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## A Legal Obituary for Ramiro

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## A LEGAL OBITUARY FOR RAMIRO

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Sheri Lynn Johnson\*

### *Author's Note*

*Most death penalty lawyers who practice long enough will watch the execution of a client. It is always, always terrible, but not always terrible in the same way. With each client's execution, a lawyer is confronted with the death of a human being—not an accidental death, not an inevitable death, but an avoidable one—and with his or her own failure to prevent that death. Some executions also involve a very personal loss for the lawyer because of their relationship with the client. Other executions are horrific because things go awry and impose extreme suffering on the executed individual. No matter how many times a lawyer walks that last walk with a client, it does not get easier. Each loss is different because each life is different. I have lost clients whom I have loved as friends and I have witnessed a botched execution. Ramiro Hernandez Llanas was not a friend, nor did his execution appear to cause him pain. But for me as a lawyer, his execution was the hardest. I could not save Ramiro. I could not get even one judge to care about Texas's willingness to flout the law. This is the story of Ramiro's case—not a famous case, but one that otherwise would be lost to history, as many outrageous applications of the death penalty are.*

### INTRODUCTION

In the shuffle of life's cards, Ramiro Hernandez Llanas got nothing. *Really* nothing: not a loving family, not adequate food or shelter, not schooling, not a normal brain, not even a federal court willing to review the disingenuous justifications offered by the state of Texas for his execution.

This Article proceeds in four Parts. Part I, "The Making of Ramiro," summarizes the violence of Ramiro's childhood and his crimes, which are necessary to grasp the abject failure of the rule of law recounted in Part II, "The Judging of Ramiro." Part III, "Dies Irae," delineates the different failings of the state court, the Fifth

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\* The James and Mark Flanagan Professor of Law, and Assistant Director of the Cornell Death Penalty Project, Cornell Law School. I am grateful to my co-counsel, Naomi Terr, both for her wonderful work on this case and for her unfailing compassion for Ramiro. I am also grateful to former students Alison Bain-Lucey, Laura Berumen, and Patrick Wilson for the work they did on this case long after their duties in the clinic had ended.

Circuit, and the Supreme Court, and reflects on the reforms that might address those failings. Part IV, “Requiescant in Pace?” offers a concluding thought.

## I. THE MAKING OF RAMIRO

### A. *Ramiro’s Childhood*

The facts of Ramiro’s childhood are so stark that editorializing is not necessary. Moreover, the state never disputed the extraordinary poverty, constant exposure to neurotoxins, and violent abuse at the hands of his parents that characterized Ramiro’s developmental period as a child.

#### 1. Extreme Deprivation

Ramiro was born to a family of ten children in Nuevo Laredo, Mexico in 1969.<sup>1</sup> When he was two or three years old, his family moved to a toxic waste dump.<sup>2</sup> When they arrived, they had no shelter and slept on the ground outdoors.<sup>3</sup>

The family built a ramshackle hut from cardboard, metal, and wood gathered from the dump, but it was so insecure that Ramiro’s father had to tie it down in the wind so that it would not blow away.<sup>4</sup> The hut had a dirt floor and rodents freely entered.<sup>5</sup> Like the rest of the makeshift shelters at the dump, the hut had neither water nor electricity.<sup>6</sup>

Ramiro’s family survived by scavenging through the trash at the dump.<sup>7</sup> Ramiro’s parents forced him to work at the dump when he was about four years old.<sup>8</sup> A neighbor, who also scavenged through the trash, described the grueling nature of the work:

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1. Cf. Petition for Writ of Certiorari at 3, *Hernandez v. Stephens*, 134 S.Ct. 1760 (2014) (No. 13–8004) (denying writ of certiorari to 537 F. App’x. 531 (5th Cir. 2013)) [hereinafter Petition for Writ of Certiorari].

2. See Hearing Pursuant to Writ Vol. 3 of 6 at 14, *Texas v. Hernandez*, 2008 Tex. Crim. App. Unpub. LEXIS 599 (Tex. Crim. App. Sep. 10, 2008) [hereinafter Hearing Vol. 3].

3. Hearing Pursuant to Writ Volume 4 of 6 at 298, *Texas v. Hernandez*, 2008 Tex. Crim. App. Unpub. LEXIS 599 (Tex. Crim. App. Sep. 10, 2008) [hereinafter Hearing Vol. 4].

4. Hearing Vol. 3, *supra* note 2, at 15.

5. *Id.* at 17.

6. Petition for Writ of Certiorari, *supra* note 1, at 1.

7. Hearing Vol. 3, *supra* note 2, at 18.

8. *Id.*

Working in the dumps was very hard . . . . You would end up black, black from the dust . . . . We worked without gloves . . . [or any] protection . . . . Our noses would get full of dirt.

[W]e worked out in the open air . . . . We worked in the four winds [and] the very hot sun. If it was drizzling, we still had to take out the garbage. . . . Sometimes we even had to work at night.

Sometimes there would even be dead animals among the trash.<sup>9</sup>

The family ate from the trash.<sup>10</sup> Another neighbor recalled that when her family had leftover food, her mother sent that food to Ramiro's house because his family was so much poorer than the other dump residents.<sup>11</sup>

## 2. Exposure to Neurotoxins

The dump that Ramiro's family called home exposed him and his family to a variety of unidentified toxic chemicals and spray containers.<sup>12</sup> The chemicals included black dust from a company that built brakes for cars—a dust that “burned when you breathed or would even burn your eyes.”<sup>13</sup> Several times during Ramiro's childhood the chemicals ignited.<sup>14</sup> Ramiro's brother recalled one chemical fire that blew up the holding tanks and spread for blocks.<sup>15</sup>

The family's drinking water exposed Ramiro to additional toxins. His family stored the water in containers formerly used by gas stations—they used trash to clean off the oily residue.<sup>16</sup> As a young child, Ramiro would climb inside the containers in an attempt to clean them. According to his sister, Yolanda, he would come out “all black, coal black, and you could only see his eyes.”<sup>17</sup>

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9. Petitioner-Appellant's Motion to Expand the Certificate of Appealability and Brief in Support at 13, *Hernandez v. Stephens*, 537 F. App'x. 531 (5th Cir. 2013) (No. 12-70006) [hereinafter Motion to Expand].

10. *Id.*

11. *Id.*

12. Hearing Vol. 3, *supra* note 2, at 13–14.

13. *Id.*

14. *See id.* at 20.

15. *Id.* at 20–21.

16. Hearing Vol. 4, *supra* note 3, at 303.

17. *Id.*

### 3. Severe Physical Abuse

Severe physical abuse was ubiquitous throughout Ramiro's childhood. His father "disciplined" him with "belts, wires, hoses, whatever was available."<sup>18</sup> His sister Adelita explained:

My father at work had some kind of stake, the one that he used there to hit the horses . . . And when we didn't obey him, that's the wood he would hit us with. He would also hit us with electricity cables, with wires, with a belt, with a broom, or with whatever he could find.<sup>19</sup>

His mother was even more violent. One sibling reported that she "would kick [Ramiro], and she would hit him with electric wires, the ones that go over the posts. She even once broke a broomstick in his back."<sup>20</sup> Another sibling recalled that Ramiro received the most abuse:

[S]ince [Ramiro] was the one who understood the least, he was the one who got beaten the most . . . [W]hen my mother would come looking for [him, he would] hide among the cardboard boxes that were laying there. . . . [S]he would start hitting with these bars all the boxes. So whenever she found [Ramiro], she would leave him laying on the floor almost passed out because of the beating he would get. It was always like that.<sup>21</sup>

Neighbors also confirmed the severe abuse. One stated that "[s]ometimes she would hit him with a belt, sometimes with a rope, sometimes with a piece of cable . . . with whatever she could find,"<sup>22</sup> so when Ramiro came to the neighbor's house to hide, the neighbor would lie to his mother and say she had not seen him so he could avoid being beaten by her.<sup>23</sup> Another neighbor also recalled the severe abuse Ramiro and his siblings endured at the hands of their parents:

I was scared of [their] mother . . . She dealt with her children by yelling and hitting. She would say very harsh curse words to

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18. Hearing Vol. 3, *supra* note 2, at 24.

19. Hearing Vol. 4, *supra* note 3, at 261.

20. *Id.* at 238.

21. *Id.* at 302.

22. Motion to Expand, *supra* note 9, at 15.

23. *Id.*

them. Since our house was very close to [their] house, we could hear when she would beat her children. It sounded as though she was hitting them with a whip and you could hear the screams of the children.<sup>24</sup>

### B. Ramiro's Crimes

Half of a capital trial is mitigation. The other half is aggravation, and given Ramiro's background, it is not surprising that the state was able to offer substantial evidence in aggravation. Ramiro was quite violent on several occasions before the capital offense of which he was convicted. On at least one occasion, he and his brothers beat his sister.<sup>25</sup> In 1989, at the age of twenty, he was convicted of manslaughter in Mexico, a conviction elevated, on appeal, to murder.<sup>26</sup> In what seemed like the first break in his entire life, the prison hospital guard fell asleep, and Ramiro simply walked out.<sup>27</sup> Assisted by others, he crossed the border into Texas soon after.<sup>28</sup>

But it was not a fresh start. After entering the United States, Ramiro raped a fifteen-year-old girl at knifepoint.<sup>29</sup>

In 1997, Ramiro had obtained minimal employment caring for puppies at a ranch outside Kerrville, Texas.<sup>30</sup> According to the rancher's wife, one night in October, her husband went outside to speak with Ramiro.<sup>31</sup> Ramiro returned to the house with blood on his hands and face, then held a knife to her neck and sexually assaulted her twice.<sup>32</sup> After he tied her hands and feet, he stole her jewelry, then went outside to start the rancher's Jeep,<sup>33</sup> returned to the house, tied the rancher's wife more securely, left and returned again, and sexually assaulted her again.<sup>34</sup> After threatening to harm the woman's mother and daughter if she called the police, Ramiro fell asleep next to her.<sup>35</sup> While Ramiro slept, the woman freed herself, escaped to a neighbor's house, and called 911.<sup>36</sup> Police officers

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24. *Id.*  
25. Petition for Writ of Certiorari, *supra* note 1, at 5.  
26. *Id.* at 3.  
27. *Id.*  
28. *Id.*  
29. *Id.* at 4.  
30. *Id.* at 35.  
31. *Id.* at 4.  
32. *Id.*  
33. *Id.*  
34. *Id.*  
35. *Id.*  
36. *Id.*

woke and arrested Ramiro.<sup>37</sup> The police then found the rancher's body,<sup>38</sup> he had been bludgeoned to death with a crowbar.<sup>39</sup>

Ramiro was charged with capital murder for this crime. In the penalty phase of his capital trial, the prosecution introduced his Mexican conviction, his prison behavior, and testimony relating to two uncharged prior offenses: the rape of a fifteen-year-old girl, and the knifing of a man at a bar.<sup>40</sup>

### *C. The Judging of Ramiro*

Different people might judge Ramiro's moral agency and moral desert differently. Indeed, the Constitution requires that twelve jurors assess a defendant's eligibility for the death penalty,<sup>41</sup> each of whom applies his or her own moral compass (albeit within the bounds of the law), but the functioning of the legal system that condemned and executed Ramiro may also be judged, and that judging is not so free-form. At the very least, legal proceedings that culminate in execution are judged with respect to a constitutional floor.

