No. 18-443

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF OF DONALD B. AYER, BOB BARR, MARK L. EARLEY SR., DAVID A. KEENE, KENNETH W. STARR, LARRY D. THOMPSON, RICHARD A. VIGUERIE, AND THE CONSTITUTION PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are proponents and opponents of the death penalty. Some amici have previously taken oaths of office to protect and defend the United States Constitution. Other amici are private citizens who have long sought to ensure adherence to the rule of law and who file this brief in support of Bobby Moore's claim for relief because of the important issues of Supreme Court authority raised by this case.

Donald B. Ayer served as Deputy Attorney General of the United States from 1989 to 1990, as Principal Deputy Solicitor General from 1986 to 1988, and as United States Attorney for the Eastern District of California from 1981 to 1986.

Bob Barr served as a Member of Congress from 1995 to 2003, representing Georgia's Seventh District. He was also the United States Attorney for the Northern District of Georgia from 1986 to 1990.

Mark L. Earley Sr. served as Attorney General of Virginia from 1998 to 2001 and is former President and CEO of Prison Fellowship USA.

David A. Keene chaired the National Conservative Union for over two decades and is the former Opinion Editor for the *Washington Times*.

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record received timely notice of intent to file this brief. All parties have consented in writing to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

Kenneth W. Starr served as Solicitor General of the United States from 1989 to 1993 and as a Judge for the United States Court of Appeals for the District of Columbia Circuit from 1983 to 1989. He also served as an Independent Counsel in five investigations from 1994 to 1999.

Larry D. Thompson served as the Deputy Attorney General of the United States from 2001 to 2003 and as the United States Attorney for the Northern District of Georgia from 1982 to 1986.

Richard A. Viguerie is the Chairman of *ConservativeHQ.com*.

The Constitution Project (TCP) at the Project On Government Oversight seeks consensus-based solutions to contemporary constitutional issues, including by working to ensure due process in the criminal justice system and bolster the authority of the federal judiciary. TCP is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues. The Project takes no position on the abolition or maintenance of the death penalty. Rather, it focuses on forging consensus-based recommendations aimed at achieving the common objectives of justice for both victims of crimes and for those accused of committing crimes.

SUMMARY OF ARGUMENT

In *Moore v. Texas*, 137 S. Ct. 1039 (2017), this Court rejected the approach taken by the Texas Court of Criminal Appeals to evaluating Bobby Moore's intellectual disability for purposes of determining eligibility for the death penalty. On remand, the State of Texas agreed with all other parties and amici before the CCA that Moore was intellectually disabled under the standard announced in *Moore*. Nonetheless, the CCA disregarded this Court's instruction to apply medical standards and instead resurrected its prior standards in all but name to hold that Moore must be executed.

Because the rule of law demands that this Court's decisions be followed, and because this demand is particularly clear on remand in cases this Court has heard, this Court should vindicate its authority by summarily reversing the CCA.

ARGUMENT

Applying medical standards as required by this Court's prior decision in this very case, Bobby Moore is intellectually disabled. Moore's tested intelligence quotient ("IQ") is within the range for diagnosis of significantly subaverage intellectual functioning, and substantial evidence from throughout Moore's life demonstrates significant deficits in adaptive functioning.

Applying this Court's precedent, it is indisputable that this disability renders Moore categorically ineligible for the death penalty. As the Harris County Prosecutor's Office, speaking for the state of Texas, conceded on remand, "based on the findings of the habeas court, the clear import of the Supreme Court's decision in *Moore*, and [] review of the applicable standards of the DSM-5, . . . Moore is intellectually disabled, cannot be executed, and is entitled to *Atkins* relief." Respondent's Brief, *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018). Yet the Texas Court of Criminal Appeals ("CCA") once again held that Moore must be executed.

The decision below is irreconcilable with this Court's previous decision and reflects a disturbing disregard for the binding authority of that decision. One need not agree with the Court's prior holding in this case, or with the Court's death penalty jurisprudence more generally, to recognize that the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)).

The CCA's disregard of this Court's prior decision is untenable, and this Court should summarily reverse.

I. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRIOR DECISION.

