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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

STATUTES

REGULATIONS

INTRODUCTION

The principles in this case are straightforward. The Eighth Amendment "forbid[s] the execution of persons with intellectual disability." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002). "Intellectual disability is a condition[.]" *Hall*, 134 S. Ct. at 2001. Thus the inquiry into intellectual disability "is informed by the medical community's diagnostic framework." *Id.* at 1993, 2000.

The Texas Court of Criminal Appeals ("CCA") has sharply deviated from this Court's decisions. In *Atkins*, this Court held that the intellectually disabled are excluded from execution as "a categorical rule." 536 U.S. at 320. But the CCA's seminal decision on *Atkins* held it an open question in Texas whether there is "a 'mental retardation' bright-line exemption from our state's maximum statutory punishment." *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). The CCA viewed its task as defining "that level and degree of mental retardation at which *a consensus of Texas citizens* would agree that a person should be exempted from the death penalty." *Id.* (emphasis added). In *Atkins*, this Court "point[ed] to the diagnostic criteria employed by psychiatric professionals." *Hall*, 134 S. Ct. at 2000. But in *Briseno*, the CCA—while ostensibly adopting a 1992 clinical definition of intellectual disability—criticized the medical community's diagnostic framework as "exceedingly subjective," and fashioned its own additional "factors" for intellectual disability derived from lay stereotypes and lacking any clinical foundation. 135 S.W.3d at 8-9. The CCA has repeatedly reaffirmed *Briseno*—reasserting, for example, that an

intellectual-disability determination is "instructive" but not "conclusive," *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012), and that its *Briseno* "factors" are "non-diagnostic." *Ex parte Van Alstyne*, 239 S.W. 3d 815, 820 (Tex. Crim. App. 2007).

In this case, the CCA's sharp deviation from this Court's decisions and from "the medical community's diagnostic framework," *Hall*, 134 S. Ct. at 2000, continued and increased. The CCA strongly reaffirmed *Briseno*—every element of that deeply problematic decision—without qualification. Pet. App. 6a-8a. It proceeded to rely "heavily" on its *Briseno* factors (*id.* at 89a), which are inconsistent with the medical community's diagnostic framework. And the CCA took its conflict with this Court's decisions and "the medical community's diagnostic framework" a major step further by prohibiting the use of current medical standards in *Atkins* claims—once again, based on the CCA's view of "the subjectivity" of "the medical diagnosis of intellectual disability." *Id.* at 6a-7a.

Respondent seeks to deflect from the CCA's glaring deviation from this Court's decisions in several ways. But none obscure the central flaws in the CCA's rejection of the "medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Many of Respondent's suggestions also are erroneous on their own terms. Accordingly, it is helpful at the outset to address some of Respondent's principal deflections before turning to core problems in the CCA's evaluation of Petitioner's intellectual-disability claim.

***Briseno* Factors as "Optional"**: Respondent seeks to minimize the non-medical *Briseno* factors as merely "optional" and "not relevant to the outcome" here. Resp. Br. 18. But this is wrong on both counts. *First*, the CCA emphasized that the factors "weigh[ed] heavily" in its lack-of-intellectual-disability determination (Pet. App. 89a); Respondent cannot simply elide that holding or wish it away. *Second*, the CCA has rejected an intellectual-disability finding solely because the lower court did not consider a *Briseno* factor. *Sosa*, 364 S.W.3d at 893-94. That holding alone belies their "optional" nature. *Third*, lower courts have heeded the CCA's emphasis on the *Briseno* "factors"—leading one court, in a decision upheld by the CCA, to stress that, in Texas, the factors receive "at least equal weight" as medical criteria.[1] And, *fourth*, that the factors are sometimes treated as vitally important and sometimes termed "optional" vividly highlights the arbitrariness, uncertainty and incoherence of the CCA's approach to this fundamental Eighth Amendment issue—which is especially troubling in light of the stark conflict between these lay-stereotype "factors" and clinical standards. Pet. Br. 52-55.

