SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re:	)	CAPITAL CASE
	)	Case No. S117235
ROBERT LEWIS, JR.,	)	
	)	Related Automatic Appeal
	)	Case No. S020670
On Habeas Corpus	)	Los Angeles Superior Court
	)	Case No. A0227897

REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re:	)	CAPITAL CASE
	)	Case No. S117235
ROBERT LEWIS, JR.,	)	
	)	Related Automatic Appeal
	)	Case No. S020670
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

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INTRODUCTION

The Respondent makes two arguments: 1) Penal Code Section 1376 implicitly defines "adaptive behavior," even though it does not explicitly define it, and this implicit definition is impliedly frozen as of the time of Atkins; and 2) even though Dr. Hinkin testified here that race was a "proxy" and in *Champion* that "ethnic corrections" were based on the race of the

Petitioner, his "corrections" in this case were not invidious discrimination.[1] Both arguments are untenable but, even if there were some merit to them, the Referee's finding that this Petitioner is intellectually disabled is supported by the record and the law.

I.

PENAL CODE SECTION 1376 DOES NOT IMPLICITLY DEFINE "ADAPTIVE BEHAVIOR" AND, EVEN IF IT DID, IT DOES NOT FREEZE THE DEFINITION AS OF THE DATE OF ATKINS.

A. Penal Code Section 1376 does not define adaptive behavior.

Penal Code Section 1376 does not define adaptive behavior. It simply uses the term. If the legislature intended to define "adaptive behavior" they could have done so. Instead 1376(a) says:

> "(a) As used in this section, "intellectual disability" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age."

The rules of statutory construction require courts to follow the language of the statute. In the words of Code of Civil Procedure Section 1858, the job "is simply to ascertain and declare what is in terms or in substance contained

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1

The Respondent's Brief does not comply with the Court Rules as to maximum word length of 2800 words (California Rule of Court 8.520(d)(2)) Although the declaration says the font is 13 points, the version received by Petitioner has an actual font of less than 12. A font size of 13 points is required. (California Rule of Court 8.204(b)(4)). Petitioner objects but concurrently submits this Reply.

therein, not to insert what has been omitted or omit what has been inserted . . ." The legislature in enacting 1376 did not insert a definition of "adaptive behavior" and it cannot be inserted by implication.

B. Adaptive behavior is a clinical determination.

The United States Supreme Court, itself, in *Hall v. Florida* 134 S. Ct. 1986 (2014) cites the 2011 edition of the DSM-5 as authority for the definition of adaptive behavior: ". . . an individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability. See DSM–5, at 37." (*Hall* at 1991).

Contrary to Respondent's assertion, the Court in *Hall* makes both the determination that the Court will abide by the new terminology of intellectual disability and it also acknowledges that phenomena is subject to continuing medical and legal evolution. The Court discussed the *current* clinical understanding of intellectual disability, saying, "In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." (*Hall* at 1993) The Court, thereafter, cited numerous scholarly and diagnostic materials written long after the *Atkins* decision. (Id., *passim, n.b. 1993-2000*).

Brumfield v. Cain (2015) 135 S.Ct. 2269 does not help the Respondent. There, Justice Sotomayor simply took the criteria actually applied by the Louisiana court (a combination of the medical texts and the state statute) and held that the Petitioner should have been granted a hearing using the criteria most favorable to the state. There was no issue as to whether the criteria established in current medical practice were consistent or inconsistent with the criteria applied. Respondent claims that the Court "implicitly" found that using state statutes was permissible even if the statute had different criteria (Resp. Supp. Brief on the Merits 4). The issue was not raised in *Brumfield* and it was not decided there. Respondent's "implicit" reading of *Brumfield* is not the law.

Furthermore, even if the case stood for the proposition that a state could legislatively define "adaptive behavior" (which Respondent admits still could not "render the decision in *Atkins* a nullity") (Resp. Supp. Brief on the Merits 3), California did not do so. In fact, the Louisiana statute is an example of the kind of detail a legislature could go into if it set out to define the term. And, of course, even in Louisiana, the courts construed the term in light of the medical definitions as well as the statuory language.

C. Even if the Penal Code implicitly intended to freeze the definition of "adaptive behavior," it cannot supercede the Constitutional prohibition on

executing the Intellectually Disabled.

The inquiry as to whom is intellectually disabled is not a dry, technical one. The reason that the United States Supreme Court in both *Hall* and *Brumfield* have made a broad clinical inquiry into whether the Petitioners qualify for relief is because the use of rigid rules "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." (*Hall* at 1990).

