IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ELKIE LEE TAYLOR, Petitioner,	§	
v.	§	CIVIL ACTION NO. 4:06-CV-00459-A
NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	* DEATH PENALTY CASE *

RESPONDENT QUARTERMAN'S ORIGINAL ANSWER WITH BRIEF IN SUPPORT

Petitioner, Elkie Lee Taylor, was convicted by a jury and sentenced to death in a Texas court for capital murder. He challenges the validity of his conviction and sentence in this Court in a successive petition pursuant to 28 U.S.C. § 2244. Taylor alleges that his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded, a claim which he has exhausted in state court. But he has failed to demonstrate that he is entitled to federal habeas corpus relief. The Director denies all allegations of fact made by Taylor, except those supported by the record and those specifically admitted herein.[1]

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below.

Taylor was indicted in cause number 0542281AR[2] on March 18, 1994, in the 213th

[1] Copies of Taylor's state trial, direct appeal, and first writ of habeas corpus records were previously filed in this Court in Civil Action No. 4:01-cv–00264. The Director has forwarded a copy of Taylor's second state writ, which was received by the Court on August 3, 2006.

[2] This was a reindictment from a prior cause number, 0508586A, returned on June 30, 1993.

District Court of Tarrant County, Texas, for the capital offense of murdering Otis Flake in the course of committing and attempting to commit robbery and in the course of committing and attempting to commit burglary of a habitation on or about April 2, 1993. Taylor was tried before a jury in the 297th District Court of Tarrant County, and found guilty of the capital offense on June 23, 1994. On June 24th, following a separate punishment hearing, the jury returned a verdict in which it affirmatively answered the first two special punishment issues and answered in the negative the third special punishment issue submitted pursuant to article 37.071, §§ 2(b)(1), 2(b)(2), and 2(e) of the TEXAS CODE OF CRIMINAL PROCEDURE. In accordance with state law, the trial court assessed Taylor's punishment at death. Taylor appealed and the Court of Criminal Appeals of Texas affirmed his conviction and sentence on April 24, 1996. *Taylor v. State*, 920 S.W.2d 319 (Tex. Crim. App. 1996). The Supreme Court denied a petition for writ of certiorari on October 21, 1996. *Taylor v. Texas*, 519 U.S. 951. Taylor, represented by appointed counsel, James Rasmussen,[3] filed a state writ of habeas corpus on July 13, 1998, and it was denied on March 28, 2001.

Taylor's first federal writ of habeas corpus was filed on May 31, 2001, and the Director responded on July 5, 2001. This Court denied relief on July 13, 2001. The Fifth Circuit denied Taylor a certificate of appealability on August 9, 2001, and the Supreme Court denied Taylor a writ of certiorari on October 7, 2002.

On January 16, 2003, Taylor filed a successive writ application in the Court of Criminal Appeals alleging mental retardation. The trial court recommended denial of relief, but the CCA remanded the case for an evidentiary hearing, which was held June 20-22,

[3] Counsel Rasmussen has continued to represent Taylor throughout the course of proceedings in this case.

2005.[4] The trial court again recommended denial of relief, which recommendation was adopted by the CCA on February 1, 2006. On April 10, 2006, Taylor filed a Motion to Authorize Filing of a Second Writ Petition in the Fifth Circuit and authorization was granted June 27, 2006. The instant petition was filed June 30th.[5]

B. Statement of Facts

1. Summary of the facts of the crime.[6]

The Court of Criminal Appeals summarized the facts of Taylor's crime as follows:

> On April 2, 1993, Mary Carson saw [Taylor] and Darryl Birdow leaving the home of her friend, Otis Flake. Carson went inside and discovered Flake dead. His hands were tied behind his back with a length of white plastic tubing, his feet were tied with a coat hanger, a white piece of cloth had been tied around his neck, and he had been strangled with two coat hangers twisted around his neck from behind.

2. Facts presented at the state habeas evidentiary hearing.

In Taylor's successive state writ regarding his *Atkins* claim, the CCA summarized the evidence presented at the June 2003 hearing:

> In support of his mental-retardation claim, [Taylor] presented several exhibits, including school, employment, and prison records, as well as affidavits and reports from experts who had evaluated [Taylor]. [Taylor] also presented a personal affidavit and affidavits from his brother, sister, and aunt. The trial court found that [Taylor]'s experts had based their evaluations on

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[4] References to the statement of facts from the evidentiary hearing made herein cite "SH" for State Hearing and are preceded by the volume number and followed by the page number.

[5] For purposes of 28 U.S.C. 2244(d), the Director calculated that Taylor's one-year limitations period commenced with the date of the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which was handed down on June 20th of 2002. When his successive state writ was filed on January 16, 2003, Taylor had 155 days remaining of the one-year period. The remainder began to run on February 1, 2006, with the CCA's denial of his second writ, and was set to expire on July 6th. The instant petition, filed June 30th, was thus filed within the limitations period and the Director does not challenge the timeliness of it.

[6] Since the facts of Taylor's crime are relevant to his claim of mental retardation, the Director gives a fuller account of the details of the crime below in Sec. III B, based on the evidence presented at his trial.

incomplete information; while [Taylor]'s experts had met with him on three separate occasions to administer different diagnostic examinations designed to measure [Taylor]'s adaptive behavior skills, they had failed to consider [Taylor]'s written statements, the facts of the crimes and arrest, and the information about [Taylor]'s conduct while incarcerated. The trial court found that the state's expert, on the other hand, had personally interviewed [Taylor] and had reviewed all relevant documents before concluding that, while [Taylor] exhibits signs of borderline intellectual functioning or even mild mental retardation, he is not so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus regarding exemption from the death penalty.

The trial-court record reflects that [Taylor] took at least five IQ tests. The first test, the Wechsler Intelligence Scale for Children (WISC), was administered by the State Department of Education in Leland, Mississippi, when [Taylor] was ten years old. [Taylor]'s full-scale score on this test was 75, slightly above the presumptively retarded score of 70. The examination administrator, Dr. Leon Jackson, indicated that [Taylor] "is presently functioning within the borderline to dull range of normal intelligence ..." and that variances in the sub-test scores suggested that [Taylor] had not put forth sufficient effort during the test and was capable of achieving a higher score. The trial court found that Dr. Jackson's assessment of [Taylor]'s mental abilities was accurate and that [Taylor]'s level of intellectual functioning was higher than the WISC score indicated.