The Role of Lennie: Respondent maintains that the *Briseno* invocation of Steinbeck's Lennie is "irrelevan[t]." Resp. Br. 56. The important issue, of course, is the foundational erroneous point for which Lennie was invoked—that the CCA deems it an open question whether all "mentally retarded" in Texas

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[1] *Ex parte Taylor*, No. C-297-006327-0542281-B, slip op., 24, *adopted in all relevant parts*, Sept. 26, 2005 Order (297th D. Ct. Jefferson Cty. Tex.), *aff'd*, No. WR-48498-02, 2006 WL 234854, at *1 (Tex. Crim. App. Feb. 1, 2006) (per curiam).

are protected by *Atkins*. *Briseno*, 135 S.W.3d at 6; *see also Sosa*, 364 S.W.3d at 892 ("[i]n cases of severe mental retardation," execution is "certainly" prohibited; in other cases, such as "where IQ scores are near the threshold of mild retardation," a clinical diagnosis is "instructive" but not "conclusive"). At least one CCA judge, moreover, does not share Respondent's view that the invocation of Lennie at a pivotal point in the CCA's seminal *Atkins* decision is irrelevant in Texas intellectual-disability jurisprudence: "In referring to Lennie as someone who might be exempt from execution whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution." Pet. App. 117a (Alcala, J., dissenting).

Prohibition on Current Medical Standards: Respondent suggests that the CCA's decision does not actually prohibit the use of current medical standards. But, here too, Respondent's statement does not make it so. The CCA's determination that the trial court "erred" by using current medical standards is clear and explicit. Pet. App. 6a-7a. This is now the law of Texas. The CCA made this holding even while recognizing that "[i]t may be true that the [American Association on Intellectual and Developmental Disabilities ("AAIDD")'s] and [American Psychiatric Association ("APA")'s] positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno* were decided." *Id.* Respondent intimates (at 36) that the CCA was simply correcting the trial court about its subordinate role in the judicial hierarchy. But the CCA also prohibited current medical standards *as its own current and*

prospective standard for *Atkins* claims, which Texas courts must follow. Pet. App. 7a. Respondent likewise points (at 38) to a handful of scattered references to current standards for the proposition that the CCA considered those standards. But the CCA's decision is not saved from its across-the-board prohibition on current medical standards by the fact that, notwithstanding its general rule, it referred to current standards on a few occasions (with characterizations that are themselves erroneous, Pet. Br. 44 n.22). Indeed, if anything, the fact that the CCA occasionally invokes current medical standards in an effort to bolster rejecting Petitioner's *Atkins* claim, while otherwise prohibiting use of the current diagnostic framework, again highlights the arbitrariness and unpredictability of the CCA's approach.[2]

Straw man characterization of Petitioner's position: Respondent raises a straw man—that Petitioner seeks a rule requiring "precise" adherence to a clinical organization's most recent definition of intellectual disability by every State. Resp. Br. I, 1. Respondent (and its amici) even restate the Question Presented to reflect their straw man. But that is not, and never has been, Petitioner's position. This

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[2] The CCA's conclusory assertion (Pet. App. 7a n.5) that "*Briseno*'s legal definition remains generally consistent" with the current clinical definition—without analysis, without explanation, and without even considering either its acknowledgement that the AAIDD and APA "positions regarding the diagnosis of intellectual disability" may have changed since *Briseno*, *id.* at 6a, or the conflict between its non-medical "factors" and clinical criteria—likewise does not justify prohibiting use of the current diagnostic framework. Moreover, the conclusory statement is erroneous: *Briseno* cannot be reconciled with the diagnostic framework. *See* Pet. Br. 31-59; *infra*, 11-23; AAIDD Br. 4, 28-33; APA Br. 4-6, 14-26.

Court's position on the relationship between clinical standards and the legal determination in the *Atkins* context is clear. As *Hall* explained, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." 134 S. Ct. at 2000. Being "informed by the medical community's diagnostic framework" does not mean "precise" recitation. But, just as clearly, it does not mean prohibiting use of the current diagnostic framework or adopting judicially-created "factors" in conflict with that framework. Respondent rejects this view, maintaining that this Court has given the States broad "latitude" in "substantively defining intellectual disability for *Atkins* purposes." Resp. Br. 16, 22. Texas overreaches. While this Court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction,'" *id.* at 1 (quoting *Atkins*, 536 U.S. at 317), it did not give States the authority to fundamentally reshape the condition (through rejection of current standards, erroneous interpretations of diagnostic criteria, and creation of non-medical "factors" derived from lay stereotypes and lacking any clinical justification) in order to limit the group of *Atkins*-eligible intellectually-disabled individuals, as Texas has done.

