CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICKY LYNN LEWIS,
Petitioner,

-v-

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

This is a death penalty case. Mr. Lewis is scheduled to be executed in Texas, Thursday, April 9, 2013, at 6 p.m.

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Questions Presented

The state court conducted a contested *Atkins* hearing. The IQ threshold for mental retardation is 70; experts tested Lewis's IQ as low as 59. Facing an *Atkins* finding, prosecutors hired Dr. Susana Rosin, who purchased a new IQ test, tried it on her husband and kids, then Lewis, and obtained a score of 79, higher than any reliable instrument had ever determined. Dr. Rosin admitted: 1) she had never administered this new test in a clinical setting and 2) numerous deviations from protocol administering Lewis's test, which the prosecutors and state court confirm, and the Fifth Circuit acknowledges. Embracing the 79 score, discounting contrary ones, and applying certain Court of Criminal Appeals non-scientific criteria used to determine adaptive behavior deficits, the state court found Lewis not to be subaverage intellectually functioning and therefore not mentally retarded.

1. Whether the Fifth Circuit properly merged into a single test Antiterrorism and Effective Death Penalty Act section 2254(d)'s unreasonableness requirement with section 2254(e)'s clear and convincing evidence burden, thereby requiring inmates to prove both (a) that the state court decisions and fact findings are unreasonable (which should end discussion), and also (b) unreasonable by clear and convincing evidence, notwithstanding that the inmate is prohibited by state procedures from introducing new evidence post-state habeas findings to meet that burden, and by *Pinholster v. Cullen* from doing so in federal court.

2. Whether certiorari should be granted to resolve a five-way split among seven different Circuit Courts of Appeals as to the application of AEDPA section

2254(d)(2)'s unreasonableness requirement and section 2254(e)(1)'s clear and convincing evidence burden in situations like ours, where the inmate received a state habeas hearing, but was denied introduction of evidence in federal court by *Pinholster*.

3. Whether certiorari should be granted because the Texas Court of Criminal Appeals *Atkins*-enacting decision in *Briseñeo v. State* imposes non-scientific criteria that permit execution of certain sub-classes of mentally retarded inmates.

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Texas death row prisoner Rickey Lynn Lewis asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The November 20, 2012 opinion of the U.S. Court of Appeals for the Fifth Circuit appears in Appendix A. *See Ricky L. Lewis v. Thaler,* No. 10-70031 (5th Cir. Nov. 20, 2012). The district court's opinion appears in Appendix B. *See Lewis v. Thaler,* No. 5:05-cv-70 (E.D. Tex. October 9, 2010). The district court's final judgment denying relief appears in Appendix C. The order of the district court granting a certificate of appealability ("COA") appears in Appendix D (E.D. Tex. December 27, 2010). The state court's Findings of Fact and Conclusions of Law are found in Appendix E. (114th District Court of Smith County, Texas February 14, 2005).

JURISDICTION

The Fifth Circuit Court of Appeals rendered its decision November 20, 2012. This petition was timely filed. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals possessed jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION INVOLVED

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS INVOLVED

The Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. §2254, states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d) & (e) (2010).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in State Court

Following a September 1990 murder, Rickey Lynn Lewis was convicted April 26, 1994 in Tyler of capital murder during a burglary and aggravated sexual assault and sentenced to death. Finding that the court applied the wrong sentencing statute, the Texas Court of Criminal Appeals ("CCA") upheld the conviction but remanded for re-sentencing. *Lewis v. State*, No. 71,887 (Tex. Crim. App. Jun. 19, 1996).

Lewis was again sentenced to death, which was affirmed by the CCA. *Lewis v. State*, No. 71,887 (Jun. 23, 1999). Lewis did not file for writ of certiorari. The CCA denied Lewis's first state application for habeas relief. *Ex parte Lewis*, No. 44,725 (Tex. Crim. App. Apr. 19, 2000) (unpubl.).

B. Course of Proceedings and Disposition in Federal Court

Lewis timely sought federal habeas relief. *Lewis v. Johnson*, No. 5:01CV105 (E.D. Tex.). In 2002, the district court denied relief, *Lewis v. Cockrell*, 5:01CV105 (E.D. Tex. Jun. 20, 2002) (unpublished), which the Fifth Circuit affirmed, *Lewis v. Cockrell*, No. 02-40985 (5th Cir. Jan. 22, 2003) (unpublished). The Supreme Court denied certiorari. *Lewis v. Texas*, 540 U.S. 841 (2003).

C. Additional Proceedings in State Court

When in 2002 the Supreme Court exempted mentally retarded inmates from execution, Lewis filed a successive state habeas application in the trial court, seeking relief under *Atkins v. Virginia*, asserting mental retardation. On July 24,

2003, the CCA stayed Lewis's execution and ordered a hearing. *Ex parte Lewis*, No. 44,725-02 (Tex. Crim. App. July 24, 2003) (unpublished).

Following an *Atkins* hearing, on February 14, 2005, the trial court signed findings of fact and conclusions of law recommending denial of relief. *See* State FFCL; Appendix E. The CCA agreed and denied relief on the merits of the *Atkins* claim June 29, 2005. *Ex parte Lewis*, No. 44,725-02 (Tex. Crim. App. June 29, 2005) (unpub.).

D. Additional Federal Proceedings

Concerned about the AEDPA limitations period, Lewis sought and received from the Fifth Circuit April 20, 2005 leave to file a successive federal habeas petition on his *Atkins* claim, conditioned on anticipated denial of relief by the CCA. *See In re: Rickey Lynn Lewis*, No. 05-40484 (5th Cir. Apr. 15, 2005) (unpublished order). Lewis filed his federal writ application effective April 20, 2005. *Lewis v. Dretke*, No. 5:05-CV-70 (E.D. Tex.) When the CCA denied relief June 29, 2005, the U.S. District Court stayed Lewis's execution.

