No._____

In The

Supreme Court of the United States

RICK THALER, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

ERIC LYNN MOORE,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

Following numerous arguments in the Fifth Circuit, the en banc court held that Moore established both cause and prejudice for his unexhausted and procedurally defaulted *Atkins*[1] claim, despite his failure to present any substantial factual evidence or legal argument to the Court of Criminal Appeals (CCA) in his subsequent state-habeas petition.

On rehearing, the panel granted deference to the district court's determinations of facts and conclusions of law, and held that, while other courts may have ruled differently, there was no clear error in the district court's grant of relief.

Both the en banc court's and panel's holdings give rise to two important questions:

1. Whether the district court had authority to grant relief on Moore's unexhausted and procedurally defaulted claims when he failed to establish either cause or prejudice for his failure to properly present the claims in state court; and

2. Whether the district court, and in turn the court below, erroneously interpreted Texas law in finding Moore's IQ, measured at 76 and 74 prior to his conviction, indicated significantly subaverage intellectual functioning.

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

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OPINION BELOW

The Fifth Circuit Court of Appeals, sitting en banc, remanded the case to the panel in a published opinion. PA 59-63 (*Moore v. Quarterman*, 533 F.3d 338, 342 (5th Cir. 2008)).[2] The panel subsequently affirmed the district court's grant of habeas corpus relief on August 21, 2009. PA 1-58 (*Moore v. Quarterman*, No. 05-70038, 2009 WL 2573295 (5th Cir. 2009) (op. on reh'g) (per curiam) (unpublished)).

JURISDICTION

The court of appeals' judgment was entered on August 21, 2009. No petition for rehearing was filed. The Director's petition for writ of certiorari is timely filed on or before November 19, 2009. Sup. Ct. R. 13.3 (West 2007). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28, section 2254 of the United States Code states in pertinent part:

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[2] "PA" refers to the petitioner's appendix to the instant petition for certiorari review. "CR" refers to the clerk's record of pleadings and documents filed in the trial court. "RR" refers to the reporter's record of the trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTR" refers to the transcript of Moore's subsequent state habeas petition, cause number 38,670-02. "FHH" refers to the court reporter's record of the federal habeas hearing on Moore's *Atkins* claim. Petitioner Moore's and Respondent Thaler's exhibits from that hearing are denoted as "PX" and "RX" respectively.

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise by any available procedure, the question presented.

28 U.S.C. § 2254 (West 2009).

STATEMENT OF THE CASE

I. Facts of the Crime

Moore's guilt is not in dispute. The evidence supporting the underlying capital-murder conviction was briefly summarized by the state court:

> Appellant and three cohorts stopped at the rural home of the victims, a married couple, and requested automotive assistance. Pursuant to their plan, the four robbed the victims at gun point. Subsequently both the husband and wife were shot in a ransacked room of the house and left for dead. Only the husband survived.

Moore v. State, 882 S.W.2d 844, 846 (Tex. Crim. App. 1994).

II. Facts Related to Moore's *Atkins* Claim

A. Facts adduced at trial

The record indicates that Moore was the leader of the group responsible for the murder of the victim, Mrs. Ayers. During trial, the jury heard an audiotape of an interview with Moore on which he admitted to shooting Mr. Ayers because he feared being "an accessory," and wished to avoid identification. 17 RR 201, 221, 224. He further repeatedly shifted the blame for the murder to his accomplice, Anthony Bruce. *Id.* at 201-02, 207-09, 222-23. However, Mr. Ayers testified that Moore was the leader of the four men who murdered his wife. 19 RR 450.

In keeping with his ringleader status, Moore disposed of the guns and stolen property himself. 18 RR 314-17, 332-36; 19 RR 202-03. He also took Mr. Ayers' wallet, which contained $150, but later told his accomplices that the wallet only had $10 in it. 17 RR 203; 19 RR 444-45.

During the punishment phase of trial, the State outlined Moore's history of violence and criminal activity, including two prior aggravated assaults where Moore attacked unarmed victims with a knife. 22 RR 347-48. Moore later committed a third assault in which he dragged his girlfriend from an automobile by her hair, struck her repeatedly with a baseball bat, and smashed the windows of her car. *Id.* at 349-50. And in 1987, Moore assaulted yet another person, stabbing him with a broken beer bottle. *Id.* at 354.

In early 1990, Moore resisted arrest when he was picked up on outstanding warrants. *Id* at 350-51. In February of the same year, Moore resisted arrest again, requiring five officers to subdue and apprehend him. *Id.* at 352. In July 1990, Moore was apprehended for fighting, and again resisted arrest. *Id.* at 353-54.

On a different occasion, Moore was driving a car with several other occupants when he made an aggressive move toward a family crossing the street. *Id.* at 360. The father made a disparaging gesture at Moore, and Moore retaliated by pursuing the family through residential yards. *Id.* at 360-61. Moore struck two other automobiles during the chase, and eventually fled the scene. *Id.*

Defense expert, Dr. Crowder, testified that he examined Moore on June 21, 1991, and conducted a thorough investigation of the case, interviewing several people by telephone, and reviewing all relevant documents, including a prior psychological examination and contemporaneous psychological and IQ testing. 23 RR 582-84, 587. He concluded that Moore's intellectual abilities were "clearly below average" and "borderline,"

but he did not opine that Moore was mentally retarded. *Id.* at 586-88. He also testified that a recent electroencephalogram indicated Moore did not suffer from brain damage. *Id.* at 594-95.