The Court recognized that the evolving standards of decency are a part of the Eighth Amendment analysis and said, "No legitimate penological purpose is served by executing a person with intellectual disability. [Citing *Atkins*] at 317, 320, 122 S.Ct. 2242. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." (*Hall* at 1992).

Such a constitutional mandate cannot be made into a trivial game of convoluted logic. Claims, for instance, that a different statute in Louisiana might "implicitly" allow the California legislature to draft a definition where there is none are hollow. Even more importantly, the Supreme Court mandates that we protect the intellectually disabled and that means those who are, under current medical understanding, clinically disabled.

D. Even if the "adaptive functioning" criteria of the older treatises were applied, Petitioner still meets those criteria and the Referee's finding of deficit of adaptive functioning was supported by the evidence.

When all the dust settles, the clinical definition of adaptive behavior has not changed since 1959. The fact that there were different diagnostic modes employed over the decades does not change the overall inquiry. The AAIDD, itself surveyed the definitions and said that the "definitions used over the last 50 or more years shows that the three essential elements of ID–limitations in intellectual functioning, behavioral limitations in adapting to environmental demands, and early onset–have not changed substantially [citations omitted]." (AAAIDD *Manual*, 11th ed., 2010) In fact, the AAIDD went on to say that the elements, including "coping with everyday life . . . common to the current definition were used by professionals in the United States as early as 1900." (Id. at 9).

Adaptive behavior is multidimensional and includes the following: conceptual skills, social skills and practical skills. (Id. at 44). The Referee made findings of fact which covered all three of these domains even though deficits in only one domain may be sufficient for a diagnosis of intellectual disability. This is true whether the domains are divided into "categories"

under the AAMR 9th and DSM-IV-TR or the three "domains" and subcategories of the AAIDD 11th ed. or the DSM-5. (See the detailed analysis at Petitioner's Reply to Respondent's Exceptions to the Referee's Report and Simultaneous Brief on the Merits, 18-30).

II.

SINCE DR. HINKIN DID NOT EVALUATE PETITIONER AND MADE CORRECTIONS BASED ON RACE AS A PROXY, HE HAS ADJUSTED PETITIONER'S SCORES BASED ON RACE AND, EVEN IF HE IS CLAIMING THAT RACE IS A PROXY FOR SOCIOECONOMIC FACTORS, HE IMPERMISSIBLY MAKES A DETERMINATION BASED ON THE "AVERAGE" SCORES OF A GROUP, NOT THE INDIVIDUAL FACING DEATH.

A. Dr. Hinkin testified in Champion that he "ethnically adjusted" IQ scores based on race and did the same here, claiming race is a "proxy."

In *In re Champion* 322 P.3d 50 (2014), this court stated,

> "Dr. Hinkin disagreed with Dr. Riley's method of scoring the tests given. He explained that because Blacks ordinarily perform more poorly than Whites on those tests, it is preferable to use ethnically corrected norms when scoring the tests, which Dr. Riley did not do."

There is no other interpretation than that Dr. Hinkin classified the particular Petitioner on the basis of race in order to adjust his IQ score upward. Respondent tries to dodge this fact and to discuss why the Court did not reach the issue after quoting the testimony. Petitioner agreed that the question was not reached. It does not matter. What matters is that Dr. Hinkin made an individual determination from a generalization based on race.

In this case, the same Dr. Hinkin used race again as his criteria. He did not evaluate the Petitioner himself and he made generalizations about his possible socioeconomic status and consequences of his culture. However, he said that race is a proxy. (12 RHT. 2011-12.) Race is his basis for adding points and he explains--with the kind of general speculation condemned by this Court in *Sargon v. University of Southern California,* (2012) 55 Cal.4th 747 -- why there might be socioeconomic factors correlated to race.

It is simply unconstitutional to take a broad category and condemn, in this case literally, every person within it. Dr. Hinkin's testimony is both speculative and unconstitutional within the Equal Protection Clause.