At age 32, [Taylor] was given the Revised Beta II (a brief screening test) by the Texas Department of Criminal Justice (TDCJ) and scored 63. Shortly thereafter, TDCJ administered the Wechsler Adult Intelligence Scale-Revised Test (WAIS-R), upon which [Taylor] scored 69. Similar to the WISC test, the TDCJ examiner noted that the WAIS-R score "appears to be an underestimation of current functioning." TDCJ records seemingly corroborate these conclusions; after a thorough examination of [Taylor]'s mental status and test results, he was deemed not to be mentally retarded. His intellectual functioning, however, was considered to be in the "borderline" range. The trial court found that [Taylor]'s placement in the Mentally Retarded Offenders Program (MROP) at TDCJ was the result of a determination by prison officials that such a placement constituted the most appropriate option, even though [Taylor] was never diagnosed as mentally retarded.

Two subsequent IQ tests were administered to [Taylor] in preparation

> for trial. Those tests show the 41-year-old [Taylor] scoring near or below presumptive intelligence levels indicating mental retardation. In particular, [Taylor] achieved a full-scale score of 65 on the Wechsler Adult Intelligence Test (WAIS-III), administered by the state's expert, and a full-scale score of 71 on the Kaufman Adolescent and Adult Intelligence Scale, administered by [Taylor]'s expert. Among the various tests relied upon by the trial court, only the WISC assessed [Taylor]'s intellect before age 18.

Ex parte Taylor, No. WR-48498-02, *3-4 (Tex. Crim. App. 2006) (Johnson, J, concurring) (not designated for publication).

ANSWER WITH BRIEF IN SUPPORT

A. Standard of review.

This proceeding is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Under § 2254(d), an application for a writ of habeas corpus 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
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d) establishes standards of review for each of the three different questions on which a judicial decision may rest, *i.e.*, questions of law, mixed questions of law and fact, and questions of fact. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000). With regard to questions of law, the Supreme Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially

indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Id.* at 405-06. Similarly, when confronting a mixed question of law and fact, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case, or unreasonably extends or refuses to extend a legal principle to a new context.[7] *Id.* at 407-08. A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Id.* at 409-10. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable. *Id.*

With regard to questions of fact, § 2254(e)(1) requires federal courts to presume correct the factual findings of the state courts unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." § 2254(e)(1).[8] Further, except for the narrow exceptions contained in § 2254(e)(2), the evidence upon which an applicant would challenge a state court fact finding must have been presented to the state court. Because a federal habeas court is prohibited from granting relief unless a decision was based on "an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," it follows that demonstrating the incorrectness of a state court fact finding

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[7] Justice O'Connor explained that the term "unreasonable" is "no doubt difficult to define"; however, she concluded that "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410; *see also Neal v. Puckett,* 239 F.3d 683, 695(5th Cir. 2001) (holding that "in making our unreasonable application determination . . . [t]he precise question, then, is whether the [state] court's ultimate conclusion . . . is minimally consistent with the facts of [the] case.").

[8] *See also Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S. Ct. 843, 850 (1983) (explaining that, under the pre-AEDPA standard, a federal habeas court was required to "conclude that the state court's findings lacked even 'fair [] support' in the record" before rejecting those findings.").

based upon evidence not presented to the state court would be of no avail to a habeas petitioner.

II. The Decision of the State Court to Deny Taylor Relief Was Based on a Reasonable Determination of the Facts Presented at the Evidentiary Hearing and a Reasonable Application of Federal Law.

The focus of this proceeding is whether the Texas Court of Criminal Appeals reasonably applied the state court definition of mental retardation, in conformity with *Atkins v. Virginia*,[9] when it found that Taylor did not establish a *bona fide* claim of mental retardation in his successive habeas application. Because Taylor failed to show that he falls within the category of offenders *Atkins* is designed to protect, the state court's rejection is reasonable and entitled to deference.

The *Atkins* Court held that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (internal quotation omitted). The Court noted that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id.* at 317. "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." *Id.* Although the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences," *id.*, it cited with approval the following definitions of mental retardation:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home

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[9] 536 U.S. 304 (2002).

> living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."[10]
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> The American Psychiatric Association's [APA] definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

Atkins, 536 U. S. at 309 n. 3 (internal citations omitted); *id.* at 317 n. 22.

The Texas Court of Criminal Appeals has adopted the 1992 AAMR definition, explaining that, although Texas has not yet enacted statutory provisions to implement the *Atkins* decision, "[u]ntil the Texas Legislature provides an alternate statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR or [TEX. HEALTH & SAFETY CODE] section 591.003(13)[11] criteria in addressing *Atkins* mental retardation claims." *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004); *see also*

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[10] Although the *Atkins* Court used the AAMR's 9th edition definition, in May 2002 the AAMR released its 10th edition which contained a somewhat different definition: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002). The State and federal courts continue to use the 1992 definition from the 9th edition. *Clark v. Quarterman,* — F.3d —, No. 05-70008 at *3, 2006 WL 2023114 (5th Cir. 2006).

[11] Under the TEXAS HEALTH & SAFETY CODE, "'mental retardation' means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH & SAFETY CODE § 591.003(13).

Morris v. Dretke, 413 F.3d 484, 496, 497-98 (5th Cir. 2005) (acknowledging *Briseno*'s adoption of AAMR definition). Significantly, the Fifth Circuit recently noted that both the AAMR and § 591.003 (13) definitions plainly require that all three elements exist to establish mental retardation. *Clark v. Quarterman*, — F. —, No. 05-70008, slip op. at *3-4 (5th Cir. July 20, 2006) ("[i]f the state court correctly found that Clark failed to meet any of the three elements, he cannot demonstrate mental retardation under the Texas definitions").

The *Briseno* court provided evidentiary factors to consider when making mental retardation determinations in a criminal trial context:

- 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?