Texas as Outlier: Respondent and its amici contend that Texas is not an outlier. But Texas and its amici do not point to a single other State that prohibits its current medical standards, as Texas now does. Pet. App. 5a-7a. Nor do they cite a single other State that has created its own non-medical "factors" for as-

sessing adaptive behavior.[3] Both characteristics make Texas a conspicuous outlier. Moreover, neither Respondent nor its amici even address the telling fact that the CCA's approach to *Atkins* claims is an outlier *within Texas itself*. In other non-*Atkins* intellectual-disability contexts, Texas *requires*, rather than *prohibits*, use of current medical standards. *See, e.g.,* 37 Tex. Admin. Code § 380.8779(e)(2)(B) (intellectual-disability determination for juvenile justice discharge requires diagnosis "based upon the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association").[4] *Compare 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."). The CCA is plainly an outlier in its approach to intellectual disability under *Atkins*—whether one considers the other 29 States with the death penalty; the 20 States without the death penalty who consider intellectual disability in other

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[3] Only one high state court (Pennsylvania) and one intermediate state court (Tennessee) have allowed use of the CCA-created *Briseno* factors (and in Pennsylvania, only in limited circumstances). Pet. Br. 55. The overwhelming majority of States have not adopted such an approach. *Id.*

[4] *See also, e.g.,* 37 Tex. Admin. Code § 343.100(26) (intellectual-disability diagnosis for juvenile detention based on "the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders"); *id.* § 380.8751(e)(3) (intellectual-disability diagnosis based on "latest edition of the DSM"). *Cf.* Tex. Hum. Res. Code Ann. § 114.002 (West) (autism diagnosis defined by "the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), 5th Edition"); Tex. Ins. Code Ann. § 1355.001 (West) ("Serious mental illness" determination based on definition "by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM)").

contexts; or even Texas law on intellectual disability in non-*Atkins* contexts.[5]

Evaluation of the record: In minimizing the CCA's *Briseno* "factors" and prohibition against the current diagnostic framework, Respondent suggests that the decision here reflects a routine and unobjectionable weighing of evidence and experts. Respondent ignores the critical fact, however, that the CCA, with its no-current-medical-standards and *Briseno*-centric framework, applied a fundamentally distorted legal lens to its evaluation of the record. The permissibility of using the current and appropriate diagnostic framework in Texas is a legal issue. It necessarily has a profound impact on the evaluation of evidence and testimony. It cannot be batted aside

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[5] Respondent's "counting" of States also is rife with problems on its own terms. For example, Respondent counts, as conflicting-with-current-medical-standards, States that sensibly interpret their statutes in light of current medical standards. *See, e.g., Ybarra v. State*, 247 P.3d 269, 273-74 (Nev. 2011) (en banc); *Coleman v. State*, 341 S.W.3d 221, 244-47 (Tenn. 2011). Respondent likewise erroneously counts as opposing-current-medical-standards States with wording differences from current standards even though there is no suggestion that those differences are material. *See, e.g.*, Resp. Br. 4a n.20 (relying on differences between "significantly subaverage general intellectual functioning" and "significant limitations" in first prong of intellectual disability inquiry, notwithstanding that clinical guidance makes clear that the concept of "significantly subaverage" remains part of the clinical inquiry as to the first prong). Moreover, Respondent's appendix (and that of its amici) are inapposite: they do not address the actual issues in this case—whether other States prohibit the use of current medical standards and whether other States apply judicially-created "factors" that conflict with the medical community's diagnostic framework.

on the ground that the CCA was merely reviewing the record.

Professional organizations: Respondent seeks to discredit current medical and clinical standards by pointing to perceived disagreements between the two leading authorities on intellectual disability—the AAIDD and the APA. But Respondent's efforts to rest on asserted disharmony are unavailing. At the outset, Respondent ignores the most salient fact: the relevant professional organizations are entirely in agreement that the CCA's intellectual-disability framework for *Atkins* cases sharply and irreconcilably conflicts with the diagnostic framework. *See, e.g.*, AAIDD Br. 4 (Texas's approach "is wholly inconsistent with accepted scientific standards. Deviating from the basic clinical framework of the definition inevitably leads to inaccurate and unreliable results, and protects only a sub-set of defendants with intellectual disability"); APA Br. 6 (Texas's "divergences from the professional consensus of the mental health professions on the diagnosis of intellectual disability create[] an extraordinary risk that persons with intellectual disability will be executed").[6] Respondent (at 28-29) points to three areas of purported disagreement. But Respondent's claims fall short: on one

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[6] *See also, e.g.,* APA Br. 6 (*Briseno* factors "are unsupported by any scientific or medical evidence and inconsistent with the professional standards used by mental health professionals to diagnose intellectual disability."); AAIDD Br. 29-30 (*Briseno* factors are "fundamentally inconsistent with the clinical understanding of intellectual disability"); APA Br. 5 ("As the scientific and medical knowledge in the area of mental health have evolved and advanced, so have the diagnostic standards adopted and utilized by the mental health professions."); AAIDD Br. 3 (same).

