NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN L. WILSON,
Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mr. Wilson is scheduled to be executed after 6:00 p.m. central time on Tuesday, August 7, 2012.

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QUESTIONS PRESENTED (CAPITAL CASE)

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment categorically bars the execution of offenders with mental retardation (MR). Using the clinical criteria identified in *Atkins*, the only mental health expert to assess Marvin Wilson's cognitive functioning diagnosed him with MR. At no point in the Texas proceeding did the State introduce any evidence or testimony disputing the MR diagnosis. Texas courts and the Fifth Circuit are nevertheless allowing the execution to proceed, having concluded that *Atkins* does not apply to Mr. Wilson because he does not satisfy the so-called "Briseño" factors. The Briseño factors, which Texas courts use to conduct MR inquiries, narrow the universe of offenders that *Atkins* protects by permitting execution of offenders with "mild MR," the condition for which *Atkins* originally announced the Eighth Amendment exemption. Most elementally, the Questions Presented are about whether Texas can evade *Atkins* and whether lower federal courts must enforce it.

1. Did the Texas decision unreasonably apply *Atkins* by using the *Briseño* factors to narrow the Eighth Amendment exemption for capital offenders with MR?
2. May a federal court incorporate the presumption of correctness from 28 U.S.C. § 2254(e)(1) into an inquiry under 28 U.S.C. § 2254(d)(2), thereby using the § 2254(e)(1) presumption to ignore inconsistent evidence as having been subject to an "implied adverse credibility" determination?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which the Petitioner before this Court, Marvin Wilson, was the Petitioner before the United States District Court for the Eastern District of Texas and the Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Wilson is a prisoner sentenced to death and in the custody of Rick Thaler, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director was the Respondent before the United States District Court for the Eastern District of Texas and the Appellee before the United States Court of Appeals for the Fifth Circuit. Mr. Wilson asks that the Court issue a writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR A WRIT OF CERTIORARI

Marvin Wilson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished, per curiam Panel Opinion of the United States Court of Appeals for the Fifth Circuit, affirming the district court's judgment, is attached as Appendix A. See *Wilson* v. *Thaler*, 450 Fed. App'x 369 (5th Cir. Nov. 16, 2011). The unpublished Order of the United States Court of Appeals for the Fifth Circuit revising the Panel Opinion is attached as Appendix B. The unpublished Order granting Mr. Wilson's certificate of appealability is attached as Appendix C. The Memorandum Opinion of the United States District Court for the Eastern District of Texas denying habeas relief is attached as Appendix D. The Texas Findings of Fact and Conclusions of Law are attached as Appendix E.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 2241 & 2254. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has appellate (certiorari) jurisdiction under 28 U.S.C. § 1254(1). The initial Panel Opinion issued on November 16, 2011. After supplementing the initial Panel Opinion with a new paragraph, the court of appeals denied the first panel rehearing petition and mooted the first *en banc* rehearing petition on February 23, 2012. The court of appeals terminated all rehearing proceedings on April 19. On April 27, JUSTICE SCALIA ordered that Mr. Wilson have until July 19 to file this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

* * * * *

28 U.S.C. § 2254(d), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * * * *

> 28 U.S.C. § 2254(e), also enacted by AEDPA, provides in pertinent part:
>
> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Marvin Wilson seeks federal habeas relief from his capital sentence because, under the Eighth Amendment and *Atkins* v. *Virginia*, 536 U.S. 304 (2002), he has mental retardation (MR) and is categorically ineligible for the death penalty. The only expert to examine Mr. Wilson for MR was a court-appointed, board certified neuropsychologist with 22 years of clinical experience as an MR specialist. The neuropsychologist concluded that Mr. Wilson had mild MR, the cognitive condition that precipitated the *Atkins* exemption. (The Neuropsychological Report is attached

as Appendix F, the Addendum thereto is attached as Appendix G, the Neuropsychologist's C.V. is attached as Appendix H, and his testimony is attached as Appendix I.) During all nine years of *Atkins* litigation, the State has never put on a single witness or introduced a single piece of evidence to contest the MR claim.

Mr. Wilson received a 61 on the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), recognized as the gold standard of intellectual assessment. The WAIS-III measures verbal and non-verbal (performance) components, yielding a full-scale IQ ("FSIQ") score. Mr. Wilson's FSIQ places him below the first percentile of human intelligence. If he does not obtain federal habeas relief, he will own the grisly distinction as the Texas *Atkins* claimant executed with the lowest WAIS-III score not subject to expert dispute.

Mr. Wilson remains on death row because of the coinciding jurisdictions that impose and review his death sentence: Texas and the Fifth Circuit. Mr. Wilson is the most extreme in a long line of Texas *Atkins* decisions applying the "*Briseño* factors," first announced in 2004. See *Ex parte Briseño*, 135 S.W.3d 1, 8-9 (Tex.Crim.App. 2004). The *Briseño* factors specify, within the universe of inmates with MR, the subset that receive *Atkins* protection—they identify which claimants have the "level and degree of [MR] at which a consensus of *Texas* citizens" would prefer the death penalty imposed. *Ex parte Sosa*, 364 S.W.3d 889, 891 (Tex.Crim.App. 2012) (emphasis added); 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 MR from the *Atkins* exemption). Because

the *Briseño* factors lack any scientific foundation, violate the basic diagnostic principle that adaptive strengths and limitations coexist, exclude inmates from *Atkins* coverage on the basis of MR-consistent behavior, and marginalize expert evaluation, courts invariably use them to deny relief to claimants with mild MR.

Under AEDPA, federal courts cannot award habeas relief to prisoners challenging reasonable state decisions, but the Fifth Circuit has taken the statute too far. That court tolerates the ongoing *Briseño* project by misconstruing multiple AEDPA provisions and *Atkins* itself. First, under 28 U.S.C. § 2254(d)(1), when the Fifth Circuit permits Texas to use the *Briseño* factors to deny relief to offenders with mild MR, it tolerates an unreasonable application of *Atkins*. Second, the Fifth Circuit misapplied 28 U.S.C. § 2254(d)(2) by using the presumption of correctness from 28 U.S.C. § 2254(e)(1) to disqualify the only expert opinion offered at the state *Atkins* proceeding. Using the presumption to improvise "implied findings" on inconsistent record material, the Fifth Circuit rendered § 2254(d)(2)—which requires scrutiny of state factual findings in light of the state record—a nullity.

A. Pre-*Atkins* Litigation

In 1999, the Texas Court of Criminal Appeals ("TCCA") affirmed Mr. Wilson's capital sentence for murdering Jerry Williams, an informant who told police that Mr. Wilson and some other men were dealing cocaine. *Wilson* v. *State*, 7 S.W.3d 136 (Tex.Crim.App. 1999). In the early evening of November 9, 1992, eyewitnesses saw two men—Mr. Wilson and his accomplice, Andrew Lewis—attack Mr. Williams at Mike's Grocery store in Beaumont, Texas. The eyewitness testimony as to the

primary assailant was inconsistent. See T.R. Vol. 15: 78-79, 89-92, 98-99, 146, 159. The eyewitnesses saw the assailants force Mr. Williams into a car, and one witness testified that, shortly thereafter, she heard what were either gunshots or noises from a nearby refinery. See T.R. Vol. 16: 16-17.[1] The forensic expert testified that attributes of the body strongly indicated that Mr. Williams was not killed immediately after the incident at Mike's Grocery, but shortly before he was discovered at 7:00 a.m. the next morning. See T.R. Vol. 20: 5. In light of evidence discovered on June 18 of last month, there have been and will be proceedings seeking to establish that Mr. Williams was entrapped in the early hours of November 10, that Mr. Wilson was not the shooter, and that he did not otherwise have a significant role in the murder that he did not know was about to take place.[2]

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[1] When record evidence does not have an "App." cite, it has either a "T.R." or an "A.H." designation. "T.R." stands for "trial record," and "A.H." stands for "*Atkins* hearing."