B. Facts presented by Moore in his state habeas petition

Moore's state habeas claim of mental retardation consisted of a six-page petition, averring he was mentally retarded based on: his obtained IQ score of 74 on a 1973 administration of the Primary Mental Abilities Test (PMA); the false allegation that Moore was in special education classes "throughout school";[3] the disingenuous claim that he "was hit in the head with a baseball bat at around age nine or ten and suffered another head injury in an automobile accident during the same time frame";[4] and the fact that a Plano police officer saw Moore banging his head against the cage of a patrol car and against the wall of his jail cell. SHTR 7-9.

Moore failed to mention the score of 76 that he received on an IQ test administered in preparation for his capital-murder trial, and presented absolutely no evidence of significant limitations in adaptive functioning. Nor did he cite to the clinical definition of mental retardation recognized in *Atkins* or codified in Tex. Heath & Safety Code, section 591.003(13). Instead

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[3] The federal habeas record indicates that, at most, Moore may have attended some special education classes during elementary school. 2 FHH 49-51, 122-23, 139-44, 162-65.

[4] The trial record established that the baseball-bat incident occurred in 1987, when Moore was twenty-years old. 23 RR 589.

he erroneously argued that the cutoff IQ for defining mental retardation was 80, but that the CCA had not yet defined mental retardation under Texas law. SHTR 7-8, 9; *but see Ex parte Tennard*, 960 S.W. 2d 57, 60-61 (Tex. Crim. App. 1997) (holding that "[t]o be classified as mentally retarded, a person generally must have an IQ of 70 or below").

C. Facts presented in conjunction with Moore's federal *Atkins* claim

1. Evidence pertaining to Moore's IQ

Moore has taken three known full-scale IQ tests, two prior to his current claim of mental retardation, and one following it. At age 6, Moore scored a 74 on the PMA, administered through his school district. 1 FHH 139-40; RX 4 at 7. At age 24, Moore scored a 76 on the Wechsler Adult Intelligence Scales, Revised (WAIS-R), administered by Dr. Richard Fulbright in conjunction with Moore's capital murder trial. RX 7 at 1, 3-4, 7. At age 37, Moore scored a 66 on the Wechsler Adult Intelligence Scales, third edition (WAIS-III), administered by Dr. Llorente, the expert retained by Moore to assist in his *Atkins* litigation. 1 FHH 137-38; 2 FHH 3; PX 1 at 1, 6-7. Of these three tests, only the one taken in anticipation of his *Atkins* claim falls below the cutoff for mental retardation as defined in Texas. *See, Ex parte Briseño*, 135 S.W.3d 1, 7-8 & n.24 (Tex. Crim. App. 2004) (holding IQ must be "about 70 or below").

The WAIS-III exam Moore took in 2004 was improperly scored by his expert, Dr. Llorente. In his testimony, Dr. Llorente correctly noted it is very important that an IQ test be administered and scored

according to the procedure established by the test manual. 1 FHH 167. Moreover, if an error on a subtest occurs, the full-scale IQ score is questionable, and potentially invalid. *Id.* at 168-69, 173. Yet Dr. Llorente erred in his administration of the WAIS-III by prematurely discontinuing the information subtest in violation of the test rules. 2 FHH 217-18; PX 1 at 7. As a result, the full-scale IQ score of 66 obtained by Dr. Llorente is at best, an underestimate of Moore's true IQ, and at worst, wholly invalid. 1 FHH 168-69.

Additionally, Dr. Llorente was unable to rule out the possibility of malingering, or that Moore's obvious motivation to obtain a low score on the WAIS-III may have led him to dishonestly answer some questions incorrectly in order to appear mentally retarded. 2 FHH 57, 60, 62, 71. Dr. Llorente admitted that several questions Moore answered incorrectly on the WAIS-III were correctly answered during the 1991 administration of the WAIS-R. 2 FHH 57-61.

For example, Moore knew the meaning of the words "assemble" and "terminate" on the 1991 test but feigned ignorance of those words on the 2004 test. 2 FHH 55-57. Moore also correctly identified the concepts "leaf" and "mirror" on the 1991 test but not in 2004. *Id.* at 58. Further, Moore's picture-completion and arithmetic subtest scores from 2004 were substantially lower than his scores on the 1991 test. *Id.* at 58-59; *cf.* PX 1 at 7 and RX 7 at 4; 2 FHH 59. Finally, Moore answered one question concerning the concept of a "marriage license," incorrectly, despite his clear understanding of the term, evidenced by his correct use of it in written requests to prison authorities. 2 FHH 61-62; RX 2 at 163.