135 S.W.3d at 8-9. Since *Briseno*, these factors have been applied by the Court of Criminal Appeals in *Ex parte Elizalde*, No. WR-48957-02, *3 (Tex. Crim. App. 2006) (not designated for publication); *Ex parte Taylor*, No. WR-48498-02, *3-4 (Tex. Crim. App. 2006) (Johnson, J, concurring) (not designated for publication) (the instant case); and *Ex parte Modden*, 147

S.W.3d 293, 296-98 (Tex. Crim. App. 2004). The United States District Court, Western District, San Antonio Division, recently examined the *Briseno* evidentiary factors and found that they represented "an objectively reasonable application of what is admittedly a far-from crystal-clear federal constitutional standard," in concluding that the state habeas court's application of the factors was "eminently reasonable."[12] *Rodriguez v. Quarterman*, No. SA-05-CA-659-RF, slip op. at 12-13 (W.D.Tex. July 11, 2006).

Applying the AAMR definition, the Court of Criminal Appeals concluded that Taylor had not shown significant limitations in his adaptive behaviors, and thus "failed to show, by a preponderance of the evidence, that he is mentally retarded such that he is exempt from the death penalty under *Atkins v. Virginia*[,]" and denied relief. *Ex parte Taylor*, No. 48,498-02; Petitioner's Appendice A. This, and all other state court findings on this matter, are not unreasonable and are entitled to a presumption of correctness under Section 2254(e)(1). *Patterson v. Dretke*, 370 F.3d 480, 484 (5th Cir. 2004) ("a state court's determination that a prisoner is competent to be executed is a factual finding entitled to the presumption of correctness under Section 2254(e)(1)"). The Taylor habeas court correctly found that the record lacked any formal, definitive diagnosis of Taylor's mental retardation or that it had originated prior to age 18. And, the court concluded that Taylor had failed to prove by a

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[12] In an unreported case in the Eastern District of Texas, Tyler Division, the court stated that it considered the *Briseno* factors to have been intended by the Court of Criminal Appeals as an aid in differentiating between limitations in adaptive functioning caused by a personality disorder and those caused by mental retardation. *Moore v. Dretke*, No. 503CV224, *5 n.4 (E.D. Tex 2005), *vacated* and *remanded*, — F.3d —, 2006 WL 1776605 (5th Cir.(Tex.) June 29, 2006) (No. 05-70038). It declined to analyze the factors in Moore's case since (1) the Director did not argue or present evidence that Moore had a personality disorder, (2) there was no evidence that a personality disorder was responsible for Moore's cognitive and adaptive deficits, (3) the *Briseno* factors were not part of the AAMR's definition of mental retardation which was adopted by the *Briseno* court, and, (4) according to *Briseno*, analysis of the factors was discretionary and not required. It should be noted, however, that the Court of Criminal Appeals applied the factors in the *Elizalde, Taylor* and *Modden* cases despite the absence of evidence or pleading by the State of a personality disorder.

preponderance of the evidence that his intellectual functioning is significantly sub-average.

III. The Evidence Presented at the State Hearing Clearly Showed Taylor Is Not Mentally Retarded.

As Taylor points out in his petition, the state evidentiary hearing turned on the testimony of three expert witnesses and their evaluations of his mental functioning ability. Drs. Denis Keyes, a college professor of special education and certified school psychologist, and George Denkowski, a clinical psychologist specializing in testing and psychological evaluation, testified for Taylor. 3 SH 7-9; 2 SH 9. Dr. Randy Price, a college professor of clinical psychology and certified forensic psychologist, testified on behalf of the State. Taylor asserts that all three testified and agreed that he had met two of the three criteria for a mental retardation diagnosis. Fed. Writ Pet at 3. And, he claims, his experts effectively disputed Dr. Price on the third (adaptive behavior). Fed. Writ Pet. at 21-25.

The Director maintains that Taylor did not meet any of the criteria for a mental retardation diagnosis: (1) his post-*Atkins* IQ test results were tainted with the potential for attempts to "dumb down" in the course of these proceedings and his earlier TDCJ intake processing test results were suspicious to evaluators at the time; (2) his only childhood IQ test result of 75 took him out of the mildly mentally retarded range of 50 to 70, plus, even those results were suspect to the examiner; (3) the State's adaptive functioning testing showed significant adaptative behavior skills and only one deficit; (4) the facts of his crime revealed his possession of several of the adaptive behavior skills cited as measurements in *Atkins* and the AAMR definition of mental retardation; and (5) the anecdotal evidence provided of early signs of retardation are inconclusive and do not, by themselves, contribute to a diagnosis and are, by their nature, biased.

A. Taylor's IQ evaluations show he cannot meet the intellectual functioning prong of the AAMR, APA and Texas Health & Safety Code definitions of mental retardation.

Texas law holds that a person is considered mentally retarded if he is able to demonstrate that he has (1) significantly sub-average general intellectual functioning, which is defined as an IQ score of 70 or below, (2) accompanied by related limitations in adaptive functioning and (3) the onset of which occurs prior to the age of 18. *Ex parte Briseno*, 135 S.W.3d at 7 and n. 24. In neither the first nor the third prong of this test has Taylor established by a preponderance of the evidence that his intellectual functioning is significantly sub-average.

In a concurring opinion to the Court of Criminal Appeals's denial of his second state writ, Justice Johnson pointed out that Taylor took at least five IQ tests in his life. The first test, administered by Dr. Leon Jackson, was the Wechsler Intelligence Scale for Children (WISC), given when Taylor was ten in Leland, Mississippi; his full-scale score was 75.[13] *Ex parte Taylor*, 2006 WL 234854 * 3. There was no diagnosis of mental retardation for Taylor prior to the age of 18.

1. Taylor's childhood IQ test rules out mental retardation under the applicable standard.

Taylor's WISC score of 75 at age ten was categorical. Although Dr. Denkowski "norm-corrected" the result from its 1948 standard to a 1972 standard, thereby reducing the result to a score of 68, the deflated score is still questionable since Taylor's performance was suspect to the evaluator, Dr. Jackson. According to Jackson, Taylor was functioning "well

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[13] Of the three components of the WISC test, his lowest score was that of verbal, at 69; however, Dr. Jackson concluded that the variances in the subtest patterning caused him to give limited reliability and validity to the evaluation and that he thought Taylor was capable of verbally functioning at a higher level. *Taylor v. Dretke*, Second [Proposed] Petition, Appendice at 17.

within the educable mentally retarded range of intelligence." The norm-correction does not change the absence of a diagnosis of mental retardation for Taylor as a child.