[2] In 2002, Mr. Wilson sought DNA testing of a Caucasian hair that Mr. Williams was clutching when police reached Mr. Williams' body. The forensic expert believed that Mr. Williams pulled the hair out of someone's head just before he died. T.R. Vol. 15: 194. The TCCA affirmed the trial court's order dying the DNA-testing motion because, it reasoned, the hair was from a white person and both men seen at Mike's Grocery were black. See Order, *Wilson* v. *State*, No. 74390 (Tex.Crim.App. Mar. 26, 2003). Mr. Wilson, however, had sought the test to show that Mr. Williams might have struggled with someone other than his assailants at Mikes' grocery. On June 18, 2012, the DA's Office disclosed that it had information suggesting that Mr. Williams may indeed have been killed by gunshots in the early-morning hours of November 10, that Mr. Wilson was not a shooter, that he had planned only to participate in an assault, and that he was not otherwise a principal assailant. The Texas trial court, acting *sua sponte*, convened a hearing on July 2. On July 6, the trial court issued an Order refusing to withdraw the execution date on the grounds that "it is not clear" that the newly discovered evidence "would definitely have been admissible at trial," and that—because Mr. Wilson was convicted as a co-party—there was not "clear and convincing evidence that no reasonable juror would have convicted him at trial in light of this newly[-]available evidence." Order, *Texas* v. *Wilson*, No. 63940 (Jul. 6, 2012). As the investigation into the newly-discovered evidence develops, Mr. Wilson anticipates further proceedings contesting, at least, the role it would have played in his punishment-phase verdict.

The evidence that Mr. Wilson was the principal perpetrator came from testimony of Terry Lewis, the wife of Mr. Wilson's accomplice. Ms. Lewis testified that, when she became concerned that her husband pulled the trigger, Mr. Wilson calmed her by assuring her that Mr. Lewis was not the primary assailant. See T.R. Vol. 16: 25. In short, Mr. Wilson received his sentence under precisely the circumstances that make the capital punishment of offenders with MR problematic: he was one of multiple perpetrators, the eyewitness identification of the primary assailant shifted over time, the more-sophisticated accomplice fingered Mr. Wilson as the leader, and evidence of Mr. Wilson's "confession" came from the accomplice's wife. The TCCA denied relief on Mr. Wilson's first state post-conviction challenge, which did not include an MR claim because this Court had not yet decided *Atkins*. *Ex parte Wilson*, No. 46,928-01 (Tex.Crim.App. Oct. 11, 2000). The Fifth Circuit affirmed a district court order denying Mr. Wilson's initial federal habeas petition. *Wilson* v. *Cockrell*, 70 Fed. App'x 219 (5th Cir. Jul. 17, 2003) (per curiam).

On June 20, 2002, during the pendency of his initial federal habeas proceedings, this Court decided *Atkins*. *Atkins* held that there was a national consensus that people with MR should not be executed, a consensus reflected in the clinical definitions promulgated by the American Association on Mental Retardation ("AAMR")[3] and the American Psychiatric Association ("APA"). See 536 U.S. at 308 n.3; see also *id.* at 317 n. 22 ("The statutory definitions of mental retardation are not identical, but generally conform to the [AAMR and APA] clinical definitions.")

Atkins clearly established an Eighth Amendment exemption for offenders with mild MR. See *Atkins*, 536 U.S. at 340-41 (SCALIA, J., dissenting). *Atkins* expressly rejected the proposition that the "national consensus" against executing offenders with MR reached only those with more severe cognitive impairments. See *id.* at 343 n.2 (SCALIA, J., dissenting). The three clinical MR criteria that *Atkins* identified are: (1) significantly sub-average intellectual functioning (low FSIQ); (2) adaptive deficits; and (3) onset during the developmental period. See *id.* at 308 n.3.[4]

B. State *Atkins* Hearing

Mr. Wilson thereafter sought state post-conviction relief on his newly-accrued *Atkins* claim. The state court conducted his *Atkins* hearing in two parts, each with a different judge presiding.[5] Mr. Wilson adduced evidence on the three clinical criteria

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[3] The AAMR was renamed the American Association on Intellectual and Developmental Disabilities. For clarity's sake, this Petition will refer to the entity as the AAMR.

[4] The primary variation in clinical definitions involves the adaptive deficits criterion. The APA deems the adaptive deficits criterion satisfied when the subject has limitations in "at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Atkins*, 536 U.S. 308 n.3 (citing APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed.2000) ("DSM-IV")). When *Atkins* was decided, the AAMR deemed the adaptive deficits criterion satisfied when the subject had limitations in "two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. 308 n.3 (citing AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("1992 AAMR MANUAL")). The Tenth Edition of the AAMR Manual changed the structure of the adaptive deficits criterion somewhat, requiring two-standard-deviations-below-average performance in at least one of three adaptive "domains": conceptual, social, and practical. See AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 76 (10th ed. 2002) ("2002 AAMR MANUAL")). Each of the skill areas from the 1992 AAMR MANUAL slots under one of the three domains specified in the 2002 AAMR MANUAL. See 2002 AAMR MANUAL at 82. Formally, there are representative skills associated with each adaptive domain. See *ibid.*

[5] The judge that entered the state findings did not hear any of the testimony in the first part of the state proceeding.

upon which this Court premised *Atkins*. Neuropsychologist Dr. Donald Trahan remains the only expert to have evaluated Mr. Wilson for MR, and he testified during the state *Atkins* hearing. App I1-I59. Dr. Trahan was board certified with 22 years of clinical experience, had evaluated over 500 patients with MR, and specialized in diagnosing the condition. App. H1-H5, I2-I7. He had administered over 10,000 intelligence tests, reviewed hundreds of other psychologists' IQ scoring records, and written over 75 articles on neuropsychology and cognitive disorder. App. H5-H14, I2-I7.

To evaluate Mr. Wilson, Dr. Trahan personally administered nine different neuropsychological tests, including the TONI-II, the Raven Standard Progressive Matrices, the Peabody Individual Achievement Test-Revised, the Wide Range Achievement Test–3rd ed., the Language Assessment Battery, the Orientation Evaluation, the Verbal Selective Reminding Test, the Visual Reproduction Subtest, and the Remote Sensory Evaluation. App. F6, I9-I12. He also reviewed and confirmed Mr. Wilson's WAIS-III results, considered prior intelligence testing dating back to 1971, analyzed Mr. Wilson's school records, interviewed Mr. Wilson for eight hours, administered the industry-standard Vineland Adaptive Behavior Skills Examination, and obtained first-person testimony regarding all three generally-accepted MR criteria. App. F1-F6, G1-G2, I12-I17. Dr. Trahan concluded that Mr. Wilson had mild MR. App. F9, G2, I24. Texas, by contrast, did not conduct a cognitive assessment of Mr. Wilson. As a result, it literally adduced no evidence and no testimony in the state *Atkins* proceeding.

1. State hearing evidence on sub-average intellectual functioning.

The first MR criterion requires significantly-sub-average intellectual functioning. See *Atkins*, 536 U.S. at 308 n.3 (citing AAMR and APA criteria). A person with an FSIQ approximately two standard deviations below the mean—below 70—will satisfy this criterion, and an FSIQ score below 75 can be consistent with MR, depending on sampling error and the severity of adaptive deficits. See App. G7, I44; *Atkins*, 536 U.S. at 309 n.5; AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 57-59 (10th ed. 2002) ("2002 AAMR MANUAL"); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 316 (4th ed. 2000) ("DSM-IV").

