No. 18-____

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment and this Court's decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017) prohibit relying on non-clinical criteria and lay stereotypes, rather than current medical standards, to determine whether a capital defendant is intellectually disabled.

2. Whether it violates the Eighth Amendment to proceed with an execution when the prosecutor and the defendant both agree that the defendant is intellectually disabled and may not be executed.

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PETITION FOR A WRIT OF CERTIORARI

In a decision in this case, this Court held that Texas's framework for deciding a capital defendant's claim of intellectual disability violated the Eighth Amendment. *Moore v. Texas*, 137 S. Ct. 1039 (2017). Texas's Court of Criminal Appeals ("CCA") had impermissibly disregarded current medical standards, and instead relied on non-clinical criteria and lay stereotypes to deny the intellectual-disability claim of Bobby James Moore. Accordingly, the Court vacated the CCA's decision and remanded for further proceedings.

On remand, over a vigorous dissent in a closely divided opinion, the CCA ruled again that, in its view, Moore is not intellectually disabled and must be executed. As in its previous decision, and in conflict with this Court's decision, the CCA again relied on non-clinical criteria and lay stereotypes, rather than current medical standards, for its intellectual-disability determination.

The State, which had sought the death penalty for Moore, agreed in its submission to the CCA that Moore is intellectually disabled and that he may not be executed. The CCA, however, rejected the position of both the prosecutor and the defendant and ordered that Moore be executed over both parties' objections.

Notably, moreover, this Court had emphasized the state habeas trial court's well-supported determination that Moore is intellectually disabled, which was based on current medical standards, clinical evidence, and the record in this case. But, as before, the CCA again rejected the state habeas trial court's findings and conclusions (including those highlighted by this Court), just as the CCA rejected the shared

view of the prosecutor and the defendant that Moore is intellectually disabled and may not be executed.

While purporting to comply with this Court's opinion, the CCA's decision did anything but. It even resurrected, in all but name, the substance of the "outlier" non-clinical "*Briseno* factors"—resting on the CCA's lay stereotypes of intellectual disability—that this Court unanimously invalidated as unconstitutional. *Moore*, 137 S. Ct. at 1052. In light of the CCA decision's conspicuous conflict with this Court's opinion in this very case, Moore respectfully requests that the Court grant his petition, summarily reverse the CCA's judgment, and rule that he is intellectually disabled and may not be executed. Alternatively, Moore requests that the Court grant the petition and conduct plenary review.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals under review (App. 1a–108a) is reported at 548 S.W.3d 552. The prior opinion of the Texas Court of Criminal Appeals in this case (App. 109a–234a) is reported at 470 S.W.3d 481. The findings of fact and conclusions of law of the state habeas trial court (App. 235a–311a) are unreported.[1]

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on June 6, 2018. On August 17, 2018, Justice Alito extended the time to file this petition until

[1] "App." refers to the appendix filed with this petition.

October 4, 2018. *See* No. 18A163. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

A. Conviction and Prior Habeas Proceedings

On May 13, 1980, Bobby James Moore was charged with capital murder in Texas state court for fatally shooting a store clerk during a bungled robbery. App. 236a; *see also Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017). He was convicted and sentenced to death. App. 236a. The CCA affirmed Moore's conviction and sentence on direct appeal. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

Following state habeas proceedings, a federal district court granted Moore's habeas petition on the ground that he was deprived of his right to the effective assistance of counsel during his sentencing proceeding. The Fifth Circuit affirmed and ordered the State to give Moore a new punishment proceeding or a sentence less than death. *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999). The State elected

to conduct a new sentencing hearing. App. 236a–237a. Moore again was sentenced to death on February 14, 2001. App. 237a. The CCA affirmed Moore's death sentence. *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004), *cert. denied*, 543 U.S. 931 (2004).