(relatedness), it seeks to manufacture conflict where there is none;[7] on another (adaptive-deficit measurement), it also erroneously claims discord;[8] and, on the third (age of onset), it raises an issue that is of no significance in this case and that will rarely, if ever, be of consequence.[9] As this Court has recognized, "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 134 S. Ct. at 1193. Respondent's wide-ranging criticisms of these professional organizations—like the CCA's repeatedly expressed view that medical standards are "exceedingly subjective"—provide no sound basis for rejecting "the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000.[10]

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[7] *See infra*, 20-21.

[8] Respondent argues the AAIDD establishes adaptive-behavior limitations through standardized measures two standard deviations below the mean, while the DSM-5 lacks a specific performance threshold. But there is no actual conflict: the DSM-5 states that standardized measures should be used "to the extent possible" and interpreted consistent with clinical judgment. DSM-5, 37.

[9] Respondent points to "before age 18" (AAIDD) and "the developmental period" (DSM-5), but identifies no significant clinical difference.

[10] Respondent (at 29-30) also emphasizes an AAIDD letter to the APA. Respondent overlooks that the letter sought to ensure that the organizations remained in accord on core points of definitional guidance (and they have) and also ignores that the APA made revisions to several areas in response (*e.g.*, the DSM-5 included two standard deviations below the mean in its diagnostic criteria on the first prong). Most fundamentally, robust public debate in consideration of new standards reflects important medical dialogue and does not undermine the role of medical standards.

ARGUMENT

With an understanding of the CCA's decisions as written and applied, it is clear that the CCA's decision is not "informed by the medical community's diagnostic framework." In urging a contrary view, Respondent principally maintains (at 36-37) that *Briseno*'s definition of intellectual disability is "consistent" with current clinical definitions because it uses the established three criteria. But that definitional consistency is not in dispute. *See* Pet. Br. 32 ("The three essential elements of intellectual disability—limitations in intellectual functioning, limitations in adaptive functioning, and early age of onset—have remained consistent."). Instead, the issue here, as in *Hall*, is how Texas's definition of intellectual disability is interpreted and applied. *See Hall*, 134 S. Ct. at 1994 (emphasizing that it is not enough to have a definition of intellectual disability that "*could be* interpreted consistently with *Atkins*") (emphasis added). And that is where Respondent's argument fundamentally fails. The problems with the CCA's prohibition of current medical standards—and the clinically unsound approach it has mandated instead—are clear in its interpretation of both the intellectual-functioning and adaptive-behavior prongs.[11]

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[11] Respondent's emphasis (at 33-34 & n.22) on the CCA's grant of relief in some *Atkins* cases ignores that, in almost all of the cited cases, either the State did not oppose *Atkins* relief, the State's expert agreed the claimant was intellectually disabled, or the State chose not to produce expert testimony to rebut the claimant's showing. *See, e.g.*, *Ex parte Smith,* No. AP-76906, 2012 WL 5450895, at *1 (Tex. Crim. App. Nov. 7, 2012). And, of course, granting relief in selected cases does not alleviate the

I. The CCA's Interpretation of Intellectual Functioning Is Inconsistent with the Medical Community's Diagnostic Framework

As this Court has explained, "established medical practice" recognizes both that IQ scores are not "final and conclusive evidence of a defendant's intellectual capacity" and that IQ scores are "imprecise" and require a standard error of measurement ("SEM"). *Hall*, 134 S. Ct. at 1995. While these points previously have been part of clinical standards, the current diagnostic framework, including the DSM-5, gives them heightened emphasis. *See*, *e.g.,* DSM-5, 33-37; *Hall*, 134 S. Ct. at 1994-95 (citing DSM-5). Indeed, two of Petitioner's experts stressed these points about the current medical standards in their testimony. *See, e.g.,* JA9, JA27-28 (Borda); JA114 (Greenspan).

