No. 14-_____

IN THE

Supreme Court of the United States

JULIUS JEROME MURPHY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Julius Murphy, a Texas death-row inmate, had a tested IQ of 71 at the time of his crime and trial. Under this Court's decisions in *Atkins* v. *Virginia*, 536 U.S. 304 (2002) and *Hall* v. *Florida*, __ U.S. __, 134 S. Ct. 1986 (2014), he is intellectually disabled, and the Eighth Amendment prohibits his execution.

The Texas courts below concluded, however, that based on IQ tests administered *fifteen years* after his crime and trial, petitioner was not intellectually disabled. The first question presented is:

1. Whether a capital defendant's intellectual function should be assessed at the time of the crime and trial, as *Atkins* instructs and as multiple state and federal courts have held, or at some indeterminate later time, as Texas, Alabama, Florida, and Oklahoma have held.

The trial court further justified its conclusion that petitioner was not intellectually disabled by referencing an outdated Texas case as well as his own observations at petitioner's trial fifteen years earlier—where petitioner did not testify. The second question presented is:

2. Whether a state court's reliance on nondiagnostic criteria and lay observation violates this Court's pronouncements in *Atkins* and *Hall* that any determination of intellectual disability must be made pursuant to clinical standards.

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Petitioner Julius Murphy respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. 1a) is available at 2014 WL 6462841. The district court's order stating its findings of fact and conclusions of law (Pet. App. 3a) is unreported.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on November 19, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [U.S. Const. amend. VIII.]

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV.]

INTRODUCTION

At the time of his crime and trial in 1998, Petitioner Julius Murphy had a tested IQ of 71. He presented substantial deficits across the board with respect to adaptive functioning. He was nineteen years old.

After this Court announced a constitutional prohibition against executing the intellectually disabled in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), Mr. Murphy sought state post-conviction relief from his death sentence, contending that his intellectual disability rendered him ineligible to be executed. The Texas Court of Criminal Appeals concluded that Mr. Murphy had made out a prima facie case of intellectual disability and remanded for an evidentiary hearing.

At that hearing, the trial court concluded that Mr. Murphy's IQ at the time of his crime and trial was 71. That tested number is significant. It is the same score this Court found to be "evidence of intellectual disability" in *Hall* v. *Florida*, __ U.S. __, 134 S. Ct. 1986, 1992 (2014).

Despite that finding, however, and despite overwhelming evidence of multiple limitations in Mr. Murphy's adaptive functioning consistent with intellectual disability, the court concluded that Mr. Mur-

phy failed to demonstrate that he is intellectually disabled. Pet. App. 11a ¶ 39. It made that finding in part based on IQ scores obtained more than fifteen years after the underlying crime and trial. In relying on those after-the-fact IQ scores for its conclusion, the Texas court put itself at odds with *Atkins* and multiple other state and federal courts—all of which have instructed that a capital defendant's IQ should be measured at the time of the crime and trial—and joined Alabama, Florida, and Oklahoma in determining that IQ may be assessed and re-assessed throughout a capital defendant's time on death row.

The Texas court's decision was also based in large part on consideration of nondiagnostic criteria—including the now-discredited framework set forth in *Ex parte Briseño*, 135 S.W. 3d 1 (Tex. Crim. App. 2004) and its own lay observations of Mr. Murphy at his trial (at which he did not testify) fifteen years earlier. *Hall* forbids such forays into nondiagnostic factors to determine intellectual capability. And the Due Process Clause guaranteed Mr. Murphy an impartial judge, not one already disposed to find him sufficiently intellectually equipped to be executed.

Because of the lower courts' rulings, the State of Texas may execute a man with a tested IQ of 71 at the time of his crime and trial.

The petition should be granted.

STATEMENT OF THE CASE

In 1998, Mr. Murphy was convicted of capital murder and sentenced to death in Texas state court. His tested IQ at the time was 71.

In 2002, this Court issued its decision in *Atkins* v. *Virginia*, holding that it is unconstitutional to exe-

cute the intellectually disabled. 536 U.S. at 321. After *Atkins* came down, Mr. Murphy sought habeas relief in Texas state court on the ground that he is intellectually disabled and thus constitutionally ineligible to be executed. The Texas Court of Criminal Appeals found that Mr. Murphy had presented a prima facie case of intellectual disability and remanded the case to the trial court for an *Atkins* hearing.

For purposes of the *Atkins* inquiry, Texas has adopted the American Association on Mental Retardation (AAMR)'s clinical definition of intellectual disability.[1] Under that test, a person is intellectually disabled if he has (1) significantly subaverage general intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurred during the developmental period, *i.e.*, before he turned 18. *Gallo* v. *State*, 239 S.W.3d 757, 769 (Tex. Crim. App. 2007). At his hearing, Mr. Murphy presented substantial and largely unchallenged evidence demonstrating that, at the time of his crime and trial, he satisfied each of the AAMR's three clinical criteria for intellectual disability.

1. *Intellectual Functioning.* Before Mr. Murphy's trial in 1998, Dr. Stephen Martin administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R). When adjusted to account for several undisputed scoring errors, that test yielded an IQ score of 71. Pet. App. 8a ¶ 24. The State did not contest the score

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[1] The American Association on Mental Retardation has changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD).

or suggest that it was marred by any impropriety. And at his *Atkins* hearing, the Texas trial court ultimately found as a fact that Mr. Murphy's IQ at the time of the crime and trial was 71.

While Mr. Murphy's *Atkins* hearing was already under way, however, the State sought to administer a new IQ test. Over Mr. Murphy's objections, the Texas court permitted the State to administer two additional tests in 2012 and 2013, fifteen years after the crime and trial. The 2012 test yielded a score of 95. The 2013 test yielded a score of 94.[2]

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[2] The State's own expert conceded that there are a number of reasons why a person's IQ may increase after one's teen years, and may even move from intellectual disability into a presumptive non-disabled category. Jan. 6, 2014 Hr'g Tr. at 107:20-108:16. Mr. Murphy was nineteen years old when his IQ was first tested, at the time of his crime and trial. As the State's expert explained, the brain continues to develop until about age 25. *Id.* at 100:10-20. The State's expert further testified that IQ scores may increase when the original intellectual deficits were exacerbated by factors such as brain injury or alcohol and drug abuse, all of which were present here. *Id.* at 132:9–133:8. And Dr. Thomas Oakland testified that intellectual disability is "not a static quality," but rather "a dynamic quality that can be improved." *See* Nov. 15, 2013 Hr'g Tr. at 24:4–11. Thus, "[a] child [who] might be moderately disabled at 14, 15, 16, may at the age of 40 assume a fairly normal lifestyle." *Id.* Both Dr. Allen's and Dr. Oakland's testimony is consistent with the consensus among the professional community that "[m]ental retardation is not necessarily a lifelong disorder." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 47 (4th ed. text rev. 2000); *see also* Am. Ass'n on Intellectual & Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification, and Systems of Supports* 106 (11th ed. 2010) (noting that intellectual disability "is neither fixed nor dichotomized; rather, it is fluid, continuous, and changing, de-

2. *Adaptive Functioning*. In connection with Mr. Murphy's *Atkins* hearing, Dr. Thomas Oakland, a licensed psychologist board certified in school- and neuro-psychology who has authored numerous peer-reviewed articles on intellectual disability and adaptive behavior, assessed Mr. Murphy's developmental-phase adaptive behavior using the Adaptive Behavior Assessment System-II (ABAS-II), a test widely used in the psychiatric community. Nov. 15, 2013 Hr'g Tr. at 14:16-15:20, 32:7–35:18; Allen Report at 15. Significant limitations in adaptive behavior indicative of mental retardation exist when a subject's scores for the ABAS-II tested skill areas fall at or below the third percentile. Nov. 15, 2013 Hr'g Tr. at 47:3-48:2.

As part of his assessment, Dr. Oakland reviewed educational documents, medical records, testing documents, court documents, and interview records. He also interviewed Mr. Murphy and 16 people who knew him before he turned 18. Oakland Report at 2–3. Dr. Oakland also selected the three individuals most familiar with Mr. Murphy's childhood as "respondents" to provide in-depth information on Mr. Murphy's adaptive behavior: his mother, Faye Murphy; Collette Jones, a nonrelative who lived with Mr. Murphy for a time when Mr. Murphy was a child; and his sister, Latasha Murphy. Dr. Oakland also administered the same questions to Mr. Murphy. *Id.* at 9.

Dr. Oakland found deficits consistent with intellectual disability in *every* scored skill area of the ABAS-

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pending on the person's functional limitations and the supports available within the person's environment").

II. For example, Mr. Murphy scored in the first (lowest) percentile for functional academics. He dropped out of school in eighth grade, and his grades were consistently poor. Nov. 15, 2013 Hr'g Tr. at 50:7–51:10. He had to repeat a grade at least twice. *Id.* at 51:17–25. And he received failing scores in at least one subject every year. *Id.* at 50:7–51:10.

Mr. Murphy also had substantial deficits in self-care during his developmental period. He wet the bed at night through adolescence; others had to remind him to take a shower before school so that he would not smell of urine. *Id.* at 66:13–68:5; Interview of C. Jones (June 19, 2009) at 1. He relied on his mother to set out clothes for him throughout adolescence. Nov. 15, 2013 Hr'g Tr. at 66:13-68:5. He could not tie his shoes well past the age when he should have been able to do so. Interview of C. Jones (June 19, 2009) at 1. Collette Jones, who lived with Mr. Murphy for a time during his childhood, described him as very slow, unable to care for himself in major respects, and as having substantial impairments in communication skills, math skills, and self-care. *Id.* at 1-3. Indeed, Ms. Jones tried to have Mr. Murphy assessed for special education but could not do so because she was not his legal guardian. *Id.* at 2. Ms. Jones's observations were consistent with those of Mr. Murphy's school guidance counselor, who characterized Mr. Murphy as "very slow." Interview of W. Wilson (July 24, 2013) at 1. They were also consistent with observations from at least fifteen other family members.

Mr. Murphy also scored in the first percentile for self-direction. Respondents described him as uninvolved and needing direction from others to accomplish simple daily tasks. Nov. 15, 2013 Hr'g Tr. at

58:17–59:5. His relatives described him as "acting like he had no sense" and as "not normal." *Id.* at 79:6-9. For example, when asked to rake leaves out of a relative's yard, Mr. Murphy would use his cupped hands to place leaves in a pile. When told to put the leaves in a plastic bag instead, Mr. Murphy "put them in the plastic bag, then he took the plastic bag over to the leaf pile and emptied them there and went back to collect more leaves." *Id.* at 79:10-19.