In this case, on the record, Dr. Hinkin testified "African Americans" generally score 15 points lower than "White individuals" on IQ tests, although the gap narrowed in recent years to about a 10 point range. (12 RHT 2011) He said that race is a "proxy" for differences in "educational opportunities,

occupational opportunities, the kinds of things that would . . . affect IQ test performance." (12 RHT 2011-12.) Dr. Hinkin said that the petitioner was not from a "mainstream" group and speculated, without doing any testing of his own, that his poor performance might be due to illiteracy rather than mental retardation, even though he admitted that the Wechsler tests did not involve reading. (12 RHT 1992)

Even taking all of these concerns into account, Dr. Hinkin concluded: "I think that the IQ Subaverage intellect prong is probably closer to the mental retardation. I don't think that's it, but that one is certainly in the ballpark." (12 RHT 2017) Nevertheless, he opined that the petitioner did not qualify as intellectually disabled. (12 RHT 2074) This kind of opinion is no less speculative than the economist's opinion in *Sargon.*

B. Even if Dr. Hinkin used socioeconomic grounds, individuals subject to those conditions are the victims of actual biological impairment.

It is simply the fact, based on scientific literature, that people subjected to poverty, stress, trauma and abuse, suffer actual phenotypic/biological harm. The irony is that the very things Dr. Kasanoff testified to such as neuronal pruning and exposure to lead-based paint, cause physically based deficits in intellectual functioning

C. Respondent attempts to mix and match concepts and both augment the

record and object to it being augmented.

Ironically, Respondent objects to Petitioner referring to current medical texts or current scientific literature claiming that it is outside the record while Respondent then goes outside the record to cite a federal district court from 1979 to support its factual claims. To the extent that the Court would consider the *Larry P. V. Ryles* (N.D. Cal. 1979) 495 F.Supp. 926 case, please note that its findings were not followed in the federal courts elsewhere. See, e.g., *PASE v. Hannon*, (N.D. Ill. 1980) 506 F. Supp. 831, 883, holding that Chicago's standardized intelligence tests were not culturally biased against African Americans.

Even more ironic is the Respondent's effort to argue about "pre-modern" testing and its significance while trying to criticize the Referee for considering the evidence in front of him regarding the modern test and the modern medical science. But, this is all beside the point since the modern subtest results were so similar to the older subtest results (with almost identical FSIQ scores) that the experts agreed they would be impossible to fake (8 RHT 1371-1371; 11 RHT 1890).

III.

CONCLUSION

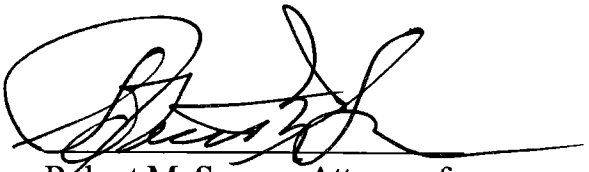
The bottom line is that the credible test results, the three almost

identical Wechsler tests, had results at or below 70, well under the 75 range clearly approved by the United States Supreme Court in *Hall* and *Brumfield.* Furthermore, the contemporaneous trier of fact, the Referee, heard the testimony of witnesses, who observed Petitioner's adaptive behavior over the years. The Referee also heard the testimony of all three testifying psychologists. Based on the totality of the evidence–following the clinical approach of making a clinical judgment based on all the evidnece–the Referee found Mr. Lewis ineligible for execution due to intellectual disability. That determination was correct and is even more clearly affirmed by virtue of current medical science and current decisions of the United States Supreme Court.

Dated: September 16, 2015

Respectfully Submitted,

SANGER SWYSEN & DUNKLE

By: 

Robert M. Sanger, Attorney for
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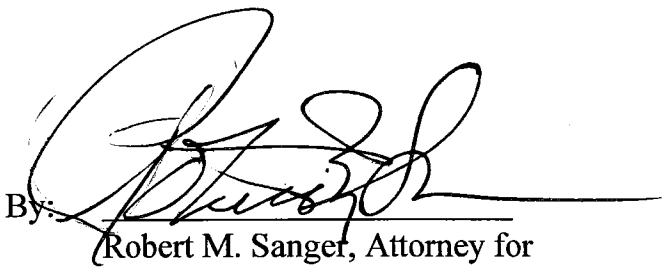
CERTIFICATE OF WORD COUNT

I have run the "word count" function in WordPerfect and hereby certify that this brief contains 2239 words, including footnotes.

Dated: September 16, 2015



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PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 125 E. De La Guerra Street, Suite 102, Santa Barbara, California, 93101.

On September 17, 2015, I served the foregoing document entitled: **REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS** on the interested parties in this action by depositing a true copy thereof as follows:

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____ **FEDERAL** - I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed this September 17, 2015 at Santa Barbara, California.

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