Dr. Llorente was also unable to rule out the possibility that high-blood-pressure medications taken by Moore at the time of the test could have negatively affected his full-scale IQ score by rendering him sluggish, and unable to perform to the best of his abilities, especially on the timed subtests. 2 FHH 64; PX 1 at 1. Auditory hallucinations and depression, from which Moore suffered at the time of the testing, could also have affected the validity of the test and could have lowered the full-scale IQ score obtained. 2 FHH 65; PX 1 at 1. Finally, Dr. Llorente did not attempt to correct for Moore's age or educational level, despite the fact that Moore is well outside the demographic group to which the WAIS-III is normally applied, and advanced age or lack of education artificially lowers IQ scores. 2 FHH 68-70, 228-30.

2. Evidence pertaining to Moore's adaptive behaviors

Dr. Mears, the Director's expert, testified that based on his clinical evaluation of Moore and review of the record, Moore was a very good historian, providing considerable detail about his early home life, academic history, work history, and criminal record. 2 FHH 209-16; RX 8 at 6-8. He opined that Moore's social/interpersonal and communication skills were better than any other capital offender he had evaluated for mental retardation, and were not significantly deficient. 2 FHH 215-16, 250-53, 257; PX 8 at 7-9. Dr. Llorente, on the other hand, identified no credible, objective evidence of significant deficits in the communication or social/interpersonal-skill areas, yet still found Moore had significant limitations in these areas. 2 FHH 73. His limited opinion regarding these adaptive areas was

apparently based on the self-serving claims made by Moore's family members that Moore stuttered or sometimes preferred to be alone. *See, e.g.*, 1 FHH 38, 44-45, 64, 66, 84. Both experts testified that stuttering is a physical problem, does not constitute a deficit in communication skills, and is not a product of mental retardation. *Id.* at 198; 2 FHH 15, 226, 240.

Larry Lambert, a science and math teacher in the Celina Independent School District (CISD), remembered Moore and recalled that he communicated effectively and interacted well with his classmates. 2 FHH 145-46; RX 4 at 8. Mary Hughes, another CISD teacher, also recalled that Moore interacted well with his classmates. FHH Deposition at 10-11; RX 4 at 9. Tyrone Brown testified Moore was a leader when he was a child. FHH Deposition at 11.

Brandon Daniel, Kyle Rains, Robert Moss, and Roger Dale Burks, all correctional officers at the Polunsky Unit in Livingston, Texas, interact with Moore on a regular basis and believe that he communicates effectively, is well liked, and socializes with others. 2 FHH 166-68, 177-78, 182-87, 193-94. Moore married Kim Butler while incarcerated on death row. *Id.* at 60; RX 2 at 165. And prior to his incarceration, Moore was involved in long-term romantic relationships and fathered a child. 2 FHH 80, 212, 251, 253, 256.

Dr. Mears opined that Moore's use of community resources, self-care, home-living, health, and self-direction skills were not significantly deficient. 2 FHH 250-53, 256-57; PX 8 at 7-9. He noted that Moore made an effort to succeed in life despite his difficult childhood. 2 FHH 254, 257; RX 8 at 7-9. However, as with other

adaptive-skill areas, Dr. Llorente assumed Moore was deficient in these areas despite identifying no credible, objective evidence of significant deficits. 1 FHH 201-02; 2 FHH 78-80, 97-89. In reaching this conclusion, Dr. Llorente relied on suspiciously similar statements made by several of Moore's family members, such as the claim that Moore had trouble dressing himself. *See, e.g.*, 1 FHH 36, 69, 103.

In contrast to stories told by Moore's family, Joan McKnight, Moore's fifth-grade teacher, recalled that Moore's hygiene was good and that he was generally clean. 2 FHH 121-22, 124; RX 4 at 8. Jerry Moore, who was Moore's school principal, remembered Moore from approximately 1979-81 and believed that his hygiene was decent. 2 FHH 150-51; RX 4 at 8. Furthermore, Moore was never referred to the school nurse for poor hygiene. 2 FHH 151. Officers Daniel, Rains, and Moss testified that Moore exhibits good hygiene and keeps his cell relatively clean, neat, and organized. *Id.* at 167, 176, 178, 184-86. Importantly, neither Ms. McKnight, Ms. Bradshaw, nor Jerry Moore — all unrelated and unbiased witnesses — suspected that Moore was mentally retarded. 2 FHH 124, 151; FHH Deposition at 8.

Dr. Llorente testified that he "couldn't find any records showing ... that [Moore] ever paid rent," leased an apartment, managed money, or sought "assistance for drug use." 1 FHH 199, 201; 2 FHH 79. He then made the leap that this lack of evidence indicated significant deficits in Moore's home living and use of community resources. *Id.* Yet he was unable to explain how Moore left home at age fifteen and lived independently with his girlfriend and child. 2 FHH 80-81. Dr. Llorente also dismissed Moore's procurement of a driver's license by

speculating, without any evidence, that "someone assisted him" in passing the test. *Id.* at 196.