Mr. Murphy also scored below the disability threshold in skills related to living independently and functioning within the community. Mr. Murphy would withdraw from interactions with others if the activities became too demanding cognitively. *Id.* at 59:6–60:24. There is no evidence that Mr. Murphy ever voted, had a driver's license, or used a community resource like a library, or joined a club or a sports team, or engaged in any other organized activity. *Id.* There is no evidence that Mr. Murphy ever lived independently. *Id.* at 63:25–65:8.

3. *Onset Before Age 18.* Mr. Murphy presented substantial and largely unchallenged evidence that his intellectual disability manifested before he turned 18. This evidence included his failing grades and his failure to advance in school, as well as statements from a school counselor and multiple family members describing him as very slow. And those who knew Mr. Murphy well during his childhood and adolescence regarded him as mentally retarded and described his slowness as a "family secret." *Id.* at 77:3-16.

Moreover, the record evidence—including from Texas' own experts—shows that Mr. Murphy's upbringing, rife with all of the risk factors for intellec-

tual disability, worsened his deficits in adaptive functioning. Mr. Murphy suffered at least five head injuries as a child—including being dropped down a flight of concrete stairs when he was two weeks old. Proctor Report at 3–8. Mr. Murphy's alcohol and drug abuse further exacerbated his existing intellectual limitations. Mr. Murphy started using drugs at the age of nine; by age twelve, he was an addict. Jan. 16, 2014 Hr'g Tr. at 99:5–100:20. In the opinion of Texas' expert on cognitive functioning, Dr. Allen, these drugs—cocaine, PCP, and marijuana laced with formaldehyde, among others—likely damaged Mr. Murphy's developing brain. *Id.* at 100:10-20. The State's experts also extensively documented Mr. Murphy's exposure to other risk factors, including a family history of intellectual disability. Proctor Report at 3–8.

Notwithstanding the overwhelming evidence that Mr. Murphy was intellectually disabled at the time of his crime and trial—much of which was unchallenged (or even supported) by the State—the Texas trial court recommended denial of Mr. Murphy's habeas petition. To reach that decision, the court relied on Mr. Murphy's 2012 and 2013 IQ test scores—the ones the State obtained more than fifteen years after Mr. Murphy's crime and trial. Pet. App. 9a–11a ¶¶ 27, 33–34, 39. The Texas court also relied extensively on evidence of Mr. Murphy's *current* adaptive functioning. The court highlighted, for example, testimony that Mr. Murphy currently understands the need to "stay hydrated" and to engage in "physical exercise," that he "takes medication as prescribed," and that he apparently has acquired "basic cooking skills," Pet. App. 15a ¶ 64—none of which is incon-

sistent with a definition of intellectual disability under any accepted clinical definition.

Compounding its error, the court evaluated Mr. Murphy's adaptive functioning pursuant to the now-discredited framework set forth in *Ex parte Briseño*, 135 S.W. 3d 1 (Tex. Crim. App. 2004). The *Briseño* court articulated a number of nondiagnostic factors it suggested should influence the intellectual-disability determination, including whether people who knew the person during his childhood thought he was intellectually disabled; whether the person can make plans or whether he is impulsive; whether he is a leader or follower; whether his response to external stimuli is rational and appropriate; whether he responds coherently and rationally to questions; whether he can hide facts or lie to further his own or others' interests; and whether the facts of the underlying crime required forethought, planning, and complex execution of purpose. *Id.* at 8–9. As several Texas Court of Criminal Appeals judges recently have observed, the *Briseño* factors create a "scattershot approach to adaptive deficits" by permitting a "fact-finder [to] hunt and peck among adaptive deficits, unfettered by the specific diagnostic criteria that inform the expert opinion." *Lizcano* v. *State*, No. AP-75879, 2010 WL 1817772, at *35, *40 (Tex. Crim. App. May 5, 2010) (unpublished) (Price, J., concurring and dissenting, joined by Holcomb and Johnson, JJ.).

The kicker to all of these conclusions was the Texas court's own lay observations of Mr. Murphy's intellectual ability: to bolster his determination that Mr. Murphy was not intellectually disabled, the court relied on its own observations of Mr. Murphy *at his trial fifteen years earlier*. Pet. App. 23a ¶¶ 75–76. As the judge put it, he had "had the opportunity to

observe" Mr. Murphy "through the entire trial process," and in the judge's view, Mr. Murphy did not "show, demonstrate or otherwise reveal or display any indication of mental retardation." *Id.* ¶ 76**.**

Mr. Murphy submitted objections to the trial court's findings and conclusions in the Texas Court of Criminal Appeals. He also sought a stay pending the disposition of *Hall* v. *Florida*, which was then pending before this Court. The appellate court ignored the stay request.

This Court issued its decision in *Hall* in May 2014, holding that Florida's rigid requirement that a defendant must show an IQ test score of 70 or below before being permitted to submit additional evidence of intellectual disability created an unacceptable risk that an intellectually disabled person will be executed. 134 S. Ct. 1986 (2014). Hall's IQ, like Mr. Murphy's, was 71. The *Hall* decision also makes clear that "the clinical definitions of intellectual disability * * * were a fundamental premise of *Atkins*," and that a court's determination of intellectual disability must be based on prevailing clinical standards. *Hall*, 134 S. Ct. at 1999.

In November 2014, the Texas Court of Criminal Appeals issued an unpublished order denying Mr. Murphy's habeas petition. Pet. App. 1a–2a. It did not discuss the question of which IQ should control—that at the time of trial, or some more recent number. It did not discuss any of the evidence or arguments presented to the state trial court. It did not contain any independent reasoning. And it did not mention *Hall*.

REASONS FOR GRANTING THE WRIT

The decision below has all of the hallmarks of a case warranting review by this Court. *See* S. Ct. R. 10. It conflicts with this Court's precedents, which teach that the relevant time period for assessing a claim of intellectual disability is the time of the crime and trial, and that the intellectual disability assessment must adhere to clinical, diagnostic standards. It exacerbates a split among state courts of last resort. And it "creates an unacceptable risk that [a] person[] with intellectual disability will be executed, and thus is unconstitutional." *Hall*, 134 S. Ct. at 1990. This Court should grant the petition to bring the Texas courts into line with its instructions and the constitutional holdings of multiple other state courts. In the alternative, the Court should vacate the court of appeals' judgment and remand for appropriate consideration of *Hall*.

I. THE TEXAS COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND EXACERBATES A SPLIT AMONG STATE COURTS OF LAST RESORT.

The Texas court's heavy focus on Mr. Murphy's current functioning at the time of his *Atkins* hearing cannot be reconciled with *Atkins*. It also deepens an existing split among state courts of last resort on this important issue.

A. The Texas Court's Decision Contravenes *Atkins*.

1. When this Court held in *Atkins* that intellectually disabled individuals are categorically excluded from execution, it identified two reasons why:

First, the Court explained that there is a "serious question" about whether the justifications identified for imposing the death penalty—retribution and deterrence of capital crimes by prospective offenders—apply to intellectually disabled individuals. *Atkins*, 536 U.S. at 318. As to retribution, the Court held that the "lesser culpability of the mentally retarded offender surely does not merit" retribution befitting "a narrow category of the most serious crimes." *Id.* at 319; *accord Hall*, 134 S. Ct. at 1993 ("The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the [death penalty]."). As to deterrence, it explained that the "theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. But the intellectually disabled are less likely to be able to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* Because of this inability to process and be deterred by the availability of the death penalty as a punishment, the Court held that "executing the mentally retarded will not measurably further the goal of deterrence." *Id.* All of this discussion—is an intellectually disabled person less culpable for a capital crime? Is he able to comprehend the deterrent effect of the death penalty?—centers the intellectual-disability question *at the time of the crime*.

Second, this Court explained that intellectually disabled defendants are "less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their

crimes." *Id.* at 320–21. Reliance on intellectual disability as a mitigating factor might also have the perverse effect of "enhanc[ing] the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.* at 321. This discussion—how can an intellectually deficient capital defendant best assist his counsel at trial?—centers the intellectual-disability question *at the time of trial.* And *Hall* later underscored that conclusion: as this Court noted there, the concern with wrongfully executing the intellectually disabled relates to "the integrity of the trial process." 134 S. Ct. at 1993. Indeed, even the State's own expert conceded that *Atkins* focuses on functioning at the time of the crime and trial and that the relevant question was Mr. Murphy's functioning during that period. Jan. 6, 2014 Hr'g Tr. at 122–123.

2. The Texas court below ignored this Court's clear directives. It found that Mr. Murphy "had an IQ of 71" in 1998—the same year as his trial and ten months after the crime. Pet. App. 8a ¶ 24. A score of 71 is within the typical "cutoff score" for intellectual functioning under *Atkins*: 75 or lower. 536 U.S. at 309 n.5. Indeed, it is the same score this Court held to be "evidence of intellectual disability" in *Hall*. 134 S. Ct. at 1992.

Despite the unrebutted evidence of Mr. Murphy's low IQ at the time of trial, however, the court nevertheless concluded that Mr. Murphy "has not shown, by the preponderance of the evidence, that he has significantly sub-average intellectual functioning." Pet. App. 11a ¶ 39. To reach that conclusion, the court relied on IQ tests administered in 2012 and 2013—fifteen and sixteen years, respectively, after Mr. Murphy's crime. *See id.* 9a–10a ¶¶ 27, 33–34.

Indeed, the court made no secret of the fact that it was focused on Mr. Murphy's *current* intellectual capability; the court framed the issue before it as whether Mr. Murphy "*has* significantly sub-average intellectual functioning." *Id.* 11a ¶ 39 (emphasis added). But Mr. Murphy's IQ score in 2012 and 2013 is irrelevant to his ability to understand the consequences of a crime committed in September 1997. Nor does a 2012 or 2013 IQ score shed any light on Mr. Murphy's ability to assist his counsel during his trial in 1998. The court's reliance on those later IQ tests cannot be squared with *Atkins* or *Hall*.

