No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2014

ROBERT CHARLES LADD,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

THIS IS A DEATH PENALTY CASE
EXECUTION SCHEDULED: JAN. 29, 2015

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CAPITAL CASE

QUESTION PRESENTED:

Robert Charles Ladd has a valid full-scale Weschler IQ score of 67, and significant deficits in adaptive functioning manifesting well before he was 18. A psychiatrist for the State of Texas accordingly found him, at age 13, "obviously" mentally retarded.

Whether, the State of Texas may constitutionally ignore the Eighth Amendment protections required under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014), and instead rely on the non-scientific and non-medical rule of *Ex parte Briseño*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), to execute Petitioner solely because a State's expert attributed Petitioner's adaptive deficits to a personality disorder rather than his intellectual disability?

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OPINION BELOW

The Texas Court of Criminal Appeals order dismissing Mr. Ladd's application for a successive writ of habeas corpus is unreported, but is attached as Appendix A.

JURISDICTION

This Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) (2010).

Any argument by the State that the decision below is supported by adequate and independent state grounds that foreclose this Court's jurisdiction under, *Michigan v. Long*, 463 U.S. 1032, 1037 (1983), should be rejected.

Mr. Ladd alleged in his successive state habeas application to the court below, filed on January 21, 2015, that his execution would violate the Eighth Amendment to the U.S. Constitution. Under Texas law, a successive state habeas application requires prior authorization. Three different statutory "gateways" give way to authorization and preclude dismissal of the petition as an "abuse of the writ." *See* Tex. Code. Crim. Proc. art. 11.071 § 5.

With respect to the only conceivable gateway here, Texas law authorizes a successive application when the applicant shows "by clear and convincing evidence, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury[.]" Tex. Code. Crim. Proc. art. 11.071 § 5(a)(3). Section 5(a)(3), unlike the first two § 5 gateways, permits successive state habeas litigation of claims available when the inmate filed a prior application of habeas corpus relief.

An order dismissing a successive Texas application under § 5(a)(3) can never be independent of federal law because the dismissal necessarily entails evaluation of the merits of the underlying capital eligibility claim. By its express terms, § 5(a)(3) "embrace[s] constitutional as well as statutory ineligibility for the death penalty." *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007). Consistent with that understanding, the Texas Court of Criminal Appeals has held that even a prisoner whose previous application for habeas relief was filed after intellectually disabled offenders were held constitutionally ineligible for the death penalty in *Atkins v. Virginia*, 536 U.S. 304 (2002), could nonetheless obtain successive review of an *Atkins* claim under § 5(a)(3) by "alleg[ing] and present[ing], as a part of his subsequent pleading, evidence of a sufficiently clear and convincing character that we could ultimately conclude, to that level of confidence, that no rational factfinder would fail to find he is in fact mentally retarded." *Id.* at 162. That determination unquestionably requires an adjudication on the merits of the underlying *Atkins* claim, as the Fifth Circuit has correctly recognized. *See, e.g., Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) (treating order that "dismissed" an *Atkins* claim as an "abuse of the writ" as a decision on the merits; noting that the "state accepts that the CCA decided the merits of Blue's *Atkins* claim").

The federal question whether Ladd is exempt from execution based on his intellectual disability is thus squarely before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Eighth Amendment and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

INTRODUCTION

The State of Texas first concluded that Robert Ladd was intellectually disabled when Ladd was 13. An evaluating psychiatrist for the Texas Youth Commission (TYC) reviewed his full scale IQ score of 67, interviewed Ladd on three occasions, and determined that he was "rather obviously retarded." The evaluator concluded that Ladd had "mild to moderate mental retardation." When Ladd was an adult, he was employed through a non-profit organization that serviced individuals with intellectual disability. Because of his status as a person with intellectual disability, the law allowed him to be paid below minimum wage. Only now that he has committed a capital crime and faces execution does the State of Texas seek to deny his intellectual disability under standards this Court announced in *Atkins* and reaffirmed in *Hall v. Florida*, 134 S.Ct. 1986 (2014).

Texas insists on Ladd's execution despite his IQ of 67 and the fact that his disability manifested itself before he was 18. It does so because under *Ex parte Briseño*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), a State's expert attributes Ladd's

documented, life-long deficits in adaptive functioning to a personality disorder rather than his obvious intellectual disability. *Briseño* created a false distinction, unrecognized by science or medicine to assess "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." *See Ex parte Sosa*, 364 S.W.3d 889, 891 (Tex. Crim. App. 2012). The level of disability contemplated by *Briseño* is consistent with "the lay stereotype of [intellectual disability] . . . what would historically be considered moderate or severe . . ." Stephen Greenspan, *The Briseño Factors in* DEATH PENALTY AND INTELLECTUAL DISABILITY 219 (Edward A. Polloway ed. 2015) (hereafter DEATH PENALTY AND INTELLECTUAL DISABILITY).

This Court's decision in *Hall* makes clear that such non-scientific standards can no longer bar valid *Atkins* claims. Accordingly the petition for certiorari should be granted and the decision below should be summarily reversed. At the very least, Ladd's execution should be stayed pending a decision on his petition for certiorari.

STATEMENT OF THE CASE

Petitioner Robert Charles Ladd, an intellectually disabled man facing execution on Thursday, asks this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals, and for a stay of execution pending a decision on the petition for certiorari.

Ladd was found to be intellectually disabled[1] by the TYC psychiatrist in 1970, twenty-seven years before his conviction for capital murder in 1997, and thirty-two years before this Court issued its landmark decision barring the execution of people who are intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Evidence of his intellectual disability started before his birth, and continued through his adult life.

