No. 15-797

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

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INTRODUCTION

In *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court recognized a fundamental constitutional principle: the Eighth Amendment bars the execution of an individual who is intellectually disabled. The Court explained that a State's legal determination must be "informed by the medical community's diagnostic framework," and that a state's determination may not "go[] against the unanimous professional consensus" or "disregard[] established medical practice." *Hall*, 134 S. Ct. at 1995, 2000. In conflict with this Court's decisions, and the Eighth Amendment, the Texas Court of Criminal Appeals ("CCA") has prohibited consideration of current medical standards when evaluating the constitutionality of executing an individual who claims intellectual disability.

In this case, the state habeas trial court—applying current medical standards—determined that Petitioner Bobby James Moore is intellectually disabled and thus ineligible for the death penalty. The CCA rejected that determination and held that the trial court erred in "us[ing] the most current position . . . regarding the diagnosis of intellectual disability." App. 6a. The CCA explained that, rather than current medical standards, Texas courts must use a 1992 definition of intellectual disability that the CCA invoked in the wake of *Atkins,* along with seven non-clinical "evidentiary factors" that the CCA derived from lay stereotypes of the intellectually disabled and the fictional character Lennie in John Steinbeck's *Of Mice and Men*. The CCA crafted these non-clinical factors pursuant to its view that not all who are diagnosed as intellectually disabled for "clin-

ical purposes" are entitled to protection from execution under *Atkins*. *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012); *Ex parte Briseno*, 135 S.W.3d 1, 6-9 (Tex. Crim. App. 2004). The CCA held that Moore is not intellectually disabled under its approach, and that Moore's execution should proceed.

The CCA's determination that Texas courts must not consider current medical standards—and must instead use its *Briseno* framework of superseded medical standards and non-clinical factors—runs headlong into this Court's decisions. Texas's approach defies both the Constitution and common sense. It is a conspicuous outlier among state and federal courts considering intellectual disability, and squarely presents the deeply troubling prospect that intellectually disabled individuals—like Moore—will be executed in violation of their Eighth Amendment rights.

Accordingly, the CCA's decision should be reversed.

OPINIONS BELOW

The CCA's opinion is reported at 470 S.W.3d 481 (Tex. Crim. App. 2015) and reprinted in the Appendix to the Petition for Certiorari ("App.") at App. 1a–126a. The state habeas trial court's findings of fact and conclusions of law are unreported. *See* App. 127a–203a (intellectual disability claim), 204a–287a (other claims).

STATEMENT OF JURISDICTION

The CCA issued its judgment on September 16, 2015. The petition for a writ of certiorari was filed on December 15, 2015 and granted with respect to Ques-

tion 1 on June 6, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Bobby James Moore was born in 1959. Throughout his childhood, he had grave difficulties with academic, social and conceptual issues. At the age of twenty, in 1980, he was involved in a bungled robbery with two other individuals in which an employee was shot and killed. He was convicted as the shooter and sentenced to death.

His subsequent state and federal habeas proceedings included a resentencing proceeding as the result of ineffective assistance of counsel at his initial sentencing proceeding. The resentencing again resulted in a death sentence. After a two-day *Atkins* hearing in January 2014, the state habeas trial court determined that Moore is intellectually disabled. In September 2015, the CCA rejected that determination.

A. Bobby James Moore's Childhood and Adolescence

Moore had profound mental and social difficulties as a youth. Even as a thirteen-year-old, Moore lacked basic understanding of the days of the week, the months of the year, the seasons, telling time, the standards of measure, and the principle that subtraction is the reverse of addition. App. 187a, ¶153. Teachers, peers, and Moore's own father called Moore "stupid" for being slow to read and speak, and his teachers separated him from the rest of the class, often instructing him to draw pictures because he was unable to keep up with basic schoolwork. App. 146a, ¶54; 181a–182a, ¶ 141; 182a–183a, ¶142. Moore was consistently described as "withdrawn" by his teachers, and he took no part in his classes unless called upon. App. 190a–191a, ¶¶161–162.

Moore's time in school—from his earliest years—was marked by a pattern of failure to grasp basic academic skills. Moore failed first grade twice, but school officials let him advance to second grade—not because of any showing of academic improvement, but simply to "keep him with children of a similar age." App. 184a, ¶¶145–146. His subsequent school years repeated this routine: Moore displayed a wholesale lack of comprehension of fundamental skills possessed by his peers and received failing grades, but school officials nevertheless promoted him so that he would not be markedly older than his classmates. *See* App. 184a–188a, ¶¶147–49, 151, 155–57. Finally, Moore dropped out of school after failing every subject in ninth grade. App. 188a, ¶157.

Not only did Moore experience grave struggles with his intellectual development and abject failure

in school, he also suffered a debilitating head injury during Texas's schoolhouse integration battles. Moore, as a fifth grader, was part of an *African American g*roup of students newly assigned to Scroggins Elementary, a predominantly Hispanic school. App. 136a–137a, ¶30. In a violent episode in December 1971, when he was twelve, Moore tried to board his school bus while hostile throngs confronted the children and set their bus on fire by lobbing Molotov cocktails inside. 2 RR 39–40.[1] Moore was hit in the head with a chain and a brick as he tried to make his way to the bus. *Id.* at 39–41, 62, 64. Four of his classmates pulled him onto the bus and away from the chaos outside, but Moore's face was "gashed wide open" and his entire head was swollen from the attack. *Id.* at 39–40, 64; *see also* App. 136a, ¶30 ("he got hit with a chain across his head, in his eye, it was bleeding, his mouth was busted") (internal quotation marks omitted). According to the state habeas trial court, it is "highly possible" that Moore suffered a "traumatic brain injury" in this school bus fracas. *Id.*; *see also* App. 137a, ¶31 (noting additional likely causes of a traumatic brain injury).

Moore was not able to seek refuge at home from the criticisms of teachers and classmates about his diminished intellectual abilities. While Moore's father was generally very abusive to his children and wife, he was particularly "displeased" with Moore because of his abysmal performance at school and because Moore "didn't talk much." 2 RR 34; *see also*

[1] All record citations designated "RR" are to the Reporter's Record for the state habeas proceedings. All record citations designated "CR" are to the Clerk's Record for the state habeas proceedings.

App. 141a, ¶39; 181a–182a, ¶ 141. Moore's father routinely beat him for exhibiting slow intellectual development. For instance, Moore's father tried to teach him to spell the word "cat." 2 RR 61–62. When Moore failed to properly spell the word, his father would bend Moore's fingers back as far as possible and whip him with his hand. *Id.* at 61–62, 67–68. His father also would beat Moore when he performed poorly on school assignments, *see id.* at 33, or if he failed to understand what his father was saying and did not know how to respond, *see* App. 181a–182a, ¶ 141. Moore's sister, in an effort to protect Moore from their father's rage about Moore's mental shortcomings, would guide Moore's hand in school so that he wrote and spelled words properly. 2 RR 33. Moore's father's anger would erupt when school officials visited the home and told him that Moore needed additional assistance. *Id.* at 34.

When Moore was fourteen, his father's anger boiled over about Moore's mental deficiencies. His father became irate when he realized that Moore still did not know how to read. *Id.* at 43. His father "called [Moore] dumb and he was whipping him," but Moore did not cry and "just stood there while [his father] beat him." *Id.* Moore's father then ordered him to leave the house and never return "because he wasn't no son of his because he was dumb." *Id.*[2]

[2] The record also contains testimony that Moore's expulsion from home was precipitated by his attempt to protect his mother from his father's abuse, and that his father singled him out for especially harsh treatment because of his protective efforts. App. 140a-141a, ¶37.

B. Moore's Conviction and Death Sentence

On May 13, 1980, the State charged Moore with capital murder stemming from a bungled robbery and shooting at a Houston market in April 1980, when Moore was twenty. App. 128a, ¶¶ 1–2; *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999). Moore and two others attempted to rob the market. *Moore*, 194 F.3d at 593. During the course of the botched robbery, Moore's gun discharged and killed one of the store clerks. *Id.* Moore insisted that the shooting was accidental (although his initial defense also included a claimed alibi defense). *See id.* at 618.

On July 15, 1980, Moore was convicted of capital murder and sentenced to death. App. 128a, ¶2. The CCA affirmed. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

C. Habeas Proceedings Prior to the *Atkins* Hearing

After initial state and federal habeas proceedings, Moore filed his second state habeas petition in April 1992. On April 23, 1993, the state habeas court conducted an evidentiary hearing on his ineffective-assistance-of-counsel claims, including the claim that trial counsel failed to investigate, develop, or present evidence of Moore's impaired mental functioning as a mitigating factor. The court denied Moore's petition, and the CCA affirmed. Moore then raised those claims in his second federal habeas petition. *Moore*, 194 F.3d at 601-02, 613.