The court similarly gave undue weight to evidence of Mr. Murphy's *current* adaptive functioning. *Atkins* held, and *Hall* clarified, that courts should consider "significant limitations in adaptive skills" arising *during the developmental period* when making a determination about an individual's intellectual disability. *See Atkins*, 536 U.S. at 317–18; *Hall*, 134 S. Ct. at 1991. A pile of evidence supported Dr. Oakland's conclusion that Mr. Murphy scored in the *first percentile* in functional academics, self-direction, and home-living skills while a child and adolescent. But the court set all that to the side, instead finding it significant that, "[*w*]*hile confined*, [Mr. Murphy] has shown a substantial understanding of health related issues, such as the need to stay hydrated, physical exercise * * * as well as[] dental care." Pet. App. 15a ¶ 64 (emphasis added). The court also found it relevant that Murphy "currently washes his sheets and clothing and cleans his cell." *Id.* 13a ¶ 52.[3]

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[3] The only "testimony" the court cited for its finding that Mr. Murphy currently washes his clothes and cleans his cell actual-

The court of appeals, for its part, affirmed all these conclusions without any comment at all. *See* Pet. App. 1a-2a. Its brisk treatment of the issue is inexcusable, but perhaps understandable, because the same court had made its opinion clear on the *Atkins* timing issue not long before its decision in this case.

In Ex parte Cathey, __ S.W.3d __, 2014 WL 5639162 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals opined in passing that "[t]he point of an Atkins hearing is to determine whether a person was mentally retarded during his developmental period and at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded." Id. at *14. That observation is, of course, a very promising start. But the *Cathey* court then went on to ask, answer, and base its holding on, *precisely* the question it had declared irrelevant. *Id.* at *17–*20. The court examined in exacting detail the capital inmate's *current* intellectual and adaptive functioning, including pages and pages' worth of discussion of the inmate's books, his magazines, his letters, his other written work, his "aware[ness]" of "current events," his participation in a prison breakout attempt requiring "elaborate" planning, and his participating in a prisoner interest group affiliated with the Black Panthers. *Id.* at *17–*19. The *Cathey* court wrapped up all this analysis

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ly was not testimony at all; it was a presumption in a hypothetical question posed to Dr. Oakland during Mr. Murphy's *Atkins* hearing. *See* Nov. 15, 2013 Hr'g Tr. at 206:1–5 ("Q. Would you agree that if he currently washes his sheets and washes his clothing and cleans his living area, that that is an indicator of adaptive behavior that fits within home living. A. Currently, yes.").

by asking the precise question it had earlier sworn off: "*Is* this person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior wherever he is? Or *is* he so intellectually disabled that he falls within that class of mentally retarded persons who are exempt from the death penalty?" Id. at *19 (emphases added). And the court held that the answer was no: Cathey had "failed to prove * * * that he *suffers from* significant adaptive deficits or limitations." *Id.* at *20 (emphasis added).

No surprise, then, that when the trial court below asked and answered the same question—whether Mr. Murphy "*has* significantly sub-average intellectual functioning," Pet. App. 11a ¶ 39 (emphasis added), the court of appeals let that constitutional error slide without further comment.

B. The Decision Below Exacerbates a Split Among State Courts of Last Resort.

By relying on IQ tests given fifteen-plus years after the crime rather than the undisputed score of 71 at the time of trial, and by favoring facts about Mr. Murphy's *current* adaptive functioning in prison over his severe limitations as a child and adolescent, the Texas courts contravened *Atkins* and *Hall.* And there is more: The lower courts' rulings also deepened a split among state courts of last resort.

The Mississippi Supreme Court expressly held in 2012 that "[t]he point of an *Atkins* hearing is to determine whether a person was mentally retarded *at the time of the crime* * * * not whether a person is *currently* mentally retarded." *Goodin* v. *State*, 102 So. 3d 1102, 1114 (Miss. 2012) (emphases added). The Idaho Supreme Court has expressly held the same:

"The issue in *Atkins* v. *Virginia* is not whether the offender is currently mentally retarded. The issue is whether the offender was mentally retarded when he or she committed the murder and whether such mental retardation began prior to the offender's eighteenth birthday." *Pizzuto* v. *State*, 202 P.3d 642, 653 (Idaho 2008). As the Idaho Supreme Court explained, that holding follows from the fact that "[t]he rationale for exempting mentally retarded murderers from the death penalty is based upon their mental impairments at the time they committed the killings and, to a lesser extent, during their criminal trials and sentencing hearings." *Id.* at 654. Tennessee agrees; its Supreme Court has held that the relevant inquiry is "whether a person was intellectually disabled at the time he or she committed first degree murder." *Coleman* v. *State*, 341 S.W. 3d 221, 223 (Tenn. 2011); *see also id.* (a defendant must prove "that he or she had an intellectual disability at the time of the offense"). And the Kentucky Supreme Court has expressly held that the relevant time period for determining whether a prisoner is intellectually disabled is the "time of the offense." *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 376 (Ky. 2005); *cf. Wilson* v. *Commonwealth*, 381 S.W. 3d 180, 187-88 (Ky. 2012) (emphasizing that courts should give weight to IQ tests administered around the time of the crime and trial).[4]

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[4] The overwhelming majority of federal courts that have weighed in on this question concur with Mississippi, Idaho, Tennessee, and Kentucky. *See, e.g.*, *United States* v. *Montgomery*¸ No. 2:11-CR-20044-JPM-1, 2014 WL 1516147, at *5 (W.D. Tenn. Jan. 28, 2014); *United States* v. *Northington*, No. 07-550-05, 2012 WL 4024944, at *1 n.2 (E.D. Pa. Sept. 12, 2012); *United*

In reaching the opposite conclusion, the Texas court joined three other states: Alabama, Florida, and Oklahoma. The Alabama Supreme Court held in *Smith* v. *State*, not long after *Atkins* and years before *Hall*, that "for an offender to be considered mentally retarded in the *Atkins* context, the offender must *currently* exhibit subaverage intellectual functioning, *currently* exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18." *Smith* v. *State*, No. 1060427, 2007 WL 1519869, at *8 (Ala. May 25, 2007) (emphases added). *See also Burgess* v. *Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1321 n.13 (11th Cir. 2013) (interpreting *Smith* to require a defendant to "exhibit significantly subaverage intellectual functioning abilities and significant deficits in adaptive behavior during three periods of his life: before the age of eighteen, on the date of the capital offense, *and currently*") (emphasis added). The Florida Supreme Court has similarly held that "the exception to the

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States v. *Wilson*, 920 F. Supp. 2d 287, 297 (E.D.N.Y. 2012); *United States* v. *Hardy*, 762 F. Supp. 2d 849, 881–882 (E.D. La. 2010); *Rodriguez* v. *Quarterman*, No. CIV. SA-05-CA-659-RF, 2006 WL 1900630, at *11 (W.D. Tex. July 11, 2006); *see also Thomas* v. *Allen*, 614 F. Supp. 2d 1257, 1321 (N.D. Ala. 2009). But some federal courts *do* consider evidence of current intellectual functioning. *United States* v. *Williams*, 1 F. Supp. 3d 1124, 1147 (D. Haw. 2014) ("[T]he court is assessing a defendant's intellectual condition per se—and considers available evidence both at the time of the crime, as well as before and after"); *see also Ochoa* v. *Workman*, 669 F.3d 1130, 1138 (10th Cir. 2012) (holding that Oklahoma's focus on present functioning is not contrary to clearly established law). The federal courts, as well as the state courts of last resort, thus are in need of this Court's guidance on this important issue.

death penalty applies to a defendant who 'is mentally retarded' or 'has mental retardation.' * * * Thus, the question is whether a defendant 'is' mentally retarded, not whether he was." *Jones* v. *State*, 966 So. 2d 319, 326 (Fla. 2007). And the Oklahoma Court of Criminal Appeals has held that the relevant question in the *Atkins* determination is whether a petitioner " 'is' mentally retarded, as opposed to * * * that he 'was' mentally retarded at the time of the crime." *Ochoa* v. *State*, 136 P. 3d 661, 665-66 (Okla. Crim. App. 2006).

The current and deepening split among state courts of last resort on this grave constitutional question is the most outcome-determinative split that could possibly be imagined: If Mr. Murphy were on death row in Mississippi, Idaho, Tennessee, or Kentucky, he likely would be found to be intellectually disabled, and therefore would be constitutionally exempt from execution. But he was sentenced in Texas. And Texas thinks his *current* intellectual capacity suffices to qualify him for death. This Court should step in to resolve this clash among multiple state courts of last resort.

II. THE TEXAS COURT'S RELIANCE ON NONDIAGNOSTIC CRITERIA CONTRAVENES THIS COURT'S DECISION IN *HALL* V. *FLORIDA*.

This Court clarified in *Hall* that courts may not deviate from the professional community's diagnostic framework when assessing a claim of intellectual disability under *Atkins*. *See Hall*, 134 S. Ct. at 1991–2000; *accord Atkins*, 536 U.S. at 308 n.3, 317 n.22 (relying on established clinical definitions of intellectual disability to give content to the constitutional prohi-

bition). But that is exactly what the Texas court did here, in several respects.

1. The *Hall* Court struck down Florida's strict IQ cutoff because it "disregard[ed] established medical practice." 134 S. Ct. at 1995. As the Court explained, while *Atkins* left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," it "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998 (citing *Atkins*, 536 U.S. at 317) (quotation marks and citations omitted). States instead must tether the metrics they use to assess intellectual disability to prevailing clinical standards. *See id.* at 1991 (emphasizing the necessity of following "the framework followed by psychiatrists and other professionals in diagnosing intellectual disability"); *id.* at 1999 ("clinical definitions of intellectual disability * * * were a fundamental premise of *Atkins*").

There is good reason for that limitation on the States' discretion: only medical experts possess the "learning and skills" necessary for the "diagnosis of persons with mental or psychiatric disorders or disabilities." *Id.* at 1993; *see also Van Tran* v. *Colson*, 764 F.3d 594, 612 (6th Cir. 2014) ("In *Hall*, the Court reasoned that the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability."); *Burgess*, 723 F.3d at 1316 ("Common sense dictates that any standard dependent upon an IQ score—a concept that does not exist

outside the context of a medical examination—requires verifiable expert analysis and diagnosis.").[5]

2. Compare those instructions to the framework for the Texas courts' decisions below: the Texas Court of Criminal Appeals' 2004 *Briseño* decision.