Dr. Mears testified that Moore's functional academic skills were not significantly impaired. 2 FHH 254; 3 FHH 63-64; RX 8 at 4-5, 7-9. And Dr. Llorente was unable to identify any credible, objective evidence of significant deficits in the functional-academic-skill area other than his lackluster academic performance. 2 FHH 49-51, 82-84. Rather, he based his opinion on the fact Moore was receiving "large portions" of special education, and he speculated, again without any actual evidence, that Moore was socially promoted until the eleventh grade. 1 FHH 197; 2 FHH 82. But while Moore was held back in first grade and referred to "special education," the credible evidence establishes that he never attended a special-education program. *Id.* at 49-51, 122, 137, 139-43, 147-48, 154, 158-59, 162-65; RX 4 at 9. The records and testimony reflect that Moore participated in only two remedial classes throughout his academic career, and received "Bs" in those classes. 2 FHH 49-51, 122-23, 127-29, 139-43, 147, 154, 158-59, 162-65; RX 4 at 4, 8-9. Ms. McKnight testified that Moore's academic performance, which was negatively impacted by his frequent school transfers, would have improved if he had applied himself. 2 FHH 123, 139.

Despite Moore's implications that he could not graduate for academic reasons, he was actually expelled from high school for fighting. 2 FHH 19, 83; PX 5 at 9. He then attended six months of vocational training with the Job Corps in automotive mechanics, paint, and body work. 2 FHH 16-17, 83; PX 5 at 5. Moore did not complete this program because he was again expelled for fighting. 2 FHH 17-18, 83; PX 5 at 5. As both experts

admitted, antisocial or maladaptive behavior and resulting poor performance in an academic setting does not meet the criteria for significant deficits in functional academics. 2 FHH 83, 252; 3 FHH 63-64; PX 7 at 79.

At the time of the hearing Moore possessed and read numerous books, newspapers, and magazines in his cell at the Polunsky Unit. 2 FHH 88-90, 168, 176, 179, 185, 194-95, 212, 218; RX 2 at 114-121; RX 5. This literature included such titles as the Bible, the Harry Potter series, "Tombstone", "Quest of the Mountain Man", and "449 Stupid Things Republicans Have Said". RX 5. Moore also read and wrote personal letters. 2 FHH 168, 176.

Dr. Mears opined that Moore's work skills were not significantly impaired. 2 FHH 213-14, 250-54. The evidence established Moore was employed at several jobs between 1985 and 1989. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. Moore was never terminated from any of the jobs. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. In fact, he was repeatedly commended for good performance during his years of employment, and was rehired by some employers after quitting. 2 FHH 27-35; RX 3 at 46-47, 63-66, 80-82. Moore also worked in the garment factory at the Ellis Unit prior to his transfer to Polunsky Unit. 2 FHH 32. As he did with the other adaptive areas, Dr. Llorente chose to ignore these facts, and opined Moore had a significant deficit in the area of work, despite any credible, objective evidence of significant deficits in the work-skill area. *Id.* at 27-35, 80-82.

Finally, there was no credible evidence or opinion concerning significant deficits in the leisure skill area. 2

FHH 202; RX 8 at 7-9. Dr. Mears opined that Moore's safety skills were not significantly impaired, and Dr. Llorente identified no evidence of significant deficits in the safety-skill area. 1 FHH 201-03; 2 FHH 85-86, 250-557; 3 FHH 42; RX 8 at 7-9.

III. Prior Proceedings in State and Federal Court

A. Pre-*Atkins* litigation

Moore was convicted of capital murder and sentenced to death in 1991. His conviction and sentence were affirmed on direct appeal by the CCA, and this Court denied certiorari. *Moore v. State*, 882 S.W.2d 844 (1994), *cert. denied*, 513 U.S. 1114 (1995). Moore then filed a state habeas petition, which was likewise denied by the CCA. *Ex parte Moore*, No. 38,670-01 (Tex. Crim. App. 1998) (unpublished).

Moore's federal habeas application was denied in district court, and that denial was affirmed on appeal. *Moore v. Cockrell*, No. 1:99-CV-018 (E.D. Tex. 2001) (unpublished), *aff'd*, No. 01-41489, 54 Fed. App'x 591 (5th Cir. 2002) (unpublished), *cert. denied*, 538 U.S. 965 (2003).

B. Postconviction litigation related to Moore's *Atkins* claim

After Moore unsuccessfully appealed the constitutionality of his conviction, this Court held the execution of mentally retarded persons violates the cruel and unusual punishments clause of the Eighth Amendment of the United States Constitution. *Atkins*, 536 U.S. at 321. Following this ruling, Moore filed a

subsequent state habeas petition, alleging he was mentally retarded and thus ineligible for execution. PA 98-99 (*Ex parte Moore*, No. 38,670-02 (Tex. Crim. App. 2003) (unpublished)). The CCA examined Moore's subsequent petition, which contained incomplete and partially inaccurate facts, and dismissed it without reaching the merits, holding that the petition "fail[ed] to contain sufficient specific facts which would satisfy the requirement of Art. 11.071, Sec. 5(a), V.A.C.C.P." PA 98-99.