The federal district court held that Moore's trial counsel performed deficiently at both the guilt and punishment phases. *See Moore v. Collins*, No. 4:93-

cv-03217, Dkt. No. 13, Mem. Op. at 31 (S.D. Tex. Sept. 29, 1995) ("[t]rial counsel grossly mishandled the representation of Moore and violated their oath as members of the bar with astonishing frequency"; "[t]he egregiousness of their conduct not only jeopardized the rights of [Moore], but denigrated the legal system as a whole, the aggregate effect of which resulted in a sure death sentence"). The court ruled that Moore had established prejudice regarding the punishment phase and remanded for a new punishment hearing. *Id.*

The Fifth Circuit affirmed, holding, among other things, that the failure of trial counsel to investigate, develop, or present mitigating evidence constituted ineffective assistance in the punishment phase. *Moore*, 194 F.3d at 593. The court discussed, inter alia, Moore's school records, explaining that they "describe a morose and withdrawn child who rarely participated in classroom activities," who "never passed any year and was granted only social promotions," and who "suffer[ed] from severe developmental delays, perhaps resulting from poor nutrition and inadequate parenting." *Id.* at 613. The court also highlighted the "substantial evidence of impaired mental development and functioning" that Moore had produced, including "some evidence of organic brain damage resulting from severe trauma." *Id.* The court held that the state should be permitted to remedy the constitutional error by imposing a sentence less than death or by conducting a new punishment proceeding. *Id* at 593.[3]

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[3] The Fifth Circuit so ruled after this Court granted Moore's prior certiorari petition, vacated the Fifth Circuit's initial decision, and remanded for further consideration in light of *Lindh v.*

The State conducted a new punishment hearing. App. 128a–129a, ¶¶6–8. On February 14, 2001, the jury answered two special issues in the affirmative and the mitigation special issue in the negative. App. 129a, ¶8. The state trial court again sentenced Moore to death. *Id.* at 129a, ¶9.[4]

On January 14, 2004, the CCA affirmed. *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App.), *cert. denied*, 543 U.S. 931 (2004).

Murphy, 521 U.S. 320 (1997). *See Moore v. Johnson*, 521 U.S. 1115 (1997).

[4] During this new punishment hearing—which was held prior to *Atkins*—Moore's counsel did not argue that Moore was intellectually disabled. Instead, his counsel urged that Moore was "'capable of learning'" and that prison had afforded him the opportunity to "'learn and grow and become the kind of person that he could have become had he come from a safe environment.'" App. 42a-43a. The counsel's decision must be viewed in context. As this Court recognized in *Atkins*: "As *Penry* demonstrated, . . . reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321; *see also, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (at "pre-*Atkins* trial," Brumfield had "little reason to . . . present evidence relating to intellectual disability"; if he had "done so at the penalty phase, he ran the risk that it would 'enhance the likelihood . . . future dangerousness [would] be found by the jury" (citation omitted)); *Bobby v. Bies*, 556 U.S. 825, 836-37 (2009) (distinguishing intellectual disability as a mitigator from intellectual disability under *Atkins*, and recognizing that *Atkins* changed parties' interests with respect to intellectual disability determinations). The issue was further compounded in Moore's case because, at the time of Moore's resentencing, Texas juries did not have the option of recommending a sentence of life without parole in capital cases. 2005 Tex. Sess. Law Serv. Ch. 787 (S.B. 60) (West) (effective Sept. 1, 2005), *codified at* Tex. Penal Code Ann. § 12.31 (West 2015).

D. The *Atkins* Hearing

On June 17, 2003, Moore filed a state habeas petition. It included a claim that the Eighth Amendment and this Court's decision in *Atkins* barred his execution on the ground that he is intellectually disabled. CR00048–00061. On January 2 and 3, 2014, the state habeas trial court held an evidentiary hearing on Moore's *Atkins* claim. App. 129a, ¶13.

Moore's submission at the *Atkins* hearing included seven witnesses—two family members and a childhood friend who testified about Moore's intellectual deficiencies in his youth; a former inmate; and three mental health experts. The State's submission included two witnesses—a prison official and a mental health expert.

Moore presented the testimony and reports of two experts who diagnosed him with an intellectual disability. Robert Borda, a clinical neuropsychologist, determined that Moore has "a significant Intellectual and Developmental Deficiency, and by any current standards should be considered to have functioned within the Mentally Deficient (or Mentally Retarded) range for all of his teen and adult life." JA17 (emphasis removed); *see also* JA39 (confirming that Moore "meets the criteria for a diagnosis" of intellectual disability). Borda testified about Moore's intellectual deficiencies and adaptive problems. He emphasized the conspicuous deficit that Moore displayed on a test to assess Moore's "executive functioning": "He had a score of 1, which is the lowest score I've ever recorded and I've done a lot of testing of brain injury people." JA35, JA16–17. Borda also found that Moore "clearly had marked deficits in adaptive functioning," noting, among other things,

Moore's inability to learn from past experiences, communication deficits and follower behavior. JA11–12.[5]

Shawanda Williams-Anderson, a neuropsychologist, likewise determined that Moore "met full criteria for a diagnosis of mental retardation as a child." JA73; *see also* JA89 (confirming that Moore "meet[s] the criteria for mental retardation"). As part of her clinical evaluation, Williams-Anderson administered a battery of ten assessment tools to Moore and interviewed him and his family. JA58–59, JA73. She concluded that Moore has deficits in executive functioning, slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability. JA80, 82–85; JA74. She also found deficits in the adaptive domains of socialization, communication and cognition. JA73. Noting reports of multiple head injuries, she stressed that "Bobby's severity and characterization of deficits was complicated by head trauma. That is, specific to his case is an impover-

[5] Borda previously had testified about Moore's intellectual disability in a 1993 hearing on Moore's ineffective assistance of counsel claim. During that hearing, Borda testified—based on his limited review of certain school records and psychological testing—that Moore's intelligence was in the "borderline retarded range." *Moore*, 194 F.3d at 613; JA7–8. In affirmatively diagnosing Moore as intellectually disabled at the 2014 hearing, he explained that he now viewed Moore as "having a significant Intellectual and Development Deficiency," because, inter alia, he had reviewed "extensive additional records" and "extensive additional test findings and testimony from family members"; he had personally evaluated Moore; and "the definition of 'mental retardation' or intellectual disability (ID) has changed to some extent." JA7–8, JA17.

ished brain that was even more compromised by multiple insults." JA74.[6]

Moore also presented the testimony of Stephen Greenspan, a retired professor of educational psychology with an expertise in intellectual disability, regarding general standards for intellectual disability. Greenspan noted that, while he had reviewed records regarding Moore's condition, he had not met him or diagnosed him. JA120.

Moore's experts emphasized that medical standards on intellectual disability have changed over time, and that current standards should be considered and applied. Borda, for instance, testified that the standards have "changed over the years," JA21, and that compared to earlier editions, "[t]he DSM-V puts much more heavy emphasis on practical abilities, everyday life." JA27.[7] He further explained that "the [DSM-]IV is more heavily weighted towards test scores and the ability to function independently and [DSM-]V is getting away from the test scores and looking at adaptive functioning." JA28.[8]

Similarly, Greenspan testified that clinical definitions of intellectual disability have evolved over the years and moved away from the use of rigid reliance on IQ scores. *See, e.g.*, JA114. He also testified

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[6] The record also contained two expert reports filed with the motion for an *Atkins* hearing which supported a finding of intellectual disability. *See* JA229–255.

[7] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (hereinafter, "DSM-5" or "DSM-V").

[8] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1992) (hereinafter, "DSM-IV").

about the "persistence of stereotypes" of what intellectually disabled persons can and cannot do and the difficulties those stereotypes can present for diagnosing intellectual disability. JA116-117.

The State introduced the testimony of Kristi Compton, a clinical and forensic psychologist. She testified that she administered a Wechsler Adult Intelligence Scale—Fourth Edition ("WAIS-IV") IQ test to Moore, and that Moore scored a 59. App. 53a. She acknowledged that this result was consistent with a diagnosis of intellectual disability. JA187. Compton testified, however, she "was surprised by that result" and "thought it would be higher." JA154. She expressed her view that Moore had given "some suboptimal performance" on the test; she variously testified that she "expected him to fall somewhere within the 70s," in the "upper 60s, upper 70s if you took the mean," and "somewhere between the upper 60s and the 70s." JA154, JA203, JA204. Compton similarly administered a test to measure adaptive functions – the Texas Functional Living Scales – and found that Moore's performance was "2.5 standard deviations below the mean." JA200–201. While acknowledging that Moore was unable to do simple tasks such as "draw the hands of [a] clock correctly," JA201-202, she again expressed doubt about the result, this time because of Moore's limited life experiences. JA156. Compton opined that, although "there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning," she "d[id] not have the data to support a diagnosis of mental retardation . . . because [Moore's] adaptive functioning . . . has been too great." JA185. She concluded, "I believe that I don't have enough information on his adaptive deficits or adaptive – I do

not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis." JA186. Regarding adaptive deficits, in addition to her own test results that put him 2.5 standard deviations below the mean, she pointed to information she had received about Moore's behavior in prison, his ability to survive on the streets after he was thrown out at age 14, his ability to play pool and mow neighbors' grass for money, the circumstances of his crime, and other matters. JA146–148. On cross-examination, she testified that, if some of her "assumptions" about Moore's "adaptive deficits and adaptive skills" were changed, it "may" affect her conclusion. JA215.

E. The State Habeas Court's *Atkins* Decision

The state habeas trial court concluded that Moore was intellectually disabled and that the Eighth Amendment barred his execution. The court determined that Moore's petition should be granted on his *Atkins* claim.

The court began by noting that, "[i]n determining whether Mr. Moore has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ('AAIDD') and the American Psychiatric Association ('APA')." App. 147a, ¶58. It then explained that the "standards of psychological diagnosis" "evolve" over time. App. 150a, ¶66. Thus, it "dutifully relied on the [AAIDD 2010 Manual's] definition of mental retardation to determine wheth-

er Mr. Moore has mental retardation." App. 163a, ¶97; *see generally* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) (hereinafter, "AAIDD 2010 Manual").

The state habeas trial court first analyzed Moore's numerous risk factors for intellectual disability, App. 129a–147a (relying on AAIDD 2010 Manual, 58–62), including, traumatic brain injury (App. 136a, ¶¶ 30–31), malnutrition (App. 137a-138a, ¶¶32–33), family poverty (App. 141a, ¶38), child abuse and neglect (App. 141a, ¶ 39) and inadequate special education services (App. 145a–146a, ¶¶51–56).