Under the *Briseño* framework, Texas courts are instructed to consider, in addition to the AAMR's 1992 guidelines, seven factors to evaluate an individual's adaptive functioning. First, did those who knew the person best during the developmental stage think he was intellectually disabled at that time, and if so, did they act accordingly? Second, has the person formulated plans and carried them through, or is his conduct impulsive? Third, does his conduct show leadership or does it show that he is led around by others? Fourth, is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable? Fifth, does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? Sixth, can he hide facts or lie effectively in his own or others' interests? And finally, did the commission of the charged offense require

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[5] *See also Hill* v. *Humphrey*, 662 F.3d 1335, 1372 (11th Cir. 2011) ("Mental retardation is a medical condition that is diagnosed only through, among other things, a subjective standard that requires experts to assess intellectual functioning"); *Hill* v. *Anderson*, 300 F.3d 679, 682 (6th Cir 2002) ("[W]hen discussing retardation in *Atkins*, the Supreme Court * * * presumably expected that states will adhere to * * * clinically accepted definitions when evaluating an individual's claim to be retarded."); *Coleman*, 341 S.W.3d at 247 (aligning the intellectual-disability assessment "with the clinical approach to diagnosing and assessing intellectual disability * * * result[s] in more accurate and consistent decisions").

forethought, planning and complex execution of purpose? *Briseño*, 135 S.W. 3d at 8–9.

"Few if any intellectual disability (ID) scholars, representative bodies, or specialists consider [*Briseño* to] provide a valid diagnostic framework." Stephen Greenspan, AAIDD, *The Death Penalty and Intellectual Disability* 219 (Edward A. Polloway, ed. 2015). Indeed, the Texas Court of Criminal Appeals *itself* has forthrightly observed that the *Briseño* factors are "non-diagnostic criteria." *Ex parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007). Even before *Hall*, three judges on the Texas Court of Criminal Appeals had lamented that the *Briseño* factors create a "scattershot approach to adaptive deficits"; allow courts to "deviate from * * * specific diagnostic criteria"; and "let[] the fact-finder hunt and peck among adaptive deficits, unfettered by the specific diagnostic criteria that inform the expert opinion." *Lizcano*, 2010 WL 1817772, at *35, *40 (Price, J., concurring and dissenting, joined by Holcomb and Johnson, JJ.). At least one member of that court has opined that *Briseño* is no longer viable after *Hall*. *See Ex parte Cathey*, 2014 WL 5639162, at *20 (Price, J., concurring in part and dissenting in part) (opining that "the writing is on the wall for the future viability of *Ex parte Briseno.*"). And at least one Fifth Circuit judge similarly has decried Texas' continued use of the *Briseño* factors. *See Chester* v. *Thaler*, 666 F.3d 340, 371 (5th Cir. 2011) (Dennis, J., dissenting) (noting that *Briseño* "departs substantially from the nationally accepted criteria for determining whether a petitioner has adaptive functioning deficits" and thus "clearly falls outside *Atkins*'s constitutional bounds").

The professional community, too, has criticized Texas' continued use of the *Briseño* factors, noting that

they have "no basis of support in the clinical literature or in the understanding of mental retardation by experienced professionals in the field." Br. of the Am. Ass'n on Intellectual & Developmental Disabilities (AAIDD) & the Arc of the U.S. as Amici Curiae in Supp. of Pet'r at 23, *Hall* v. *Thaler*, 131 S. Ct. 414 (2010) (No. 10-37) [hereinafter AAIDD *Hall* Amicus]; *see also id.* at 12 (noting that *Briseño* "departed from a clinical assessment or diagnosis, especially as it related to evaluating the adaptive behavior criteria"). In fact, the AAIDD's recently published book on intellectual disability and the death penalty devotes an *entire chapter* to the problems with the *Briseño* factors, noting that they "lack any theoretical or empirical basis" and "reflect a view of the disorder that is inappropriate for most of the incarcerated [intellectually disabled] population." Greenspan, AAIDD, *The Death Penalty and Intellectual Disability* 222.[6]

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[6] The AAIDD is far from alone in its view. Others have noted that because the *Briseño* factors have no grounding "in professional practice or guidelines," Texas' test for intellectual disability "significantly departs from those employed by professionals in the field." Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 727–728 (2008). Others have criticized *Briseño* as lacking "any basis in scientific literature." Anna M. Hagstrom, Atkins v. Virginia: *An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 Law & Ineq. 241, 245 (2009). And still others have said that the *Briseño* factors "present an array of divergences from the clinical definitions," John H. Blume *et al.*, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 712 (2009), and "gross[ly] deviat[e] from clinical definitions of adaptive functioning," John Blume, *et al.*, *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Pun-*

This debate is not just an academic exercise. *Briseño*'s deviations from clinical standards put "individuals who clearly meet the accepted clinical definition of mental retardation * * * at risk of being sentenced to death and executed." AAIDD *Hall* Amicus, *supra*, at 3. And Texas' reliance on the *Briseño* factors has resulted "in a much higher than average rejection of *Atkins* claims." Greenspan, AAIDD, *The Death Penalty and Intellectual Disability* 229. Indeed, the likelihood of prevailing on an *Atkins* claim in, for example, North Carolina, Mississippi, Arizona, or Oklahoma is markedly higher than in Texas—eighty-two percent, fifty-seven percent, forty-six percent, and thirty percent, respectively, as compared to Texas' eighteen-percent "success rate." Blume, *et al.*, *A Tale of Two (and Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. at (2014).[7] In other words, "[t]he use of the *Briseño* factors "directly relates to the question of whether or not defendants who have an intellectual disability will continue to be exempted from the death penalty." Greenspan, AAIDD, *The Death Penalty and Intellectual Disability* 229. Just as Florida's strict IQ score cutoff at issue in *Hall* "disregard[ed] established medical practice," 134 S. Ct. at 1995, and went "against the unanimous professional consensus," *id.* at 2000, so too does Texas' continued use of the *Briseño* factors. This Court held in *Hall* that Florida's strict IQ cutoff "create[d] an unacceptable risk that persons with intellectual disability will be

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ishment Twelve Years After the Supreme Court's Creation of a Categorical Bar, 23 Wm. & Mary Bill Rts. J. 393, 414 (2014).

[7] These data were taken from a study of states that resolved more than ten *Atkins* claims from 2002 through 2013.

executed." *Id.* at 1990. The *Briseño* factors carry exactly the same risk.

3. The Texas court did not even stop after applying the discredited *Briseño* factors. The judge presiding over Mr. Murphy's *Atkins* hearing was the same judge who had presided over his trial fifteen years earlier. Mr. Murphy did not testify at his trial. But the judge nevertheless invoked his own "past observations and experience" to conclude that Mr. Murphy "simply does not display the characteristics as manifested in mentally retarded individuals." Pet. App. 18a ¶ 75. In other words, the court rejected Mr. Murphy's *Atkins* claim because, to the court's eye, Mr. Murphy did not *look or act* sufficiently intellectually disabled.

The judge's seat-of-the-pants observations run directly "against the unanimous professional consensus" that such observations should play no part in the analysis. *See Hall*, 134 S. Ct. at 2000. Only medical professionals have the expertise required to diagnose intellectual disability. For example, the American Psychiatric Association has noted that "[c]linical training and judgment are required to interpret test results and assess intellectual performance." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013); *accord* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* at xxxvii (4th ed. text. rev. 2000) ("The proper use of these criteria requires specialized clinical training that provides both a body of knowledge and clinical skills."). Similarly, the AAIDD has stated that, "[a]s with measuring intellectual functioning, assessing an individual's adaptive skills requires a clinical review by an experienced mental retardation professional." AAIDD

Hall Amicus, *supra*, at 7. The AAIDD has stressed that diagnosing intellectual disability is a *clinical judgment*—that is, a judgment "rooted in a high level of clinical expertise and experience and judgment that emerges directly from extensive training, experience with the person, and extensive data." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 29 (11th ed. 2010). In fact, the AAIDD has put the point more strongly: "[M]ental retardation is not susceptible to evaluation by non-experts, and the disability can be assessed only through scientific tests administered by experienced professionals in the field using their training, experience, and clinical judgment." AAIDD *Hall* Amicus, *supra*, at 19 n.5.

The judge should have left it to the professionals: "[L]aymen cannot easily recognize mild mental retardation." *State* v. *White*, 885 N.E.2d 905, 915 (Ohio 2008); *see also Van Tran*, 764 F.3d at 610 ("[W]here lawmakers deliberately incorporate clinical standards into legal definitions, the courts strain the limits of reasonableness by rejecting expert opinions based exclusively on the court's own inexpert analysis."). Recognizing as much, many "state statutes stipulate that only a licensed clinical psychologist can make a diagnosis of [intellectual disability.]" AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 87. These statutes reflect the reality that, to the untrained eye, an intellectually disabled person "may look relatively normal." *White*, 885 N.E.2d at 915 (emphasis omitted).

Lay observations are especially dangerous in cases of mild intellectual disability—Mr. Murphy's proper classification—because, as the Texas Court of Criminal Appeals itself has recognized, people within this

classification "often learn to disguise their disabilities in a so-called 'cloak of competence,'" causing the unschooled to overestimate the person's intellectual abilities. *Ex parte Van Alstyne*, 239 S.W.3d at 822–23 & n.23.[8] The court's reliance on its own lay observations to determine that Mr. Murphy is not intellectually disabled was an extreme departure from professional and scientific consensus and thus contravenes *Hall*. This Court should step in to clarify that courts may not indulge their "own expectations of how a mentally retarded person would behave," *White*, 885 N.E.2d at 915, or reject expert conclusions based on their own "ad hoc, ostensibly commonsense reasoning" when assessing intellectual disability under *Atkins*," *Van Tran*, 764 F.3d at 610.