Intellectually disabled individuals are constitutionally ineligible for the death penalty under the Eighth Amendment. *See Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017); *see also Hall v. Florida*, 572 U.S. 701, 704, 708 (2014); *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). This Court has reasoned that executing such individuals is inconsistent with any penological purpose, and that "some characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317, 319-20. Accordingly, the execution of such individuals is "cruel and unusual." *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Although several states, including Texas, still permitted executions of individuals with intellectual disabilities at the time of *Atkins*, no state purports to do so today.

Recognizing the challenge of "determining which offenders are in fact [disabled]," *Atkins* and its progeny have clarified how courts are to make this determination, with the importance of medical standards a consistent theme. *See Atkins*, 536 U.S. at 317 & n.22 (explaining that while relevant state definitions were "not identical," they "generally conform[ed] to the clinical definitions set forth" by medical associations); *Hall*, 572 U.S. at 710

(highlighting the importance of being "informed by the work of medical experts in determining intellectual disability").

In its prior review of this case, this Court yet again emphasized the importance of medical standards to inform evaluations of intellectual disability. *See Moore*, 137 S. Ct. at 1053 (clarifying that "[t]he medical community's current standards supply [a] constraint on States' leeway in this area"). Those standards compelled a finding in this case that Moore is intellectually disabled, as even the District Attorney's Office that prosecuted Moore recognized. In concluding otherwise, the CCA—instead of a good-faith effort to apply this Court's holding—relied on factors this Court rejected, and ignored the consensus of the habeas court, the Harris County District Attorney, and all parties and amici before the CCA.

A. The CCA Ignored This Court's Repeated Emphasis on Medical Standards and Relied on Lay Stereotypes the Supreme Court Has Repeatedly Rejected.

In *Atkins* and subsequent cases addressing the availability of the death penalty for individuals with intellectual disabilities, this Court has made clear that decisions must turn on accepted medical authorities rather than lay stereotypes of intellectual disability. As implied by *Atkins*, *Hall*, and *Brumfield* and as made explicit in this Court's prior review of this case, "[e]ven if the views of medical experts do not dictate a court's intellectual-disability determination, . . . the determination must be informed by the medical community's

diagnostic framework." *Moore*, 137 S. Ct. at 1048 (internal quotation marks omitted).

In *Atkins* itself, the Court's holding was premised in part on "clinical definitions of mental retardation." 536 U.S. at 318. Based on these definitions, the Court noted that, by definition, "some characteristics of [intellectual disability] undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* at 317. *Atkins*' reasoning, then, turned on the use of clinical standards for intellectual disability to determine which individuals would be protected by its ruling.

Building on this, *Atkins*' progeny have conclusively rejected reliance on lay stereotypes to define intellectual disability. *Hall*, 572 U.S. 701, rejected Florida's approach to identifying intellectual disability in the death penalty context precisely for its lack of scientific basis. *See* 572 U.S. at 712 ("Florida's rule disregards established medical practice in two interrelated ways."). *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), similarly rejected a state trial court's factual determinations as unreasonable when they departed from clinical standards. *See id.* at 2277-81.

When Moore's habeas petition was initially reviewed by the CCA, that court had the benefit of *Atkins*, *Hall*, and *Brumfield*. Indeed, the CCA decision came several months after *Brumfield* expressly noted that in evaluating intellectual disability, the "relevance of [a personality disorder] diagnosis is [] unclear, as an antisocial personality is not inconsistent with . . . intellectual disability."

135 S. Ct. at 2280. Despite this guidance, the CCA reversed the habeas court because the habeas court applied clinical standards instead of the factors developed by the CCA in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), to distinguish between a personality disorder and an intellectual disability. *Ex parte Moore*, 470 S.W.3d 481, 486-87 (Tex. Crim. App. 2015) ("*Ex parte Moore I*").

As the dissent from the CCA's decision noted, even at the time, this Court's jurisprudence left little room for the non-clinical *Briseno* factors. *Ex parte Moore I*, 470 S.W.3d at 536-37 (Alcala, J., dissenting) ("The *Briseno* analysis . . . makes Texas's determination of intellectual disability unconstitutional because, as observed by the Supreme Court in *Atkins* and *Hall*, any such assessment should be informed by the current diagnostic standards.") The CCA's majority, however, rejected that conclusion. Applying the *Briseno* factors, the majority determined that Moore was not intellectually disabled. *Id.* at 527-28.