The court then analyzed the three prongs of the definition of intellectual disability: (1) intellectual functioning; (2) adaptive behavior; and (3) onset during the developmental period.

(1) *Intellectual functioning.* Turning first to the intellectual-functioning prong, the court determined that "Moore's IQ scores establish that he has 'significant limitations' in intellectual functioning or 'significantly subaverage' general intellectual functioning." App. 167a, ¶103. The court identified scores on seven IQ tests that Moore had completed between 1971 and 1989:

- 77 on the Otis-Lennon Mental Abilities Test in 1971, App. 167a, ¶105;
- 57 on the Slosson Intelligence Test for Children in 1972, App. 167a, ¶106;
- 78 on the Wechsler Intelligence Scale for Children ("WISC") in 1973, App. 167a–168a, ¶107;
- 67 on the Bender Visual Motor Gestalt Test in 1973, App. 168a, ¶108;

- 72 on the Goodenough Draw-A-Man Test in 1973, App. 168a, ¶109;
- 71 on a test taken as part of a psychological evaluation at prison in 1984, App. 168a, ¶110; and
- 74 on the Wechsler Adult Intelligence Scale—Revised ("WAIS-R") in 1989, App. 168a–169a, ¶111.[9]

The court calculated that the average IQ score from Moore's IQ tests was 70.66. App. 170a, ¶116. It held that Moore's "mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the [AAIDD]." App. 201a, ¶180.[10]

(2) *Adaptive behavior.* The court next analyzed the adaptive behavior prong. Applying the definition from the AAIDD 2010 Manual, which "requires 'performance that is approximately two standard deviations below the mean'" in any one of three areas of adaptive behavior, the court found that Moore's "adaptive behavior in at least one of the skill-sets is approximately two standard deviations below the mean." App. 200a, ¶¶176–77. The court further credited the testimony of Moore's "highly qualified expert witnesses . . . that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him

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[9] The habeas trial court noted that Moore's 1989 WAIS-R test contained a calculation error, with an incorrect score of 74 rather than 73. App. 169a, ¶112; *see also* App. 63a-64a n.38 (CCA's holding that error should not be corrected).

[10] This mean IQ score does not include the 59 that Moore received on the WAIS-IV administered by Compton in December 2013, App. 170a ¶115, or the 71 on the abbreviated WAIS-R administered by the prison in 1984. App. 168a, ¶110.

approximately two standard deviations below the mean in adaptive functioning." App. 201a, ¶181.[11]

(3) *Onset during the developmental period.* Finally, the state habeas trial court found the third prong satisfied because "[t]here is ample evidence that Mr. Moore suffered from significant deficits in adaptive functioning . . . before the age of 18." App. 201a, ¶178.

Turning to the ultimate question of whether Moore is intellectually disabled, the court agreed with Moore's experts "that Mr. Moore meets the diagnostic criteria for mental retardation intellectual functioning." App. 201a–202a, ¶182. The court held that Moore "has established that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both the DSM-IV and DSM-V, and under the prevailing legal standards per [*Atkins*]." App. 202a, ¶183. The court determined that relief should be granted on Moore's *Atkins* claim.

F. The CCA's *Atkins* Decision

The CCA rejected the state habeas trial court's decision. It held that the trial court "erred by . . . employing the definition of intellectual disability presently used by the AAIDD." App. 6a. The CCA

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[11] The court rejected the state's argument that Moore's behavior in prison undermined his showing of significant deficits in adaptive functioning. It explained that "[t]he very fact that he has adapted to life inside a prison so well, is almost certainly due to its highly regimented routine, which leaves little room for independent decision-making." App. 193a–194a, ¶167. It further observed that "these records [of behavior in prison] are not appropriate tools by which to exclude intellectual disability in capital murder cases." App. 194a, ¶168.

stated that this Court in *Atkins* "determined that the execution of intellectually disabled individuals violates the Eighth Amendment, but left it to the States to develop appropriate ways to enforce the constitutional restriction." App. 5a. The CCA then noted that, in its 2004 *Briseno* decision, it had "adopted the definition of intellectual disability stated in the ninth edition of the [American Association on Mental Retardation ("AAMR")] manual, published in 1992." App. 5a;[12] *see generally* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed. 1992) (hereinafter, "AAMR 1992 Manual").[13] The CCA acknowledged the trial court's recognition that "the AAMR's and APA's conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided." App. 5a. However, in light of what it viewed as "the subjectivity surrounding the medical diagnosis of intellectual disability" and the failure of the Texas legislature to adopt a statute, it stated that it will "continue to follow the AAMR's 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases," notwithstanding the changes in clinical standards since that time, and that it would also continue to apply

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[12] In addition to the 1992 AAMR definition, the *Briseno* Court also invoked the definition of mental retardation found in the Texas Health and Safety Code: "'significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.'" *Briseno*, 135 S.W.3d at 6 (quoting Tex. Health & Safety Code § 590.003(13)).

[13] The AAIDD formerly was known as the AAMR. The AAMR 1992 Manual was a predecessor to the AAIDD 2010 Manual used by the state habeas trial court.

additional non-clinical factors that it had fashioned in *Briseno*. App. 5a–7a.[14]

Applying its own standard, which referenced the decades-old medical standard in the AAMR 1992 Manual and incorporated its own non-clinical factors, the CCA concluded that Moore failed to establish he was intellectually disabled.

(1) *Intellectual functioning.* The CCA employed a strict IQ cut-off to determine that Moore's above-70 IQ disqualified him from a diagnosis of intellectual disability. Rejecting reliance on five of seven IQ tests that Moore completed between 1971 and 1989, the CCA selected two of Moore's three highest IQ scores: his 78 on the WISC in 1973, and his 74 on the WAIS-R in 1989. App. 73a. Although the CCA initially acknowledged the standard error of measurement, App. 8a, it then discounted the low-end of the range associated with his 74 IQ score because of Moore's "history of academic failure" and because he took the test while "on death row and facing the prospect of execution," App. 74a-75a. Based upon its determination that Moore's IQ scores placed him "above the intellectually disabled range," App. 75a, the CCA held that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." App. 63a, 74a–75a.

(2) *Adaptive behavior.* The CCA then found that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual func-

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[14] In prohibiting the use of current medical standards, the CCA included the statement that "the legal test it established [in 2004] . . . remains adequately 'informed by the medical community's diagnostic framework.'" App. 7a (quoting *Hall*, 134 S. Ct. at 2000).

tioning," he "has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." App. 75a. The CCA explained that it "'consider[s] *all* of the person's functional abilities,' including 'those that show strength as well as those that show weakness.'" App. 11a. According to the CCA, the trial court erred by "consider[ing] only weaknesses in [Moore's] functional abilities." App. 12a. The CCA cited Compton's testimony regarding Moore's adaptive behavior, including that Moore purportedly showed adaptive skills by, among other things, living in a pool hall after he was thrown out of his house; playing pool and mowing lawns for money; living on the streets; covering up his gun while entering the store during commission of the crime; wearing a wig during the crime; fleeing to Louisiana after commission of the crime; and testifying at trial. App. 80a–81a, 85a–86a. The CCA also emphasized Moore's development of skills while in prison, holding that the trial court erred by not relying on Moore's prison records. App. 12a, 81a–84a.

In addition to rejecting the habeas trial court's findings regarding Moore's intellectual functioning and adaptive behavior, the CCA also held that the trial court erred by purportedly failing to make a "relatedness inquiry" between the two prongs of the intellectual-disability standard. App. 10a. The CCA stated that an individual must prove not only "significantly sub-average general intellectual functioning and significant limitations in adaptive functioning," but also that "his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause." *Id.* The CCA further explained that its additional "*Briseno*

factors" "weigh[] heavily against a finding that [Moore's] adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." *Id.* at 89a.[15]

Applying its "relatedness" test to Moore's case, the CCA concluded that "the record does not support a finding that," even assuming that Moore had adaptive deficits, "these deficits were linked to

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[15] In *Briseno*, the CCA crafted its factors after observing that clinical standards are "exceedingly subjective" and invoking the character Lennie from *Of Mice and Men* as the example of an intellectually disabled individual whom "[m]ost Texas citizens might agree . . . should, by virtue of his lack of reasoning ability and adaptive skills, be exempt" from the death penalty. 135 S.W.3d at 6-9. The CCA's seven *Briseno* factors are:

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

App. 11a (brackets in original).

significantly sub-average general intellectual functioning." App. 88a. "Rather," according to the CCA, "the record overwhelmingly supports the conclusion that [Moore's] academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated harassment and violence at school, a history of academic failure, drug abuse, and absenteeism." App. 88a–89a. The CCA also stated that "[t]he significant advances [Moore] has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning." App. 89a.

Judge Alcala dissented. She expressed her profound disagreement with the majority's prohibition on using current medical standards, and explained that "[i]n light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person." App. 100a; *see also* App. 98a. Judge Alcala emphasized important differences between the DSM-IV and the DSM-5. *See* App. 111a–112a (discussing multiple sources). She highlighted significant developments in the approach to IQ scores; the evaluation and role of adaptive functioning; the recognition that the ability "to perform basic life functions" may be entirely consistent with intellectual disabilities; and the lack of clinical significance of adaptation in prison and on death row. App. 107a, 112a–114a.