June 22, 2007, the district court found that Lewis failed to prove he was mentally retarded and denied Atkins relief, but granted a COA. *Lewis v. Quarterman*, No. 5:05CV70 (E.D. Tex. June 22, 2007) (unpub.).

Following oral argument, the Fifth Circuit remanded for consideration of Lewis's affidavit of Dr. Gale Roid, the sole author of the Stanford-Binet IQ test administered— mis-administered according to Lewis — by the state psychologist

(Dr. Rosin) on whom the state trial judge chiefly based her denial of Lewis's Atkins claim. *Lewis v.*

Quarterman, 541 F. 3d 280 (5th. Cir. 2008).

The district court reconsidered the evidence, denied *Atkins* relief, but again granted a COA. *Lewis v. Thaler*, No. 5:05CV70 (E.D. Tex. Oct. 19, 2010 & Dec. 27, 2010) (Appendices C and D).

On November 20, 2012, the Fifth Circuit affirmed. *Lewis v. Thaler*, 701 F.3d 783 (5th Cir. 2012) (Appendix A).

STATEMENT OF FACTS AND OUR ANALYSIS

A. There are no circumstances in which a state court could reasonably rely on Dr. Rosin's IQ score of 79 –- if one accepts the Texas Court of Criminal Appeals' Atkins-implementing decision in *Breseño* as limiting evidence relevant to the first retardation element (general subaverage intellectual functioning) to properly conducted forensic IQ testing.

There are no circumstances in which a state court could reasonably rely on Dr. Rosin's IQ score of 79 — more so if one restricts analysis of the subaverage intellectual functioning element of retardation to the only evidence that counts: properly conducted forensic IQ tests. Given that the state's experts admit that Lewis has established the other two elements of retardation (adaptive deficits and pre-18 onset), this score is the only barrier to a mental retardation finding, if one accepts the Texas Court of Criminal Appeals' *Atkins*-implementing decision in *Breseño* as defining the universe of evidence relevant to remaining element (sub-

average general intellectual functioning) to consist of validly conducted forensic IQ tests.

Even the state judge was forced to acknowledge that Dr. Rosin's testing procedures were seriously flawed.

When Lewis tested an IQ score of 59, worried prosecutors hired Dr. Susana A. Rosin to try again. On October 25, 2004, at the Beaumont jail, she administered the Stanford-Binet Intelligence Scales, Fifth Edition (SB 5), known as the Stanford-Binet V.[1] This is the most recent iteration of the well-known Stanford-Binet IQ test, with significant changes in norms, testing and protocol. She reported Lewis's IQ at a remarkable 79,[2] just out of mental retardation range, and much higher than *every other* reliable indicator of Lewis's cognitive functioning.[3]

Given: (1) that Dr. Martin conducted the only other contemporaneous testing on Lewis and obtained a 59 IQ, and (2) that Dr. Rosin agreed that Lewis possessed requisite pre-age-18 deficits in adaptive functioning, SHR 2:78, 80, 81, the central evidence standing in the way of mental retardation is Rosin's 79 IQ score. (Rosin

[1] The Stanford Binet V is a lengthy publication with various checklists and aids for application. A description of the publication and its utility appears at: http://www.assess.nelson.com/test-ind/stan-b5.html and at http://www.riverpub.com/products/sb5/details.html. The entire SBV kit costs between $1,000 and $1,900. Because of this cost it was not possible for Lewis to acquire a copy for the appellate record. The record, however, contains Rosin's raw test results, SHR ("State Habeas Record") SX 32, and the SB 5 Technical Manual, SHR SX 33.

[2] *See* 7 SHR at PX 27 (Rosin SB5 test documents); 8 SHR at SX 8 (Rosin's report).

[3] The Director points to a series of prison administered IQ scores from 67 to 104, but, as will be discussed if certiorari is granted, Lewis denies that these scores have any probative value since the record is silent as to: (1) the testing instrument given, (2) whether it was individually administered and standardized as contemplated by the *Atkins* opinion, or (3) as to the date the tests were normed, thereby rendering it impossible to assess the impact of test obsolescence on the score obtained.

cited poor employment history and failure in school, SHR 2:78, 80, which proved the *Atkins* element of adaptive deficits.)

Grossly understating the problem, the state judge conceded that Dr. Rosin "did not exactly follow all the instructions for the application of the assessment instrument." State FFCL at 13; *Appendix E*. The state judge should have stopped there. The first step in finding unreasonable *Atkins* application here is to recognize the state judge's failure, or refusal, to acknowledge the significance of Dr. Rosin's mis-administration of the Stanford Binet V, which rendered *any* reliance on Dr. Rosin's testimony objectively unreasonable. This classic junk science must be rejected.

The state prosecutors championed Dr. Rosin's report to the state judge, who placed exceptional weight on Dr. Rosin's presumed unbiased credibility and skill. The state judge wrote:

> 2. She [Dr. Rosin] is familiar with and uses a variety of instruments for psychological testing including the WAIS and Stanford-Binet.
>
> 4. She testified that her testing has Applicant's IQ as borderline intelligence but that does not encompass mental retardation.
>
> 35. The Court finds that the test score of 79 does not overstate the actual intellectual function of the Applicant.
>
> State FFCL at 24, 34; Appendix E.