#### 1. The Constitutional Framework

##### *a. Individualized Decision-Making*

One can imagine—and in the past, some jurisdictions have enacted—a capital-sentencing scheme that renders all the facts about Ramiro's past irrelevant and determines his guilt based solely upon his crimes, but such a scheme is impermissible today. The meaning of the Eighth Amendment prohibition against cruel and unusual punishment is not static; it compels consideration of “the evolving standards of decency that mark the progress of a maturing society.”<sup>42</sup> For the last forty years, one aspect of those evolving standards “has been the rejection of the common law practice of inexorably imposing a death sentence upon every person convicted of a specified offense.”<sup>43</sup> Any process that “accords no significance to relevant

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 4–5.

41. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

42. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

43. *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

facets of the character and record of the individual offender or the circumstances of the particular offense”<sup>44</sup> is impermissible because it “excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>45</sup>

Similarly, statutes that make imposition of the death penalty mandatory fail Eighth Amendment scrutiny because they treat all persons convicted of murder “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death,”<sup>46</sup> but prohibition against the “blind infliction” of the death penalty goes beyond the condemnation of mandatory capital sentencing regimes; it requires that the sentencing body possesses “the fullest information possible concerning the defendant’s life and characteristics.”<sup>47</sup> The state may not preclude consideration of “the diverse frailties of humankind,”<sup>48</sup> but what ensures that the jury will actually be provided with “the fullest information possible concerning the defendant’s life and characteristics”?<sup>49</sup>

*b. The Effective Assistance of Counsel.*

A defendant’s Sixth Amendment right to the effective assistance of counsel is violated whenever counsel provides professionally deficient representation that results in prejudice.<sup>50</sup> It took the Supreme Court almost thirty years to explain how this right applied to the presentation of individualized mitigation evidence in capital cases,<sup>51</sup> but it is now clear that, in the context of a capital sentencing proceeding, counsel’s performance is deficient whenever he breaches his duty “to conduct a thorough investigation of the defendant’s background.”<sup>52</sup> Although “strategic choices made after thorough investigation . . . are virtually unchallengeable[,] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the

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44. *Id.* at 304.

45. *Id.*

46. *Id.*

47. *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

48. *Woodson*, 428 U.S. at 304.

49. *Lockett*, 438 U.S. at 602–03.

50. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

51. *See Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

52. *Williams*, 529 U.S. at 396.



limitations on investigation.”<sup>53</sup> Prejudice flowing from deficient investigation or presentation of mitigating evidence is established when the available mitigating evidence that is not presented “might well have influenced the jury’s appraisal of [the defendant’s] moral culpability.”<sup>54</sup>

*c. Categorical Ineligibility*

Even when a jury has made a determination based on full knowledge of individual frailties, that jury might simply incorrectly balance aggravating and mitigating factors. If a jury’s decision is wrong in an idiosyncratic way, then the defendant must rely upon proportionality review or clemency to save him. Both are very small safeguards; proportionality review has no teeth in any state, and clemency in many states is virtually never granted.<sup>55</sup> To protect against more systematic errors, however, another shield is in place. Because “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution,”<sup>56</sup> the Court has considered whether there are categories of offenders whose diminished moral culpability renders them ineligible for the death penalty.

One such category is relevant to Ramiro: intellectual disability. In *Atkins v. Virginia*,<sup>57</sup> the Supreme Court held that the Eighth Amendment categorically bars the imposition of the death penalty on persons with intellectual disability.<sup>58</sup> First, the Court determined that there was a national consensus against the execution of persons with intellectual disability.<sup>59</sup> Then, applying its own judgment, it concluded that sound reasons reinforced that consensus: because intellectual disability diminishes a defendant’s culpability, it undermines both retributive and deterrent justifications for the death penalty, and raises a “special risk of wrongful execution.”<sup>60</sup> To support a categorical exemption, the Court relied on two professional

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53. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690–91).

54. *Williams*, 529 U.S. at 398.

55. See generally, J. Acker & C. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200 (2000).

56. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005)) (internal quotation marks omitted).

57. 536 U.S. 304 (2002).

58. In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Supreme Court switched to the nomenclature now used by mental health professionals, “intellectual disability.”

59. *Atkins*, 536 U.S. at 316.

60. *Id.* at 317–21.

definitions of intellectual disability.<sup>61</sup> Both definitions have three prongs: (1) significantly sub-average intellectual functioning; (2) limitations in adaptive functioning; and (3) onset before age 18.<sup>62</sup>

## 2. Judging Ramiro's Judges

Capital proceedings are long—at least nine steps even if there are no reversals. Each case begins with a trial, followed by a direct appeal, followed by a petition for certiorari after the direct appeal. Then, state post-conviction proceedings examine the trial: what counsel failed to present, what the prosecution withheld, how the jurors misbehaved, whether any new legal developments have occurred since trial. State post-conviction proceedings are also followed by an appeal and a petition for certiorari. After state post-conviction proceedings, there is the federal habeas corpus proceeding in district court. The district court examines all of the state court proceedings for error, followed by an appeal to a federal circuit court, and a final cert petition.

Measuring Ramiro's proceedings against the three relevant constitutional standards—individualized decision-making, effective assistance of counsel, and categorical ineligibility—yields shortfalls at each stage.

### *a. Trial*

Shortly after Ramiro's arrest in late 1997, one of his "friends," Carmen, visited him in jail after consulting her husband's attorney.<sup>63</sup> While there, she convinced Ramiro to admit to a stabbing with which her husband was charged<sup>64</sup> and to which Ramiro had no evidentiary ties.<sup>65</sup> Three days after the state dropped the charges against Carmen's husband, the lawyer who had represented him—and who had engineered Ramiro's confession—was appointed lead counsel to defend Ramiro in his capital murder case.<sup>66</sup>

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61. *Id.* at 308 n.3.

62. *Id.*

63. Motion to Expand, *supra* note 9, at 44.

64. *Id.*

65. The state never produced any evidence (other than the admission Carmen elicited from Ramiro) that Ramiro had any connection with the stabbing. As discussed below, there was ample evidence linking Carmen's husband to the stabbing.

66. Motion to Expand, *supra* note 9, at 45.

Perhaps out of loyalty to his first client, Ramiro's trial counsel presented none of the abundant evidence that Carmen's husband—and not Ramiro—committed that crime.

Because the lawyer had previously represented Carmen's husband, he would have had access to this evidence: police reports that showed two eyewitness identifications of Carmen's husband as the perpetrator,<sup>67</sup> strong circumstantial evidence placing the husband at the scene,<sup>68</sup> and a police officer's assessment that the husband's denials were not credible.<sup>69</sup> There was no evidence at all implicating Ramiro as the assailant or even as having been at the scene of the crime.

Moreover, Ramiro's lawyers conducted family and social history "investigations" so minimal that not even a hint of the childhood trauma that Ramiro endured was revealed.<sup>70</sup> Indeed, they conducted such a limited investigation that it suggests they did not know what a mitigation investigation is.<sup>71</sup> Counsel sent a former policeman to Mexico to ask Ramiro's mother to come to the United States to plead for his life.<sup>72</sup> Not surprising, Ramiro's mother, his most persistent and savage abuser, refused.<sup>73</sup> The officer, as instructed, spoke to no one else in Mexico.<sup>74</sup> He did speak to Ramiro's sister in Texas, who was the same sister that Ramiro and his brothers beat while pregnant,<sup>75</sup> and who also refused to help.<sup>76</sup> Counsel did not conduct any further social history investigation prior to trial.<sup>77</sup>

As a result, the jury heard penalty phase evidence establishing future dangerousness, but no persuasive evidence in mitigation. Two defense psychiatrists, neither informed by a family and social history, offered differing psychiatric diagnoses.<sup>78</sup> A psychologist, Dr. Martinez, reported Ramiro's low IQ scores of fifty-four and fifty-

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67. *Id.* at 43.

68. *Id.*

69. *Id.*

70. *See* Petition for Writ of Certiorari, *supra* note 1, at 4.

71. *Id.* (stating that based on an interview with one sister, lead counsel "did not feel that it was necessary or even potentially in [Petitioner's best interest] to dwell on interviews with her or additional family members").

72. *Id.*

73. *Id.*

74. *Id.* at 5.

75. *Id.*

76. *Id.*

77. *Id.* at 5. During jury selection, counsel sent a letter to another sister in Mexico asking for helpful information, but did not explain what would be helpful; counsel also phoned the sister mid-trial to say, without explanation, that his mother needed to come to the United States immediately, but, again not surprisingly, she did not come.

78. *Id.*

seven,<sup>79</sup> but because Ramiro's lawyers had not supplied information about Ramiro's childhood or adaptive functioning, Dr. Martinez could not determine whether Ramiro had an intellectual disability.<sup>80</sup>

No one testified to the abhorrent conditions of Ramiro's upbringing, including his family's extreme poverty, his constant exposure to neurotoxins, the violent beatings both parents regularly inflicted upon him, or the fact that he grew up on a waste dump, eating from it and sorting trash and begging at the age of four.

It could be argued that the only malfeasance at this stage was that of Ramiro's trial lawyers, but the judge appointed Ramiro's trial counsel, and he knew—or should have remembered—that trial counsel had represented Carmen's husband. Perhaps that was only negligence, and perhaps he cannot be blamed for the completely inadequate mitigation investigation that trial counsel conducted. In any event, the trial judge's performance is the pinnacle of judging compared to what followed.

*b. State Post-Conviction Proceedings*

State post-conviction proceedings raised a number of claims, but two stood out: Ramiro's jury never heard the evidence of his extraordinarily deprived and abusive childhood, and he was ineligible for execution because of his low intelligence.<sup>81</sup> The state courts' treatment of both claims sharply departed from relevant constitutional commands.