A. **Robert Ladd's history: labeled at an early age**

When Robert Ladd's mother Ruby was pregnant with him, she finished a half-pint of whiskey at least six days per week after work. App. E (Evid. Hearing Tr. Excerpt, from *Ladd v. Thaler*, No. 1:03CV239, 2013 WL 593927, at *6 (E.D. Tex. Feb. 15, 2013), *aff'd sub nom. Ladd v. Stephens*, 748 F.3d 637 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 192, 190 L. Ed. 2d 150 (2014)), at 202-05, 213.

Ladd was born on March 19, 1957, weighing only 5 pounds,14 ounces. App. E at 62. Given his low birth weight and the history of alcohol abuse by his mother, fetal alcohol syndrome was likely. *Id.* at 115. As Dr. Richard Garnett testified in the federal courts on behalf of Ladd,[2] "fetal alcohol syndrome is one of the recognized – probably the easiest and most prominent preventive issues in mental retardation. If

[1] Following *Hall v. Florida*, 134 S.Ct. at 1990, the term "intellectual disability" is generally used to refer to the disability previously known as mental retardation, but reference to the prior terminology is retained when referring to older documents or testimony that used it.

[2] Dr. Richard Garnett, who holds a Ph.D. in psychology, is a recognized expert in the field of intellectual disability, having taught and worked in this field for thirty-five years. App. C (Petitioner's Ex. 1 in evidentiary hearing in *Ladd*, 2013 WL 593927). Dr. Garnett served on the Board of Directors for the Texas Self Advocates, an organization made up of people with intellectual disability. *Id.* He is a past president of the Texas Association on Mental Retardation, President of the Arc of Texas, and a member of the Mental Retardation Public Advisory Council for the Texas Department of Mental Health and Mental Retardation. *Id.*

you can stop people from drinking when they're pregnant, the estimates are that you may be able to reduce mental retardation by as much as 30 or 40 percent." *Id.* at 116. *See also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (hereafter DSM-5) 39 (5th ed. 2013) (listing alcohol exposure among prenatal etiologies of intellectual disability).

As a child, Ladd struggled with basic recreation and self-care. Nelma Thomas, the sibling closest in age to Ladd, testified that Ladd struggled as child to play simple card games and kickball because he could not grasp the rules. App. E at 244-47. He dressed inappropriately: often going outside in freezing weather without a shirt and shoes. *Id.* at 241. When their mother would send him to the store with a simple order, he had to return repeatedly because he could not remember the order. *Id.* at 241-42. He would often get whipped for repeating the same behavior. Id. at 242. His siblings thought he was "different" because he had a different father and would call him "retarded." *Id.* at 240-41.

Ladd was first sent to the custody of the Texas Youth Commission (TYC) at age 10, and then multiple times throughout his adolescence for offenses such as shoplifting, truancy, theft, arson, and robbery. App. E at 244-47; Ladd *Hr'g* Pet. Exs. 3F, 3G (institutional history).

While housed at TYC's Gatesville School Training School for Boys at age 13, Ladd was seen by the psychiatrist Dr. Weldon Ash. In his notes, Dr. Ash repeatedly referenced Ladd's IQ of 67. App. B. at 1, 3. A separate Summary For Psychiatric Consultation from this same time period completed by a caseworker documented

the 67 IQ score and that Ladd was then functioning at a 4th grade level. Dr. Ash saw Ladd on at least three occasions, November 5, 12, and December 8, 1970. *Id.* at 1-3. Two of these reports specifically mentioned his disability:

- Dr. Ash's November 5th report stated that Ladd was "*rather obviously retarded.* Hi IQ has been tested at 67." Under "psychiatric interview," Dr. Ash wrote of Ladd's juvenile crime, "generally speaking it sounds like an act of retaliation and an impulse in a *mentally retarded* individual would be compatible with this act." Under "impressions," Dr. Ash wrote: "*mental retardation* mild to moderate coupled with unsocialized aggressive reaction of adolescence."
- His December 8th report stated, "I do not feel that this boy needs any more follow-up sessions due to his limited IQ and motivation to improve himself."

Id. at 1, 3 (emphasis added). *See also Ladd,* 2013 WL 593927, at *2 (summarizing this evidence and these records). In the end, Ladd's opportunity for therapy with Dr. Ash ended with his conclusion that Ladd's IQ and motivation made him an unsuitable candidate to continue.

When Dr. Ash reviewed his records decades later, after the *Atkins* decision, he reiterated his confidence in his contemporaneous diagnosis. App. B at 4; App. E at 77.

By the age of 19, Ladd had achieved only a fourth-grade academic level. 2013 WL 593927, at *9. At the age of 21, Ladd was convicted of murdering a young woman and her two small children and setting fire to their home. *Id.* at *1. But after serving 16 years of a 40 year sentence, he was released from prison. *Id.*

After his release, Ladd went to work in the vocational division of Andrews Center, "a community mental health/mental retardation healthcare center, providing counseling, group homes, day programs, and employment training and opportunities. . . . 90% of the client workforce is comprised of persons with mental retardation." *Id.* at 4. *See also* http://www.andrewscenter.com/about.htm (describing the center) (as visited on Jan. 26, 2015). The work environment is structured. App. E at 296.

