No. 15-797

IN THE
# Supreme Court of the United States

BOBBY JAMES MOORE,
*Petitioner*,

*v.*

TEXAS,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
TEXAS CRIMINAL COURT OF APPEALS

## BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether Texas's prohibition on the use of current clinical standards, and its use of standards that contravene clinical practice, to identify capital defendants with intellectual disabilities violates the Eighth Amendment principles articulated in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and *Hall* v. *Florida*, 134 S. Ct. 1986 (2014).

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## INTEREST OF AMICUS CURIAE[1]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also in-

[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. The parties have granted blanket consent to the filing of amicus briefs.

cludes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. Although the ABA takes no position on the death penalty itself, it has a well-established concern that the death penalty be enforced in a fair and unbiased fashion, with appropriate procedural protections. In 1986, the ABA founded the ABA Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death-penalty jurisdictions. Since 1989, the ABA has had a policy stating "that no person with mental retardation, as now defined by the American Association on Mental Retardation [AAMR], should be sentenced to death or executed." ABA House of Delegates Recommendation 110 (adopted 1989).[3] In 2001, the ABA Section of Individual Rights and Responsibilities issued a set of recommended protocols to improve the administration of the death penalty. ABA Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June 2001). The protocols included recommendations that the death penalty not be imposed upon "individuals who have mental retardation, as that term is defined by the [AAMR]," and that "[w]hether the definition is sat-

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[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

[3] Like this Court, the ABA consistently used the terms "mental retardation" and "mentally retarded" prior to the *Hall* decision. *See Hall* v. *Florida*, 134 S. Ct. 1986, 1990 (2014) (noting "change in terminology"); *see also infra* n.4.

isfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure." *Id.* at 63.

Following this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the ABA developed guidelines and best practices for implementing *Atkins*. In 2003, the ABA published *Mental Retardation and the Death Penalty*, which included model legislation for States implementing *Atkins*. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11 (2003). The ABA also established the Task Force on Mental Disability and the Death Penalty, composed of lawyers, mental-health practitioners, and academics, to examine the imposition of the death penalty on persons with intellectual disability and other mental or psychiatric conditions and limitations. In 2006, the ABA adopted as policy the Task Force's conclusion that the death penalty should not be imposed on persons with "significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation." ABA House of Delegates Recommendation 122A, at 1 (adopted 2006). Finally, the ABA filed an amicus brief in support of the petitioner in *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), explaining that Florida's scheme for determining intellectual disability based on a rigid IQ test score cut-off violated clinical standards and the rule of *Atkins*.

Of particular significance to this brief, between 2003 and 2013, the ABA's Death Penalty Due Process Review Project conducted comprehensive assessments of the operation of the death penalty in twelve States, including Texas, that together have carried out almost 65% of all executions since *Gregg* v. *Georgia*, 428 U.S.

153 (1976). ABA, *State Death Penalty Assessments*, *available at* http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited Aug. 4, 2016). The assessments were conducted by teams including current or former judges, prosecutors, and defense attorneys; state bar representatives; state legislators; and law professors, who evaluated each State's administration of the death penalty against uniform benchmarks of fairness and accuracy set out in the ABA's 2001 protocols. Each assessment includes an evaluation of the State's procedures for determining whether a capital defendant has an intellectual disability and is thus exempt from the death penalty.

Notably, the ABA's Texas assessment found that Texas does not determine intellectual disability according to clinical standards. Rather, Texas has adopted standards that are "not supported by any medical authority and instead rely on popular misconceptions regarding how persons with mental retardation behave." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* x (Sept. 2013) (*ABA Texas Assessment*). The assessment warns that this approach "creates an unacceptable risk that persons with mental retardation will receive the death penalty or be executed." *Id.*

In light of the intensive work the ABA has done evaluating death-penalty jurisdictions' standards and procedures for determining intellectual disability, it submits this brief to assist the Court in considering whether Texas's standards for determining intellectual disability comport with the Constitution.

## SUMMARY OF ARGUMENT

In this case, the Texas Court of Criminal Appeals (CCA) prohibited Texas courts from considering current clinical standards for determining intellectual disability, instead requiring them to apply a standard articulated by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). *Briseno* purported to apply the AAMR's 1992 standards for determining intellectual disability, but in fact departed from those standards in numerous ways. Most egregiously, *Briseno* replaced the clinical standards for determining whether a defendant has deficits in adaptive functioning—one of the three critical components of an intellectual-disability diagnosis—with a fundamentally different and far more restrictive test of the CCA's own invention that lacks any clinical basis.

The so-called "*Briseno* factors"—which include such questions as whether the defendant's family and friends think he has an intellectual disability, whether the defendant can respond coherently to a question, whether he can lie, and whether his crime required planning—all depart from clinical standards in many ways. For example, they rely on and reflect lay stereotypes of intellectual disability that are not used in clinical assessments and that often bear no relation to the actual abilities and behavior of individuals with intellectual disability. They invite courts to overlook a defendant's deficits in adaptive functioning based on strengths in other areas, despite the scientific consensus that adaptive limitations often coexist with strengths in persons with intellectual disability. And they emphasize the circumstances of the defendant's crime even when they are atypical of the defendant's functioning in everyday life.