After the jury had sentenced Ramiro to death in 2000<sup>82</sup> and the Texas Court of Appeals affirmed his conviction,<sup>83</sup> the Supreme Court decided *Atkins*.<sup>84</sup> Ramiro's state post-conviction counsel sought a hearing on an *Atkins* claim and ineffective assistance of counsel. In support of these claims, they proffered affidavits from Ramiro's family members, describing the extreme conditions of his childhood summarized in Part I. They also proffered several IQ test results well within the intellectually disabled range, and affidavits

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79. *Id.*

80. *Id.*

81. *See id.* at 5.

82. Brief for Appellant 2, *Hernandez v. Stephens*, 537 F. App'x. 531 (5th Cir. 2013) (No. 12-70006).

83. *Id.*

84. *Atkins v. Virginia*, 536 U.S. 304 (2002).

describing Ramiro's functioning as a child and as a young adult.<sup>85</sup> Despite these proffers, the lower state court refused to grant an evidentiary hearing on either claim, and denied relief on all claims.<sup>86</sup> For the ineffective assistance of counsel claim, the lower state court, with little elaboration, deemed counsel's minimal efforts adequate. The Texas Court of Criminal Appeals affirmed the denial of relief on the ineffective assistance claim, but remanded the case to the lower court for a hearing on the *Atkins* claim.<sup>87</sup>

Both expert and lay evidence provided compelling support for the *Atkins* claim. Prior to the hearing, Dr. Antonio Puente, who had conducted between 2500 and 5000 intellectual disability examinations for the Social Security Administration, and who was the Project Director for the Spanish translation of the Wechsler Adult Intelligence Scale (WAIS), evaluated Ramiro.<sup>88</sup>

Puente administered twenty different neuropsychological tests to Ramiro, including several IQ tests.<sup>89</sup> On all these tests, a score of seventy or below indicates that the subject is within the intellectually disabled range; on each test, Ramiro scored seventy or below.<sup>90</sup> On the Comprehensive Test of Non-Verbal Intelligence, Ramiro scored fifty-two; on the Beta III, he scored sixty-four; and on the full scale Spanish WAIS, he scored sixty-two using American norms.<sup>91</sup> Even using Mexican norms, which are widely criticized for overstating IQ,<sup>92</sup> Ramiro's IQ score was seventy.<sup>93</sup> Dr. Puente also reviewed the results of Dr. Martinez's prior testing, which included an IQ score of fifty-four on the WAIS III performance subtest and an IQ score of fifty-seven on the Test of Nonverbal Intelligence II.<sup>94</sup> Citing multiple sources—including results of tests that screen for malingering consistency between academic achievement tests and family members' reports regarding Ramiro's functioning, clinical impressions, and his own experience administering thousands of IQ tests—Dr. Puente concluded that Ramiro was not malingering.<sup>95</sup>

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85. See Petition for Writ of Certiorari, *supra* note 1, at 5.

86. *Id.* at 6.

87. *Id.*

88. *Id.*

89. *See id.*

90. *Id.*

91. *Id.*

92. See, e.g., Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why U.S. Norms Should Be Used with the Mexican WAIS-III in Capital Cases*, 34 PSYCHOL. INTELL. & DEVELOPMENTAL DISABILITIES 2, 2 (2008); Hoi K. Suen & Stephen Greenspan, *Serious Problems with the Mexican Norms for the WAIS-III When Assessing Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 214, 215 (2009).

93. See Hearing Vol. 4, *supra* note 3, at 151.

94. See Petition for Writ of Certiorari, *supra* note 1, at 6.

95. *Id.* at 6–7.

Thus, the expert evidence was highly credible due to the qualifications of the experts, and that evidence was unequivocal.

Lay witnesses—three siblings and a neighbor—added further evidence of intellectual disability. They testified to Ramiro’s extreme deficits in conceptual, practical, and social skills, which manifested during childhood, including his inability to sort glass, pile cardboard, do homework, bathe himself, run simple errands, prepare food safely, travel alone, make change, play games, or follow directions.<sup>96</sup> Because of his inability to learn, his school kicked him out in the third grade.<sup>97</sup> His peers both cheated him out of money and made fun of him because of his limitations.<sup>98</sup> Based on this undisputed testimony, and his clinical evaluation and testing of Ramiro, Dr. Puente concluded that Ramiro has an intellectual disability.<sup>99</sup>

The only expert testimony the state offered in response was from Dr. Coons, a psychiatrist who was patently unqualified to diagnose intellectual disability: Dr. Coons had never administered or even scored an IQ test, nor could state the clinical definition of intellectual disability.<sup>100</sup> Moreover, he was particularly unqualified to offer an opinion about Ramiro because he had never spoken to Ramiro or interviewed a single person who had observed Ramiro’s functioning.<sup>101</sup> Additionally, because he could not speak Spanish, Dr. Coons could not read the protocols from the IQ tests Dr. Puente had administered.<sup>102</sup> Yet these obstacles did not stop Dr. Coons from stating that Ramiro might be malingering to avoid the death penalty,<sup>103</sup> though he did admit that malingering or lack of motivation, if present, were “not extremely important factors.”<sup>104</sup> Thus, the only expert who doubted that Ramiro met the first diagnostic criterion for intellectual disability was both unqualified and uncertain.

Regarding the second diagnostic criterion for intellectual disability, Dr. Coons was more certain, though equally unqualified to express an opinion. He discounted *all* evidence of adaptive functioning deficits as normal for Ramiro’s “cultural group.”<sup>105</sup> During

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96. *Id.* at 7.

97. *Id.* at 3.

98. *Id.*

99. *Id.* at 7.

100. *Id.*

101. *Id.*

102. *Id.* Dr. Coons testified that a psychologist with whom he consulted thought that some of the protocols might have been incorrectly scored, but admitted that the psychologist’s review was limited because that psychologist, like Dr. Coons, was unable to understand Spanish.

103. *Id.*

104. *Id.*, at 7–8.

105. *Id.* at 8 n.4. Prior to the evidentiary hearing, Dr. Coons provided an affidavit that relied on Ramiro’s “cultural group” as a basis for determining that Ramiro does not meet the

his testimony, Dr. Coons repeatedly referred to Ramiro's "cultural group" as explaining his poor functioning.<sup>106</sup> However, Dr. Coons admitted that he had no prior knowledge of that group: "Well, his cultural group is—we've heard lots of testimony about it. I don't know that I could—you can just scrape all those things together. I don't know much about it beyond that."<sup>107</sup> Moreover, Dr. Coons's generalizations about Ramiro's "cultural group" did not address the far higher functioning of Ramiro's siblings, who presumably belonged to the same cultural group.<sup>108</sup>

Following the hearing, the State submitted a proposed order concluding that Ramiro met none of the criteria for intellectual disability, which the lower state court signed with some modifications.<sup>109</sup> With respect to intellectual functioning, the state court order rejected all of Ramiro's IQ scores in the fifties and low sixties as the product of malingering, finding more reliable a single score of eighty-three on a prison-administered rough screening instrument.<sup>110</sup> This screening test, however, was an invalid instrument for multiple reasons: it was extremely short, was designed only to classify prisoners for services rather than diagnosis, was very outdated, and was administered by unqualified prison personnel through an interpreter.<sup>111</sup> Finally, the accuracy of the score—for whatever little value it might have had—could not be checked because the raw data was destroyed.<sup>112</sup> The order discussed neither the multiple sources of invalidity of the prison-administered test nor Dr. Puente's reasons for rejecting the possibility of malingering on the valid tests.<sup>113</sup>

As noted in the certiorari petition, "with respect to adaptive functioning, the state court order cited Dr. Coons's testimony that, given Ramiro's 'cultural group,' his 'skills in communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, were appropriate and [ ] did not support a finding of [intellectual disability].'"<sup>114</sup>

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criteria of intellectual disability. *Id.* Post-conviction counsel moved to strike the affidavit on Equal Protection grounds. *Id.* Following the evidentiary hearing, post-conviction counsel renewed the motion to strike Dr. Coons's affidavit and moved to strike his testimony based both upon Dr. Coons's lack of qualifications and the violation of Ramiro's equal protection rights. *Id.* Both motions were denied. *Id.*

106. *Id.* at 8.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 8–9.

114. *Id.* at 9.

However, the order did not discuss the testimony that his siblings—members of the same cultural group—shared none of his deficits.<sup>115</sup> The order also cited Ramiro’s employment, but did not acknowledge that his jobs all involved unskilled labor and menial tasks.<sup>116</sup> It further cited his criminal activity and attempt to deceive his interrogators, but did not note that his attempt to deceive law enforcement was quickly and predictably unmasked.<sup>117</sup> Similarly, the order cited his escape from custody in Mexico, without mentioning that the record established that he was able to simply walk away while the guard slept.<sup>118</sup> It also cited his illegal border crossing, but without considering testimony from a state witness that he received assistance.<sup>119</sup> Finally, it listed his “coherent, articulate and knowledgeable” confessions and ability to “mak[e] written, meaningful requests,” but failed to acknowledge either the incoherent and tangential “answers” he gave during his interrogation or the extremely simple content of his error-ridden writings.<sup>120</sup> Most remarkably, as further evidence purportedly inconsistent with adaptive functioning limitations, the order cited that Ramiro drank beer, drove a car, behaved normally in court, communicated with counsel, and could distinguish right from wrong.<sup>121</sup>

Finally, with respect to the third criterion, juvenile onset, the order stated only that there was no “credible evidence that any [intellectual disability] manifested during the developmental period.”<sup>122</sup>

The Texas Court of Criminal Appeals affirmed the lower court’s decision without opinion.<sup>123</sup> Thus, at the end of state court proceedings, the lower state court had dismissed the ineffective assistance of counsel claim as meritless despite the fact that the jury knew nothing of the extreme poverty of Ramiro’s childhood, his constant exposure to neurotoxins, or the violent beatings both parents regularly inflicted upon him, and the Texas Court of Criminal Appeals had affirmed that determination without comment. The lower court had also denied Ramiro’s *Atkins* claim based upon reasoning wildly deviant from clinical understandings of intellectual

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Ex Parte Hernandez*, 2008 Tex. Crim. App. Unpub. LEXIS 599, at \*1 (Tex. Crim. App. Sep. 10, 2008).



disability, and the Texas Court of Criminal Appeals likewise affirmed that determination without comment.