But as Dr. Garnett's testimony proves and Dr. Roid's *Pinholster*-excluded affidavit confirms, these three state findings are flatly untrue; reliance by a state judge on untrue facts is patently unreasonable. *See* 3 SHR 222.

When Dr. Rosin's evaluation of Lewis was re-scored by Dr. Garnett, who found an IQ score of 75 more accurate (using Rosin's own raw testing data), the state judge unreasonably side-stepped this troublesome warning sign, and likewise found that because Dr. Garnett failed to review a stack of irrelevant case offense documents *he was biased* which "diminishes his credibility in his opinions and evaluations." (FFCL 11 & 12; Appendix E. Remarkably, the trial judge stated that "[n]o witness or evidence definitively diagnosed [Petitioner] as mentally retarded," ignoring Dr. Garnett's testimony to the contrary. *See* 3 SHR 29.

The state judge, encouraged by the prosecutors, attempted to paper over the deficiencies in Dr. Rosin's testing procedures:

> 5. He [Dr. Garnett, a Defense psychologist] re-scored Dr. Rosin tests and found errors in scoring. His re-score was 75 which is within the range of mental retardation. He believes the full-range IQ score of 79 on the test given by Dr. Rosin has low validity because of his noted overt mistakes made in scoring, but he cannot say it is an invalid score.
>
> State FFCL at 18; *Appendix E.*

This phrase, "but he cannot say it is an invalid score," was a weak effort by the state judge to minimize the obvious defects in Rosin's high IQ score, on which the judge later pinned *Atkins* denial. In other words, faced with an inflated IQ score which even the judge acknowledged was produced by defective procedures, and confronted with a low IQ score *not* produced by defective procedures, the state judge relied upon the defective higher score, *unless* Lewis's expert would declare the score flatly invalid.

Worse, *the abbreviated IQ based on Rosin's data was 58, nearly identical to Dr. Martin's 59.* There are two routing tests (mini-tests) contained within the SB 5, which are administered first and may be scored separately. These are called abbreviated IQ tests. They are self-checks used to verify the accuracy of the administration of the SB 5. Using *Dr. Rosin's data,* Dr. Garnett easily calculated Lewis's abbreviated IQ score, *which turned out to be 58.* 2 SHR 189; 4 SHR 145-46; SHR SX 32 (data). That Rosin's ultimate score of 79 was 21 points higher than her abbreviated score should have alerted Rosin that there were serious problems with her administration of the SB 5, precisely what the abbreviated test was designed to do. Either Rosin did not perform this self-check, or she did not understand the significance of it, or if she did, she ignored it, all of which demonstrates that relying on her 79 score was unreasonable. 4 SHR 149.

Read entirely, Dr. Garnett's testimony about the "validity" of Dr. Rosin's high IQ score establishes that Rosin's administration of the test was compromised, so that her results have low validity. *See* 3 SHR 222. Read in context, the most reasonable interpretation of Dr. Garnett's testimony is that he could not say that Rosin's high IQ score was wholly unfounded, but it was without adequate or proper foundation — in other words, junk science.

Dr. Rosin's mistakes in administering the SB 5 strike at the heart of the Director's arguments. The Director has embraced what it describes as *the systematic and objective methodology* of Dr. Rosin to support her high IQ score and the state court's *Atkins* denial. For instance, the Director embraces Dr. Rosin's

testing to suggest that Lewis was malingering, commenting that "Dr. Rosin (whom the court found more credible) disagreed with Dr. Martin's [defense expert] method for detecting malingering." (Director Dist. Crt. Resp. Brf. at 23-24.) The Director argues that "Dr. Rosin testified it was her understanding that Dr. Martin assessed malingering just by looking at Lewis whereas she believed *objective* testing provided a better method." (Director's Dist. Crt. Resp. Brf. at 24) (emphasis added).

Regardless of methodology, however, even Dr. Rosin concluded that Lewis was not malingering on her test. 2 SHR 265. ("Q.: Did you detect any evidence of malingering or dissimilation on the part of Mr. Lewis? [Dr. Rosin]: No. Q.: Do you feel like he put forth his best efforts? [Dr. Rosin]: Yes."); *also* 5 SHR 27 ("I did not have any evidence of malingering.").

B. Dr. Rosin was not qualified to administer the SB 5 at the time she gave it to Rickey Lewis.

Dr. Rosin was not qualified by training or experience to administer the Stanford-Binet V. She purchased her copy of the test about two months before the hearing. (2 SHR 38.) To learn the complicated exam, she practiced on her husband and two children. (2 SHR 38.) Lewis was her first attempt to use the Stanford-Binet V forensically. (2 SHR 38.) She conceded that the SB 5's accuracy required her to follow the exam protocols scrupulously because the sophisticated model is calibrated over a large population and minor deviations from protocols will skew the results. (2 SHR 39-40.) She agreed that if she did not follow the steps and precise words when asking Lewis test questions, then she deviated from the required technique. (2 SHR 63.) Moreover, she conceded that whether Lewis was mentally retarded depends

entirely on the validity of procedures she followed to administer the SB 5. (2 SHR 81.)[4]

In federal court, Dr. Gale Roid, the well-known author of the Stanford Binet V, pinpointed a string of critical mistakes by Rosin in her use of the Stanford-Binet which affected her results. He believes her 79 score should be discarded, and that a proper administration would have produced a lower score, as low as 69. In light of *Pinholster*, his affidavit is barred from consideration and we do not contest it now, but reserve the right to do so if *Pinholster*'s evidentiary barrier is altered.

