NO. WR-13,374-05

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE BOBBY JAMES MOORE,

Applicant.

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. 314483-C IN THE 185TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

BRIEF OF AMICI CURIAE MEMBERS OF THE TEXAS CAPITAL PUNISHMENT ASSESSMENT TEAM

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

IDENTITY OF AMICI CURIAE ON WHOSE BEHALF THIS BRIEF IS TENDERED

Pursuant to Rule 11(b) of the Texas Rules of Appellate Procedure, the undersigned counsel certify that this Brief is tendered on behalf of the following listed individual Members of the Texas Capital Punishment Assessment Team[1]:

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PAYMENT FOR THE PREPARATION OF THIS BRIEF

Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, the undersigned counsel certify that they are representing amicus curiae on a pro bono basis. To the extent any fee is paid for the preparation of this Brief, the source of any such fee is the Texas Capital Punishment Assessment Team.

INTEREST OF THE AMICI CURIAE

Amici are members of the Texas Capital Punishment Assessment Team (hereinafter the "Assessment Team"), a group organized under the auspices of the American Bar Association, who researched and published a comprehensive report on the Texas death penalty in 2013 entitled *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* (hereinafter "the Assessment Report").[2] The Assessment Report reviewed how each stage of the state's capital punishment system operates, and made recommendations based on the uniform *ABA Protocols on the Administration of Capital Punishment*. Analysis of how the State of Texas evaluated claims of intellectual disability by defendants charged with and convicted of capital crimes occupied a significant portion of the Team's review. The Assessment Report was intended to serve as a basis from which the state's citizens, leaders, and government could consider, propose and implement reforms in response to the findings and recommendations.

[2] The Assessment Report is available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf (last visited Oct. 3, 2017). It was not formally approved by the American Bar Association House of Delegates or Board of Governors and should not be construed as representing policy of the American Bar Association, but its benchmarks and protocols are based on existing American Bar Association policies, guidelines and standards. The Assessment Report was cited by the Supreme Court on appeal. *Moore v. Texas*, 137 S. Ct. 1039, 1053 n. 10 (2017). The Assessment Team members were Professor Jennifer Laurin (Chair), Ron Breaux, Paul Coggins, The Honorable Royal Furgeson, the Honorable Deborah Hankinson, Professor Ana M. Otero, Charles T. Terrell, and Governor Mark White.

In particular, the Assessment Team conducted a thorough review of the application of the U.S. Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), in Texas capital punishment cases, and of the "temporary judicial guidelines" set out by this Court in *Ex parte Briseño*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).[3] In *Atkins*, the Court held that offenders with intellectual disabilities are less culpable than other offenders because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions." *Atkins*, 536 U.S. at 318.

In the Assessment Team's view – and that of the U.S. Supreme Court, as made clear in *Moore v. Texas* and other relevant post-*Atkins* decisions - *Atkins* should be interpreted to require use of current standards adopted by the relevant medical experts in making the determination of an intellectual disability. This was the standard supported by the Assessment Team and was reflected in the Assessment Report's detailed recommendations for reform, cited by the Supreme Court in *Moore*. *Moore v. Texas*, 137 S. Ct. 1039, 1052 n. 10 (2017). In their role as members of the Assessment Team, Amici did not take a position on the death penalty generally, and did not consider whether Texas, as a matter of morality, philosophy, or penological theory, should have the death penalty. Rather, their interest is to

[3] *See* The Assessment Report, at 389-444.

advance fairness in the administration of the death penalty in Texas, and to help ensure that Texas does not create an unacceptable risk that persons with intellectual disabilities will receive the death penalty or be executed. Amici offer their individual expertise as experienced Texas practitioners and scholars, as well as their knowledge gleaned through the creation of the Assessment Report and its analysis of consideration of intellectual disability in death penalty cases.