### 3. Federal District Court Proceedings

On federal habeas, Ramiro argued that the state court determination of both his *Atkins* claim and his ineffective assistance of counsel claim relied upon “unreasonable determinations of fact” and that the application of law to the facts were “contrary to, and involved an unreasonable application of,” clearly established Supreme Court precedent.<sup>124</sup> He also argued that, because he was denied an evidentiary hearing on his ineffective assistance claim in state court, he was entitled to one in federal court.<sup>125</sup>

The federal district court denied the motion for a hearing and denied relief on all claims.<sup>126</sup> The district court’s treatment of the intellectual disability claim is remarkable in its factual misstatements regarding state court credibility determinations. Its opinion regarding the ineffective assistance of counsel claim is equally remarkable, but remarkable for its dramatic departures from Supreme Court precedent. The district court’s opinion demonstrates how far it was willing to go to sustain a death sentence.

#### *a. Intellectual Disability*

As set forth below, the district court’s initial order denying *Atkins* relief attributed credibility determinations to the state court that the state court had never made; the district court also mischaracterized, both through omission and misstatement, much of the critical evidence. In the absence of these gross factual errors, the district court’s conclusion is untenable. The section below recounts four of those false assertions.

According to the district court, “[t]here are several reasons why the state habeas trial court reasonably gave more credence to Dr. Coons’s opinions regarding Petitioner’s lack of adaptive functioning deficits over the opinions of Dr. Puente.”<sup>127</sup> Although the district court’s order denying Ramiro’s Rule 59 motion withdrew that sentence, the court inserted as a replacement an identical sentence except for the replacement of the word “credence” with the

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124. See Petition for Writ of Certiorari, *supra* note 1, at 10.

125. *Id.*

126. See Hernandez v. Thaler, 2011 WL 4437091 at \*59 (W.D. Tex. Sept. 23, 2011).

127. *Id.* at \*23.

word “weight”: “[T]he state habeas trial court reasonably gave more *weight* to Dr. Coons’s opinions regarding Petitioner’s lack of adaptive functioning deficits over the opinions of Dr. Puente . . . .”<sup>128</sup> Yet call it weight or call it credence, the state court made no such comparison of credibility. In fact, at *four* separate points in its proposed order, the state specifically asked the state court to disparage Dr. Puente’s credibility, and at all four points, the court *crossed out* the language doing so, eliminating that finding from the order it signed.<sup>129</sup>

Second, according to the district court:

Petitioner failed to present the state habeas trial court with any credible testimony from independent third parties with personal knowledge of [Appellant]’s developmental milestones or any documentation from reliable independent sources addressing Petitioner’s achievement or failure to achieve developmental childhood milestones . . . [and consequently] the state habeas trial court reasonably found the testimony of Petitioner’s siblings and neighbor regarding [his] childhood to be incredible.<sup>130</sup>

The order further asserted that “[t]he state habeas trial court reasonably relied upon the information contained in the November 2002 statement of [Ramiro’s sister] when it rejected Ramiro’s *Atkins* claim.”<sup>131</sup> It then stated that, in contrast to the sister’s 2002 affidavit, the testimony of Ramiro’s siblings and a neighbor during the state court evidentiary hearing “are so extreme as to defy credibility.”<sup>132</sup>

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128. *Hernandez v. Thaler*, 2012 WL 394597 at \*29 (W.D. Tex. Feb. 6, 2012) (emphasis added).

129. See generally Supplemental Findings of Fact and Conclusions of Law on Post-Conviction Application for Writ of Habeas Corpus, *Ex Parte Hernandez*, 2008 Tex. Crim. App. Unpub. LEXIS 599 (Tex. Crim. App. Sep. 10, 2008) [hereinafter Supplemental Findings of Fact and Conclusions of Law on Post-Conviction Application for Writ of Habeas Corpus]. The court crossed out and initialed a paragraph that criticized Dr. Puente’s methodology, and concluded “This court did not find Dr. Puente to be credible”; crossing out and initialing the sentence “The court finds that Dr. Puente’s opinion regarding the applicant’s malingering to lack credibility”; crossing out and initialing the statement, “In summary, this Court finds Dr. Coons’ opinion to be more credible and trustworthy than those of Dr. Puente and Dr. Martinez”; crossing out and initialing the sentence “Dr. Puente improperly applied the law in his analysis by considering adaptive behavior only prior to 18 years of age to the exclusion of current behavior, thus making his opinion unreliable.” Moreover, it is easy to see why the district court did not give more weight to Coons’s testimony than to Puente’s; there were many reasons to find Dr. Coons completely unqualified, and none to find him more credible than the preeminently qualified Dr. Puente.

130. *Hernandez*, 2011 WL 4437091 at \*23.

131. *Id.* at \*20 n.153.

132. *Id.*

But these assertions about the state court credibility findings are simply wrong. On the contrary, the state habeas trial court specifically rejected the State's proposed findings crediting Ramiro's sister's 2002 statement and determining that the testimony of his relatives was not credible, again by crossing out those proposed findings.<sup>133</sup>

Third, the district claimed that "Given the . . . diagnosis of Petitioner as possessing an anti-social personality . . . the trial court reasonably credited Dr. Coon's concern over the likelihood that negative motivation may have caused Petitioner's test scores to inaccurately under-measure [his] true level of intellectual functioning."<sup>134</sup> However, the state court never relied on an antisocial personality disorder diagnosis in any of its findings. Indeed, there is absolutely *no* discussion of antisocial personality disorder in the state court's decision.

Finally, the district court's opinion stated that "[G]iven Petitioner's high scores on a number of the tests administered by Dr. Puente, the state habeas trial court reasonably rejected the contentions of Dr. Martinez and Dr. Puente that Petitioner was too 'unsophisticated' to have 'malingered by deliberately performing poorly on some IQ tests.'"<sup>135</sup>

Although Ramiro's experts testified that he was too unsophisticated to mangle in a fashion that would be undetectable to experts, the state court never rejected these contentions, or even addressed them. Moreover, the state court could not have "reasonably" done so based on Petitioner's high scores because he had no valid high scores.

These four false assertions of state court findings do not stem from false assertions in the state's brief, but originated with the district court. The blatant inaccuracy of those statements is confirmed by the fact that the State never repeated them in later proceedings.

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133. The State had proposed the following language:

The court finds that the testimony of the above relatives of the applicant is not entirely credible as the demeanor exhibited indicates an attempt to assist the applicant's position, with the exception of Adelita who described the basis for her testimony being an attempt to heal a breach with the family over this issue. Each of these witnesses was interviewed prior to hearing by defense expert, Dr. Antonio Puente.

*See* Supplemental Findings of Fact and Conclusions of Law on Post-Conviction Application for Writ of Habeas Corpus, *supra* note 129, at 12. But rather than endorsing that proposed finding, the state court crossed out the entire paragraph and initialed that he struck it out. *Id.*

134. *Hernandez*, 2011 WL 4437091 at \*22.

135. *Id.*

Despite the state court's express rejection of the proposed finding that the state's expert was more credible than the defense experts, the district court insisted that logic compelled the conclusion that the state court implicitly made that finding.<sup>136</sup> The district court likewise asserted that, despite the state court's express rejection of the finding that the neighbor's and family members' testimonies on Ramiro's childhood limitations were not credible, that finding was made implicitly as well.<sup>137</sup>

*b. Ineffective Assistance of Counsel*

The district court took a different, but no less idiosyncratic, approach to the ineffective assistance claim. The district court did not try to defend the order on its own terms probably because that order seemed, on its face, to fly in the face of circuit precedent concerning what constituted an adequate investigation.<sup>138</sup> Instead, the district court argued that the state court opinion was not contrary to, or an unreasonable application of, Supreme Court precedent because reasons exist that could have rendered the decision to find counsel's conduct competent reasonable if the state

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136. *Id.* at \*88.

137. *Id.* at \*101. If the state court had not expressly rejected those credibility determinations, it might not be crazy to imply them. Here, however, the state court expressly rejected the credibility determination the district court claims it "must" have made, given its legal conclusions. But "[i]n 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." 28 U.S.C. § 2254(e)(1). Thus, its factual determinations—not its legal conclusions—must be presumed to be correct. Moreover, there is an obvious reconciliation of the state's factual findings and its legal conclusions that does not require ignoring either one. The state court found both the defense lay testimony and its expert testimony credible—but applied the wrong legal standard to that testimony. If the state court held extreme stereotypes of intellectual disability (as suggested by its citation of facts, such as Appellant's drinking beer, as disproving intellectual disability), then it would have found a lack of "credible evidence that any intellectual disability manifested during the developmental period." *Hernandez*, 2011 WL 4437091 at \*108. The state court applied the wrong legal standard—the equivalent of a "drooling idiot" standard that fails to protect mildly mentally retarded offenders as *Atkins* requires.

138. The "investigation" of Ramiro's family and social history was limited to brief conversations with three family members. However, the Fifth Circuit had previously declared that "three uncooperative family members does not an unwilling family make," *Adams v. Quarterman*, 324 F. App'x. 340, 348 (5th Cir. 2009), and noted that "[i]t is widely accepted that family members do not represent the only potential avenue of mitigating evidence," *Id.* at 347.

court had articulated them.<sup>139</sup> It is unclear if this substituted justification is permissible under AEDPA.<sup>140</sup> Even if hypothetical reasoning can supplant actual, clearly impermissible reasoning, however, the hypothetical reasoning offered by the federal district court was no cure. The district court's concoction was a soup of legally irrelevant and absurd statements, beginning with a complaint about the purported failure of Ramiro's family members to offer mitigating information to counsel:

None of [the affidavits from Ramiro's family] include any assertions that any members of Ramiro's family ever

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139. The state court made no findings at all on the prejudice, but the district court also supplied reasons for concluding that counsel's omissions did not prejudice Ramiro. See *Hernandez*, 2011 WL 4437091 at \*135. Those reasons also contravene Supreme Court precedent, and, probably for that reason, were not endorsed by the Fifth Circuit. First, the district court relied upon Ramiro's brutal crime and significant criminal history—which included a rape, a knifing, and a murder conviction in Mexico—as precluding a finding of prejudice. *Id.* at \*137. That reasoning, however, flies in the face of the Supreme Court's decision in *Williams*, which found prejudice for failure to conduct an adequate family and social history investigation despite the defendant's history of savagely beating an elderly woman, stealing two cars, setting fire to a home, stabbing a man during a robbery, and confessing to choking two inmates and breaking a fellow prisoner's jaw. See *Williams v. Taylor*, 529 U.S. 362, 362 (2000) (Rehnquist, C.J., dissenting). It also is contrary to the Supreme Court's statement that it has “firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). Equally contrary to Supreme Court precedent, the district court reasoned that “the lack of any evidence of genuine remorse or sincere contrition” led it to “conclude[ ] de novo there is no reasonable probability that, but for the failure . . . to present evidence of [Ramiro]'s abused and deprived childhood, the outcome of the punishment phase would have been different.” *Hernandez*, 2011 WL 4437091 at \*138. Of course, Ramiro's life history—his very limited cognitive ability, his elementary school education, the great brutality and numbing poverty he experienced as a child—would have helped to explain the absence of apparent remorse to the jury. But more importantly, the Supreme Court, over the dissent's objection, found that the defendant was prejudiced by counsel's failure to conduct an adequate mitigation investigation, despite the absence of “regret or remorse for his heinous crimes.” *Sears v. Upton*, 130 S.Ct. 3259, 3271 (2010) (Scalia, J., dissenting).

