No. 14-989

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

CLAYTON C. JAMES
HOGAN LOVELLS US LLP
One Tabor Center
Suite 1500
1200 Seventeenth Street
Denver, CO 80202

CATHERINE E. STETSON
Counsel of Record
STUART M. ALTMAN
E. DESMOND HOGAN
JACLYN L. DILAURO
KATHRYN L. MARSHALL
ELIZABETH AUSTIN BONNER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

CONSTITUTIONAL PROVISIONS:

IN THE

Supreme Court of the United States

No. 14-989

JULIUS JEROME MURPHY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

CAPITAL CASE

INTRODUCTION

There is a deep and real split among state courts of last resort on how to assess *Atkins* Eighth Amendment intellectual-disability claims. Some courts ask—correctly, petitioner maintains—whether an individual *was* intellectually disabled at the time of the crime and trial. Others pose the very different question of whether an individual currently *is* intellectually disabled at the time of an evidentiary hearing on the issue. That split is real, growing, and outcome-determinative in the starkest way imaginable.

Yet Texas declines to engage with the actual question presented. Instead, it characterizes petitioner as seeking this Court's blessing of an evidentiary rule that "a court may *only* consider evidence of a petitioner's intellectual and adaptive functioning at the time of the crime and trial *to the exclusion of any other evidence*." Opp. 18 (emphases added).

No. Petitioner seeks only to ensure that a court conducting an *Atkins* inquiry asks the right question: *was* this individual intellectually disabled at the time of the crime and trial, as this Court's precedents require? As long as the court commences its inquiry from the correct legal starting point, it may consider as many IQ tests as it likes. And it can collect adaptive-functioning evidence from throughout an *Atkins* claimant's life. But the *probative weight* of that evidence necessarily declines as it grows further and further removed from the dates on which *Atkins* centers the inquiry: the time of the crime and the time of trial. Texas (and Alabama, and Florida, and Oklahoma) asked the wrong question.

Compounding that constitutional error, the Texas courts used non-diagnostic and non-clinical criteria untethered to recognized clinical standards—despite this Court's recent observation that "clinical definitions of intellectual disability * * * were a fundamental premise of *Atkins*." *Hall* v. *Florida*, 134 S. Ct. 1986, 1999 (2014). The Texas courts did so by applying the stale and discredited framework from *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), and by favoring the trial court's own lay "past observations" that Mr. Murphy "simply does not display the characteristics as manifested in mentally retard-

ed individuals," Pet. App. 18a, over diagnostically valid medical criteria.

Texas argues in response that Mr. Murphy's emphasis on clinical standards would "take the decision of whether a defendant is intellectually disabled out of the hands of the fact-finder and place it into the hands of medical professionals." Opp. 34. Not in the least. Factfinders still get to find facts. But medical diagnoses must be based on opinions offered by medical doctors, not juris doctors. And that truism does not come from Mr. Murphy. It comes from this Court, which has recently admonished that only medical experts possess the "learning and skills" necessary for the "diagnosis of persons with mental or psychiatric disorders or disabilities." *Hall*, 134 S. Ct. at 1993. Fancying themselves sufficiently versed in the medical arts to pass judgment on Mr. Murphy's disability, the courts below ignored that admonition.

The petition should be granted.

ARGUMENT

I. THE SPLIT IS REAL AND SIGNIFICANT.

Texas actually concedes the legal baseline of Mr. Murphy's argument: *Atkins*' Eighth Amendment holding is rooted in the time of the crime—when the intellectually disabled are "less able * * * to control their conduct based upon the possibility of receiving the death penalty"—and the time of trial, when they are less able to " 'give meaningful assistance to their counsel.' " Opp. 16. That is precisely right. Thus, when assessing whether a convicted prisoner is ineligible for the death penalty under *Atkins*, courts

must discern whether that disability existed *at the time of the crime and trial*. And that is the heart of Mr. Murphy's petition: Some courts do that; others do not.

Texas, however, apparently read a different petition than the one Mr. Murphy filed. According to the State, the petition argues that "a court may only consider evidence of a petitioner's intellectual and adaptive functioning at the time of the crime and trial to the exclusion of any other evidence." Opp. 18. This Court will look in vain in the petition for that statement or anything resembling it. Mr. Murphy does not contend that evidence of intellectual disability from other times may *never* be admitted. He contends (and multiple courts have held) that evidence relating to a petitioner's intellectual disability must be evaluated in light of the relevant question: whether that individual was intellectually *disabled at the time of crime and trial*. Later-in-time information must be evaluated through that lens—meaning for its value in determining, *retrospectively*, whether an individual was intellectually disabled at the time of crime and trial.

Because it so radically re-characterizes the question presented, Texas does not acknowledge the confusion among the lower courts as to where the intellectual-disability inquiry is moored. And since *Atkins* was decided, more and more courts have provided divergent answers to that question.