Carolyn Collins supervised Ladd over the three years he worked at Andrews, and knew him quite well. Collins explained that Ladd's work performance was reviewed as one of the mentally retarded clients. App. D (Collins Deposition), at 7-9. He relied on a service coordinator that assisted this population. *Id.* at 9-10. He needed assistance in obtaining housing as "part of his mental retardation." *Id.* at 11, 45-46, 54. He used a trust fund that Andrews set up to help those who are mentally retarded manage their money. *Id.* at 12. His work was monitored with vocational reviews that were used only for mentally retarded clients, the purpose of which was to documents prompts the workers needed to do their job and any corrections needed. *Id.* at 7-8. The Andrews Staff found Ladd to have only a "limited

knowledge" of his rights under the Texas Mental Health and Handicap regulations. App. E at 284.

Significantly, Collins had to take Ladd to buy clothes and food and to pay his bills because Ladd would not buy the proper items, he would not get the proper sizes and he often would get the wrong change back. App. D. at 13-14, 37-38, 53.

Ladd also signed a contract allowing Andrews, under the Fair Labor Standards Act, to pay him less than minimum wage because of his mental handicap. *Id.* at 14-15.[3]

Although not a professional, Collins had worked with this population for 14 years, and was very familiar with people with this disability. Based on Ladd's deficits, Collins believed he was a "high-level mentally retarded consumer." *Id.* at 16. *See also Ladd*, 2013 WL 593927, at *7 (summarizing Collins's testimony). A different supervisor, Al Matson, believed that Ladd was not intellectually disabled despite his reduced pay, the services he received, and the broad mission of Andrews to help this population. *Id.* at 4. But even he conceded that Collins worked more closely with Ladd, on a daily basis, and knew him much better. App. E at 285-86, 96.

In 1996, Ladd committed the capital crime for which he faces execution, killing Vicki Garner, who also worked at Andrews, during the commission of burglary, robbery, sexual assault and arson. *Ladd,* 2013 WL 593927, at *1.

[3] *See* 29 U.S.C.A. § 214 (C) (1)(A-C) (permitting pay under minimum wage for those "whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury . . .").

B. Procedural history

The entire history of this case involves Ladd's fight for the protections announced after his trial in *Atkins*, which patently apply to him.

To begin, in August 1997, a Texas state jury convicted Ladd of capital murder and sentenced him to death. The Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ladd v. Texas*, 3 S.W.3d 547 (Tex. Crim. App . 1999), *cert denied*, 529 U.S. 1070 (2000).

Ladd's first state petition for habeas relief asserted an ineffective assistance of counsel claim, alleging that his trial counsel failed to present mitigating evidence of intellectual disability during the punishment phase. The Texas Court of Criminal Appeals denied Ladd's petition for state habeas relief. *Ex parte Ladd*, No. 42,639-01 (Tex. Crim. App. 1999).

Ladd then filed his first application for a writ of habeas corpus in federal district court. The court denied his application, finding that Ladd's counsel had acted reasonably and effectively in not presenting evidence of his intellectual disability. The United States Court of Appeals for the Fifth Circuit affirmed in *Ladd v. Cockrell*, 311 F.3d 349 (5th Cir. 2002).

Following the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Ladd filed his second petition for state habeas relief, arguing that he was categorically excluded from eligibility for the death penalty due to his intellectual disability. In support of his claim, Ladd attached several exhibits to his state

petition, including the documentation of his IQ score of 67. Ladd requested an evidentiary hearing to refute any evidence the state might offer and to fully develop his claim. Ten days later, on April 17, 2003, the Court of Criminal Appeals dismissed the petition as an abuse of the writ without granting an evidentiary hearing, explaining that Ladd had failed to plead sufficient facts to permit a successive writ under Texas state law.

Ladd then sought authorization from the United State Court of Appeals for the Fifth Circuit to file a second application for a writ of habeas corpus in the district court, which was granted. The federal district court conducted an evidentiary hearing on the *Atkins* issue in 2005, and denied relief in 2013, concluding that Ladd established sub-average intellectual functioning and an onset before age 18, but "failed to establish by a preponderance of the evidence that any of his adaptive deficits are significant" and therefore failed to establish an *Atkins* claim. *Ladd*, 2013 WL 593927 at *8. The Fifth Circuit affirmed. *Ladd v. Stephens*, 748 F.3d 637 (5th Cir.), *cert denied*, 135 S. Ct. 192 (2014).

The Fifth Circuit's affirmance came in April of 2014, roughly two months before this Court announced its decision in *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). With sub-average intellectual functioning and age of onset decided in Ladd's favor, the decision in the federal courts was close, and came down to choosing between two experts on the sole issue of Ladd's deficits in adaptive functioning. Key to both the district court and the Fifth Circuit's decision was reliance on *Ex parte Briseño*, 135

S.W.3d 1, 8 (Tex. Crim. App. 2004), which applies a multi-factor, non-scientific test to sort those intellectually-disabled deserving of *Atkins* protection from those who instead have a personality disorder. The district court cited this *Briseño* dichotomy, 2013 WL 593927, at *8,[4] deciding ultimately to credit the State's expert claim that Ladd's adaptive deficits were indicative of a personality disorder. *Id.* at 8-9.

The Fifth Circuit affirmed, citing *Briseño* (and a subsequent case applying it) for the proposition that "adaptive behavior criteria are exceedingly subjective[,]" and that "adaptive limitations must be related to a deficient intellectual functioning and not a personality disorder." *Ladd*, 748 F.3d at 646 & n. 70, 647 & n.76 (citing *Briseño* and *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex.Crim.App.2010)).The Fifth Circuit found no clear error in the district court decision under this analysis, noting that while "the experts sharply disagreed as to whether [Ladd's] deficits were related to [his] sub-average intellectual functioning" or personality disorder. *Ladd*, 748 F.3d at 646-47, the lower court had "heard and evaluated the testimony of each expert, [and] found the State's expert to be more persuasive." *Id.* at 647.