140. Whether a federal court may hypothesize “reasonable” reasons as a substitute for the state court's unreasonable ones has not been determined by the Supreme Court. It has held that “[w]here a state court's decision is *unaccompanied* by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98 (2011) (emphasis added). The Fifth Circuit has held that even when the state court decision *does* provide an explanation for its conclusion, that explanation, if unreasonable, may be ignored and the decision nonetheless upheld if a federal court can imagine a reasonable basis for the decision. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (stating that upon federal habeas review of a state court's adjudication, a federal court ultimately “review[s] only a state court's ‘decision,’ and not the written opinion explaining that decision”); see also *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (“The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.”).

communicated the gist of [the conditions of his childhood] to [Ramiro]'s investigator or trial counsel.<sup>141</sup>

This statement, while true on its face, misses the fact that none of Ramiro's relatives were *asked* questions about those conditions. Indeed, the investigator spoke to three relatives, but by the investigator's own account, he did not ask anyone about Ramiro's childhood.<sup>142</sup> It was *counsel's* duty to investigate—not the duty of Ramiro's relatives, who had no knowledge of what was legally relevant, to come forward.

The district court again completely ignores *counsel's* duty to investigate when it digresses to completely unfounded speculation about what Ramiro might have told mental health professionals who examined him:

While complaining about the alleged failure of [Ramiro]'s defense team to contact members of [Ramiro]'s family, [the claim] . . . ignores the fact [Ramiro] was interviewed by no less than three different mental health clinicians [who testified at trial and whom Ramiro furnished] with a personal history . . . Thus, there was evidence in the record from which the state habeas court reasonably could have determined [Ramiro]'s trial counsel [was] aware of the dire circumstances of [Ramiro]'s childhood, even without personally interviewing every member of [Ramiro]'s family. [Ramiro] does not allege . . . he concealed [those facts from the experts].<sup>143</sup>

The state court did not articulate its assumption that Ramiro himself told the mental health experts about the neurotoxins to which he was exposed, the third-world poverty that he survived, or the abuse that he endured. Moreover, there is nothing in the record to suggest that Ramiro—a man with a third grade education—did, or even could have, described these conditions. Mental health experts are supposed to be furnished with a social history to assist their diagnosis, but they are not substitutes for a family and social history investigation. This is, in part, because the defendant may be unaware of what happened when he was very young, he may be too ashamed to reveal it, too cognitively limited to report it, or completely unaware of the legal significance of mitigating facts. It is likely that all of these factors would have impaired Ramiro as a

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141. *Hernandez*, 2011 WL 4437091 at \*123.

142. Motion to Expand, *supra* note 9, at 8–9.

143. *Hernandez*, 2011 WL 4437091 at \*124–25.

source. Indeed, it is impossible to square this aspect of the district court's rationale with the Supreme Court's insistence on a thorough family and social history.

The district court also denigrated the importance of Ramiro's horrible childhood by a statement that borders on tautology:

Whatever sympathy that evidence showing [that Ramiro] was an abused, neglected child might have engendered in [Ramiro]'s capital jury, the reality was, at the time of [Ramiro]'s capital murder trial, [that] Ramiro was no longer a child.<sup>144</sup>

Of course, *all* capital defendants are adults at the time of trial,<sup>145</sup> and if their adulthood justified failure to investigate or present a family and social history, then counsel could never be found ineffective based upon their failure to conduct a family and social history investigation.<sup>146</sup> This conclusion also cannot be squared with Supreme Court precedent requiring such investigations and with finding counsel ineffective for failing to conduct them.

However, the district court's following statement is the most remarkable, both for its misstatement of the law and for its breathtaking callousness:

There is also the obviously double-edged nature of such evidence. Ramiro's jury might very well have interpreted testimony showing Ramiro's abusive, deprived childhood as establishing that Ramiro was destined from an early age to grow into a violent adult . . . . *The picture of [Ramiro]'s childhood painted [by state post-conviction proceedings and confirmed by new evidence] is so utterly bleak and bereft of hope it would likely have furnished a shrewd prosecutor with compelling evidence from which to argue [Ramiro] was molded by his own family into a person without a conscience who posed a substantial risk of future violence.*<sup>147</sup>

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144. *Id.* at \*132.

145. *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding juveniles ineligible for the death penalty).

146. Indeed, even when the defendant is fifty-four at the time of the crime, it is "unreasonable to discount to irrelevance the evidence of [his] abusive childhood." Porter v. McCollum, 558 U.S. 30, 43 (2009). Moreover, *Williams, Wiggins, Rompilla v. Beard* (545 U.S. 374 (2005)), and *Sears v. Upton* (130 S.Ct. 3259 (2010)) provide four additional examples of cases where, despite the fact that the defendant "was no longer a child," the Supreme Court found counsel ineffective based upon failure to investigate and present evidence of childhood abuse, neglect, and hardship.

147. *Hernandez*, 2011 WL 4437091 at \*34 (emphasis added).

Thus, according to the district court, the fact that Ramiro's childhood was truly horrendous—"utterly bleak and bereft of hope"<sup>148</sup>—was why trial counsel should not have investigated it and should not have presented the results of its investigation to the jury. This statement flies in the face of virtually every ineffective assistance of counsel case decided by the Supreme Court.<sup>149</sup> It also imagines a jury—all twelve jurors—so heartless and cynical that compassion could not touch them. Moreover, it suggests that a jury is willing to disobey the instruction that, after future dangerousness is established, it must consider whether mitigating factors warrant a sentence of life imprisonment.<sup>150</sup> Finally, the district court ignores the fact that counsel never made a strategic decision not to present mitigating evidence of Ramiro's childhood—because counsel failed to perform the requisite investigation.<sup>151</sup>

#### 4. The Fifth Circuit Proceedings.

Just as the federal district court abjured reliance on the reasoning of state court, the Fifth Circuit chose not to endorse the reasoning of the federal district court. Instead, it invented new justifications for the state court's conclusions regarding intellectual disability and ineffective assistance.

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148. *Id.*

149. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."); *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003) ("In light of these standards, our principal concern in deciding whether [counsel] exercised 'reasonable professional judgment . . . is not whether counsel should have presented a mitigation case[, but] . . . whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable."); *Rompilla*, 545 U.S. at 377 ("We hold that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."); and *Sears*, 130 S.Ct. at 953 ("[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [the defendant].").

150. *See Ex parte Gonzales*, 204 S.W. 3d 391, 394 (Tex. Crim. App. 2006) ("We have adapted the Supreme Court's prejudice test to require a showing that there is a reasonable probability that, absent the errors, the jury would have answered the mitigation issue differently.").

151. Although "strategic choices made after thorough investigation . . . are virtually unchallengeable," "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984); *see also Wiggins*, 539 U.S. at 521 (quoting *Strickland*); *Soffar v. Dretke*, 368 F.3d 441, 487 (5th Cir. 2004) (same); *Lewis v. Dretke*, 355 F.3d 364, 367 (5th Cir. 2003).



*a. Intellectual Disability.*

The Fifth Circuit affirmed the district court's finding that habeas relief was not available.<sup>152</sup> 28 U.S.C. § 2254(d) limits the power of federal courts to grant the writ of habeas corpus to cases in which the state court decision was "contrary to or involved an unreasonable application" of Supreme Court precedent or "based on an unreasonable determination of the facts."<sup>153</sup> According to the Fifth Circuit, the state court's decision was neither. Citing § 2254(e)(1), the Fifth Circuit added that Ramiro did not rebut the presumption of correctness "by clear and convincing evidence."<sup>154</sup> Largely ignoring the district court's reasoning, the Fifth Circuit substituted new hypothetical justifications for the state court's decision, explained below.

With respect to intellectual functioning, the Fifth Circuit held that "other evidence" undermined the accuracy of IQ scores in the intellectual-disability range.<sup>155</sup> The "other evidence" cited by the court included "[e]vidence . . . that [Ramiro's] motivation to score lower could have been a factor in the test results."<sup>156</sup> The Fifth Circuit's opinion acknowledges neither Dr. Puente's multiple reasons for rejecting that possibility nor Dr. Coons's admission that, if such motivation affected the score, it had very little effect.

Additional "other evidence" the Fifth Circuit cited to undermine the scores was a completely novel objection to Ramiro's evidence: "When scaled to Mexican norms, [Ramiro] scored exactly [seventy] on the *one* full-scale WAIS-III test."<sup>157</sup> In raising this criticism, the court did not acknowledge that: 1) Ramiro scored sixty-two on this test using American norms; 2) Mexican norms have been criticized as overstating IQ; or 3) Ramiro could not have produced more than

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152. See *Hernandez v. Stephens*, 537 F. App'x. 531, 533 (5th Cir. 2013), cert. denied, 134 S. Ct. 1760 (2014).

153. 28 U.S.C. § 2254 (d)(1)–(2).

154. *Hernandez v. Stephens*, 537 F. App'x. at 540. The Fifth Circuit did not adopt the district court's approach of relying upon adverse credibility determinations crossed out by the state court, but instead introduced a new source of credibility determinations not briefed by the parties: statements made by the state district court in the order written prior to the remand for an evidentiary hearing—i.e., determinations made prior to hearing the testimony of any witnesses. *Id.* The opinion defends this new source by noting that the order issued after the hearing states that it incorporates the order issued prior to the remand; it does not address the possibility that the incorporation statement refers to the findings made with respect to Ramiro's other claims, nor does it consider whether explicit rejection of credibility determinations after testimony was heard trumps earlier determinations made prior to the taking of testimony.

155. *Id.* at 539.