State courts in Mississippi, Tennessee, and Kentucky have recognized that the analysis required under *Atkins* is, of necessity, "retrospective." *See, e.g.*, *Goodin* v. *State*, 102 So. 3d 1102, 1114 (Miss. 2012) ("Unlike in a medical, educational, or social services

context, the law is concerned with what *was* rather than what *is*.") (quoting *United States* v. *Hardy*, 762 F. Supp. 2d 849, 881 (E.D. La. 2010)) (emphases added). Intellectual-disability determinations are thus anchored at "the time of the offense." *Coleman* v. *State*, 341 S.W.3d 221, 230, 233 (Tenn. 2011). If a petitioner seeks to avoid execution on the basis that he is intellectually disabled, then "logic dictates that the diminished culpability exist at the time of the offense, not necessarily at the time of the execution." *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 376 (Ky. 2005).

State courts in Alabama, Florida, and Oklahoma, however, ask a very different question: whether the individual "*currently* exhibit[s] deficits in adaptive behavior." *Smith* v. *State*, No. 1060427, 2007 WL 1519869, at *8 (Ala. May 25, 2007) (emphasis added); *see also Jones* v. *State*, 966 So. 2d 319, 326 (Fla. 2007) (stating that "the question is whether a defendant 'is' mentally retarded, not whether he was"); *Ochoa* v. *State*, 136 P.3d 661, 665-666 (Okla. Crim. App. 2006) (*Atkins* asks whether a petitioner " 'is' mentally retarded, as opposed to * * * [whether] he 'was' mentally retarded at the time of the crime.").

In this case, the court made clear which question it was answering: "Applicant has failed to demonstrate that he *is* mentally retarded and, therefore, that his sentence was unlawfully imposed." Pet. App. 24a

(emphasis added). In doing so, the Texas court cast its lot with Alabama, Florida, and Oklahoma.[1]

Texas attempts to cure this split by claiming that Mississippi, Tennessee, and Kentucky consider evidence from times other than the time of the crime and trial. *See* Opp. 21. But Mr. Murphy does not dispute that courts may consider evidence from other times in a defendant's life. Courts *must*, however, review such evidence with the right inquiry in mind: whether the defendant was intellectually disabled at the time of the crime and trial. Thus, in *Coleman*, the Tennessee Supreme Court considered "all the tests administered to the criminal defendant," 341 S.W.3d at 238, for their bearing on whether the defendant was intellectually disabled at "the time of the offense." *Id* at 242. So too in *Wilson* v. *Commonwealth*, 381 S.W.3d 180 (Ky. 2012), where the court reviewed later-in-time test scores for their "relevan[ce] to whether a defendant *had* an IQ of 70 or

---

[1] As noted in the petition, Pet. 16-17, the Court of Criminal Appeals in *Ex parte Cathey*, 45 S.W. 3d 1 (Tex. Crim. App. 2014) recently stated 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 * * * not whether a person is currently mentally retarded," *id.* at 14. But the *Cathey* court quickly made clear that it did not mean what it said, because the court went on to ask and answer precisely the question it had just declared irrelevant: "*Is* this person capable of functioning adequately in his everyday world * * * Or *is* he so intellectually disabled that he falls within that class of mentally retarded inmates who are exempt from the death penalty?" *Id.* at 19 (emphases added).

below" and thus was a "seriously mentally retarded offender" as defined in the state's statute.[2] *Id.* at 188 (emphasis added).

As Texas points out, Opp. 29-30, in some cases there may be no IQ test dating from the time of the crime or trial, and tests given years later may be the only available evidence on that issue. In some cases, that might well be true. But not here. Texas has *never* taken issue with the validity or accuracy of the 1998 IQ test administered to Mr. Murphy. And it does not—because it cannot—dispute that the Texas trial court *found as a fact* that Mr. Murphy scored a 71 on that test[3]—a score this Court has held to be "evidence of intellectual disability," *Hall*, 134 S. Ct. at 1992. To the extent there is a disparity between the score Mr. Murphy received in 1998 and those he

---

[2] Texas further argues that "[t]he opinions of federal courts relied upon by Murphy are * * * of no assistance to him." Opp. 22. Wrong again. The district courts' holdings, for example, in *United States* v. *Montgomery* that "all information regarding Defendant's post-incarceration behavior should [not] be ignored entirely," No. 2:11-cr-20044-JPM-1, 2014 WL 1516147, at *49 (W.D. Tenn. 2014), and in *United States* v. *Wilson* that it would not "categorically exclude" consideration of a petitioner's adaptive behavior while incarcerated, 920 F. Supp. 2d 287, 295 (E.D.N.Y. 2012), hew precisely to the approach Mr. Murphy presses here. Such evidence need not be *categorically* excluded, but it deserves less weight than time-of-crime and time-of-trial evidence.