REASONS FOR GRANTING THE WRIT

First Reason:

The Fifth Circuit's analysis compels the conclusion that even an objectively unfair or unreasonable finding of fact (in this case, concerning sub-average intellectual functioning) is functionally insulated from habeas review.

Specifically, section 2254(d)(2) provides that a petitioner is entitled to relief if the state court's determinations of fact are unreasonable. Section (e)(1) provides that state court determinations of fact are entitled to a presumption of correctness that can only be overcome by clear and convincing evidence. By grafting the clear

[4] *See* SB 5, General Testing Guidelines, PX 15 ("Because the interpretation of the SB5 normative scores, such as the Full Scale IQ, are based on the expectation that the examiner uses standardized procedures to administer the instrument, the examiner should follow the directions for administering and scoring each portion of the test carefully. ***If the examiner deviates from standardized procedures in the Item Books, he or she risks invalidating the normative interpretation of the battery.")*** (emphasis added).

and convincing evidence standard of (e)(1) onto (d)(2), and by transferring to intellectual capacity analysis the list of factors identified by the CCA for adaptive behavior analysis, the Fifth Circuit was able to write that Lewis failed to rebut the state court's finding of credibility notwithstanding the fact that both the state court and the Fifth Circuit recognized that the expert who scored Lewis's IQ at 79 failed to follow established protocols, rendering the score useless for forensic purposes.

Second Reason:

A striking Circuit split has developed as to the relationship between sections 2254(d)(2) and (e)(1). This Court chose not to address this issue in *Wood v. Allen*, 130 S. Ct. 841 (2010). Since then, however, the confusion among the various Courts of Appeals has reached a point that it cries out for Supreme Court clarification. Eight Circuit Courts of Appeals have created five different standards for determining whether an inmate overcomes section 2254(d) and (e).

Lewis would not be facing execution in the First, Seventh, or Ninth Circuits, and would likely not be facing execution if he lived in the Third, Fourth, Eighth, or Eleventh Circuits.

Third Reason:

Concerns about the *Briseño* factors' compliance with the *Atkins* mandate are at least as significant as those the Court previously addressed regarding the Texas implementation of the Court's *Penry* and *Ford* constitutional mandates.

If the state statutes before this Court in *Atkins* had defined mental retardation in terms of different levels or classes, this Court would have had

difficulty discerning a common commitment to sparing "the mentally retarded" from execution. *See* 536 U.S. at 321 ("[D]eath is not a suitable punishment for a mentally retarded criminal."). This Court did, however, identify a national consensus against executing all offenders with mental retardation based on a consensus definition of mental retardation--which captures individuals with a range of impairment. *Id.* at 354 n.3.

Justice Scalia's dissent in *Atkins* is premised on the correct conclusion that the Court announced "a categorical rule" that applies to all persons with mental retardation whether the impairment is mild, moderate, or severe. 536 U.S. at 350 (Scalia, J. dissenting). While he disagreed with the outcome, Justice Scalia recognized that *Atkins*' holding is clear in that "***all*** executions of the mentally retarded" means "all." *See, e.g., id.* at 342 (emphasis retained). Texas, however, has created a system by which some are executed.

I. THE FIFTH CIRCUIT GRAFTED ONTO SECTION 2254(D)(2) THE CLEAR AND CONVINCING STANDARD OF SECTION (E)(1)

Four assertions from the *Lewis* opinion demonstrate how the Fifth Circuit merged subsections (d) and (e) together to form a barrier that Lewis can only cross by showing that the state court's "finding" that Lewis is not mentally retarded is wrong by clear and convincing evidence, and that the state court's decision that Lewis is not mentally retarded is unreasonable, which is an impossible threshold once the state conducts a contested evidentiary hearing, and state procedures allow no further evidence to challenge the state court's findings, and federal evidence is barred by *Pinholster*:

> In short, for Lewis to prevail on a claim of factual error, he must both (1) rebut the state court's finding that Lewis failed to show subaverage intellectual functioning with clear and convincing evidence, § 2254(e)(1), and show the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2).
>
> 701 F.3d, at 789.
>
> Section 2254 also requires that determinations of fact issued by state courts are 'presumed to be correct,' and that they not be disturbed unless an applicant rebuts the presumption with clear and convincing evidence. § 2254(e)(1). '[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state- court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 1 (2003) (citing § 2254(d)(2)).
>
> *Id*. at 791-92.
>
> The state court's finding of credibility is entitled to a presumption of correctness that Lewis had the burden of rebutting with clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and Lewis failed to do so.
>
> *Id*. at 795.
>
> In light of the substantial corroborating evidence, we cannot hold Lewis rebutted the trial court's finding that Lewis does not have significantly subaverage intelligence with 'clear and convincing evidence,' nor can we hold that the trial court's decision was objectively unreasonable in light of the evidence presented in the state-court proceeding.
>
> *Id*.

Lewis recognizes that "[i]f this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Lewis also recognizes that "[a]gainst the backdrop of dueling expert opinions, it must be remembered that the habeas writ exists only for constitutional violations."

Maldonado v. Thaler, 662 F. Supp. 2d 684, 704-05 (S.D. Tex. 2009) (citation omitted), aff'd, 625 F.3d 229 (5th Cir. 2010).

The Fifth Circuit's logic in *Lewis* stretches *Richeter* past its breaking point. Unlike the situation averred to in *Maldonado*, Lewis's case does not present "dueling expert opinions"; several experts concluded that Lewis's IQ was far below 70 and another expert came up with a higher number through use of a test both the state court and the Fifth Circuit recognize she performed improperly.