Following the CCA's procedural dismissal of Moore's *Atkins* claim, Moore requested and received permission to file a subsequent federal habeas petition under 28 U.S.C. § 2254 (b)(3)(C). *In re Moore*, No. 03-40207, 67 Fed. App'x 252 (5th Cir. 2003) (unpublished). The district court subsequently granted relief based on the CCA's failure to address the merits of Moore's *Atkins* claim. *Moore v. Cockrell,* No. 6:03-CV-224, 2003 WL 25321830 (E.D. Tex. 2003) (unpublished). The Fifth Circuit reversed and remanded the case, holding the state court's application of its own procedural rules did not constitute grounds for relief. *Moore v. Dretke,* 369 F.3d 844, 846 (5th Cir. 2004).

Following a live evidentiary hearing on the *Atkins* issue, the district court again granted relief, this time finding Moore sufficiently established he was mentally retarded under Texas law. PA 64-97 (*Moore v. Dretke*, No. 603-CV-224, 2005 WL 1606437 (E.D. Tex. July 1, 2005)). On appeal, the Fifth Circuit reversed the district court based on Moore's failure to properly exhaust his *Atkins* claim in state court, and ordered the district court to dismiss the petition without prejudice. *Moore v. Quarterman*, 454 F.3d 484, 486 (5th Cir. 2006).

Moore petitioned for rehearing, and the panel vacated the judgment of the district court and remanded the case with orders for the district court to dismiss the case with prejudice as being both unexhausted and procedurally defaulted. *Moore v. Quarterman*, 491 F.3d 213, 215 (5th Cir. 2007). Moore again applied for rehearing, and the en banc court reversed the panel opinion, holding Moore had established both cause for his failure to present evidence of mental retardation in state court, and prejudice resulting from the state court's procedural dismissal. PA 63. The court returned the case to the panel to address the merits of the State's claim that the district court erred in finding Moore to be mentally retarded. *Id.* On rehearing, in a divided opinion, the panel affirmed the finding of the district court. PA 17. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The District Court Did Not Have Authority Under AEDPA to Grant Relief on Moore's Unexhausted and Procedurally Defaulted *Atkins* Claim.

The exhaustion provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) are based on the longstanding doctrines of federalism and comity, which promote state-court resolution of constitutional claims arising in state proceedings. *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (citations omitted). When federal courts usurp a State's duty and right to correct constitutional errors that occur in its courts, the balance between the individual States and the union of those States is disrupted. Since the codification of the exhaustion doctrine in 1948, federal courts have been generally divested of the authority to hear unexhausted claims

without first giving state courts a full and fair opportunity to address any potential errors. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). And since AEDPA's enactment, courts are expressly divested of the authority to grant relief on an unexhausted claim unless the petitioner can show both cause and prejudice for his failure to exhaust his state court remedies. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

As demonstrated below, Moore's *Atkins* claim, which was inadequately presented to the state court, is unexhausted and procedurally defaulted, and Moore can show neither cause nor prejudice sufficient to overcome AEDPA's strict exhaustion requirements. The lower court's opinion holding Moore is entitled to federal relief flies in the face of the deep-seated exhaustion principles found in federal habeas jurisprudence, and disrupts the balance between federal and state courts. This Court should therefore grant certiorari to re-establish the balance between the federal and state courts by permitting the State of Texas to examine and decide Moore's mental retardation claim.

A. Moore's *Atkins* claim is unexhausted and procedurally defaulted.

"Exhaustion means more than notice," and requires a petitioner to fairly present a constitutional claim and its supporting factual allegations to a state court before seeking federal habeas relief. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992); *Picard v. Connor*, 404 U.S. 270, 276 (1971). A petitioner must, at the very least, give the state court the ability to understand their claims, and determine whether such claims amount to constitutional error. *See Baldwin v. Reese*, 541 U.S. 27,

30-32 (2004) (holding state courts are not required to ready beyond the pleadings presented to discover the legal or factual claims being presented). Accordingly, when material, additional evidentiary support that fundamentally alters or significantly bolsters a claim is presented for the first time in federal court, exhaustion is not satisfied. *Vasquez v. Hillery*, 474 U.S. 254, 259-60 (1986).

Moore unquestionably failed to fairly present his *Atkins* claim to the state court. Instead, he submitted a sketchy subsequent petition containing inaccurate and incomplete information, and lacking readily available additional support for his skeletal claim. In the two pages of argument Moore submitted, he articulated only four factual allegations, two of which were, at the very least, inaccurate. SHTR 7-9.

First, Moore noted that his IQ was "referenced in school tests at 74." *Id.* at 7. In support of this, he cited to the trial transcript where his own expert, Dr. Crowder, noted that Moore had two previous IQ scores of 76 and 74. 23 RR 586. However, Moore failed to make any mention of the 76 IQ score in his argument to the CCA.[5] SHTR 7-9.

Moore then erroneously declared that "[a]n IQ of 80 or below is the mental retardation range." SHTR 7-8.

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[5] On the very page listing Moore's IQ scores, his own expert also observed that the scores were "clearly below average. According to the testing that has been done, they fall in what we call borderline intellectual functioning." 23 RR 586. Thus, by Moore's own expert's admission, he did not meet the criteria for significantly subaverage intellectual functioning. For obvious reasons, Moore also failed to mention this statement in his subsequent petition.