This Court granted Moore's petition for certiorari and vacated the CCA's opinion, with the majority and dissent in agreement that *Briseno*'s stereotypes had no place in the analysis. *Moore*, 137 S. Ct. at 1044 ("Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors . . . may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled."); *Id.* at 1053 (Roberts, C.J., dissenting, jointed by Thomas, J., and Alito, J.) ("I agree with the Court today that [the *Briseno*] factors are an unacceptable method of enforcing the guarantee of *Atkins*, and that the CCA

therefore erred in using them to analyze adaptive deficits."). The Court noted that its decisions since *Atkins* "cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus" regarding the diagnosis of intellectual disability. *Moore*, 137 S. Ct. at 1044.

On remand, the CCA dutifully acknowledged that the Supreme Court had roundly rejected the *Briseno* factors as "merely advanc[ing] lay stereotypes of the intellectually disabled." *Ex parte Moore*, 548 S.W.3d 552, 559 (Tex. Crim. App. 2018) ("*Ex parte Moore II*"). The opinion also acknowledged that, according to this Court, the CCA's prior opinion had been "wrong to suggest that adaptive deficits in certain areas could be offset by strengths in unrelated areas," and it purported to adopt the DSM-5 as Texas's "approach to resolving the issue of intellectual disability." *Id.* at 559-60.

Yet the remainder of the opinion revealed these quotes to be little more than window dressing. While asserting that it was no longer applying the *Briseno* factors, the CCA nonetheless grounded its analysis in precisely the facts that it had found determinative under *Briseno*, and used them to reach precisely the same conclusion:

- *Briseno* asked if "the person [has] formulated plans and carried them through." *Ex parte Moore II*, 548 S.W.3d at 556. The CCA opined that Moore's crime "indicate[d] a level of planning and forethought." *Id.* at 572.
- *Briseno* asked if the individual's "conduct show[s] leadership." *Id.* at 556. The CCA opined

that Moore "was capable of influencing others." *Id.* at 570.

- *Briseno* asked if the person "respond[s] coherently, rationally, and on point to oral or written questions." *Id.* at 556-57. The CCA opined that Moore's "testimony was coherent" and "showed that he could conceptualize what was being asked." *Id.* at 564.

It is difficult to read the CCA's opinion on remand without seeing it as a repackaging of the CCA's rejected *Briseno* analysis.

Furthermore, notwithstanding this Court's warning against "overemphasiz[ing] [Moore's] behavior in prison" in the analysis, *id.* at 559, the CCA did just that. It began its analysis of Moore's language skills with its observation that during his years "in prison, [Moore] progressed from being illiterate to being able to write at a seventh-grade level." *Id.* at 565. Nine of the CCA's twelve paragraphs about Moore's math skills are about Moore's orders from the prison commissary. *Id.* at 566-69. And the CCA's analysis of Moore's learning ability and social skills also rely heavily on Moore's behavior in prison. *Id.* at 569-71.

This Court has already found that the CCA's first opinion in this case was "irreconcilable" with the Court's prior precedents, *Moore*, 137 S. Ct. at 1049, yet on remand the CCA effectively reasserted the same approach, in apparent disregard of this Court's prior holding. Such disregard for this Court's binding authority is impermissible, and calls for swift correction.

B. Moore Is Ineligible for the Death Penalty Under the Standard Established By This Court.

Applying the standard that this Court established when it heard this case the first time yields only one conclusion: Moore is intellectually disabled and constitutionally ineligible for the death penalty.

"[T]he medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall*, 572 U.S. at 710; see also *Moore*, 137 S. Ct. at 1045. The third of these criteria, onset during the developmental period, is undisputed for Moore. This Court's prior opinion reflects that the other two criteria are satisfied as well: The Court acknowledged that Moore's IQ, "adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore*, 137 S. Ct. at 1050. The Court also acknowledged the "considerable objective evidence of Moore's adaptive deficits[.]" *Id.* The logical conclusion is that Moore satisfies the standards for intellectual disability. To reach the opposite conclusion, the CCA had to ignore the consensus of the Texas habeas court, the prosecutor's office, and numerous amici.