But under the reasoning in *Lewis*, anytime a state district judge makes adverse findings in a contested state hearing, the judgment will be effectively unreviewable on federal habeas. By definition, once the inmate introduces evidence at a contested state habeas hearing, state procedures bar him from later introducing new evidence to overcome the adverse state determinations by clear and convincing evidence, and *Pinholster* bars him from doing so in federal court. If he is required by 2254(d) to prove first that the adverse determinations are unreasonable, why is he next required to prove that the unreasonable determinations are unreasonable by a 2254(e) clear and convincing standard?

II. THE FIFTH CIRCUIT MANUFACTURED AN EXTRA-*BRISEÑO* FACTOR LACKING IN ANY SCIENTIFIC BASIS

A. Dichotomy Between Forensic IQ Testing (Subaverage General Intellectual Functioning) and Adaptive Functioning

The Texas Court of Criminal Appeals *Atkins*-implementing decision in *Briseno* embraced the AAMR definition of retardation:

> Under the AAMR definition, mental retardation is a disability characterized by: (1) "significantly subaverage" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

We believe, and we think the text of *Briseño* bears this out, that the CCA clearly established that the first element, subaverage intellectual deficiency, is decided solely by a contest of experts using validly conducted forensic IQ tests:

> [T]here was not much dispute about applicant's IQ level. He had been tested in June, 2002, when he was 45, by applicant's expert and obtained a full-scale IQ score of 72. He was tested by the State's expert approximately one year later and obtained a full-scale IQ score of 74.

Id. at 14.

Further, the structure of *Briseño*'s analysis is important, setting out a clear order of operations in the retardation analysis. In all cases, the element of subaverage general intellectual functioning must be considered before the element adaptive behavior. Immediately after quoting the AAMR definition, the CCA quoted the definition from the Texas Health and Safety Code:

> Mental retardation means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

Id. at 7 (quoting TEX. HEALTH & SAFETY CODE § 591.003(13)).

Immediately thereafter, the CCA elaborated on intellectual functioning in footnote 24; adaptive behavior is defined in footnote 25. *Id*. at 7.

Applying these principles to Brise*ño*'s situation, the CCA devoted an entire section under the heading, "Applicant did not prove, by a preponderance of the evidence, that he has significantly subaverage general intellectual functioning." *Id*. at 14 (Part III.A.). Only after this analysis did the CCA turn to the second element and conclude that "Applicant did not prove, by a preponderance of the evidence, that he had significant limitations in adaptive functioning." *Id*. at 14 (Section III.B).

The bottom line is that all of the controversial additional factors, which we contend are unscientific ("the adaptive behavior criteria and exceedingly subjective", *id*. at 8), are contained in subsequent structured sections of the opinion, and are segregated ***only*** for analysis of the adaptive deficient element.

This distinction is important to Lewis's situation because of the unusual procedural posture of his case. The certificate of appealability is limited to the first element, subaverage intellectual functioning. After finding that Lewis failed to prove the first element, the district court ceased analysis, denied relief, and granted COA, without considering the other two elements, probably in part because the state's experts conceded those. In its Fifth Circuit brief, the Director reminded that the sole issue therefore was whether or not Lewis proved the first element and overcame the AEDPA barriers. Consequently, in this case, all discussion of the adaptive behavior criteria is irrelevant if the Court accepts our contention, with which the Fifth Circuit disagrees, that *Briseño* (and the scientific community) limits success of the first element to valid IQ test analysis — nothing else. The Fifth

Circuit's position is that *Briseño* allows much, much more to be considered for determining subaverage intellectual functioning, pointing to the laundry list of *Briseño*'s adaptive behavior criteria, contended by us to be largely unscientific. -

B. The Fifth Circuit Dubbed *Briseno* "Ambiguous" In Order To Skip Past the First Element and Consider Other Factors the Fifth Circuit Itself Conceded Were Not At Issue.

At the outset of the *Lewis* opinion, the Fifth Circuit framed the issue as follows:

> [W] ask ***only*** whether the State court's determination that Petitioner did not establish by a preponderance of the evidence that he had significantly ***subaverage general intellectual functioning*** was unreasonable.

Lewis, 701 F.3d, at 787 (emphasis added).

Despite having initially framed the issue on appeal as being confined to the first element in *Briseño*'s dichotomy, the Fifth Circuit chose to ignore the distinction between forensic IQ testing and adaptive functioning by calling *Briseno* "ambiguous:"

> The [CCA] was ***ambiguous*** as to whether these factors applied only to the 'adaptive deficit' inquiry or also to the two other prongs of the analysis.

Id., at 792-793 (emphasis added).

Having announced an ambiguity that the CCA did not express, and about which the CCA has never clarified (much less confirmed) in any opinion in the nine years since *Breseño* issued, the Fifth Circuit made the leaped that "[t]he *Briseno* factors are therefore applicable to **all three prongs of Texas's *Atkins* analysis**."

Id at 793. (emphasis added). In other words, the Fifth Circuit has taken it upon itself to rewrite the CCA's *Breseño* opinion and to extirpate the crisp distinction between IQ and adaptive function which derives from the AAMR and Texas Health and Safety Code definitions which were quoted and examined in detail.

The bottom line is that the Fifth Circuit chose to import facts impinging exclusively on the adaptive functioning element in order to paper over the junk science that infected the state court's methodology concerning Lewis's intellectual functioning.

III. THE FIFTH CIRCUIT CALLED DR. ROSIN'S JUDGMENT "QUESTIONABLE" AND PROVIDED A LIST OF HER SELF-CONFESSED MISTAKES

There is no such thing as a valid forensic IQ test obtained under improper protocol procedures. Incredibly, the Fifth Circuit conceded Dr. Rosin's manifold mistakes. "In her trial testimony, Dr. Rosin admitted to making several errors during her administration of the exam." *Id*. at 794 n.3. "Dr. Rosin's judgment in scoring other questions was at least questionable." *Id*.