156. *Id.*

157. *Id.* at 531.

one full-scale score to prove sub-average intellectual functioning because no other appropriate full scale IQ test is available in Spanish, the only language he speaks.<sup>158</sup>

In the course of reviewing the state court evidence on adaptive functioning, the Fifth Circuit cited the opinions of Dr. Coons as supporting the state court's conclusion that Ramiro's did not have significant deficits, but it did not mention Dr. Coons's opinions were based upon his view that Ramiro's poor functioning was due to his "cultural group."<sup>159</sup> It also failed to acknowledge that that the state court findings incorporated reliance upon Ramiro's "cultural group,"<sup>160</sup> or to question whether such reliance was impermissible racial stereotyping, as the defense argued.

*b. Ineffective Assistance of Counsel.*

The Fifth Circuit found the state court's determination that Ramiro failed to establish the incompetence of his trial counsel's performance was reasonable.<sup>161</sup> Its justification for doing so, however, was completely unsupported by the record. Recounting the "investigation" conducted by trial counsel, the Fifth Circuit asserted that the three professionals (two psychiatrists and one psychologist) interviewed Ramiro and "learned about his history, including his abusive and deprived childhood," all three of whom "testified at trial and presented evidence of their evaluations to the jury."<sup>162</sup> However, the state court articulated no such finding, and there is no evidence in the record that any of the three learned anything at all about Ramiro's "abusive and deprived childhood" from Ramiro.<sup>163</sup>

The Fifth Circuit also cited "[e]vidence . . . that counsel employed someone to travel to Mexico and interview [Ramiro's] mother and two siblings[,] each of whom provided written declarations. The interviews revealed detailed information about [his] violent childhood circumstances and behavioral abnormalities."<sup>164</sup> This is indisputably wrong: the only written declarations signed by the siblings in Mexico were obtained by *post-conviction* counsel, not

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158. *See supra* notes 96–102.

159. *See* Petition for Writ of Certiorari, *supra* note 1, at 7.

160. *Id.*

161. The Fifth Circuit denied the motion to expand the Certificate of Appealability to include the ineffective assistance claim, but nonetheless addressed the merits of the claim. *Hernandez v. Stephens*, 537 F. App'x at 540–41.

162. *Id.* at 541.

163. *Id.*

164. *Id.*

by trial counsel.<sup>165</sup> There is no evidence in the record that *trial counsel* had information from anyone concerning either the violence Ramiro endured as a child or his “behavioral abnormalities.” Moreover, these “facts” are the Fifth Circuit’s own invention. They were never asserted by the State or the state court.

### 3. Certiorari.

After the Fifth Circuit affirmed the denial of the habeas corpus petition, but before Ramiro’s petition for certiorari had to be filed, the Supreme Court granted certiorari in *Hall v. Florida*.<sup>166</sup> The petition in *Hall* challenged Florida’s imposition of a bright line cut-off at an IQ of seventy for the determination of *Atkins*’s first prong.<sup>167</sup> The petition argued that this cut-off violated professional norms concerning the assessment of sub-average intellectual functioning and consequently violated *Atkins*.<sup>168</sup> The issue *Hall* would determine was closely related to the first question raised in Ramiro’s petition: Whether a federal court may find a state court determination that a defendant is not a person with an intellectual disability neither “contrary to, [nor] involv[ing] an unreasonable application of” *Atkins*, based upon reasons that are inconsistent with clinical definitions of intellectual functioning and adaptive functioning.

Because Ramiro’s case involved a deviation from professional norms with respect to the first prong (albeit a different deviation than *Hall* raised), it would not have been surprising if the Court had chosen to hold Ramiro’s petition until *Hall* was decided. Alternatively, because the case involved deviations from professional norms on the second prong, the Court might have granted certiorari to determine whether deviations on the second prong, like deviations on the first prong, violated *Atkins*.

The petition for certiorari filed on behalf of Ramiro presented two additional questions:

1. Whether a state court determination that denies a Mexican national the protection of *Atkins v. Virginia* based upon his

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165. See Petition for Writ of Certiorari, *supra* note 1, at 4.

166. *Hall v. Florida*, 134 S.Ct. 1986 (2015) (holding that Florida’s rule foreclosing further exploration of a capital defendant’s intellectual disability if his IQ score was more than 70 created unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment).

167. *Id.* at 1992.

168. *Id.* at 2000.

national origin and native language is “contrary to, or involv[es] an unreasonable application of” this Court’s precedents[.]

2. Whether, with respect to either an Atkins claim or a claim of ineffective assistance of counsel, the reasonableness of a state court’s factual determination under § 2254(d)(2) or the correctness of such a determination under § 2254(e)(1) may be assessed without consideration of the evidence proffered by the petitioner[.]<sup>169</sup>

Four different amici filed supporting briefs. The American Association on Intellectual and Developmental Disabilities, the premier organization of intellectual disabilities professionals, and the Arc, an advocacy organization for persons with intellectual disabilities, argued that to ensure non-arbitrary applications, *Atkins* claims must be assessed under generally accepted clinical definitions.<sup>170</sup> The AAIDD brief also demonstrated that the application of the intellectual functioning prong in this case embodied a fundamental misunderstanding of the objective, standardized measures used to assess significantly sub-average intellectual functioning.<sup>171</sup> AAIDD explained that the interpretation of Ramiro’s adaptive behavior ignored relevant data, particularly from the developmental period, and hinged instead upon professionally unacceptable stereotyping.<sup>172</sup>

The Brief of Amicus Curiae for the United Mexican States in Support of Petitioner argued that Dr. Coons’s testimony reflected personal prejudices and false stereotypes regarding Mexican culture.<sup>173</sup> It maintained that both the Equal Protection Clause of the Fourteenth Amendment and international law precluded reliance on culture.<sup>174</sup>

The Amici Curiae Brief of League of United Latin American Citizens, American Gateways, Texas Appleseed, and Latino Law Professors in Support of Petition for Writ of Certiorari argued that

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169. Petition for Writ of Certiorari, *supra* note 1, at i.

170. *See generally* Brief for American Association on Intellectual and Developmental Disabilities as Amici Curiae Supporting Petitioner, *Hernandez v. Stephens*, 537 F. App’x. 531 (2013), *cert. denied*, 134 S. Ct. 1760 (2014).

171. *Id.* at 7–8.

172. *Id.* at 8–13.

173. *See* Brief for The United Mexican States as Amici Curiae Supporting Petitioner, *Hernandez v. Stephens*, 537 F. App’x. 531 (2013), *cert. denied*, 134 S. Ct. 1760 (2014) (No. 13-8004), 2014 WL 316661 at 13–17.

174. *Id.* at 12.

the conclusion that Ramiro was not intellectually disabled impermissibly depended upon his ethnicity.<sup>175</sup> It attacked both the intellectual-functioning and the adaptive-functioning determinations as race discrimination, and linked that discrimination to the dismal history of discrimination against Latinos in Texas.<sup>176</sup>

Finally, a group of conservative legal academics filed the Brief of Public Law Scholars as Amici Curiae in Support of Petitioner.<sup>177</sup> Their brief first noted the signatories' lack of commitment to the correctness of *Atkins*, and then protested the influence of race in determining intellectual disability. The brief also collected and discussed many other *Atkins* cases in which race has played a role.<sup>178</sup>

Nonetheless, the Supreme Court denied certiorari with no dissent from its denial in October 2013.<sup>179</sup> Texas executed Ramiro on April 9, 2014.

On May 27, 2014, the Supreme Court issued its opinion in *Hall*, holding unconstitutional Florida's rule that an IQ score of more than seventy foreclosed further exploration into capital defendant's intellectual disability.<sup>180</sup> The Court reasoned that this rule disregarded both medical practice and a consensus in other states, and thereby created an unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment.<sup>181</sup>

### III. DIES IRAE ("DAY OF WRATH")

Parts I and II recounted, in some detail, a story of Article III judges completely mischaracterizing the facts, omitting relevant facts, and asserting facts with no support in the record. This story also involves Texan recalcitrance, Fifth Circuit race discrimination, and Supreme Court passivity. Because this is a journal of reform and not despair, suggestions follow below on how the manifest injustice in this case might be avoided in the future.

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175. See Brief for League of United Latin American Citizens et al. as Amici Curiae Supporting Petitioner, *Hernandez v. Stephens*, 537 F. App'x. 531 (2013), *cert. denied*, 134 S. Ct. 1760 (2014) (No. 13-8004), 2014 WL 316660 at 6, 24 [hereinafter Brief for League of United Latin Am. Citizens et al.].

176. *Id.* at 8–11.

177. See Brief for Public Law Scholars as Amici Curiae Supporting Petitioner, *Hernandez v. Stephens*, 537 F. App'x. 531 (2013), *cert. denied*, 134 S. Ct. 1760 (2014) (No. 13-8004), 2014 WL 333536 [hereinafter Brief for Public Law Scholars].

178. *Id.*

179. See *Hernandez v. Stephens*, 537 F. App'x. 531 (2013), *cert. denied*, 134 S. Ct. 1760 (2014).

180. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

181. *Id.* at 1995, 1998.

*A. Not Dumb Enough for Texas?*

The state post-conviction judge's order contained strikingly and indisputably incorrect statements about intellectual disability.<sup>182</sup> Most notably, the order credits a screening test, invalid for many reasons, over multiple scores on valid tests.<sup>183</sup> It relies in large part on the "expert" opinion of someone patently unqualified as an expert and employs blanket racial stereotypes regarding the adaptive functioning of Latinos.<sup>184</sup> Finally, it cites behaviors completely within the abilities of a person with intellectual disability, such as "drinking beer," as proof that Ramiro was not a person with intellectual disability.<sup>185</sup>

The state proposed the order ultimately adopted by the state post-conviction court judge, a practice that is frequently disapproved of as compromising judicial independence, or at least the appearance of independence, but not so serious as to require reversal.<sup>186</sup>

In this case, however, the judge clearly read the order and edited out extreme credibility determinations the state proposed in its draft. While this was a step in the right direction for judicial independence, it led to a muddled, illogical final order. The judge removed the state's proposed language that disparaged Dr. Puente and the lay witnesses, but the court failed to affirmatively find these witnesses credible. If one does not disparage the credibility of Dr.

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182. See *supra* Part I.C.2 for discussion of state-post conviction proceedings.