No scientific authority supports the CCA's approach, which allows the execution of individuals who indisputably meet clinical standards for a diagnosis of intellectual disability. That is not happenstance: The CCA adopted the *Briseno* test specifically for the purpose of restricting the protections of *Atkins* v. *Virginia*, 536 U.S. 304 (2002), to a small subgroup of persons with intellectual disabilities. In the CCA's view, its task was not to ensure that no persons with intellectual disability are executed, but to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W.3d at 6.

As *Atkins* and *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), make clear, however, States do not have license to ignore the medical community's agreed-upon standards for diagnosing intellectual disability. "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S. Ct. at 1999. Indeed, "[t]he clinical definitions of intellectual disability … were a fundamental premise of *Atkins*." *Id.* Accordingly, States may not "disregard[] established medical practice" and establish a standard for defining intellectual disability that contradicts that practice. *Id.* at 1995. Texas's *Briseno* standard overrides established clinical practice in the exact way *Hall* found impermissible.

Unsurprisingly, Texas's anti-clinical approach to adaptive functioning is an outlier. As legislation, judicial decisions, and the ABA's assessments of numerous capital jurisdictions make clear, most States seek to employ standards that bar the death penalty for all

persons who warrant a clinical diagnosis of intellectual disability. Because Texas repudiates those standards, its approach has excluded multiple defendants with compelling claims of intellectual disability from the protection of *Atkins*. That approach contravenes the Eighth Amendment and should be rejected.

## ARGUMENT

### I. TEXAS'S STANDARDS FOR INTELLECTUAL DISABILITY CONTRADICT ESTABLISHED CLINICAL STANDARDS IN VIOLATION OF THE EIGHTH AMENDMENT

#### A. Texas's *Briseno* Standard Contravenes Clinical Standards For Diagnosing Intellectual Disability

In *Atkins*, this Court cited clinical, scientifically based standards as the proper measure of whether a criminal defendant is intellectually disabled and thus ineligible for execution under the Eighth Amendment. Specifically, this Court endorsed the AAMR's three-part definition of intellectual disability: "'[1] significantly subaverage intellectual functioning, [2] existing concurrently with related limitations in two or more of the following applicable adaptive skill areas … [3] manifest[ing] before age 18.'" *Atkins* v. *Virginia*, 536 U.S. 304, 308 n.3 (2002) (quoting AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) (*1992 AAMR Manual*)).[4] In *Hall*

[4] Since *Atkins*, the AAMR has changed its name to the American Association on Intellectual and Developmental Disabilities, or AAIDD, to be consistent with the change in terminology from "mental retardation" to "intellectual disability." The basic definition of intellectual disability, however, has remained the same. The current AAIDD manual explains that "[i]ntellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social,

v. *Florida*, this Court reaffirmed that "clinical definitions of intellectual disability … were a fundamental premise of *Atkins*," and rejected as inconsistent with the Eighth Amendment an approach to assessing intellectual disability that "disregard[ed] established medical practice," thereby creating an unacceptable "risk[] [of] executing a person who suffers from intellectual disability." 134 S. Ct. 1986, 1995, 1999, 2001 (2014).

Notwithstanding *Atkins* and *Hall*, the CCA in this case expressly rejected established clinical standards for diagnosing intellectual disability. Indeed, the CCA overturned the trial court's finding that Moore has an intellectual disability on the ground that the court had erred by relying on current clinical standards for determining intellectual disability. Pet. App. 5a-12a. Stating that "the mental-health fields and opinions of mental-health experts … do not determine whether an individual is exempt from execution under *Atkins*," the CCA held that courts were *required* to abide by the standards for intellectual disability that it had established in *Ex parte Briseno* and were *prohibited* from relying on current clinical standards. Pet. App.7a.[5]

*Briseno* purported to adopt the standard for intellectual disability set out in the AAMR's 1992 manual

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and practical adaptive skills" and "originates before age 18." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) (*AAIDD Manual*); *see also* APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) (*DSM-5*) ("[t]he essential features of intellectual disability … are deficits in general mental abilities … and impairment in everyday adaptive functioning," with onset "during the developmental period").

[5] The Texas legislature has never enacted a statute implementing *Atkins*, so there is no statutory definition of intellectual disability for purposes of capital punishment. Pet. App. 7a.

and quoted in *Atkins*, requiring "significantly subaverage general intellectual functioning … accompanied by related limitations in adaptive functioning." 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (internal quotation marks omitted). But while it paid lip service to *Atkins*, *Briseno* immediately proceeded to rewrite the standard for assessing limitations in adaptive behavior, rejecting clinical standards in the process. As *Atkins* noted, the AAMR's 1992 manual explained that limitations in adaptive behavior mean deficits in two or more of the following areas: "'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.'" 536 U.S. at 308 n.3 (quoting *1992 AAMR Manual*); *see also id.* (reciting the APA's materially identical criteria). The current AAIDD manual frames the inquiry as whether a person has significant limitations in one of three broader domains—conceptual, social, or practical adaptive behavior. *AAIDD Manual* 43; *see also DSM-5* at 37 ("Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical.").[6] But the basic idea remains the same: Each of the former ten skill areas is "conceptually linked" to one or more of the broader domains. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 81 (10th ed. 2002). Critically, a person's particular *strengths* are irrelevant to the inquiry: An individual with intellectual disability may well possess