Dr. Rosin's mistakes were far from a new revelation in the Fifth Circuit. The district court noted:

> Dr. Rosin admitted that she "did not exactly follow all the instructions" in giving Lewis the second test…
>
> Dr. Richard Garnett testified that Dr. Rosin made errors in scoring the test and he (Garnett) would have rated Lewis's IQ at 76…
>
> Appendix A.

In the exact same vein, the state judge observed, Rosin "did not exactly follow all the instructions for the application of the assessment instrument." State FFCL at 13; Appendix E.

And as discussed, Dr. Rosin herself conceded, among other errors, that the SB 5's accuracy required her to follow the exam protocols scrupulously because the sophisticated model is calibrated over a large population and minor deviations from protocols will skew the results. (2 SHR 39-40, 63, 81.)

IV. A STRIKING CIRCUIT SPLIT HAS DEVELOPED

A. *Wood v. Allen* Declined to Resolve the Issue

This Court was expected to address a conflict that had developed among the circuit courts regarding § 2254(d)(2) and (e)(1) in *Wood v. Allen*. 130 S. Ct. 841 (2010); *see also Fields v. Thaler*, 588 F.3d 270, 279 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 235 (2010) (discussing the split among the circuit courts).

The inmate in *Wood* argued that in a case based only on evidence that was presented in state court, the habeas court should apply § 2254(d)(2), and that § 2254(e)(1) applies only in cases involving evidence that was not presented in state court. The state argued that § 2254(e)(1) applies in every case, irrespective of whether the evidence was presented in state court. This Court, however, declined to decide the issue and reiterated that the relationship between these two provisions remains an open question:

> [W]e granted review of a question that has divided the Courts of Appeals: whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the

> decision was based was "unreasonable," or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence
>
> *Woods*, at 848.
>
> Notwithstanding statements we have made about the relationship between §§ 2254(d)(2) and (e)(1) in cases that did not squarely present the issue, … we have explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2). The parties and their amici have offered a variety of ways to read the relationship between these two provisions. Although we granted certiorari to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question, because our view of the reasonableness of the state court's factual determination in this case does not turn on any interpretive difference regarding the relationship between these provisions. For present purposes, we assume for the sake of argument that the factual determination at issue should be reviewed, as Wood urges, only under § 2254(d)(2) and not under § 2254(e)(1).
>
> *Id.* at 848-49.

B. The Fifth Circuit Has Erased Any Distinction Between (d)(2) and (e)(1)

The Fifth Circuit's holding in *Lewis* imported theory enunciated a year earlier in *Blue v. Thaler*, 665 F.3d 647 (5th Cir. 2011), asserting (without justification or explanation) that clear and convincing evidence is subsumed within an unreasonableness determination:

> The clear-and-convincing evidence standard of § 2254(e)(1)—which is 'arguably more deferential' to the state court than is the unreasonable-determination standard of § 2254(d)(2)—pertains only to a state court's determinations of particular factual issues, while § 2254(d)(2) pertains to the state court's decision as a whole.
>
> *Id.* at 654.

If this opinion is allowed to stand, no *Atkins* petitioner in the Fifth Circuit will be ever able to successfully challenge a state court's determination that he has mentality above the boundary for retardation. Henceforth, the Fifth Circuit will require petitioners to establish that the state court's decision as whole was wrong by clear and convincing evidence; but because the state court chose to discredit whatever the petitioner adduced at the hearing any evidence such a petitioner could propound on habeas review will necessarily be regarded as falling short of the standard of clear and convincing. The logic of *Lewis* suffers the fallacy of infinite regress, such that *Atkins* will be rendered null in the Circuit which executes the most number of people.

Of all the Circuit opinions overviewed in the sections immediately below, the Fifth Circuit's is far and away the most extreme.

C. By Contrast, the Third Circuit Allows Its District Courts to Vacillate Between Which Standard to Apply

The Third Circuit declined to adopt a rigid approach to habeas review of state fact-finding, instead allowing its district courts to decide on which standard to apply on an *ad hoc* basis.

> In some circumstances, a federal court may wish to consider subsidiary challenges to individual fact-finding in the first instance applying the presumption of correctness as instructed by (e)(1). Then, after deciding these challenges, the court will view the record under (d)(2) in light of its subsidiary decisions on the individual challenges. In other instances, a federal court could conclude that even if petitioner prevailed on all of his individual factual challenges notwithstanding the (e)(1) presumption of their correctness, the remaining record might still uphold the state court's decision under the overarching standard of (d)(2). In that event, presumably the (d)(2) inquiry would

> come first. Whatever the order of inquiry, however, two points are paramount. First, both (d)(2) and (e)(1) express the same fundamental principle of deference to state court findings. Second, before the writ can be granted, petitioner must show an unreasonable determination—under (d)(2)—in light of the entire record in the original state court trial.
>
> *Lambert v. Blackwell*, 387 F.3d 210, 236 n.19 (3d Cir. 2004).

D. The Fourth Circuit Tolerates A Vague 'Interrelation' Between the Two Subsections

The Fourth Circuit goes one step farther than the Third Circuit, finding that the two subsections interrelate but affording its district courts somewhat less latitude (in favor of the state rather than the petitioners). More specifically, clear and convincing evidence "has a place in § 2254(d)(2) review" but a petitioner does not know how much of a place *a priori*. *Lenz v. Washington*, 444 F.3d 295, 300–01 (4th Cir. 2006) (applying § 2254(e)(1) in the context of determining whether relief was appropriate under § 2254(d)(2)).