The State's expert, Dr. Price, suggested that Taylor's early school problems were influenced by cultural and family factors and were not clearly indicative of retardation. 3 SH 157-58. While Price stated that Taylor's problems in school and learning existed when he started school, he postulated that socioeconomic factors might have been behind the early school failure, *i.e.*, that Taylor just did not want to go to school. 3 SH 157. Testimony from Taylor's sister, who was two years older, was that he would not go to school unless she did. 2 SH 174. The forty-eight absences in his first year underscore the absence of a familial commitment to education. As Dr. Price reasoned,

> I think that there could be some cultural, some socioeconomic factors here that led to early school failure. . . . But that 48 absences in the first grade, I mean, it probably is a recollection of family values, cultural considerations and certainly could put a child behind from the start and I think that's a real problem."

3 SH 157.

Taylor makes much of what is referred to as the "Flynn Effect" on the WISC score. 2 SH 21-22. The Flynn Effect is a phenomenon popularized by a professor emeritus of political studies at New Zealand's University of Otago, James R. Flynn, that refers to how the general IQ scores of a population change over time, which is the continued year-on-year rise of IQ scores. Scores on a given test in a given population have tended to rise across time throughout the history of IQ testing. The Flynn Effect theorizes that the rise of IQ test scores is attributable to the use of testing procedures made outdated by societal changes and advances. The theory holds that test scores become inflated as the tests age and advocates

the periodic renormalization of IQ test standard deviations to compensate for the inflation.[14] In capital litigation, that formula is being applied by defense experts to a litigant's particular test score in an attempt to show the score, which is borderline or above the cut-off, is invalid because of the inflation and the litigant is actually closer to or below they consider to be a "bright line" score of 70. Taylor's experts advocate applying the Flynn Effect to his WISC score to reduce it to the cut-off 70 points, in their attempts to establish the third prong of Texas's MR definition.[15] Still, Taylor's WISC score of 75± at age ten does not establish mental retardation: Dr. Jackson noted:

> According to the WISC Elke is presently functioning within the borderline to dull normal range of intelligence, well within the educable mentally retarded range of intelligence. There were such variances in the subtest patterning that the examiner is inclined to give but limited reliability and validity to the present evaluation. I feel that the youngster is capable of verbally functioning at a higher level than that obtained and that [ ] the performance or non-verbal functional level.[16]

Ex parte Taylor, No. 48,498-02 at 215. Most importantly, the Flynn Effect has not been accepted in this Circuit as a valid scientific theory. *See In re: Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006) (per curiam).[17]

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[14] In MR determinations, study results suggest that standard deviations can be maintained by reducing test scores by approximately one-third to two-thirds of a point per year following the normalization of a particular test. The degree of estimated inflation is found by multiplying .3 times the number of years between the normalization and the administration of the test to a litigant, and the number is deducted from the litigant's score on the test.

[15] Taylor's WISC scores were 69+ in Verbal Scale IQ, 85- in Performance Scale IQ, and 75± Full Scale IQ.

[16] Dr. Jackson prefaced this assessment with this observation in the same report: "Throughout the interview I had the distinct impression that Elke could profit from articulation speech therapy."

[17] The Director would point out to the Court that the cause(s) of the Flynn Effect has not been determined and there is no agreement among professionals, including Flynn, as to why the scores of a general population go up over time on a standardized IQ test. Explanations range from environmental causes,

Given the history of Taylor's IQ test results over his lifetime, it is not clear that his scores support his experts' determinations that he is mentally retarded. What becomes crucial to his MR determination, then, is whether Taylor had sufficient, significant deficits in his adaptive functioning skills, the second, but final prong. The evidence adduced at the state hearing shows he did not.

2. Taylor's post-*Atkins* testing is inherently suspect and fails to establish mental retardation.

Twenty-two years after the WISC, Taylor was administered a Revised Beta II (a brief screening test) by the Texas Department of Criminal Justice and scored a 63, which was followed by the Wechsler Adult Intelligence Scale-Revised Test (WAIS-R) and on which he scored a 69. *Id.* Lastly, in preparation for his state writ evidentiary hearing, a Wechsler Adult Intelligence Texas (WAIS-III) was administered by the State's forensic expert, Dr. Price, with a score of 65, and a Kaufman Adolescent and Adult Intelligence Scale was administered by Taylor's expert, Dr. Keyes, with a full-scale score of 71. *Id.* There was no dispute between the experts, including Taylor's other expert, Dr. George C. Denkowski, over the accuracy of the IQ measuring tests. All experts agreed that the WAIS-III was the most reliable test for intellectual functioning.

Taylor's 1992 TDCJ testing resulted in a Verbal IQ of 71, a Performance IQ of 70 and a Full Scale IQ of 69. Importantly, though, while the result fell within the presumptively mildly mentally retarded range, he was not diagnosed as mentally retarded:

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including social trends such as smaller family size, more professional work roles, use of leisure time in activities such as playing chess or certain video games, an accelerating abstract-problem-solving ability (Flynn's original causal theory), a cultural renaissance in scientific discoveries, technological innovations and cultural developments in general, longer schooling, improved health and nutrition, stimulation by mass media, especially television, and more focused attention on children by parents, which can stimulate cognitive development.

> Taking into account the client's age and cultural group, his adaptive behavior is concluded to be below average, but not to the degree expected of a mentally retarded person. It appears that Mr. Taylor is more capable in terms of adaptive skills than he has actually demonstrated. . . .We find that this client is not mentally retarded as defined by the Mentally Retarded Persons Act of 1977. His intellectual functioning is in the borderline range and his adaptive behavior is below average, but not to the degree expected of a mentally retarded person. The client is to be retained in the MROP.

2 SH 127-28; 5 SH State's Exhibit 2. About the test results, the examiner commented, "This test appears to be an understatement of current functioning." 2 SH 129. The State's expert, Dr. Price, in reference to TDCJ's retention of Taylor in the MROP, stated, "No rationale was found in the records for this classification decision, but my personal experience is that inmates with borderline functioning are sometimes placed in the MROP when prison classification personnel decide that it is the best placement." *Ex parte Taylor*, No. 48,498-02 at 216.