Mr. Wilson scored a 61 on the WAIS-III FSIQ test, placing him below the first percentile of human intelligence, and very far below the MR threshold. See App. F8, G1, I11, I14-I16, J6-J7. The WAIS-III yields an FSIQ score and consists of six verbal and five perceptual-motor sub-tests that measure verbal and "performance" (nonverbal) intelligence. See 2002 AAMR MANUAL at 61-62. The WAIS-III was, in 2004, the gold standard for IQ measurement. See App. F8, I42, I56, J4; *Atkins*, 536 U.S. at 309 n.5; see also *Rivera* v. *Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (stating Director's agreement that the WAIS-III "is the best full-scale IQ test available in English"). Dr. Trahan, however, emphasized that his diagnosis was "not based exclusively on [the] WAIS-III." App I52-I53; see also App. G2 (reiterating that the mild MR diagnosis reflected all available data, including the all other tests).

The WAIS-III was administered by the office of psychologist Dr. Curt Wills. Mr. Wilson's WAIS-III answers were recorded by Mr. August Wehner, Dr. Wills' assistant and a licensed professional counselor who was close to completing his PhD in psychology. App. J2-J3. While cross-examining Dr. Trahan, counsel for the Director insinuated that the WAIS-III was unreliable because of Mr. Wehner's role in the assessment. Mr. Wehner had testified at the first part of the State *Atkins* hearing. App. J1-J10. He was well-trained, had administered and/or scored 30-40 WAIS-III batteries, and worked closely with the supervising psychologist, who interpreted Mr. Wilson's responses to the test questions. App. I22-I24, J3-J4. Dr. Trahan testified that this WAIS-III protocol—whereby a graduate student collects data and the lead clinician interprets it—is commonplace. App. I23-I24, I56-I57.

Dr. Trahan testified that any error in test administration would not skew the result more than three points in either direction. App. I42-I43, I56-I57. Nor would such error be biased above or below the real FSIQ; the score of 61 is as likely an overstatement of Mr. Wilson's FSIQ as it an understatement. I43. Mr. Wilson's intellectual profile shows that his verbal impairments exceed his nonverbal ones, but that the aggregate impairment is easily MR-consistent. App. F8, F11.

The Director did not introduce evidence or present witnesses at the Texas *Atkins* hearing. The Director argued that the nonverbal test scores in Dr. Trahan's data were, standing alone, inconclusive as to MR. The tests in Dr. Trahan's report, many of which are MR-consistent in persons with severe adaptive deficits, included: (1) an MR-consistent Lorge-Thorndike IQ of 73 that Mr. Wilson scored when he was

thirteen, App. F7-F8, I12-I13; (2) an MR-consistent score of 75 on a 15-minute, group-administered prison intake examination, App. F8, I13, I42; and (3) two short-form, nonverbal IQ scores (a 75 and 79 on tests where scores are known to skew 10-15 points high) cherry-picked from the nine intellectual assessment instruments that Dr. Trahan administered. App. F8, I11-I13, I42.[6]

The WAIS-III is the only instrument recognized as "Commonly Available Intelligence Scale" by the AAMR—an FSIQ test. See 2002 AAMR MANUAL at 59-66. With the exception of the MR-consistent Lorge-Thorndike score, the Director selectively emphasized data from "short-form" tests and from instruments that measured only nonverbal impairment. The WAIS-III nonverbal sub-score was a 68. App. F11. Dr. Trahan audited the other test scores. App. F7-F8; I10-I15. Because they were short-form tests that omitted the verbal batteries necessary for an FSIQ result, he repeatedly emphasized that the WAIS-III was the superior intellectual assessment. App. F8, I21, I42. His Neuropsychological Report underscored that, as among the various test results, an MR diagnosis should "rely most heavily on the WAIS-III score as an indicator of his level of intellectual functioning." App. F8.

While cross-examining Dr. Trahan, the Director's counsel insinuated that Mr. Wilson deliberately missed test questions—that he "malingered," in clinical parlance. Dr. Trahan, however, stated that he "saw no evidence of malingering or

[6] Mr. Wilson received a 75 on the Raven Standard Progressive Matrices and a 79 on the Test Of Nonverbal Intelligence-II ("TONI-II"). App. F8, I11. Neither nonverbal IQ score is incompatible with MR. App. F8, I11. The TONI-II is a non-comprehensive, short-form test and is not used to assess general intellectual functioning. App. F8, I42. Because of its limited subject matter and sample size, the TONI-II routinely overestimates IQ by ten to fifteen points. App. F8, I11, I21.

inadequate effort." App. F9. He observed that the WAIS-III score was not an "aberration" because it was consistent with Mr. Wilson's extraordinarily poor academic performance at every level of schooling. App. F9. Dr. Trahan concluded that "the test results obtained during this examination are a valid estimate of [Mr. Wilson's] ability." App. F9. The Director introduced no evidence of malingering.

2. State hearing evidence on adaptive deficits.

The second MR criterion requires that a person be subject to adaptive deficits. See note 4, *supra*. Deficits may be expressed by significant limitations in conceptual, social, and practical domains. An individual with MR often has strengths in a domain for which he is subject to a net limitation, and adults with mild MR can possess social and vocational skills enabling minimum self-support. See 2002 AAMR MANUAL at 8; DSM-IV at 317.

Using Mr. Wilson's school records, sworn affidavits, and observations from an eight-hour interview, Dr. Trahan comprehensively analyzed Mr. Wilson's adaptive deficits. App. F1-F12. Dr. Trahan completed the Vineland Adaptive Behavior Scale, the formal measure of adaptive behavior used by psychiatrists. App. G1-G2, I22-I23. Mr. Wilson exhibits significant limitations in each of the three 2002 AAMR domains and in at least six of the 1992 AAMR skill areas: communication, self-care, social/interpersonal skills, functional academics, leisure, and work. App. F8-F9, G1-G2. Dr. Trahan concluded and testified that Mr. Wilson's adaptive deficits are actually consistent with moderate MR. App. F1 ("His composite adaptive behavior score was 44 [on the

Vineland], which places him within the moderately impaired range."), I16.

State Hearing Evidence on Conceptual Deficits. Representative skills in the conceptual domain are: (1) language, (2) reading and writing, (3) money concepts, and (4) self-direction. See 2002 AAMR MANUAL at 82. Mr. Wilson's "most profound deficits were in the area of conceptual skills." App. F8. Dr. Trahan summarized:

> [Mr. Wilson] exhibited substantial deficits in terms of general language development, as well as in reading and writing skills. He also exhibits considerable deficits in money management concepts. * * * [H]he had difficulty demonstrating the ability to perform even simple tasks involving money management. * * * [H]e has never been able to handle his own financial affairs, use a bank account, or even make sound decisions with regard to spending money. Limitations in self-direction also have been noted throughout the years of development. * * * [H]e has requested supervision and assistance in most aspects of self-care and daily living.

App. F8-F9.

Mr. Wilson's language and arithmetic skills never progressed beyond an elementary school level. App. F8-F9. He was a horrible grammar school student, and other kids nicknamed him "Stupid," "Dummy," and "retarded." App. F5; L2, N1. He was placed in junior high special education classes, but by seventh grade failed the vast majority of them. App. F3-F4. Despite being in special education, Mr. Wilson repeated the seventh grade, and was socially promoted to eighth and ninth grades. App. F3-F4. He received D's and F's in most of his high school classes, even though he had been placed in a vocational track for lower-functioning students. App. F4. He dropped out in tenth grade. App. F4. His TDCJ trade school performance was abysmal and, despite 642 course hours, he was not certified as completing a vocational trade curriculum. App. F4.

Mr. Wilson reads and writes below a second grade level. App. F8, I11-I12. Dr. Trahan's testing was consistent with TDCJ assessment, which occurred long before his conviction. App. I13. While in TDCJ, Mr. Wilson failed in attempts to obtain a vocational trade certificate and a GED. App. F4.