See also Elmore v. Ozmint, 661 F.3d 783, 850 (4th Cir. 2011) ("As our Court has interpreted the two provisions, the § 2254(e)(1) standard has a place in § 2254(d)(2) review: We consider whether the state PCR court based its decisions 'on an objectively unreasonable factual determination in view of the evidence before it, bearing in mind that factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.'") (*quoting Baum v. Rushton*, 572 F.3d 198, 210 (4th Cir. 2009), *cert. denied,* 130 S. Ct. 1704, 176 L. Ed. 2d 193 (2010) (internal quotation marks omitted)).

E. The Eighth Circuit Defines the Interrelationship Somewhat More Clearly Than The Fourth Circuit

In the Eighth Circuit, "'[b]asic, primary, or historical facts' in the state court record are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1)," *Collier v. Norris*, 485 F.3d 415, 422–23 (8th Cir. 2007) and that the state court's factual adjudication is governed by § 2254(d)(2), leading the circuit to express the standard as interconnected:

> Because [the government] concedes that both of these factual statements were erroneous, we will assume that Collier has overcome the presumption of their correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). Notwithstanding this assumption, it does not necessarily follow that the state court adjudication was based on an unreasonable determination of facts because subsection (d)(2) instructs federal courts to evaluate the reasonableness of the state court decision 'in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2))

Id. (footnotes omitted); *accord Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006) (federal habeas relief is available only "if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' 28 U.S.C. § 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support").

F. The First and Seventh Circuits Maintain A Crisp Distinction Between Subsections (d)(2) and (e)(1)

The First Circuit has declined to resolve the relationship between these two provisions definitively, but has stated that for the time being it will "follow the lead in *Miller-El*" and apply § 2254(e)(1) to a state court's individual factfindings and §

2254(d)(2) to the granting of habeas relief itself. *Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007).

Similarly, the Seventh Circuit has indicated that underlying factual issues are judged under § 2254(e)(1)—the petitioner must show that the state court determined the underlying factual issue against the clear and convincing weight of the evidence—while the state court's ultimate factual determination is reviewed for reasonableness under 28 U.S.C.A. § 2254(d)(2). *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003); *Harding v. Walls*, 300 F.3d 824, 828 (7th Cir. 2002); *see also Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008), cert. denied, 129 S. Ct. 2890, 174 L. Ed. 2d 581 (2009) (§ 2254(d)(2) can be satisfied by showing, under § 2254(e)(1), that a state-court decision "rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision "is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable") (internal quotation marks omitted).

G. Ninth Circuit Reads (d)(2) In the Context of "Intrinsic" Challenges

The Ninth Circuit has held that the "unreasonable determination" standard of § 2254(d)(2) applies to *intrinsic* challenges to state-court findings—situations where the inmate challenges the state court's findings based *entirely on the state record*—or claims that the process employed by the state court was defective. *Taylor v. Maddox*, 366 F.3d 992, 999–1000-01 (9th Cir. 2004); *see also Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004).

Intrinsic challenges to state-court findings pursuant to the "unreasonable determination" standard may arise in a number of ways, such as where the finding is unsupported by sufficient evidence; the state court should have made a finding of fact but neglected to do so the state court made a finding of fact under a misapprehension of the correct legal standard; and the fact-finding process itself was defective. *Maddox*, at 999, 1000-1001.

In *Edwards v. Lamarque*, the Ninth Circuit stated that it is unclear whether the Supreme Court's "passing recitation of the AEDPA standard" undermines the holding of *Taylor v. Maddox*. 439 F.3d 504, 518 n.1 (9th Cir. 2005), *on reh'g en banc*, 475 F.3d 1121 (9th Cir. 2007) (Rymer, J., dissenting), *reh'g en banc granted*, 455 F.3d 973 (9th Cir. 2006) *and on reh'g en banc*, 475 F.3d 1121 (9th Cir. 2007). *But see Williams v. Warden,* 422 F.3d 1006 (9th Cir. 2005) (applying § 2254(e)(1) to state court factual finding based on record evidence [verdict forms]).

H. Eleventh Circuit "Struggles" With These Competing Standards

The Eleventh Circuit has recently explained that "courts have struggled to interpret how these abutting standards interact in the context of fact-based challenges to state court adjudications." *Cave v. Secretary*, 638 F.3d 739, 745 (11th Cir. 2011) cert. denied, 132 S.Ct. 473 (2011). The Eleventh Circuit seems to embraced the confusion, concluding that the "distinction between these two standards is unnecessary to decide the case" while avoiding for another day deciding the question "claims under (d)(2) must use the standard set out in (e)[(1)]," *id*. (presenting these two questions in dichotomous relationship).

I. In Conclusion, Eight Circuits Have Created Five Different Standards And Further Refined Sub-standards Therein

By our count, therefore, eight Circuit Courts of Appeals have created five different standards for determining whether an inmate overcomes section 2254(d) and (e):

- The Fifth Circuit has erased the distinction entirely.
- The Third, Fourth, and Eighth Circuits countenance decreasing degrees of ambiguity between these two disparate subsections.
- The First and Seventh Circuit maintain a crisp distinction.
- The Ninth Circuit reads (d)(2) in the context of "intrinsic" challenges.
- The Eleventh Circuit "struggles" with the issue and will avoid taking a position until some petitioner forces its hands.