To support this wholly inaccurate contention, Moore cited to the testimony of a defense expert from an unrelated case. *Id.* at 8, 14. He made no attempt to support his assertion with any case law. And he made no mention of this Court's definition of mental retardation in *Atkins*, or Texas's definition of mental retardation codified in the Health and Safety Code, and referenced five years earlier in *Ex parte Tennard*. *See Atkins*, 536 U.S. at 309, n. 3 (citing the AAMR and APA definitions of mental retardation); Tex. Health & Safety Code § 591.003(13) (defining mental retardation); *Ex parte Tennard*, 960 S.W. 2d 57, 60-61 (Tex. Crim. App. 1997) (defining mental retardation in the context of capital-sentencing mitigation evidence).

Moore's next equally fallacious contention was that "Moore was in special education throughout school." *Id.* at 8. He cited to his expert's equivocal statements during trial that while he didn't "recall the specific years," he thought Moore was in special education "much of the time." 23 RR 612-13. The fully developed federal habeas record, however, demonstrates that, based on the records available, Moore was rarely, if ever, in special education. 2 FHH 49-51, 122-23, 139-44, 162-65.

The next assertion made by Moore was that he was hit in the head with a baseball bat "at around age nine or ten, and suffered another head injury in an automobile accident during the same time frame." SHTR 8. However, the trial record indicates that the reported baseball-bat injury allegedly occurred four years prior to trial, when Moore was approximately twenty years old. 23 RR 589. Furthermore, Moore presented absolutely no supporting evidence, such as easily-obtainable medical records, to corroborate either of these alleged injuries.

Without supporting evidence, it is impossible to determine whether Moore's alleged automobile accident occurred four years prior to trial, or when Moore was around ten...or whether it occurred at all.

Finally, Moore noted that, when resisting arrest, he had a tendency to bang his head on the cage of the police car, or walls of his cell. SHTR 8-9. Moore offered nothing to establish that this behavior ever caused any serious head injury, much less mental retardation. *Id.* Nor did he even attempt to show that the actions occurred prior to the age of eighteen. *Id.*

Conspicuously missing from Moore's argument were any mention of Moore's alleged deficits in adaptive behavior areas. However, in federal court, Moore did present evidence, much of which was readily available at the time he filed his petition in state court. For example, Moore could have, but did not present both of the known IQ scores. Likewise, he could have presented, but inexplicably did not present, affidavit-testimony from Moore's family members, or reports from either of the two psychological experts utilized during trial.

Because Moore failed to present the state court with even the already-known facts, the CCA was left to assume Moore had no evidence to present, and properly procedurally barred his subsequent petition. As a result, the district court did not have the authority under AEDPA to grant relief on Moore's unexhausted and procedurally defaulted *Atkins* claim. *Reese,* 541 U.S. at 31-32; *Coleman*, 501 U.S. at 729; *Gray v. Netherland,* 518 U.S. 152, 161-62 (1996); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

B. Moore failed to establish cause for his failure to properly present his *Atkins* claim in state court.

This Court has made clear that to establish cause for failure to properly exhaust a claim, a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The factual or legal unavailability of a claim would constitute sufficient cause, *see id.*, but "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 130 (1982). The petitioner must put forth a good faith effort in state court, and only then, if he is prevented from having his claim heard, can he succeed in showing cause.

The court below attributes Moore's failure to properly present his *Atkins* claim to the CCA's lack of guidance on what to present in a subsequent *Atkins* petition. PA 62-63 (noting that, prior to its opinion in *Ex parte Williams*,[6] the CCA had never detailed "the factual criteria that must be pled in an *Atkins* petition"). In reaching this conclusion, the court apparently placed no significance on the fact that the CCA outlined a definition for mental retardation in the context of capital sentencing in *Tennard*, five years before Moore filed his *Atkins* claim. *See Ex parte Tennard*, 960 S.W. 2d at 60 (using the AAMR and Texas Health and Safety Code

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[6] No 43907-02, 2003 WL 1787634, at *1-2 (Tex. Crim. App. 2003) (Cochran, J. concurring) (unpublished).

definitions to establish a working definition).

Furthermore, the plain language of Texas's bar on subsequent habeas petitions clearly requires a petitioner to argue sufficient facts to establish a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). Regardless of whether Moore could foresee the inevitable path that Texas law would take in defining mental retardation, he knew—from this Court's opinion in *Atkins*, and from the CCA's opinion in *Tennard*—that *some* definition of mental retardation would have to be used, and it would undoubtedly require more than a single IQ score in the borderline range, and some self-reported bump on the head, to establish a viable claim.

In fact, in *Isaac*, this Court held that the petitioner's claim of lack of notice was entirely insufficient when the basis for the claim had previously been established in federal court. 456 U.S. at 131-33. Like the petitioner in *Isaac*, Moore's failure to properly present his claim in state court falls squarely on his own shoulders. As demonstrated above, a definition for mental retardation was available under Texas law, and Moore could have made a colorable showing of mental retardation sufficient to overcome the procedural bar to subsequent petitions with minimal effort, but he chose not to try.