INTRODUCTION

Amici adopt the facts recited in Applicant's Brief filed herein on November 1, 2017. Further, Amici fully support the arguments set forth in Applicant's Brief, in which Applicant persuasively explains why Moore's claim for *Atkins* relief should be granted and his death sentence should be reformed to a term of life imprisonment. Accordingly, Amici adopt and will not fully replicate those arguments here but will offer additional arguments and factual points they believe this Court should consider. For the reasons stated in Applicant's Brief on the Merits, as well as for the reasons set forth below, this Court should grant Mr. Moore's claim for *Atkins* relief and reform his death sentence to a term of life imprisonment.

ARGUMENT AND AUTHORITIES

I. THE SUPREME COURT HAS PROVIDED A DEFINITIVE ROADMAP FOR APPLYING *ATKINS* AND *HALL* ON REMAND

A. In *Moore v. Texas*, the Supreme Court determined that Texas' framework for addressing and determining intellectual disability claims is incompatible with the requirements of the Eighth Amendment

The Supreme Court's core holding in *Moore* is that Texas' "adherence to superseded medical standards and its reliance on [*Ex parte*] *Briseño*, [135 S.W.3d 1 (Tex. Crim. App. 2004)]" failed to comply with the Eighth Amendment and the Supreme Court's precedents in *Atkins v. Virginia*, 536 U.S. 304 (2003), and *Hall v. Florida*, 34 S. Ct. 1986, 1998 (2014). *Moore*, 137 S. Ct. at 1048. The *Briseño* framework, which this Court applied in rejecting Mr. Moore's claim of intellectual disability, contravenes the Eighth Amendment because it disregards the lower end of the IQ range, applies non-clinical factors, emphasizes adaptive strengths, and disregards adaptive weaknesses. *Id.*

The *Briseño* framework purports to rely upon a decades-old definition of intellectual disability promulgated by the American Association on Intellectual and Developmental Disabilities ("AAIDD") (then the AAMR). *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). It requires an applicant to prove three elements by a preponderance of the evidence. *Id*.

First, the applicant must prove that he "suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of 70 or less," (the "first *Briseño* prong" or "general intellectual functioning"). *Id.* This Court's prior decision interpreted Texas law as permitting a court to disregard the low-end of IQ testing's ten-point standard error of measurement range based on evidence of past trauma, mistreatment, poverty, drug-abuse, academic failure, and testing under adverse circumstances. *Id*. at 519. The Supreme Court rejected this as non-scientific and as "irreconcilable with *Hall*." *Moore*, 137 S. Ct. at 1049.

Second, if he carries his burden on the first *Briseño* prong, the applicant must prove that "his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning" (the "second *Briseño* prong" or "adaptive functioning"). *Ex parte Moore*, 470 S.W.3d at 486. In its prior decision, this Court determined that adaptive strengths could outweigh adaptive deficits. *Id.* at 522-23, 526-27. In overturning this analysis, the Supreme Court held that "the medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Moore*, 137 S. Ct. at 1050. This Court also maintained that assessment of "relatedness" may be done by reference to "seven evidentiary factors that [this Court] developed in *Briseño*." *Ex Parte Moore*, 470 S.W.3d at 489. But as the Supreme Court found, citing the findings of the Assessment Report, these

factors do not find their source in any medical standard, current or past. *Moore*, 137 S. Ct. at 1052 & n. 10.

Third, the applicant must prove the onset of general intellectual disability prior to the age of eighteen. *Ex parte Moore*, 470 S.W.3d at 486. The third prong is not "at issue" in this case, *Moore*, 137 S. Ct. at 1045 n. 3, because "[t]he evidence revealed that [Mr.] Moore had significant mental and social difficulties beginning at an early age," *id.* at 1045.

The habeas court below found that Mr. Moore was intellectually disabled by referencing current medical standards, including the definition of intellectual disability presently used by the AAIDD, which has changed since *Briseño* was decided. This Court rejected that approach determining that *Briseño* established a legal framework that did not evolve with modern science. *Id.*

Under the Supreme Court's holding in *Moore*, this Court's application of the outdated and medically baseless criteria enshrined in the *Briseño* framework does not withstand constitutional scrutiny. Though the Supreme Court has left to the States "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399 (1986)), its decisions do not give the States unfettered discretion "to define [the term] intellectual disability as they wish[]." *Hall*, 34 S. Ct. at 1999. The Eighth Amendment prohibits intellectual disability

determinations that "disregard current medical standards," *Moore*, 137 S. Ct. at 1049, which "supply one constraint on states' leeway" in developing ways to protect intellectually disabled persons from capital punishment, *id.* at 1053.