The dissent also criticized the majority's use of the non-clinical *Briseno* factors, finding them unsupported by any "authority, medical or legal." App. at 97a–98a. Judge Alcala argued that "the majority opinion's continued application of the *Briseno* standard is constitutionally unacceptable because it relies on an unscientific assessment that (1) considers adaptive deficits based on the DSM-IV alone, (2) includes a comparison to the fictional character Lennie, and (3) considers seven evidentiary factors that are inapplicable in this context." App. 111a. The dissent further criticized the majority for effectively employing an IQ cutoff and for "cherry pick[ing] [Moore's] two higher IQ scores" and "disregard[ing] the other scores." App. 106a–108a.

Judge Alcala explained that she would have held that the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and that the reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable." App. 104a. She thus would have "modif[ied] [the CCA's] analysis in *Briseno* so that it conforms to the current consensus of the medical community," including the 2010 AAIDD Manual and the DSM-5. App. 104a–105a. Judge Alcala emphasized, "This Court cannot continue to apply an outdated and erroneous standard." App. 95a n.2.

SUMMARY OF ARGUMENT

This Court's decisions in *Atkins* and *Hall* squarely control this case. As this Court made clear in *Hall,* a state's legal determination of intellectual disability must be "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. The CCA's decision to prohibit consideration of the medical community's *current* "diagnostic framework" is inconsistent with that fundamental principle.

The CCA has repeatedly expressed skepticism of clinical standards in the *Atkins* context. In its seminal case after *Atkins*, the CCA adopted non-clinical factors for evaluating intellectual disability (and invoked the fictional character Lennie) because of the CCA's view that clinical standards are "exceedingly subjective" and because the CCA questioned whether everyone who qualifies as intellectually disabled under clinical standards is entitled to *Atkins* protection in Texas. *Briseno*, 135 S.W.3d at 5–9. In this case, the CCA has taken its hostility to clinical standards a major step further by flatly prohibiting the use of current medical standards, again based on what it views as "the subjectivity surrounding the medical diagnosis of intellectual disability." App. 6a–7a.

In *Atkins* and *Hall*, this Court established that the Eighth Amendment categorically prohibits the execution of persons with intellectual disability. Citing the impairments set forth in clinical definitions, *Atkins* concluded that defendants with intellectual disability bear diminished personal culpability "by definition." 536 U.S. at 318. In *Hall*, this Court reiterated that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. In holding Florida's strict

IQ cut-off unconstitutional in *Hall*, the Court emphasized that a State's legal determination of intellectual disability cannot "disregard[] established medical practice" or "go[] against the unanimous professional consensus." *Id.* at 2000. In both *Atkins* and *Hall*, this Court used the current clinical and medical standards.

The medical community itself relies on the current diagnostic framework precisely because, based on constant study and refinement, it best reflects clinicians' understanding of intellectual disability and its proper diagnosis. Just as there would be no valid medical reason for a clinician to diagnose whether an individual suffers from intellectual disability based on outdated or unscientific standards, there is no valid legal reason for a court to use such a standard in evaluating a claim under *Atkins*. Moreover, if states are permitted to disregard current medical standards, they may under-enforce *Atkins*'s categorical prohibition, with the inevitable and irreversible result that a person who is intellectually disabled according to prevailing clinical standards will be executed in clear violation of *Atkins* and *Hall*.

The CCA's prohibition on the use of current medical standards—and its conflict with current medical standards—violates *Atkins*, *Hall,* and the Eighth Amendment. The CCA erroneously refused to consider current standards on intellectual functioning and adaptive behavior. For intellectual functioning, current standards do not impose a strict numerical cut-off, as this Court recognized in *Hall*. Similarly, for adaptive behavior, current standards emphasize the centrality of adaptive deficits and methods for their assessment. And, for the relationship between intellectual functioning and adaptive behavior, cur-

rent standards belie the distorted inquiry adopted by the CCA, in which concurrent evidence that an individual suffered childhood abuse, racial harassment, and other misfortunes—and even evidence that he had a history of academic failure, which is obviously correlated with intellectual disability—poses an enormous additional hurdle to be overcome for *Atkins* eligibility.

The CCA's *Briseno* factors, moreover, conflict with current medical standards because they are inconsistent with clinical standards. The *Briseno* factors are unapologetically non-clinical—and indeed they are anti-clinical. The *Briseno* factors are rooted in lay misconceptions of intellectual disability; they are erroneously derived from the literary character Lennie; and they are based, at least in part, on the fundamental misconception that only a subset of those diagnosed as intellectually disabled may be excluded from execution. *See, e.g., Briseno*, 135 S.W.3d at 6 (asking whether "a consensus of Texas citizens" would agree that persons "whom the mental health profession might diagnose as meeting the criteria for mental retardation" but who are less impaired than "Steinbeck's Lennie" should be exempt from the death penalty); *Sosa*, 364 S.W.3d at 892.

For these reasons, the CCA's decision in this case violates the Eighth Amendment. Its wholesale disregard of current medical standards "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990. Under this Court's decisions, and the Eighth Amendment, an individual's claim to intellectual disability in the *Atkins* context must be informed by current medical standards.

ARGUMENT

The CCA's prohibition on the use of current medical standards in intellectual disability determinations is unconstitutional. *First*, *Atkins* and *Hall* recognize that current medical standards may not be excluded in considering intellectual disability. *Second*, the prohibition on the use of current medical standards in this case has profound consequences and violates Moore's Eighth Amendment rights.

I. *ATKINS* AND *HALL* MAKE CLEAR THAT PROHIBITING THE USE OF CURRENT MEDICAL STANDARDS IN INTELLECTUAL DISABILITY DETERMINATIONS IN CAPITAL PROCEEDINGS VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment categorically prohibits the execution of persons with intellectual disability. The Court's analysis of this constitutional principle is thoroughly grounded in the clinical and medical understanding of intellectual disability.

In *Atkins*, the Court prominently relied on the clinical definitions of mental retardation provided by the AAMR and the APA in reaching its conclusion that execution of the "mentally retarded" violates the Eighth Amendment. At the outset of its opinion, the Court quoted the clinical definitions from these two leading mental health authorities. *See Atkins*, 536 U.S. at 308 n.3. In the core of its Eighth Amendment analysis, the Court similarly relied on these "clinical definitions of mental retardation." *Id.* at 318. Then, using the clinical definitions as a linchpin of the analysis, the Court concluded: "Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude

that such punishment [the death penalty] is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id*. at 321 (internal quotation marks omitted). While the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction," *id*. at 317, it recognized that the states' "statutory definitions of mental retardation . . . generally conform to the clinical definitions" relied upon by the Court. *Id*. at 317 n.22. "The clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*," *Hall*, 134 S. Ct. at 1999, and *Atkins* relied on "the diagnostic criteria employed by psychiatric professionals." *Id*. at 2000.

Similarly, in *Hall*, this Court emphasized that, "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. at 1993. The Court explained:

> That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising. Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the medical condition at issue.

Id. The Court carefully considered the views of "the medical community," the "established medical practice," and the "professional explanations" in evaluating Florida's absolute numerical cut-off for IQ

scores. *Id.* at 1994–96. Recognizing the Court's statement in *Atkins* that States have "the task" of devising means to enforce the constitutional principle, the Court emphasized that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection," *id.* at 1998, and that *Atkins* did not give States plenary authority to reject clinical definitions. *Id.* at 1998–99. The reason for this limitation is clear and of surpassing importance: "If States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999. Accordingly, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id.* at 2000.

Atkins and *Hall* both also recognized that "the medical community's diagnostic framework," in the intellectual disability context, is best found in the current editions of the AAMR/AAIDD's clinical manual and the APA's Diagnostic and Statistical Manual of Mental Disorders. *Atkins* relied on these two authorities for its understanding of "mental retardation." *See, e.g.,* 536 U.S. at 308 n.3, 317 n.22, 318. *Atkins* also relied on the most current versions of both authorities—the ninth edition of the AAMR's clinical manual, published in 1992, and the fourth edition of the DSM (DSM-IV-TR), published in 2000. *Id.* at 308 n.3, 317 n.22.[16] *Hall* similarly relied on

[16] The DSM-IV-TR did not alter the substantive criteria of any disorders in the DSM-IV, published in 1994, but instead revised "the descriptive text that accompanies the criteria sets

the AAIDD manual and the DSM as the leading authorities on the medical and clinical understanding of intellectual disability. *See, e.g.,* 134 S. Ct. at 1994, 2000. Indeed, the Court referred to the DSM as "one of the basic texts used by psychiatrists and other experts." *Id*. at 1990. As in *Atkins*, moreover, the Court relied on the most current versions of those authorities—the AAIDD manual's eleventh edition, published in 2010, and the DSM-5, published in 2013. *Id*. at 1990, 1994, 2000.

The authorities used by the Court in *Atkins* and *Hall* explicitly recognize that clinical knowledge and clinical standards evolve as the medical community seeks improvements and advances in medical understanding. Both authorities invoked in *Atkins* emphasized that medical and clinical knowledge is continually advancing. *See, e.g.*, AAMR 1992 Manual, ix; DSM-IV-TR, xxviii. The authorities relied upon in *Hall*, in turn, similarly emphasize that the medical and clinical method leads to improvements and advancements after rigorous study and review. *See, e.g.*, AAIDD 2010 Manual, xiii-xvi; DSM-5, 5.

