No. 09-70022

In the United States Court of Appeals for the Fifth Circuit

MARVIN LEE WILSON,
Petitioner -Appellant,

v.

RICK THALER,
Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division
No. 6:06-CV-140

BRIEF OF THE NAACP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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THIS IS A CAPITAL CASE

Corporate Disclosure Statement

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Dated: October 15, 2009

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STATEMENT OF INTEREST[1]

Founded in 1909, the NAACP is a non-profit membership corporation chartered by the State of New York. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of rights of all persons, and to eliminate racial hatred or racial discrimination. The NAACP has been at the forefront of the struggle to eliminate disparities in the criminal justice system.

[1] In accordance with Fed. R. App. P. 29(a), this *amicus curiae* brief in support of Petitioner-Appellant is filed with the consent of all parties.

SUMMARY OF ARGUMENT

The Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), categorically prohibited the execution of mentally retarded offenders as unconstitutional under the Eighth Amendment. Every State to respond to *Atkins* has adopted its three-pronged clinical definition of mental retardation—with one exception. The Texas Court of Criminal Appeals ("TCCA") in *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), defined mental retardation to incorporate the *Atkins* clinical criteria, as well as seven additional non-clinical factors. The TCCA regards the mental retardation inquiry as a Potter Stewart test: "[a]lthough the Trial Court cannot articulate with expertise a definition and identification of mental retardation, the court concludes that it can identify it when it sees it."[2]

This Potter Stewart standard allows Texas state courts to evade the *Atkins* requirements, subjecting clinically retarded offenders to executions that violate the Eighth Amendment. Texas courts almost invariably have applied the non-clinical *Briseño* factors to deny *Atkins* relief. These factors sever *Atkins* from its scientific mooring and allow subjective, lay observation to trump even uncontroverted expert opinion. This application of the *Atkins* mandate is legal error.

Thus, in the instant petition of Marvin Lee Wilson, this Court should reaffirm adherence to the clinical inquiry of *Atkins*.

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[2] *Ex parte Henderson*, 2006 WL 167836, at *4 (Tex. Crim. App. 2006) (unpublished).

ARGUMENT

I. *ATKINS* REQUIRES THAT STATE COURTS USE A CLINICAL STANDARD TO DETERMINE WHETHER AN OFFENDER IS MENTALLY RETARDED.

A. The Standard for Adjudicating Mental Retardation Must Be Clinically Accepted.

Atkins announced a categorical prohibition against executing mentally retarded individuals, in light of the "national consensus" that had developed against such punishment. At the heart of the Court's holding was the recognition that mental retardation "diminish[es] . . . personal culpability." *Id.* at 318. Yet the Court did not prohibit the execution of the mentally retarded based on a standard test of diminished responsibility. Instead, it "enunciated a constitutional rule that turns explicitly and entirely on a clinical diagnosis."[3] In an *Atkins* adjudication, the only question is whether the offender is mentally retarded. That diagnosis is a bright line that delineates a category of people constitutionally ineligible for the death penalty and is analogous to the bright line in *Roper v. Simmons*, 543 U.S. 551, 578 (2005): whether the perpetrator was eighteen years old when he committed a capital offense. In both instances, a single characteristic—separate and apart from culpability—precludes eligibility for a capital sentence.

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[3] Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 813 (2007).

The *Atkins* Court recognized the challenges of "determining which offenders are in fact retarded." 536 U.S. at 317. It approved States' use of definitions of mental retardation that "generally conform to the clinical definitions set forth" by the American Association of Mental Retardation ("AAMR") and American Psychiatric Association ("APA"). *Id.* at 317 n.22. The hallmarks of those clinical definitions are three criteria: (1) significantly subaverage intellectual functioning; (2) significant limitations in adaptive behavior; and (3) onset before age 18.[4] That three-pronged inquiry represents a constitutional floor.

In *Atkins*, the Court recognized the clinical features of Eighth Amendment limits on capital eligibility, and left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (internal cites, quotes omitted) (alteration in the original). While *Atkins* allowed individual States to devise procedures for enforcing the Eighth Amendment's ban on executing the mentally retarded, it required that they do so within the parameters of the substantive clinical standards. Departures from these standards would belie the national consensus upon which the prohibition is grounded and would inevitably focus on individual culpability, an approach the Court expressly disavowed.