As the Supreme Court reiterated in *Moore*, the Eighth Amendment requires Texas to adopt a test for assessing and determining intellectual disability that is "adequately . . . inform[ed] [by] . . . 'the medical community's diagnostic framework.'" *Id.* That test must be consistent with current manuals, which offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* Because it is inflexibly inconsistent with current medical standards, and because its consideration of the seven evidentiary factors is scientifically baseless, the *Briseño* framework fails to comply with the Eighth Amendment's requirements. *Id*.

B. In *Moore*, the Supreme Court has given this Court a detailed roadmap for analyzing Mr. Moore's claim consistent with Eighth Amendment requirements

The Supreme Court's *Moore* decision provides this Court with specific guidance as to how Mr. Moore's intellectual disability claim must be assessed to conform to current medical standards and the Eighth Amendment.

First, the Court must adhere strictly to *Atkins*'s holding that the Eighth Amendment "'restrict[s] . . . the State's power to take the life of' *any* intellectually disabled individual." *Id.* at 1048 (citing *Atkins*, 536 U.S. at 321). In determining

whether an individual is intellectually disabled, the Court must rely, as the Supreme Court did in *Atkins* and in *Hall*, on current medical standards in defining and assessing intellectual disability. *Id.* at 1053 (describing *Hall* as "employing current clinical standards" and *Atkins* "relying on then-current standards"). The Court, therefore, must disavow any legal definition of intellectual disability that precludes consideration of intellectual disability guides currently used in the medical community, and it must adopt a test that looks to current medical standards for defining intellectual disability. *Moore*, 137 S. Ct. at 1044, 1049.

Second, as interpreted by *Hall*, the Eighth Amendment precludes the Court from ruling that an individual with an IQ within the standard error of measurement of a sub-70 score is not intellectually disabled without considering other evidence of intellectual disability. *Id.* at 1049 (citing *Hall* 134 S. Ct. 1994, 2001 (noting that intellectual disability is a "condition" not a number)). A court cannot avoid the standard error of measurement by relying upon other sources of imprecision in administering the test as a basis to disregard the low-end of the test-specific standard-error range. *Id.* Rather, the courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050.

Third, in evaluating adaptive functioning, it is inconsistent with *Hall* to use evidence that the medical community considers indicative of intellectual disability as a basis for determining that an individual is not intellectually disabled. *Id.* Accordingly, this Court must, as the habeas court did, consider a defendant's adaptive deficits, and must not: (A) overemphasize perceived adaptive strengths as a basis for discounting those adaptive deficits or rely upon putative adaptive strengths that are inconsistent with medical consensus, *id.*; (B) rely upon items identified by the medical community as risk factors for an intellectual disability, such as record of academic failure or childhood abuse and suffering, as a basis for finding that intellectual and adaptive deficits are unrelated, *id.* at 1051; or (C) consider the existence of a personality disorder or other mental-health issue to be evidence that a person does not also have intellectual disability, *id.*

Fourth, this Court may not consider evidentiary factors that are not based on current or past medical standards, or that are outliers when compared to Texas' own or to others states' practices, in assessing a defendant's adaptive functioning. *Id.* at 1052. This precludes use of the seven *Briseño* factors, which the Supreme Court held to be rooted in "stereotypes" rather than "medical and clinical appraisals," and found to be "an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts." *Id*; *see also id.* at 1052 n. 10 ("'The *Briseño* factors create an especially high risk that [an intellectually

disabled defendant] will be executed because, in many ways, they contradict established methods for diagnosing [intellectual disability].'") (citing American Bar Assn., Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report 395 (2013)).

