

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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BOBBY JAMES MOORE,  
*Applicant,*

*v.*

TEXAS,  
*Respondent.*

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**APPLICATION TO THE HON. SAMUEL A. ALITO, JR.  
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE  
A PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF TEXAS**

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Bobby James Moore hereby moves for an extension of time of 60 days, up to and including November 3, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Texas Court of Criminal Appeals dated June 6, 2018 (attached as Appendix A). This Court has jurisdiction under 28 U.S.C. § 1257(a).

1. The date within which a petition for a writ of certiorari would be due, if not extended, is September 4, 2018. This application is being filed more than 10 days before that date.

2. This case presents the question whether the decision of the Texas Court of Criminal Appeals (“CCA”) conflicts with this Court’s prior decision in this case. *See Moore v. Texas*, 137 S. Ct. 1039 (2017). It also raises important and

recurring questions about the application of current medical and clinical standards regarding intellectual disability in the capital context.

3. In 1980, Moore was convicted of capital murder and sentenced to death for his role in the botched robbery of a grocery store in Houston, Texas. In 2003, in the wake of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Moore applied for state habeas relief in Texas and raised the claim that he is intellectually disabled and may not be executed consistent with the Eighth Amendment. The state habeas court conducted an extensive evidentiary hearing, considered current medical standards, and held in a 2015 decision that Moore is intellectually disabled and hence ineligible for execution. *Ex Parte Moore*, No. 314483-C (185th Dist. Ct., Harris Cty. Feb. 6, 2015). The court found that Moore satisfies the governing three-part framework for an intellectual disability determination: (1) significant limitations in intellectual functioning; (2) deficits in adaptive functioning; and (3) onset before age 18.

4. The CCA reversed, holding that the state habeas court “erred” by applying current medical standards. *Ex Parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). The CCA concluded that Moore failed to prove deficits in intellectual functioning and adaptive functioning. *Id.* at 514, 520. It further held that “consideration of the *Briseno* evidentiary factors”—a set of nonclinical factors embodying lay stereotypes about the intellectually disabled—“weighs heavily against a finding” of intellectual disability. *Id.* at 526–27.

5. This Court granted certiorari and vacated the CCA’s decision. *Moore v. Texas*, 137 S. Ct. 1039 (2017). Explaining that the state habeas court “consulted current medical diagnostic standards,” the Court emphasized that “[t]he evidence revealed that Moore had significant mental and social difficulties beginning at an early age.” *Id.* at 1045. Among other things, “[a]t 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.” *Id.* On the first prong of the intellectual-disability analysis, this Court held that Moore’s IQ tests established the necessary limitations in intellectual functioning and that the CCA’s contrary conclusion was “irreconcilable with *Hall [v. Florida]*, 134 S. Ct. 1986 (2014).” *Moore*, 137 S. Ct. at 1049. On the second prong, this Court held that “[t]he CCA’s consideration of Moore’s adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply”; the Court emphasized the “considerable objective evidence of Moore’s adaptive deficits” and rejected the CCA’s “overemphasi[s] [of] Moore’s perceived adaptive strengths,” the CCA’s reliance on Moore’s “improved behavior in prison,” and the CCA’s application of an insuperable “relatedness” element untethered to current medical standards. *Id.* at 1050–51. Finally, the Court unanimously rejected the CCA’s use of the nonclinical *Briseno* factors. *Id.* at 1051; *id.* at 1053 (Roberts, C.J., joined by Thomas & Alito, J.J., dissenting). The Court vacated the CCA’s judgment and remanded for “further proceedings not inconsistent with this opinion.” *Id.* at 1053.

6. On remand, both Moore and the State agreed, in separate submissions to the CCA, that Moore is intellectually disabled and that the Eighth Amendment thus prohibits his execution. Despite the agreement by the parties regarding the proper disposition on remand, the CCA held in a 5-3 decision that Moore is not intellectually disabled and may be executed. *Ex Parte Moore*, 548 S.W.3d 552 (Tex. Ct. Crim. App. 2018). The CCA first acknowledged that, consistent with this Court’s decision, Moore had demonstrated significant limitations in intellectual functioning, thereby satisfying the first part of the intellectual disability test. *Id.* at 562. But, on the second prong, the CAA held that Moore “failed to demonstrate adaptive deficits sufficient to support a diagnosis of intellectual disability.” *Id.* at 555. In concluding that Moore had not established sufficient deficits in adaptive functioning, the CCA again highlighted his purported strengths—including that he formerly “had a girlfriend . . . and . . . played pool, dice, and dominoes with peers”—as well as his alleged development of skills during his thirty-eight years in prison. *Id.* at 563–71.

