

CT ORIGINAL

FILED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

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CLERK OF COURT

ELKIE LEE TAYLOR

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4-06CV-459-A  
NO. \_\_\_\_\_

VS.

NATHANIEL QUARTERMAN, Director  
Texas Department of Criminal Justice,  
Correctional Institutions Division

PETITIONER'S SUCCESSIVE (SECOND)  
PETITION FOR WRIT OF HABEAS CORPUS

FILED WITH PERMISSION PURSUANT TO 28 U.S.C. § 2244  
AUTHORIZATION GRANTED BY THE U.S. COURT OF APPEALS  
FOR THE FIFTH CIRCUIT IN CAUSE NO. 06-10386

(THIS IS A CAPITAL CASE)

MAY IT PLEASE THE COURT:

INTRODUCTION

NOW COMES, Elkie Lee Taylor, the petitioner herein, through counsel and petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and for relief from his unconstitutional sentence of death entered by the 297<sup>th</sup> District Court of Tarrant County, Texas and would show the Court as follows:

I.

PRIOR PROCEEDINGS AND BACKGROUND

On June 20, 2002 the United States Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002) declaring that execution of persons with mental retardation

constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Id.* On January 16, 2003, seven months after the Supreme Court issued its decision in *Atkins* and seven days before his scheduled execution on January 23, 2003, Elkie Lee Taylor filed a subsequent state application for writ of habeas corpus with the Texas Court of Criminal Appeals (“CCA”) raising a claim of mental retardation. In support of his application, Mr. Taylor presented IQ scores of 63, 57 and 75, and substantial evidence in support of adaptive functioning deficits as well as developmental age onset.<sup>1</sup>

The Texas Court of Criminal Appeals followed the appropriate state statutory procedure set forth in Tex. Code Crim. Pro. art. 11.071 § 5; reviewed the application and found that Taylor’s *Atkins* claim of mental retardation demonstrated a *prima facie* showing satisfying the requirements of Section 5 of Article 11.071. The CCA granted applicant’s request for a stay of execution, and remanded his mental retardation claim to the trial court for further proceedings. *Id.*

The trial court, in reviewing Mr. Taylor’s application, received extensive documentary evidence, expert affidavits including test results, and a current valid IQ test conducted by the State’s expert psychologist revealing an IQ of 65. After reviewing the evidence the trial court made findings of fact and conclusions of law and recommended that relief be denied. In accordance with Texas procedure the trial court then submitted the matter back to the CCA. The CCA observed, however, that the trial court had not conducted an evidentiary hearing to consider testimony and evidence regarding mental

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<sup>1</sup> Included in the documentary evidence was TDCJ-ID records revealing that during an prior incarceration for burglary, prison officials had placed Mr. Taylor in their Mentally Retarded Offenders Program (“MROP”).

retardation and found that a “live hearing is necessary,” and referred the matter, once again back to the trial court for an evidentiary hearing.

The trial court ordered an evidentiary hearing that lasted for three days on June 20, 21 and 22, 2005. During the course of this hearing three experts, for both state and defense, testified and all agreed that Mr. Taylor met two of the three criteria for a mental retardation diagnosis.<sup>2</sup> Dr. Randy Price, the state’s psychologist, testified consistently with his earlier affidavit, that Elkie Lee Taylor’s general intellectual functioning, represented by the various IQ tests, was significantly subaverage and that in his opinion Taylor’s cognitive impairment manifested before the age of 18. Dr. Price’s only expressed disagreement during the evidentiary hearing with a “formal” mental retardation diagnosis centered around Mr. Taylor’s adaptive behavior functioning. Price believed in his opinion that Elkie’s limitations in functioning did not warrant a “formal” diagnosis of mental retardation. Dr. Price’s opinion was, however, less than certain:

Q. And I think you've testified also that you even, although it was not your opinion, you were open to the possibility that Elkie Lee Taylor is a person with mild mental retardation?

A. I am.<sup>3</sup>

See App. E, pp. 11-12.

The two defense psychologists also testified at length. Dr. Denis Keyes and Dr. George Denkowski, each disagreed with Dr. Price’s opinion on Elkie’s adaptive behavior

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<sup>2</sup> All three of the testifying experts conducted extensive face-to-face testing and evaluation of Mr. Taylor.

<sup>3</sup> Writ Hearing Reporter’s Record (“RR”) volume an page; Apps. C, D and E; State Court Evidentiary Hearing held on June 20, 21 and 22, 2005.

functioning and presented their own psychometric evidence of Mr. Taylor's serious adaptive functioning limitations existing since childhood. All experts concurred on the IQ and age-of-onset findings and no evidence was presented to contradict those opinions.

The trial court entered a new set of findings of fact and conclusions of law Again finding that Elkie Lee Taylor failed to show he was a person with mental retardation and submitted the matter back to the CCA and recommended that relief be denied. Despite uncontradicted evidence upon the IQ and age-of-onset issues, the trial court still found that Taylor did not meet any of the criteria by a preponderance of the evidence.

The Court of Criminal Appeals reviewed the trial court's new findings and conclusions, and on February 1, 2006 entered an order denying Mr. Taylor's request for relief. Despite a lack of disagreement on the issues of IQ and age-of-onset, the CCA, in its order including a concurring statement joined by four judges, left undisturbed the trial court's finding upon these uncontroverted facts. See *Ex Parte Taylor*, No. WR-48,498-02 (February 1, 2006).(concurring statement by Johnson, J), See App. A.

## II.

### **CLAIM FOR RELIEF UNDER SUCCESSIVE HABEAS PETITION**

**ELKIE LEE TAYLOR CLAIMS THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE IS MENTALLY RETARDED. SEE *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002).**

#### **1. This Claim Has Never Been Presented to This Court**

As set forth above, the decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) established a new rule of constitutional law exempting mentally retarded persons from execution. Elkie Lee Taylor claims that his execution violates the Eighth Amendment's

prohibition against cruel and unusual punishment because he is mentally retarded. Mr. Taylor during his first federal habeas proceedings did not raise this claim, see *Taylor v. Cockrell*, No. 01-11044 (5<sup>th</sup> Cir. 2002) (*per curiam*), however, because *Atkins* had not yet been decided the basis for such a claim was not in existence at the time of Taylor's initial habeas proceeding. Therefore, this claim did not form any part of Mr. Taylor's initial petition for habeas corpus relief filed with the United States District Court for the Northern District of Texas. *Id.*

Consequently, this motion meets the first prong of the *Morris* test. See *In Re Morris*, *supra*; 28 U.S.C. § 2244 (b) (2).

**2. This Claim Relies On a New Rule Made Retroactive by the Supreme Court.**

As this Court recognized in addressing an *Atkins* mental retardation claim in *In Re Morris*, 328 F. 3<sup>rd</sup> 739 (5<sup>th</sup> Cir. 2003):

[T]he claim to be presented in the proposed successive habeas corpus application relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, see *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989) and *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002); ...

*Id.* at 740-741.

Thus, this Court has previously determined that claims of mental retardation made possible by the *Atkins* decision, *do rely* upon a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” *Id.* Therefore the second prong of the *Morris* test for a grant of permission to file a successive habeas petition is met. See 28 U.S.C. § 2244 (b) (2) (A).

**3. Elkie Lee Taylor is Mentally Retarded**

The third prong of *Morris* sets forth that a motion for permission to file a successive application for habeas relief under an *Atkins* claim will be granted if “applicant should be categorized as ‘mentally retarded’ as defined in these cases [*Penry v. Lynaugh*, and *Atkins v. Virginia*].” *Id.*

The United States Supreme Court and the Texas Court of Criminal Appeals both subscribe to the AAMR<sup>4</sup> definition of mental retardation. See *Atkins*, 536 U.S. at 305 n.3, and *Ex Parte Briseno*. 135 S.W.3d 1 (Tex. Crim. App. 2004). The AAMR defines mental retardation as follows:

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.

See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) (“2002 AAMR Manual”)

Elkie Lee Taylor meets the third prong of the *Morris* test. Two well-qualified and highly experienced psychologists using standard and generally accepted methods for diagnosing mental retardation both made independent determinations and reported and testified in the state evidentiary hearing that Elkie Lee Taylor is mentally retarded. Moreover, all expert evidence in this case, including the state’s expert testimony, reveals that on two of the three mental retardation criteria are met and no evidence contradicts those findings.

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<sup>4</sup> American Association of Mental Retardation.