Judge Cochran's concurring opinion in *Williams* demonstrates just how lacking Moore's subsequent petition was. As she noted, Article 11.071, section 5(a) of the Texas Code of Criminal Procedure has — as a threshold matter — required a sufficient showing of specific facts since its enactment in 1995. *Ex parte Williams*, 2003 WL 1787634 at *1-2. It is true that

Williams gave petitioner's more understanding regarding what the CCA would require to make a successful showing of a colorable mental retardation claim, but the plain language of the statute makes clear that the petitioner must at least present a prima facie case.

Moore's four factual allegations, two of which were directly refuted by the record, did not come close to meeting the section 5 bar of subsequent petitions, regardless of what guidance was available at the time of Moore's filing. While the court below may be correct in more closely scrutinizing procedurally-barred subsequent *Atkins* claims filed in state court prior to *Williams*, such a review of this case makes clear that Moore's half-hearted attempt to throw a claim together cannot suffice. Moore simply cannot show adequate cause for his failure to exhaust his claim.

C. Moore cannot establish prejudice for his failure to properly present his *Atkins* claim in state court.

Assuming he had sufficient cause, Moore cannot establish prejudice for his failure to properly exhaust. To do so he must show that the procedural default of his claim would result in error of constitutional dimensions. *United States v. Frady*, 456 U.S. 152, 170 (1982). The court below ruled without explanation that "Moore would plainly suffer prejudice from being unable to establish the facts involved in his mental retardation claim." PA 63. However, Moore still has an available state-court remedy in the form of yet another subsequent state-habeas petition.

Texas law provides for the consideration of subsequent claims not only when a new rule of law is established, but also, if a petitioner can show "by clear and convincing evidence," that "but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).

The CCA has expressly held that "a subsequent habeas applicant may proceed with an *Atkins* claim if he is able to demonstrate to this Court that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded." *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007). This holding has since been applied in other Texas cases, including *Ex parte Woods*, where the court expressly held that a petitioner could re-litigate a fully adjudicated *Atkins* claim in state court if he met the section 5(a)(3) standard. — S.W. —, 2009 WL 3189179 (Tex. Crim. App. 2009); *see also Ex parte Sells*, No. WR-62552-02, 2007 WL 1493151 (Tex. Crim. App. 2007) (unpublished) (holding Sells did not meet threshold requirement of 11.071 §5(a)(3) to warrant consideration of subsequent *Atkins* claim).

In sum, Moore had the opportunity to have his mental retardation claim considered in state court, but he chose to present so little evidence that the CCA was left with no choice other than to dismiss his successive petition for failure to state a claim. Notwithstanding his failure to properly present his claim on his first attempt, he could still go back to state court and re-litigate his

claim by showing by clear and convincing evidence that "no rational finder of fact would fail to find he is mentally retarded." *Blue*, 230 S.W.3d at 154. Because this state-court remedy is still available to correct any constitutional infirmity in his sentence, Moore cannot show prejudice for his unexhausted and procedurally defaulted claim.

The Fifth Circuit's broad holding in this case that any attempt at alleging mental retardation prior to *Williams* is sufficient to show cause and prejudice wholly negates the import of this Court's cause and prejudice standards. For this reason, this Court must grant certiorari to correct the court below's erroneous and wide-reaching application of law.

II. The District Court Erroneously Interpreted Texas Law, and Incorrectly Determined that Moore Had Significantly Sub-average Intellectual Functioning.

The CCA has been clear that, in order to succeed on a claim of mental retardation, a petitioner must demonstrate an IQ of 70 or below. *See* PA 29, n. 21 (Smith, J. dissent) (listing several Texas cases noting a bright-line cutoff for IQ). Even in the cases that do not state a bright line cutoff, the CCA's language indicates the cutoff point is "about 70." *See, e.g., Ex parte Woods*, 2009 WL 3189179 at * 1 (noting significantly subaverage general intellectual functioning in defined as an IQ of "about 70 or below.") (*citing Briseño*, 135 S.W.3d at 7 n. 24). Thus, any analysis of the IQ prong of the test for mental retardation should begin with a determination of whether the petitioner's IQ falls above or below the cutoff

of 70.[7]

The district court articulated the correct definition of significantly subaverage intellectual functioning, but then patently refused to apply it, and took the extraordinary measure — never before taken by the CCA or the court below — of averaging all of Moore's known full-scale scores to determine his actual IQ. PA 73. The court did not consider the reliability of any of the tests — something both experts discussed at length — and likewise did not consider the score adjustments that either expert advocated. *Id.* at 73-74. The court erred again by assuming that an average IQ score of 72 demonstrated significantly subaverage general intellectual functioning. *Id.*

To reach this conclusion, the court had to make multiple assumptions. The first is that the standard error of each of the IQ tests was plus or minus five points. *Id.* In fact, Moore's own expert testified that the standard error associated with the WAIS-III that he administered resulted in a confidence interval of 63 to 70, or plus or minus 4 points from Moore's score of 66. 1 FHH 166. He further testified that the confidence interval for the PMA was unknown. *Id.*

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[7] The court below is clearly divided on the state of Texas law regarding whether Texas has established a bright-line cutoff for the IQ prong of the mental retardation definition. *See* PA 10-11, n. 5, 28-33. It is because of confusion such as this over the correct interpretation of state-law issues that federal courts should dismiss unexhausted cases without prejudice and permit state courts to make the first attempt at resolving state-law questions. As the majority noted, "the ultimate responsibility for providing guidance and clarifying the relevant standard . . . rests with the Texas court, not with us." *Id.* at 10-11, n. 5.

