June 7, 1995) (unpublished opinion) (defendant ordered pizza, ambushed and stabbed the delivery man; had a prior conviction for attempted armed robbery)

Ex parte Lane, 2008 WL 152722 (Tex. Crim. App. January 16, 2008) (prosecution stipulated defendant was mentally retarded and governor commuted sentence);
Lane v. State, 933 S.W.2d 504 (Tex. Crim. App. 1996) (defendant kidnapped, sexually assaulted, and

murdered child for which he was not arrested for 10 years; he admitted a similar kidnap, murder, and rape of another child; provided a false alibi when arrested)

United States v. Davis, 611 F. Supp. 2d 472 (D. Md. 2009) (finding defendant mentally retarded pretrial; defendant charged with robbery and murder; record included drug trafficking, with a long history of criminal behavior including premeditated robberies of other dealers and people who cheated him);
United States v. Davis, 690 F.3d 226 (4th Cir. 2012) (affirming conviction; defendant held up armored vehicle leaving bank with deposit, shot driver, then carjacked another vehicle to flee the scene)

Moore v. Quarterman, 342 Fed. Appx. 65, 2009 WL 2573295 (5th Cir. Aug. 21, 2009) (finding defendant mentally retarded);
Moore v State, 882 S.W.2d 844 (Tex. Crim. App. 1994) (defendant planned and carried out a robbery at a rural home, stopping on a ruse of needing automotive assistance, shooting both residents, killing one and injuring the other; previous record not stated)

Holladay v. Allen, 555 F.3d 1346 (11th Cir, 2009) (finding defendant mentally retarded; after capital offense, defendant eluded police for months; record included juvenile burglaries, long series of felonies over 20 years including sex assault, burglary, receiving stolen property, kidnapping, attempted

murder, a successful escape from prison, and an attempted escape);
Holladay v. State, 549 So.2d 122 (Ala. Crim. App. 1988) (defendant planned and carried out murder of his ex-wife and two other people found with her)