183. *Id.*

184. *Id.*

185. *Id.*

186. The only exception of which I am aware is the extreme and embarrassing situation presented in an Alabama post-conviction case:

Noting that the circuit judge who ruled on Ingram's Rule 32 petition was not the judge who had presided over Ingram's trial, the Supreme Court determined that the circuit court's wholesale adoption of the State's proposed order constituted reversible error because the order contained patently erroneous statements, including statements that the circuit judge ruling on the petition had presided over Ingram's trial, which he had not; that the circuit judge had personally observed the performance of Ingram's trial counsel, which he had not; and that the circuit judge was basing his decision, in part, on events within his own personal knowledge of the trial of the case, of which he had no knowledge. Recognizing the general rule "that, where a trial court does in fact adopt [a] proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court," the Supreme Court found that the "unusual" circumstances of the case rendered the general rule inapplicable . . . The Supreme Court then held that "the nature of the errors present in the June 8 order . . . undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order reflects the findings and conclusions of that judge."

Ingram v. Alabama, 103 So. 3d 86, 88–89 (Ala. Crim. App. 2012) (citations omitted).

Puente or the law witnesses, it is impossible to understand how the evidence failed to establish intellectual disability under governing professional definitions. The unreasonableness of the order is made plain by the fact that neither the federal district court nor the Fifth Circuit defended the state court's reasoning. One might simply respond that better training is needed for lower court state judges.

Perhaps this would help. However, if the lower state court's errors are viewed as the product of (fixable) ignorance or idiosyncrasy, the failure of the Texas Court of Criminal Appeals to write an opinion correcting these errors is less easily dismissed. That court sees many *Atkins* cases, and indeed, that court has resolutely charted its *Atkins* enforcement, or rather, its under-enforcement, path contrary to professional consensus. In *any* other jurisdiction, Ramiro would have been found to be a person with intellectual disability. He just wasn't dumb enough for Texas, which has its own standard for the determination of *Atkins* ineligibility for capital punishment.<sup>187</sup>

Because one of the most basic principles of intellectual disability is that its strengths coexist with its weaknesses, according dispositive weight to a defendant's strengths clearly strays from clinical definitions. However, Texas courts completely disregarded this in their judicial revision of the *Atkins*-approved clinical definitions. In *Ex Parte Briseno*, the Texas Court of Criminal Appeals articulated (and since has followed) "evidentiary factors which fact-finders in the criminal trial context might also focus upon in weighing evidence as indicative of [intellectual disability] or a personality disorder."<sup>188</sup> The seven *Briseno* factors<sup>189</sup> have no connection, either historical or

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187. See *infra* notes 210–216 and accompanying text.

188. *Ex Parte Briseno*, 135 S.W.3d 1, 13 (Tex. Crim. App. 2004).

189. *Id.* at 8–9. *Briseno* sets forth these factors:

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

logical, to clinical definitions.<sup>190</sup> Instead, several factors incorporate stereotypes by asking whether the defendant acts rationally and responds coherently, whether he can lie, and whether he can plan—all of which a person with intellectual disability is generally able to do.<sup>191</sup> Another factor *Briseno* instructs courts to rely upon is whether people who knew the defendant as a child thought that he was mentally retarded; this reliance upon lay opinion, however, is prohibited by professional consensus.<sup>192</sup> Finally, the factors narrow the scope of relevant adaptive functioning behaviors from a wide universe of possibilities to a group of seven questions,<sup>193</sup> and completely ignore some of the skill areas set out in the clinical definitions, such as home living and self-care.<sup>194</sup>

Perhaps Texas's deviance from the consensus of intellectual disability professional consensus should not be surprising given its history of flouting the Supreme Court's rulings regarding the significance of intellectual disability.<sup>195</sup> Even before *Atkins* rendered persons with intellectual disabilities categorically ineligible for execution, Texas was engaged in a struggle with the Court over the mitigating significance of intellectual disability. In *Penry v. Lynaugh*, the Supreme Court reversed Penry's capital sentence because Texas refused to instruct Penry's jury that it could consider and give effect to mitigating evidence concerning his intellectual disability and history of abuse by declining to impose the death penalty.<sup>196</sup> After *Penry*, Texas courts were still recalcitrant in implementing Supreme Court rulings on intellectual disability; the jury instructions at Penry's resentencing did not comply with the Supreme Court's mandate in *Penry I*, and required a second grant of certiorari and reversal.<sup>197</sup>

Obviously, neither Texas nor any other state should be free to decide how much intellectual impairment is enough to exempt a defendant from execution: it is axiomatic that a constitutional provision—the Eighth Amendment—must mean the same thing in all

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190. For the premier manual on clinical definitions and best practices, see generally ROBERT L. SCHALOCK ET AL., AM. ASS'N INTELLECTUAL AND DEV. DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed.) (2010).

191. See generally, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. rev. 2000) (stating that intellectual disability does not preclude independent living, friends, jobs, or spouses).

192. SCHALOCK ET AL., *supra* note 190, at 85.

193. *Briseno*, 135 S.W.3d at 8–9.

194. SCHALOCK ET AL., *supra* note 190, at 44.

195. See *infra* notes 218–220 and accompanying text.

196. 492 U.S. 302, 328 (1989).

197. *Penry v. Johnson*, 532 U.S. 782 (2001). The Fifth Circuit has its own history of cooperating with Texan recalcitrance regarding the significance of intellectual disability. See e.g., *Tennard v. Dretke*, 542 U.S. 274 (2004).



states. Nonetheless, the success rates for *Atkins* claims vary enormously by, and correspond to, differences in substantive definitions.<sup>198</sup> In *Hall v. Florida*, the Supreme Court took the first step to enforce a uniform definition of the first prong, sub-average intellectual functioning.<sup>199</sup> Texas's *Briseno* factor approach to the second prong, adaptive functioning, represents at least as large a deviation from professional norms as did Florida's approach to intellectual functioning, and because Texas contributes such a large proportion of this country's death sentences,<sup>200</sup> its approach to the second prong threatens uniform application of the Eighth Amendment prohibition much more than did Florida's strict IQ cut-off.

More broadly, less systematic deviations from professional definitions on the second prong are rampant, both in Texas and in other states<sup>201</sup> For example, from 2008 to 2012, all of the reported losses discussed some aspect of the claimant's prison behavior as support for the court's conclusion that the claimant failed to demonstrate deficits in adaptive functioning sufficient to satisfy the second prong.<sup>202</sup> However, as at least one court has noted,<sup>203</sup> the clinical literature is adamant that consideration of behavior in institutional settings is inappropriate because how an individual functions in highly structured environments (such as death row) says very little about how well he can cope with the demands of ordinary life.

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198. John Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability And Capital Punishment Twelve Years After The Supreme Court's Creation Of A Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 413–14 (2014) [hereinafter Blume et al., *Tale of Two Atkins*]:

24 cases have been litigated in Florida, and through 2013, the claimant lost in every single one of those cases. The success rates in Alabama (5 out of 34), Georgia (1 out of 9), Kentucky (1 out of 9), Tennessee (0 out of 8), Texas (8 out of 45), and Virginia (0 out of 7) are also strikingly low. In contrast, the North and South Carolina rates (28 out of 34 and 5 out 6, respectively) are strikingly high. Our additional data not only confirms the jurisdictional variation we saw in the earlier cases, but also aligns with procedural and substantive differences in the state system. Rates are lower in states with substantive deviations from clinical definitions. Florida and Alabama are in that category, as both of them (prior to *Hall*) adhered to an IQ cutoff. Texas also deviates greatly, having adopted its own idiosyncratic approach to adaptive functioning. And Georgia, too, is an oddity, as it requires proof of intellectual disability beyond a reasonable doubt.

199. *Hall v. Florida*, 134 S Ct. 1986, 2001 (2014) (holding that the “Court agree[d] with the medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits”).

200. Blume et al., *Tale of Two Atkins*, *supra* note 198, at 413 (noting that by 2014 Texas had decided 45 *Atkins* cases).

201. *Id.* at 414.

202. *Id.* at 406.

203. *United States v. Smith*, 790 F. Supp. 2d 482, 517 (E.D. La. 2011); *United States v. Hardy*, 762 F. Supp. 2d 849, 899 (E.D. La. 2010).

The problem is not that the professional consensus is unclear. The problem is enforcement. The most obvious enforcer is the Supreme Court, and as discussed below, the need for Supreme Court policing in this—or some other—Texas *Atkins* case is at least as pressing as was the need for Supreme Court review in *Hall*. However, because Supreme Court review of every *Atkins* case with a rogue expert will never occur, discipline of such experts is also important.

The American Psychiatric Association has been willing to discipline psychiatrists whose testimony in death penalty cases has violated professional norms. Most notably, the APA expelled Dr. Grigson, colloquially referred to as “Dr. Death.”<sup>204</sup> He was expelled after he violated the APA’s ethics code by “arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100[%] certainty that the individuals would engage in future violent acts.”<sup>205</sup>

Psychologists—not psychiatrists—provide most of the expert testimony in *Atkins* cases. No organization that licenses psychologists has been willing to discipline a psychologist for testimony that contravenes professional consensus. However, if the professional organizations from both disciplines were willing to police members who testify in defiance of professional norms, the most extreme deviations might be avoided.

### B. Not White Enough for the Fifth Circuit?

We count on the federal courts to enforce constitutional rights, including those guaranteed by the Cruel and Unusual Punishment Clause, through the writ of habeas corpus.<sup>206</sup> After AEDPA, a federal court’s role as protector is less vigorous because its power to grant relief is limited to cases where the state courts have made unreasonable determinations of fact or where the decision is “contrary to, or an unreasonable application of . . . federal law” as determined by the Supreme Court.<sup>207</sup> Nonetheless, their job is to police recalcitrant state courts, not to offer new defenses for their errors. Certainly distorting the record to affirm state court decisions

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204. Chris McDaniel, *Texas Court Halts Execution of Man Who Didn’t Kill Anyone*, BUZZFEED (Aug. 19, 2016) [https://www.buzzfeed.com/chrimcdaniel/jeff-wood-texas-execution?utm\\_term=.fmqPJJLaK#.dxqdAExb](https://www.buzzfeed.com/chrimcdaniel/jeff-wood-texas-execution?utm_term=.fmqPJJLaK#.dxqdAExb).

205. *Id.*

206. U.S. CONST. amend. VIII.

207. 28 U.S.C. § 2254(d)(1) (2012).

is not the role that the framers of the Constitution—or even the drafters of AEDPA—had in mind.