B. Current Habeas Proceedings

On June 17, 2003, Moore filed a habeas petition in Texas state court challenging his resentencing proceeding and death sentence. Among other claims, he asserted that the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002) bar his execution because he is intellectually disabled. R00048–00061.[2]

1. Evidentiary Hearing and the State Habeas Trial Court's Decision

The state habeas trial court conducted a two-day evidentiary hearing on Moore's *Atkins* claim in January 2014. App. 237a. After considering all of the evidence, the state habeas trial court concluded that Moore is intellectually disabled and may not be executed. App. 310a.

In conducting its analysis, the state habeas trial court relied on current medical and clinical standards in the manual published by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the Diagnostic and Statistical Manual of Mental Disorders ("DSM") published by the American Psychiatric Association ("APA"). App. 255a, 310a. It applied the governing three-part standard for find-

[2] Citations to "R" refer to the Clerk's Record in this case, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App.)

ing intellectual disability, which requires (1) deficits in intellectual functioning, (2) deficits in adaptive functioning, and (3) onset of these deficits while still a minor. App. 255a. As to all three, the state habeas trial court found that Moore had established intellectual disability.

As is relevant here, the state habeas trial court explained that an individual has deficits in adaptive behavior when his performance is "approximately two standard deviations below the mean" in "one of the following three types of adaptive behavior: conceptual, social, or practical." App. 308a. It concluded that Moore has adaptive deficits in all three areas. App. 308a–309a. The court catalogued the extensive evidence of Moore's adaptive deficits, including the following:

- At the age of 13, Moore did not understand the "days of the week, months of the year, seasons, standards of measure and telling time." App. 295a.
- Moore failed first grade twice and then failed every grade thereafter (but was "socially promoted" each year) until he dropped out of school in ninth grade. App. 292a–296a.
- In school, Moore was "kept separate from the rest of the class because he couldn't keep up with the work" and was instructed to draw pictures instead of reading with the rest of the class. App. 290a.
- Moore "continued to eat from neighbor[s'] garbage cans" even after becoming sick and being treated for ptomaine poisoning. App. 300a.

- When evaluated by an expert in 2013 and given a test that measures executive functioning, Moore obtained the lowest score that the expert had ever recorded, and a score far below the standard for living independently. App. 284a.

Concluding that Moore had met the operative three-part definition of intellectual disability, the state habeas trial court determined that, in light of *Atkins* and the Eighth Amendment, he may not be executed. App. 311a.

2. The CCA's First Decision

In its first decision, before this Court's review, the CCA rejected the state habeas trial court's recommendation, concluding that Moore is not intellectually disabled and must be executed. App. 113a. At the threshold, the CCA reaffirmed its continued adherence to the "[American Association on Mental Retardation's] 1992 definition of intellectual disability that [it] adopted in [*Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." App. 113a.[3] The CCA faulted the state habeas trial court for using current medical and clinical standards on intellectual disability, rather than two-decades-old superseded standards. For the CCA, it was irrelevant if "the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed." App. 114a. The CCA also reaffirmed the seven explicitly non-clinical factors that it had fashioned in

[3] The American Association on Mental Retardation has been renamed the AAIDD.

Briseno for evaluating intellectual-disability claims by capital defendants (with a reference by the CCA, in its *Briseno* decision, to the fictional character Lennie in John Steinbeck's *Of Mice and Men*, 135 S.W.3d at 6). App. 119a.

Having reaffirmed the central role of *Briseno* in resolving *Atkins* claims, including *Briseno*'s reliance on now-superseded medical standards from 1992, the CCA proceeded to reject the state habeas trial court's determination on Moore's intellectual disability.

First, with regard to the intellectual-functioning prong, the CCA determined that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning." App. 171a. It considered two of Moore's IQ tests (which produced scores of 78 and 74, respectively). App. 181a. Although the standard error of measurement called for treating the scores as a range of plus or minus five points, the CCA rejected the lower end of the range for each test. App. 182a–183a. It thus concluded that Moore had not established deficits in intellectual functioning because he had not shown an IQ of 70 or less. App. 183a.