The CCA's analysis here sharply conflicts with the diagnostic framework for analyzing intellectual functioning in two fundamental respects.

First, without any clinical justification, the CCA jettisoned the low end of the SEM of Petitioner's IQ score of 74 based on Petitioner's "history of academic failure," and the fact that "he was on death row and facing the prospect of execution" and had "exhibited withdrawn and depressive behavior." Pet. App. 75a. As Petitioner previously established, both are deeply problematic reasons to disregard the low end of the SEM for *Atkins* claimants, as such individuals will generally have a history of academic failure and all

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CCA's responsibility to provide constitutionally sound adjudications in *all* cases.

will be confined to the depressive environment of death row. Pet. Br. 38-39. While Respondent (at 41-42) attempts to defend the CCA's reasoning, the contrast between the CCA's attempted justifications and those in a decision relied on by Respondent are stark. *See Ledford v. Warden*, 818 F.3d 600, 641 (11th Cir. 2016) (district court did not clearly err in disregarding low end of IQ scores of 77 and 79 where defendant had "sophisticated knowledge of historical and cultural facts suggest[ing] that he was not intellectually disabled" and verbal IQ score of 86).[12]

Second, the CCA held that Petitioner's purported failure of proof on IQ scores was itself sufficient to deny Petitioner's intellectual-disability claim. *See* Pet. App. 75a; Pet. Br. 36-37. In light of Petitioner's IQ score of 74, however, the CCA could not simply conclude that Petitioner had "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." Pet. App. 63a. Instead, it was required to consider evidence of his adaptive deficits in conjunction with the claimed intellectual deficits. *See Hall*, 134 S. Ct. at 1996 ("For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would

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[12] The CCA's reasons for disregarding the low end of Petitioner's IQ score of 78 are similarly problematic and non-clinical. Pet. App. 74a. Among other things, the CCA erroneously used risk factors for intellectual disability—evidence that Moore was "traumatized by paternal violence," was "referred for testing due to withdrawn behavior," and had an "impoverished" background—as well as Moore's race ("minority cultural background"), to determine that he should not receive the low end of the SEM. *Id.*

consider factors indicating whether the person had deficits in adaptive functioning."). Respondent's contrary view (at 43-44) simply cannot be reconciled with the clinical understanding that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Hall*, 134 S. Ct. at 2001. Accordingly, the CCA's treatment of Petitioner's IQ scores as independently dispositive of the intellectual-disability inquiry—where one of his credited scores was a 74—lacks medical justification and conflicts with this Court's precedent.[13]

II. The CCA's Interpretation of Adaptive Behavior Is Inconsistent with the Medical Community's Diagnostic Framework

The CCA's interpretation of adaptive behavior likewise fundamentally conflicts with the medical community's diagnostic framework through (1) its weighing of purported strengths against adaptive deficits, (2) its use of the non-medical *Briseno* "factors," and (3) its novel and distorted standard for "relatedness" in which a defendant must establish that adaptive deficits were caused by intellectual deficits and eliminate other possible contributing causes. Here too, while the diagnostic framework has long recognized the problems with this approach, the conflicts are now particularly pronounced in light of the

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[13] Although the CCA proceeded to analyze Moore's adaptive functioning, it did so in the alternative, Pet. App. 75a—only after wrongly concluding that Moore had failed to satisfy the intellectual-functioning prong (*id.* at 63a) and without considering the IQ scores and adaptive deficits as "a conjunctive and interrelated assessment." *Hall*, 134 S. Ct. at 2001.

heightened emphasis that current standards place on adaptive deficits. *See, e.g.,* DSM-5, 37; JA9, 28, 114.

A. The CCA Weighed Purported Strengths Against Adaptive Deficits

The clear and unequivocal clinical consensus provides that an individual's strengths may not be weighed against deficits in determining whether the individual meets the second criterion of the intellectual disability definition. *See* Pet. Br. 39-43; AAIDD Br. 19 ("Clinical diagnostic standards focus exclusively on *deficits* in adaptive functioning because practically every individual who has intellectual disability also has things that he or she has learned to do, and can do"); APA Br. 13 ("Importantly, mental health professionals agree that intellectual disability can and should be diagnosed where there are sufficient *deficits* in adaptive functioning. That remains true even if the individual has relative strengths in other areas. The presence of relative strengths in some spheres of behavior is *not* evidence that a person does *not* have intellectual disability."); *see also* Pet. App. 123a n.17 (Alcala, J., dissenting).