The district court's next error was to assume — again without any evidentiary support — that the standard error for the average of the three tests would be plus or minus five points. Dr. Llorente testified that while each subtest of the WAIS-III had some standard error associated with it, the full-scale score had less standard error than the individual subtests. *Id.* at 151. Thus, the only analogous evidence presented indicates that the averaged scores may have less error than the individual tests. In any event, without supporting statistical evidence, such an assumption cannot form the basis of a sound judicial determination of this complex factual issue.

Most importantly, the court erred in assuming the average score should be reduced to account for standard error. As noted by Judge Smith in his dissent, the CCA has consistently held that IQs between 70 and 75 alone are insufficient for a finding of mental retardation." PA 30 (citing Texas cases in which IQ scores between 70 and 75 were insufficient to warrant habeas relief on an *Atkins* claim). In fact, in *Clark v. Quarterman*, the court below expressly approved of the CCA's refusal to lower an IQ score to account for standard error without evidentiary support justifying such an action. 457 F.3d 441, 445-46 (5th Cir. 2006)[8] Thus, the district court should have

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[8] When adjusting a score or group of scores for standard error, the approach most commonly used by the CCA, and in turn the Fifth Circuit, is to analyze each test individually, and reduce or increase the score or scores based on the relative reliability of the tests in the context of the individual case presented. *See, e.g.*, *Rivera v. Quarterman*, 505 F.3d 349, 362 (5th Cir. 2007) (offering "a reasoned basis" for how the court weighed each test presented); *Taylor v. Quarterman*, 498 F.3d 306, 307 (5th Cir. 2007) (same) ; *Woods v. Quarterman*, 493 F.3d 580 (5th Cir. 2007) (giving greater

started with the assumption that its estimate of Moore's IQ was accurate, and only adjusted it based on credible evidence presented by either party.[9] If the court did this, it certainly didn't make any mention of it in the opinion. PA 72-74. Rather, it apparently assumed that, since standard error exists, Moore's IQ should be lowered to account for it. *Id.* at 73-74.

Finally, the district court erred in finding the Director's expert agreed that Moore satisfied the intellectual-functioning prong of the mental retardation definition. *Id.* at 73. As aptly explained by Judge Smith in his dissent, Dr. Mears never stated Moore met the first prong of the definition of mental retardation. *Id.* at 23-27. At most, his alleged concession on cross-examination was

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weight to pre-eighteen scores than scores attained in preparation for *Atkins* claim); *In re Mathis*, 483 F.3d 395, 398 (5th Cir. 2007) (discounting IQ score of 62 "because of [the expert's] belief that [the petitioner's] limitations stemmed from heavy drug use and did not manifest themselves prior to [the petitioner's] eighteenth birthday"); *In re Henderson*, 462 F.3d 413, 416-17 (5th Cir. 2006) (looking at a specific test's confidence ban in order to determine if a particular score range is a "reliable conclusion"); *Hunter v. State*, 243 S.W.3d 664, 671 (Tex. Crim. App. 2007) (discounting a lower score based on the expert's belief that "appellant's uneven acquisition of knowledge served to artificially lower" that score); *Howard v. State*, 153 S.2.3d 382, 387 (Tex. Crim. App. 2004) (rejecting a score entirely because it was based on "only portions of an I.Q. test on which [the expert] had based an estimate of the appellant's I.Q.").

[9] The record indicates that both parties made arguments to support adjusting the scores: both parties found errors in at least one of the three tests, and both parties made arguments for adjusting at least one of the tests to account for various factors such as age, socioeconomic background, and level of education. *See* 1 RR 140-41, 167-75; 2 RR 216-20. The district court's opinion does not appear to consider any of this testimony.

that, even assuming the IQ scores were valid, in his opinion Moore is not mentally retarded. In his expert report, Dr. Mears unequivocally stated "Mr. Moore does have intellectual limitations, but his intelligence scores and adaptive behavior estimates do not in my judgment approximate the mild mentally retarded features outlined by the AAMR." RX 8 at 9. And on direct examination, he questioned the validity of the 66 score Moore obtained on Dr. Llorente's administration of the WAIS-III, Moore's only score in the range of mental retardation. 2 RR 216-20. The district court erred in supporting its legal conclusion of significantly subaverage general intellectual functioning on its misinterpretation of Dr. Mears' testimony.

In sum, the district court arbitrarily reduced its erroneously-created average IQ despite the *Briseño* court's warning that, "IQ tests differ in content and accuracy." *Ex parte Briseño*, 135 S.W. 3d at 7 n 24. The court then compounded this error by misconstruing the testimony of the State's expert. Because the two premises that the district court based its legal conclusion about Moore's IQ on were both erroneous, the court below erred in affirming the district court's grant of habeas relief. Moore did not show that his scores were inflated, and without such evidence, Texas law requires a finding of insufficient evidence to establish significantly subaverage general intellectual functioning. And this Court should therefore grant certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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