Second, with regard to the adaptive-functioning prong, the CCA held that Moore had not "proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." *Id.* Emphasizing what it viewed as Moore's purported adaptive skills—primarily those developed in prison—the CCA found that the state habeas trial court "erred to the extent that it . . . considered only weaknesses in [Moore's] functional abilities." App. 120a. The CCA also rejected the opinions of Moore's experts in part on the ground that, in the CCA's view, the

clinicians "applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes." App. 194a. The CCA further opined that, "even assuming for purposes of argument that [Moore's] limitations in academic and social-interaction skills were significant, the record does not support a finding that these deficits were linked to significantly sub-average general intellectual functioning." App. 196a. "Rather," according to the CCA, "the record overwhelmingly supports the conclusion that [Moore's] academic difficulties were caused by a variety of factors," including his abusive home environment, learning disorders, and academic failure. App. 196a–197a.

Finally, the CCA held that its seven non-clinical *Briseno* factors "weigh[ed] heavily" in its determination that Moore's adaptive deficits do not establish intellectual disability. App. 197a–199a.

Judge Alcala dissented. She emphasized that the majority's decision conflicted with current medical and clinical standards by "improperly appl[ying] a strict cutoff based on IQ scores" and by "erroneously appl[ying] unscientific criteria to assess whether a defendant has adaptive deficits." App. 208a–209a.

3. This Court's Reversal

This Court granted Moore's petition for a writ of certiorari and reversed. *Moore*, 137 S. Ct. 1039. The Court reiterated that a court's intellectual-disability determination "must be 'informed by the medical community's diagnostic framework'" and emphasized that a court may not "disregard . . . current medical standards." *Id.* at 1048–49 (quoting *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014)). The Court then held

that "[b]y rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly non-clinical *Briseno* factors, the CCA failed adequately to inform itself of the 'medical community's diagnostic framework.'" *Id.* at 1053 (quoting *Hall*, 134 S. Ct. at 2000); *see also id.* ("Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand."); *id*. at 1060 (Roberts, C.J., dissenting) ("the *Briseno* factors" are "incompatible with the Eighth Amendment").

With regard to the first prong (intellectual-functioning), the Court held that "[t]he CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*." *Id.* at 1049. The Court explained that a court "must account for [an IQ] test's 'standard error of measurement.'" *Id.* (quoting *Hall*, 134 S. Ct. at 1995, 2001) The Court rejected the CCA's dismissal of the lower end of the range of Moore's IQ scores, which had no scientific basis and rested on the CCA's own assumptions. *Id.* Because the lower end of Moore's range on his 74 score fell below 70, the CCA "had to move on to consider Moore's adaptive functioning." *Id.*

As to the second prong (adaptive functioning), the 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." *Id.* at 1050. This Court stressed Moore's "significant mental and social difficulties beginning at an early age" and the "considerable objective evidence of Moore's adaptive deficits," emphasizing as well that "Moore's [adaptive] performance fell roughly two standard deviations be-

low the mean in *all three* skill categories." *Id.* at 1045–46, 1050. The Court then explicated four principal errors that the CCA had made when evaluating Moore's adaptive functioning.

First, the Court found that the CCA "overemphasized Moore's perceived adaptive strengths." *Id.* at 1050. Noting that the CCA "recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money," the Court rejected the CCA's conclusion that those purported strengths "constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits." *Id.* "[T]he medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.*

Second, the Court explained that the CCA improperly "stressed Moore's improved behavior in prison" when analyzing his supposed adaptive strengths. *Id.* "Clinicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.* (citation omitted).

Third, the Court rejected the CCA's imposition of an onerous "relatedness" requirement under which an individual must prove that his adaptive deficits are not related to myriad causes besides his intellectual functioning. *Id.* at 1051. The Court first noted that the alternative causes cited by the CCA—including "Moore's record of academic failure, along with the childhood abuse and suffering he endured"—are "'*risk factors*' *for* intellectual disability" that cannot be used to "counter the case for a disability determination." *Id.* (citation omitted). Explaining that "many intellectually disabled people also have other mental or physical impairments," the

Court also rejected the CCA's requirement that Moore "show that his adaptive deficits were not related to 'a personality disorder.'" *Id.* (citation omitted). The Court emphasized that "[t]he existence of a personality disorder or mental-health issue . . . is 'not evidence that a person does not also have intellectual disability,'" *id.* (quoting Brief of American Psychiatric Association et al. as Amici Curiae Supporting Petitioner at 19, *Moore v. Texas* (No. 15-797)); "[c]oexisting conditions frequently encountered in intellectually disabled individuals have been described in clinical literature as '[c]omorbidit[ies]," *id.* (quoting Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 40 (5th ed. 2013) [hereinafter "DSM-5"]).