In conflict with this clinical consensus, the CCA weighed Petitioner's supposed "adaptive skills"—*e.g.*, his stay "in the back of a pool hall" and "evidence that he had played pool and mowed lawns for money"—against Petitioner's manifest limitations in academic skills and social interactions (and completely ignored other significant deficits credited by the trial court). Pet. App. 80a, 88a. By dismissing Petitioner's serious deficits based upon his alleged strengths, the CCA's analysis of adaptive functioning

flagrantly violated clinical consensus on this fundamental inquiry.

Respondent attempts to side-step the CCA's problematic approach by arguing that the CCA's weighing of strengths and deficits was largely done in the context of discussing the State's expert testimony. Resp. Br. 46. But courts must evaluate expert testimony pursuant to a legally sound framework. Here, the CCA announced at the outset of its decision that "we consider *all* of the person's functional abilities, including those that show strength as well as those that show weakness," and that the trial court "erred" by not doing so (in keeping with the clinical framework). Pet. App. 11a-12a (internal quotation marks omitted). The CCA then proceeded to review the record for testimony it found indicative of Petitioner's "strengths," which it used to negate the finding of significant adaptive deficits.

This fundamental conflict with the clinical framework, unfortunately, is common in Texas *Atkins* determinations—a point repeatedly emphasized by individual CCA judges. *See, e.g.*, *Ex parte Butler*, 416 S.W.3d 863, 883 (Tex. Crim. App. 2012) (Price, J., joined by Johnson, J., dissenting) (*Atkins* denial erroneous because it "focused inordinately on the applicant's relative *strengths* rather than ruling out manifest weaknesses in at least two adaptive skills areas"; "this emphasis on adaptive strengths rather than adaptive weaknesses runs contrary to standard diagnostic protocol"). Ultimately, through what one judge called the CCA's "scattershot approach to adaptive deficits," the CCA creates the profound risk that defendants meeting the clinical definition of intellectual disability will "be executed simply because they demonstrate a few pronounced adaptive strengths

along with their manifest adaptive deficits." *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *40 (Tex. Crim. App. May 5, 2010) (Price, J., joined by Johnson and Holcomb, JJ., concurring and dissenting). Such a result is constitutionally untenable, and is exactly what occurred in this case as the result of the CCA's conflict with the diagnostic framework.

B. The CCA Relied Heavily On Its Non-Medical *Briseno* Factors

The CCA also has sharply deviated from the current clinical framework—in this case and in others—through use of the non-clinical *Briseno* "factors" in considering adaptive deficits. Pet. Br. 49-59. Presumably cognizant of the problematic nature of these non-diagnostic judge-made factors, Respondent makes several failed attempts to minimize their impact.

First, as noted, Respondent argues (at 52) that the *Briseno* factors "are purely an optional suggestion." Yet actual practice has shown that these factors are not optional. The CCA decision rejected an intellectual-disability determination solely because it failed to consider a *Briseno* factor (*Sosa*, *supra*), and the supposedly optional nature of the factors is belied by the many cases—like this one—in which they were used to deny *Atkins* relief.[14] To the extent use of the

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[14] *See, e.g.*, *Ex parte Chester*, No. AP-75037, 2007 WL 602607, at *4 (Tex. Crim. App. Feb. 28, 2007) (affirming denial of *Atkins* relief where "[t]he trial court's findings addressed all seven evidentiary factors listed in *Briseno*"); *Butler*, 416 S.W.3d at 875-876 (Cochran, J., concurring); *Ex parte Woods*, 296 S.W.3d 587, 610-613 (Tex. Crim. App. 2009); *Taylor*, No. WR-48498-02, 2006 WL 234854, at *3 (Johnson, J., concurring); *Ex*

Briseno factors is "optional," it is arbitrary and unpredictable. And although Respondent contends the CCA's consideration of the *Briseno* factors in this case demonstrates "their optional nature and limited purpose," Resp. Br. 52-53, the exact opposite is true: the CCA analyzed every *Briseno* factor, held that they "weigh[ed] heavily" against Petitioner, and rejected the trial court's decision not to consider them. *Id.* at 89a-91a, 161a-162a. Such an approach is far from "attenuated and extraneous." Resp. Br. 53.