Mr. Wilson's financial skills remain severely under-developed. He always lacked an age-appropriate concept of money. App. F8-F9, L2, N2; A.H. Vol. 2: 72. As an adult, Mr. Wilson could not understand bank accounts or manage his finances. App. M3. He could not pay bills, and his mother-in-law had to handle all of Mr. Wilson's money. App. F5. Dr. Trahan reported that "[Mr. Wilson] has never been able to handle his own financial affairs, use a bank account, or even make sound decisions with regard to spending money." App. F5.

Those knowing Mr. Wilson during his youth noted his lack of self-direction, including an inability to cut grass or to use a ladder on his own. App. L1-L2. Dr. Trahan observed that "[Mr. Wilson's] [l]imitations in self-direction also have been noted throughout the years of development. At various times he has required supervision and assistance in most aspects of self-care and daily living." App. F9. He "basically has to be told everything to do," and cannot "make independent decisions [or] engage in self-directed behavior." App. F9.

State Hearing Evidence on Social Deficits. The social domain includes interpersonal skills, responsibility, self-esteem, gullibility, naïveté, following rules, obeying laws, and avoiding victimization. See 2002 AAMR MANUAL at 82. Dr. Trahan summarized:

> Mr. Wilson * * * was limited in the types of activities that he could perform with peers because of his learning difficulties. He was basically a follower, and had to be told everything to do even when performing simple tasks and playing childhood games. [H]e has had obvious problems following rules and obeying laws.

App. F9. This diagnosis confirms the testimony of those knowing Mr. Wilson as a child. App. L1-L2, M1, N1.

State Hearing Evidence on Practical Deficits. Representative skills in the practical domain include activities of daily living, instrumental activities of daily living, occupational skills, and maintaining safe environments. See 2002 AAMR MANUAL at 82. More concretely, these skills include eating, dressing, mobility, toileting, meal preparation, taking medication, using the telephone, managing money, using transportation, and housekeeping. App. F9. The Neuropsychological Report states that "Mr. Wilson has again shown obvious deficits in [the practical domain] when compared to others his age." App. F9.

Mr. Wilson was severely limited in self-care. During the developmental period, he was unable to dress himself properly, match his socks, button his clothes, tie his shoes, or keep his collar down. App. L1-L2, N2. He often tightened his belt to the point that it impaired his circulation. App. L1 He struggled with personal hygiene, App. N2, A.H. Vol. 2: 71, and he continued to suck his thumb as an adult. App. O1.

Mr. Wilson was also unable to participate successfully in leisure activities or to hold down a job. App. L1-L2. He could not always tell the difference between left and right. App. L1. His problems keeping a job were exacerbated by his

struggles with even very basic functional skills, and he requires constant supervision and assistance. App. F9. He could not, for example, handle money or use a telephone book. App. F9. He did not acquire a driver's license until adulthood, and was unable to drive long distances without assistance. App. F3. Neither the successful completion of unskilled labor nor acquisition of a driver's license is inconsistent with MR. I57-I58.

3. State hearing evidence on developmental onset.

The third criterion requires that intellectual impairment and adaptive deficits be evident during the developmental period. See App. F9; *Atkins*, 536 U.S. at 308 n.3 (citing clinical definitions); 2002 AAMR MANUAL at 1. There is no requirement that the offender be diagnosed with MR as a child, and that term indeed appears as documentary evidence in only a small fraction of meritorious cases. App. I33.

Attributes of MR were present during Mr. Wilson's developmental period. Laypeople do not ordinarily use the clinical term "mentally retarded," but *every witness and affiant* provided descriptions of his behavior and intellectual functioning that are consistent with that condition. App. L1-L3, M1-M3, N1-N2, O1-O2; A.H. 1:12-35; A.H. 2:68-74. Walter Kelly specifically said that peers considered Mr. Wilson "retarded" as a child. App. L2. Mr. Wilson's academic failures in grammar school, middle school, and high school have already been discussed. He received an MR-consistent score on a Lorge-Thorndike IQ test when he was 13. App. F7-F8, I12-I13. Dr. Trahan specifically concluded that "deficiencies in general

intelligence and adaptive behavior have been present since early childhood and well before the age of 18." App. F9, L1-L3, M1-M3, N1-N2, O1-O2; A.H. 2:68-74.

C. State *Atkins* Decision

On August 31, 2004, the judge presiding over the second part of the state *Atkins* hearing entered the State Findings of Fact and Conclusions of Law ("State Findings") and recommended that Mr. Wilson's *Atkins* claim be denied. App. E1-E13. The TCCA adopted those findings without comment and denied relief. *Ex parte Marvin Lee Wilson*, No. 46-928-02 (Tex.Crim.App. Nov. 10, 2004).

Aside from its recitation of the facts, the State Findings subdivide into two parts. The first part evaluates the evidence in light of the Texas *Briseño* factors. App. E3-E7. In their earliest form, the *Briseño* factors were used to distinguish between adaptive limitations resulting from MR and adaptive limitations resulting from personality disorder. *See Briseño*, 135 S.W.3d at 8-9. They have since become the primary legal test for MR in Texas, and the AAMR standards that the TCCA once formally adopted are now purely ornamental. See *Chester*, 666 F.3d at 346. The *Briseño* factors are: (1) whether those knowing the offender best during the developmental stage thought he was retarded and whether they acted consistent with that belief; (2) whether the offender thought about his plans or acted impulsively; (3) whether the offender's conduct suggested leadership; (4) whether an offender's responses to external stimuli were rational or whether they were merely socially inappropriate; (5) whether his responses to questions are coherent or are wandering; (6) whether the offender is capable of lying in his self-interest; and (7)

whether the criminal offense required forethought, planning and complex execution. App. E3-E7. In the first two pages of findings the state decision resolves, often in a single sentence, each of the *Briseño* factors against Mr. Wilson. App. E5-E7.

The second part of the State Findings analyzes intellectual impairment and developmental onset. (The State Findings left the sub-heading on adaptive limitations blank. App. E11.) The state court performed that analysis in fewer than 25 lines of text. App. E7-E11. The majority of that text, in turn, summarizes and reprints roughly three pages of selectively-cropped hearing transcript pertaining to the various IQ scores. App. E8-E11. The State Findings cite testimony in which Dr. Trahan states that the identity of the WAIS-III questioner did not affect his assessment of the FSIQ score:

[Question:]	Okay. Would it surprise you and would it make a difference to you that Dr. Wills didn't give that test.
[Dr. Trahan:]	He may have actually had someone in his office assist with the admission of that. I don't have—I haven't spoken personally with Dr. Wills.
[Question:]	But would it surprise you?
[Dr. Trahan:]	Those things are done fairly regularly.
[Question:]	But I thought you just told us that the validity of the test, you gave it because Dr. Wills is a well-known, respected psychologist who's been doing it for a long time?
[Dr. Trahan:]	In each of those cases they're individually supervised by Dr. Wills even when he doesn't personally administer every item on the test.