The Supreme Court was unequivocal in providing the standards that Texas must adopt to comply with the Eighth Amendment's prohibition against executing intellectually disabled individuals. Amici respectfully request that this Court adopt the Supreme Court's roadmap, conform Texas jurisprudence on intellectual disability with constitutional requirements, and assess Mr. Moore's claim in a manner consistent with the Eighth Amendment.

C. The Supreme Court's decision effectively mandates a finding on remand that Mr. Moore is intellectually disabled and ineligible for the death penalty

Applying the controlling standard reaffirmed by the Supreme Court to the factual findings adopted by this Court effectively mandates a decision on remand that Mr. Moore is intellectually disabled and is not eligible for the death penalty. In that determination, this Court must apply the "generally accepted, uncontroversial intellectual-disability diagnostic definition," endorsed by the Supreme Court, *Moore*, 137 S. Ct. at 1045,

> which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"—*i.e.,* a score of roughly 70—adjusted for

> "the standard error of measurement"); (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing circumstances"); and (3) the onset of these deficits while still a minor.

Id. (citations omitted).

The Supreme Court held that (a) intellectual-functioning deficits had been adequately demonstrated under the standards set in *Hall*, 135 S. Ct. 1986; (b) there was ample evidence of adaptive deficits in the record which could not be offset by unrelated adaptive strengths; and (c) there was no dispute as to the third element of onset while still a minor.[4] Accordingly, this Court should and must reverse the vacated decision and find Mr. Moore to be intellectually disabled.

1. Intellectual-Functioning Deficits

With respect to the first element of the diagnostic definition, this Court accepted two of Mr. Moore's IQ scores – Moore's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." *Ex parte Moore*, 470 S.W.3d at 519. Under *Hall* and *Moore*, "where an IQ score is close to, but above 70, courts must account for the test's 'standard error of measurement.'" *Moore*, 137 S. Ct. at 1049 (citing *Hall*, 134 S. Ct. at 1995, 2001; *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015)). The standard error of measurement is "a statistical fact, a reflection of the inherent imprecision of the test itself." *Id.* (quoting *Hall*, 134 S. Ct. at 2001).

[4] The State does not dispute the third element, onset of adaptive deficits while still a minor.

Adjusting for the standard error of measurement, Mr. Moore's "score range on the WAIS-R [in 1989] [was] between 69 and 79." *Ex parte Moore*, 470 S.W.3d at 519; *see also Moore*, 137 S. Ct. at 1049 (Texas's retained expert also acknowledged this adjustment). The lower end of this range may not be disregarded based on other "factors unique to Moore." *Moore*, 137 S. Ct. at 1049. To the contrary, the Supreme Court held that "the presence of other sources of imprecision in administering the test to a particular individual … cannot *narrow* the test-specific standard-error range." *Id.* (citation omitted; emphasis in original).

"In line with *Hall*," the Supreme Court "require[d] that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* "Because the lower end of Moore's score range falls at or below 70, [this Court] had to move on to consider Moore's adaptive functioning." *Id.* (citing *Hall*, 134 S. Ct. at 2001; *Ex parte Moore*, 470 S.W.2d at 536 (Alcala, J., dissenting) (even if the majority correctly limited the scores it would consider, "current medical standards ... would still require [the Court] to examine whether [Moore] has adaptive deficits")). *See also Brumfield*, 135 S. Ct. at 2278 (relying on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding).

2. Adaptive Functioning

Turning then, as this Court must, to Mr. Moore's adaptive deficits, the Supreme Court held that

> the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.,* AAIDD–11, at 47 [5] ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM–5,[6] at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see *Brumfield*, 576 U.S., at ___, 135 S.Ct., at 2281 ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002))).

Moore, 137 S. Ct. at 1050 (emphasis in original).

The Supreme Court found "considerable objective evidence of Moore's adaptive deficits." *Id.* In particular,

> The evidence revealed that Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school, because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out

[5] AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES ("AAIDD"), INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATIONS, AND SYSTEMS OF SUPPORT (11th ed. 2010).