Second, Respondent argues that the *Briseno* factors "are a legitimate tool developed to help courts implement *Atkins*," contending that the *Briseno* factors "track specific applications of this Court's precedents regarding *Atkins* claims." *Id.* at 53-55. Not so. In *Atkins*, this Court adopted a categorical rule against executing the intellectually disabled, and did so against the backdrop of States whose own categorical rules "generally conform[ed] to the clinical definition" of intellectual disability. 536 U.S. at 317-319 & n.22. Although this Court highlighted "characteristics" of the intellectually disabled and explained why those "deficiencies" warranted exemption from execution, it did not suggest that an individual's ability to qualify for Eighth Amendment protection is dependent upon his ability to prove each of those characteristics in his individual case; the Court ruled on the intellectually disabled as a category. Nor can this Court's decisions in *Hall* and *Brumfield*—which explicitly relied on clinical criteria—be construed as "endors[ing] th[e] sort of

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parte Wilson, No. 62490-B, slip op., 4-8 (252nd D. Ct. Jefferson Cty. Tex. Aug. 31, 2004), *aff'd*, WR-46,928-02 (Tex. Crim. App. Nov. 10, 2004) (per curiam).

inquiry" the *Briseno* factors create, Resp. Br. 53-55, which is grounded in lay stereotypes and skepticism of medical standards as "exceedingly subjective." *Briseno*, 135 S.W.3d at 8.

At bottom, the *Briseno* factors reflect the CCA's decision to supplant the diagnostic framework on adaptive deficits with its own non-diagnostic factors in order to limit the scope of Eighth Amendment protection to a subset of the intellectually disabled. *Cf. Sosa*, 364 S.W.3d at 891. The *Briseno* factors act to provide factfinders in Texas with "a certain amorphous latitude . . . to supply the normative judgment—to say, in essence, what mental retardation *means* in Texas (and, indeed, in the individual case) for Eighth Amendment purposes." *Lizcano*, 2010 WL 1817772, at *35 (Price, J., joined by Johnson and Holcomb, JJ., concurring and dissenting).[15] The *Briseno* factors simply cannot be reconciled with this Court's precedent or the Eighth Amendment. *See Hall*, 134 S. Ct. at 1999 ("those persons who meet

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[15] *See, e.g., Ex parte Thomas*, W86-85539-M(B), slip op., 52 (194th D. Ct. Dallas Cty. Tex. Sept. 30, 2006) ("Assuming for purposes of argument that applicant is mildly mentally retarded, the Court finds that the facts of this case do not diminish applicant's personal culpability such that he should be excluded from the death penalty."), *adopted*, No. WR-16556-04, 2006 WL 3692644 (Tex. Crim. App. Dec. 13, 2006) (per curiam); *Ex parte Mathis*, WR-50,772-03, slip op., 24 (268th D. Ct. Fort Bend Cty. Tex. Jan. 4, 2006) ("Even if Applicant had established by a preponderance of the evidence that he met the psychological definition of mental retardation, Applicant has failed to establish that those mental deficiencies diminished his moral culpability for his crimes. Consequently, Applicant has failed to establish that due to his alleged mental deficiencies his sentence amounted to cruel and unusual punishment . . . "), *adopted*, 2006 WL 2706745 (Tex. Crim. App. Sept. 20, 2006) (per curiam).

the clinical definitions of intellectual disability by definition . . . bear diminish[ed] . . . personal culpability" and cannot be executed) (quoting *Atkins*, 536 U.S. at 318) (internal quotation marks omitted).

C. The CCA Required Proof of "Relatedness" In the Form of a Causal Link Between Intellectual Deficits and Adaptive Deficits

The CCA also conspicuously violates the medical community's current diagnostic framework by requiring *Atkins* claimants to prove that adaptive deficits were caused solely by intellectual deficits. Pet. App. 10a; Pet. Br. 43-46. It held that Petitioner's intellectual-disability claim failed because he could not ex-exclude the possibility that his adaptive deficits were caused by such factors as his "history of academic failure" (which, logically, would *support*, rather than detract from, a determination of intellectual disability), "the abusive atmosphere in which he was raised" (a risk factor for intellectual disability), or co-occurring disorders (despite the clinical recognition of the frequency of comorbidity and multiple causes), notwithstanding that there is no science-based methodology for providing such proof and no science-based reason for compelling it. Pet. App. 88a-89a.