First, the CCA had to again reject the findings of the state habeas trial court. In 2014, following two days of testimony from family, prison officials, and experts, the habeas court concluded that Moore had

established that he had an intellectual disability based on medical standards, and that he was therefore entitled to have his death sentence commuted. *See Ex parte Moore I*, 470 S.W.3d at 485. Under Texas law, the CCA "defer[s] to and accept[s] a trial judge's findings of fact and conclusions of law when they are supported by the record." *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). This rule is based on the common-sense observation that, because he is "[u]niquely situated to observe the demeanor of witnesses first-hand, the trial judge is in the best position to assess the credibility of witnesses." *Id.* In its initial review of the habeas court's decision, the CCA rejected it precisely because of the habeas court's decision to rely on medical standards rather than the *Briseno* factors. *Ex parte Moore I*, 470 S.W.3d at 486. That rationale was rejected by this Court, yet on remand the CCA again declined to grant deference to the habeas court's findings, concluding that "a vast array of evidence in this record is inconsistent with a finding of intellectual disability." *Ex parte Moore II*, 548 S.W.3d at 555.

That conclusion, however, was inconsistent with the Supreme Court's prior opinion in this case, which discussed the habeas court's analysis favorably, noting that it had "applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty." *Moore*, 137 S. Ct. at 1053. This Court also noted that "the CCA overemphasized Moore's perceived adaptive strengths," an approach inconsistent with "the medical community['s] focus[ing] the adaptive-functioning inquiry on

adaptive *deficits*." *Id.* at 1050. This Court thus expressly disapproved the CCA's reliance on the very evidence to which the CCA on remand complained the habeas court had given insufficient weight.

The CCA's decision on remand was even contrary to the position of the prosecution. Prior to the Supreme Court's decision in this case, the state of Texas consistently maintained that Moore was eligible for the death penalty. Yet on remand, the state of Texas reversed course. The Harris County District Attorney, speaking on behalf of the state of Texas, concluded that "based on the findings of the habeas court, the clear import of the Supreme Court's decision in *Moore*, and [] review of the applicable standards of the DSM-5, . . . Moore is intellectually disabled, cannot be executed, and is entitled to *Atkins* relief." Respondent's Brief, at 27-28, *Ex parte Moore*, 548 S.W.3d 552. In reaching this conclusion, the prosecutor's office applied the exact medical standard the CCA later claimed to adopt in its own analysis, the DSM-5.

Harris County prosecutors are no strangers to pursuing the death penalty. In fact, Harris County has for decades generated a disproportionate number of death sentences and executions. From 1976 to 2010, "Harris County . . . sentenced more people to die that subsequently were executed (115) than any *state* except (obviously) Texas." Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 238 n.61 (2012). The state's change of heart in Moore's case, then, is a particularly strong indication that this Court's

prior opinion mandated a finding of intellectual disability.

This conclusion, moreover, was unanimously echoed by every amicus entity before the court, including several prominent medical associations. *See* Brief of *Amici Curiae* American Psychological Association, American Psychiatric Association, American Academy of Psychiatry and the Law, National Association of Social Workers, and National Association of Social Workers Texas Chapter in Support of Applicant, at 22, Ex parte Moore, 548 S.W.3d 552.

In short, not a single entity before the CCA on remand maintained that Moore was not intellectually disabled, reflecting the indefensibility of the CCA's conclusion.

II. TO UPHOLD THE RULE OF LAW, THIS COURT MUST SUMMARILY REVERSE.

The clear error committed by the CCA is reason enough for summary reversal, especially when what is at stake is "the gravest sentence our society may impose." *Hall*, 572 U.S. at 724. But the need to ensure respect for this Court's authority provides an equally compelling reason for summary reversal.