**A. Elkie Lee Taylor Suffers from Sub-Average Intellectual Functioning**

Elkie Lee Taylor obtained the following IQ scores over his lifetime:

<b>TEST</b>	<b>EXAMINER</b>	<b>SCORE</b>	<b>RESULT</b>
<b>WISC (1972)</b>	Dr. Leon Jackson	75 ± <sup>5</sup>	MR Criteria is Met
Revised Beta II (1992)	TDCJ-ID	63	MR Criteria is Met
Culture Fair (1992)	TDCJ-ID	57	MR Criteria is Met
<u>WAIS-R</u> (1992)	TDCJ-ID	69	MR Criteria is Met
<u>WAIS-III</u> (2003)	Dr. Price	65	MR Criteria is Met
<u>KAIT</u> (2003)	Dr. Keyes	71	MR Criteria is Met

The foregoing table illustrates that *each and every score* meets the first criteria for a mental retardation diagnosis. Each obtained IQ score, according to prevailing AAMR standards, is applied by using a “range” of scores, or “confidence band.” The application of a “range” or “confidence band” is used because all IQ tests have a certain level of

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<sup>5</sup> See Affidavit of Dr. George Denkowski. Dr. Denkowski determined that the 1972 IQ test administered to Mr. Taylor was based upon “norms” from 1948. Denkowski re-normed the test and determined that the 1972 score was actually a score of 68. The state’s psychologist, Dr. Price, agreed with this procedure and also accepted the re-scoring of the 1972 test. See App. B, pp. 117-118.

measurement error, known as standard error of measurement (“SEM”). A confidence band helps to interpret the obtained score by providing a level of confidence for that particular score. AAMR methodology requires that if any portion of the “confidence band” is below the score 70 (representing two standard deviations below the mean average for the general population) the IQ criteria are met.

Dr. Denis Keyes, using a *KAIT* test,<sup>6</sup> observed in his affidavit: “[o]n this test battery, Elkie’s overall (Composite IQ) placed him approximately at the lowest 3 percentile of the U.S. population, *and consistently within the range of mental retardation...*” (emphasis added). Dr. Keyes testified at the hearing as follows:

Q. So based upon the intelligence test and the records that you had of other tests that were performed, were you able to form an opinion as to whether or not Elkie Taylor suffered from significant subaverage general intellectual functioning?

A. Yes.

Q. And what is that opinion?

A. He does suffer from low intellectual functioning, significantly low.

See App. D, p. 25.

The State’s expert, Dr. Randall Price, using a *WAIS-III* test,<sup>7</sup> also found that Elkie Lee Taylor met this criteria for a MR diagnosis. In his affidavit Price observed: “Mr. Taylor’s scores fall more than two standard deviations below the mean and *within* the mildly mentally retarded range...” (emphasis added). See App. B, 127.

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<sup>6</sup> *Kaufman Adult and Adolescent Intelligence Scales.*

<sup>7</sup> *Wechsler Adult Intelligence Scales - 3<sup>rd</sup> Edition.*



At the evidentiary hearing Dr. Price testified consistent with his findings as follows:

Q. And would you agree with me that Elkie Lee Taylor, and I think you've testified to that yesterday, does, in fact, suffer from significantly subaverage general intellectual functioning; is that correct?

A. It is.

See App. E, p. 7.

Dr. Denkowski, relying upon the existing scores including the IQ testing of Dr. Price testified as follows:

Q. Now, you said that you didn't do any IQ testing on Elkie because that had already been conducted; is that right?

A. Yes, there were three adult testings that pretty much indicated where he functioned intellectually.

Q. And where did he function intellectually?

A. It was within the significantly subaverage range.

See App. C, p. 19.

All of the experts had before them the testing of Dr. Leon Jackson who examined Elkie Lee Taylor in 1972, at age 10, using the *WISC*.<sup>8</sup> Dr. Jackson concluded, "Elkie is

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<sup>8</sup> *Wechsler Intelligence Scales for Children*.

presently functioning within the borderline to dull normal range of intelligence, *well within the educable mentally retarded range of intelligence.*”<sup>9</sup> See App. B, p. 34.

Dr. George Denkowski, norm-corrected Elkie’s 1972 *WISC* IQ score, and in his affidavit stated as follows:

Mr. Taylor was tested in 1972 with the *WISC* that was normed in 1948, the resultant IQ of 75 overstated his actual intelligence at age 10 by about 7 points. Interpretation of the quality of that developmental period test score must therefore be made on the basis of an IQ of 68, which then indicates that Mr. Taylor’s general intellectual ability was significantly subaverage quality at that time.

See App. B, p. 118.

The concept of norm-correcting IQ scores is now a common procedure because of what is known as the “Flynn effect.” The “Flynn effect” posits that over time obtained IQ scores from a normed test, regardless of the testing instrument used, will systematically increase as measured against the general population (e.g. a 1948 IQ test given to someone in 1972 will no longer reflect an accurate IQ score unless norm-corrected for this IQ score inflation). The “Flynn effect” was another area upon which Keyes, Denkowski and Price all agreed.

Dr. Price further agreed with Dr. Denkowski that it was appropriate to “norm-correct” Mr. Taylor’s 1972 test in order to obtain an accurate IQ score:

Q. For example, the one test we've got from 1972 when Elkie was ten years old, probably good procedure, good professional procedure, to norm-correct that as Dr. Denkowski did; would you agree with that?

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<sup>9</sup> Under the terminology existing in 1972, educable mental retardation, or EMR, is a “label for a child who scores below the “normal” range on a standard IQ test and ...formally still classified as mentally retarded but can profit from education. See *Dictionary of Psychology*, p. 236.

A. I would.

See App. E, 15.

In sum, upon the intellectual functioning prong of a mental retardation diagnosis, all experts agreed that the IQ testing performed indicates that Elkie Lee Taylor meets the first prong of a mental retardation diagnosis. For this reason a *prima facie* showing of subaverage intellectual functioning is demonstrated.

**B. Elkie Lee Taylor Suffers Significant Limitations in Adaptive Behavior**

Elkie Lee Taylor also meets the second criteria for a mental retardation diagnosis in that he has serious and severe limitations in the area of adaptive behavior.

Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background and community setting. See DSM-IV p. 40. The AAMR defines “Adaptive Behavior” as “the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.” See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) p. 73. An evaluation of this criteria for a mental retardation diagnosis under the AAMR formula:

[R]equires the use of instruments that (a) are psychometrically sound, (b) address the three areas of adaptive behavior in the definition, and (c) are normed on groups of people with and people without mental retardation.

*Id.* at p. 73.<sup>10</sup>

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<sup>10</sup> The 2002 version of the AAMR manual translates the 10 skill areas from the 1992 AAMR manual definition (communication, self-care, home living, social skills,

Individually administered IQ tests will have, as previously stated, a few points of error or SEM (standard of error measurement). That is why individuals with measured IQs as high as 75 can sometimes be diagnosed as having mental retardation—they have problems with adaptive functioning that help define the mental retardation condition. The true importance of adaptive behavior evaluation exists to assure the examiner that the individual is not merely a poor test-taker, but rather a truly disabled individual. See 2002 AAMR Manual.

Adaptive behavior testing assists an examiner but the selection of tests, use of historical information, application of clinical judgment, selection of test respondents and the importance of accurate test interpretation make adaptive deficit evaluation less objective than IQ scoring. As a result, adaptive behavior is an area where disagreements among professionals most often develop in obtaining a valid diagnosis of mental retardation.

To understand and apply the concept of adaptive functioning, the AAMR in its 1992 Manual references the 10 areas of adaptive functioning necessary for evaluating mental retardation. In order for a valid diagnosis of mental retardation under the 1992 Manual (referenced by the *Atkins* Court) the subject must be deficient in two or more of the following areas:

- ✓ Communicating;

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community use, self-direction, health and safety, functional academics, leisure and work) into the three new “broad domains” of adaptive behavior—*conceptual, social and practical* skill areas. *Id.* at p. 82, Table 5.2. The evaluation of adaptive behavior in the 2002 version of the AAMR contains the same areas of functioning as the 1992 version of the AAMR but the skill areas are presented differently.

- ✓ Caring for self;
- ✓ Living at home;
- ✓ Relating to others;
- ✓ Using community resources;
- ✓ Directing self;
- ✓ Academic functioning;
- ✓ Working;
- ✓ Using free time;
- ✓ Health and safety

See American Association on Mental Retardation, *Mental Retardation: Definition, Classification and Systems of Supports 5* (9<sup>th</sup> ed. 1992) (1992 AAMR Manual).

Dr. Keyes in his adaptive behavior testing and evaluation of Elkie Lee Taylor used two instruments that are commonly used in the field of adaptive behavior assessment (i.e. the Vineland Adaptive Behavior Scale, "VABS" and the Scale of Independent Behavior, "SIB"). Both of these tests demonstrate Elkie Lee Taylor's severe deficits in adaptive functioning. For example, under the Vineland scoring, Elkie's scores show that Elkie is at such a low position that he functions roughly at the bottom 1 percentile of the general population. The SIB scores confirm this with scores also placing his functioning in the lowest 1 percentile of the general population. See Exhibit A, Keyes Affidavit and Report p. 1. See App. B, pp. 102-107.

In addition to Keyes's VABS and SIB scoring, Dr. Denkowski, as a part of his examination, administered a different test, the Adaptive Behavior Assessment Survey ("ABAS") and concluded as follows:

Q. Were you able to gather enough data and information that's relied upon by experts in your field to render an opinion as to the adaptive behavior of Elkie Taylor?

A. Yes, I was.

Q. What is your opinion of the adaptive behavior functioning of Elkie Taylor?

A. It's my opinion that he has deficits in adaptive behavior as contemplated by the diagnostic criteria that we follow here in Texas in Atkins proceedings.

See App. C, pp. 53-54.

One of the important benefits of the ABAS is that it scores each of the 10 skill areas recognized by the 1992 AAMR Manual. According to Denkowski the ABAS is an instrument of "extremely good reliability," and even "as good as the Wechsler Intelligence Scales [IQ test], which is excellent." See App. C, 62-63.