[6] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

> of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning.

Id. at 1045 (citations to the App. to Pet. for Cert. omitted).

This evidence was confirmed by adaptive functioning testing. "In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical)." *Id.* at 1046 (citing AAIDD–11, at 43). Mr. Moore's and the State's experts agreed that Mr. Moore's adaptive-functioning test scores fell more than two standard deviations below the mean in all three skill categories. *Id.* at 1046 (citing App. to Pet. for Cert. 200a-201a), 1047 (citing *Ex parte Moore*, 470 S.W.2d at 521).

The State advanced four arguments for discounting, offsetting, or disregarding this considerable evidence of adaptive deficits, each of which was rejected in turn by the Supreme Court. First, the Court held that unrelated adaptive strengths do not offset deficits in this inquiry. "[E]ven if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths…." *Id.* at 1050 n. 8.

Second, the State cannot rely on evidence of adaptive strengths from Mr. Moore's incarceration. Rather, clinicians "caution against reliance on adaptive

strengths developed 'in a controlled setting,' as a prison surely is…. see AAIDD–11 User's Guide 20 (counseling against reliance on 'behavior in jail or prison')." *Id.*

Third, the State cannot argue that Mr. Moore's "record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related." *Id.* (citations omitted). Rather, the medical community treats these traumatic experiences as "'risk factors' for intellectual disability." *Id.* (citing AAIDD–11, at 59–60).

> Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination. See [AAIDD-11] at 60 ("[A]t least one or more of the risk factors [described in the manual] will be found in every case of" intellectual disability.).

Id.

Finally, the Supreme Court held that current clinical practice precludes the State from "requiring Moore to show that his adaptive deficits were not related to 'a personality disorder.'" *Id.* at 1051 (citation omitted). To the contrary,

> As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments…. Coexisting conditions frequently encountered in intellectually disabled individuals have been described in clinical literature as "[c]omorbidit[ies]." The existence of a personality disorder or mental-health issue, in short, is "not evidence that a person does not also have intellectual disability."

Id. (citations omitted).

Accordingly, all three of the elements of the current clinical diagnostic standard for intellectually disability were met by Mr. Moore below. As the Supreme Court held, "the habeas court applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty." *Id.* at 1053 (citation omitted). This Court, "by rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseño*, including the wholly nonclinical *Briseño* factors, . . . failed adequately to inform itself of the 'medical community's diagnostic framework.'" *Id.* (quoting *Hall*, 134 S. Ct. at 2000). The Supreme Court therefore held that this Court's decision cannot stand and must be vacated. *Id.* On remand for further proceedings not inconsistent with the Supreme Court's decision, the only consistent ruling left is to find Mr. Moore intellectually disabled and ineligible for the death penalty.

II. THE RULE OF LAW AND FUNDAMENTAL FAIRNESS REQUIRE FOLLOWING THE ROADMAP SET OUT BY THE SUPREME COURT

A. If Texas is to have the death penalty, it must be fair and comport with the rule of law in line with the Supreme Court's standards

Since the founding of this country, our citizens have looked to the courts to be "faithful guardians of the Constitution, where legislative invasions of it ha[ve] been instigated by the major voice of the community," to be "an essential safeguard against the effects of occasional ill humors in the society," and to "mitigate[e] the

severity and confin[e] the operation" of "unjust and partial laws" that cause "injury [to] the private rights of particular classes of citizens." THE FEDERALIST NO. 78, at 468-69 (Alexander Hamilton) (Signet Classics ed., 2003); *see also* Gib Walton, *A Call to Action*, 70 TEX. B.J. 578 (2007) (positing that the "rule of law is based on four fundamental principles," including "[a] fair and accessible legal process in which rights and responsibilities based on th[e] laws are enforced. . . ."). In cases in which "the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution," the courts should be governed by "the fundamental laws, rather than by those which are not fundamental." THE FEDERALIST No. 78, at 466.

