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No. WR–13,374–05

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

IN RE: EX PARTE BOBBY JAMES MOORE,

Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 314483-C IN THE 185 JUDICIAL DISTRICT HARRISS COUNTY

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., LATINOJUSTICE PRLDEF, THE RIGHT2JUSTICE COALITION, AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF APPLICANT BOBBY JAMES MOORE

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Interest of the *Amici Curiae*

The NAACP Legal Defense & Educational Fund, Inc. (LDF), LatinoJustice PRLDEF (LatinoJustice), the Right2Justice Coalition, and The Leadership Conference on Civil and Human Rights respectfully submit this brief as *amici curiae* in support of appellant Bobby James Moore.[1]

Founded in 1940 under the leadership of Thurgood Marshall, LDF is a non-profit law organization that focuses on advancing civil rights in education, economic justice, political participation, and criminal justice. LDF has a longstanding interest in ensuring that any death sentence meets constitutional requirements designed to ensure non-arbitrary sentencing. LDF has litigated or filed amicus briefs in numerous capital cases, including: *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005), and *Buck v. Davis*, 137 S. Ct. 759 (2017).

[1] Consistent with this Court's Rule 11(c), undersigned counsel states that no fee or other financial contribution has been paid to any *amicus curiae* for preparing this brief.

LatinoJustice PRLDEF is a national not for profit civil rights organization that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting & voting rights. During its 45-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging multiple forms of racial discrimination including discriminatory policing and law enforcement practices. LatinoJustice supports greater transparency and fairness in our justice system.

The Right2Justice Coalition is a coalition based in Harris County, Texas and made up of local, statewide, and national organizations that fight for criminal justice reform, including the Texas Criminal Justice Coalition, the Texas Organizing Project, Service Employees International Union Texas Council, United We Dream - Houston, Truth 2 Power, BLMHTX, Houston: reVision, Black Lives Matter: Houston,

Texas Civil Rights Project, Immigrant Legal Resource Center (ILRC), Mi Familia Vota, ACLU of Texas, Texas Appleseed, Texas Defender Service (TDS), and the Texas Fair Defense Project.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, The Leadership Conference has participated as an amicus party in cases of great public importance.

Introduction

The Supreme Court has held that "the Constitution restricts the State's power to take the life of *any* intellectually disabled individual." *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)) (Court's emphasis) (alterations omitted). This constitutional prohibition reflects the national consensus against executing individuals with intellectually disability, and the fact that executing intellectually disabled persons would "create a 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Id*. (quoting *Atkins*, 536 U.S. at 320).

Last Term, the Supreme Court applied this constitutional rule to this case. The Supreme Court held that this Court erred in rejecting appellant Bobby James Moore's intellectual disability claim because it: (a) incorrectly determined that Mr. Moore's IQ scores were too high to establish intellectual-functioning deficits, and (b) improperly discounted "the considerable objective evidence of Moore's adaptive deficits" based on considerations that are inconsistent with Supreme Court precedent and with the "medical community's current standards." *Id*. at 1050, 1053.

This Court is "bound by Supreme Court reasoning on [this] federal constitutional issue[]." *Aekins v. State*, 447 S.W.3d 270, 275 (Tex. Ct. Crim. App. 2014). And the Supreme Court's reasoning permits of only one result, *viz.*, Mr. Moore has satisfied both the intellectual-functioning deficits and adaptive deficits elements of the test for intellectual disability, and he is exempt from execution under the Eighth Amendment.

Yet, *amici* understand that the State may argue that Mr. Moore is not intellectually disabled. Any such argument would be foreclosed by the Supreme Court's opinion, and *amici* respectfully urge this Court to decline any invitation to depart from the reasoning of the Supreme Court.