7. Three judges dissented. The dissent first emphasized that this Court’s prior decision “has already effectively determined that [Moore] meets the requirements for intellectual disability so as to preclude his eligibility for execution under *Atkins*.” *Id.* at 574 n.5 (Alcala, J., dissenting). The dissenting judges then explained that the CCA majority “set forth an unconstitutional standard for intellectual disability that continues to permit consideration of wholly subjective, non-clinical factors and stereotypes about intellectually disabled people that lack

any basis in the medical criteria.” *Id.* at 585. “[D]espite [the majority’s] contention that it is applying a new constitutionally compliant standard for evaluating adaptive deficits,” the dissent emphasized, the CCA’s majority opinion “in practice[] continues to apply the essence of the *Briseno* standard that was flawed due to its departure from accepted scientific practices for diagnosing intellectual disability.” *Id.* at 600. The dissent then identified several ways in which the CCA majority’s analysis “fails to comport with current standards,” including that it “permits the weighing of adaptive strengths against evidence of deficits; permits consideration of a defendant’s optimal or atypical performance; requires a defendant to satisfy a non-clinical ‘relatedness’ inquiry; affords undue weight to evidence of a defendant’s functioning while incarcerated; and fails to afford adequate importance to the role of standardized assessments in the evaluation of adaptive behavior.” *Id.*

8. This case presents an important question about the CCA’s consistency with—and adherence to—this Court’s decisions. Clarifying and reiterating the controlling standard, this Court reviewed the evidentiary record, found “considerable objective evidence of Moore’s adaptive deficits,” and highlighted a number of particularly compelling pieces of evidence *Moore*, 137 S. Ct. at 1050. This Court also observed that “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,” and then emphasized that Moore’s adaptive performance “fell roughly two standard deviations below the mean in *all three* skill categories.” *Id.* at 1046. Finally, the Court stressed that the state habeas court—which found

Moore intellectually disabled—properly “consulted current medical diagnostic standards.” *Id.* at 1045. Instead of complying with this Court’s decision in this case, the CCA held that Moore is not intellectually disabled based on nonclinical and inappropriate factors, and that he thus may be executed.

9. This case also presents important and recurring questions regarding the application of current medical standards to intellectual disability determinations. While this Court explained that current medical standards “focus[] the adaptive-functioning inquiry on adaptive *deficits*,” *id.* at 1050, the CCA relied almost exclusively on Moore’s adaptive *strengths* when conducting its analysis, *see Moore*, 548 S.W.3d at 563–72. While this Court noted the medical community’s rejection of reliance on behavior in prison, *Moore*, 137 S. Ct. at 1050, the CCA supported its holding by placing great weight on Moore’s conduct in prison, *Moore*, 548 S.W.3d at 563–69. And while this Court unanimously rejected the “wholly nonclinical *Briseno* factors,” *Moore*, 137 S. Ct. at 1053, the CCA again repeatedly relied on lay stereotypes with no clinical grounding, *see Moore*, 548 S.W.3d at 570–71.

10. Applicant’s Counsel of Record in this case, Clifford M. Sloan, has substantial existing obligations in advance of and near the current due date of the petition. Mr. Sloan is counsel for the petitioner in three certiorari-stage cases with upcoming deadlines: *Segovia v. United States*, No. 17-1463 (docketed Apr. 23, 2018), for which a reply brief will be filed on or before September 12, 2018; *Applied Underwriters Captive Risk Assurance Co. v. Citizens of Humanity, LLC*, No. 18-174

(docketed Aug. 8, 2018), for which a reply brief is scheduled to be filed on or before September 21, 2018; and *Applied Underwriters, Inc. v. Citizens of Humanity, LLC*, No. 18-175 (docketed Aug. 8, 2018), for which a reply brief is scheduled to be filed on or before September 21, 2018. Mr. Sloan also is participating in two complex mediations in federal court: an ongoing mediation in an appeal pending before the U.S. Court of Appeals for the Fifth Circuit; and a mediation in mid-September in a Securities and Exchange Commission enforcement proceeding currently pending in the U.S. District Court for the Central District of California. Additionally, Mr. Sloan is counsel for the defendant in a criminal insider-trading case currently set for trial on October 23, 2018 in the U.S. District Court for the Central District of California. Finally, Mr. Sloan is preparing an amicus brief to be filed by November 5, 2018 in a capital case in the U.S. Court of Appeals for the Third Circuit.

11. An extension of time will not prejudice Respondent.

For the foregoing reasons, Applicant hereby respectfully requests that an extension of time up to and including November 3, 2018 be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Clifford M. Sloan \_\_\_\_\_  
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