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[4] *See* AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (10th ed. 2002) ("AAMR 2002"); AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000).

B. The Texas Court of Criminal Appeals Crafted Temporary Guidelines for the Mental Retardation Inquiry.

The Texas legislature, for four consecutive sessions since *Atkins*, has foregone the opportunity to statutorily define mental retardation for capital sentencing purposes, leaving the judiciary responsible for enforcing the mandate. The TCCA, "during this legislative interregnum," has provided "temporary judicial guidelines" for determining whether an individual is mentally retarded. *Briseño*, 135 S.W.3d at 5.

Instead of acknowledging that the salient *Atkins* question is whether the claimant is "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, the *Briseño* court recast the issue as whether the claimant suffers the "*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 (emph. added). Despite *Atkins*' emphasis of the national consensus that had developed against executing individuals with a clinical diagnosis of mental retardation, Texas added seven non-clinical factors to the framework. *Id.* at 8-9. Purportedly, this modification reflects the subjective consensus in Texas about who *among* the mentally retarded should be subject to the death penalty, *id.* at 6—notwithstanding the Eighth Amendment's wholesale ban on capital punishment for the mentally retarded.

C. Every Other State Requires that Mental Retardation Be Adjudicated Pursuant to Clinically Accepted Definitions.

Other states have overwhelmingly responded to *Atkins* by utilizing the clinical inquiry. Since *Atkins*, eight states have statutorily defined mental retardation, in addition to the eighteen states that had done so before the Supreme Court ruling.[5] Every state with a statutory definition has incorporated the three-pronged test.[6] Importantly, even states that have judicially defined the term have imposed a variant of the same three-pronged inquiry.[7] While the definitions vary

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[5] *See* Death Penalty Info. Ctr., States That Have Changed Their Statutes to Comply With the Supreme Court's Decision in *Atkins v. Virginia*, http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited Oct. 11, 2009); Death Penalty Info. Ctr., State Statutes Prohibiting the Death Penalty for People with Mental Retardation, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited Oct. 11, 2009).

[6] Twenty-seven of the thirty-seven death penalty states have codified statutory definitions of mental retardation. *See* ALA. CODE §15-24-2(3) (adopted for social services purposes, not for criminal law purposes); ARIZ. REV. STAT. §13-703(K)(3); ARK. CODE ANN. §5-4-618(a)(1); CAL. PENAL CODE §1376(a); COLO. REV. STAT. §18-1.3-1101(2); CONN. GEN. STAT. §1-1(g); DEL. CODE ANN. tit. 11, §4209(d)(3)(a); FLA. STAT. §921.137; GA. CODE ANN. §17-7-131(a)(3); IDAHO CODE ANN. §19-2515A; 725 ILL. COMP. STAT. 5/114-15(d); IND. CODE §35-36-9-1; KAN. STAT. ANN. §21-4623; KY. REV. STAT. ANN. §532.130(2); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1); MD. CODE ANN., CRIM. LAW §2-202(b)(1); MO. ANN. STAT. §565.030(6); NEB. REV. STAT. §28-105.01(3); NEV. REV. STAT. §174.098(7); N.M. STAT. ANN. §31-20A-2.1(A) (New Mexico abolished the death penalty in 2009, but this action was not retroactive); N.Y. CRIM. PROC. LAW §400.27(e); N.C. GEN. STAT. §15A-2005(a)(1)(a); S.C. CODE ANN. §16-3-20(C)(b)(10); S.D. CODIFIED LAWS §23A-27A-26.2; TENN. CODE ANN. §39-13-203(a); UTAH CODE ANN. §77-15a-102; VA. CODE ANN. §19.2-264.3:1.1(A); WASH. REV. CODE ANN. 10.95.030(2)(a).

[7] *See Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002); *Chase v. State*, 873 So. 2d 1013 (Miss. 2004); *State v. Jimenez*, 880 A.2d 468 (N.J. Super. Ct. App. Div. 2005); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002); *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005); *State v. Laney*, 367 S.C. 639 (2006). Montana, New Hampshire, Oregon, and Wyoming do not appear to have had the opportunity to rule on a definition.

in certain respects—*e.g.*, the cutoff level for IQ impairment[8]—all replicate the same familiar formula.