App. E9, I23-I24. Then, to support the state court's decision to ignore the WAIS-III score, the State Findings cropped Dr. Trahan's testimony by omitting the italicized portion and quoting the un-italicized portion of the excerpt below:

[Question:]	Going back to '71, '72 school year, we have [a Lorge-Thorndike] I.Q. test of 73.
[Dr. Trahan:]	That's correct.
[Question:]	Coming forward to TDC where he was—gone through diagnostic, we have a [short-form] test score of 75.
[Dr. Trahan:]	That's correct.
[Question:]	When we go to your office—and I believe Mr. Wilson actually came to your office and you interviewed him there, is that correct?
[Dr. Trahan:]	That's correct.
[Question:]	We have a [TONI-II short-form nonverbal test score] of 75 and [a Raven Standard Progressive Matrices short-form nonverbal test score] of 79?
[Dr. Trahan:]	That's correct.
[Question:]	And when Mr. Wilson was tested in Jail by a psychology student, we have a [WAIS-III FSIQ] test score of 61.
[Dr. Trahan:]	That's correct.
[Question:]	*Do you see an aberration there?*
[Dr. Trahan:]	*Do I consider the WAIS-III an aberration? No. Of all the test[s] that have been done, again, that is the standard. All of these other tests are briefer in nature. The Lorge-Thorndike that was administered back in '71 is the only thing that even close to approximates the WAIS in terms of its comprehensive nature and validity. The others are all brief measures of ability.*

App. E10-12, I41-I42. The State Findings repeatedly mention the two short-form nonverbal scores (75 and 79) among the battery of examinations that Dr. Trahan administered, App. E8-E12, but omitted any reference to scores on the PPVT-R (47), WRAT-III (<45), or the PIAT-R (55). App F8, F11-12.

In performing a short developmental onset analysis, the State Findings relied primarily on the inaccurate stereotype that Mr. Wilson did not have mild MR because he "functioned sufficiently in his younger years to hold jobs, get a driver's

license, marry and have a child." App. E11. It then referenced some of Mr. Wilson's letters, describing his writing as "clear, coherent, and clever." App. E11. Whatever the due process problems of basing a decision on letters that were neither authenticated nor introduced as evidence, that correspondence is attached as Appendix K. Suffice it to say that the parts of these letters that Mr. Wilson did write are virtually unintelligible. App. K1-K13.[7]

D. Federal District Court Proceedings

The Fifth Circuit determined that Mr. Wilson made a prima facie showing of MR, and authorized his successive federal habeas proceedings. See *In re Wilson*, 442 F.3d 872 (5th Cir. 2006). The district court correctly observed that "the [S]tate relied on the *Briseño* factors alone, rather than as a supplement to clinical factors, in determining whether [Mr. Wilson] had significant deficits in adaptive functioning." App. D13; see also App. D12 ("The state court did not make explicit findings and reached no explicit conclusion as to whether [Mr.] Wilson had significant limitations in adaptive functioning."). The district court nonetheless reasoned that, under § 2254(d), it lacked power to grant relief because the state court's "implicit" findings regarding Mr. Wilson's intellectual functioning, adaptive functioning, and developmental onset were not unreasonable. In making that determination, the district court invoked the Subsection (e)(1) presumption of correctness to zero out all evidence inconsistent with the state judgment. App. D15.

[7] States are required either to offer legal assistance to inmates or to allow literate offenders (writ writers) to help illiterate ones. See *Johnson* v. *Avery*, 393 U.S. 483, 497 (1969); *Novak* v. *Beto*, 453 F.2d 661, 664 (5th Cir. 1971).

On July 7, the district court granted a certificate of appealability on the issues of, among other things: the *Atkins* claim, whether § 2254(e) was properly applied in his case, and whether § 2254(d)(1)-(2) precluded relief. App. C1.

While Mr. Wilson's appeal was pending, undersigned counsel discovered that, in violation of the statute and a court order, the Director had never provided the district court with the state *Atkins* record necessary for any § 2254(d) analysis. The omitted materials included the Neuropsychological Report. The Parties thereafter moved the Fifth Circuit to stay the appeal, so that the district could reconsider its prior § 2254(d) ruling in light of the entire state record. The Fifth Circuit granted the motion. The district court then issued a Supplemental Opinion affirming its prior judgment. Inexplicably, the Supplemental Opinion contained only a single mention of the Neuropsychological Report, which had been the primary basis for the order to reconsider the full record. In the pertinent passage, the Supplemental Opinion quotes the Neuropsychological Report only to show, with respect to the Fifth *Briseño* factor, that Mr. Wilson's "responses were coherent, rational, and on point[.]" Order Denying Rule 60(b) Motion For Relief From Judgment, *Wilson* v. *Thaler*, No. 6:06-CV-00140 (E.D. Tex. Jan. 11, 2011). Otherwise, the Supplemental Opinion simply repeated its original conclusions: (1) that the state court's adjudication of Mr. Wilson's MR claim was neither contrary to, nor the result of an unreasonable application of, clearly established federal law; and (2) that it was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See *id.* at 8-13.

E. Fifth Circuit Proceedings

On November 16, 2011, the Fifth Circuit issued an opinion affirming the district court's order. App. A1-A16. In Part III.B, the Fifth Circuit considered whether, under 28 U.S.C. § 2254(d)(1), the state decision unreasonably applied *Atkins*. App. A13-A14. The Fifth Circuit affirmed the proposition that Texas does not unreasonably apply *Atkins* when it uses the *Briseño* factors to prevent inmates with mild MR from obtaining relief:

> Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. Accordingly, [*Atkins*] left to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences. * * * [After eight pages of further discussion, the Fifth Circuit concluded that it] is not "clearly established Federal law as determined by the Supreme Court of the United States" that the analysis by the state court must precisely track the clinical definitions referenced in *Atkins*. * * * Its analysis of the *Briseño* factors, whether standing alone or as incorporated into its conclusions on the clinical factors of adaptive deficits and age of onset, is not an unreasonable application of *Atkins*.

A6, A14 (internal citations, quotation marks, and alterations omitted).[8] The Fifth Circuit held that some inmates with MR are not entitled to an Eighth Amendment exemption, thereby misinterpreting this Court's observation that some offenders with cognitive impairments will not have MR.

The Fifth Circuit also addressed Mr. Wilson's position that he satisfied 28 U.S.C. § 2254(d)(2). It recited the State Findings, and its entire § 2254(d)(2) analysis consisted of the following paragraph:

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[8] Mr. Wilson has never suggested that reasonable applications of clearly established law must "precisely track" the AAMR or APA definitions. The Fifth Circuit was rejecting the

> We agree with the district court that the state court *implicitly* found that Wilson did not suffer from adaptive deficits related to mental retardation and that the condition did not manifest prior to age 18. * * * Although other factfinders might reach a different conclusion as to whether Wilson is mentally retarded on the evidence before the state habeas court, on this mixed record, Wilson has failed to overcome the presumption of correctness that attaches to the state court's factual findings which are fairly supported by the record.

App. A12-A13 (emphasis added). Acting on Mr. Wilson's Petition for Rehearing, the Fifth Circuit panel excised a paragraph of its initial opinion addressing § 2254(d)(2), and swapped in new language. App. B1-B3. The rehearing issue involved the relationship between § 2254(e)(1), which supplies a presumption of correctness and a clear and convincing evidence standard for certain factfinding, and § 2254(d)(2), which calls for a federal court to determine whether the state decision was factually reasonable in light of the state record. The revised opinion held that the § 2254(e)(1) presumption of correctness applied in all § 2254(d) analyses, and that it required federal courts to defer to "implied credibility determinations" with "fair support in the record." App. A13, A15, B3. After explaining that there was not clear and convincing evidence to rebut the presumption of correctness that attached to the state court's factual findings, the Fifth Circuit added a confusing footnote stating without any explanation that Mr. Wilson would lose under § 2254(d)(2) even if some standard less than "clear and convincing evidence" applied. App. B2 n.2. Although

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much more conservative claim that the discipline of clinical psychiatry, which underlies the *Atkins* decision, must inform the state's MR criteria.

Mr. Wilson contests that proposition,[9] the Question Presented primarily involves the application of the presumption rather than the standard for overcoming it.