Dr. Denkowski as a part of his testimony at the evidentiary hearing prepared for the trial court a table reflecting Mr. Taylor's ABAS test results. The following table reflects Elkie's scoring in each the 10 AAMR skill areas as follows [continued on next page]:

Table 4

Mr. Taylor's Adult Adaptive Behavior Rated with the  
Adaptive Behavior Assessment System (ABAS)

<u>Adaptive Behavior Skills Area</u>	<u>Scaled Score</u>	
	<u>Initial</u>	<u>Adjusted</u>
Communication	5	7
Self-Care	1	6
Social	5	6
Work	6	6
Self-Direction	3	4
Community Use	2	4
Home Living	3	4
Health & Safety	2	3
Leisure	1	1
Functional Academics	1	1
General Adaptive Composite Score		62
95% Confidence Range		59 – 65

Ratings of the quality of 44 of the ABAS 239 skills were adjusted upward as clinical judgement indicated that they could have been performed or could have been performed more often if permitted by circumstances.

Scaled Scores of 4 or less in two Skills Areas establish deficits in adaptive behavior, as does a Composite Score of 70 or less.

The results of the ABAS indicate deficits (i.e. significant limitations) in at least six of the tested skill areas and a composite score also establishing the requisite limitations in adaptive functioning necessary for a mental retardation diagnosis.

In addition to Mr. Taylor's adaptive behavior test results, documentary evidence and affidavits from family members and experts reflect the following practical real-life difficulties:

**Academic Functioning.**

Elkie's level of academic functioning was so low that his grades in school were almost exclusively Ds and Fs—even in the first grade (representing a severe deficit in “functional academics”)

Elkie Taylor's grade records, of course, amply verify this adaptive deficit. With the exception of his grades in art, which ranged from B to C-, all of his academic grades were Ds and Fs.

See Report of Dr. Leon Morris App. B, p. 16.<sup>11</sup>

Elkie dropped out of school in the second year of the seventh grade, unable to perform the academic work, see Application App. p. 88-94, Elkie's academic achievement (“EA”) scores while in prison for burglary confirm that he “consistently fell at or below the third grade level (roughly 9 years of age);” TDCJ-ID records indicate the following EA scores:

- o 7/16/92<sup>12</sup>

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<sup>11</sup> Dr. Leon Morris, Ed.D., a forensic psychologist and a certified professional school psychologist performed an evaluation of Elkie Lee Taylor's school, Job Corps and prison records.

<sup>12</sup> These scores reflect grade levels (e.g. the composite 2.4 score indicates Elkie is functioning at the second grade fourth month level).



- Reading 2.6;
  - Math 3.3;
  - Language 2.1;
  - Composite 2.4
- 10/17/92
    - Reading 2.5;
    - Math 3.3;
    - Language 1.7;
    - Composite 2.8;
  - These scores indicate that Elkie Taylor's performance on achievement testing was at the first to third grade level on two separate occasions. *These scores are consistent with his intelligence test scores;*

See Report of Dr. Morris, App. B, pp. 17-18 (emphasis added).

Elkie's California Achievement Scores while in elementary school also placed him within the 1<sup>st</sup> percentile for his age group.

His [Taylor's California Achievement Test scores are consistent with his low grades, His overall performance on this test in 1971 was at the 1<sup>st</sup> percentile for his age group, and all of his scores were below the second grade level, even though he was in the third grade.

See Report of Dr. Morris, App. p. 16; see also App. B, p 35.

Elkie's family confirmed his difficulties and his "slowness:"

Elkie was always mentally "slow" from the time he was born. Elkie had difficulty in school and was in special education classes until the time Elkie quit going to school.

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Elkie never really learned to read or write he tried to learn when he was in school but never was able to do well in school many of Elkie's problems

came from not being able to understand people and not being able to read or write.

See Affidavit of Maggie Taylor<sup>13</sup> See App. B, p. 59.

Upon this skill area of “functional academics,” no disagreement existed between the defense psychologists and the state psychologist, Dr. Randy Price:<sup>14</sup>

Q. And even on the adaptive behavior, and I understand that you do not believe the adaptive deficits are there; is that the gist of your testimony?

A. That's the gist, that I don't think the evidence for adaptive deficits tips the scale for my opinion that he meets all three criteria for mental retardation.

Q. Okay. Fair enough. But I take it that you did note some adaptive deficits in his adaptive behavior?

A. That's correct.

Q. Functional academics, for example?

A. Absolutely.

See App. E, p. 8.

### **Work**

Elkie failed to “adjust to the Job Corps program:”

Job Corps records indicate that Elkie Taylor was in the Job Corps approximately three weeks in 1978. These records indicate that “Elkie was in the Job Corps pre-reading program. He was on level 2 (division) in math.” It was also noted that “he was enrolled in the masonry program” but that he did not adjust to the Job Corps program.”

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<sup>13</sup> Elkie Lee Taylor's maternal aunt.

<sup>14</sup> Dr. Price administered the SSSQ (Street Skills Survival Questionnaire) and determined that in his opinion Elkie did not exhibit sufficient adaptive deficits to warrant a MR diagnosis. The use of the SSSQ was hotly contested at Elkie's evidentiary hearing.

See Report of Dr. Morris, App. p. 17; see also App. B, pp. 67-78;

Elkie was unable to fill out a job application and never held a steady job:

I don't remember any time when Elkie ever had a job, either as an adult or before age eighteen. Because Elkie was always "slow" and had problems in dealing with people, I don't think he could hold down a job.

See Affidavit of Maggie Taylor App. B, p. 60.

My Family has said that they can't remember Elkie ever having a job. I can't ever remember him having job either. I don't think that he was able to understand things enough in order to work at a regular job. I know that he never could read or write and that meant that he couldn't fill out a job application.

See Affidavit of Pearlie Pierson<sup>15</sup> App. B, p. 62.

#### **Use of Community Resources**

Elkie is unable to use public transportation.

Elkie didn't understand bus routes and if he went alone he might end up in the wrong place or just ride around without going anywhere" (representing a severe deficit in "using community resources")

See Affidavit of Fred Taylor App. B, p. 57.

Elkie has never possessed a driver's license:

I never knew Elkie to have a driver's license. He mostly walked in order to get around.

See Affidavit of Fred Taylor App. B, p. 57.

#### **Self-Care and Self-Direction**

As a youngster, Elkie could not perform simple tasks like "cooking rice."

He always had trouble doing things, For example, he couldn't cook rice. The rice was always runny and full or too much butter. He tried and tried but couldn't do it.

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<sup>15</sup> Elkie Lee Taylor's sister.

See Affidavit of Pearlie Pierson App. B, p. 62.

**Health and Safety**

Elkie got venereal disease at least three times and needed assistance to obtain medical treatment:

Also, he got involved in things that weren't safe. For example, he got venereal disease at least three (3) times that I know about. I had to personally take him to a medical clinic to get penicillin and treatment for the disease. I considered his behavior very unsafe.

See Affidavit of Fred Taylor<sup>16</sup> App. B, pp. 57-58.

**Communication and Social Skills "Relating to Others"**

Elkie has always had difficulty communicating with others:

Elkie's behavior has always been strange. For instance, once in Milwaukee Elkie and I and another man were laughing and talking and then all of a sudden Elkie was fighting with the man. He did this for no reason. I think that he just misunderstood something the man said and that it was directed at him. There was no call for that, but I think that Elkie didn't understand a lot of things.

See Affidavit of Fred Taylor App. B, p. 57.

Elkie always had trouble communicating with people and understanding situations. Usually he didn't understand.

See Affidavit of Fred Taylor App. B, p. 57.

**Use of Leisure or "Free" Time**

Elkie exhibited deficits in the use of his leisure time.

When in Milwaukee Elkie used to just sit in our apartment and listen to the radio and talk on the phone. He also ran with a bad family up there. People that I didn't think he should be with. These people were into drugs and didn't have jobs or anything. Elkie didn't seem to care for any of my

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<sup>16</sup> Elkie Lee Taylor's cousin.

friends who had jobs and led normal lives. Elkie seemed to think people who had jobs were "high class."

See Affidavit of Fred Taylor App. B, p. 57.

### **Living at Home**

Elkie demonstrated an inability to live independently.

It was always strange to me how immature Elkie was in his life. Also, he needed people to help him with certain things. For example, when we lived together in Milwaukee Elkie got around by walking everywhere unless I went with him. If I went with Elkie then we could take public transportation, usually the bus.

See Affidavit of Fred Taylor App. B, p. 57.

When Elkie was in his 20s this conduct continued. For example, the reason Elkie went to Texas in the first place was because of a girlfriend that he hardly knew. He met this girl in Milwaukee and within a very short time was ready to move to Texas with her. Even though he had no money, no job, and no idea how he was going to live in Texas. I tried to stop him but he wouldn't listen to me. He was not able to reason clearly. At the time he moved to Texas he had no family in Texas and did not know any one there except the girlfriend he was going with.

See Affidavit of Fred Taylor App. B, p. 56-57.