The Texas trial judge added an additional constitutional insult to Mr. Murphy's Eighth Amendment injury when he relied on his observations of Mr. Murphy at his trial fifteen years earlier to reach his conclusion that Mr. Murphy is not intellectually disabled. The Due Process Clause entitled Mr. Murphy to far better than that. Mr. Murphy was entitled to have his claim decided on the basis of the evidence presented at his *Atkins* hearing by a decision-maker who did not already harbor an opinion on the ulti-

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[8] Mr. Murphy exhibited just that tendency. *See* Nov. 15, 2013 Hr'g Tr. at 80:1–7 (testimony that Mr. Murphy "fear[ed] that his cognitive shortcomings would be apparent to others" and so would often "avoid[] responding to factually based questions" and "deflect[] questions that he could not answer by removing himself or engaging in clown-like behavior"). And, on the ABAS-II test that Dr. Oakland administered, Mr. Murphy consistently rated himself as higher functioning than the other respondents rated him. *Id.* at 61–64.

mate issue before that claim was adjudicated. *Caperton* v. *A. T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). Mr. Murphy deserved "a fair trial in a fair tribunal." *Id.* at 876 (alteration omitted). He did not get that.

III. ALTERNATIVELY, THE COURT SHOULD GRANT, VACATE, AND REMAND THIS PETITION IN LIGHT OF ITS DECISION IN *HALL*.

The Court should grant this petition to resolve the important questions raised by the Texas courts' decisions. But even if the Court does not grant the petition outright, it should at the least grant certiorari, vacate the Texas Court of Criminal Appeals' decision, and remand for consideration in light of *Hall*.

Hall bears directly on Mr. Murphy's case. It confirms that the *Atkins* inquiry centers on the time of trial. 134 S. Ct. at 1993**.** And it confirms that courts must base their *Atkins* determinations on "clinical definitions of intellectual disability," not rules and requirements ungrounded in science and medicine. *Id.* at 1999. The court below made no mention of *Hall*. Accordingly, if the Court does not grant plenary review, it should vacate the judgment and remand for the Texas Court of Criminal Appeals to consider the effect of *Hall* in the first instance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 17, 2015

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-38,198-03

EX PARTE JULIUS JEROME MURPHY

Filed: Nov. 19, 2014

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 97-F-462-102 IN THE 102ND DISTRICT COURT
BOWIE COUNTY**

Per curiam.

O R D E R

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.[1]

In August 1998, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071, and the trial court, accordingly, set punishment at death.

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[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

This Court affirmed applicant's conviction and sentence on direct appeal. *Murphy v. State*, No. AP-73,194 (Tex. Crim. App. March 24, 2000) (not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on October 20, 2000. This Court denied relief. *Ex parte Murphy*, No. WR-38,198-02 (Tex. Crim. App. April 10, 2002) (not designated for publication). Applicant's subsequent application was received in this Court on January 17, 2006.

In this subsequent application, applicant alleges that he is mentally retarded and so he cannot be executed following the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). In 2006, we concluded that this application made a *prima facie* case of mental retardation, sufficient to satisfy the requirements for a subsequent writ under Article 11.071, Section 5. We remanded the application to the trial court for consideration of applicant's claim.

The convicting court conducted a hearing, in which the applicant and the State presented the testimony of witnesses and introduced exhibits in support of their respective positions. After consideration, the judge of the convicting court entered his findings of fact and conclusions of law and recommended that relief be denied.

We have reviewed the record and the trial judge's findings of fact and conclusions of law, and we agree with the trial court's recommendation. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

IT IS SO ORDERED THIS THE 19TH DAY OF NOVEMBER, 2014.

Do Not Publish

APPENDIX B

IN THE 102ND DISTRICT COURT
BOWIE COUNTY, TEXAS

CAUSE NO. 97F0462-102A
WR-038,198-03

EX PARTE JULIUS JEROME MURPHY

Filed: Feb. 26, 2014

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER RECOMMENDING THE DENIAL OF APPLICANT'S SUCCESSIVE APPLICATION FOR WRIT OF HABEAS CORPUS

Applicant, Julius Jerome Murphy (hereinafter "Applicant") contends he is a person with mental retardation and, therefore, his sentence of death constitutes cruel and unusual punishment under the United States Supreme Court ruling in *Atkins v. Virginia*, 546 U.S. 304 (2002). He asks the Court to find him mentally retarded and to impose a life sentence in the Texas Department of Criminal Justice — Institutional Division.

The Court, after considering the following: the evidentiary hearings held December 15, 2010, November 15, 2013, December 16, 2013, December

17, 2013, and January 6, 2014; all motions and exhibits filed by the parties; official court documents; all state court records; the Court's personal experience and knowledge, now issues the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. Procedural History

1. Applicant was convicted of capital murder in the 102nd Judicial District Court of Bowie County, Texas and was thereafter sentenced to death on August 13, 1998. *State v. Murphy*, No. 97F0462-102.

2. On direct appeal, the Texas Court of Criminal Appeals affirmed his conviction and sentence. *Murphy v. State*, No. 73,194 (Tex. Crim. App. May 24, 2000)(unpublished).

3. Pursuant to Texas Code of Criminal Procedure, Article 11.071, Applicant filed his initial Application for Writ of Habeas Corpus on October 20, 2000. The Court of Criminal Appeals denied his application on April 10, 2002. *Ex Parte Murphy*, Writ No. 38,198-02 (Tex. Crim. App. Apr. 10, 2002)(unpublished).

4. Applicant filed a federal petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas on February 7, 2003. The federal district court denied Applicant relief in 2004.

5. Applicant appealed to the United States Court of Appeals for the Fifth Circuit. On July 11, 2005, the Fifth Circuit affirmed the district court's denial of relief. *Murphy v. Dretke*, 416 F.3d 427 (5th Cir. 2005).

6. Applicant filed a petition for a writ of certiorari and the United States Supreme Court denied his petition on January 9, 2006. *Murphy v. Dretke*, No. 05-6940 (Jan. 9, 2006).

7. Following the United States Supreme Court's holding in Atkins, Applicant filed the pending application for writ of habeas corpus pursuant to Article 11.071, section 5, arguing that he is mentally retarded and, as such, cannot be executed pursuant to *Atkins*.

8. On January 18, 2006, the Texas Court of Criminal Appeals remanded Applicant's case to this Court to resolve the issue set forth herein. The Texas Court of Criminal Appeals also granted a stay of execution.

B. Burden of Proof and Standard of Review

9. On June 20, 2002, the United States Supreme Court held that there is a national consensus to exempt from the death penalty those who suffer from mental retardation. *Atkins v. Virginia*, 536 U.S. 304, 307. However, the Supreme Court left the implementation of that decision to the states. *Atkins*, 546 at 317.

10. The Texas Legislature, to date, has failed to enact any law that would assist in implementing the holding in *Atkins*. Therefore, the Texas Court of Criminal Appeals undertook the task and adopted the definition of mental retardation used by the American Association on Mental Retardation (hereinafter referred to as "AAMR") and contained in Texas Health and Safety Code Section 591.003(13). *Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App.

2004) (citing *Ex Parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

11. As the Supreme Court noted in *Atkins*, [n]ot 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." *Atkins*, 536 U.S. at 317.

12. As with all habeas claims, including those based upon mental retardation, the applicant has the burden of proving facts that entitle him to relief. *Id.* With a claim such as one before the Court, an applicant must meet his burden by a preponderance of the evidence. *Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App. 2004).

13. Even though a finding of mental retardation can result in an absolute bar to execution, an applicant must still raise the issue at the earliest possible time or face procedural hurdles, and possibly even a procedural bar, that would have otherwise not been encountered. Specifically, if an applicant could have raised a claim of mental retardation previously but failed to do so, then to overcome the procedural bar, he must present facts and evidence "sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational trier of fact would fail to find mental retardation. *Ex Parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).[2]

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[2] Because the Court is making a recommendation denying Applicant's Successive Application for Writ of Habeas Corpus based on the "preponderance of the evidence" standard of proof, it will decline to address whether or not Applicant had the

14. The scientific and clinical definitions of mental retardation as set forth by the AAMR is as follows: a disability characterized by the following: (a) significantly sub-average general intellectual functioning (an IQ of about 70 or below); accompanied by (b) related limitations in adaptive functioning; (c) commencing prior to the age of eighteen. The Court has applied these definitions in determining whether Applicant presented sufficient evidence of mental retardation.

15. The question of whether an applicant has limitations in adaptive functioning, however, is "exceedingly subjective," so the *Briseño* Court listed seven factors that "factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." *Briseño* at 8-9. The consideration of any or all of these factors is not mandatory. *Ex parte Butler*, 416 S.W.3d 863 (Tex. Crim. App. 2012); *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012). There are "no scientifically verifiable standards by which one might measure whether a person's academic, social, or functional deficits are related to innate mental deficiencies, bad upbringing, impoverished environment, bad moral character, emotional problems, poor habits, lack of motivation, drug or alcohol dependence, or other factors." *Ex parte Rodriquez*, 164 S.W.3d 400, 406 (Tex. Crim. App. 2005)(Cochran, J., concurrence). "If there is evidence in the record to support a factfinder's conclusion, by a preponderance of the

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higher burden of proving that he was mentally retarded by clear and convincing evidence

evidence, that a person does or does not suffer from significant "deficits in adaptive behavior"—whatever that may mean to the factfinder — that conclusion must be affirmed." *Id.*

16. The Court of Criminal Appeals has not read *Atkins* or *Briseño* to require a quantitative measurement of adaptive behavior. *Sosa*, 364 S.W.3d at 893, n.17

17. Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that is expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales." *Briseño*, 135 S.W.3d at 7, n. 25.

18. Without a significantly sub-average IQ, a diagnosis of mental retardation is impossible. HRR 1/6 at 63, 187; *Ex parte Blue*, 230 S.W.3d at 166.

19. The United States Supreme Court has held that "expert testimony does not trigger a conclusive presumption of correctness." Therefore, this Court may consider the testimony of the experts as well as its own common-sense understanding of the evidence before it.

20. The Court finds that the Diagnostic and Statistical Manual versions four and five which were referred to in the hearings in this matter, are not referenced in *Atkins* or Texas case law. While the Court gives weight to the information contained therein, it does not find it to be a strict authoritative

treatise for purposes of the issue to be decided herein.

C. Sub-average Intellectual Functioning. The Court finds as follows:

21. Dr. Stephen K. Martin administered a variety of tests to Applicant on July 14, 1998, including the Wechsler Adult Intelligence Scale-Revised (hereinafter "WAIS-R), which is a test that deals directly with intellectual functioning. At the time of the test, Applicant was 19 years and nine months old. (RX 32C; RX 32D). At trial, Dr. Martin reported a full scale IQ score for Applicant of 81 (32C).