We also rely on the federal courts to protect racial minorities by enforcing the provisions of the Equal Protection Clause of the Fourteenth Amendment.<sup>208</sup> Yet both the federal district court and the Fifth Circuit were silent concerning the racial implications of Dr. Coons's testimony. Without addressing the stereotyping that Dr. Coons employed to discredit the evidence of impaired adaptive functioning, both the district court and the Fifth Circuit determined that a state court decision relying on his opinion would be reasonable. However, Dr. Coons's opinion both employed a derogatory ethnic stereotype—that it was normal for persons in Ramiro's "cultural group" to be unable to cook food, count change, travel alone, perform simple jobs, read and write competently—and also used that stereotype to find that Ramiro was not impaired in his adaptive functioning. Therefore, the court reasoned, Ramiro was not intellectually disabled. Thus, the state court's reasoning allowed Texas to execute Ramiro based on stereotypes of his "cultural group" when it would not have been able to execute a white person displaying the same behavior.

Moreover, the Fifth Circuit went beyond passive, silent incorporation of the state court's discrimination on prong two. It created its own discriminatory justification for the state court's conclusion that Ramiro did not meet the prong one requirement of standard intellectual function. According to the Fifth Circuit, despite Ramiro's multiple valid IQ scores in the sixties (all administered in Spanish), and no valid score above seventy, the state court decided that the lack of more than one full-scale IQ score using *Mexican norms* meant he had not met the burden of proving substandard intellectual functioning. This reasoning, however, precludes *every* Mexican national from *Atkins* relief, because there is only one Mexican-normed IQ test. To permit the execution of Mexicans (and only Mexicans) because they have failed to produce results on tests *that do not exist* is also blatant racial discrimination.

Is it surprising that any reform at all is necessary to eradicate explicit<sup>209</sup> racial discrimination in the imposition of the death penalty? For half a century, racial classifications have been subjected to strict scrutiny, which requires that the law's use of a racial

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208. U.S. CONST. amend. XIV, § 1.

209. As I have argued elsewhere, discrimination in the imposition of the death penalty is rampant. See e.g., John Blume et al., *Post-McCleskey Racial Discrimination in Capital Cases*, 83 CORNELL L. REV. 1771, 1774–76 (1998). However, it is rarely explicit.

classification to be necessary to the accomplishment of a compelling state interest.<sup>210</sup> Even when racial classifications are “benign” or intended to compensate for past discrimination, it is now clear that strict scrutiny applies.<sup>211</sup> In this case, racial classifications were used against a member of a historically disadvantaged group in order to permit that person’s execution. For what compelling state interest could these explicit uses of race against a member of a disadvantaged group be necessary? Again, an established norm was violated, and again, the obvious enforcer should have been the Supreme Court.

### C. Not Important Enough for the Supreme Court?

Rule 10 of the Supreme Court Rules sets forth the considerations governing review on writs of certiorari, and each of the three listed reasons for granting the writ requires “an important federal question.”<sup>212</sup> Moreover, the rule cautions: “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”<sup>213</sup>

At one time, individual injustice troubled the Supreme Court enough that it was willing to grant certiorari to engage in “error correction” on behalf of death-sentenced inmates.<sup>214</sup> Those days are gone.<sup>215</sup>

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210. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

211. *Richmond v. Croson*, 488 U.S. 469, 490 (1989).

212. SUP. CT. R. 10.

213. *Id.*

214. See generally, Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91 (2006); see also, EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 276 (9th ed. 2007) (“It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.”).

215. Indeed, the pendulum has swung the other way. As another commentator noted, “the current Court’s disdain for error correction is selective. In a steady trickle of cases, the Court has been granting certiorari and summarily reversing decisions *favorable* to criminal defendants and habeas petitioners.” Robert Yablon, *Justice Sotomayor and the Supreme Court’s Certiorari Process*, 123 YALE L.J. FORUM 551, 562 n.49 (2014) (emphasis added).

During the 2012 Term, for instance, the Court granted certiorari and summarily reversed without argument in five cases. Three of these decisions wiped out rulings in favor of prisoners seeking habeas corpus. See *Ryan v. Schad*, 133 S. Ct. 2548 (2013); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013). None of them granted relief to a criminal defendant or prisoner. Likewise, six of the Court’s eleven summary reversals during the 2011 Term nullified rulings in favor of habeas petitioners and a seventh went against a family that sought damages for alleged police misconduct. See *Parker v. Matthews*, 132 S. Ct. 2148 (2012); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012); *Ryburn v. Huff*, 132 S. Ct. 987 (2012); *Hardy v. Cross*, 132 S. Ct. 490 (2011); *Bobby v. Dixon*, 132 S. Ct. 26 (2011); *Cavazos v. Smith*, 132 S. Ct. 2 (2011). Again, no

But here, willingness to engage in error correction was not a prerequisite for a vote for certiorari. Flouting of Supreme Court precedent creates a pressing need for certiorari federal question. Texas not only failed to apply Supreme Court precedent in this case, but also had decided a stream of cases applying the clearly impermissible *Briseno* factors to facilitate the execution of defendants categorically protected by *Atkins*. The Court did not have to take the word of Ramiro's lawyers on this point: the amicus brief of AAIDD and ARC, the premier organizations representing, respectively, the professional experts on and familial representatives of, the intellectually disabled, made that plain,<sup>216</sup> and they had argued the same in previous Texas *Briseno* factor cases.<sup>217</sup>

Why was it more important to grant certiorari on Florida's sub-average intellectual functioning deviation—which affected very few cases—than on an adaptive functioning case, which affects far more cases?<sup>218</sup> Less than a month after *Hall v. Florida* condemned a departure from professional consensus in the application of the intellectual functioning prong, the Fifth Circuit declared that *Hall* had no effect on Texas's gross deviations from professional consensus concerning the adaptive functioning prong.<sup>219</sup> Given the history of resistance to Supreme Court precedent on intellectual disability in capital cases, this stance should not have been a surprise.

Perhaps the Court has concluded that this explicit recalcitrance requires admonishment. After this article was written—but before it went to press—the Supreme Court did grant certiorari in a Texas *Briseno* rule case, *Moore v. Texas*.<sup>220</sup> *Moore*, however, has an idiosyncratically phrased question presented: “Whether it violates the Eighth Amendment . . . to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be

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relief was granted to a criminal defendant or prisoner. *See also*, Merits Opinions, SCOTUS-Blog (June 27, 2013), [http://scotusblog.com/wp-content/uploads/2013/06/merits-opinions\\_OT12.pdf](http://scotusblog.com/wp-content/uploads/2013/06/merits-opinions_OT12.pdf) (charting summary reversals by Term).

216. *See* Brief of Am. Assoc. on Intellectual and Developmental Disabilities & The Arc of the United States as Amici Curiae Supporting Petitioner, *Hernandez v. Stephens*, 537 F. App'x. 531 (5th Cir. 2013).

217. *See e.g.*, Brief of Am. Assoc. on Intellectual and Developmental Disabilities & The Arc of the United States as Amici Curiae Supporting Petitioner, *Lizcano v. Texas*, 136 S. Ct. 584 (2015).

218. Even outside of Texas, deviation on the second prong has been common. *See generally*, John H. Blume, Sheri L. Johnson & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009).

219. *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014).

220. 470 S.W.3d 481 (Tex. Crim. App. 2015).

executed.”<sup>221</sup> Why the Court chose this Texas case is unclear; one can only hope that the Court will focus not on the narrow question of current versus outdated medical standards, but turn its attention to the gross deviations from clinic consensus employed in all Texas determinations of the adaptive functioning prong. That question was worthy of review in Ramiro’s case, and remains important to resolve.

But gross deviation from the clinical definition adaptive functioning was not the only questions worthy of Supreme Court attention in *Hernandez v. Stephens*. How is racial discrimination in the administration of the death penalty not an important federal question? The use of racial and ethnic criteria in *Atkins* cases is neither subtle nor isolated.<sup>222</sup> The amicus brief from Mexico and from the Latino advocacy groups and law professors protested both the intellectual functioning and the adaptive functioning determinations as egregious race discrimination.<sup>223</sup> If nothing else, shouldn’t the Court’s attention to the broader implications of the case have been drawn by the amicus brief from conservative legal academics documenting and protesting the many other *Atkins* cases in which race has played a role? Yet there was no dissent from denial of certiorari from the purportedly colorblind wing of the Court, nor was there dissent from Justice Sotomayor, who is often far more willing to express her views on denials of certiorari.<sup>224</sup>

Because this is a Court purportedly committed to color blindness, it should use its limited time to address the most outrageous violations of that norm. Justice Stewart wrote in his concurrence in *McLaughlin v. Florida*, more than fifty years ago, “[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.

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221. Petition for a Writ of Certiorari at 1, *Moore v. Texas*, 136 S.Ct. 2407 (2016) (No. 15-797).

222. See generally Brief for Public Law Scholars, *supra* note 177.

223. See Brief of League for United Latin Am. Citizens et al., *supra* note 175.

224. See Yablon, *supra* note 215. Among the most prominent of her comments is her statement respecting the denial of certiorari in *Calhoun v. United States*, 133 S. Ct. 1136, 1138 (Sotomayor, J., dissenting from a denial of cert.) where a federal prosecutor made racially charged remarks. Justice Sotomayor agreed that the consideration of the comment was procedurally barred, but wrote to make plain that the vote to deny certiorari was procedurally based and did not reflect her view on the impropriety of the remarks, which she then set forth. *Id.* at 558–59. During her confirmation process, Justice Sotomayor was criticized for saying “I would hope that a wise Latina woman, with the richness of her experience, would more often than not reach a better conclusion than a white male.” *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary*, 111th Cong. 139 (2009). I have no criticism of that statement, but would have hoped for more of the “wise Latina” influence here.

Discrimination of that kind is invidious per se.”<sup>225</sup> Surely imposing the death penalty on the basis of race, like assigning criminality based upon race, is invidious per se. Surely the Supreme Court should say so.

Finally, if there really is not sufficient time for the Supreme Court to hear a case like this one, then, as both Justice Blackmun and Justice Stevens concluded after years of such cases,<sup>226</sup> abolition of the death penalty is the only adequate reform.

#### IV. REQUIESCANT IN PACE?

A requiem mass, offered for the soul of one who has died, ends in the Latin for “Rest in Peace.” After the expression of wrath in the *Dies Irae*, there is a plea for mercy, and then, the assurance of mercy.

If there is a merciful God, or mercy of any sort in the universe, Ramiro rests in peace. His life was hell on earth, and to the extent that his experiences and abilities allowed him to be remorseful, he was. At the end, lying on the table with the poison flowing into his veins, he said he was sorry, and that he loved his family.

As for Ramiro’s judges? May God have mercy on *their* souls.

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225. 379 U.S. 184, 198 (1964) (Stewart, J., concurring).

226. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death.”); *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) (“I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’”).