As Dr. Keyes so aptly concluded "Elkie has also displayed clearly defective adaptive skills since elementary school and has, most certainly, been adaptively impaired by anyone's standards." See Exhibit A, Keyes Affidavit and Report p. 5. See App. B, p. 106. Dr. Keyes opined: "[r]esults of the interviews suggest that Elkie's *adaptive skills* are more likely to fall within the moderate to severe range of mental retardation. See Exhibit A, Keyes Affidavit and Report p. 4. See App. B, p. 104.

### **C. Prima Facie Showing of Onset Before the Age of 18**

Dr. Denkowski as a part of his evaluation of Taylor also conducted a detailed examination of Mr. Taylor's Mississippi school records to glean information of adaptive

functioning during Taylor's developmental years and prepared several tables in order to illustrate Taylor's adaptive functioning based upon that information:

Table 2

Mr. Taylor's Developmental Adaptive Behavior at Ages 5 to 12 Rated by School Teachers with the *Evaluation of Social & Personal Assets*

<u>Adaptive Behavior Area</u>	<u>Annual Teacher Ratings per Grade</u>					
	<u>1<sup>st</sup></u>	<u>1<sup>st</sup></u>	<u>2<sup>nd</sup></u>	<u>3<sup>rd</sup></u>	<u>4<sup>th</sup></u>	<u>5<sup>th</sup></u>
<u>(Self-Direction)</u>						
Assumes Responsibility	4	4	4	5	5	5
Initiative	4	4	4	5	5	5
Leadership	4	4	4	5	5	5
<u>(Self-Care)</u>						
Personal Hygiene	4	4	4	5	5	5
<u>(Social Skills)</u>						
Works Well with Others	4	4	4	4	5	5

1 = high skill level; 5 = low skill level.

Teachers considered adaptive behavior to have been poor at ages 6 through 9. At the slow rate adaptive behavior was developing, its quality for age fell further behind thereafter, to where teachers found adaptive behavior to have been significantly deficient by ages 11 and 12.

**Source:** Mississippi school records

Dr. Denkowski compiled information indicating that any adaptive deficits were not the result of excessive absences or lack of effort on the part of young Elkie:

Table 1

Mr. Taylor's Average Annual Elementary School Grades,  
Academic Achievement, and Classroom Behavior Ratings  
Through the 5<sup>th</sup> Grade

<u>Subjects</u>	<u>School Grades per Grade Placement</u>					
	<u>1<sup>st</sup></u>	<u>1<sup>st</sup></u>	<u>2<sup>nd</sup></u>	<u>3<sup>rd</sup></u>	<u>4<sup>th</sup></u>	<u>5<sup>th</sup></u>
Arithmetic	-	D	D	D	F	F
Art	-	D	B	-	C	C
Health/Phys Education	-	D	D	D	D	-
Language Arts	-	-	F	F	D	F
Reading	-	D	F	D	D	F
Spelling	-	D	F	F	F	F
Writing	-	D	D	D	D	F
Science	-	D	D	F	D	D
Social Studies	-	-	F	F	-	F
 <u>Academic Achievement</u>						
<i>California Achievement Tests Results</i>						
(Grade-Level Functioning)	-	-	Mid-Kdg	Mid-Kdg	Entry-1st	-
 <u>Classroom Behavior Ratings</u>						
Aggressiveness	0 2	0	0	0	0	2
Restlessness	0	0	0	0	0	2
Temper Tantrums	0	0	0	0	0	2
Day Dreaming	0	0	0	0	0	2
Mannerisms	0	0	0	0	0	2
 <u>Absences</u>	 11	 37	 10	 11	 5	 18

1 Removed from school after four weeks

2 0=satisfactory, 2=moderately unsatisfactory, 3=needs correction.

Failing grades in the absence of classroom behavior problems and lack of excessive absences show that lack of academic progress was not due to interfering/disruptive behaviors.

Source: Mississippi school records

The foregoing table illustrates that with the exception of the first grade, excessive absenteeism was not a problem and as reflected by the "classroom behavior ratings" Elkie's level of effort was satisfactory at all pertinent times.

As a result of Dr. Denkowski's extensive evaluation he concluded that Elkie Lee Taylor's cognitive impairment manifested itself during the developmental period of life originating before age 18;

Q. Did you have enough data and information to form an opinion as to whether or not Elkie Taylor's impairment or mental retardation manifested prior to age 18?

A. Yes, I have enough information to make that decision.

Q. And what is that opinion?

A. That he did manifest the condition of mental retardation prior to age 18.

See App. C, p. 35.

Dr. Denis Keyes based upon his examination and evaluation of pertinent information also concurred that Elkie Lee Taylor's condition manifested itself before the age of 18.

Q. So do you have an opinion whether or not Elkie's problems with mental retardation manifested itself during the developmental period?

A. Yes.

Q. And what is that opinion?

A. It definitely was there prior to age ten, I would say.

See App. D, p. 35.



The psychological assessment and evaluation of Dr. Leon Jackson, including the sub-average results of the Wechsler Intelligence Scale for Children ("WISC") IQ test performed when Elkie was 10 years old further indicate that the onset of Taylor's mental retardation manifested itself well before he reached the age of 18 years. See App. B, p. 34

The historical data including Elkie's sub-average and abysmal elementary school grade records and the information provided by the family members' affidavits confirm that Elkie Lee Taylor's cognitive impairment is one that has existed since childhood.

I believe that Elkie does not think like other people because of his "slowness." This is something that I have seen over the years that I have known Elkie.

See Affidavit of Maggie Taylor B, p. 60.

Dr. Price, the state's psychologist, concurred with the age-of-onset evidence in Elkie's case:

Q. So if the Judge were to enter a finding of fact that age of onset, that the problems were manifested during the developmental stage and the age of onset prong was met, you would have no quarrel with that?

A. I wouldn't. I wouldn't have any quarrel with any finding of fact the Judge decided to enter.

Q. Well, I guess my question -- the Judge can -- I guess only we have to worry about that. But the evidence supports that finding, would you agree with that?

A. I agree.

See App. E, pp. 7-8

**III.**

**THE STATE COURT FINDINGS ARE NOT ENTITLED TO DEFERENCE**

The statute applicable to this motion, 28 U.S.C. § 2244, and this Court's standard of review under a "new rule of constitutional law." See *In Re Morris*, supra, The federal habeas statute, 28 U.S.C. § 2254 (e)(1), provides in pertinent part:

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...

In this regard, the presumption may be rebutted if the state court findings (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, (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, or (3) the applicant has failed to develop the factual basis of the claim, but—"the claim relies on a new rule of constitutional law (in this case, *Atkins*), made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See 28 U.S.C. § 2244 (d) and (e)(1) and (e)(2).

The Texas Court of Criminal Appeals in *Briseno* established certain "temporary judicial guidelines," ostensibly as a "way to enforce" *Atkins*. As evidenced by the approach taken in Mr. Taylor's case in particular, the State court decision is an "unreasonable determination of the facts in light of the evidence," and The *Briseno* decision, by its unconstitutional approach, denies to Elkie Lee Taylor and to all similar

defendants who have made a *prima facie* showing of mental retardation an adequate constitutional procedure to establish their claims.

### **1. Defining and Diagnosing Mental Retardation.**

The definition of mental retardation announced by the Court of Criminal Appeals attempts to create two separate classifications of persons with mental retardation, those who are considered mentally retarded by psychological or “social services” standards and those individuals who, although diagnosed as mentally retarded by psychologists, are nonetheless not *too* mentally retarded to be executed;

We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty. Most Texas citizens might agree that Steinbeck’s Lennie should by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty?

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

Nevertheless, the court states “[a]s a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature,” the court then holds that “[u]ntil the Texas Legislature provides an alternate statutory definition of ‘mental retardation’ for us in capital sentencing, we will follow the AAMR or section 591.003(13) criteria in addressing *Atkins* mental retardation claims.” *Id.*

The Court of Criminal Appeals, however, in applying the approved AAMR definition to Elkie Lee Taylor’s IQ testing ignored the AAMR standards in several important respects.

First, IQ scores *always* account for the standard error of measurement (“SEM”) of the particular instrument used for assessment. See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) p. 57 (“The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement.”)

The Court of Criminal Appeals simply ignored SEM in its review of Taylor’s IQ scores. Any IQ evidence that does not follow the appropriate standards of the applicable AAMR definition in accounting for a standard error of measurement—when the standard mandates consideration of SEM—cannot be considered a constitutionally “way to enforce” *Atkins*. To disregard that which is “universally accepted” can only be achieved by an approach that is arbitrary and capricious.<sup>17</sup>

Second, The AAMR defines “Adaptive Behavior” as “the collection of conceptual, social, and practical skills that have been learned by people in order to

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<sup>17</sup> The Court of Criminal Appeals in *Briseno* approved the ignorance of this important convention of mental retardation diagnoses:

But even if a factfinder applied the statistical standard deviation, there is not enough evidence in this record that proves, by a preponderance of evidence, that applicant’s true IQ is lower than 72-74 rather than higher than 72-74. *Thus, the trial court did not abuse its discretion in finding that applicant failed in his burden of proof even if it did “disregard” the standard error of measurement as applicant asserts.*

See *Briseno, supra*.

function in their everyday lives.”<sup>18</sup> See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) p. 73. An evaluation of this criteria for a mental retardation diagnosis under the AAMR formula:

[R]equires the use of instruments that (a) are psychometrically sound, (b) address the three areas of adaptive behavior in the definition, and (c) are normed on groups of people with and people without mental retardation.