22. Dr. Martin also testified at trial that Applicant would not be classified as mentally retarded. (RX 32C). Dr. Martin later acknowledged that the scoring of the test was inaccurate. RX 32C). Dr. Martin also advised that the obtained IQ score on the WAIS-R should be adjusted with the Flynn Effect to fall within the mentally retarded range. (RX 32C). Dr. Martin did not testify during the hearings. His final determination was that Applicant "could, in fact, meet the criteria for mental retardation." (RX 32C).

23. At the hearing, testimony was presented from Dr. Kevin McGrew. Dr. McGrew is the Director of the Institute for Applied Psychometrics. He is a vetting professor in educational psychology at the University of Minnesota. Dr. McGrew is also the Associate Director of Measurement Learning Consultants, which is a private test development corporation. In addition, Dr. McGrew is the

Research Director for the Woodcock-Munoz Foundation. (HRR 12/16 at 8).

24. Dr. McGrew testified regarding a statistical error in the norming for WAIS-R testees aged 18-19, known as soft norms. Dr. McGrew testified that he believed this artificially inflated Applicant's full scale IQ score by three points. (HRR 12/16 at 35-49). Dr. McGrew also believed that the Flynn Effect may have artificially inflated Applicant's full scale IQ score. (HRR 12/16 at 50-71). As a result of the scoring error, soft norms, and the Flynn Effect, and taking into account the statistical error of measurement, Dr. McGrew testified that in 1998, the Applicant had an IQ of 71, falling in a 95% confidence band between 66 and 76. (HRR 12/16 at 71-72).

25. Dr. Timothy Proctor, has a bachelor's degree in psychology from Texas A&M University, and a Ph.D. in clinical psychology from the University of Texas Southwestern Medical Center where he was the Carmen Miller Michael Award recipient. He had a year of pre-doctoral internship in clinical psychology at UT-SWMC and one year of postdoctoral internship in forensic psychology at the University of Southern California Keck School of Medicine, Institute of Psychiatry, Law and Behavioral Science. He also has two years of postdoc oral training in Psychopharmacology at Texas A&M. He was licensed to practice in 2002, has taught in several universities, and has practiced as a clinical and forensic psychologist since 2002. Dr. Proctor began working with the mentally retarded in 1996 in an inpatient residential unit. Also Dr. Proctor is board certified as a Forensic Psychologist. (RX 28).

26. On March 7 and 8, 2012, Dr. Proctor tested Applicant with the WAIS-IV, WRAT-4, the Word Choice Test, the Test of Memory Malingering, and Green's Medical Symptom Validity Test. (DX 10; RX 28).

27. On the 2012 WAIS-IV, Applicant obtained a full scale IQ of 95, with a verbal comprehension score of 103 and a perceptual reasoning score of 94. The range of error was 91-99. Dr. Proctor determined that the Applicant's intellectual functioning was within average range except his working memory which was low average. The full scale score of 95 does not meet the first prong of the diagnostic criteria for mental retardation. (DX 10 at 13-14; RX 28).

28. As administered by Dr. Proctor, Applicant obtained on the WRAT-4 an achievement level or grade level, of above twelfth grade in word reading, sentence comprehension, and spelling, while his math computation was fifth grade level. (DX 10 at 14; RX 28).

29. The effort testing administered by Dr. Proctor included the Word Memory Test and the Medical Symptom Validity Test. No issues with suboptimal effort were suggested by the test results (DX 1 at 13; RX 28).

30. As it relates to Dr. Thomas Allen's report and testimony, Applicant's counsel did not renew the motion to strike his report and testimony. The Court will consider his report and testimony in its findings of fact and conclusions.

31. Dr. Allen has a bachelor's degree in psychology from Western New Mexico University; a

master's degree in psychology from Texas A&M University; and a Ph.D. in psychology from East Texas State University (Texas A&M- Commerce). He had a year of pre-doctorate internship at the Forensic Psychiatric Unit at Rusk State Hospital and one year of post-doctorate internship through the University Park Hospital in Tyler, Texas. Dr. Allen was licensed to practice in 1984, work at Rusk State Hospital for seven years. He has taught psychology at the university level and began practice in 1986. Dr. Allen has experience in forensic, criminal populations. (DX 8 at 3-5).

32. Dr. Allen appropriately used standardized tests, but where necessary, qualified the results by expressing his professional opinion regarding their limitations. (DX 8 at 8-25).

33. On September 24, 2013, Dr. Allen interviewed Applicant at the Polunsky Unit of the Texas Department of Criminal Justice, to determine whether or not he was mentally retarded. Dr. Allen administered the WAIS-IV; the WRAT 4; the Green's Word Memory Test (hereinafter "WMT"); and the Non-Verbal Symptom Validity Test (hereinafter NV-MSVT). Dr. Allen also conducted an adaptive behavior interview and mental status exam. (DX 8 at 1).

34. According to Dr. Allen, Applicant obtained a verbal comprehension score of 95, a perceptual reasoning score of 90, and a full scale score of 94, and the range of error was 90-98. (DX 8 at 14).

35. According to Dr. Allen, Applicant obtained a grade equivalent of 12.2 in word reading, 10.9 in

sentence comprehension, >12.9 in spelling, and 5.1 in math computation. (DX 8 at 14).

36. Using an IQ test itself to assess effort has poor reliability and validity measures, and the superior way to assess effort is by using effort testing. (HRR 1/6 at 55, 58-59, 206-207). No measurement existed in 1998 to establish that Applicant used full effort in 1998. (HRR 1/6 at 55, 58-59, 206-207).

37. The parties addressed the issue of the Flynn effect, which is the theory that a population's IQ test scores increase over time, therefore test scores on dated test should be adjusted upwards. (HRR 12/16 at 50). The Court considered the evidence presented and gave the appropriate weight to it in making the findings herein.

38. The parties addressed the issue of whether or not Applicant was malingering during the times he was being evaluated. The Court considered the evidence presented and gave the appropriate weight to it in making the findings herein. (HRR 1/6 at 50-54).

39. Taking into consideration the aforementioned findings and Applicant's various IQ scores (71, 95, and 94), the Court finds that Applicant has not shown, by the preponderance of the evidence, that he has significantly sub-average intellectual functioning.

D. Limitations in Adaptive Functioning. The Court makes the following findings:

40. The AAMR specifies that impairments in adaptive behavior are defined as significant

limitations in a person's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group.

41. The assessment of adaptive behaviors occurring after the developmental phase, and even while in prison, can provide useful data relevant to the question before the Court. (HRR 1/6 at 48-50, 78-79).

42. Limitations in functioning must be considered within the context of community environments typical of Applicant's age, peers, and culture, and that valid assessment considers cultural diversity as well as differences in communication and behavioral factors. (RX 25 at 6).

43. To address the issue of adaptive behavior, Applicant presented testimony from Dr. Thomas Oakland. (HRR 11/15). Dr. Oakland is a child and educational psychologist with experience in assessing adaptive behaviors and diagnosing mental retardation. Dr. Oakland has a bachelor's degree in history and received a Ph.D. in educational psychology from Indiana University in 1967. He is board certified in school and neuropsychology. Along with a variety of other positions, Dr. Oakland was the Director of the Learning Abilities Center at the University of Texas at Austin and Chair of the Department of Educational Psychology at the University of Florida. (HRR 11/15 at 9-17).

44. Dr. Oakland assessed Applicant's adaptive behavior and skills using the Adaptive Behavior Assessment System-II—Adult Form (hereinafter "ABAS-II). (DX 1 at 9). The ABAS II is designed to

assess a person's adaptive behavior; however, the ABAS-II is not normed in the criminal forensic environment. (HRR 1/6 at 134, 141, 148).

45. Dr. Oakland reviewed various records and conducted multiple interviews in order to evaluate Applicant using the ABAS-II. He met with Applicant and sixteen relatives, reviewed educational documents, medical records, testing documents, court documents, and interview records. (DX 1 at 2-3). Dr. Oakland also selected four individuals to provide in-depth information on approximately 250 questions relating to Applicant's adaptive behavior. These individuals were Applicant, his mother, his aunt, and his sister. (DX 1 at 9). While the Court finds the information from Applicant's relatives informative and relevant, it also considers that their answers could be somewhat bias as it relates to the issue before the Court.

46. The Court is of the opinion that mental retardation is basically a static condition, wherein movement in a person's IQ is minimal, most likely, within one standard error of measurement. (HRR 1/6 at 39-40, 124, 187-88, 199-201).

47. It is implausible that Applicant was mentally retarded while growing up in a chaotic home environment, but when he arrived on death row, the stability and structure there enabled him to improve his IQ and adaptive behaviors sufficiently to preclude a finding of mental retardation. (HRR 1/6 at 41-42, 124-27, 200-201).

48. Contrary to Dr. Oakland's opinion, the Court is not inclined to believe that traumatic head injuries or substance abuse during Applicant's

developmental years was responsible for a recognizable diminution of intellectual abilities or the presence of retardation. (HRR 11/15 at 90). The Court is of the opinion, however, that Applicant's poor performance in school and lack of knowledge acquisition, are more likely the result of a combination of poor school attendance, a chaotic family situation, gang affiliation, use of illegal drugs, poverty, frequent moves, and poor role modeling from those around him, both peers and adults. (HRR 11/15 at 91-94, 171-75).

49. Applicant's functional academics are borderline, however, they are not significantly limited. (HRR 1/6 at 70).

50. Applicant has not shown a substantial deficit in communication, especially in his written communications. (HRR 1/6 at 82; RX 42).

51. Many of Applicant's issues with cleanliness and self-care are related to his home environment and his poverty level while in his early years, not mental retardation. (HRR 11/15 at 186-90; RX 47).

52. Applicant was not asked to do chores at home, so therefore, he did not acquire those skills. As with many adolescents, Applicant did not manage his money well. Applicant has mastered basic cooking skills. Applicant currently washes his sheets and clothing and cleans his cell. (HRR 11/15 at 196-202).

53. Applicant lived in areas of poverty and, therefore, befriended individuals who may have been bad influences. Applicant joined at least one gang and incited fights with others. Applicant had at

least one girlfriend by the age of seventeen. (HRR 11/15 at 202-205).

54. Applicant traveled around town by bicycle, including getting to work. Applicant attended church with his grandmother and went to the store at her request. (HRR 11/15 at 207-208).