In capital cases, Texas courts have frequently discounted post-Atkins IQ results due to the incentive to malinger. A capital litigant in an *Atkins* proceeding has the highest motivation one can have in scoring poorly on an IQ test. *See, e.g.*, *Ex parte Elizalde*, No. WR-48957-02 (only IQ scores presented were ones administered after his capital conviction; no retardation found); *Briseno*, 135 S.W.3d at 14 (post-capital-conviction scores of 72 and 74, the standard of error measurement range, *see infra*, not applied; no retardation found); *Ex parte Rodriguez*, 164 S.w.3d 400 (Tex. Crim. App. 2004) (post-conviction scores of 60 and 68; no retardation found); *Hall v. State*, 160 S.W.3d 24, 29 (Tex. Crim. App. 2004) (post-conviction scores of 64 and 71; no retardation found). Intelligence functioning tests are imprecise and courts have recognized that results derive from factors other than native ability such as lifestyle choices and cultural influences.

> Webster had an incentive not to perform well on cognitive tests administered after he was charged in this case; they pointed to earlier tests taken by Webster on which he scored higher. Parker also testified that lifestyle choices and cultural factors can account for low I.Q. scores (a point defense experts Dr. Keyes and Dr. Finn acknowledged), thus casting doubt on the reliability of the tests administered by Keyes, which required Webster to define words (he was unable to define "inflation") and recognize faces (he could not identify Shakespeare, Mark Twain, or Albert Einstein from pictures) to which he was unlikely to have been previously exposed.

United States v. Webster, 421 F.3d 308, 313 n.13 (5th Cir. 2005).

Taylor was not diagnosed as mentally retarded prior to the *Atkins* decision. Because his pre-*Atkins* scores indicated borderline intelligence, Taylor's post-*Atkins* scores below 70 are suspect. Taylor knew escaping his death sentence depended on how poorly he fared on the IQ tests.[18] Given Taylor's suspect intellectual functioning scores, it cannot be stated that he did, indeed, meet the first prong of the AAMR, the APA or the TEXAS HEALTH & SAFETY CODE definitions of mental retardation. Accordingly, the state court reasonably determined that Taylor did not satisfy the IQ prong by a preponderance of the evidence.

Taylor takes issue with the *Briseno* decision and asserts that it ignored standards established by the AAMR in making an MR determination, in particular, the standard error of measurement ("SEm"). He contends that the court ignored the SEm in his case. The SEm is an estimate of the amount of error in an individual's obtained score and reflects the reliability of a test. The AAMR Definition and Classification Manual suggests a 5-point standard error scale. The SEm is comparable to a "margin of error" in statistics, which means it is just as likely that the person's "true" score is 5 points higher than the obtained score as it is 5 points lower. The *Briseno* court recognized the difficulty of applying the SEm

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[18] Although Dr. Denkowski, one of Taylor's experts, administered a "Level of Effort" test, the test was not designed to determine whether there was malingering or cheating, but whether the subject was putting forth sufficient effort or was engaged in the test. 2 SH 44-45.

in a legal proceeding. "This statistical 95% confidence interval may not be an entirely appropriate measurement when the burden of proof is preponderance of the evidence, not a 95% confidence burden." 135 S.W.3d at 14. Taylor apparently would have the Court conclude that his IQ score was not actually 65 on the 2003 WAIS-III test, but 60,[19] based on the SEm. The fact that his score *could* be the lower end of the range, however, does not automatically require that the Court conclude as such because the inverse is also true – the SEm could also indicate that Taylor's true score was as high as 70. As the *Briseno* court recognized, there are no means of determining in which direction the SEm should adjust the obtained score in a criminal context. Adaptive behavior skills assessment makes the adjustment. As does use of the *Briseno* evidentiary factors.

B. Despite his experts' assertion to the contrary, Taylor suffered no adaptive behavior skills deficits sufficient to establish mental retardation.

Taylor needs more than just a low IQ score to merit a successive petition. "A low IQ score by itself . . . does not support a finding of mental retardation." *Stevenson v. State*, 73 S.W.3d 914, 917 (Tex. Crim. App. 2002); *see also Tennard*, 960 S.W.2d at 61 ("Because of their unreliability in determining mental retardation, IQ scores should not be used as a 'unitary measure of mental retardation;' a low IQ alone does not provide a justifiable basis for classifying a person as mentally retarded") (citation omitted); Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") at 42 ("Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental

[19] The WAIS-III, by the way, was published in 1997. Flynn thinks the norming date should be two years earlier, to account for the lead time in production before publication, so that would make the test 10 years old. Carrying Taylor's logic to its extremes, he loses another 3 points for "Flynn Effect" test result inflation (IQ score "inflation" from 1995 to 2005) and his score, after the Flynn Effect and SEm adjustments, would be 57. There is absolutely no evidence whatsoever to support such a score.

Retardation"). Rather, a capital defendant claiming that he is mentally retarded must also prove that a low IQ score exists "concurrent with deficits in adaptive behavior." TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (Vernon 2003).

In Texas, adaptive behavior is defined as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." TEX. HEALTH & SAFETY CODE § 591.003(13). The AAMR and APA also describe the factors in evaluating adaptive functioning. *Atkins,* 536 U.S. at 309 n.3. For example, the AAMR refers to "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Id.* The APA guidelines require "significant limitations in adaptive functioning" in at least two of its list of similar skill areas. *Id.* However, just as with the assessment of cognitive IQ, adaptive functioning may be influenced by various factors independent of the individual's mental capabilities, including education, motivation, cooperation, background, personality characteristics, social and vocational opportunities, and other mental disorders or medical conditions. *See* DSM-IV-TR at 42.

Taylor would have the Court rely solely on the analysis of experts and not make its own determination of mental retardation. The *Briseno* decision, he asserts, "urges the habeas judge to, in effect, make his or her own diagnosis of mental retardation, irrespective of what the opinion of the experts may be." But that court merely recognized that it is the factfinder who must decide whether a defendant is mentally retarded and, by law, must make such a decision on the basis of the evidence, particularly where there are contradicting expert opinions. As stated above, the *Briseno* court offered seven evidentiary factors for weighing evidence of mental retardation. Contrary to Taylor's claim, the *Briseno* decision does not

"fail to enforce" the *Atkins* decision; *Atkins* specifically left enforcement and a determination of mental retardation to the States. *Atkins*, 536 U.S. at 317.