*Id.* at p. 73.

The definition of mental retardation under *Briseno* sanctions an analysis of “adaptive behavior” that is inconsistent with the principles of the AAMR. As discussed herein, an appropriate “Adaptive Behavior Assessment” focuses not on what the subject *can do* but on those areas that isolate and demonstrate *limitations*, in other words, what a subject cannot do—“[w]ithin an individual limitations [of adaptive behavior] often coexist with strengths.” *Id.* at p. 13. Persons with mental retardation will always have both strengths and weaknesses, and any analysis that considers only the strengths of the individual is flawed.

In Taylor’s hearing, the state court’s approach was to adopt the state’s argument that Mr. Taylor’s mental retardation claim could be defeated through evidence of those areas of life in which Elkie Lee Taylor appeared to function normally. The focus of the state court was on the strengths of adaptive functioning, not the limitations.

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<sup>18</sup> The 2002 version of the AAMR manual translates the 10 skill areas from the 1992 AAMR manual definition (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work) into the three new “broad domains” of adaptive behavior—*conceptual, social and practical* skill areas. *Id.* at p. 82, Table 5.2. The 2002 version still evaluates the 10 skill areas but does so within the three broad domains.

As a result, the state court's findings fail to address the limitations established by the evidence but instead address only those adaptive functioning areas that display Elkie Lee Taylor's strengths and not his weaknesses. The limitations that define the condition of mental retardation are the proper focus of any scientific-based inquiry. If an individual suspected of being mentally retarded is able perform a particular skill, this fact alone means nothing, the question remains: Are there limitations that define the disability of mental retardation?

Third, the Court of Criminal Appeals analysis of "Adaptive Behavior" expands the investigation to include independent factors that psychologists do not ordinarily use in determining adaptive functioning. By suggesting seven (7) additional and new "factors" the court urges habeas judges to make *their own diagnosis* upon the issue of adaptive deficit criteria. The state court does not cite any authority for the inclusion of these "additional" factors. No authority is cited because none exists.

The AAMR, for instance, does not speak about Factor No. 6—"Can the person hide facts or lie effectively in his own or others' interests?" The suggestion that a habeas court use this particular factor to support an evaluation of mental retardation is unfounded. Even persons with mental retardation may be able to lie and hide facts effectively—this type of consideration by itself has nothing to do with a mental retardation diagnosis.

Factor No. 1 asks: "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?" This Factor is

singularly misleading. The AAMR observes serious problems in relying upon what others “think:”

Most of the children who fit within the MMR [mild mental retardation] range are being classified by schools as having LD [learning disabilities] rather than mental retardation” due to the stigma of the label that applies to an overly heterogeneous group. A study of 150 grade-school students in five southern California school districts by MacMillan, Gresham et. al. (1996) showed that schools were hesitant to diagnose students with low IQs and learning problems as having mental retardation and more often classified them as having learning disabilities.

Estimates from the U.S. Department of Education annual counts lent further evidence to this trend as they indicated that a percentage of school-age students classified as having mental retardation has decreased enormously—40% between the 1976-1977 school year and 1994-1995 (Beirne-Smith, Ittenback & Patton, 1988). At the same time, the percentage of students with learning disabilities greatly increased, some estimating an increase as high as 207% (MacMillan, Gresham et. al., 1996).

See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) p. 31-32.

These seven *fictional* factors simply do nothing more than remove an appropriate evaluation of mental retardation from the grasp of a proper expert-guided analysis and place the diagnosis of mental retardation in the hands of the convicting court—and as far away as possible from any form of meaningful review.

## **2. The Use of Expert Testimony in Mental Retardation Cases.**

The *Briseno* decision, as applied in Taylor’s case, rather than assisting the trial judge in evaluating evidence presented by expert opinion testimony upon the ultimate issue of mental retardation, 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:

Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.

See *Briseno, supra*.

*Briseno*, diminishes the proper use of expert opinion in evaluating mental retardation. In *Briseno* the court simply noted “experts may offer insightful opinions” upon who is mentally retarded. This approach undercuts the proper use of opinion testimony in determining an ultimate issue. See *Daubert v. Merrill Dow Pharms., Inc.* 509 U.S. 579 (1993). Who is to be executed may, indeed, be a question to be determined by a fact-finder, but who is actually mentally retarded is a psychological question that must be informed predominantly by psychological or psychiatric opinions and evidence. Cf. *Addington v. Texas*, 441 U.S. 418 (1979) (“Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists.”).

Just as a determination of mental illness turns upon “facts which must be interpreted” by experts, so must the “facts” relative to mental retardation turn upon the interpretation by expert psychologists and psychiatrists. The *Atkins* decision is not properly enforced and is, in effect, meaningless if the opinions of experts upon the issue of mental retardation are simply dismissed as being “insightful.”

The subject matter of the expert’s testimony must “assist the trier of fact.” Tex. R. Evid. 702, accord Fed. R. Evid. 702. Although “expert testimony is not necessary ... if all the primary facts can be accurately and intelligently described to the jury, and if they, as



[persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special and peculiar training of the subject under investigation,” see *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 415-16 (3<sup>rd</sup> Cir. 1999). Expert opinion is *necessary*, if a fact-finder is not capable of drawing correct conclusions. *United States v. Locoscio*, 6 F. 3<sup>rd</sup> 924, 936 (2d Cir. 1993) (quoting Fed. R. Evid. 7021 Advisory Committee Note.) The trial judge, in mental retardation cases, is simply not as capable of “drawing correct conclusions as are witnesses possessed of special and peculiar training.” Therefore, factual findings relevant to mental retardation cannot be reliably made without the “assistance” of appropriate expert opinion and *methodology*. See Tex. R. Evid. 702. The AAMR acknowledges this important fact:

The assessment of intellectual functioning is a task that requires specialized professional training. Assessment data should be reported by an examiner(s) experienced with people who have mental retardation and qualified in terms of professional and state regulations as well as meeting a publisher’s guidelines for conducting a thorough, valid psychological evaluation of the individual’s intelligence functioning.

See American Association on Mental Retardation: *Mental Retardation: Definition, Classification and System of Supports* (10<sup>th</sup> ed. 2002) p. 51.

As set forth hereinabove, two experts, both with extensive special training in mental retardation (including criminal populations), using reliable and accepted methodologies and determined after evaluating all the appropriate evidence that—Elkie Lee Taylor was mentally retarded. Moreover, the state’s own expert, Dr. Price, concurred with the defense experts on all opinions except the evaluation of adaptive behavior. Applying an appropriate *Daubert-Joiner-Kumho* analysis, Drs. Denkowski and Keyes

used those methods and tests that have been generally accepted, peer-reviewed and established in the psychological community. The *Briseno* guidelines effectively allow the judges to disregard appropriate expert testimony and apply, in its place, arbitrary judicial standards for diagnosing mental retardation.

This *Briseno* procedure, through its loose application of and adherence to sound psychological principles in favor of anecdotal evidence, encourages a finding that a capital murder defendant is not mentally retarded. In this manner, the “almost total deference” afforded to the trial judge’s “credibility determinations,” are not subject to accurate review and if no accepted principles of law and psychology are endorsed or need be applied the end-result is predictable— *Atkins* claims will not be enforced by the Texas courts

Because the *Briseno* decision and its application to Elkie Lee Taylor’s IQ and adaptive behavior testing provide constitutionally inadequate procedures to enforce the *Atkins* decision, and ignore overwhelming evidence of Elkie Lee Taylor’s mental retardation, the findings of fact and the conclusions of law of the convicting court adopted by the Court of Criminal Appeals are unreasonable and not supported by the record in this case and as a result are not entitled to the deference normally afforded to state findings. It is believed that upon the appropriate filing and consideration of a successive petition for writ of habeas corpus, that Elkie Lee Taylor will be GRANTED relief from his unconstitutional sentence of death.

IV.

**REQUESTED FINDINGS AND CONCLUSIONS OF LAW**

Based upon the law and the evidence presented, petitioner requests that at the conclusion of all proceedings herein that this Court find that the state court findings “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,” see 28 U.S.C. 2254, and enter the following findings of fact and conclusions of law that are properly based on the evidence adduced at the hearing and the principles of law applicable to the factfinding necessary to resolve this matter.

**FINDINGS OF FACT**

**History of the Case**

- 1) A Capital Judgment sentencing Elkie Lee Taylor to death was entered on June 23, 1994;
- 2) The judgment and death sentence was affirmed on direct appeal to the Court of Criminal Appeals of Texas on April 24, 1996. See *Taylor v. State*, 920 S.W. 2d 319 (Tex. Crim. App. 1996) *cert denied*, *Taylor v. Texas*, 519 U.S. 951 (1996);
- 3) Applicant’s first application for writ of habeas corpus filed in state court and with the Court of Criminal Appeals was denied on March 28, 2001, *Ex Parte Taylor*, 48,498-01;
- 4) Applicant’s first petition for writ of habeas corpus filed in the United States District Court for the Northern District of Texas, Fort Worth Division, was denied on July 13, 2001. *Taylor v. Johnson*, No. 4:01-CV-0264-A;

5) Applicant's federal application for a certificate of appealability to review the decision of the district court was denied on February 15, 2002. *Taylor v. Cockrell*, No. 01-11044 (5<sup>th</sup> Cir. 2002, *per curiam*);

6) The United States Supreme Court denied applicant's Petition for Writ of Certiorari on October 7, 2002. *Taylor v. Cockrell*, No. 01-10308 (October 7, 2002);

7) This pending and second application for writ habeas corpus was filed with the 297<sup>th</sup> District Court of Tarrant County, Texas No. C-297-006327-0542281-B and with the Court of Criminal Appeals of Texas No. 48,498-02 on January 16, 2003.