REASONS FOR GRANTING RELIEF

The Texas trial findings bear almost no relationship to the record or to clearly established federal law. Because the federal district court issued its judgment without receiving crucial parts of the state record, it failed to assess the reasonableness of the state decision in light of the state *Atkins* record. The Fifth Circuit thereafter issued an opinion that not only compounds the multiple errors originating in the State Findings, but that also contains legal holdings differing considerably from the law in other federal jurisdictions. This Court should grant certiorari to do two things: (1) to affirm that *Atkins* does not empower states to apply any MR standard they please—that, under § 2254(d)(1), states unreasonably apply *Atkins* when they use the *Briseño* Factors to exclude offenders with mild MR from *Atkins* protection; and (2) to resolve the extraordinary confusion among the courts of appeal, recognized by this court in *Wood* v. *Allen*, 130 S.Ct. 841 (2010), as to whether § 2254(d)(2) incorporates any elements of § 2254(e)(1).

[9] A court confronting two potential standards would ordinarily deny relief based on the standard more favorable to the claimant, and then say that discussion is unnecessary under the less favorable standard; not vice versa.

I. A DECISION UNREASONABLY APPLIES *ATKINS* WHEN IT USES THE "*BRISEÑO* FACTORS" TO DECIDE WHETHER AN INMATE EXHIBITS "THAT LEVEL AND DEGREE OF [MR] AT WHICH A CONSENSUS OF TEXAS CITIZENS WOULD AGREE THAT A PERSON SHOULD BE EXEMPTED FROM THE DEATH PENALTY."

28 U.S.C. § 2254(d)(1) provides that federal habeas relief may issue if state merits adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" A legal application is unreasonable if "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 413 (2000). This Court does not use certiorari to correct mine-run error. *Wilson*, however, presents the unique opportunity to clarify the legal standards for state courts to decide and federal courts to review Texas *Atkins* claims. The state court unreasonably applied clearly established federal law when it used the *Briseño* factors—already the most under-inclusive MR definition in any jurisdiction—to deny the *Atkins* claim of an offender with mild MR.

A. A State Court Can Unreasonably Apply *Atkins* If It Uses Legal Criteria Designed To Exempt Only Offenders With Severe MR.

Atkins determined that, in light of a national consensus against executing offenders with MR, the Eighth Amendment categorically bars capital punishment of such inmates. See *Atkins*, 536 U.S. at 314-17, 321. While *Atkins* did not adopt a single legal standard for MR, it nonetheless observed that legal criteria "generally conform to the clinical definitions set forth [by the AAMR and APA]." *Id.* at 317 n.22; see also *id.* at 308 n.3 (setting forth the AAMR and APA definitions).

Centering the MR definition around the prevailing clinical criteria makes sense; *Atkins* could only posit a consensus against punishing offenders with a certain cognitive condition if there exists some shared understanding of what that condition is. *Atkins* specifically held that the Eighth Amendment forbid the execution of those offenders with mild MR, a subcategory of MR usually associated with an FSIQ between 55 and 70. See *id.* at 308 n.3 (citing APA definition); see also *id.* at 340-41, 343 n.2 (SCALIA, J., dissenting) (arguing in dissent that national consensus was only against executing offenders with more severe cognitive limitations).

Once this Court decided that offenders meeting a threshold of cognitive impairment should be categorically ineligible for the death penalty under the Eighth Amendment, "[t]he bounds of that category are necessarily governed by federal constitutional law." *Ford* v. *Wainwright*, 477 U.S. 399, 419 (1986) (POWELL, J., concurring). *Ford* claims, of course, involve an Eighth Amendment exemption for inmates that are not competent for execution. The analogy between the exempt categories, however, is obvious. Cf. *Atkins*, 536 U.S. at 317, 322 (citing *Ford*, 477 U.S. at 405, 416-17). In *Panetti v. Quarterman*, 51 U.S. 930 (2007), this Court made clear that *Ford's* failure to announce a single competency definition did not mean that states could adopt restrictive definitions that would undermine the exemption: "That the standard is stated in general terms does not mean the application was reasonable. * * * [E]ven a general standard may be applied in an unreasonable manner." *Id.* at 953; see also *id.* at 962 (citing *Atkins* for proposition that "there is precedent to guide a court in conducting Eighth Amendment analysis").

B. *Wilson* Is An Ideal Vehicle Because It Exhibits All Of The Problems With The Texas *Briseño* Inquiry And The Fifth Circuit Review Thereof.

One of the cardinal rules of MR diagnosis is that it must reflect *typical* functioning. See 2002 AAMR MANUAL 74-87. The *Briseño* factors generally require a court to ignore typical functioning and to instead focus almost entirely on the level of functioning that might be inferred from the criminal conduct adjudicated at the guilt phase of a capital proceeding. See, e.g., *Chester*, 666 F.3d at 366 n. 21 (DENNIS, J., dissenting) ("The *Briseño* evidentiary factors, because they focus heavily on isolated instances of a person's behavior, by design are not meant to indicate whether a person meets the standard clinical criteria for mental retardation, which assess an individual's limitations in adaptive functioning based on his or her typical behavior.") The entire point of *Atkins*, however, is that offenders with MR are often convicted of criminal behavior that is not indicative of their actual moral culpability: "Because [claimants with MR have impaired] reasoning, judgment, and control of their impulses," they lack the "moral culpability that characterizes the most serious adult criminal conduct" and "their impairments can jeopardize the reliability and fairness of capital proceedings against" them. *Atkins*, 536 U.S. at 306-07. *Atkins* observed that offenders with MR confess to roles in crimes they did not have, that they cannot effectively testify in their own defense, that "their demeanor may create an unwarranted impression of lack of remorse," and that they are frequently unable "to make a persuasive showing of mitigation[.]" *Id.* at 320-21.

Precisely the same things that made Mr. Wilson vulnerable to a finding of primary-party guilt and to an inflated culpability assessment made him vulnerable

to an adverse *Briseño* determination. Although there is no other evidence that Mr. Wilson was the shooter or that he orchestrated a complex crime—Mr. Wilson's encounter with Mr. Williams at the gas station was not planned—he was treated as the primary assailant on the grounds of a "confession" he allegedly made to Terry Lewis, his more-sophisticated accomplice's wife. See T.R. Vol. 16: 24-25. In applying the *Briseño* factor asking whether the inmate "formulated plans and carried them through or [whether] his conduct is impulsive[,]" the state court observed that the "trial evidence indicated the defendant formulated a plan to kill the victim because the defendant believed the victim had informed on him to the police." App. E6. In applying the *Briseño* factor asking whether an inmate "can lie effectively in his own * * * interest[,]" the state court answered affirmatively on the ground that Mr. Wilson denied his guilt. App. E7. In applying the *Briseño* factor asking whether "the commission of [the capital] offense require forethought, planning and complex execution of purpose," the state court just restated the inquiry in the form of a single-sentence conclusion. App. E7. As a practical matter, the *Atkins* exemption was necessary to reach offenders with precisely Mr. Wilson's cognitive capacities for seeking simple retribution and forming intent. Individuals with more severe cognitive limitations would be institutionalized or adjudged incompetent.[10]

The Texas court's application of the *Briseño* factors were particularly aggressive, and so were the federal holdings that the state court reasonably applied *Atkins*. While the State Findings gesture superficially at the AAMR definition, the

[10] See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53

focus of the Texas inquiry was plainly on the seven *Briseño* factors. (That focus forced the lower federal courts to characterize the findings on clinical criteria as "implicit." See App. A8, A9, A12, A15 (federal appeals court); D9, D14-D16 (federal district court).) The Fifth Circuit then gave the *Briseño* findings maximum conceivable immunity on federal habeas review: "[T]he *Briseño* factors, whether standing alone or incorporated into [the state court's] conclusions on the clinical factors of adaptive deficits and age of onset, is not an unreasonable application of *Atkins*." App. A14.

C. Texas And The Fifth Circuit Have Become Extreme *Atkins* Outliers By Using The *Briseño* Factors To Exclude Certain Offenders With MR From Eighth Amendment Protection.