The Fifth Circuit's decision in *Lewis* would have been decidedly opposite if Lewis lived in the First, Seventh, or Ninth Circuits, and might have been different if he lived in the Third, Fourth, Eighth, or Eleventh Circuits: Absent the insuperable obstacle of clear and convincing evidence, the state court's result as "a whole" could not have found Lewis's IQ to be over 70 because Dr. Rosin's test result would have been rejected and would not have been bolstered to skew the average IQ the state court assigned to him.

Lewis's case presents the ideal case for this Court to resolve these differences.

V. BRISEÑO *DOES NOT COMPLY WITH* ATKINS

Concerns about the *Briseño* factors' compliance with the *Atkins* mandate are at least as significant as those the Court previously addressed regarding the Texas implementation of the Court's *Penry* and *Ford* constitutional mandates.

Atkins v. Virginia announced a categorical ban: individuals with mental retardation cannot be executed without offending the Eighth Amendment. 536 U.S. 304, 321 (2002). Lewis's *Atkins* claim was rejected below based on the Texas Court of Criminal Appeals now entrenched misunderstanding of that holding.

The Texas Court of Criminal Appeals' misunderstanding stems from a single sentence in *Atkins*: "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." 536 U.S. at 317. The CCA misread this sentence as suggesting that the *Atkins* rule does not necessarily apply to all, but only to some persons with mental retardation. *See Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Based on its misreading of *Atkins*' mandate, the CCA speculated that not all Texans would necessarily agree that those "legitimately" diagnosed with mental retardation under prevailing professional standards should be exempt from execution: "does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation [should] be exempt from an otherwise constitutional penalty?" *Id*. at 6. The CCA then erroneously suggested that the question whether there should be "a 'mental retardation' bright-line exemption from our state's maximum statutory

punishment" remained unresolved. *Id.* The CCA "decline[d]" to answer this rhetorical question because it felt that, while "[m]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt" from execution, the CCA was not sure that others with less severe mental retardation should be exempt as well. *Id.* (citing John Steinbeck, Of Mice and Men (1937)).

The sentence from *Atkins* at issue plainly does not mean that states retain the right to decide which subset of persons with mental retardation are included within *Atkins*' categorical ban. Rather, the sentence makes the uncontroversial point that not all persons who claim to have mental retardation actually have the disorder as defined by professional standards. To fall "within the range of mentally retarded offenders about whom there is a national consensus" is to have mental retardation in accordance with generally accepted clinical standards, which the Court referenced on the same page of the decision. *See* 536 U.S. at 317 n.22. The passage does not mean to exclude from protection persons with mental retardation whom some states might nonetheless deem execution-worthy.

In announcing a national consensus against executing persons with mental retardation, this Court recognized the stable meaning of mental retardation. *See Atkins*, 536 U.S. at 317 n. 22 (noting that state statutory definitions of mental retardation "generally conform to the clinical definitions" promulgated by the AAMR (now the AAIDD) and the APA). Indeed, the elements of the current clinical definition have been consistent for nearly 100 years. *See generally* R.C.

Scheerenberger, *A History of Mental Retardation: A Quarter Century of Progress* (1983). Further, the Court directed states to implement procedures for screening Atkins claims that reflect the contemporary scientific consensus. *Atkins*, 536 U.S. at 308 n.3 (quoting AAMR, Mental Retardation: Definition, Classification and Systems Supports 5 (9th ed. 1992) [hereafter AAMR 1992] and American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) [hereafter DSM-IV-TR]). This Court directed the states to the authoritative medical manuals because mental retardation is a medical condition, properly assessed in accordance with the national medical consensus.

Atkins cannot properly be read as suggesting that states retain the right to create sub-classes of offenders with mental retardation based on whether a state believes individual claimants are as impaired as a fictional character (Steinbeck's Lennie). Instead, the Court drew a bright line, protecting all offenders who satisfy the widely accepted clinical definition of mental retardation and excluding those who could not satisfy that clinical standard.

If the state statutes before the Court in *Atkins* had defined mental retardation in terms of different levels or classes, the Court would have had difficulty discerning a common commitment to sparing "the mentally retarded" from execution. *See* 536 U.S. at 321 ("[D]eath is not a suitable punishment for a mentally retarded criminal."). The Court did, however, identify a national consensus against executing all offenders with mental retardation based on a consensus definition of

mental retardation--which captures individuals with a range of impairment. *Id.* at 354 n.3.

Lewis would also note that Justice Scalia's dissent in *Atkins* is premised on the correct conclusion that the Court announced "a categorical rule" that applies to all persons with mental retardation whether the impairment is mild, moderate, or severe. 536 U.S. at 350 (Scalia, J. dissenting). While he disagreed with the outcome, Justice Scalia recognized that *Atkins*' holding is clear in that "all executions of the mentally retarded" means "all." *Id.* at 342 (emphasis retained).

CONCLUSION

This petition presents an ideal vehicle for resolving the confusion and Circuit splits surrounding application of AEDPA sections 2254(d) and 2254(e), and whether a state may adopt a definition of mental retardation that permits execution of some sub-categories of inmates who are retarded under scientifically accepted standards.

Rickey Lewis respectfully asks the Court to grant a writ of certiorari and to stay his execution.

Respectfully submitted this 18th day of February 2013,

By: _____

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CERTIFICATE OF MAILING

I hereby certify that, on the 18th day of February 2013, this pleading was deposited with the U.S. Postal Service, in an envelope or package correctly addressed, with sufficient postage to assure delivery by certified first-class mail, R.R.R.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th day of February 2013, a true and correct copy of this petition and appendices was mailed by first-class U.S. mail to:

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