Respondent defends the CCA's causation requirement on the ground that the word "related" appears in the AAIDD (formerly AAMR) 9th edition and the DSM-5. Yet the CCA's interpretation of that language—and its seemingly arbitrary decision to

give it totemic importance here—has no clinical or medical basis.[16]

As amicus APA explains about the meaning of "related" in its DSM-5 standard, "[t]he current diagnostic criteria require *a connection* between the deficits in intellectual functioning and adaptive functioning, but that connection need only exclude the obvious limits to adaptive functioning imposed by other ailments," such as "physical disabilities that impair sensory abilities (e.g., blindness or deafness)." APA Br. 9; *accord* AAIDD Br. 23 n.26 ("the term 'related' has always required only a relatively minimal connection" and has never had a causation requirement). Respondent defends the CCA's anti-clinical approach, arguing that "[o]n this prong, . . . the 'distinct[ion] between 'a legal determination' and a 'medical diagnosis' is significant." Resp. Br. 50. There is no justification, however, for creating a causation requirement (Pet. App. 10a, 88a) that is irreconcilable with clinical consensus on co-morbidities and risk factors.

By selectively and randomly requiring defendants to "prove the unprovable" to avoid execution, AAIDD Br. 24 n.26, Texas once again stands alone.

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[16] While the CCA emphasizes the importance of "relatedness" in this case and faults the trial court for "fail[ing] to make the relatedness inquiry," Pet. App. 10a, some CCA *Atkins* decisions do not even mention (much less apply) a relatedness requirement. *See, e.g.*, *Ex parte Cathey*, 451 S.W.3d 1, 9 (Tex. Crim. App. 2014). Relatedness appears to be one of several tools selectively and arbitrarily deployed by the CCA to reject *Atkins* claims.

The evidence that Bobby James Moore is intellectually disabled is overwhelming. *See* Pet. App. 127a-203a; JA 6-17, 58-74; Pet. Br. 4-6, 10-17. At age 13, Moore still lacked a basic understanding of the days of the week, the seasons of the year, and telling time. He spent his days at school often drawing pictures because he was unable to read, write, or keep up with lessons. As the trial court concluded—applying the medical community's current diagnostic framework—Moore has significantly subaverage general intellectual functioning (as reflected in his numerous IQ test scores under 75, including one relied upon by the CCA); significant and related limitations in adaptive functioning (as evidenced by, *inter alia*, his abysmal school records and test scores; the fact that he failed first grade and received only social promotions every year thereafter; his withdrawn social behavior; his limited communication skills; and his score of 2.5 standard deviations below the mean on the State expert's adaptive-behavior test); and all of these characteristics manifested during childhood. Pet. App. 127a-203a. It was only by rejecting the medical community's diagnostic framework, and instead analyzing Petitioner's intellectual-disability claim under its fundamentally flawed *Briseno* framework—in which the low end of the IQ range was erroneously dismissed, purported strengths were given primacy, the non-clinical *Briseno* factors were "weigh[ed] heavily" and an insurmountable and clinically unsound causation requirement was imposed—that the CCA was able to conclude otherwise. Accordingly, in light of the overwhelming evidence in support of Petitioner's claim, this Court should vacate the CCA's decision and make clear that, based on the record

and decision by the trial court, the Eighth Amendment bars Petitioner's execution.[17]

In sum, the CCA reviews *Atkins* claims to ensure relief is granted only to those individuals whom it perceives as having "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W.3d at 6. Its distorted (and often arbitrary) approach to analyzing claims of intellectual disability is irreconcilable with the medical community's diagnostic framework. No other State prohibits consideration of the current diagnostic framework or interprets the three-prong definition of intellectual disability in a similar manner—nor does Texas itself in any context other than the death penalty. Without intervention by this Court, the CCA threatens to render *Atkins* "a nullity" for many intellectually-disabled defendants in Texas (like Petitioner), and undoubtedly "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S. Ct. at 1999, 1990.

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[17] Respondent's suggestion (at 51) that this Court should treat the CCA like a federal administrative agency entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and simply remand to give the CCA an opportunity to provide a better explanation, has no basis in this Court's precedents—and vividly illustrates an inadequate valuing of the vital Eighth Amendment issues at stake.

CONCLUSION

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

Respectfully submitted,

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