Capital punishment is the legislatively-enacted "expression of society's moral outrage at particularly offensive conduct," *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion), but its application is cabined by the Eighth Amendment's prohibitions on "excessive" sanctions and "cruel and unusual punishment," *Atkins*, 536 U.S. at 311 (citing U.S. CONST. amend VIII). These prohibitions antedate the Constitution, *see* Bill of Rights, 1689, 1 W. & M. 2d sess., c. 2 (Eng.) (enacting the English Bill of Rights), and are grounded on "nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

It has long been recognized that any death penalty scheme must be fair and enforce the Eighth Amendment's protections, consistent with the Supreme Court's

guidance. Among those constitutional protections is the prohibition on execution of "*any*" individual with intellectual disability. *Moore*, 137 S. Ct. at 1048 (emphasis in original); *Atkins*, 536 U.S. at 321.

The Texas Legislature has decided that this State will have a death penalty. But the CCA bears the solemn responsibility to ensure that the State's death penalty is fairly, properly, and constitutionally applied, subject to the rule of law, and in accordance with the decisions of the United States Supreme Court.

B. In updating the standard applied in Texas for the determination of intellectual disability in capital cases and following the roadmap that the Supreme Court set out in *Moore*, this Court will take an important step toward administering justice more fairly

This case presents not only the issue of how Texas assesses and determines intellectual disability in death penalty cases, but also the related question of whether Texas administers justice fairly in this context. Even in an era of declining executions, Texas more frequently imposes and carries out capital punishment than most other states. Mark Berman, *Execution in Texas called off as death penalty continues to dwindle nationwide*, WASH. POST, Aug. 23, 2016, available at: https://www.washingtonpost.com/news/post-nation/wp/2016/08/23/execution-in-texas-called-off-as-death-penalty-continues-to-dwindle-nationwide/?utm_term=.7d6773e241d1; Manny Fernandez & John Schwartz, *Confronted on Execution, Texas Proudly Says It Kills Efficiently*, N.Y. TIMES, May 13, 2014, at A1

(reporting the number of executions in Texas and examining citizens' attitudes towards the death penalty).

The Supreme Court's *Moore* decision is emblematic of the Supreme Court's decreased confidence regarding this State's imposition of the death sentence. *See Moore*, 137 S. Ct. at 1051 ("By design and in operation, the *Briseño* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed[.]'") (citing *Hall*, 134 S. Ct. at 1988-89); *see also Buck v. Davis*, 137 S. Ct. 759 (2017) (holding 6-2 in a Texas capital punishment case that defense counsel's performance was ineffective where he presented expert testimony that the defendant was more likely to act violently in the future because of race). The Supreme Court called Texas an "outlier" in its approach to assessing intellectual disability, and highlighted in *Moore* that "scholars and experts have long criticized" the *Briseño* factors. *Moore*, 137 S. Ct. at 1052 & n. 10. Further, this case is the subject of national media attention. *See, e.g.*, Richard Wolf, *Supreme Court blocks Texas execution over disability*, USA TODAY, Mar. 28, 2017, available at: https://www.usatoday.com/story/news/politics/2017/03/28/supreme-court-texas-death-penalty-execution-intellectual-disability/98218248/; Ariane de Vogue, *Supreme Court sides with death row inmate*, CNN, Mar. 28, 2017, available at: http://www.cnn.com/2017/03/28/politics/bobby-james-moore-supreme-court-death-penalty. With the eyes of society thus focused, it is all the more important for

this Court to fully embrace its responsibility to enforce the Constitution and demonstrate Texas's capacity to fairly administer the death penalty.

Enforcing the Constitution requires adopting the roadmap set out by the Supreme Court in *Moore* for applying *Atkins* and *Hall*. Following that roadmap here requires a ruling that Mr. Moore is intellectually disabled and is ineligible for the death penalty.