[6] "Conceptual skills" include "language; reading and writing; and money, time, and number concepts"; "[s]ocial skills" include "interpersonal skills, social responsibility, self-esteem, gullibility, … and social problem solving"; and "[p]ractical skills" include "activities of daily living …, occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." *AAIDD Manual* 44 (italics omitted).

some adaptive skills, but the condition is—and has long been—defined by *limitations* in adaptive behavior. *AAIDD Manual* 47; *see also 1992 AAMR Manual* 1 ("Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities[.]").

*Briseno* expressly rejected those established clinical criteria for assessing adaptive behavior, opining—without support—that they were "exceedingly subjective." 135 S.W.3d at 8. Instead, *Briseno* instructed courts to employ seven non-clinical factors for assessing adaptive behavior:

> [1] Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> [2] Has the person formulated plans and carried them through or is his conduct impulsive?
>
> [3] Does his conduct show leadership or does it show that he is led around by others?
>
> [4] Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> [5] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
>
> [6] Can the person hide facts or lie effectively in his own or others' interests?
>
> [7] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require fore-

> thought, planning, and complex execution of purpose?

*Id.* at 8-9.

These factors are scientifically bankrupt. Tellingly, they "are absent from other areas of Texas law" concerning intellectual-disability determinations. *ABA Texas Assessment* 396. And *Briseno* offered no authority supporting their use in any context. To the contrary, the court acknowledged that the factors diverge from established medical practice, opining that it is "understandable that those in the mental health profession should define mental retardation broadly," but that Texas citizens might not agree that all persons who meet clinically based "definition[s] of mental retardation" should be exempt from the death penalty. 135 S.W.3d at 6; *see also Ex parte Van Alstyne*, 239 S.W.3d 815, 820 & n.29 (Tex. Crim. App. 2007) (per curiam) (*Briseno* factors are "non-diagnostic").

As the ABA has documented, the *Briseno* factors contravene clinical standards for diagnosing intellectual disability in several ways.

1. *Reliance on lay stereotypes.* The *Briseno* factors reflect lay stereotypes rather than objective medical diagnosis. The first factor alone—whether family, friends, and other laypeople believed the defendant had an intellectual disability as a child—allows the opinions of those without training to displace those of medical professionals. It should go without saying that, "[w]hile laypersons may be able to provide descriptions of the defendant's behavior that are relevant to a mental retardation diagnosis, they are not qualified to make this diagnosis themselves." *ABA Texas Assessment* 396; *see also* Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental

& Physical Disability L. Rep. 11, 13 n.29 (2003) ("[T]hat an individual possesses one or more [skills] that might be thought by some laypersons [to be] inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying.").

The other factors similarly reflect lay conceptions of the intellectually disabled that have no scientific basis. For example, the fourth factor, which asks whether the defendant can respond rationally to external stimuli, reflects the misconception that a person with intellectual disability is categorically incapable of reacting sensibly to his or her environment. Yet according to the DSM-5, some intellectually disabled individuals "may function age-appropriately in personal care," possess "[r]ecreational skills resembl[ing] age-mates," and pursue "competitive employment … in jobs that do not emphasize conceptual skills." *DSM-5* at 34; *see also* Richardson et al., *Patterns of Leisure Activities of Young Adults with Mild Mental Retardation*, 97 Am. J. Mental Retardation 431, 433, 440 (1993) (study of young adults with intellectual disability, some of whom had jobs, were married, and had children).

The fifth factor, which asks whether a defendant can respond coherently to questioning, assumes that people with intellectual disability must lack normal language skills, another lay misconception. Research predating *Atkins* has shown that, for the most part, persons with intellectual disability have qualitatively normal syntax, vocabulary, and grammar. Fowler, *Language Abilities in Children with Down Syndrome*, *in Children with Down Syndrome: A Developmental Perspective* 302 (Cicchetti & Beeghly eds., 1990) ("the language structures that are acquired by children with Down Syndrome … [are] normal and unremarkable in the order of their appearance"); Kamhi & Johnston,

*Towards an Understanding of Retarded Children's Linguistic Deficiencies*, 25 J. Speech & Hr'g Res. 435, 444 (1982) (language abilities of children with intellectual disability are comparable to normal children's).

The sixth factor similarly treats the ability to lie as inconsistent with intellectual disability, but the capacity for deceptive behavior in some persons with intellectual disability is well-documented. *E.g.*, Sodian & Frith, *Deception and Sabotage in Autistic, Retarded and Normal Children*, 33 J. Child. Psychol. & Psychiatry 591, 601 [year] (task in which "children had to tell a simple lie to prevent an opponent from winning a reward … was easily passed by almost all normal 4-year olds and by all retarded children with a mental age of about 5 years"). The *Briseno* factors thus allow the determination of intellectual disability to turn on lay conceptions of a host of behaviors (rationality, intelligibility, lying) that have minimal or no relevance to a clinical diagnosis of intellectual disability.