55. Applicant drove alone substantial distances in order to attend rap performances. (HRR 11/15 at 208-09).

56. Applicant had several jobs prior to his incarceration. Applicant usually chose to leave his jobs or was too young to work, as opposed to being incompetent or incapable. (HRR 11/15 at 214-18).

57. Applicant engaged in a number of normal leisure activities, including playing dominoes, visiting with his girlfriend, listening to music with friends, playing video games, reading novels, and playing homemade Scrabble. (HRR 11/15 at 219).

58. There is some evidence that Applicant may have failed to properly care for minor injuries. However, the Court gives less weight to this evidence due to the fact that the record is replete with instances of Applicant requesting specific medical tests in prison, such as a full lipid panel. (HRR 11/15 at 220-222; RX 41H).

59. Applicant was held back in the third and seventh grades. (HRR 12/16 at 151, 187).

60. Applicant performed in the average to low average range on the Iowa Test of Basic Skills (hereinafter "ITBS") in the fourth and fifth grade. (HRR 12/16 at 138-39, 148; HRR 1/6 at 60; R)C 30 at 4, RX 36 at 40.

61. Dr. Cunningham, Dr. Martin, and Dr. Otero testified at trial that Applicant's poor performance at school may have been due to learning disabilities. This seems to be consistent with evidence from Dr. Allen and Dr. Hughes during the evidentiary hearings on this issue, and more plausible as an explanation that mental retardation. (20 RR at 158; 21 RR at 87, 245).

62. Applicant performed at the average to below average level, he was not preforming on the level of a mentally retarded student. (HRR. 12/16 at 186).

63. The Court agrees with Ms. Vanessa Wakefield, Applicant's science teacher in 1993 that Applicant was capable of better school work. (HRR 12/17 at 20; RX 36 at 45). The Court finds that Applicant's home environment, lack of parental support relating to his education, and excessive absences contributed to his lack of desire and failure to achieve at a higher level. (HRR 12/17 at 19-23).

64. While confined, Applicant has shown a substantial understanding of health related issues, such as the need to stay hydrated, physical exercise, requests to monitor his blood lipids and cholesterol levels, as well as, dental care. (HRR 11/15 at 190-191; DX 41H).

65. The Court believes that using a thesaurus, dictionary, or other reference materials to increase Applicant's word choices is inconsistent with the behavior or abilities of a person with mental retardation. (HRR 11/15 at 186; HRR 1/6 at 178).

66. While confined, Applicant possesses a dictionary, a German dictionary, and reports reading

theology, and can instruct others about concepts such as "service fees." This evidence also supports the finding that Applicant's functional academics skills are not significantly limited. (RX 25 at 19; RX 42 at 63, 265).

67. The Court compared the documents established to be handwritten by Applicant during the 2010 hearing with documents apparently handwritten by Applicant introduced as RX 42, and believes the letters leaving the prison to be handwritten by Applicant as well. (SX 5-10, 22; RX 37B, C; RX 42).

68. Applicant is able to communicate in writing very well. Applicant uses correct spelling and appropriate word choices. (RX 37B at 85). He expresses concepts, feelings, and emotions. He also demonstrates rational thought processes. Applicant's written communications skills are not at all consistent with a finding of mental retardation. (RX 25 at 11; RX 37B at 84-110, 127-128; SX 5-10, 22; RX 42A, RX 42B, 42C).

69. Applicant's vocabulary exceeds that which would be expected of a person with mental retardation, especially considering that he used and spelled words correctly in context, including the following: palpable, shroud (RX 42A at 5); irreconcilable, slanderers, reckless, conceited, millennia (42A at 5); haunt, conscientious (RX 42A at 18); gestures (RX 42A at 19); perversion, derogatory (RX 42A at 20); manipulate (RX 42A at 21); pertaining, contemplating, humidity, neglecting (RX 42A at 25); impressions, underscore, convey, self-importance (RX 42A at 26); floored, immersed (RX 42A at 31); fervor (RX 42A at 37); devote, bankrupt

(RX 42A at 39); fulfillment, disillusionment, ignorant (RX 42A 41); manifestation (RX 42A at 44); formulated, splendor (RX 42A at 48); precious, passionately, clitoris, labia, curvaceous, crevice (RX 42A at 49); depravity (RX 42A at 54); weary (RX 42A at 55); naive, essence (RX 42A at 56); abhor (RX 42A at 62); turmoil (RX 42A at 86); fleeting, gratification, achievement, pursue (RX 42A at 87-88); exploited, sabotage (RX 42A at 89); suspiciously (RX 42A at 91); arouses, caressing, reveals (RX 42A at 92); anticipate, enclosure (RX 42A at 94); surrender (RX 42A at 96); ascended, kegel muscles (RX 42A at 97); cultivate, ailments (RX 42A at 106) (HRR 1/6 at 70-72).

E. *Briseno Factors*.

70. As it relates to the issue of whether or not the people around Applicant treated him as though he was mentally retarded, the Court makes the following findings: Applicant's sister described Applicant as acting autistic, not retarded (DX 13 at 21); Applicant's cousin could not say that she thought Applicant was slow or retarded. (HRR 11/15 at 166-167; DX 13 at 53); Applicant's eighth grade science teacher, Vanessa Wakefield, did not think Applicant was slow or retarded. (HRR 11/5 at 167-168); Applicant's eighth grade principal, Mary O'Farrell, thought Applicant was street smart and certainly not retarded (HRR 11/15 at 168).

71. As it relates to the issue of whether or not Applicant formulated plans and carried them through or whether his conduct was impulsive, the Court makes the following findings: the capital murder, in which Applicant was convicted of, required planning. Applicant sought help in robbing

the victim, demanded the victim's wallet, and also disposed of the wallet after the crime was committed. (2 RR at 8, 14-15, 29-30). In addition, the Court finds that while incarcerated, Applicant has arranged for his asthma inhaler to be refilled and expressed concern over his blood chemistry, cooperated with diet trays designed to improve blood cholesterol, and takes medications as prescribed. This indicates foresight, planning, and awareness that is not consistent with a finding of mental retardation. (DX 411-1). To the extent Applicant's actions and choices demonstrate impulsiveness, the Court finds it is due more to personality traits and environmental influences than lack of intelligence.

72. As it relates to whether or not Applicant is a leader or a follower, the Court makes the following findings: While Applicant shows some indication that he was a follower, there is also evidence to the contrary. Applicant's teacher, Vanessa Wakefield described Applicant as a leader (HRR 11/15 at 205). (*See also* Finding of Fact No. 71).

73. As it relates to (a) Applicant's conduct in response to external stimuli (b) whether Applicant is able to hide facts or lie effectively in his own or other's interests; and (c) whether the commission of the offense required forethought, planning and complex execution of purpose, the Court makes the following findings: (See Finding of Fact No. 71).

74. As it relates to whether or not Applicant responds coherently, rationally, and on point to oral or written questions, the Court finds Applicant has no deficit in his ability to speak and communicate in a logical and rational manner. (RX 25 at 18)

F. The Court's Personal Observations and Experience

75. In addition to the foregoing, the Court draws on its lengthy experience as the presiding judge for the Mental Health Court in Bowie County, Texas. The Court has presided over a myriad of cases involving emotional, psychological, educational, familial, and drug related issues. Considering its past observations and experience, the Court is unable to make a finding of mental retardation in the case before it. While Applicant has some learning deficiencies, taking into consideration the evidence in its totality, Applicant simply does not display the characteristics as manifested in mentally retarded individuals.

76. The Court also had the opportunity to observe Applicant through the entire trial process beginning with pre-indictment, pre-trial hearings, trial, post-trial and prior habeas hearings. Applicant always demonstrated an ability to consult and converse with his counsel, witnesses and court personnel and fully comprehended the nature of the charges pending and the possible consequences of conviction and punishment. At no time during the lengthy proceedings did Applicant show, demonstrate or otherwise reveal or display any indication of mental retardation contemplated by *Atkins*.

77. The Court believes, and finds, that the majority of Applicant's intellectual, Case academic, and behavioral issues are a direct result of a chaotic family life, lack of parental supervision and attention, residing in a poverty stricken area, and

associating with other adolescents who were brought up in the same or similar circumstances.

II. CONCLUSION OF LAW

Taking into consideration the foregoing, the Court finds that Applicant has failed to demonstrate by a preponderance of the evidence that he possesses (1) significantly sub-average general intellectual functioning (an IQ of about 70 or below) and (2) related limitations in adaptive functioning (3) commencing before the age of 18. Applicant has failed to demonstrate that he is mentally retarded and, therefore, that his sentence was unlawfully imposed.

III. CONCLUSION

It is therefore, **RECOMMENDED** that Applicant's Successive Application for Writ of Habeas Corpus be **DENIED**. Further, it is **ORDERED** that to the extent the District Clerk has not previously done so, she shall include for transmittal to the Court of Criminal Appeals, certified copies of the following:

1. All of Applicant's pleadings filed in the above-entitled and numbered cause number, including his Successive Application for Writ of Habeas Corpus;

2. All of the State's pleadings filed in the above-entitled and numbered cause number, including the State's Original Motion to Dismiss;

3. The transcripts of the hearings on Applicant's Successive Application for Writ of Habeas Corpus;

4. All affidavits and exhibits filed in this matter;

5. The parties' Proposed Findings of Fact and Conclusions of Law;

6. This Court's Findings of Fact and Conclusions of Law; and

7. The indictment, judgment, sentence, docket sheet, and appellate record in the above-entitled and numbered cause.

It is further **ORDERED** that the District Clerk send a copy of this Court's Findings of Fact and Conclusions of Law to the following:

Clay James and Stuart Altman
Hogan Lovells
One Tabor Center
1200 Seventeenth Street, Suite 1500
Denver, Colorado 80202

Ms. Georgette P. Oden
Texas Attorney General's Office
P.O. Box 12548
Captital Station
Austin, Texas 78711

SIGNED this 26th day of February, 2014.

/s/ John F. Miller, Jr.
Judge John F. Miller, Jr.
102nd Judicial District Court
Bowie County, Texas

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-38,198-03

EX PARTE JULIUS JEROME MURPHY

Filed: Jan. 18, 2006

ON SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 97-F-462-102 FROM THE 102ND DISTRICT COURT OF BOWIE COUNTY

Per curiam. Keller, P.J. *and* Meyers, J. *dissent*

O R D E R

This is a subsequent application for habeas corpus filed pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5. Applicant asserts he is mentally retarded and cannot be sentenced to death under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002).