Argument

After a two-day evidentiary hearing, the habeas court found that Mr. Moore is intellectually disabled and recommended that this Court grant habeas relief. *See Ex Parte Moore*, 470 S.W.3d 481, 484-85 (Tex. Ct. Crim. App. 2015). As the Supreme Court stressed, the habeas court did so by "follow[ing] the accepted, uncontroversial intellectual disability-diagnostic definition, which identifies three core elements: (1)

intellectual-functioning deficits . . ., (2) adaptive deficits . . ., and (3) the onset of these deficits while still a minor." *Moore*, 137 S. Ct. at 1045. The third element is not at issue here, but, in its prior opinion, this Court disagreed with the habeas court as to the first two elements. *See Ex Parte Moore*, 470 S.W.3d at 484-85. The Supreme Court, in turn, rejected this Court's reasons for disagreeing with the habeas court and made clear that Mr. Moore meets both the intellectual-functioning and adaptive deficits prongs of the intellectual disability test.

I. Under the Supreme Court's Opinion, Mr. Moore Meets the Intellectual-Functioning Deficits Prong.

The intellectual-functioning deficits prong turns on whether an individual has "an IQ score 'approximately two standard deviations below the mean'—i.e., a score of roughly 70—adjusted for 'the standard error of measurement.'" *Moore*, 137 S. Ct. at 1046. Here, this Court recognized that Mr. Moore's IQ score of 74 on the 1989 WAIS-R test was reliable and, given the standard error of measurement, resulted in a score range of between 69 and 79. *See Ex Parte Moore*, 470 S.W.3d at 519. This Court nonetheless discounted the lower end of that range

based on, *inter alia*, Mr. Moore's history of academic failure and the fact that he took the test on death row. *See id.*

The Supreme Court disagreed with this Court's analysis, holding that it contravened *Hall v. Florida*, 134 S. Ct. 1986 (2014). The Supreme Court explained that the "presence of other sources of imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range." 137 S. Ct. at 1049. Simply put, because the lower end of Moore's IQ range falls at or below 70, he satisfies the intellectual-functioning deficits prong, such that his adaptive deficits must be considered. *See id.*

II. Under the Supreme Court's Opinion, Mr. Moore Meets the Adaptive Deficits Prong.

The medical community defines adaptive deficits as an "inability to learn basic skills and adjust behavior to changing circumstances." *Hall*, 134 S. Ct. at 1994. Specifically, "clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean of any of the three adaptive skill sets (conceptual, social and practical)." *Moore*, 137 S. Ct. at 1046. Here, as the Supreme Court explained, "Moore's performance fell roughly two to three standard deviations below the mean in *all three* skill categories." *Id.* (Court's

emphasis). As such, Mr. Moore necessarily meets the adaptive deficits prong of the intellectual disability test as defined by current medical standards.

As the Supreme Court further explained, this Court reached a different conclusion because it did not adhere to current medical standards. And, as the Court further clarified, states must use those standards in analyzing intellectual disability claims. While "States have some flexibility . . . in enforcing *Atkins*' holding," the "medical community's current standards supply one constraint on states' leeway in this area." *Id*. at 1053. Current manuals reflect "improved understanding over time," and they "offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id*. (quoting DSM-5). The Supreme Court therefore held that this Court erred by rejecting the habeas court's reliance on "current medical standards in concluding that Moore is intellectually disabled," and by instead "fastening its intellectual-disability determination to 'the AAMR's 1992 definition of intellectual disability.'" *Id*. (quoting this Court's opinion).

Similarly, the Supreme Court held that this Court erred by concluding that Mr. Moore's traumatic childhood and emotional problems suggested his adaptive deficits did not support a finding of intellectual disability. *See Moore*, 137 S. Ct. 1051. As this Court aptly explained, Mr. Moore's family life was filled with brutality and privation. *See Ex Parte Moore*, 470 S.W. at 495-97, 499-50. At school, he endured racial isolation and terror. When he was twelve, Mr. Moore and his sister were bused to a new elementary school as part of an integration effort; the other students "didn't want [them] there" and hit Mr. Moore in the head with a brick, causing a significant injury. *Id*. at 499; *see id*. at 500. In light of this and other evidence, this Court concluded that Mr. Moore's academic difficulties were not indicative of intellectual disability because they were likely "caused by a variety of factors, including the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, [and] racially motivated harassment and violence at school." *Id*. at 526. The problem with this analysis, the Supreme Court explained, is that Mr. Moore's "traumatic experiences . . . count in the medical community as *'risk factors' for* intellectual disability." 137 S. Ct. at 1051 (citation omitted).