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[4] "In *Briseño*, the Texas Court of Criminal Appeals instructed fact-finders to consider whether the evidence of adoptive skill deficits was indicative of mental retardation or of a personality disorder. *Briseño*, 135 S.W.3d at 8. The court therefore construes the term "related" [from the medical definition] as meaning indicative of sub-average intellectual function, as *opposed to indicative of a personality disorder.*" *Ladd*, 2013 WL 593927, at *8

Not until two months after the Fifth Circuit ruled did this Court announce its opinion in *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014), limiting the "unfettered discretion" of states to adopt definitions that defeat valid claims of intellectual disability, and holding that states definitions "may not deny the basic dignity the Constitution protects."

On January 23, 2015, Ladd filed an application for leave to file a successor writ of habeas corpus in the Texas Court of Criminal Appeals, urging the court to find Ladd ineligible for execution by evaluating his *Atkins* claim without reference to the un-scientific and discriminatory *Briseno* factors, which clearly clash with *Hall*. The court denied the petition on January 27, 2015. Ladd faces execution this Thursday, January 29, 2015.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THURSDAY'S SCHEDULED EXECUTION OF ROBERT LADD, AN INTELLECTUALLY DISABLED MAN WHOSE *ATKINS* CLAIM WAS DENIED UNDER TEXAS'S NON-SCIENTIFIC *BRISEÑO* APPROACH, WOULD VIOLATE THE EIGHTH AMENDMENT.

As the Court reaffirmed last term, "the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability." *Hall v. Florida*, 134 S. Ct. at 1990 (quoting *Atkins v. Virginia*, 536 U.S. at 321). With an IQ of 67, Robert Ladd's intellectual disability has been well documented since he was a youth, including by the State of Texas. But Ladd faces execution this Thursday because Texas now refuses to acknowledge his disability, clinging to a

rigid, judge-made, non-scientific approach, under *Ex parte Briseño*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

In *Hall v. Florida*, this Court held that the State of Florida's failure to recognize the standard error of measurement in IQ scores "creates an unacceptable risk that persons with intellectual disability will be executed . . ." 134 S. Ct. at 1990. As shown below, the *Briseño* approach entails precisely the same risk, including most urgently the execution of Robert Ladd despite his obvious disability. As one justice of the court below wrote, "after the recent opinion of the United States Supreme Court in Hall v. Florida, I should think that the writing is on the wall for the future viability of Ex parte Briseno." *Ex parte Cathey*, No. WR-55,161-02, 2014 WL 5639162, at *20 (Tex. Crim. App. Nov. 5, 2014) (Price, J., concurring).

A. Texas's non-scientific *Briseño* approach violates *Atkins* and *Hall* by creating an unacceptable risk of executing those with intellectual disabilities.

In *Ex parte Briseño*, 135 S.W.3d at 8, the Texas Court of Criminal Appeals announced a novel approach to determining intellectual disability: in addition to satisfying the traditional definition of intellectual disability by showing significant sub-average functioning and adaptive deficits before age 18, Texas petitioners must prove that their adaptive deficits are the result of intellectual disability alone, and not a personality disorder. The court explained that, in its view, "adaptive behavior criteria are *exceedingly subjective*," and therefore proposed additional evidentiary factors courts should weigh "in the criminal trial context" as indicative of *mental*

retardation or of a personality disorder." *Id.* (emphasis added).[5] As the court later clarified, this approach aims to identify which *Atkins* claimants possess the "level and degree of [intellectual disability] at which a *consensus of Texas citizens*" would prefer the death penalty still be imposed. *Ex parte Sosa*, 364 S.W.3d 889, 891 (Tex. Crim. App. 2012); *see also Chester v. Thaler*, 666 F.3d 340, 346 (5th Cir. 2011) (stating the Fifth Circuit position that the Briseño factors permissibly exclude certain offenders with intellectual disability from the *Atkins* exemption).

The core of this approach asks non-scientific questions about what an *Atkins* claimant *can do* to sort what the lower court deems as deserving intellectually-disabled from those whose personality disorder is the true cause of their deficits. *See Ex parte Weathers*, No. WR-64,302-02, 2014 WL 1758977, at *6 (Tex. Crim. App. Apr. 30, 2014) (requiring proof "that the first and second prongs are linked—the adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder") (internal citation and quotation marks omitted); *Ex parte Hearn*, 310 S.W.3d 424, 428–29 (Tex.Crim.App.2010) (citing factors set out in *Briseño* as "evidentiary factors" to "help distinguish" mental retardation from

[5] The factors the court identified are as follows: 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 interests? 7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? *Ex parte Briseño*, 135 S.W.3d at 8-9.

personality disorders); *Chester*, 666 F.3d at 346; *Moore v. Quarterman*, 342 F. App'x 65, 72 (5th Cir. 2009) ("We first address the State's contention that the district court abused its discretion in not considering "other factors" suggested in Briseño to help the factfinder distinguish mental retardation from antisocial personality disorder."); *Ladd*, 2013 WL 593927, at *8 ("In *Briseño*, the Texas Court of Criminal Appeals instructed fact-finders to consider whether the evidence of adaptive skill deficits was indicative of mental retardation or of a personality disorder. *Briseño*, 135 S.W.3d at 8. The court therefore construes the term "related" [from the medical definition] as meaning indicative of sub-average intellectual function, as *opposed to indicative of a personality disorder*.") (emphasis added).