Applicant was convicted of capital murder in 1998. We affirmed the conviction and sentence. *Murphy v. State*, No. 73,194 (Tex. Crim. App. May 24, 2000). On October 20, 2000, applicant filed his initial

application for writ of habeas corpus pursuant to Article 11.071. We denied relief. *Ex parte Murphy*, No. WR-38,198-02 (Tex. Crim. App. April 10, 2002).

We have reviewed this subsequent application and find that it has presented a *prima facie* case under our holding in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) and satisfies the requirements of Texas Code of Criminal Procedure, Article 11.071, section 5. Accordingly, we find that the requirements for consideration of a subsequent application have been met in his first claim and the writ should issue according to Article 11.071, section 6. The cause is remanded to the trial court to resolve the issue as set out in Article 11.071, sections 7 through 10. Our determination necessitates the granting of a stay of execution until this matter is resolved by order of this Court.

IT IS SO ORDERED THIS THE 18TH DAY OF JANUARY, 2006.

Do Not Publish.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-38,198-03

EX PARTE JULIUS JEROME MURPHY, Applicant

Filed: Jan. 18, 2006

ON SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 97-F-462-102
FROM THE 102ND DISTRICT COURT OF BOWIE COUNTY

COCHRAN, J., *filed a concurring statement in which* PRICE and HERVEY, JJ., *joined.*

CONCURRING STATEMENT

Based upon the affidavits attached to his application, I agree that applicant has made a *prima facie* showing of mental retardation under *Atkins*,[1] and thus we should remand this case to the trial court for further consideration. I am, however, concerned that applicant claims that he is mentally retarded even though the only intelligence test score that he relies upon is one that shows his over-all I.Q.

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

as being 81. This score is well above the generally accepted cut-off score of 70 for the mildly mental retarded.

Applicant relies on a purported "Flynn effect" and the statistical margin of error to argue that his "true" I.Q. might be as low at 69.[2] It is on this basis that applicant asserts that he has made a *prima facie* showing of the first prong of mental retardation.

Discussion of the Flynn effect has, since the *Atkins* decision, suddenly come to the fore of death-penalty mental-retardation claims.[3] According to the description by one court,

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[2] Applicant asserts that approximately 6 points should be shaved off of his 1998 I.Q. test score because the version of the test he took, the WAIS-R, was normed twenty years earlier and thus reflected a person's "true" intelligence level only at the time it was normed. He claims that another 5-6 points should be shaved off to account for the possible statistical margin of measurement error. And them, because that brings his I.Q. score down into the possible rage of 69-75, he may be considered mentally retarded as falling within the range of those considered mildly mentally retarded under the first American Association for Mental Retardation criterion.

[3] *See*, *e.g., Walton v. Johnson*, 40 F.3d 285, 295-97 (4th Cir. 2005) (capital murder defendant claimed that his I.Q. test of 90 and 77 were really within range of mental retardation taking into account "the Flynn effect" and the statistical margin of error); *Walker v. True*, 399 F.3d 315 (4th Cir. 2005), *after remand*, 401 F.3d 574 (4th Cir. 2005); *In re Hicks*, 375 F.3d 1237 (11th Cir. 2004); *People v. Superior Court (Vidal)*, 129 Cal. App. 4th 434, 28 Cal. Rptr. 3d 529 (5th Ct. App. 2005), *vacated and later proceeding at People v. S.C.*, 2005 Cal. LEXIS 13290 (Cal., Nov. 17, 2005); *Bowling v. Commonwealth*, 163 S.W.3d 361, (Ky. 2005); *State v. Burke*, 2005 Ohio 7020 (2005); *State v. Murphy*, 2005 Ohio 423 (2005); *Myers v. State*, 278 P. 1106

> "Ever since the introduction of standardized IQ tests in the early 20th century, there has been a systematic and pervasive rise in IQ scores all over the world, including the United States. Known as the *Flynn effect* …, [it] causes IQ test norms to become obsolete over time [citations]. In other words, as time passes and IQ test norms get older, people perform better and better on the test, raising the mean IQ by several points within a matter of years. Once a test is renormed, which typically happens over 15-20 years, the mean is reset to 100, making the test harder and 'hiding' the previous gains in IQ scores."[4]

Thus, if the Flynn effect is credited, "[g]ains on the Wechsler scales are approximately 0.311 points per year; '[a]lthough there is not a consensus among professionals as to why these gains are occurring or what these gains actually mean (e.g., are we really getting smarter?), all are in agreement that the gains occur … .'"[5] However, at least one court has stated that the American Association of Mental Retardation (AAMR) "does not suggest that an IQ score must reflect adjustment for the Flynn effect." [6]

(Okla. 2005); *Black v. State*, NO. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129 (Tenn.2005)

[4] *People v. Superior Court*, 129 Cal. App. 4th at 471 (quoting Kanaya et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses,* AMERICAN PSYCHOLOGIST, at 778 (Oct. 2003)

[5] *Id.*

[6] *Burke*, 2005 Ohio 7020, P51.

Furthermore, "[t]he scientific community does not agree on the cause of this phenomenon.[7]

Mr. Flynn, a political scientist residing in New Zealand, attributes his namesake effect to environmental factors such as "the advent of television and the greater cognizant demands of industrial development."[8] Mr. Flynn states that "[t]he hypothesis that best fits the results is that IQ tests do not measure intelligence but rather correlate with a weak causal link to intelligence."[9] According to one unscientific source, Mr. Flynn "concluded that someone who scored among the best 10% a hundred years ago, would nowadays be categorized among the 5% weakest. That means that someone who would be considered bright a century ago, should now be considered a moron!"[10]

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[7] *Bowling*, 163 S.W.3d at 374, n. 12.

[8] *Id.* (citing James r. Flynn & William T. Dickens, *Heritability Estimates Versus Large Environmental Effects: The IQ Paradox Resolved*, 108 PSYCH. REV. 346 (April 2001)). Others have attributed it to better nutrition. *Id.* (citing Richard Lynn, *The Role of Nutrition in Secular Increases in Intelligence*, 11 PERSONALITY & INDIVIDUAL DIFFERENCES 273-85 (1990 No. 3).

[9] Flynn, J.R., *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, PSYCHOLOGICAL BULLETIN, 101, 171-191 (1987) (found at http://www.indiana.edu/~intell/flynneffect.shtml#Flynn87) (last visited on Jan. 18, 2006).

[10] F. Heylighen, *Increasing Intelligence: The Flynn Effect*, Principal Cybernetica Web (Aug. 22, 2000) at http://pespmc1.vub.ac.bc/FLYNNEFF.html (last visited January 18, 2006). This same source explains that:

There is something intuitively illogical about this argument, but perhaps there is a sound scientific basis for it.[11] If so, what impact, if any, does (or

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> Older people tend to have lower scores on IQ tests than younger people. Until now, it was always assumed that this means that intelligence diminishes with age. However, this observation can be explained as well by noting that older people were raised in a period when the general level of intelligence was lower. Flynn showed that if people's IQ is evaluated with tests calibrated for the period during which they grew up, an old person scores as well as a young one. The reason that older people do less well on IQ tests is not that they have become more stupid with age, but that the younger generation simply got a head start.

Id.

[11] *See generally*, Stephen J. Ceci, *So Near and Yet So Far: Lingering Questions About the Use of Measures of General Intelligence for College Admission and Employment Screening*, 6 PSYCH. PUB. POL AND L. 233, 245-46 (March 2000) (discussing Flynn effect and reasons why, even when I.Q. tests are re-normed, the number of mental retardation classifications do not immediately increase); *see also* Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins v. Virginia, 11 WIDENER L. REV. 121, 127-28 (2004) (noting the Flynn effect and stating the "[e]ach time an IQ test is re-normed, a generalized lowering of IQ scores occurs because the new norms recalibrate the average IQ. This removes the increases that accumulated over the previous norming cycle. So, if 2.27% of the population is diagnosed as MR in the year an IQ test is normed, then each subsequent year fewer people will score in the MR range due to the tendency for scores to rise. This will continue until new norms once again come into use. Thus, we can expect an increase in MR diagnoses each time new IQ norms are published[,]" but concluding that "these documented changes in IQ scores occur in the absence of any meaningful change in the intellectual ability of the individuals affected. Any inconsistencies most likely result from imperfections in our

should) this Flynn effect have upon the determination of whether a person standing trial today is so mentally retarded that it would violate the Eighth Amendment to execute him regardless of all other facts that might militate in favor of the death penalty? Do, as Mr. Flynn posits, I.Q. tests have merely a "weak correlation" with actual intelligence? Do I.Q. tests accurately reflect a person's ability to function in society? To be morally cognizant and culpable for his criminal conduct? Should the legal standard for determining mental retardation for Eighth Amendment purposes rely upon I.Q. test scores (and if so should that reliance be based upon the highest score, the lowest, the most recent, an average of all scores, the raw score, a score that has been recalculated by taking into account the Flynn effect and/or the standard deviation of error, one that is a specific number or that falls within a range—and, if so, what range) as part of its definition or should the fact-finder focus solely upon a person's childhood or adult behavior and cognitive abilities? For if, in fact, I.Q. scores are so unreliable in measuring actual mental functioning that an overall test score of 81 may be equivalent to an actual I.Q. of 69, perhaps the use of I.Q. test scores is a scientifically inappropriate means of measuring mental retardation. The result may be that, for purposes of *Atkins*, what juries and courts need is a "reasonable man" assessment of mental competence as opposed to a statistician's.

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tools and data, rather than from actual changes in the intellectual abilities of those being tested") (footnotes omitted).

These are questions upon which the parties in this case might wish to offer documentary evidence and testimony so that the trial court and this Court may make the ultimate factual determination of whether applicant is so mentally impaired that he is exempt from the death penalty under the Eighth Amendment to the United States Constitution. The ultimate question that must be decided is not whether a person has a certain specific I.Q. test score or whether that person's measured I.Q. score might qualify him for the receipt of additional social services or special educational assistance, but rather whether he is so mentally deficient that he ought not be held fully morally accountable for his criminal conduct.

I therefore join in the Court's decision to grant applicant's request for a stay of execution and to remand this case to the trial court for further evidentiary development on these issues.

Filed: January 18, 2006

Do Not Publish.