Accordingly, in *Atkins* and *Hall*, this Court made clear that (1) the Eighth Amendment-mandated inquiry into intellectual disability must be informed by the medical diagnostic framework and (2) the medical diagnostic framework is determined by current medical standards. Just as there would be no sound clinical reason to use superseded medical standards and prohibit consideration of current medical stand-

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for DSM-IV disorders" to reflect information that had become available since the DSM-IV. APA, *Diagnostic and Statistical Manual of Mental Disorders*, xxix (4th ed. 2000) (hereinafter, DSM-IV-TR").

ards in making a diagnosis, there is no sound legal basis for relying on superseded medical standards and prohibiting consideration of current medical standards in conducting the intellectual disability inquiry under *Atkins*.

A rejection of governing medical standards also would create grave practical problems. Medical experts, whose discipline requires them to apply current standards, would need to diagnose and evaluate individuals artificially based on past standards —a requirement that would be both pointless for clinical purposes and groundless.

A rule prohibiting consideration of current medical standards, such as that announced by the CCA in this case, starkly conflicts with *Atkins*, *Hall*, and the Eighth Amendment. It violates both the Constitution and common sense.

II. THE CCA'S REJECTION OF CURRENT MEDICAL STANDARDS VIOLATES THE EIGHTH AMENDMENT

To determine whether Moore was intellectually disabled, the state habeas trial court in this case did what *Atkins* and *Hall* require: it consulted "the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Noting that "[a]s our standards of decency evolve, so too do the standards of psychological diagnosis," the court explained that, in 2010, the AAIDD had published a new edition of its manual. App. 150a, ¶66. Applying current medical standards, it determined that Moore is intellectually disabled and constitutionally ineligible for the death penalty. App. 147a–154a, ¶¶58–76; 202a, ¶¶183–184.

The CCA determined that the state habeas trial court "erred by . . . employing the definition of intel-

lectual disability presently used." App. 6a. The CCA made fundamental errors in its analysis—and conflicted with the medical community's "diagnostic framework," *Hall*, 134 S. Ct. at 2000—by (1) rejecting consideration of current medical standards and (2) relying on its own clinically unsound *Briseno* factors. The CCA's errors arise from the CCA's view, which it has expressed since first addressing *Atkins* in *Briseno*, that medical standards must be viewed skeptically because of their supposed "subjectivity" and that not all persons who meet the clinical definition of intellectual disability should necessarily be ineligible for execution under *Atkins*. The CCA's approach is incompatible with *Atkins*, *Hall,* and the Eighth Amendment. It also is aberrational, with almost no support in the standards of any other states.

A. The CCA's Rejection Of Current Medical Standards Conflicts With The Medical Community's Diagnostic Framework

The three essential elements of intellectual disability—limitations in intellectual functioning, limitations in adaptive functioning, and early age of onset—have remained consistent. *See, e.g.*, *Atkins*, 536 U.S. at 308 n.3; *Hall*, 134 S. Ct. at 1994; AAIDD 2010 Manual, 7; DSM-5, 33, 40-41. At the same time, the medical community has made important strides in understanding and diagnosing intellectual disability in the last quarter century.

As explained in the AAIDD 2010 Manual, the medical community has an "evolving understanding of the disability and ID construct," and the organization correspondingly updates its manual approximately every decade to reflect the "current

understanding of the ID construct and guidelines to use in defining, diagnosing, and classifying individuals with ID." AAIDD 2010 Manual, xiii. The same is true with the DSM, with the 2013 edition of the DSM-5 updating and refining the 1994 edition of DSM-IV based on diagnostic advances. As the DSM-5 explains: "it is important to emphasize that the current diagnostic criteria are the best available description of how mental disorders are expressed and can be recognized by trained clinicians." DSM-5, xli; *see also id.* at 5 (noting that "[t]he science of mental disorders continues to evolve").

In light of these clinical advances, it is clear and well understood that clinicians should not "rely[] on past language, definitions, and models of mental retardation." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports*, xii (10th ed. 2002). Yet that is precisely what the CCA has required here.

By adopting a head-in-the-sand approach to advances in the diagnostic framework for assessing intellectual disability, the CCA completely ignores advances in the medical community's understanding and assessment of intellectual disability over the last quarter century. Those improvements include clarifications regarding the role of IQ scores in assessing intellectual functioning and the evaluation of adaptive deficits.

Notably, the CCA did not dispute that the medical community's diagnostic framework has evolved and been updated in the intervening decades. Instead, it acknowledged that "[it] may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins*

and *Briseno* were decided"— just as the state habeas trial court determined they had. App. 6a. The CCA nevertheless concluded that, whatever the current diagnostic framework, courts in Texas may not be informed by it. App. 6a-7a. In reaching that determination, the CCA did not consider the substance of the clinical changes since 1992, much less apply them to Moore's claim. Instead, without *any* explanation or analysis, the CCA summarily asserted that the legal definition of intellectual disability that it had established in *Briseno* "remains adequately 'informed by the medical community's diagnostic framework.'" App. 7a. Not so—and the CCA's prohibition on considering current medical standards had profound effects in this case.

As Judge Alcala explained in her dissent, significant refinements have occurred with regard to both intellectual functioning and adaptive behavior: current standards place "greatly reduced" emphasis on IQ scores in the assessment of intellectual functioning and "rel[y] more on adaptive functioning than [earlier standards] did, both for diagnosing intellectual disability and for determining its level of severity." App. 107a, 112a.

Accordingly, it is important to consider the conflict between the CCA's decision and current medical standards with regard to both intellectual functioning and adaptive deficits.

Intellectual functioning – Current medical standards advise that IQ scores must be considered as part of a complete clinical inquiry, rather than standing alone with totemic significance.

The DSM-5 does not require the specification of a particular IQ score as an essential feature of the di-

agnosis of intellectual disability. This is in recognition of the fact that "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM-5, 37. In its text commentary, the DSM-5 continues to recognize that IQ scores are an important tool: it explains that "[i]ndividuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error," which generally "involves a score of 65-75." *Id.* The ultimate clinical inquiry into intellectual functioning, however, is focused on "deficits in intellectual functions . . . confirmed by both clinical assessment and individualized, standardized intelligence testing," such as IQ scores and standardized neuropsychological testing. *Id.* at 33; *see also* APA, *DSM-5 Intellectual Disability Fact Sheet*, https://www.psychiatry.org/psychiatrists/practice/dsm/dsm-5 ("By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels.").

The AAIDD 2010 Manual, like the DSM-5, views intellectual functioning in terms of "intelligence," which it defines as "mental ability," including "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." AAIDD 2010 Manual, 31. With respect to IQ scores, the manual explains that "[t]he 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score . . . approximate-

ly two standard deviations below the mean, considering the standard error of measurement for the specific instruments used and the instruments' strengths and limitations." *Id.* Importantly, the AAIDD also emphasizes that "the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination," and stresses that "[a] fixed point cutoff score for ID is not psychometrically justifiable." *Id.* at 40.

The CCA's evaluation of intellectual functioning sharply conflicts with these current standards. The CCA treated two of Moore's IQ scores—scores of 74 and 78 (which the CCA cherry-picked from a series of IQ scores, including several IQ scores that were below 70)—as dispositive of Moore's *Atkins* claim.[17] After considering only those two selected scores, the CCA determined that Moore had "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." App. 63a; *see also* 74a-75a. Such a conclusion cannot be reconciled with current medical practice.

First, and most fundamentally, the CCA's use of IQ scores as a closed box for determining the first prong—precluding consideration of any other clinical factors in evaluating intellectual functioning—sharply conflicts with the explicit recognition in current medical standards that IQ numbers alone, particularly when in the range of 70-75, should not be given dispositive significance in evaluating intellectual functions. As this Court recognized in *Hall*, "[i]ntellectual disability is a condition, not a number."

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[17] Although the CCA did consider Moore's adaptive deficits (through its fundamentally flawed lens), it did so in the alternative. *See* App. 63a, 75a.

134 S. Ct. at 2001. It therefore is "unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Brumfield*, 135 S. Ct. at 2278 (internal quotation marks and citation omitted). Yet, notwithstanding guidance from this Court that "[i]t is not sound to view a single factor as dispositive" of "the conjunctive assessment necessary to assess an individual's intellectual ability," *Hall*, 134 S. Ct. at 2000–01 (citing DSM–5, 37), the CCA nevertheless chose to "disregard[] established medical practice," *id.* at 1995, in concluding that Moore failed to prove he had significantly subaverage general intellectual functioning based solely on his IQ scores of 74 and 78. This conclusion is contrary to both the DSM-5 and the AAIDD 2010 Manual. *See* AAIDD 2010 Manual, 40 (rejecting the use of a "fixed [IQ] cutoff score" for diagnosing intellectual disability); DSM-5, 37 (IQ scores are only "approximations of conceptual functioning"; "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score").

The CCA further contradicted current medical standards by ignoring that Moore's IQ scores must be treated as ranges, not precise numbers. *See Brumfield*, 135 S. Ct. at 2278 (state court's conclusion that petitioner could not possess significantly subaverage intelligence with IQ test result of 75 was "an unreasonable determination of the facts"); *Hall*, 134 S. Ct. at 2001 (rejecting Florida's "rigid rule" treating IQ score in the marginal range as dispositive). Although the CCA stated that it recognized that "[t]here is a measurement error of approximately five points in

assessing IQ," App. 8a, it did not give Moore the benefit of this range. The CCA rejected the standard error of measurement in this case for two reasons, neither of which is sound under current medical standards.

The CCA first asserted that it would disregard the low end associated with Moore's IQ score of 74 in light of Moore's "history of academic failure," which it believed may have adversely affected his performance. App. 75a. In doing so, the CCA ignored the obvious fact that a history of academic failure supports a diagnosis of intellectual disability. *See* DSM-5, 34 (for "school-age children and adults" with mild intellectual disability "there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money"); *id.* at 38 ("associated features supporting diagnosis" of intellectual disability include, inter alia, "associated difficulties with . . . motivation in school"); *see also, e.g.*, Gilbert S. Macvaugh III & Mark D. Cunningham, Atkins v. Virginia*: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 163 (2009) ("academic achievement is usually adversely affected by mental retardation").