Similarly, any evidence of Mr. Moore's "emotional problems" does not weigh against a finding of intellectual disability, because "many intellectual disabled people also have other mental or physical impairments," which are referred to as comorbidities. *Id.*

Finally, this Court failed to adhere to current medical standards by relying on evidence of certain adaptive strengths "to overcome the considerable objective evidence of Mr. Moore's adaptive deficits." *Id.* at 1050. Current medical standards "focus[] the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 1050 (Court's emphasis). So long as an individual has significant limitations in either conceptual, social or practical skills, the adaptive deficits element of the intellectual disability test is satisfied regardless of whether the individual also has adaptive strengths in certain areas. *See id.* (describing AAIDD-11 and DSM-5). As such, the habeas court correctly concentrated on Mr. Moore's adaptive weaknesses, and this Court—like the State's expert—erred by relying on evidence of adaptive strengths to "undercut the significance of Mr. Moore's adaptive limitations." *Id.* at 1047; *see id.* at 1050.

In sum, Mr. Moore's "considerable objective evidence of . . . adaptive deficits" satisfies the second prong of the intellectual disability test. *Id.* at 1050. This Court previously disagreed based on considerations that the Supreme Court has now rejected. Under the Supreme Court's reasoning in this case, Mr. Moore is intellectually disabled.

* * *

In several previous cases, the Supreme Court has had to intervene when the State convinced this Court, or the Fifth Circuit Court of Appeals, to depart from the Supreme Court's reasoning in capital cases. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (stressing that *Atkins* did not "suggest[] that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered," and the Court similarly "cannot countenance the [Fifth Circuit's] suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime"); *Smith v. Texas*, 545 U.S. 37, 45 (2004) (per curiam) (holding that this Court "erroneously relied on a test [for screening intellectual limitations and other

mitigating evidence] we never countenanced and now have unequivocally rejected"); *see also Brewer v. Quarterman*, 550 U.S. 286, 296 (2007) ("For reasons not supported by our prior precedents, but instead dictated by what until quite recently has been the Fifth Circuit's difficult *Penry* jurisprudence, the Court of Appeals concluded that Brewer's evidence of mental illness and substance abuse could not constitute a *Penry* violation.") *Miller-El v. Dretke*, 545 U.S. 231, 257 (2005) (rejecting an argument "first advanced in dissent when the case was last here . . . and later adopted by the State and the [Fifth Circuit]" because it "simply does not fit the facts").

Amici urge the Court to reject any effort to inject a similar error into this case.

Conclusion

The Supreme Court's decision establishes that Mr. Moore is intellectually disabled. His death sentence must be vacated.

Dated: November 1, 2017

Respectfully submitted,

s/ Natasha Merle

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4, I hereby certify that:

1. This brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(3), because this brief contains 2,132 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because this brief has been prepared in a conventional typeface using Microsoft Word in Century Schoolbook 14-point font.

Dated: November 1, 2017

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CERTIFICATE OF SERVICE

I, Natasha Merle, hereby certify that I caused to be electronically filed the foregoing Brief of *Amici Curiae* NAACP Legal Defense & Educational Fund, Inc., Latinojustice Prldef, The Right2justice Coalition, and The Leadership Conference on Civil and Human Rights in Support of Applicant Bobby James Moore with the Court via the EFile TX Court.gov system and will cause to be filed 11 copies of the foregoing brief with the Court to be received within 10 days, this 1st day of November 2017. I also certify that the counsel, who have consented to electronic service, will be served the foregoing brief via the EFile TX Court.gov system.

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