The *Briseño* factors render Texas and the Fifth Circuit extreme outliers in *Atkins* adjudication. *Atkins* observed that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. Texas, however, has misread this passage as a license to exclude certain offenders with mild MR from *Atkins* coverage: "[W]e established guidelines in [*Briseño*] for determining whether a defendant had 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." *Sosa*, 364 S.W.3d at 891 (internal quotation marks omitted). The Texas court applied that principle here, and the results are consistent with the state trend. Texas grants *Atkins* relief at less than half the rate

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GEO. WASH. L. REV. 414, 423, 474-75 & nn. 340, 342 (1985).

of other jurisdictions.[11] By applying *Atkins* in way that excludes offenders with mild MR from Eighth Amendment protection, Texas excludes up to eighty-nine percent of the population entitled to the exemption. See 2002 AAMR MANUAL at 32.

Texas is the only state that uses "supplemental evidentiary factors" to limit the *Atkins* exemption to a subset of MR claimants. Every state to adopt a legislative definition of MR has used an unsupplemented variant of the three-pronged clinical definitions from *Atkins*.[12] Even those states lacking an MR statute have judicially adopted unsupplemented clinical criteria for MR.[13] No state has varied its MR

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[11] See Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post*-Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 37-38 & nn.203-04, 71 & nn.373-74 (2011).

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

[13] 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, up until which it 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)).

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.[14]

Notwithstanding the fact that Texas is an extreme outlier, the Fifth Circuit now formally adopts the TCCA's position that *Atkins* established an Eighth Amendment capital exemption only for a subset of offenders with MR. See *Chester*, 666 F.3d at 346 ("The *Briseño* court recognized that the AAMR definition was [not] designed * * * for the purposes of determining whether a person was so impaired as to fall within the range of mentally retarded offenders about whom there is national consensus.) (internal quotation marks omitted); but see *Chester*, 666 F.3d at 371 (DENNIS, J., dissenting) ("The prohibition becomes meaningless unless it is moored to a generally agreed upon definition of 'mental retardation.' * * * The TCCA should not be permitted to circumvent *Atkins's* constitutional prohibition by totally supplanting the definition of adaptive functioning that [generally conformed] both

[14] Nine states incorporate the "skill areas" from either the 1992 AAMR Manual or the DSM-IV. 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). As explained in note 12, *supra*, Oklahoma and South Dakota have varied the age-of-onset requirement.

with the AAMR clinical definition and with the national consensus that had developed around the AAMR and APA definitions.").

II. TO ADDRESS THE CHAOS IN THE COURTS OF APPEALS, THIS COURT SHOULD RESOLVE WHETHER AND HOW § 2254(e)(1) APPLIES IN § 2254(d)(2) INQUIRIES.

Wilson presents the same issue for which this Court granted certiorari in *Wood* v. *Allen*, 130 S.Ct. 841 (2011). 28 U.S.C. § 2254(d)(2) provides that federal habeas relief may issue if state merits adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that a federal habeas claimant "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Wood* was decided on other grounds, however, and this Court did not reconcile the two provisions. See *id.* at 845 ("We granted certiorari to address the relationship between §§ 2254(d)(2) and (e)(1). We conclude, however, that the state court's factual determination was reasonable even under petitioner's reading of § 2254(d)(2), and therefore we need not address that provision's relationship to § 2254(e)(1).").

Consistent with Fifth Circuit law, the courts below incorporated § 2254(e)(1) into *the process* of assessing the reasonableness of fact determinations under § 2254(d)(2)—even though there was no new federal evidence. See App. A13 ("Wilson has failed to overcome the presumption of correctness that attaches to the state court's factual findings which are fairly supported by the record."); App. A15 ("The state court's factual findings are statutorily entitled to the presumption of

correctness and deferential review. 28 U.S.C. § 2254(e)(1).").[15] The Fifth Circuit even applied the § 2254(e)(1) presumption to the state court's "*implicit* findings on intellectual impairment, adaptive deficits, and developmental onset." App. A15 (emphasis added). By incorporating the § 2254(e)(1) presumption into the § 2254(d)(2) inquiry, *Wilson* implicates a familiar disagreement among the federal circuits, and the maneuver works particular mischief in this case.

A. By Incorporating The "Presumption Of Correctness" From 28 U.S.C. § 2254(e)(1) Into An Inquiry Under § 2254(d)(2), *Wilson* Deepens An Existing Split In The Federal Circuits.

The federal circuits are in disarray regarding how Subsections (d)(2) and (e)(1) relate. In two circuits, § 2254(e)(1) applies only as a *result of* a claimant failing to satisfy § 2254(d)(2). In the Third and Ninth Circuits, a § 2254(d)(2) determination simply reflects whether a state decision was factually reasonable in light of the state record; § 2254(e)(1) applies only when a challenge involves new federal evidence. See *Lambert* v. *Blackwell*, 387 F.3d 210, 235 (3rd Cir. 2004) ("[Subsection] 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the [state record,] while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record."); *Taylor* v. *Maddux*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (KOZINSKI, J.) ("[Subsection 2254(d)(2)] applies most readily to

[15] The Revised Panel Opinion concedes that "the relationship between 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) is ambiguous." App. B2 n.2 After explaining, in a footnote, that it need not choose between the "unreasonableness" standard appearing in § 2254(d)(2) and the "clear and convincing evidence" standard in § 2254(e)(1), it then proceeds apply the § 2254(e)(1) "presumption of correctness" as set forth in the text of this Petition.

situations where petitioner challenges the state court's findings based entirely on the state record. * * * Once the state court's fact-finding process survives this intrinsic review[,] * * * the state court's findings are dressed in a presumption of correctness [that a petitioner may overcome with new federal] evidence amount[ing] to clear and convincing proof that the state-court finding is in error.").

In two other circuits, § 2254(e)(1) applies in *the process* of a § 2254(d)(2) analysis. In the Fourth and Tenth Circuits, a court assesses whether a state decision was factually reasonable under § 2254(d)(2), with "predicate" factual determinations subject to § 2254(e)(1)—even if there is no federal evidentiary hearing. See *Elmore* v. *Ozmint*, 661 F.3d 783, 850 (6th Cir. 2011) ("[Section 2254(e)(1)] has a place in § 2254(d)(2) review: We consider whether the [state court] based its decisions on an objectively unreasonable factual determination in view of the evidence before it, [and such] determinations * * * are presumed correct absent clear and convincing evidence to the contrary."); *Saiz* v. *Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004) ("If the district court's factual findings depend entirely on the state court record, we independently review that record, bearing in mind that * * * state court factual findings are presumptively correct and only to be rebutted by clear and convincing evidence.") (internal citations and quotation marks omitted).

The First, Second, Sixth, Eighth, and Eleventh Circuits have recently held that the interplay between § 2254(d)(2) and (e)(1) remains undecided. See *Tatum* v. *Lempke*, 2012 WL 1958941, *1 at n.2 (2nd Cir. June 1, 2012) ("It is unnecessary for us to reach [how § 2254(d)(2) & (e)(1) relate.]") (citing *Wood*, 130 S.Ct. 841); *Elam* v.

Denney, 662 F.3d 1059, 1064 n.2 (8th Cir. 2011) ("[*Wood*] ultimately did not resolve a conflict among the circuits regarding whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was unreasonable, or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence.") (internal citations and quotation marks omitted); *White* v. *Rice*, 660 F.3d 242, 254 n.6 (6th Cir. 2011) ("It is an open question whether 28 U.S.C. § 2254(e)(1) * * * applies in every case presenting a challenge under § 2254(d)(2)."); *Robidoux* v. *O'Brien*, 643 F.3d 334, 338 n.3 (1st Cir. 2011) ("We [continue to decline] to delve into the relationship between subsections (d)(2) and (e)(1), * * * as has the Supreme Court[.]") (citing *Wood*, 130 S.Ct. 841); *Cave* v. *Secretary for Dep't of Corrections*, 638 F.3d 739, 747 (11th Cir. 2011) ("We have not yet had an occasion to completely define the respective purviews of (d)(2) and (e)(1), and this case presents no such opportunity.") (citing *Wood*, 130 S.Ct. 841).