Second, the CCA also disregarded the low end of the range because Moore took the test while on death row, App. 74a-75a, thereby setting up a Catch-22 that *Hall* conspicuously avoided. *See Hall*, 134 S. Ct. at 1995 ("[a] score of 71 . . . is generally considered to reflect a range between 66 and 76," with no suggestion that low end of range should be disregarded because petitioner was on death row at time of test administration); Br. for Resp't at 3, 7-8, *Hall*, 134 S. Ct. 1986 (No. 12-10882) (test on which petitioner scored 71 was administered in 2002, long after death

sentence had been imposed). Thus, even under a strict numerical approach, the CCA's analysis did not comport with current medical standards. *See* DSM-5, 37 (individuals with intellectual disability often have IQ scores of approximately "65-75"); AAIDD 2010 Manual, 36.

In sum, by applying a strict cutoff based solely on two cherry-picked IQ scores (one of which was a 74), the CCA conflicted with current medical standards and established medical knowledge—and thus with *Atkins*, *Hall*, and the Eighth Amendment. *See also* App. 106a–111a (Alcala, J., dissenting) (analyzing the CCA's improper analysis of intellectual functioning).[18]

Adaptive deficits – As with intellectual functioning, current medical standards reflect clinical advances in understanding of adaptive deficits.

The DSM-5 places greater emphasis on the role of adaptive functioning and now assesses the levels of severity of intellectual disability based on adaptive functioning (rather than IQ scores). *See* DSM-5, 33-35. A finding of an adaptive deficit is warranted if an individual's conceptual, social, or practical capacity is sufficiently impaired that ongoing support is needed for the individual. *Id.* at 37. Importantly, the adaptive deficits are not balanced or offset against perceived adaptive strengths. *See, e.g.*, *id.* 33 (criterion is simply "[d]eficits in adaptive functioning,"

[18] The chasm between the CCA's approach and current medical standards is highlighted by the fact that *even the State's expert*, did not dispute that Moore satisfied the first prong of intellectual disability (intellectual functioning). *See* JA185, 189-90. The CCA's contrary conclusion was not shared by *any* of the clinicians who testified.

rather than a balancing of deficits and strengths). The DSM-5 also explicitly recognizes the difficulty in assessing deficits in adaptive functioning in highly controlled settings such as prisons. *Id.* at 38.

Like the DSM-5, the AAIDD 2010 definition, in assessing intellectual disability, also relies on deficits in conceptual, social, or practical skills, rather than a balancing of perceived adaptive strengths against adaptive deficits, in assessing intellectual disability. The AAIDD 2010 Manual explicitly recognizes that "[i]ndividuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior." AAIDD 2010 Manual, 47. Indeed, one of the "essential" assumptions of the AAIDD definition is that "[w]ithin an individual, limitations often coexist with strengths." *Id.* at 1. Thus, "in the process of diagnosing ID, *significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills*." *Id.* at 47 (emphasis added). Similar to the DSM-5, AAIDD also takes the position that "'street smarts', behavior in jail or prison, or 'criminal adaptive functioning," should not be used to infer levels of adaptive behavior. AAIDD, *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports*, 20 (2012) (hereinafter, "AAIDD 2012 User's Guide").

As with intellectual functioning, the CCA's analysis of adaptive deficits conflicts sharply with the current diagnostic framework it rejected.

First, under governing medical standards, the assessment of adaptive deficits focuses on those things that an individual *cannot* do in everyday life. Such

an inquiry does not involve "balancing" an individual's abilities or strengths against perceived deficits. AAIDD 2010 Manual, 45.[19] The inquiry is whether an individual has deficits in the "collection of conceptual, social [or] practical skills that have been learned and are performed by people in their everyday lives." *Id.* at 45.

The CCA, however, completely ignored the current diagnostic framework in assessing Moore's adaptive deficits. *Compare* App. 75a–91a *with* App. 180a–200a. Rather than focus on Moore's conspicuous adaptive deficits (such as his abysmal academic performance and withdrawn behavior throughout the developmental period), the CCA explicitly weighed his adaptive deficits against his perceived adaptive strengths as a means by which to negate a diagnosis of intellectual disability. *See* App. 11a; 80a–88a; *see also* App. 113a (Alcala, J., dissenting) ("The Court's majority opinion . . . gives heavy weight to [Moore's] ability to perform some of the functions listed above even though the current scientific community would discount that type of behavior as dispositive evidence of adaptive functioning.").

In conflict with medical standards, the CCA found, for instance, that Moore's significant conceptual, social, and practical deficits were outweighed by the fact that Moore had "lived in the back of a pool hall"

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[19] *See generally* AAIDD 2010 Manual, 7 ("[P]eople with [intellectual disability] are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation).").

and "played pool and mowed lawns for money." App. 80a. The CCA further found that Moore's "adaptive skills" in prison, *see* App. 80a–88a (discussing "skills" ranging from playing dominos to completing commissary forms), belied a diagnosis of intellectual disability.[20] But, in addition to the inappropriate balancing of perceived strengths against adaptive deficits, current clinical guidelines explain that such evidence should be given little weight due to the highly-structured nature of the prison environment. *See* AAIDD 2012 User's Guide, 20 (diagnosis of intellectual disability should not be based on "behavior in jail or prison"); *see also* DSM-5, 38 ("[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)"); *see also* App. 202a, ¶184 (state habeas trial court: "Mr. Moore's evidence of improvement in elementary school level reading and writing after three decades in a controlled environment on death row are not sufficient evidence to counter the large historical record and the testimony at the hearing").

Current clinical and medical standards, moreover, place greater emphasis on the crucial role of adaptive deficits in a diagnosis of intellectual disability. *See, e.g.*, DSM-5, 33-35; JA9, JA28. The CCA's rejection of the adaptive deficits here ignores – and conflicts with – this core principle of current standards.

Accordingly, the CCA's evaluation and dismissal of Moore's significant adaptive deficits simply cannot

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[20] With respect to Moore's playing pool and dominos, clinical guidance recognizes that some individuals with intellectual disability often have "[r]ecreational skills [that] resemble those of age-mates." DSM-5, 34.

be reconciled with the current diagnostic framework.[21]

Relatedness – The CCA also departed from current medical standards by discounting Moore's significant adaptive deficits based on an overly broad and clinically unwarranted notion of "relatedness."

The CCA fundamentally misinterprets the clinical element of "relatedness." Far from creating some onerous additional causation hurdle to establish intellectual disability, the notion of a relationship between intellectual deficits and adaptive deficits is routine and unexceptional. If there is no relationship at all between intellectual deficits and adaptive deficits, then addressing the adaptive deficits by taking into account the intellectual deficits makes no sense. To give a common example that is offered for teaching purposes in the clinical world, if an individual cannot read (an adaptive deficit) and is blind, then the adaptive deficit may well be unrelated to the intellectual deficit. The same may be true if adaptive deficits—shortcomings in dealing with the day-to-day world—result, for example, solely from cultural differences. The recognition that it makes clinical sense to examine whether adaptive deficits are associated with a wholly different factor from intellectual deficits is longstanding and well-understood.

In sharp contrast to this common-sense clinical approach, the CCA now has established "relatedness" as a major additional hurdle that must be overcome

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[21] Moore's position is—and has been—that he also is intellectually disabled under previous medical standards. The improvements and advances in current medical standards, however, make it even more clear that he is intellectually disabled.

before an individual with intellectual deficits and adaptive deficits may be protected by the Eighth Amendment right recognized by *Atkins* and *Hall*.

Here, the CCA seized upon the word "related" to summarily (and erroneously) determine that Moore's significant academic and social deficits "were caused by a variety of [other] factors": "trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary school three times in three years, racially motivated harassment and violence at school, a history of academic failure, drug abuse, and absenteeism." App. 88a–89a. In so holding, the CCA completely disregarded current clinical guidance that environmental challenges and other disorders can, and frequently do, coexist with and contribute to intellectual disability. *See, e.g.*, DSM-5, 40 ("co-occurring . . . conditions are frequent in intellectual disability").[22] The CCA did not explain how it determined that any or all of the "variety of [other]

[22] Even while prohibiting, as a general matter, use of current medical standards, the CCA mistakenly suggests that "relatedness" is a new standard in the DSM-5 and that it is entirely absent from the AAIDD. App. 6a. While the use of the word "related" is not in the tenth and eleventh editions of the AAIDD, the principle underlying the concept—in its appropriate clinical sense—is widely accepted, including in the AAIDD. Tellingly, the CCA's invocation of current medical standards is plainly erroneous and distorted—and arises only when, in the CCA's view, the current medical standard undermines the intellectual disability claim. The CCA similarly invokes DSM-5 on "executive functioning" in an effort to reject Borda's diagnosis, App. 87a n.57, but its brief footnote reference fundamentally misinterprets the DSM-5, *see, e.g.,* DSM-5, 37 (indicating that intellectually disabled adults may reflect adaptive deficits in the conceptual domain through impaired executive function), which the CCA otherwise declined to consider.

factors" it identified had in fact "caused" any or all of Moore's adaptive deficits. Nor did it cite any clinical or scientific support for this causation inquiry, which is unsurprising since that inquiry is completely alien to the medical community's diagnostic framework.