2. *Improper consideration of adaptive strengths.* The *Briseno* factors improperly emphasize adaptive strengths. They assume that a person does not have intellectual disability if he or she exhibits certain skills or capacities, regardless of how significant his or her deficits may be in other areas of functioning. Accepted clinical standards, on the other hand, focus on deficits: "Individuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing [intellectual disability], significant limitations in conceptual, social, or practical adaptive skills are not outweighed by the potential strengths in some adaptive skills." *AAIDD Manual* 47; *see also Brumfield* v. *Cain*, 135 S. Ct. 2269, 2281 (2015) (citing clinical guidance explaining

that "intellectually disabled persons may have 'strengths in … some adaptive skill areas'").

3. *Failure to focus on typical performance.* The *Briseno* factors encourage the factfinder to focus on the crime itself, rather than the individual's typical performance in ordinary settings, which is the focus of the clinical diagnostic inquiry. *Gallo* v. *State*, 239 S.W.3d 757, 777 (Tex. Crim. App. 2007) ("[M]any of the *Briseno* factors pertain to the facts of the offense and the defendant's behavior before and after the commission of the offense."). The seventh factor, for instance, deals only with the nature of the offense, and it can override a firmly established clinical diagnosis of intellectual disability. *Ex parte Sosa*, 364 S.W.3d 889, 893-896 (Tex. Crim. App. 2012) (reversing and remanding finding that defendant had intellectual disability because, although trial court made findings on the first six factors, it did not make findings regarding the seventh factor).

This emphasis on the offense itself contravenes the longstanding clinical recognition that adaptive functioning concerns "the collection of conceptual, social, and practical skills that have been learned and are performed by people *in their everyday lives*." *AAIDD Manual* 43 (emphasis added). Accordingly, "[t]he assessment of adaptive behavior focuses on the individual's typical performance." *Id.* at 47. Indeed, the AAIDD specifically prohibits using "past criminal behavior" as a measure of adaptive behavior. AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 20 (2012); *see also id.* ("The diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'").

4. *Failure to recognize that other mental disorders do not preclude intellectual disability.* *Briseno* assumes that intellectual disability is incompatible with other mental disorders, such as personality disorder; indeed, the *Briseno* factors purportedly permit fact-finders to determine whether a defendant has "mental retardation *or* … a personality disorder." 135 S.W.3d. at 8 (emphasis added). But intellectual disability and personality disorder are not mutually exclusive. Even before *Atkins*, the medical community understood that "[i]ndividuals with [m]ental [r]etardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than the general population." APA, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 1994) (*DSM-IV*); *see also DSM-5* at 40 (similar). For that reason, clinicians follow the rule that a diagnosis of intellectual disability "should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." *DSM-IV* at 45.

In short, *Briseno* is not remotely consistent with the accepted clinical approach to diagnosing intellectual disability. As the ABA found in its assessment of Texas's administration of the death penalty, *Briseno*'s "interpretation of the adaptive behavior component diverges significantly from the AAIDD standard," and "in many cases the *Briseno* factors have been used to overrule clinical adaptive functioning assessments that indicate the defendant has mental retardation." *ABA Texas Assessment* 392, 397.

The *Briseno* factors thus exclude from the protection of *Atkins* many defendants who meet the clinical criteria for an intellectual disability. *See* Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After*

*the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 397, 413 (2014) (pre-*Hall* analysis finding that average national success rate for *Atkins* claims was 55%, whereas rate in Texas was roughly 18%); *see also Lizcano* v. *State*, 2010 WL 1817772, at *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting) ("[*Briseno* factors] grant … latitude to fact-finders in Texas to adjust the clinical criteria for adaptive deficits to conform to their own normative judgments with respect to which mentally retarded offenders are deserving of the death penalty and which are not."). Indeed, as discussed further below, *Briseno* was designed to do just that, ensuring that only defendants with intellectual disabilities that conform to lay stereotypes—rather than *all* defendants with intellectual disabilities—are exempt from execution.

### B. Texas's Non-Clinical Standard For Determining Intellectual Disability Is Unconstitutional Under *Atkins* And *Hall*

Texas's anti-clinical approach rests on a faulty understanding of *Atkins*. That case established a categorical rule: The death penalty cannot be imposed on any person with an intellectual disability, as determined by clinical standards. *Atkins*, 536 U.S. at 318 (noting several reasons why "the mentally retarded should be categorically excluded from execution"); *see also Hall*, 134 S. Ct. at 1992 ("The Eighth Amendment prohibits certain punishments as a categorical matter. … [P]ersons with intellectual disability may not be executed."); *see supra* pp. 7-8.