The first problem with *Briseño* is that it lacks any basis in professional, medical, or scientific standards concerning intellectual disability. The Texas court justified its approach by claiming that evaluation of adaptive functioning is "exceedingly subjective." *Ex parte Briseño*, 135 S.W.3d at 8. The court therefore created its own standards. In crafting them, the Court went on to cite not science, but John Steinbeck's character Lennie as an example of someone whom the citizens of Texas "*might*" deem qualified for the exemption. *Ex parte Briseño*, 135 S.W.3d at 6 (citing John Steinbeck, *Of Mice and Men* (1937) (emphasis added)).

Atkins determinations, however must be "informed by the *medical* community's diagnostic framework. . . . And the professional community's teachings are of particular help in this case, where . . . this Court and the States have placed

substantial reliance on the expertise of the medical profession." *Hall*, 134 S. Ct. at 2000.

The *second* problem is that the *Briseño* approach not only is *not* based in science or medicine, but "gross[ly] deviat[es] from clinical definitions of adaptive functioning." John Blume et al., *A Tale of Two (and possible 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, 414 (2015).

The science debunks *Briseño*'s central premise – the sorting of those with intellectual disability from those with personality disorders. While there may be some overlap in the behaviors associated with Antisocial Personality Disorder and the adaptive deficits observed in people with intellectual disability, it is clinically inappropriate to conclude that the presence of diagnostic criteria for anti-social personality disorder rule out a diagnosis of intellectual disability. Under the heading "differential diagnosis," the DSM-V states the "diagnosis of intellectual disability should be made *whenever* Criteria A, B, and C are met." DSM-V, at 39 (emphasis added). Moreover, [c]o-occurring mental . . . conditions are frequent in intellectual disability, with rates of some conditions . . . three to four times higher than the general population." *Id.*

As the previous edition of the DSM explained, the "diagnostic criteria for mental retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder." American Psychiatric Association,

Diagnostic and Statistical Manual of Mental Disorders, 39 (4th ed. Text Revision 2007) (here after DSM-IV-TR). In other words, anti-social personality disorder and intellectual disability are not mutually exclusive: if a person meets the criteria for intellectual disability, he has intellectual disability even if he also carries a diagnosis of Anti-Social Personality Disorder. *See also* App. E at 467-68 (testimony of Dr. Garnett reviewing these authorities).

With respect to anti-social personality disorder and intellectual disability in particular, "the characteristics of the two disorders overlap, and the presence of one does not rule out the other." J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 J. Applied Psych. 135, 137 (2009) (critiquing *Briseño* for its attempt to distinguish personality disorders from intellectual disability). Some inappropriate behaviors, such as "asocial behavior, specifically aggression, assaultive behavior, conduct problems, and misunderstanding of social context and social understanding" can arise "out of the functional impairment of a person with" intellectual disability. George W. Woods et al, *Intellectual Disability and Comorbid Disorders*, in DEATH PENALTY AND INTELLECTUAL DISABILITY 279, 286. When that is the case, it is inappropriate to attribute these behaviors to personality disorders. *Id.*[6]

[6] In light of this science, Ladd in no way concedes that he is properly diagnosed as having anti-social personality disorder.

The American Association of Intellectual Disability (AAIDD) only recently published the DEATH PENALTY AND INTELLECTUAL DISABILITY.[7] The book devotes an entire chapter to problems with *Briseño*, concluding that "[f]ew if any intellectual disability (ID) scholars, representative bodies or specialists consider that the *Briseño* factors provide a valid diagnostic framework." Stephen Greenspan, *The Briseño Factors* in DEATH PENALTY AND INTELLECTUAL DISABILITY 219.

Because of its unscientific nature, the *Briseño* approach has garnered many critics, including judges, academics, and clinicians involved in the identification and treatment of this population. *See Ex parte Cathey*, No. WR-55,161-02, 2014 WL 5639162, at *20 (Tex. Crim. App. Nov. 5, 2014) (Price, J., concurring in part) (noting continued disagreement with the court's "decidedly non-diagnostic approach to evaluating the adaptive-deficits prong of the standard for determining intellectual disability" and predicting that after *Hall*, the writing is on the wall for the future viability of *Ex parte Briseño*); *Lizcano v. State*, No. AP-75879, 2010 WL 181772, *35 (Tex. Crim. App. May 5, 2010) (Price, J., concurring and dissenting, joined by Johnson and Holcomb, JJ.) ("[W]e seem to have granted a certain amorphous latitude to judges and juries in Texas to supply the normative judgment to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes.") (emphasis in original);*Chester*, 666 F.3d at 371 (DENNIS, J., dissenting) ("The prohibition becomes meaningless unless it is

[7] Coming from the AAIDD, the book is authoritative: the organization, formerly the American Association of Mental Retardation, was founded in 1876 and is the Nation's oldest and largest interdisciplinary organization in the field of intellectual and developmental activities; its definition of mental retardation was cited in *Atkins*, 536 U.S. at 308 n.3.

moored to a generally agreed upon definition of 'mental retardation.' . . . The [Texas courts] should not be permitted to circumvent *Atkins*'s constitutional prohibition by totally supplanting the definition of adaptive functioning that [generally conformed] both with the AAMR clinical definition and with the national consensus that had developed around the AA[IDD] and APA definitions."); John Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 CORNELL J. LAW & PUB. POLICY 689, 710-17 (2009); Blume et al., *A Tale of Two (and possible three) Atkins,* 23 WM. & MARY BILL RTS. J. at 399-400; Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation,* 39 HASTINGS CONST. L.Q. 1, 149-66, 173-74 (2011); Stephen Greenspan & Harvey N. Switzky, *Lessons from the Atkins Decision for the Next AAMR Manual,* in AAMR, WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY 291 (2006); Greenspan, *The Briseño Factors* in DEATH PENALTY AND INTELLECTUAL DISABILITY 219.