Fourth, the Court unanimously held that the CCA's use of the *Briseno* evidentiary factors violated the Eighth Amendment. *Id.* at 1051–52; *see also id.* at 1053 (Roberts, C.J., dissenting, joined by Thomas & Alito, J.J.). The *Briseno* factors are "an invention of the CCA untied to any acknowledged source" that impermissibly embody "lay perceptions of intellectual disability." *Id.* at 1051. They reflect unacceptable "lay stereotypes of the intellectually disabled." *Id.* at 1052.[4]

The Court vacated the judgment of the CCA and remanded the case "for further proceedings not inconsistent with this opinion." *Id.* at 1053.

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[4] The Court noted that the third element of the intellectual-disability standard—age of onset—"is not at issue here." *Id.* at 1045 n.3.

4. The CCA's Decision on Remand

On remand, the State filed a brief in the CCA agreeing that Moore is intellectually disabled and may not be executed. *See* Respondent's Brief at 27–28, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2007) ("[B]ased on the findings of the habeas court, the clear import of the Supreme Court's conclusions in *Moore*, and our review of the applicable standards of the DSM-5, the Harris County District Attorney's Office agrees that Moore is intellectually disabled, cannot be executed, and is entitled to *Atkins* relief."). Despite the parties' consensus, and despite this Court's decision, the CCA ruled in a 5-3 decision that Moore is not intellectually disabled and must be executed. App. 2a–3a & n.6.

Acknowledging that, under this Court's decision, Moore had shown deficits in intellectual functioning, App. 16a, the CCA focused on adaptive functioning. Yet again training its sights on Moore's purported adaptive strengths despite this Court's holding and admonition against doing exactly that, the CCA decided that, in light of its view of Moore's strengths, "the level of [his] adaptive functioning was too great to support an intellectual-disability diagnosis." App. 18a–19a. The CCA likewise extensively relied on Moore's purported adaptive strengths developed while incarcerated, App. 19a–34a, again despite this Court's explicit holding and admonition to the contrary.

As in its previous decision, the CCA also once again relied extensively on its own lay judgments and stereotypes to dismiss evidence of Moore's adaptive deficits. *See, e.g.*, App. 30a, 33a, 35a (emphasizing, as reasons that Moore is not intellectually disabled,

that he once had "a girlfriend"; that he once had a job at a restaurant; that he had mowed lawns; that he had played pool; and that he had survived on the streets after being thrown out of his house); App. 36a (asserting the CCA's view that "a hungry child of normal or slightly below normal intelligence could also ignore the risk of getting sick [from eating food in trash cans] because of the immediate need for food"); App. 28a–29a (suggesting reasons why errors in Moore's commissary forms might not actually have been errors); App. 34a–35a (concluding that Moore was not a "follower" or "impressionable" because of his "willingness to stand up to authority in prison," which is "one trait that the prison environment would be expected to suppress"); App. 37a–38a (speculating that Moore was "malingering" on standardized adaptive-functioning tests and "view[ing] with extreme skepticism one test resulting in the lowest score the examiner has ever recorded," even though no expert, including the State's expert, made any finding of "malingering" regarding that test).