Yet the Texas courts have refused to recognize this basic holding. To the contrary, *Briseno* opined that *Atkins* had *not* established "a 'mental retardation' bright-line exemption from [Texas's] maximum statutory pun-

ishment," and that the court's task was accordingly to "define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." 135 S.W.3d at 6. The court posited that "[m]ost Texas citizens might agree that Steinbeck's Lennie"—a fictional character from the 1937 novel *Of Mice and Men*—should be exempt from the death penalty. *Id.* But the court suggested that other persons with intellectual disabilities should not be. *Id.* at 5-6. And Texas courts have so interpreted *Briseno*. *See, e.g.*, *Sosa*, 364 S.W.3d at 892 (opining that "whether a defendant is mentally retarded for particular clinical purposes" is not dispositive). That approach cannot be squared with *Atkins* and *Hall*, which brook no distinctions among persons with intellectual disabilities for Eighth Amendment purposes.

Given this misunderstanding of *Atkins*, Texas courts have deemed it unnecessary to adhere to clinical standards. But "[c]linical definitions of intellectual disability … were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999; *see also id.* at 2000 ("The legal determination of intellectual disability … is informed by the medical community's diagnostic framework."). States have no license to ignore clinical standards. Although *Atkins* "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" 536 U.S. at 317, States cannot, in developing these procedures, rely on standards that permit the execution of persons who would satisfy the clinical standards *Atkins* explicitly endorsed.

Accordingly, in *Hall*, this Court held that Florida's standard for evaluating the first prong of the diagnostic framework—"'significantly subaverage general intellectual functioning,'" 134 S. Ct. at 1994—contravened

the Eighth Amendment because it "disregard[ed] established medical practice" concerning the use of the standard error of measurement to evaluate IQ test scores. *Id.* at 1995; *see also id.* at 2001 ("Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test."). As the Court explained, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999. Texas's approach produces precisely that result.

## II. TEXAS IS AN OUTLIER IN REFUSING TO PROVIDE THE PROTECTION OF *ATKINS* TO ALL PERSONS WITH INTELLECTUAL DISABILITIES

Texas is an outlier among the States in using an expressly anti-clinical standard—one that deliberately excludes most people with intellectual disabilities—to determine whether a person is ineligible for the death penalty under *Atkins*. That isolation is significant: Where "the vast majority of States" have rejected the use of a particular procedure or standard in imposing the death penalty, that is "strong evidence of consensus that our society does not regard [it] as proper or humane." *Hall*, 134 S. Ct. at 1998.

Moreover, as the ABA has documented, Texas's aberrant approach creates "a significant risk that persons with mental retardation remain on Texas's death row, and perhaps have been executed." *ABA Texas Assessment* 397. Texas's rejection of clinical standards has led Texas courts to impose the death penalty on defendants with intellectual disabilities whom other jurisdictions almost certainly would have recognized as exempt from the death penalty under *Atkins*. That

discrepancy is unacceptable. *See Hall*, 134 S. Ct. at 2001 (Florida's strict IQ cutoff constitutionally invalid in light of "risk[] [of] executing a person who suffers from intellectual disability").

### A. Other States Have Rejected *Briseno* And Acknowledged That *Atkins* And *Hall* Require Using Clinical Standards For Intellectual Disability

No other State uses anything like the *Briseno* factors to define adaptive functioning. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 139-140, 142 (2011). To the contrary, through legislation and judicial rulings, numerous States have endorsed the use of clinical standards for determining intellectual disability.

As this Court observed in *Atkins*, 536 U.S. at 317 n.22, many death-penalty jurisdictions have enacted legislation requiring the application of standards that "generally conform to the clinical definitions" in assessing whether a capital defendant is ineligible for the death penalty due to intellectual disability. *See, e.g.*, Del. Code Ann. tit. 11, § 4209(d)(3)(d)(1); Idaho Code § 19-2515A(1)(a); Mo. Rev. Stat. § 565.030(6); N.C. Gen. Stat. § 15A-2005(a)(1)(b); Okla. Stat. tit. 21, § 701.10b(A)(2); *Ybarra* v. *State*, 247 P.3d 269, 273-275 & n.6 (Nev. 2011) (discussing Nev. Rev. Stat. § 174.098(7)); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 369-370 & n.8 (Ky. 2005) (discussing Ky. Rev. Stat. Ann. § 532.130(2)).[7] Some go even further: Virginia

[7] Many of these statutes, including Delaware's and Idaho's, were revised immediately after *Atkins* to incorporate the AAMR's standard for evaluating adaptive functioning. *See, e.g.*, Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Of-*

requires not only a clinical definition, but also—where feasible—the use of a standardized clinical assessment to evaluate adaptive functioning. Va. Code Ann. § 19.2-264.3:1.1(B)(2).

Numerous other States have adopted or reinforced clinical standards by judicial decision. *See, e.g.*, *Chase* v. *State*, 171 So. 3d 463, 470, 481-486 (Miss. 2015); *State* v. *White*, 885 N.E.2d 905, 907-908 (Ohio 2008); *Blonner* v. *State*, 127 P.3d 1135, 1140 (Okla. Crim. App. 2006); *see also, e.g.*, *Holladay* v. *Allen*, 555 F.3d 1346, 1353 (11th Cir. 2009) (applying Alabama case law).