II. *BRISEÑO*'S SUPPLEMENTAL FACTORS HAVE OVERWHELMED THE CLINICAL ASSESSMENT REQUIRED BY *ATKINS*.

A. *Briseño*'s Use of Seven Non-Clinical Supplemental Criteria Has Compromised the Constitutional Inquiry.

The *Briseño* court fashioned a standard for adjudicating mental retardation that supplements the *Atkins* clinical guidelines with seven non-clinical factors that sideline the appropriate constitutional analysis entirely. Misuse of *Briseño* can and has undercut standardized measures of adaptive behavior and uncontroverted expert opinions, in contravention of the Constitution.

1. *Briseño* introduced non-clinical evidentiary factors.

The *Briseño* court adopted the AAMR clinical definition of mental retardation, used in *Atkins*, and the substantially similar Texas Health and Safety Code section 591.003(13) definition.[9] 135 S.W.2d at 8. The TCCA imported the APA definition of "significantly subaverage intellectual functioning," also used in

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[8] For example, several states do not require an IQ cut-off, although many require "significantly subaverage" intellectual functioning. *See* Death Penalty Info. Ctr., State Statutes Prohibiting the Death Penalty for People with Mental Retardation, http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited October 13, 2009); *see also* Holly T. Sharp, Note, *Determining Mental Retardation in Capital Defendants: Using a Strict IQ Cut-Off Number Will Allow the Execution of Many That* Atkins *Intended to Spare*, 12 JONES L. REV. 227, 247-49 (2008).

[9] "'[M]ental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH & SAFETY CODE §591.003(13).

Atkins, 536 U.S. at 308 n.3, in order to define the AAMR's use of the same phrase.[10] *Briseño*, 135 S.W.3d at 7 & n.24.

Despite its adoption of the clinical standards, *Briseño* formulated seven additional "evidentiary factors" that it purported to be "indicative of mental retardation or of a personality disorder." 135 S.W.3d at 8. These factors are as follows:

- 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?

- Has the person formulated plans and carried them through or is his conduct impulsive?

- Does his conduct show leadership or does it show that he is led around by others?

- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

- Can the person hide facts or lie effectively in his own or others' interests?

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[10] "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." *Briseño*, 135 S.W.2d at 7 n.24 (quoting APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 2000)).

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8-9.[11]

2. The *Briseño* factors resemble no other clinical criteria used to adjudicate mental retardation.

The *Briseño* factors disconnect *Atkins* from its scientific anchor. They contradict *Atkins*' clinical standards, which *Briseño* formally adopted. Moreover, they do not appear to be based on research and were dictated without reference to scientific or clinical authority. 135 S.W.3d at 8-9. Consequently, they provide untrammeled discretion to the factfinder to evade *Atkins* relief.

The *Briseño* factors permit the factfinder to work backwards from the crime to a "diagnosis" of mental retardation or, more typically, the absence thereof.

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[11] This Court has not expressly reviewed the *Briseño* factors. In dicta and without any analysis, this Court dismissed in a footnote the argument that *Briseño* was inconsistent with *Atkins*. *Woods v. Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007). There was no evidence in *Woods*, however, that the district court, the TCCA, or the state trial court had considered the *Briseño* factors. In fact, this Court concluded that the state trial court used "the proper *AAMR* framework." *Id.* at 587 (emph. added). Likewise, in *Taylor v. Quarterman*, 498 F.3d 306, 308 n.4 (5th Cir. 2007), this Court rejected the proposition that *Briseño*, generally, is "contrary to" *Atkins*, citing *In re Hearn*, 418 F.3d 444, 446-47 (5th Cir. 2005), as evidence the Court had previously approved of *Briseño*. *In re Hearn*, however, merely recognized the differences between the standard announced in *Briseño* and the standard found in the Texas Health and Safety Code with respect to whether a psychologist needs to be licensed by the State to diagnose mental retardation. *Id.* Moreover, despite the statement in *Rosales v. Quarterman*, 291 F. App'x 558, 562 (5th Cir. 2008) (unpublished), that *Moreno v. Dretke*, 450 F.3d 158, 163 (5th Cir. 2006) and *Hearn* "approved the use of the framework laid out in *Briseño*," *Moreno* simply recites elements of the *Briseño* inquiry without assessing their propriety while *Hearn* opines on witness qualifications. In short, this Court has never considered the constitutionality of the *Briseño* factors.