The confusion over how § 2254(d) and (e)(1) relate is even more pressing after *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), which calls into question whether § 2254(e)(1) concepts can *ever* apply under either subsection of a § 2254(d) analysis. Before *Pinholster*, many inmates could introduce new evidence at federal habeas hearings to support their claims of *legal* unreasonability under § 2254(d)(1). *Pinholster*, however, established that federal courts could not perform a § 2254(d)(1) inquiry in light of any new federal evidence. As a result, there appears to be no room for *any* new evidence to be considered in a § 2254(d) inquiry, whether under

Subsection (d)(1) or (d)(2). *Pinholster* therefore elevates even further the need for the Court to resolve this issue.

B. The Fifth Circuit Should Not Apply The § 2254(e)(2) Presumption Of Correctness To The Question Of Whether The State Decision Involved An Unreasonable Factual Determination Under § 2254(d)(2).

In post-*Pinholster* § 2254(d) cases, applying the Fifth Circuit's version of the presumption of correctness—where the presumption attaches to findings consistent with the state judgment and zeros out inconsistent evidence as the subject of implied credibility determinations—means that a federal claimant could never obtain habeas relief. Subsection (d)(2) would always preclude further merits review. A factual conclusion would be presumed correct unless some other inconsistent record material disproved it by clear and convincing evidence; the very existence of an inconsistency, however, would require a federal court write off the inconsistent evidence, treating it as the subject of an implied credibility finding.

The § 2254(e)(1) presumption is the *result* of an adjudication found to reasonable under § 2254(d); it is not part of the *process* by which federal court conducts the § 2254(d) inquiry itself. The Fifth Circuit did not assess whether state court's findings were reasonable in light of the state record—the inquiry that § 2254(d)(2) requires. It instead invoked the § 2254(e)(1) presumption to characterize the state decision as a series of implied credibility determinations about Dr. Trahan and implied findings about his clinical opinion. App. A8, A12, A13, A15, B3. It used an "implied credibility determination" concept even though:

(1) any credibility determination was not "implied" in the sense that it was necessary to the decision and (2) it treated his ultimate clinical opinion as a "credibility" issue. If a federal court treats every piece of record evidence that is inconsistent with the state judgment as having been rejected by an effectively-unreviewable implied credibility determination, then no § 2254(d)(2) reasonableness inquiry actually occurs. The § 2254(e)(1) presumption only makes sense if it applies to an extrinsic attack of state factfinding—when a federal court finds its own facts. See *Pinholster*, 131 S.Ct. at 1412 (BREYER, J., partially concurring) (explaining circumstances under which new federal evidence can be considered).

C. Mr. Wilson Would Have Obtained Relief If The Presumption Of Correctness From 28 U.S.C. § 2254(e)(1) Had Not Been Applied To The Court's Inquiry Under § 2254(d).

Mr. Wilson's *Atkins* claim would have survived a properly-conducted § 2254(d)(2) inquiry. As already noted, the logic of the State Findings required both lower federal courts to characterize the subsidiary findings on all three clinical MR criteria as "implicit." See App. A8, A9, A12, A15 (federal appeals court); D9, D14-D16 (federal district court). The lower courts identified implied subsidiary findings that were inconsistent with MR, but never scrutinized those implied findings—most importantly, the implied finding that Dr. Trahan was not credible—to see whether they were reasonable in light of the record.

Deferring to "implied credibility findings" during an inquiry into whether the findings are entitled to that very deference was the most egregious consequence of folding the § 2254(e)(1) presumption into the § 2254(d)(2) inquiry. First, the Panel

applied the presumption of correctness to avoid asking whether there was an implied rejection of Dr. Trahan's testimony that was reasonable—the inquiry that § 2254(d)(2) directs it to perform. Second, the lower federal courts used § 2254(e)(1) to justify deference to findings that were "implicit" only in the sense that the findings were *supportive* of, but not *necessary to*, the judgment. The State Findings required no determination that Dr. Trahan was not credible; they did not even require a determination that his conclusions on each of the three clinical criteria for MR were wrong. The State Findings were based on a determination that Mr. Wilson did not satisfy the *Briseño* criteria. Adverse findings on clinical criteria were not essential to that determination.

Under § 2254(d)(2), the state decision was based on an unreasonable factual determination, in light of the state record. First, the predicate findings the state court made were not relevant to an *Atkins* inquiry. A determination that an inmate does not have MR, if it is rooted in irrelevant predicate findings, is unreasonable. Second, with respect to pertinent predicate findings, the overwhelming weight of the state-hearing evidence was either inconsistent with or diametrically opposed to them. The entire MR analysis was grossly superficial; the state court simply ignored almost all of the evidence introduced in the state proceeding.

The state court's *Briseño* factfinding, conducted in just 32 lines of text, is redundant and superficial. App. E5-E7. On *Briseño* factor (1), the state court surmised that there was not early evidence of MR because Mr. Wilson performed manual labor, held a driver's license, and was married with a child.

App. E5-E6, E12. It resolved *Briseño* factors (2), (3), and (7), usually in a sentence, against Mr. Wilson on a single irrelevant premise—that his criminal act was deliberate and required forethought. App. E6-E7. On *Briseño* factors (4) and (5), the State Habeas Findings simply describe Mr. Wilson's conduct and demeanor as "coherent," "rational," "appropriate," and "on point." App. E6-E7. It resolved *Briseño* factor (6) against him on the ground that he was capable of self-interested lying. App. E7. None of these observations are clinically significant. No evidence anywhere suggests that coherence, deliberateness, and lying are inconsistent with MR. This idea is based on the debunked premise that all people with MR exhibit characteristics popularly associated with attributes of severe or profound MR.

Setting aside the unreasonable propositional content of the state court's *Briseño* discussion, the record evidence it cites does not even support its analysis. First, witness testimony using everyday language ("slow") to describe MR's common attributes is erroneously cited for the proposition that attesting witnesses believed Mr. Wilson was not retarded. Compare App. E5-E7 (*Briseño* analysis) with App. L1-L3, M1-M3, N1-N2, O1-O2; A.H. 2:68-74 (actual witness testimony and affidavits). Second, the State Habeas Findings repeatedly attempt to support the argument that Mr. Wilson does not have MR with citation to expert authority that draws exactly the opposite conclusion. App. E5-E7 (citing to testimony of August Wehner and Donald Trahan). The State Habeas Findings cite August Wehner's testimony for the proposition that Mr.

Wilson was a rational and deliberate thinker, but Mr. Wehner was stating only that Mr. Wilson recognized that an IQ question required an answer. Compare App. E6-E7 (citing to Mr. Wehner's hearing testimony) with App. J9 (Mr. Wehner's actual testimony). Mr. Wehner believed that Mr. Wilson's IQ was consistent with MR. App. J9-10. The State Findings also cite selectively to isolated data Dr. Trahan's Neuropsychological Report, but the Report repeatedly and unequivocally states that Mr. Wilson has MR. App. F1, F9.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Wilson prays that this Court grant a writ of certiorari to resolve the Questions Presented.

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Respectfully Submitted,

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NO. _____ (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN L. WILSON,
Petitioner,

v.

RICK THALER, Director,
Texas Department of Criminal Justice (Institutional Division),
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Lee B. Kovarsky, hereby certify that true and correct electronic versions of this Petition for a Writ of Certiorari, together with attached appendices, were served on opposing counsel on July 19, 2012, via e-mail to:

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