Federal courts have embraced clinical standards in interpreting federal law as well. Numerous federal courts since *Atkins* have held that the clinical definition of intellectual disability (and, specifically, of adaptive functioning) controls the analysis under 18 U.S.C. § 3596(c), the federal prohibition on execution of the intellectually disabled. *E.g.*, *United States* v. *Webster*, 421 F.3d 308, 313 & n.14 (5th Cir. 2005); *United States* v. *Wilson*, 2016 WL 1060245, at *3-7, *15-19 (E.D.N.Y. Mar. 15, 2016); *United States* v. *Davis*, 611 F. Supp. 2d 472, 475-477 (D. Md. 2009); *see also, e.g.*, *Ortiz* v. *United States*, 664 F.3d 1151, 1157-1158 (8th Cir. 2011) (noting use of clinical standards).

Courts outside of Texas have not only embraced current clinical standards; they have also repeatedly rejected Texas's outlier approach to evaluating adaptive behavior.

Some have done so explicitly. In *Van Tran* v. *Colson*, 764 F.3d 594, 608-612 (6th Cir. 2014), the Sixth Circuit held that the Tennessee Court of Criminal Appeals

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*fenders and Excluding Them from Execution*, 30 J. Legis. 77, 92-93 & n.95 (2003).

had unreasonably found that a habeas petitioner did not have intellectual disability when that court—relying on Texas's *Briseno* factors, *see Van Tran* v. *State*, 2006 WL 3327828, at *23-25 (Tenn. Crim. App. Nov. 9, 2006)—rejected clinical evidence and instead emphasized the petitioner's adaptive strengths and the facts of the crime. The Sixth Circuit explained that this Court's precedent "requires the courts and legislatures to follow clinical practices in defining intellectual disability." 764 F3.d at 612; *see also United States* v. *Candelario-Santana*, 916 F. Supp. 2d 191, 212 (D.P.R. 2013) (in federal case, rejecting request to apply *Briseno* and explaining that, although some *Briseno* factors were "logical considerations" to the extent they were "consistent with the clinical definitions cited in *Atkins*," others "track the *Atkins* criteria less closely"); *United States* v. *Montgomery*, 2014 WL 1516147, at *48 (W.D. Tenn. Jan. 28, 2014) ("The Court finds the approach of other federal courts that have adhered mainly to the language found in the clinical literature, as opposed to the *Briseno* factors, more appropriate.").[8]

Where state and federal appellate courts do not expressly disclaim *Briseno*, they have criticized or reversed intellectual-disability decisions that have relied on lay stereotypes or focused on adaptive strengths rather than deficits. These courts have stressed the importance of adhering to clinical guidance to ensure accuracy in diagnosing intellectual disability. For example, contrary to Texas's approach, courts have recognized that adaptive deficits often coexist with strengths

[8] Even in Pennsylvania, the one jurisdiction that had cited *Briseno* positively, the state supreme court recently declined to apply the *Briseno* factors in a capital appeal. *Commonwealth* v. *Bracey*, 117 A.3d 270, 287 (Pa. 2015).

and that a defendant's possession of adaptive skills in some areas is "in no way inconsistent with" a diagnosis of intellectual disability. *White*, 885 N.E.2d at 914; *see also, e.g.*, *Van Tran*, 764 F.3d at 608-609; *Sasser* v. *Hobbs*, 735 F.3d 833, 845 (8th Cir. 2013); *Holladay*, 555 F.3d at 1363; *Lambert* v. *State*, 126 P.3d 646, 651 (Okla. Crim. App. 2005). Courts outside of Texas have also rejected reliance on the lay stereotypes that Texas encourages factfinders to consider. *See, e.g.*, *Thomas* v. *Allen*, 607 F.3d 749, 759 (11th Cir. 2010); *Van Tran*, 764 F.3d at 612; *White*, 885 N.E.2d at 915.

Texas thus stands apart: No other jurisdiction has devised an avowedly anti-clinical standard that erects a barrier to finding intellectual disability even when a medical professional applying clinical standards would reach that diagnosis.

### B. Texas's Approach Permits The Execution Of Individuals Who Would Not Be Eligible For The Death Penalty Under Clinical Standards

Texas's aberrant approach is starkly illustrated by the Texas defendants who have been sentenced to die based on the *Briseno* factors despite strong evidence of intellectual disability under a clinical analysis.

To take just a few examples, Elroy Chester, Marvin Lee Wilson, and Juan Lizcano—whose cases were documented by the ABA's Texas death penalty assessment report—each demonstrated strong clinical evidence of intellectual disability, yet each was denied relief. And, if Texas's approach is not corrected, the same will be true of Bobby James Moore.