Application of the unscientific and misguided *Briseño* factors results in the execution of intellectually-disabled people entitled to the *Atkins* protection. Several scholars have noted the extraordinarily low proportion of *Atkins* claimants who prevail in Texas. Blume et al., *A Tale of Two (and possible three) Atkins,* 23 WM. & MARY BILL RTS. J. at 414 (comparing *Atkins*-claim success rates among the states and finding the Texas rate (8 of 45 claims) "strikingly low"); Peggy M. Toblowsky, *Excluding Intellectually Disabled Offenders from Execution: The Continuing Journey to Implement Atkins,* 211 (Carolina Academic Press 2014) (documenting

"various comparative measures suggest[ing] that Texas state offenders are less likely to succeed in their *Atkins* claims than estimates of intellectually disabled capital offenders would indicate or than offenders elsewhere"); Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 352-53 (2010) (noting Texas state courts have rejected almost every contested *Atkins* case in post-conviction review); Tobolowsky, *A Different Path Taken*, 39 HASTINGS CONST. L.Q. at 37-38 & nn. 203-04, 71 & nn. 373-74 (noting fewer than half of Atkins claimants in Texas prevail, as compared to national average).

By purposeful design, *Sosa*, 364 S.W.3d at 891, *Briseño* weeds from *Atkins* protection many persons with mild intellectually disability." This is the subgroup most likely to retain identifiable strengths and to be engaged in criminal conduct, and it makes up the overwhelming majority (85%) of those who are intellectually disabled, DSM-IV-TR, at 43, and "virtually all" of the intellectually-disabled who face possible execution. Greenspan, *The Briseño Factors* in DEATH PENALTY AND INTELLECTUAL DISABILITY 221. This exclusion runs contrary to *Atkins* and *Hall*'s mandates to exempt from execution *all* people with this disability.

"The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall*, 134 S. Ct. at 2001. While proper *Atkins* determinations are supposed to be "informed by the medical community's diagnostic framework[,]" *Hall*, 134 S. Ct. at 2000, *Briseño* dictates a purely subjective analysis in Texas. Instead of science and medicine, it is this

subjective view that ostensibly reflects the consensus of the State's citizenry that controls in Texas.

As did Florida with its refusal to acknowledge the standard error of measurement, Texas "goes against the unanimous professional consensus." *Hall*, 134 S. Ct. at 2000 (internal quotation marks omitted). The result is that, absent this Court's intervention, intellectually disabled persons like Robert Ladd will continue to be executed, and our Constitution will be diminished.

B. Texas is the only state to follow the non-scientific *Briseño* approach.

Texas is the *only* state that uses subjective "supplemental evidentiary factors" to limit the *Atkins* exemption to a subset of people with intellectual disability, highlighting the degree to which Texas has departed from "[o]bjective indicia of society's standards in the context of the Eighth Amendment". *Hall*, 134 S.Ct. at 1996 (internal quotation marks and citation omitted). Every state to adopt a legislative definition of intellectual disability has used an unsupplemented variant of the three-pronged clinical definitions from *Atkins*.[8] Even those states

[8] *See* ALA. CODE § 15-24-2(3) (2012); ARIZ. REV. STAT. ANN. § 13-753(K)(1)-(K)(3) (2012); ARK. CODE ANN. § 5-4-618(a)(1) (2011); CAL. PENAL CODE § 1376(a) (2011); COLO. REV. STAT. § 18-1.3-1101(2) (2012); DEL. CODE ANN. tit. 11 § 4209(d)(3)d (2012); FLA. STAT. ANN. § 921.137(1) (2012); GA. CODE ANN. § 17-7-131(a)(3) (2011); IDAHO CODE ANN. § 19-2515A(1)(a) (2012); IND. CODE ANN. 35-36-9-2 (2012); KAN. STAT. ANN. §§ 21-6622(h), 76-12b01 (2011); KY. REV. STAT. ANN. § 532.130(2) (2011); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2011); MO. ANN. STAT. § 565.030(6) (2012); NEB. REV. STAT. § 28-105.01(3) (2011); NEV. REV. STAT. ANN. § 174.098(7) (2011); N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(a) (2011); S.C. CODE ANN. § 16-3-20(C)(b)(10) (2011); TENN. CODE ANN. § 39-13-203(a) (2012); UTAH CODE ANN. § 77-15a-102 (2011); VA. CODE ANN. § 19.2-264.3:1.1(A) (2012); WASH. REV. CODE ANN. § 10.95.030(2)(a) (2012). Two states do not include the developmental onset criterion. See OKLA. STAT. ANN. tit. 21 § 701.10bA(1) (2012); S.D. CODIFIED LAWS § 23A-27A-26.2 (2011). Connecticut, Illinois, Maryland, and New Mexico have abolished the death penalty, but had pre-abolition statutes defining intellectual disability by reference to the clinical criteria. See CONN.

lacking statutory guidance have judicially adopted unsupplemented clinical criteria for MR.[9] No state has varied its intellectual disability definition in any way other than by either specifying a controlling version of the normal adaptive-deficit criterion or increasing the age-of-onset threshold.[10] And no state statute or

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GEN. STAT. § 1-1g(a) (2011) (superseded); 725 ILL. COMP. STAT. 5/114-15(d) (2011) (superseded); MD. CODE ANN., CRIM. LAW § 2-202(b)(1) (2012) (superseded);N.M. STAT. ANN. § 31-20A-2.1(A) (2007) (superseded). The New York Court of Appeals struck down the death penalty, *People v. Lavalle*, 783 N.Y.S.2d 485 (N.Y. 2004), but New York had previously defined intellectual disability by reference to the clinical criteria. See N.Y. CRIM. PROC. LAW § 400.27(e) (2007).