Whereas clinical assessments encompass a comprehensive evaluation of an individual in diverse settings, six of the seven *Briseño* factors examine only the crime in question. An individual that is clinically retarded can be deemed not mentally retarded under *Briseño* if, in committing his crime, he "formulated plans and carried them out"; he demonstrated "leadership" by committing the crime with someone else; he acted "rationally" in evading the police; he "responded coherently, rationally, and on point" when questioned by the police; he lied to the police demonstrating his ability to "hide facts or lie effectively in his own . . . interests"; and the crime required "forethought." *Id.* at 8-9.

The focus on an offender's execution of a crime is practically irrelevant, however, in light of *Atkins*' recognition that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial." 536 U.S. at 318. "Nothing in [*Atkins*] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered." *Tennard v. Dretke*, 542 U.S. 274, 287 (2004).

The seven *Briseño* factors undermine the role of, and allow determinations in spite of, uncontroverted expert opinion. For example, the first factor considers the opinions of "family, friends, teachers, employers, [and] authorities" regarding the individual's condition. Aside from their lack of qualifications to make such a

determination, these people may naturally be reluctant to label their child, sibling, or student as mentally retarded, given the stigma that accompanies such a label. Indeed, any characterization they do provide would be predicated on stereotypes and labels. The fourth *Briseño* factor contradicts the AAMR and APA standards by asking the factfinder to consider the individual's reaction to external stimuli without regard for the social appropriateness of the reaction. 135 S.W.3d at 8. "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of . . . social responsibility that are expected for his or her age level and cultural group." *Id.* at 7 n.25; *see also* TEX. HEALTH & SAFETY CODE §591.003(13). Asking the factfinder to disregard social acceptability when evaluating adaptive behavior strips the inquiry of its scientific core.

Moreover, by articulating "evidentiary factors" that may suggest "mental retardation *or* . . . a personality disorder," 135 S.W.3d at 8 (emph. added), *Briseño* invites a false dichotomy between two often overlapping medical conditions. And in many cases, the factors have morphed into a standalone, dispositive inquiry that attributes any adaptive deficit exclusively to a personality order.

3. The *Briseño* factors consider strengths to the exclusion of limitations.

The *Briseño* factors imply that strength in even a single aspect of cognitive ability can indicate normal intelligence, notwithstanding adaptive deficits.

According dispositive weight to perceived strengths divorces the inquiry from actual limitations, which lie at the core of a clinical diagnosis of mental retardation.

The *Briseño* court offered seven factors without direction, leaving lower courts to navigate the non-clinical mire. Whereas the AAMR and APA define significantly limited adaptive function as limitations in two or more of ten and eleven areas, respectively, *Atkins*, 536 U.S. at 309 n.3,[12] *Briseño* provides no guidance on the relative weight to accord to various factors or whether any particular result may indicate mental retardation. The omission creates an analytical chasm whereby a factfinder might determine that an individual is mentally retarded based on his strength in one adaptive area, such as his ability to "respond coherently, rationally, and on point to oral or written questions," *Briseño*, 135 S.W.3d at 8, despite his lacking all other adaptive skills. Such a conclusion would contradict the AAMR and APA standards, which qualify an individual as mentally retarded even if he demonstrates strength in all but two adaptive skill areas.[13]

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[12] The AAMR, now the American Association of Intellectual and Developmental Disabilities, revised the adaptive deficit criterion in 2002, but *Atkins* cites the 1992 criterion. 536 U.S. at 309 n.3. The 2002 assessment requires significant limitations in one of three "skill domains." AAMR 2002 at 73. Each of the ten 1992 areas is included within one of the three "skill domains." AAMR 2002 Table 5.2. Accordingly, this Court has not distinguished between the 1992 and 2002 assessments of adaptive limitations. *See Moore v. Quarterman*, 2009 WL 2573295, at *5 n.6 (5th Cir. 2009) (unpublished).