1. *Elroy Chester*.[9] In *Ex parte Chester*, 2007 WL 602607, *2-3 (Tex. Crim. App. Feb 28, 2007), the Texas Court of Criminal Appeals—relying entirely on trial court findings with respect to the *Briseno* factors—upheld a finding that Chester had not demonstrated significant limitations in adaptive behavior. Although the State's expert acknowledged that "a person with [his scores] … would properly be diagnosed as mildly mentally retarded," *id.* at *3, the court focused on Chester's adaptive strengths, not the extent of his adaptive weaknesses, *id.* at *4, *5 (Chester was "capable of learning if given proper teaching methods" and able to "converse … coherently on a wide variety of topics," "capable of hiding facts and lying to protect his own interests," and "capable of forethought, planning, and complex execution of purpose"). The court also gave substantial weight to Chester's conduct during the commission of the capital crime, noting, for example, that Chester had attempted to conceal his crime by wearing a mask and gloves. *Id.* at *5-9.

Applying clinical standards in Chester's case instead of focusing narrowly on the facts of the crime would likely have led to a different result. Indeed, while the facts of the murder formed the bulk of the Texas court's analysis, Chester's offense conduct was significantly less sophisticated than similarly situated capital defendants in other States who were found intellectually disabled under a proper clinical analysis. *See, e.g.*, *Hughes* v. *Epps*, 694 F. Supp. 2d 533, 536 (N.D. Miss. 2010) (ignoring the fact that Hughes concealed the body when determining adaptive limitations); *Holladay* v. *Campbell*, 463 F. Supp. 2d 1324,

[9] Chester's case is discussed at *ABA Texas Assessment* 397-398.

1339, 1346-1347 (N.D. Ala. 2006) (finding deficits in adaptive behavior notwithstanding that the crime demonstrated "premeditation and strategic planning"), *aff'd*, 555 F.3d 1346 (11th Cir. 2009).

2. *Juan Lizcano*.[10] Two psychologists who had evaluated Juan Lizcano agreed that his IQ scores were consistently in the 40s, 50s, or 60s and that he was intellectually disabled based on adaptive deficits in communication, self-care, and functional academics. *Lizcano*, 2010 WL 1817772, at *12-15. One expert observed that, "'[w]hile [Lizcano] possesses some adaptive strengths, this does not negate the evidence of his possessing adaptive deficits.'" *Id.* at*36 (Price, J., concurring and dissenting). Testimony from Lizcano's friends, family, and employer corroborated these deficits. Lizcano did not understand jokes and usually watched children's TV programs. *Id.* at *13-14. According to a girlfriend, Lizcano could not clean himself or take thorough showers, and would wear ill-fitting clothing—including a woman's blouse on one occasion—and had to be prompted to brush his teeth. *Id.* at *38 (Price, J., concurring and dissenting). Lizcano struggled to learn basic tasks and could not read a clock or operate a VCR. *Id.* at *15. A coworker noted that Lizcano was the only person he had ever trained who could not learn how to use a tape measure or a saw. *Id.* at *14.

The prosecution offered no expert testimony to rebut the defense's clinicians. *Lizcano*, 2010 WL 1817772, at *10. However, applying *Briseno*, the court found that

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[10] Lizcano's case is discussed at *ABA Texas Assessment* 398-399.

> (i) [Lizcano] maintained continuous employment and was recognized by his employers as a hard and reliable worker; (ii) … made regular payments on a vehicle he purchased as a co-buyer; (iii) … maintained romantic relationships with at least two women, neither of whom considered him to be mentally retarded and one of whom considered him to be "bright"; and (iv) … reliably sent significant amounts of money and other items to assist his family.

*Id.* at *15.

None of this evidence forecloses a finding of intellectual disability under any scientifically valid test of intellectual disability. The evidence used to determine Lizcano's *Atkins* claim all related to his supposed strengths, not his deficits. And even if "a person's strengths in a particular domain [are] relevant to whether the individual has significant limitations in that particular area[,]" *Wiley* v. *Epps*, 668 F. Supp. 2d 848, 902 (N.D. Miss. 2009), the court in Lizcano's case never discussed how any of the evidence before it rebutted the deficits in Lizcano's communication and functional academics. Lizcano was sentenced to death even though defendants with intellectual disability outside of Texas have both managed money and held far more difficult jobs. *E.g.*, *Wiley* v. *Epps*, 625 F.3d 199, 217 (5th Cir. 2010) (defendant who was able to hold down a job, serve in the military, and provide for a family was nonetheless held to have intellectual disability); *Holladay*, 463 F. Supp. 2d at 1339, 1346-1347 (buying and selling cars and spending frugally while on the run did not preclude an intellectual disability).

3. *Marvin Lee Wilson.*[11] Wilson presented the trial court with significant evidence of adaptive behavior limitations. *Wilson* v. *Quarterman*, 2009 WL 900807, at *8 (E.D. Tex. Mar. 31, 2009). His expert witness "testified that [his] composite score of 44 on the Vineland Adaptive Behavior Skill Test was well within retarded range." *Id.* The expert's determination was supported by "affidavits from friends and family members attesting to his difficulties in written communication and understanding money management concepts, his inability to get along with others and avoid being victimized, and his problems with personal hygiene and maintaining employment." *Id.* A childhood friend, for instance, said that Wilson "'would put on his belt so tight that it would almost cut off his circulation'" and that "'[h]e couldn't even play with simple toys like marbles or tops.'" Liptak, *Date Missed, Court Rebuffs Low-I.Q. Man Facing Death*, N.Y. Times, Dec. 17, 2005, at A14. The state presented no evidence in rebuttal. *Id.* Instead, it argued that *Atkins* "'was never intended to protect capital murderers who commit execution-style killings.'" *Id.*