[3] Texas now frantically backpedals from that factfinding, claiming that Mr. Murphy's IQ score in 1998 was an "81 (adjusted to 71)." Opp. 2. But Texas objected neither to those adjustments, nor to the trial court's finding of fact. Mr. Murphy's IQ score in 1998 was 71. *See* Pet. App. 10a-11a.

received fifteen years later, then, the tie goes to the test administered at the time most probative to the *Atkins* inquiry—the one closest to the time of the crime and trial.

The "was" courts and the "is" courts cannot both be right. Until this Court resolves the split, the states asking the wrong question may execute the wrong people.

This Court should intervene.

II. THE TEXAS COURTS' USE OF NON-DIAGNOSTIC CRITERIA SETS A DANGEROUS PRECEDENT.

This Court could not have put it more clearly in *Hall*: "[T]his Court and the States have placed substantial reliance on the medical profession's expertise." *Hall*, 134 S. Ct. 1989. Thus, "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. at 1994. The courts below failed to do that. Instead they consulted themselves, applying the discredited *Briseño* factors and the trial court's own dated lay observation to reach the conclusion that Mr. Murphy was not intellectually disabled, and thus death-eligible.

To downplay the Texas courts' error, the State accuses Mr. Murphy of trying to "take the decision of whether a defendant is intellectually disabled out of the hands of the fact-finder and place it into the hands of medical professionals." Opp. 34. That charge misses the mark. There is still a critical role for factfinders: evaluating the credibility of expert testimony and determining what weight it should receive. *See, e.g.*, *Inwood Labs., Inc.* v. *Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (noting the trial court's

unique role in evaluating the credibility of witnesses and weighing evidence). But that only underscores the error here: The testimony of Mr. Murphy's expert that Murphy's test scores were highly indicative of intellectual disability and virtually impossible to fake came in *unchallenged*. Yet the trial court invoked *Briseño* and its own observation to countermand that medical expert, and the court of appeals let that pass uncorrected.

Implicitly acknowledging the courts' error, Texas now argues that the *Briseño* factors *are* diagnostic criteria. *See* Opp. 31-33. That is an interesting new tack. It is also completely meritless. The American Association on Intellectual and Developmental Disabilities, for one, has condemned the *Briseño* factors as having "*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) (emphasis added). Likewise, at least one member of the Texas Court of Criminal Appeals is of the opinion that, after this Court's decision in *Hall*, "the writing is on the wall for the future viability of *Ex parte Briseño*." *Ex parte Cathey*, 451 S.W. 3d at 20 (Price, J., dissenting). It thus is no surprise that Texas has not even attempted to demonstrate clinical acceptance of its test.

The trial court's application of the *Briseño* factors illustrates how far short of "established medical practice" they fall. *Hall*, 134 S. Ct. at 1995. For example, in assessing whether Mr. Murphy's conduct was "impulsive" under the second *Briseño* factor, the

trial court did not just find that Mr. Murphy was impulsive. It injected its own lay opinion about the underlying *causes* of that trait. *See* Pet. App. 22a ("it is due more to personality traits and environmental influences than lack of intelligence"). Diagnostic criteria do not invite the factfinder to reach unsupported medical conclusions.

The court's reliance on its own experience and observations of Mr. Murphy at his trial fifteen years earlier, Pet. App. 23a ¶ 75, only made matters worse. Because "laymen cannot easily recognize mild mental retardation," *State* v. *White*, 885 N.E.2d 905, 915 (Ohio 2008), errors like the Texas courts made here "create[] an unacceptable risk that persons with intellectual disability will be executed, and thus [are] unconstitutional," *Hall*, 134 S. Ct. at 1990.

* * *

Where a state, like Texas here, "goes against the unanimous professional consensus" in defining intellectual disability, this Court has intervened to set the issue to rights. *Id.* at 2000. Plenary review should be granted to consider these important questions about how states apply *Atkins* and whether Texas may continue to use non-diagnostic criteria to determine whether an individual facing the death penalty should be categorically excluded because of his intellectual disability.

But even if plenary review is not granted, Texas never opposes Mr. Murphy's request that the Court grant, vacate, and remand his case to the Texas Court of Appeals for consideration in light of *Hall* v. *Florida*, 134 S. Ct. 1986 (2014). At a minimum, this Court should permit the Texas courts the opportunity to revisit these issues following *Hall*'s guidance.

CONCLUSION

For all of the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAYTON C. JAMES
HOGAN LOVELLS US LLP
One Tabor Center
Suite 1500
1200 Seventeenth Street
Denver, CO 80202

CATHERINE E. STETSON
Counsel of Record
STUART M. ALTMAN
E. DESMOND HOGAN
JACLYN L. DILAURO
KATHRYN L. MARSHALL
ELIZABETH AUSTIN BONNER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5491
cate.stetson@hoganlovells.com

MAY 4, 2015

Counsel for Petitioner