8) The Court of Criminal Appeals stayed the execution of Elkie Lee Taylor and remanded this matter to this Court on January 16, 2003 to consider Elkie Lee Taylor's claim of mental retardation. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

9) On September 29, 2004, this trial court entered findings of fact and conclusions of law recommending that Mr. Taylor's application be denied because according to the trial court's view, at that time, Mr. Taylor had failed to show by a preponderance of the evidence that he is mentally retarded.

10) On March 23, 2005, the Texas Court of Criminal Appeals once again remanded this case to this trial court for the purpose of holding an evidentiary hearing. The Court of Criminal Appeals directed this Court as follows:

In this case, we find a live hearing is necessary. Thus, this cause is remanded to the trial court for a live hearing so that the parties may present evidence regarding the issue of whether Applicant is mentally retarded.

See Order in WR-48,498-02 (Tex. Crim. App. March 23, 2005) p. 2.

11) Pursuant to the Order of the Court of Criminal Appeals this trial court held an evidentiary hearing on June 20, 21 and 22, 2005 for the purpose of hearing testimony relative to the mental retardation claim of Elkie Lee Taylor.

12) This trial court finds that based on the additional evidence received during the three (3) day evidentiary hearing that it is necessary to enter findings of fact and conclusion of law that replace the findings and conclusions previously entered in this cause, This Court now finds that Mr. Taylor has proven beyond a preponderance of the evidence that Elkie Lee Taylor is a person with mental retardation as indicated by the following findings of fact.

13) The trial court hereby takes judicial notice of all proceedings before this Court in this case, including the case-in-chief, sentencing and the proceedings of this application for post-conviction relief under Tex. Code Crim. Pro. art. 11.071, including the affidavits, documents, pleadings, exhibits and papers on file in this cause and the live testimony of the evidentiary hearing held on June 20, 21, and 22, 2005. App. C, **RR. 2: 7.**<sup>19</sup>

14) The Court has received and considered all of the evidence submitted.

15) Elkie Lee Taylor has obtained the following IQ scores during his lifetime:

<b>TEST</b>	<b>EXAMINER</b>	<b>SCORE</b>	<b>RESULT</b>
<b>WISC (1972)</b>	<b>Dr. Leon Jackson</b>	<b>75 ±<sup>20</sup></b>	<b>MR Criteria is Met</b>
<b>Revised Beta II (1992)</b>	<b>TDCJ-ID</b>	<b>63</b>	<b>MR Criteria is Met</b>
<b>Culture Fair (1992)</b>	<b>TDCJ-ID</b>	<b>57</b>	<b>MR Criteria is Met</b>

<sup>19</sup> RR = Reporter's Record by volume and then page.

<sup>20</sup> See Affidavit of Dr. George Denkowski.

<b><u>WAIS-R</u></b> (1992)	TDCJ-ID	69	MR Criteria is Met
<b><u>WAIS-III</u></b> (2003)	Dr. Price	65	MR Criteria is Met
<b><u>KAIT</u></b> (2003)	Dr. Keyes	71	MR Criteria is Met

16) At the evidentiary hearing held on June 20, 21, and 22, 2005 the trial court heard the testimony of several lay witnesses and of three expert witnesses, Dr. George Denkowski, Dr. Denis Keyes for the applicant and Dr. Jack Randall Price for the State of Texas. App. C, **RR. 2: 9-165**; App. D, **RR. 3: 7-144**; **RR. 3: 145-185**; App. E, **RR. 4: 6-61**.

**Dr. George Denkowski**

17) Dr. George Denkowski, a licensed psychologist in the State of Texas and an expert on mental retardation testified at the evidentiary hearing on June 20, 21, and 22 2005. Dr. Denkowski was the first expert to testify at the evidentiary hearing. App. C, **RR. 2: 9-165**.

18) Dr. Denkowski testified that Elkie Lee Taylor is and was at all pertinent times mentally retarded. App. C, **RR. 2: 34-35**.

19) Dr. Denkowski testified that in his expert opinion Elkie Lee Taylor suffers from significantly subaverage intellectual functioning. App. C, **RR. 2: 17-26**.

20) Dr. Denkowski testified that the IQ testing of Dr. Price who administered the Wechsler Adult Intelligence Scales Third Edition (WAIS-III) was reliable and is a sufficient basis to establish significantly subaverage intellectual functioning on the part of Elkie Lee Taylor. App. C, **RR. 2: 19-21**.

21) Dr. George Denkowski, a licensed psychologist in the State of Texas and a qualified expert in mental retardation, determined, using the appropriate, credible and reliable methodology, that he is of the opinion that the IQ score obtained by Dr. Leon Jackson indicates, based upon the "Flynn Effect," the score of 75± obtained in 1972 is overstated by approximately 7 points and is more reliably read as reflecting an IQ range or "confidence band" of from 63 to 73, thus, meeting the criteria for subaverage intellectual functioning. See Affidavit of Dr. George Denkowski. App. C, **RR. 2: 21-23.**

22) Dr. George Denkowski is of the opinion that the use of the *SSSQ* test (used by Dr. Price) for adaptive behavior assessment is an inappropriate measure of Elkie Lee Taylor's adaptive behavior functioning and should not be used in determining the adaptive functioning of Elkie Lee Taylor. See Affidavit of Dr. George Denkowski.

23) Dr. George Denkowski is of the opinion that the *SSSQ*:

- a. Uses a "Low Measurement Ceiling;"
- b. Uses a "Narrow Measurement Range;"
- c. Uses "Inappropriate Adult Norms;" and
- d. Uses and "Unrealistically Low Deficiency Cut-Off Score"

And for these reasons the use of the *SSSQ* is "contra-indicated" in this case. See Affidavit of Dr. George Denkowski.

24) Dr. George Denkowski is of the opinion that the *SSSQ* "cannot be given any weight when establishing the quality" of Elkie Lee Taylor's "adult adaptive behavior." See Affidavit of Dr. George Denkowski. See also App. C, **RR. 2: 56-61.**

25) The Court finds that the use of the *SSSQ* is not appropriate in this case and that this evidence does not comply with the methodology requirements of *Daubert v. Merrill Dow Pharms., Inc.* 509 U.S. 579 (1993). App. C, **RR. 2: 56-61.**

26) Dr. Denkowski testified that he examined and evaluated Elkie Lee Taylor on June 9, 2005 for the purpose of determining whether or not Elkie Lee Taylor meets the second criteria for a mental retardation diagnosis, severe limitations in adaptive behavior functioning. App. C, **RR. 2: 35-48.**

27) Dr. Denkowski administered the Adaptive Behavior Assessment Survey (ABAS) to Elkie Lee Taylor. App. C, **RR. 2: 43-48.**

28) Among other things, Dr. Denkowski selected the ABAS because it is the only adaptive behavior assessment instrument that evaluates all ten (10) adaptive skill areas recognized by the AAMR. App. C, **RR. 2: 38.**

29) Dr. Denkowski testified that based on his evaluation, Elkie Lee Taylor meets the second criteria for a mental retardation diagnosis, severe limitations in adaptive behavior functioning. App. C, **RR. 2: 53-54.**

30) Dr. Denkowski testified that Mr. Taylor is deficient in at least five (5), and possibly six (6) of the 10 adaptive skill areas. App. C, **RR. 2: 46.**

31) Dr. Denkowski testified that Mr. Taylor meets the third criteria for a diagnosis of mental retardation, that is, the condition was manifested prior to the age of 18. App. C, **RR. 2: 35.**

**Dr. Denis Keyes Ph.D.**

32) Dr. Denis Keyes Ph.D. is a qualified expert in the field of mental retardation whose credentials are set forth in his curriculum vitae. App. D, **RR. 3: 6-14.**



33) Dr. Denis Keyes was the second expert to testify at the evidentiary hearing held on June 20, 21, and 22, 2005. App. D, **RR. 3: 7-35.**

34) Dr. Denis Keyes is of the opinion, to a reasonable degree of psychological certainty, that the applicant, Elkie Lee Taylor, is a person with mental retardation. See Affidavit of Dr. Denis Keyes p. 5. App. D, **RR. 3: 35.**

35) Dr. Denis Keyes' methodology in arriving at his opinion is both credible and reliable. See Affidavit of Dr. Denis Keyes. See *Daubert v. Merrill Dow Pharms., Inc.* 509 U.S. 579 (1993). App. D, **RR. 3: 7-35.**

36) Dr. Denis Keyes examined and evaluated Elkie Lee Taylor on July 3<sup>rd</sup> 2003, and administered the following battery of tests to Elkie Lee Taylor: See Affidavit of Dr. Denis Keyes.