Taylor faults the *Briseno* court in its analysis of adaptive behavior as focusing on what an individual can do rather than on what he cannot do. The latter he views as the proper analysis of the AAMR definition of adaptive behavior, which he states is "the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." Fed. Writ Pet. at 11. The semantic inconsistency is obvious. Taylor wants the Court to look only at what skills he cannot do while he cites the AAMR definition of adaptive behavior as to what skills have been learned.

Taylor would have the Court look only for his limitations in the AAMR's adaptive behavior criteria: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The Director disagrees that a mental retardation determination can only be made by assessing deficits in behavior skills. Since it ignores the adaptive abilities an individual has achieved, it is far too limiting an approach in assessing a potential mental retardation defendant in a postconviction proceeding and there is no legal precedent for this approach. The Director would argue that naturally-occurring compensations where there are deficits in adaptability must be considered and that moral culpability and cunningness in criminal activity are among them. The evidentiary factors offered by the *Briseno* court to guide the fact-finder in assessing adaptive behavior skills takes into consideration the "street smarts" of a defendant suspected to be mentally retarded. Was the defendant ever considered mentally retarded? Can he plan and execute a crime, then try to cover it up? Can he control his impulses? Does he lead others? Can he stay on task? Does he engage in the conversation when questioned? Taylor would discard the factors and limit the assessment

to the opinions of experts, but the factors are all that is currently available in the State's jurisprudence and they are not anathema to the jurisprudence of *Atkins*. And, the experts disagree.

An understanding of the adaptive functioning assessment of Taylor requires a fuller, more detailed factual recitation of the crime, for it is in the facts of that event that Taylor's adaptive behavior skills are demonstrated:

> The victim, Otis Flake, lived alone in a house on East Terrell Street, in Fort Worth. He was found, by a crack-addicted prostitute, sitting up against his bed, his hands tied behind his back with white plastic tubing, his feet tied together with a coat hanger, a T-shirt wrapped around this throat, and two coat hangers twisted around his neck from behind. Death was by strangulation. The prostitute knew Flake and had stayed in his house at times. The night before, she had been sitting on his porch when Taylor and another man, later identified as Darryl Birdow, walked by. She invited them in, and the three of them smoked crack cocaine while Flake was in another room. Taylor and Birdow left when she began to believe that they were looking around the house for things to steal. She then left, but returned two hours later to find the front door open and the house ransacked. She also saw Taylor and Birdow coming from the back side of the house and called to them, but they kept going as though they didn't hear her. Taylor had a white bag in his hand. Inside the house, she found the dead man.
>
> While Taylor and Birdow were walking down the street with Flake's television set, they were stopped by a police officer, who asked where they were going with it. Taylor told him they had gotten it from a man who had moved and left it behind, that it did not play and if the officer wanted to check it out somewhere, he could do that. The officer told them okay and to go ahead.
>
> Taylor was living with two prostitutes at the time, one of which was his girlfriend. He told them on separate occasions about two murders he had committed. The first time, he said that he and Birdow had broken into the house of a Hispanic man (Ramon Carrillo). Taylor said he told [Carrillo] not to look at him, but he did. Taylor first tried to choke him, but when Carrillo did not die, Taylor hit him with a rock and wrapped a coat hanger around his neck. A few days later, when his girlfriend asked him if the police were in the

neighborhood because of him, Taylor said that he had wrapped a coat hanger around a man's neck and that "dead men can't talk." The girlfriend noted that Taylor was "bold with it, smiled and laughing about it, like it was funny."

The Carrillo murder occurred eleven days before the Flake murder, seven blocks down the street, and the victim was also elderly and living alone. He was found with the coat hanger wrapped around his neck.

Taylor was arrested two days after the second murder when he was seen in the neighborhood by a police officer driving the cab of an 18-wheel truck (without the trailer). Taylor fled in the vehicle from Fort Worth police, who pursued him to Dallas and then to just outside Waco, with police units joining in along the way during the four-hour chase. After two attempts at "rolling stops" failed, a state trooper stood in front of the truck and shot out its tires with a shotgun, causing the truck to stop and Taylor to be apprehended.

Taylor gave a written statement in which he admitted that he and Birdow had gone to the victim's house, that Taylor had taped up the victim's mouth, tied his hand and feet, and that he had taken jewelry and cash. He stated that they had returned and got a television and two more bags of stuff to sell for crack. Taylor asserted, however, that Birdow had killed the victim. In a second statement, Taylor admitted that two weeks before, he and Birdow had stolen a TV from an 87-year-old man (Carrillo) but had been caught by him in the house. Taylor admitted that he had grabbed the man, but contended that Birdow had killed him with a coat hanger.[20]

The facts of the crime showed Taylor could learn from his experience: after Carrillo's death, he abandoned using his hands as a method of strangulation when he killed Flake; wire hangers were more efficient. While smoking crack with the prostitute in Flake's house, he saw an opportunity for another crime to support his drug addiction, planned and executed it surreptitiously. He fabricated a plausible-enough excuse, on the spot, to tell a police officer why he and Birdow were carrying a television set down the street, indicating an ability to create and effect a persuasive deception in a high-risk situation. His ability to reason and use

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[20] The facts of the crime were culled from the reporter's record in Taylor's direct appeal filed with the Court in *Taylor v. Johnson*, C.A. No. 4:01-cv-264.

abstract thinking was demonstrated by his theft of the 18-wheeler cab and subsequent drive of over 150 miles away from Fort Worth as a capture-avoidance maneuver. These adaptive behavior skills alone demonstrate that Taylor is capable of functioning independently, and did, within society, albeit as a criminal.

1. The adaptive behavior assessment of the State's expert was more comprehensive since it derived from examining the full Taylor record, including the facts of the crime.

The State's expert, Dr. Price, addressed adaptive functioning through administration of the Street Survival Skills Questionnaire (SSSQ), a clinical interview, and a test of effort called the 21 Item Test. *Ex parte Taylor*, No 48,498-02 at 209; 3 SH 154. He also reviewed previous evaluations of Taylor, his school records, his file and records from his incarcerations in Texas, including his evaluations from the Mentally Retarded Offenders Program and school files, affidavits from members of his family, his prison disciplinary file, Job Corps information, his two written statements to the police, and testimony from the trial, *inter alia*. He interviewed Taylor once and attempted to do so again, but Taylor refused to talk to him.[21] 3 SH 149-50.