Indeed, remarkably, the CCA treated risk factors and associated features of intellectual disability, which *support* its diagnosis under clinical standards, as *refuting* a diagnosis here. For instance, the current diagnostic framework recognizes that "risk factors for intellectual disability" include, among other things, "child abuse and neglect," "domestic violence," "impaired parenting," "inadequate early intervention services," "inadequate special education services," and "inadequate family support." AAIDD 2010 Manual, 60; *see also id.* at 59 ("[i]ndividuals may be born with perfectly normal DNA and still develop ID due to a birth injury, malnutrition, child abuse, or extreme social deprivation"). The DSM-5 similarly recognizes that "associated features supporting diagnosis" of intellectual disability include, inter alia, "associated difficulties with . . . motivation in school," "victimization" and "risk for physical . . . abuse." DSM–5, 38, 40. Thus the very factors that the CCA used to dispense with Moore's diagnosis of intellectual disability, actually support, under current medical standards, a diagnosis of intellectual disability, as the state habeas trial court found. *See* App. 129a-147a, 201a ¶179 (analyzing Moore's numerous risk factors for intellectual disability and concluding that "[a]n extraordinary number of the risk factors commonly associated with mental retar-

dation were present prior to Mr. Moore's 18th birthday").[23]

By requiring Moore to prove that his deficits in adaptive functioning were caused specifically and exclusively by his intellectual deficits—where there is no such requirement in clinical guidelines and where the clinical guidance suggests that the "unrelated" factors, in fact, support a diagnosis of intellectual disability—the CCA created an "unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1990.[24]

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[23] The CCA's clinically unsound interpretation of the "relatedness" requirement is especially troubling in light of its possible consequences. For example, under the CCA's analysis Moore's experience as a victim of "racially motivated harassment" and child abuse, App. 88a-89a, meant that he had an additional requirement to entirely exclude racial harassment and child abuse as possible contributing factors to his adaptive deficits. That holding is unsupported by current medical standards and clinical judgment, which do not suggest that victims of racial harassment and child abuse face an additional substantial hurdle in proving intellectual disability.

[24] Based in significant part on its distortion of the relatedness requirement in conflict with current medical standards, the CCA erroneously stated that the state habeas trial court erred by not making a relatedness finding. The CCA, however, previously had stated that relatedness meant that "adaptive limitations must be related to a deficit in intellectual functioning *and not a personality disorder*.'" *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (emphasis added). In its findings of fact, the state habeas trial court expressly acknowledged the CCA's holding in *Hearn* that adaptive deficits must be related to subaverage intellectual functioning instead of a personality disorder, App. 161a, ¶92, and, noting that no party had alleged that Moore suffered from a personality disorder, App. 161a-162a, ¶94, found no reason to question that Moore's adaptive deficits were related to his subaverage intellectual functioning, *see* App. 161a-162a, ¶¶94-95. In addition, the state

The CCA's rejection of current medical standards unquestionably had a profound impact on this case. Two of the three mental health experts testifying in support of Moore's claim emphasized the differences in current standards. *See* JA8, JA21, JA27–28, JA114. The state habeas trial court relied upon current medical standards in finding Moore intellectually disabled and ineligible for execution, App. 150a, ¶66; App. 163a, ¶97, and the use of current standards was a principal point of difference between the majority and the dissent regarding Moore's intellectual disability. App. 6a–7a; App. 98a. Thus, the role of current medical standards permeated the record of Moore's *Atkins* hearing from start to finish. The CCA's irrational prohibition on considering current medical standards fundamentally distorted its constitutionally mandated inquiry.

Finally, it is important to emphasize that the CCA's prohibition on the use of current medical standards in assessing an *Atkins* claim is unusual and highly idiosyncratic. Even Texas itself considers current medical standards in assessing intellectual disability in other areas. *See, e.g.*, 37 Tex. Admin. Code § 380.8779(e)(2)(B) (youth may not be discharged from juvenile justice program based on intel-intellectual disability unless diagnosed "by a licensed psychologist *based upon the most recent edition* of the Diagnostic and Statistical Manual of the American Psychiatric Association") (emphasis added). Peti-

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habeas trial court explicitly relied on and incorporated the determinations of intellectual disability by the experts and clinicians supporting Moore's claim of intellectual disability, and none expressed any doubt that they were related in diagnosing Moore.

tioner is not aware of any other states that have prohibited consideration of current medical standards and instead required the use of an outdated medical standard. Indeed, since *Hall*, state high courts presented with the issue consistently have held that current medical standards should be considered in resolving *Atkins* claims.[25] Particularly in light of the aberrational nature of the CCA's illogical rule, there is no sound basis for departing from the accepted medical consensus—that current medical standards should inform the intellectual disability determination. *See generally Hall*, 134 S. Ct. at 1996–98 (practices of other states supported conclusion that medical consensus should be followed).

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Using its own unsound standard that references a 1992 definition of intellectual disability, the CCA rejected the state habeas trial court's finding—which was based on current medical standards—that Moore had met his burden of showing that he is intellectually disabled. With respect to intellectual deficits, Moore has a "mean full-scale IQ score of 70.66"—which is well within "the range of mild mental retardation," App. 201a, ¶180, and which includes numerous IQ scores under 75. With respect to adaptive deficits, Moore scored 2.5 standard deviations below the mean on a generally accepted standardized test of adaptive behavior and has a history of con-

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[25] *See, e.g., Oats v. State*, 181 So.3d 457, 467-68 (Fla. 2015); *State v. Agee*, 364 P.3d 971, 989-91 (Or. 2015); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015); *cf. Com. v. Bracey*, 117 A.3d 270, 273-74 & nn.4-5 (Pa. 2015) (*Atkins* claim resolved using AAIDD or DSM manual current at time of *Atkins* hearing).

spicuous adaptive deficits, *see* JA200–201; under current standards, a score of two standard deviations below the mean "meet[s] the operational definition of a significant limitation in adaptive behavior," AAIDD 2010 Manual, 46. Even the State's expert acknowledged "limitations in [Moore]'s academic skills and some adaptive deficits in social interaction during the developmental period," App. 80a, and Moore's experts testified as to adaptive deficits in all three skill domains, *see* App. 180a-200a. Under current medical standards, a significant limitation in just one domain is sufficient to establish intellectual disability when coupled with significant limitations in intellectual functioning and onset before adulthood—all of which are established in the record here. By prohibiting consideration of those current medical standards in assessing Moore's *Atkins* claim (and in setting that standard for all current and future *Atkins* claims in Texas), the CCA's decision violated the Eighth Amendment.

B. The CCA's Approach Rejects Current Medical Standards Because It Relies On Non-Clinical Factors That Conflict With Medical Consensus

Closely related to the CCA's rejection of current medical standards is its reliance on non-clinical factors that conflict with current medical standards.

In *Briseno*, while invoking the AAMR's 1992 definition of intellectual disability (which it now has frozen in time), the CCA also directed Texas courts to use a list of non-clinical factors in assessing an individual's adaptive deficits. These concededly "non-diagnostic" *Briseno* factors, *Ex parte Van Alstyne*, 239

S.W.3d 815, 820 (Tex. Crim. App. 2007), were created out of whole cloth by the CCA and have no medical or clinical foundation. By injecting unsound non-clinical criteria into Texas's diagnostic framework for assessing intellectual disability, the CCA has run further afoul of current medical standards—and further violated the Eighth Amendment protections recognized by this Court in *Atkins* and *Hall*.

The *Briseno* factors arose from the CCA's explicit distrust of the clinical framework, which it viewed as "exceedingly subjective." *Briseno*, 135 S.W.3d at 8.[26] The factors were created by the CCA after it expressed its erroneous view that not all individuals who meet the clinical definition of intellectual disability should necessarily be exempt from the death penalty in Texas. As *Briseno* explained:

> 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? Put an-

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[26] *See also, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 10 n. 22 (Tex. Crim. App. 2014) (criticizing the "subjective" nature of the clinical inquiry and explaining that *Briseno* factors provide a more "objective" basis to "assess[] the type of intellectual disability concerns raised by the *Atkins* court"); *id*. ("[t]his definitional subjectivity is the primary reason why we developed the seven, more objective, *Briseno* factors"); App. 6a-7a (emphasizing "the subjectivity surrounding the medical diagnosis of intellectual disability").

> other way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria?

Id. at 6. Although the CCA declined to expressly answer those normative questions, it nevertheless proceeded to adopt a definition of intellectual disability that limited *Atkins*' Eighth Amendment protecprotections in Texas to those defendants who had "th[e] 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." *Id.* Indeed, in the years since *Briseno*, the CCA has reiterated its view that in Texas, the only defendants clearly protected from execution under *Atkins* are those with "*severe* mental retardation": "in borderline cases, where IQ scores are near the threshold of mild retardation," it is the CCA's opinion that "whether [a] defendant is mentally retarded for particular clinical purposes is instructive" but is not necessarily dispositive. *Sosa*, 364 S.W.3d at 892 (emphasis added). In such cases, the non-clinical *Briseno* factors are used to answer the question whether a mildly intellectually disabled defendant has "limitations in adaptive functioning [that are] the sort of limitations . . . that it would violate the Eighth Amendment to execute him." *Id.*

Most fundamentally, in *Briseno*, the CCA viewed it as an open question whether there is "a 'mental retardation' bright-line exemption from our state's maximum statutory punishment." 135 S.W.3d at 6.

Atkins and *Hall* definitively hold that the Eighth Amendment requires precisely that "bright line."