- e. Kaufman Adolescent and Adult Intelligence Test ("KAIT");
- f. Vineland Adaptive Behavior Scale ("VABS");
- g. Scales of Independent Behavior-Revised ("SIB-R");
- h. Woodcock-Johnson Psycho-educational/Battery (3<sup>rd</sup> Ed.);
- i. Developmental Test of Visual-Motor Perception;
- j. Bender-Gestalt Test;

App. D, **RR. 3: 24-35.**

37) Elkie Lee Taylor's "composite" IQ score on the KAIT was 71 indicating significant sub-average intellectual functioning and well within the mildly mentally retarded range. See Affidavit of Dr. Denis Keyes p. 1. App. D, **RR. 3: 24-25.**

38) Based upon Dr. Denis Keyes evaluation and testing, review of documentation and literature and his knowledge, skill, experience, training and education in the area of

mental retardation, Dr. Denis Keyes concludes that Elkie Lee Taylor has sub-average intellectual functioning, significant limitations in adaptive behavior and skill functioning that were manifested before the age of 18 years, thereby fulfilling the criteria for a diagnosis of mental retardation. See Affidavit of Dr. Denis Keyes. App. D, **RR. 3: 7-35.**

39) Dr. Keyes is of the opinion that Elkie Lee Taylor has “severe limitations in adaptive functioning” and that Elkie Lee Taylor fulfills the “significant-limitations” criteria in adaptive behavior functioning necessary for a diagnosis of mental retardation. See Affidavit of Dr. Denis Keyes. App. D, **RR. 3: 29.**

40) Dr. Denis Keyes is also of the opinion that Elkie Lee Taylor meets the onset criteria necessary for a diagnosis of mental retardation in that Elkie Lee Taylor’s mental retardation originated before the age of 18. See Affidavit of Dr. Denis Keyes. App. D, **RR. 3: 34-35.**

***Dr. Jack Randall Price***

41) Dr. Price a licensed psychologist in the State of Texas administered the Wechsler Adult Intelligence Scales- 3rd (“WAIS-III”) to Elkie Lee Taylor. See Price Affidavit I. App. D, **RR. 3: 154.**

42) Elkie Lee Taylor obtained a “Full-Scale” IQ score of 65 on the WAIS-III. See Price Affidavit I. App. B, pp. 127.

43) Elkie Lee Taylor’s IQ score “fall[s] more than two standard deviations below the mean and within the mildly mentally retarded range.” See Price Affidavit I. App. B, pp. 127.

44) Dr. Price testified that in his opinion Elkie Lee Taylor meets the first criteria for a mental retardation diagnosis, specifically that Mr. Taylor suffers from significant subaverage intellectual functioning. App. D, **RR. 3: 156.**

45) Dr. Price testified that in his opinion Elkie Lee Taylor meets the third criteria for a mental retardation diagnosis, specifically that Mr. Taylor manifested an onset of his condition before the age of 18. App. D, **RR. 3: 156; App. D, RR. 4: 7-8.**

46) Dr. Price is of the opinion that Elkie Lee Taylor has adaptive deficits in the area of functional academics. See Price Affidavit I. App. D, **RR. 4: 8.**

47) Dr. Price concurs with the opinions of Drs. Denkowski and Keyes that Elkie Lee Taylor suffers from significantly subaverage intellectual functioning. App. D, **RR. 4: 6-8.**

48) Dr. Price concurs with the opinions of Drs Denkowski and Keyes that Elkie Lee Taylor manifested an onset of his cognitive impairment before age 18. App. D, **RR. 4: 6-8.**

49) Dr. Price testified that in his opinion, Elkie Lee Taylor is not a person with mental retardation, however, he testified to the possibility that he might be wrong and that Mr. Taylor may actually be mentally retarded. App. D, **RR. 4: 11-12.**

50) Dr. Price testified that in the area of adaptive behavior functioning Elkie Lee Taylor did not exhibit the level of adaptive deficits necessary for a diagnosis of mental retardation. App. D, **RR. 4: 8-9.**

51) Dr. Price testified that were it not for the Mr. Taylor's adaptive functioning, Mr. Taylor would meet the criteria for diagnosis of mental retardation. App. D, **RR. 4: 6-9.**

**The Tables Prepared by Dr. George Denkowski**

52) At the evidentiary hearing held on June 20, 21, and 22, 2005, the trial court received into evidence several tables that summarized evidence that was already before this Court. The Court finds these tables both helpful and persuasive on determining the issue of Elkie Lee Taylor's mental retardation.

53) The first table admitted at the hearing, Table 3, **DX 2**, is a table showing the various IQ scores obtained from the testing of Elkie Lee Taylor (see below). All of the experts subscribed to the accuracy of these scores. **DX 1; App. C, RR. 2: 15.**

54) The second table admitted at the hearing, Table 1, **DX 3**, is an achievement-rating summary taken from the elementary school records of Elkie Lee Taylor. This table is a composite of Elkie Lee Taylor's grades during his time in elementary school in Leland Mississippi, as well as his classroom behavior ratings. **DX 2: App. C, RR. 2: 26.** The table shows Mr. Taylor's attendance and adaptive behavior during elementary school.

55) The third table admitted at the hearing, Table 2, **DX 4**, is an adaptive behavior summary taken from the reports of the teachers of Elkie Lee Taylor. The table shows adaptive deficits that were exhibited during elementary school. **DX 4; App. C, RR. 2: 30-31.**

56) The fourth table admitted at the hearing, Table 4, **DX 5**, is an adaptive behavior chart showing the results, in table form, of Dr. Denkowski's ABAS testing. The table significant limitations in at least 5 and possibly 6 areas of adaptive behavior skill areas. **DX 5; App. C, RR 2: 46.**

57) These tables show compelling evidence of each of the three criteria for the diagnosis of mental retardation. Table 3 demonstrates significantly subaverage intellectual functioning, Tables 1, 2 and 4 show severe limitations in adaptive functioning (criteria two), and Tables 1, 2 and 3 show onset of Mr. Taylor's mental retardation before the age of 18. **DX Nos. 1,2,3 and 4; App. C, RR. 2:15; App. C, RR. 2: 26; App. C, RR. 2: 30-31; App. C, RR. 2. 46.**

**Other Evidence of Limitations and Onset**

58) Elkie's level of academic functioning is so low that his grades in school were almost exclusively Ds and Fs—even in the first grade (representing a severe deficit in “functional academics”)

Elkie Taylor's grade records, of course, amply verify this adaptive deficit. With the exception of his grades in art, which ranged from B to C-, all of his academic grades were Ds and Fs.

See Application, Morris, Report App. B, p. 16.<sup>21</sup>

59) Elkie dropped out of school in the second year of the seventh grade, unable to perform the academic work (representing a severe deficit in “functional academics;” See Application App. B, p. 88-94

60) Elkie's academic achievement scores while in prison for burglary “consistently fell at or below the third grade level (roughly 9 years of age);” TDCJ-ID records indicate the following EA scores:

- o 7/16/92<sup>22</sup>

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<sup>21</sup> The abbreviation “App” refers to the Appendix attached to Elkie Lee Taylor's Application for Post-Conviction Relief.

- Reading 2.6;
- Math 3.3;
- Language 2.1;
- Composite 2.4
- 10/17/92
  - Reading 2.5;
  - Math 3.3;
  - Language 1.7;
  - Composite 2.8;
- These scores indicate that Elkie Taylor's performance on achievement testing was at the first to third grade level on two separate occasions. *These scores are consistent with his intelligence test scores;*

See Application, Morris Report, App. B, pp. 17-18 (emphasis added)

61) Elkie's California Achievement Scores while in elementary school placed him within the 1<sup>st</sup> percentile for his age group.

His [Taylor's California Achievement Test scores are consistent with his low grades, His overall performance on this test in 1971 was at the 1<sup>st</sup> percentile for his age group, and all of his scores were below the second grade level, even though he was in the third grade.

See Application, Morris Report, App. B, p. 16; see also App. B, p 35.

62) Elkie's family confirmed his difficulties and his "slowness."

Elkie was always mentally "slow" from the time he was born. Elkie had difficulty in school and was in special education classes until the time Elkie quit going to school.

\* \* \* \*

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<sup>22</sup> These scores reflect grade levels (e.g. the composite 2.4 score indicates Elkie is functioning at the second grade fourth month level).

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Elkie never really learned to read or write he tried to learn when he was in school but never was able to do well in school many of Elkie's problems came from not being able to understand people and not being able to read or write.

See Application App. B, p. 59.

- 63) Elkie failed to "adjust to the Job Corps program" (representing a severe deficit in "work")

Job Corps records indicate that Elkie Taylor was in the Job Corps approximately three weeks in 1978. These records indicate that "Elkie was in the Job Corps pre-reading program. He was on level 2 (division) in math." It was also noted that "he was enrolled in the masonry program" but that he did not adjust to the Job Corps program."

See Morris Report, App. p. 17; see also App. B, pp. 67-78;

- 64) Elkie was unable to fill out a job application (representing a severe deficit in "work");

- 65) Elkie never held a steady job (representing a severe deficit in "work");

I don't remember any time when Elkie ever had a job, either as an adult or before age eighteen. Because Elkie was always "slow" and had problems in dealing with people, I don't think he could hold down a job.

See App. B, p. 60.