The SSSQ is designed to measure the specific adaptive behavior skills necessary for independent living. *Ex parte Taylor*, No 48,498-02 at 209. His overall score of 91 was in the normal range, better than 27 percent of the persons in the normative sample who had *average intelligence*. *Id.* Out of nine subtests measuring adaptive behavior knowledge, Taylor scored within the normal range on eight of them.[22] *Id.* His one below-normal-range

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[21] Drs. Keyes and Denkowski did not interview Taylor's trial lawyers or review the trial record, anything about the facts of the crime, Taylor's written statements or his prison record *Ex parte Taylor*, No. WR-48,498-02, 2006 WL 234854, *2.

[22] The Street Survival Skills Questionnaire examines the following nine areas: (1) understanding and telling time; (2) recognizing and understanding the function of tools; (3) basic concepts; (4) functional signs;

score, 69, was in the area of recognizing and understanding the function of a variety of tools. *Id.* Dr. Price agreed with the *Briseno* court that adaptive behavior assessments are subjective. 136 S.W.3d at 3; 3 SH 160-61. Price also recognized the value of the *Briseno* factors in a forensic evaluation. 3 SH 163-64. Dr. Price's conclusion was that, while Taylor had low intelligence and serious academic deficits, his adaptive behavior did not reveal significant deficits. *Ex parte Taylor*, No 48,498-02 at 211. "[T]he information and data in this case [do] not clearly support a formal diagnosis of mental retardation but rather a diagnosis of borderline intellectual functioning appears more appropriate." *Id.*

Evidence abounds that Taylor did not possess significant limitations in meeting the standards of personal independence and social responsibility expected of his age and cultural group (with the notable exception of moral culpability for his criminal behavior). As a young adult, Taylor traveled to his sisters' out-of-state homes to live with them; Taylor wanted revenge on the person he held responsible for the first time he went to prison, his victim in the instant case, and he took it through burglarizing the victim's home. He lived life as an addict and a drug dealer and financed his drug habit by planning and executing crimes. He attempted to elude the police by stealing the cab of a tractor-trailer, which had a five-speed manual transmission, and driving it for hours. 2 SH 147-48. He negotiated a second drug deal during the course of executing another for the purpose of increasing his profit. 2 SH 105. He rationed a crack cocaine purchase and sold parts of it so as to both satisfy his habit and make money. 2 SH 151-52. He learned that strangling a person with a coat hanger was more efficient than using just his hands and then used the new knowledge on his next victim. 2 SH 116-17. He used aliases when arrested. 3 SH 153. Taylor was not limited by a lack

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(5) domestic skills; (6) health and safety; (7) public services; (8) monetary skills; (9) measurement skills.

of adaptive skills; in most cases, where he did not perform as expected, it was because he was not motivated or interested.

Dr. Price, unlike the defense experts, did not discount the facts of Taylor's crime in evaluating his adaptive behavior skills. He recognized that Taylor's actions displayed leadership qualities, as well as an ability to hide facts and lie effectively in his own interests. And he recognized that Taylor's crime required forethought, planning and complex execution. Taylor would have the Court disregard the issues of moral culpability for his crime and the obvious evidence that he possesses significant adaptive behavior skills as a criminal. He would have the Court make its determination of mental retardation solely on the results of suspect IQ tests and the testimony of expert witnesses who did not consider or discounted his criminal skills and who exhibited an anti-death penalty bias.

2. The defense's adaptive-behavior tests were flawed in their application and administration.

As noted, Dr. Keyes administered the Vineland Adaptive Behavior Scale - Interview Format (VABS) and the Scale of Independent Behavior - Revised Edition (SIB-R) as part of his post-conviction evaluation of Taylor. Both tests are intended to expose deficiencies in adaptive functioning through a series of interviews with Taylor by Keyes in evaluating his communication, daily living and social skills. The trial court found that both tests were flawed.

> The SIB-R is not intended to be utilized in a forensic assessment and carries a high risk of considerable error because the results thereof are based on the self-report of the individual being evaluated. Likewise, the VABS was not designed to be administered by interviewing a person and having that interviewee rate another person's present adaptive skills against some unidentified group of people within the age group upon whom the VABS was normed or by having the interviewee retrospectively rate another person's adaptive skills as those skills existed at the time that other person was no older than 18 years, 11 months old. Based upon all the available evidence, the

> results of the tests administered by Dr. Keyes to measure the level of [Taylor's] adaptive behavior lack credibility.

Ex parte Taylor, No. 48,498-02 at 8, 267.

Dr. Price testified that he considered the SIB-R test used by Dr. Keyes to be more a measure of Taylor's present level of adaptive functioning and was not intended to be used in a forensic assessment. *Id.* at 217. The potential for error in the test is considerable, in Price's opinion, because the results are based on the self-report of the person being evaluated and, in a forensic context, the individual might either consciously or unconsciously distort his self-report of his own adaptive abilities. *Id.* Price also considered the test results in Taylor's case to be inconsistent with the facts of the crime, his prison deportment or his then-clinical presentation. *Id.*

Dr. Price similarly found Dr. Keyes's use of the VABS test to be inappropriate. *Ex parte Taylor*, No. 48,498-02 at 216. That test, based on reports from Taylor's sister, "was normed on individuals from birth to 18 years, 11 months." *Id.* Thus, Taylor's sister was rating his then-adaptive skills as compared to some group of individuals in the norm group age range or she was retrospectively rating his adaptive skills when he was in the normed age range of birth to 18 years, 11 months. *Id.* The test, he maintained, was not designed to be administered in either fashion. *Id.* The test requires an age equivalent reference group, which group was not clear from Dr. Keyes's report. *Id.* Comparing Taylor's adaptive skills at the time of his crime to those of a child between the ages of three and six was inconsistent with the facts of the crime, Taylor's behavior in prison, or his then-clinical presentation. *Id.* Further, the use of Taylor's sister in the evaluation was suspect because of the potential for bias. *Id.*