[13] This scenario is remarkably similar to the instant case where Mr. Wilson has demonstrated strong communication skills, yet is deficient in a number of other AAMR adaptive areas,

The AAMR, however, recognizes that "[w]ithin an individual, limitations often coexist with strengths." AAMR 2002 at 1. It explains that "people with mental retardation are complex human beings who likely have certain gifts as well as limitations," such as "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." *Briseño*, 135 S.W.3d at 8. The "criteria for diagnosis recognizes" that "[i]ndividuals with mental retardation have strengths and weaknesses, like all individuals." *Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009). Reliance upon adaptive strengths under *Briseño* can dangerously narrow the class of persons who receive the constitutionally mandated protection.

4. The *Briseño* factors have assumed inflated magnitude.

Although "*Briseño* makes clear that the application of the factors is discretionary," *Moore*, 2009 WL 2573295, at *6 n.7, the factors have attained preeminence as Texas courts have used them to supplant clinical definitions. The subjective nature of the inquiry can transform the assessment into a smokescreen for perfunctory clinical review and dismissal of uncontroverted expert opinion. Court findings may "reflect the stereotypical view that mentally retarded

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allowing him to satisfy the AAMR definition for mentally retarded, while allowing the trial court to find him not mentally retarded under the *Briseño* factors.

individuals must be utterly incapable of caring for themselves, potentially dangerous, and 'unfit' to reproduce, as was once believed."[14] Application of the *Briseño* factors can create a catch-22 for mentally retarded offenders, with dire consequences.

B. Texas Courts Abuse the Supplemental Criteria to Disregard Clinical Standards and Thwart Meritorious *Atkins* Claims.

A review of cases that have employed the *Briseño* framework demonstrates the inherent subjectivity and unpredictability the standard injects into the constitutional inquiry. Reasoning that "adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue," the *Briseño* court concluded that it is for the factfinder to decide whether an individual is mentally retarded under *Atkins*, even though "experts may offer insightful opinions on the question." 135 S.W.3d at 8-9. Despite this rationale, the *Briseño* factors, time and again, have provided factfinders untrammeled discretion to replace the clinical measures of mental retardation that guided *Atkins* with lay testimony and non-clinical inquiries, in stark contravention of the national consensus against executing the mentally retarded.

Ex parte Chester, 2007 WL 602607 (Tex. Crim. App. 2007) (unpublished), provides a telling example of the employment of the *Briseño* factors to avoid a

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[14] Penny J. White, *Treated Differently in Life But Not in Death: The Execution of the Intellectually Disabled After* Atkins v. Virginia, 76 TENN. L. REV. 685, 703 (2009) (internal cites, quotes omitted).

clinical diagnosis of mental retardation. Three of four IQ tests conducted before Chester was eighteen assessed his IQ as below 70. *Id.* at *2-*3. The clinical measure of his adaptive behavior on the Vineland Adaptive Behavior Survey, administered by the Texas Department of Criminal Justice, was 57—well below the threshold of 70. *Id.* at *3. The State's own expert acknowledged that someone with Chester's IQ and Vineland score "would be correctly diagnosed as mildly mentally retarded." *Id.* However, in assessing the first supplemental *Briseño* factor, the trial court found it significant that Chester "had been classified during his school years as 'learning disabled,' rather than as mentally retarded," notwithstanding his teacher's testimony that she considered him to be "moderately retarded." *Id.* at *4. And it credited the testimony of the State's diagnostician that Chester's school records were consistent with a learning disability. *Id.*

Though the trial court concluded that Chester did not suffer from intellectual impairment, the TCCA found that he did. But deferring to the trial court's analysis of the *Briseño* factors, the TCCA concluded that he did not have significant deficits in adaptive behavior and therefore was not mentally retarded. *Id.* at *3-*5. Clinical factors dictated the opposite result. Yet the non-clinical *Briseño* factors permitted the factfinder to cherry-pick evidence and disregard objective measures of adaptive behavior.