Since their inception, the *Briseno* factors have been widely and severely criticized as unscientific and contrary to clinical practice. *See, e.g.*, John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 689, 710, 711-12 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); American Bar Association, *The Texas Capital Punishment Assessment Report* 395 (Sept. 2013) ("The *Briseno* factors create an especially high risk that a defendant with mental retardation will be executed because, in many ways, they contradict established methods for diagnosing mental retardation."); Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 728 (2008) (*Briseno*'s "court-crafted overlay for assessing deficits in adaptive behavior in capital cases is not grounded in professional practice or guidelines"); *see also* App. 97a & n.5 (Alcala, J., dissenting) (citing numerous journal articles "criticiz[ing]" the *Briseno* Court for "applying an unscientific standard" to assess intellectual disability). Indeed, one analysis concludes that the Briseno *factors*—"created out of non-clinical whole-cloth" to "make it extraordinarily difficult to prove deficits in adaptive functioning"—and Florida's pre-*Hall* IQ-score cutoff are "[t]he two most pronounced examples" of state standards that "make it more difficult for persons with intellectual disability to prevail." John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins, 23 Wm. & Mary Bill Rts. J. 393, 399

(2014). This criticism is well founded.

The first factor, for instance, asks whether family or friends who knew the defendant during his developmental stage "th[ought]" he was "mentally retarded." *Briseno*, 135 S.W.3d at 8. This, in turn, incorporates whatever lay stereotypes one's childhood community may have had about what an intellectually disabled person is like. Relying on such testimony, without a corresponding clinical evaluation, is particularly problematic for "[i]ndividuals with [intellectual disability] with higher IQ scores" because such individuals are generally "physically indistinguishable from the general population"—notwithstanding popular views to the contrary. AAIDD 2012 User's Guide, 26–27 (highlighting a number of "incorrect stereotypes" about individuals with intellectual disability, including that "'if you don't have the look (as in Down syndrome) then you are not intellectually disabled'").

Other *Briseno* factors similarly permit factfinders to reject an *Atkins* claim based on "stereotypes of what persons with intellectual disability can (and cannot) do." Blume et al., *A Tale of Two (and Possibly Three)* Atkins, *supra*, at 405. For example, the factors ask whether a defendant has "formulated plans," "respond[s] coherently" to questions, or can "hide facts or lie effectively." *Briseno*, 135 S.W.3d at 8. None of these criteria, however, is considered in any known clinical assessment, because none of these behaviors is inconsistent with a diagnosis of intellectual disability. *See generally* AAIDD 2012 User's Guide, 26 (highlighting "incorrect stereotypes" about individuals with intellectual disability).

Also deeply problematic from a medical-standards perspective is the last *Briseno* factor—which focuses on the commission of the defendant's offense—and whether or not it seems consistent with a diagnosis of intellectual disability. This factor is completely at odds with clinical guidance on the issue:

> Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior. The diagnosis of intellectual disability is based on meeting three criteria: significant limitations in intellectual functioning; significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and age of onset prior to age 18. The diagnosis of [intellectual disability] is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'

AAIDD 2012 User's Guide, 20; Macvaugh & Cunningham, *supra*, at 169 ("Evaluators are discouraged from utilizing criminal behavior to ascertain the presence or absence of deficits in adaptive functioning.").[27] This factor encourages the factfinder to focus on a particular, uncommon event in assessing the defendant's adaptive behavior—the commission of the offense—notwithstanding that "[a]daptive behavior . . . is the collection of conceptual, social, and

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[27] Indeed, notwithstanding the prominent role that the CCA gave Steinbeck's "Lennie" in *Briseno*, it is unclear whether even Lennie could satisfy the CCA's self-created definition of intellectual disability because, among other things, "[a]fter committing the murder, [Lennie] went to great lengths to conceal his crime, including hiding the body." Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, *supra*, at 732-33.

practical skills that have been learned and are performed by people *in their everyday lives*." AAIDD 2010 Manual, 45 (emphasis added); *see also id.* (a "key point" is that adaptive behavior is assessed based on a person's "typical" performance); *accord* DSM-5, 33. Such "diagnosis by anecdote" is improper as well as circular insofar as the fact that a capital crime was committed may be used to negate a diagnosis of intellectual disability.

Notably, in the twelve years since Texas adopted the *Briseno* factors, only one other state high court has authorized use of these non-clinical factors, and only in limited circumstances involving malingering. *Bracey*, 117 A.3d at 287; *Com. v. Williams*, 61 A.3d 979, 982 n.9 (Pa. 2013). One other state intermediate appellate court also has applied them in unreported opinions. *See, e.g.*, *Howell v. State*, No. W2009-02426-CCA-R3PD, 2011 WL 2420378, *18 (Tenn. Crim. App. June 14, 2011). Thus, at least twenty-eight of the thirty-one states with the death penalty do not use the *Briseno* factors. The nineteen states without the death penalty of course also do not use the *Briseno* factors. Accordingly, at least forty-seven of the fifty states do not use the *Briseno* factors that the CCA crafted in response to its skepticism of clinical factors and its goal to limit the number of individuals who may receive *Atkins* protection to a subset of those who meet the clinical definition.[28]

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[28] While the Fifth Circuit has upheld Texas's *Briseno* factors, *see, e.g.*, *Butler v. Stephens*, 625 F. App'x 641, 649-50 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1656 (2016), Petitioner respectfully submits that, as numerous legal and medical analyses have explained, that view is erroneous.

All the problems with the *Briseno* factors, and their non-clinical, anti-clinical nature, are abundantly present in this case. Here, the CCA found that the *Briseno* factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." App. 89a. In so concluding, the CCA continued its single-minded focus on Moore's purported strengths: *e.g.*, that he tried, on occasion, to earn money from neighbors to buy food when he and his siblings were hungry (even though the record also shows that he ate from trash cans—even after getting food poisoning, App. 137a-138a, ¶33; 192a, ¶ 166; 197a–198a, ¶172(c)); that he submitted numerous *pro se* pleadings (minimizing evidence that he likely was assisted by fellow prisoners, *see, e.g.*, CR 3082-3084, App. 115a); and that the bungled robbery in which he participated "required forethought, planning, and moderately complex execution of purpose" (notwithstanding that two other individuals were involved, and notwithstanding that it went badly awry, *Moore*, 194 F.3d at 593-94).

What emerges, then, is *not* a determination of whether Moore is intellectually disabled under the current diagnostic framework. Instead, the CCA's decision in this case reflects its view that, regardless of whether he satisfies the current diagnostic framework, Moore lacks the "*level and degree of mental retardation at which a consensus of Texas citizens* would agree that [he] should be exempted from the death penalty"—*i.e.*, Moore does not resemble "Steinbeck's Lennie." *Briseno*¸ 135 S.W.3d at 6; *see also Sosa*, 364 S.W.3d at 892 (reiterating that, in Texas, in cases "where IQ scores are near the threshold of

mild retardation" not all individuals who are intellectually disabled under clinical guidelines will be protected by the Eighth Amendment). But neither *Atkins* nor *Hall,* with their definitive holdings that the Eighth Amendment categorically prohibits the execution of the intellectually disabled, countenances excluding individuals with intellectual disability from the Eighth Amendment protection based on a view of whether the Texas populace would want to see that person executed. Indeed, a stated purpose of *Briseno*—to identify a smaller group of "mentally retarded" individuals for *Atkins* purposes than for other purposes—sharply conflicts with this Court's decisions. *See, e.g.*, *Hall*, 134 S. Ct. at 1993 ("[T]he definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans."); *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005) (reiterating that in *Atkins*, "the Court ruled that the death penalty constitutes an excessive sanction for the entire category of mentally retarded offenders").

By relying on lay impressions, stereotypes and non-diagnostic criteria, the *Briseno* standard risks allowing the execution of individuals with intellectual disability—like Moore—whose impairments, though constitutionally significant, may be less obvious and less severe than those of other individuals. *See* App. 117a–118a (Alcala, J., dissenting) ("[T]he Lennie standard does not meet the requirements of the federal Constitution because it potentially permits the execution of a mildly or moderately intellectually disabled offender who meets the legal definition of *Atkins*, and it categorically limits

the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled."); Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill Rts. J. 467, 481 (2014) ("Using these seven [*Briseno*] factors as part of a diagnosis has the potential . . . to exclude anyone functioning in the mild [intellectual disability] range from the protection of *Atkins*."); Macvaugh & Cunningham, *supra*, at 136 ("The seven criteria of the *Briseno* opinion operationalize an *Atkins* interpretation that only exempts a subcategory of persons with mental retardation from execution.").

As this Court recently reiterated in *Hall*, "[t]he death penalty is the gravest sentence our society may impose." 134 S. Ct. at 2001. If that sentence is to be imposed on a person claiming intellectual disability, States must assess that claim according to a standard that is informed by the current views of the medical community. Texas, however, refuses to do so. Instead, it deploys its non-clinical *Briseno* factors to conclude that individuals, like Moore, are not intellectually disabled for Eighth Amendment purposes in Texas, even if they are intellectually disabled under current medical standards (as the state habeas trial court determined here) and would therefore be exempt from execution in other states.

Because nothing in *Atkins or Hall* authorizes the states to narrow the scope of the substantive Eighth Amendment right afforded by this Court by defining intellectual disability in a way that encompasses only a subset of defendants who are intellectually disabled under current clinical standards, the CCA's use of its *Briseno* factors—which conflict with current medical standards—to deny Moore's *Atkins* claim provides yet

an additional ground for reversal and further reflects and aggravates the constitutional error from the CCA's rejection of current medical standards.

CONCLUSION

This Court should reverse the judgment of the Texas Court of Criminal Appeals and vacate Bobby James Moore's death sentence.

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