Nevertheless, a Texas court found that Wilson did not have an intellectual disability. As the federal habeas court later explained, "the state court relied on the *Briseno* factors alone, rather than as a supplement to clinical factors, in determining" that Wilson did not have "related, significant deficits in adaptive functioning." *Wilson*, 2009 WL 900807, at *7. The state court's findings were "based on the view that the *Briseno* factors can be used by themselves to establish whether a person has significant deficits in adaptive functioning,

[11] Wilson's case is discussed at *ABA Texas Assessment* 399-400.

even if evidence is submitted which is relevant to the AAMR definition of adaptive deficits." *Id.* at *8. The court "did not make explicit findings and reached no explicit conclusion as to whether Wilson had significant limitations in adaptive functioning." *Id.* at *7. Instead, the court relied on the *Briseno* factors as a checklist and applied the factors in place of clinical standards. *E.g.*, *id.* ("Wilson was capable of lying and hiding facts when he felt it was in his best interest; and that the crime at issue showed deliberate forethought, planning, and execution of purpose.").[12]

Wilson's *Atkins* claim was thus denied largely on the strength of evidence relating to his crime itself—evidence that was sufficient under *Briseno*, but that is the antithesis of clinical analysis of adaptive behavior. Such evidence would barely have been probative, let alone dispositive, outside of Texas. Lying and hiding facts are commonplace aspects of capital crimes, whether or not the defendant has intellectual disability. *See, e.g.*, *Nicholson* v. *Branker*, 739 F. Supp. 2d 839, 847 (E.D.N.C. 2010); *Hughes*, 694 F. Supp. 2d at 564.

4. *Bobby James Moore.* In this case, the Texas trial court relied on the AAIDD's current standard for diagnosing intellectual disability in granting relief to Moore. Pet. App. 201a-203a; *see also* Pet. Br. 4-6, 10-17 (describing evidence of Moore's intellectual disability

[12] The district court denied federal habeas relief even after finding that Wilson had "presented evidence of significant limitations in all three areas of adaptive functioning: the conceptual domain, the social domain, and the practical domain." *Wilson*, 2009 WL 900807, at *8. It did so because it felt bound to follow the state court's factual findings and adherence to *Briseno*. *Id.* In an unpublished opinion, the Fifth Circuit later declined to hold that use of the *Briseno* factors violates *Atkins*. *Wilson* v. *Thaler*, 450 F. App'x 369, 377 (5th Cir. 2011).

and trial court's analysis). The court found that Moore's IQ test scores, which averaged slightly over 70, established that he has significant limitations in intellectual functioning. Pet. App. 167a. It credited the testimony of Moore's expert witnesses that he "has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean," Pet. App. 201a, including inability to learn from experience, impaired reasoning and judgment, a tendency to be a follower, and difficulties communicating with others, JA11-12, 73-74, 80, 82-85. And it found ample evidence, including Moore's repeated school failures and the familial abuse he received as a child for being "dumb," that Moore's intellectual disability manifested before age 18. Pet. App. 182a-190a, 201a.

The CCA, however, rejected the trial court's conclusion, reasoning that the court had erred by using the AAIDD's current standards for intellectual disability rather than the standards articulated in *Briseno*. Relying only on two of Moore's higher IQ test scores (disregarding the standard error of measurement because of Moore's "history of academic failure") and the fact that he was tested while on death row, it concluded that Moore had not proven significantly subaverage intellectual functioning. Pet. App. 74a-75a; *but see Hall*, 134 S. Ct. at 2001 (holding that "when a defendant's IQ test score falls within the test's … margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits").

The CCA then determined, based on the *Briseno* factors, that Moore had not shown significant deficits in adaptive functioning because, among other things, Moore had lived in the back of a pool hall, played pool,

mowed lawns for money, and adapted to the prison environment, Pet. App. 80a-88a—none of which is in any way inconsistent with a diagnosis of intellectual disability. Finally, the CCA concluded, with no evidentiary basis, that Moore's adaptive limitations were not "related" to his intellectual deficits, but were caused by other factors, including childhood abuse and academic failure, Pet. App. 88a-89a—factors that *support* a diagnosis of intellectual disability. For Moore, the CCA's refusal to abide by clinical standards for assessing intellectual disability could be the difference between a life sentence and the death penalty.

* * *

By prohibiting courts from using current clinical standards and instead requiring them to use the anticlinical *Briseno* standard, Texas has withdrawn the protections of *Atkins* from most defendants with intellectual disability. But, as this Court made clear in *Atkins* and *Hall*, *all* persons with intellectual disability, by definition, share characteristics that reduce their moral culpability and require their categorical exclusion from the death penalty. And intellectual disability is determined by reference to *clinical* standards. Texas's contrary approach cannot be tolerated under the Eighth Amendment.

## CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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