[9] *See Hughes v. State*, 892 So.2d 203, 216 (Miss. 2004); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002); Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005). New Jersey abolished the death penalty in 2007, but before then relied on decisional law incorporating the APA definition. See State v. Jimenez, 880 A.2d 468 (N.J. Super. Ct. App. Div. 2005), *overruled on other grounds by State v. Jimenez*, 908 A.2d 181 (N.J. 2005)).

[10] Nine states incorporate the "skill areas" from either the 1992 AAMR Manual or the DSMIV.
DEL. CODE tit. 11g § 4209(d)(3)d.1 (2012); IDAHO CODE ANN. § 19-2515A(1)(a) (2012);
725 ILL. COMP. STAT. 5/114-15(d) (2012); MO. ANN. STAT. § 565.030(6) (2012); N.C. GEN.
STAT. ANN. § 15A-2005(a)(1)(b) (2012); *Hughes*, 892 So. 2d at 216; *Wiley v. State*, 890 So. 2d
892, 895 (Miss. 2004); *Lott*, 779 N.E.2d at 1014; *Blonner v. State*, 127 P.3d 1135, 1139 (Okla.Crim.App. 2006); Miller, 888 A.2d at 630-31. One state formally uses the domain classification system from the 2002 AAMR MANUAL. SEE VA. CODE ANN. § 19.2-264.3:1.1(A) (2102). Four others have held that the AAMR and APA schemes provide useful guidance. *See In re Hawthorne*, 105 P.3d 552, 556-57 (Cal. 2005); *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005); *State v. Jimenez*, 908 A.2d 181, 184 n.4 (N.J. 2006) (death penalty subsequently repealed); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (quoting TENN. CODE ANN. § 33-1-101(17) (2003)). Seven states have adopted more general adaptive deficits language that fits into the AAMR and APA framework, although the clinical sources are not identified directly. See ARIZ. REV. STAT. ANN. § 13-753(K) (2012); CONN. GEN. STAT. § 1-1g(b) (2007) (superseded); FLA. STAT. ANN. § 921.137(1) (2012); KAN. STAT. ANN. § 76-12b01(a) (2012); LA. CODE CRIM. PROC. Ann. art. 905.5.1(H)(1) (2011); UTAH CODE ANN. §77-15a-102 (2012); WASH. REV. CODE ANN. § 10.95.030(2)(d) (2012).

decisional law rules out, like *Briseño*, a finding of significant adaptive deficits (and therefore intellectual disability) if a personality disorder is present.

Added to this already-unbalanced side "of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses[.]" *Hall*, 134 S. Ct. at 1997. Thus in 49 States an "individual in [Ladd's] position" – one excluded from *Atkins*'s protection based on judge-made standards – would not face execution. *Id.* This is far greater than the consensus number of 41 identified in *Hall*. Nothing could provide stronger "evidence of consensus that our society" rejects exclusion from the *Atkins* exemption based on subjective, judge-made criteria. *Id.* at 1998.

As it did in *Hall*, the Court should grant certiorari and reverse the judgment below to return the protections of *Atkins* to those facing execution in Texas.

C. The lower courts should evaluate Robert Ladd's eligibility without application of the *Briseño* factors, and conclude, as the State of Texas did before the question of execution eligibility ever arose, that Robert Ladd, then characterized as "rather obviously retarded," is a person with intellectual disability.

Only under *Briseño* could Robert Ladd, who was diagnosed with an IQ of 67 at age 13, and has significant deficits in adaptive functioning, not be deemed intellectually disabled and exempt from execution under *Atkins*.

When Ladd was a boy of 13 in the custody of TYC, he obtained a full-scale Weschler IQ score of 67. TYC's psychiatrist, Dr. Weldon Ash, wrote that Ladd was "*rather obviously retarded.*" App. B at 1. (emphasis added). Dr. Ash listed his diagnostic impression as "mental retardation, mild to moderate, coupled with unsocialized aggressive reaction to adolescence." *Id.* at B*. This finding came well

before Ladd's capital crime, and Dr. Ash worked for the State of Texas. His opinion thus cannot be dismissed as that of a partisan hired by the defense. Indeed, as Dr. Garnett astutely noted, it is inappropriate to second-guess a competent clinician's contemporary diagnosis at a time when the present stakes did not exist. App. C. at 2. "If that be the case, then no professional assessment is credible when agenda biased hindsight can negate that assessment when needed, *even over a quarter of a century later, essentially through second-guessing.*" *Id.* (emphasis added).

In 2003, when Dr. Ash was asked to review his diagnostic notes from 1970, he confidently reaffirmed that Ladd was mentally retarded. App. B. at 4. Ladd's intellectual disability is a life-long condition that of course remains today. It makes him constitutionally ineligible for execution.

The "medical community defines intellectual disability according to three criteria." *Hall*, 134 S. Ct. at 1973. They are:

> [1] significantly sub-average intellectual functioning[;]
>
> [2] deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances;" and
>
> [3] onset of these deficits in the developmental period.

Id. (citing *Atkins*, 536 U.S. at 308 n.3; DSM-V at 33. The developmental period is generally agreed to end at age 18. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* 5 (11th ed. 2010) (hereafter "AAIDD Manual").