Despite the TCCA's attempt to reduce subjectivity in the assessment of adaptive behavior deficits, the *Briseño* factors do the opposite by giving priority to lay testimony. Whereas "[i]mpairments in adaptive behavior are . . . determined by clinical assessment and, usually, standardized scales," *Briseño*, 135 S.W.3d at 7 n.25, such as the Vineland, lay opinion is completely divorced from any standard. For example, in *Hall v. State*, 160 S.W.3d 24, 40 (Tex. Crim. App. 2004), the *Briseño* factors allowed the State to rely on a co-worker, a waitress who served the defendant once, the arresting detective, and prison guards[15] who had limited contact with the defendant to controvert three defense expert opinions. *Id.* at 42 (Johnson, J., dissenting). Based on his experience teaching sports to mentally challenged individuals, the eighteen-year-old co-worker opined that defendant Hall was not mentally retarded. *Hall*, 160 S.W.3d at 31. One prison guard claimed that he "knew some kids in school with Down's syndrome" and therefore did not think Hall was mentally retarded. *Id.* at 43 (Johnson, J., dissenting). Another guard asserted that her neighbor's daughter was mentally retarded and that in her opinion Hall was not. *Id.* A third guard had an uncle who was mentally retarded and reasoned that Hall "was nothing like his uncle." *Hall*, 160 S.W.3d at 35. Relying on such lay opinions untethered to any clinical standard invites prejudice and

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[15] The value of testimony from prison guards with respect to adaptive behavior is dubious given the restricted and structured nature of institutional living within the prison system. *See Holladay*, 555 F.3d at 1358 n.16; 41 U. RICH. L. REV. at 848.

ensures inconsistent application.[16] This practice stands in marked contrast to the clinical measures, which increase objectivity by employing standards applied by trained psychologists.

The dissent in *Ex parte Modden*, 147 S.W.3d 293, 299 (Tex. Crim. App. 2004) (Harvey, J., dissenting), offers yet another example of how *Briseño* can be used to bypass expert opinion and clinical standards. There, on remand, the State agreed with the trial court's finding of mental retardation based upon three reports in which three mental health experts uniformly concluded that the defendant was mentally retarded. *Id.* at 295-96. The TCCA affirmed the trial court's finding, but in dissent two judges disagreed. Relying on a fourth expert opinion and its own application of the *Briseño* factors, the dissent concluded that "[o]verwhelming evidence was presented at applicant's 1985 and 1992 trials that applicant meets very few, if any, of the *Briseño* factors and that applicant is nothing like Steinbeck's childlike Lennie."[17] *Id.* at 301 (Harvey, J., dissenting).

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[16] Many people have misconceptions about mental retardation, which frequently leads to a presumption of malingering when anticipated stereotypes are not present. *See* Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the 'Invisible' Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 536 (1998).

[17] The *Briseño* court referred to Steinbeck's character Lennie from *Of Mice and Men* as an example of someone Texans might agree should be exempt from capital punishment. 135 S.W.3d at 6. The dissent's reference to Lennie is further evidence of *Briseño*'s non-clinical approach to adjudicating mental retardation.

Examining the spectrum of Texas state *Atkins* rulings, it is apparent that the *Briseño* factors overwhelmingly are applied to deny such relief.[18] Application of these factors upends the constitutional framework by allowing the factfinder to disregard the clinical measures of mental retardation, undermining the Eighth Amendment protections.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and grant Mr. Wilson *Atkins* relief, or it should remand the case with instructions to consider Mr. Wilson's *Atkins* claim *de novo*.

Respectfully submitted,

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ATTORNEYS FOR THE NAACP AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

[18] Only once has consideration of the *Briseño* factors resulted in a determination that a person was mentally retarded. *See Ex parte Van Alstyne*, 239 S.W.3d 815, 820-21 (Tex. Crim. App. 2007). Every other time those factors have been applied, they have been used to reach the conclusion that an offender is not mentally retarded.

CERTIFICATE OF SERVICE

I certify that the Brief of the NAACP as *Amicus Curiae* in Support of Appellant was filed with the Court by Federal Express on the 15th day of October, 2009, and one copy of the brief and an electronic copy of the brief were served on all counsel of record, as listed below, by Federal Express on the same date:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 4,321 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2 This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(5) and the type-style requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-point Times New Roman font.

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