My Family has said that they can't remember Elkie ever having a job. I can't ever remember him having job either. I don't think that he was able to understand things enough in order to work at a regular job. I know that he never could read or write and that meant that he couldn't fill out a job application.

See App. B, p. 62.

- 66) Elkie is unable to use public transportation.

Elkie didn't understand bus routes an if he went alone he might end up in the wrong place or just ride around without going anywhere" (representing a severe deficit in "using community resources")

See App. B, p. 57.

- 67) Elkie has never possessed a driver's license (representing a severe deficit in both "using community resources," and "work")

I never knew Elkie to have a driver's license. He mostly walked in order to get around.

See App. B, p. 57.

- 68) Elkie could not perform even simple tasks like "cooking rice."

He always had trouble doing things, For example, he couldn't cook rice. The rice was always runny and full or too much butter. He tried and tried but couldn't do it.

See App. B, p. 62.

- 69) Elkie got venereal disease at least 3 times (representing a severe deficit in "health and safety"), and,

- 70) Elkie needed assistance to obtain medical treatment (representing a deficits in both "using community resources" and "health and safety");

Also, he got involved in things that weren't safe. For example, he got venereal disease at least three (3) times that I know about. I had to personally take him to a medical clinic to get penicillin and treatment for the disease. I considered his behavior very unsafe.

See App. B, pp. 57-58.

- 71) Elkie has always had difficulty communicating with other people (representing a severe deficit in "communication" and "social skills");

Elkie's behavior has always been strange. For instance, once in Milwaukee Elkie and I and another man were laughing and talking and then all of a sudden Elkie was fighting with the man. He did this for no reason. I think that he just misunderstood something the man said and that it was directed at him. There was no call for that, but I think that Elkie didn't understand a lot of things.



See App. B, p. 57.

Elkie always had trouble communicating with people and understanding situations. Usually he didn't understand.

See App. B, p. 57.

72) Elkie has exhibited deficits in the use of his leisure time.

When in Milwaukee Elkie used to just sit in our apartment and listen to the radio and talk on the phone. He also ran with a bad family up there. People that I didn't think he should be with. These people were into drugs and didn't have jobs or anything. Elkie didn't seem to care for any of my friends who had jobs and led normal lives. Elkie seemed to think people who had jobs were "high class."

See App. B, p. 57.

73) Elkie demonstrates an inability to give independently.

It was always strange to me how immature Elkie was in his life. Also, he needed people to help him with certain things. For example, when we lived together in Milwaukee Elkie got around by walking everywhere unless I went with him. If I went with Elkie then we could take public transportation, usually the bus.

See App. B, p. 57.

When Elkie was in his 20s this conduct continued. For example, the reason Elkie went to Texas in the First place was because of a girlfriend that he hardly knew. He met this girl in Milwaukee and within a very short time was ready to move to Texas with her. Even though he had no money, no job, and on idea how he was going to live in Texas. I tried to stop him but he wouldn't listen to me. He was not able to reason clearly. At the time he moved to Texas he had no family in Texas and did not know any one there except the girlfriend he was going with.

See App. B, p. 56-57.

74) Elkie Lee Taylor prior to the crime in question, was in prison for the offense of burglary, while in prison TDCJ-ID officials placed Mr. Taylor in the Mentally Retarded Offenders Program (MROP) and although officials did not give Mr. Taylor a diagnosis at

that time they did retain him in the program and indicated that he had serious adaptive behavior functioning problems. **SX 2; App. C, RR. 2: 8-9.**

**Law Applicable to this Case**

75) *Atkins v. Virginia*, 534 U.S. 204 (2002) determined that no person with mental retardation is eligible for the death penalty.

76) The burden of producing evidence of mental retardation in a Post-Conviction Application for Writ of Habeas Corpus is upon the applicant. See *Ex Parte Briseno*, 135 S.W. 3d. 1 (Tex. Crim. App. 2004).

77) The burden of persuasion on the issue of mental retardation is by a “preponderance of the evidence.” See *Ex Parte Briseno*, 135 S.W. 3d. 1 (Tex. Crim. App. 2004).

78) The issue before this Court is whether the preponderance of the evidence demonstrates that Elkie Lee Taylor is a person with mental retardation as determined according to the standards promulgated by the American Association of Mental Retardation (“AAMR”) and the Tex. Health & Safety Code § 591.003(13).

79) The elements of mental retardation according to the AAMR and under Texas law are significantly sub-average intellectual functioning, significant limitations in adaptive behavior/skills and evidence manifesting an onset before the age of 18 years. *Id.*

80) Opinion testimony is necessary from witnesses qualified as experts in the area of mental retardation through their knowledge, skill, experience, training or education and in

accordance with Texas case law and the Texas Rules of Evidence, Rules 702, 703 and 704.

**CONCLUSION OF LAW**


1) The Court finds and concludes by a preponderance of the evidence that Elkie Lee Taylor is mentally retarded and hereby exempt from his death sentence, according to *Atkins v. Virginia*, 536 U.S. 304 (2002).

**CONCLUSION AND PRAYER FOR RELIEF**

For the reasons, herein this Court should GRANT Elkie Lee Taylor relief from his unconstitutional sentence of death set forth by the Judgment of the 297<sup>th</sup> District Court of Tarrant County, Texas and VACATE the sentence of death and REFORM the sentence to a sentence of life imprisonment in the Texas Department of Criminal Justice's Institutional Division and GRANT such other and further relief as Petitioner may show himself entitled to.

Respectfully submitted,

RASMUSSEN LAW OFFICE  
1101 Scott Avenue, Suite 17  
P.O. Box 8185  
Wichita Falls, Texas 76307-8185  
Tel. 940-761-3344  
Fax 940-761-3355

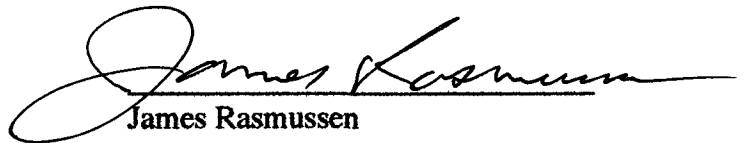


James Rasmussen  
State Bar No. 16554300

**CERTIFICATE OF SERVICE**

On the 30 day of June, 2006, a copy of the foregoing document was served upon opposing counsel.

Laura Grant Berins  
Post-Conviction Litigation  
OFFICE OF THE ATTORNEY GENERAL  
Price Daniel, Sr. Bldg.  
209 W. 14<sup>th</sup> St.  
P.O. Box 12548  
Austin, Texas 78711-2548

  
James Rasmussen

**CIVIL COVER SHEET**

JS 44 (Rev 11/04)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings, or other papers, as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of maintaining the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

RECEIVED  
U.S. DISTRICT COURT  
NORTH DIVISION  
2006 JUN 30 AM 11:41  
CLERK OF COURT

ORIGINAL

**I. (a) PLAINTIFFS**  
Elkie Lee Taylor

**(b) County of Residence of First Listed Plaintiff** Tarrant  
(EXCEPT IN U.S. PLAINTIFF CASES)

**(c) Attorney's (Firm Name, Address, and Telephone Number)**  
James Rasmussen, RASMUSSEN LAW OFFICE, 1101 Scott Ave. ste. 17, P.O. Box 8185, Wichita Falls, TX 76307-8185 (940) 761-3344

**DEFENDANTS**  
Nathaniel Quarterman, Director, Texas Department of Criminal Justice  
Correctional Institutions Division  
County of Residence of First Listed Defendant Walker  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

**4-06CV-459-A**

Attorney (if Known)  
Laura Grant Berins, OFFICE OF THE ATTORNEY GENERAL, 209 W.14 Street, P.O. Box 12548, Austin, TX. 78711-2548 (512) 936-6588

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input checked="" type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**  
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
Brief description of cause: Habeas Corpus - Death Penalty- 28 U.S.C. sec. 2254 - Atkins v. Virginia (Mental Retardation)

**VII. REQUESTED IN COMPLAINT:**  CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ N/A CHECK YES only if demanded in complaint: JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY** (See instructions). JUDGE N/A DOCKET NUMBER N/A

DATE 6-30-2006 SIGNATURE OF ATTORNEY OF RECORD James Rasmussen

FOR OFFICE USE ONLY  
RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

*United States Court of Appeals*

FIFTH CIRCUIT  
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

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NOTICE: The clerk's office is moving permanently to 600 S. Maestri Place, New Orleans, LA 70130 in **June, 2006**. All correspondence expected to arrive at the court on or after **April 24, 2006** must be sent to this address.

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June 27, 2006

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 06-10386 In Re: Taylor  
USDC No.

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: 

Monica Washington, Deputy Clerk  
504-310-7705

Mr James A Rasmussen  
Ms Laura Grant Berins  
Ms Karen S Mitchell, Clerk

**UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT**

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No. 06-10386

---

In Re: ELKIE LEE TAYLOR

Movant,

---

On Motions for Authorization to File  
Successive Petition for Writ of Habeas  
Corpus in the United States District Court  
Before the Northern District of Texas, Fort Worth

---

Before HIGGINBOTHAM, WIENER and BARKSDALE, Circuit Judges.

BY THE COURT:

The motions for authorization to file a successive petition for writ of habeas corpus is  
GRANTED. Taylor is entitled to appointment of counsel, a matter we leave to the district court.