Regarding the first criterion, the medical community recognizes that an IQ score two standard deviations below the mean IQ score of 100 is 70, and qualifies as "significantly sub-average." *See Hall*, 134 S.Ct. at 1994. Here, given the unequivocal finding that Ladd was "obviously retarded" at 13, and his IQ score of 67,[11] the only dispute about whether *Atkins* and *Hall* preclude his execution centers on the second criterion, adaptive functioning.

Ladd's deficits are well documented, debilitating, and significant. As noted above, Ladd received services at the Andrews Center, a non-profit comprehensive mental health and mental retardation center. There, he worked a job in which he was paid less than minimum wage, because of the statutory exemption from the minimum for people who are disabled. 29 U.S.C.A. § 214 (C) (1)(A-C). He survived in the community only with the help of a service coordinator, Carolyn Collins, who drove him to work and helped with his shopping for food and clothes, and had his money deposited in a trust fund, rather than receiving a check. As a child, Ladd struggled to dress appropriately, to participate in basic recreation, like kickball and playing card games, and to remember basic information when called upon to run errands for his mother. The other children called him a "retard."

Based on the records reviewed in this case, the information provided by Carolyn Collins (the case supervisor) and Ladd's family members, Dr. Garnett found that Ladd "had significant adaptive skills deficits in the areas of functional

[11] As the federal courts recognized, two other tests Ladd has taken over the years were unreliable; the courts credited only the 67 score. *Ladd*, 748 F.3d at 646 (affirming finding of district court that scores of 86 and 60, were less reliable than the 67 because the higher score of 86 was achieved on a less accurate test instrument and the lower score of 60 was allegedly the result of malingering).

academics, including money concepts, work-related skills, using community resources, communications skills and social skills." *Ladd*, 2013 WL 593927, at 3.

The only expert to dissent from this finding one was one for the State of Texas, Dr. Thomas Allen, whose neutrality could reasonably be questioned due to his testimony for the State at Ladd's original sentencing trial that Ladd would pose a threat of future danger if not executed. *Ladd*, 2013 WL 593927, at *6. And even this expert acknowledged Ladd had adaptive deficits "in functional academics, work skills, interpersonal relations and communications skills." *Id.* at 7.

But consistent with the *Briseño* approach, and clashing with the science of intellectual disability, *see* section (A) *supra*, Dr. Allen claimed that Ladd is not intellectually disabled because his deficits related to criminality and were more properly attributed to anti-social personality disorder.[12] Dr. Allen buttressed his conclusion by evaluating Ladd's functioning in the artificial prison setting using an instrument even he admitted was not properly normed for that setting. *Ladd*, 748

[12] Dr. Allen "testified that based upon his interview with Ladd and his review of Ladd's records, any deficits in adaptive behavior which Ladd possessed were better explained by Ladd's anti-social personality disorder rather than by any supposed deficits in intellectual functioning. For example, Dr. Allen testified that Ladd's failure in functional academics as a youth was not related to his intellectual functioning, but was instead because of conduct problems. He also testified that in his opinion Ladd failed in conventional work settings because Ladd preferred to commit crimes instead of do regular work. He stated that as long as Ladd wanted to pursue a legitimate career, such as barbering, he did fine, but he eventually returned to his main goal, which was to be a criminal. He also denied that Ladd had any deficit in using community resources, saying that Ladd was able to participate in groups when he wanted to, but the groups he wanted to participate in were groups of criminals. To the extent that Ladd had any difficulties with groups, Dr. Allen opined that those difficulties were related to Ladd's conduct disorders, not his intellectual functioning." *Ladd*, 2013 WL 593927, at *6. Dr. Allen's focus on Ladd's criminal activities and relative strengths typifies the *Briseño* approach.

F.3d at 647.[13] Infusing his testimony with the *Briseño* focus on criminality, Dr. Allen testified repeatedly as to Ladd's criminal conduct but acknowledged very little of the deficits others had recognized. Ladd Hr'g Vol. I at 337, 343, 344, 350, 376, 383, 394, 458.

In sum, only under the faulty *Briseño* premise of sorting the deserving intellectual disabled from those with personality disorders does Ladd's *Atkins* claim falter. As shown below, like Florida's non-scientific approach to the standard error of measure in IQ scores, the Texas *Briseño* approach clashes with science and denies "the basic dignity the Constitution protects." *Hall,* 134 S. Ct. at 2001. Under any fair application of *Hall* and *Atkins*, Ladd may not be executed. Yet, even after *Hall,* the court below refused to reevaluate Ladd's overwhelming showing of disability.

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[13] Dr. Allen "administered the Vineland Adaptive Skills Inventory, which he modified to adapt to Ladd. Although this inventory has not been normed on prisoners, Dr. Allen" still relied on it and claimed that "Ladd's score placed him well within the middle, or average, range of the [prison] population." *Ladd,* 748 F.3d at 643-44. Medical experts advise against a diagnosis on the second criterion based on the a prisoner's life. "Adaptive behavior may be difficult to assess in a controlled setting," such as a prison or detention center. DSM-V, at 38. Accordingly, the DSM-V calls on practitioners to evaluate adaptive behavior and obtain corroborating information outside of those settings. The AAIDD Manual similarly emphasizes that reports of an individual's behavior must be "evaluated relation to contexts typical of the individual's age peers." AAIDD Manual, at 53. The "prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior." Marc Tasse', *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases,* 16 J. Applied Psych. 114, 116 (2009).

CONCLUSION AND PRAYER FOR RELIEF

This Court should grant certiorari and summarily reverse under *Hall* or, in the alternative, stay Ladd's pending execution and schedule this case for further briefing and oral argument.

Respectfully submitted,

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