A. This Court's Role Is to Provide Finality and Uniformity.

The United States Constitution establishes "one supreme Court." Art. III, § 1. The Supreme Court has the final authority to ensure that the Constitution and federal laws are interpreted uniformly and applied consistently across the country. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (explaining "the

importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution"). To serve these purposes, the duty of other courts to follow the Supreme Court's precedents is absolute. As this Court has noted, "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Ordinarily there is little need for this Court to actively police the lower courts' adherence to this Court's decisions, because the lower courts readily recognize this Court's authority. As the D.C. Circuit recently explained, "[v]ertical stare decisis—both in letter *and in spirit*—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (emphasis added). *See also Bormuth v. Cty. of Jackson,* 870 F.3d 494, 520 (6th Cir. 2017) (Rogers, J., concurring) ("A lower federal court should decide the same way as an unsuperseded holding of the U.S. Supreme Court. . . . [W]hen there is argument as to whether facts are materially distinguishable, we look to the reasoning of the majority Justices to see what facts and reasoning led to the majority holding."); *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court decisions.").

The same principle holds throughout our judiciary, where "[i]nferior courts are absolutely bound to follow the decisions of [appellate] courts" because "precedents set by the higher courts are imperative in the strictest sense." Henry Campbell Black, *The Law of Judicial Precedents* 10 (1912). *See also United States v. Andrews*, 77 M.J. 393, 399 (2018) ("[C]ourts must strictly follow the decisions handed down by higher courts.") (internal quotation marks omitted); Bryan A. Garner, et. al., *The Law of Judicial Precedent* 27 (2016) ("Federal and state courts are absolutely bound by vertical precedents."); *In re Arway*, 227 B.R. 216 (Bankr. W.D.N.Y. 1998) ("No inferior court may ignore clear higher authority that itself has not been foreclosed by yet higher authority.").

This case is no exception. The CCA had an absolute duty to ensure its proceedings on remand were consistent with this Court's opinion. Its failure to do so and its application of a standard rejected by this Court are inconsistent with the rule of law under our federal system.

B. This Court Takes Particular Interest in Ensuring That Its Rulings Are Respected on Remand From Its Decisions.

Following this Court's precedents is incumbent on lower courts in every case. But the importance of this duty is particularly apparent in cases on remand from this Court. Indeed, "[w]hen a case has once been decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. . . . [U]pon a new

appeal it is for this court to construe its own mandate, and to act accordingly." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895). For this reason, the Court not infrequently grants review of a case again after remand. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231 (2005) (reversing the Fifth Circuit's decision on remand from the Supreme Court's prior opinion in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)); *Smith v. Texas*, 550 U.S. 297 (2007) (reversing the Texas CCA's decision on remand from the Supreme Court's prior opinion in *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam)). Cases already heard by the Supreme Court are also prominently represented among the Court's summary reversals. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1, 45-46 (2015).

The logic behind this special interest is apparent. Binding authority over the actual parties to the case is inherent in the "judicial authority" given this Court by Article III. Not even this Court's co-equal branches of government, working in concert, has the authority to dictate outcomes in particular cases decided by this Court. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). If the notion of a Supreme Court is to mean anything, it must at a minimum mean a court with the authority to ensure adherence to its decisions in the cases before it.

Further, the reasons this Court ordinarily avoids summary reversal apply with greatly reduced force in this context. On the one hand, the practical barriers to widespread merits review of individual cases are greatly reduced in cases this Court has already heard, because the Court will already have

familiarized itself with the facts and legal issues in a way that is not possible for the thousands of cases annually in which certiorari petitions are filed. On the other, a lower court's decision on remand to disregard this Court's ruling poses a heightened threat to the rule of law and the authority of this Court.

Perceived lack of seriousness of Supreme Court rulings has troubling implications for the rule of law. Indeed, consistency and predictability are frequently cited as core aspects of the rule of law. *See, e.g.*, Friedrich A. Hayek, *The Road to Serfdom* 72 (1972) ("Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances."). If this is to be "a government of laws, and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), a court applying an admittedly binding precedent cannot be permitted to rule in a manner manifestly contrary to that precedent. Quoting a Supreme Court decision highlighting the errors made by the CCA in its previous review of this case, but proceeding to make those same errors on remand, is inimical to the rule of law.

CONCLUSION

For the foregoing reasons, Moore's request that the decision below be summarily reversed should be granted.

Respectfully submitted,

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