III. REMAND TO DISTRICT COURT FOR FURTHER PROCEEDINGS IS UNNECESSARY AND WOULD BE HARMFUL TO MR. MOORE

As shown above, the Supreme Court in *Moore* has resolved all relevant legal and factual issues. If the Supreme Court's *Moore* roadmap is properly applied, this Court has no discretion to reach any result other than to determine that Mr. Moore is intellectually disabled and entitled to relief. As a result, further evidentiary proceedings in the habeas court are unnecessary, and remand to that court for further proceedings would be pointless. Remand is unnecessary because the habeas court already applied current medical diagnostic standards for intellectual disability, did not rely on the *Briseño* factors, and made detailed evidentiary fact findings applying the standards of *Atkins* and *Hall*.[7]

Moreover, if this Court were to remand to the district court for additional evidentiary proceedings, the disposition of such proceedings (and related appellate

[7] *See* Feb. 6, 2014 Addendum Findings of Fact & Conclusions of Law on Claims 1-3.

proceedings) could take several years. Such a delay, in and of itself, would be harmful to Mr. Moore. Mr. Moore, now 58 years old, was first sentenced to death over 37 years ago, at the age of 20.[8] For over sixteen years (since April 2001), Mr. Moore has been held almost continuously in "administrative segregation" in the Polunsky Unit.[9] Mr. Moore emphasized, as one element of his state habeas claim that it would be cruel and unusual to execute him after his prolonged period on death row, the isolated conditions he had experienced in administrative segregation on death row in the Polunsky unit: "[I]nmates held in administrative segregation by the Texas Department of Criminal Justice [("TDCJ")] are deprived of even the most basic psychological needs and suffer 'actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity.'"[10] Under the TDCJ's Death Row Plan, a death row segregation inmate must spend approximately 22.5 hours per day alone in his cell and is ineligible for contact visits.[11]

Mr. Moore has been incarcerated in solitary confinement (23 hours per day) since his original conviction in 1980 (which was reversed on habeas review in 1995),

[8] Petition for a Writ of Certiorari, *Moore v. Texas*, U.S. Supreme Court, No. 15-797 (Cert. Pet.), at 8.

[9] Cert. Pet. at 8, *citing* R01825; R01827; R02582-R02597.

[10] Cert. Pet. at 8-9, *citing* R03537-R03538 (citation omitted); *accord* R00209-00210.

[11] Cert. Pet. at 9 n. 4 (citing sources).

and certainly since his re-sentencing to death in 2001.[12] As noted in Applicant's Brief, solitary confinement is especially agonizing for those who are intellectually disabled. *See*, *e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J. L. & POL'Y 325, 345 (2006) (individuals with "borderline cognitive capacities are . . . especially at risk for severe psychopathological reactions" in solitary confinement).

The fundamental fairness of Texas's administration of the death penalty is compromised not only by the wrongful execution of an intellectually disabled individual, but also by the wrongful incarceration on death row of such an individual, in conditions that gravely worsen the very disability that is supposed to disqualify them from the death penalty in the first place. Considering the Supreme Court's *Moore* decision and the procedural posture of this case in light of the psychological trauma of solitary confinement on intellectually disabled individuals, there is no basis to inflict continued death row solitary confinement on Mr. Moore.

Given the Supreme Court's *Moore* decision, Amici respectfully suggest that this Court should rule quickly and avoid unnecessary multi-year proceedings such as those in *Penry* (initially sentenced to death in 1980; plea agreement to avoid death

[12] *Id.* at 8-9.

penalty reached in 2008),[13] and *Panetti* (received on death row on September 25, 1995; habeas proceeding pending in district court following 2007 U.S. Supreme court decision).[14]

[13] *See Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002); *Penry v. State*, 178 S.W.3d 782, 784 (Tex. Crim. App. 2005).

[14] *See Panetti v. Quarterman*, 551 U.S. 930 (2007); *Panetti v. Davis*, 863 F.3d 366, 368-74 (5th Cir. 2017).

CONCLUSION

For the foregoing reasons and the reasons set out in Applicant's Brief on the Merits, this Court should grant Applicant's claim for *Atkins* relief and reform his death sentence to a term of life imprisonment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
TEX. R. APP. P. 9.4(3)

1. This brief complies with the type-volume limitations of TEX. R. APP. P. 9.4 because:

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