Keyes testified that Taylor is mentally retarded and exempted from the death penalty by *Atkins*. But his testimony at the *Atkins* hearing was not credible for multiple reasons. First, Keyes displayed a bias against capital punishment. During one cross-examination, he admitted that he personally was in favor of abolishing the death penalty, after denying it in direct. 3 SH 13, 41. His opinions reflected that bias: "Evasive behavior and escaping behavior is not necessarily an adaptive behavior, in my opinion." 3 SH 95. Second, Keyes stated that Taylor lacked an ability to appreciate the consequences of his actions, but he ignored the fact that Taylor spent three years in prison for burglary before committing the crimes of his capital case, for which he tried to elude detection as the perpetrator. 3 SH 73. Third, Keyes repeatedly discounted any evidence that conflicted with his findings of adaptive functioning deficits, such as the written statements about his crime Taylor gave to the police. 3 SH 46. He doubted Taylor made the statements and attributed them to the interrogation techniques used by the police, even though there was no evidence to support that contention. 3 SH 46-47. Taylor's use of aliases Keyes did not consider to be an adaptive skill, but might be "maladaptive", as was Taylor's attempt to evade the police. 3 SH 49-50, 95. Keyes expressed doubt that Taylor paid a girlfriend to walk by the crime scene with him so the police wouldn't suspect him in the murder, but admitted that if true it would indicate planning by Taylor. 3 SH 71. He doubted that Taylor told a neighbor that, "[t]he last time I went down for nothing, the next time I go down, it's going to be for something." 3 SH 73-74.

Keyes was troubled by Taylor's ability to represent himself well in conversation, yet found that Taylor had deficits in communication and he expressed doubt that Taylor asked a prostitute "if she was going to take care of us." 3 SH 80-82, 113. Keyes maintained that Darryl (Birdow, Taylor's co-defendant) and not Taylor came up with the statement Taylor

gave to a policeman, who stopped them while they were carrying a television from the murder scene, which statement convinced him their behavior was legitimate. 3 SH 85-87. Keyes's admitted bias tainted his opinions and undermined his credibility as an expert witness.

Taylor's other expert, Dr. Denkowski, administered the Adaptive Behavior Assessment System (ABAS-II), which measures communication, self-care, social skills, work skills, self-direction, community use, home living, health and safety, leisure, and functional academics. As part of the testing, Denkowski conducted an in-depth interview with Taylor using 420 questions he developed specifically to assess adaptive behavior. 2 SH 16. The state court found this testing to be flawed because a chart in the test's manual used to support Denkowski's assertion that the test was effective in evaluating adaptive behavior skills of potentially mentally retarded persons contained no data on its effectiveness for that purpose. What's more, Denkowski admitted on cross-examination that the ABAS-II was not designed to address the moral culpability of a capital murderer claiming to be mentally retarded.

The primary fault the State and its expert found with Dr. Denkowski's ABAS-II was that none of the test questions addressed the issue of whether Taylor had acted with the level of moral culpability characteristic of the most serious adult criminal conduct. 2 SH 166; 4 SH 48-50. For example, Dr. Price found no correlation between questions Denkowski posed to Taylor concerning personal hygiene or riding a bike or walking to work alone and moral culpability for his crime. 4 SH 49. Dr. Price also faulted the ABAS-II test for Dr. Denkowski's method of adjusting the scores by the use of clinical judgment in interpreting the scores. He stated that, "I think that the adjustment clinically should take place after the scores are actually generated instead of adjusting them to get scores." 4 SH 47. And he

expressed concern for the retrospective rating of a period of time years before, stating that the test was standardized for a concurrent rating of the test subject, not ten years earlier. *Id.* In addition, Dr. Price objected to the context of the test since it involved the "self-report of people with low intelligence or people that have mental, who are mildly mentally retarded to someone else's independent judgment of them." 4 SH 48. "We don't know how valid the self-report of such individuals is." *Id.*

The adaptive functioning tests used by the experts in Taylor's case do not account for an individual who has been incarcerated for a period of years and whose adaptive behavior skills have been altered by the captivity. An individual incarcerated for several years is far removed from the need to adapt to society's demands and conventions in order to survive and, although prison life has its own special adaptational requirements, an incarcerated individual is provided all his basic needs in a structured environment. His survival does not depend on his ability to find food or shelter. Nor has it been shown that adaptive behavior tests accurately measure the adaptive functioning skills an individual possessed years ago. Taylor reportedly had left home by the age of 15. 2 SH 176-77. Quite apparently, he was able to adapt and function as a transient, a lifestyle choice, at an early age. But, those skills he used at age 15 cannot be measured at age 42, and although his family members reported on his early life, none reported on his life at 15, except to say that he had quit school and left home. He was portrayed as "slow" but also as headstrong and willful. He did not follow his parents' rules, frequently got into trouble and continually "ran" with the wrong people. *See* Fed. Writ Pet., Appendice B, affidavits. And, he refused to go to school without his sister. 2 SH 29. As the state habeas court noted, there was no reporting that he was mentally retarded by family members at the time.

The habeas court concluded that Taylor

> cannot properly be classified as mentally retarded or as a mentally retarded person because he fails to meet all three portions or components of the relevant definition thereof set forth in TEX. HEALTH & SAFETY CODE ANN. § 581.003(13) and that [Taylor] has failed to show by a preponderance of the evidence that he meets all three components or portions of the relevant definition set forth in TEX. HEALTH & SAFETY CODE ANN. § 581.003(13).

Ex parte Taylor, Application No. 54,954-02 at 55. That court reviewed all the evidence and found none sufficient to show Taylor is mentally retarded. The Court of Criminal Appeals concurred and denied the writ. Its conclusion that Taylor failed to establish mental retardation was not an unreasonable application of federal law, as established by the Supreme Court.

The Court should deny Taylor's petition for writ of habeas corpus with prejudice, and *sua sponte* deny a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court deny Taylor's petition for writ of habeas corpus and dismiss it with prejudice, and issue no certificate of appealability.

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

I do hereby certify, pursuant to Local Rules 7.4 and 3.1(f) of the Northern District of Texas that other than the petitioner, Elkie Lee Taylor, and the respondent, Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, counsel for Respondent is unaware of any person with a financial interest in the outcome of this case.

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above pleading has been served by placing same in the United States mail, postage prepaid, on this the 4th day of August, 2006, addressed to:

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