At the same time, the CCA entirely ignored significant clinical evidence of intellectual disability in the record that both this Court and the state habeas trial court had emphasized. For example, like the state habeas trial court, this Court highlighted the clinical evidence that, "[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." *Moore*, 137 S. Ct. at 1045. The CCA, however, never even mentioned, much less addressed, this critical evidence. Similarly, in relying on the state's expert

(and rejecting the three defense experts who supported a finding of intellectual disability), the CCA never acknowledged that the state expert's opinion explicitly relied on the unconstitutional *Briseno* framework. *See, e.g.*, JA 163–64;[5] *see also* App. 106a–107a (Alcala, J., dissenting) (noting state expert's reliance on *Briseno* framework).

The CCA, moreover, again imposed an extremely exacting "relatedness" requirement, again faulting Moore for not conclusively showing that any of his adaptive deficits were *not* related to factors besides intellectual functioning. *See, e.g.*, App. 33a (concluding that Moore had not established that evidence of his deficits in social skills "was related to any deficits in general mental abilities" and instead asserting that "the cause was 'most likely emotional problems'"); App. 36a (finding "nothing to suggest that any failure by [Moore] to get a job would be related to intellectual deficits").[6]

Three judges vigorously dissented from the CCA's ruling. They objected that "the majority's analysis fails to comport with current medical standards, the Supreme Court's holding in *Moore*, and ultimately,

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[5] "JA" refers to the joint appendix filed with this Court in the previous proceeding in this case, *Moore v. Texas*, No. 15-797.

[6] The CCA invoked the DSM-5 for support for its onerous relatedness requirement, App. 11a–12a, while failing to address (or even acknowledge) the very different explanation of the relatedness requirement provided by the APA, which is responsible for the DSM-5. *See, e.g.*, Brief of American Psychiatric Association et al. as Amici Curiae Supporting Petitioner at 8–9, *Moore v. Texas* (No. 15-797); *see also* Brief of American Psychiatric Association et al. as Amici Curiae Supporting Applicant at 15–17, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2017).

the requirements of the Eighth Amendment." App. 44a. They further explained that the CCA's decision relies on "wholly subjective, non-clinical factors and stereotypes about intellectually disabled people that lack any basis in the medical criteria." App. 65a. They stressed that the CCA's approach was "eerily reminiscent of the seven *Briseno* factors that were held to be unconstitutional by the Supreme Court," and that "[t]he majority opinion's stereotyped view of the intellectually disabled as having to be entirely non-functional people has no place in the current medical diagnostic framework." App. 97a.

The dissenting judges emphasized that the CCA's framework for evaluating claims of intellectual disability by capital defendants, like the CCA's previous standard, "fails to comport with current [medical] standards because," among other things, "it permits the weighing of adaptive strengths against evidence of deficits"; "requires a defendant to satisfy a non-clinical 'relatedness' inquiry"; and "affords undue weight to evidence of a defendant's functioning while incarcerated." App. 96a. The dissenters found that, in light of current medical standards and the record in this case, Moore is intellectually disabled and may not be executed. App. 40a–41a. The dissenters also observed that this Court's decision regarding the controlling legal principles and the record in this case "already effectively determined that [Moore] meets the requirements for intellectual disability so as to preclude his eligibility for execution under *Atkins*." App. 41a n.5.

REASONS FOR GRANTING THE WRIT

This Court's prior decision in this case found unconstitutional Texas's use of lay stereotypes and non-clinical criteria, rather than current medical standards, to deny the intellectual-disability claim of capital defendant Bobby James Moore. On remand, the CCA again relied on lay stereotypes and non-clinical criteria—in many instances, *the very same factors it had previously used before this Court's rejection of them*. It also again contradicted current medical standards to reject Moore's intellectual-disability claim. And it relied on lay stereotypes and non-clinical criteria to deny the claim even though the only other party in the case—the prosecutor—now agrees that Moore is intellectually disabled and may not be executed consistent with the Eighth Amendment. While the CCA stated in its decision on remand that it was changing its standard, its analysis and holdings are essentially the same as those repudiated by this Court. As with its previous decision, the CCA's decision reasserting its rejected views violates the Eighth Amendment and would impermissibly command the execution of an individual who is intellectually disabled.

I. The CCA's Decision Relies on Lay Stereotypes and Non-Clinical Criteria, Rather Than Medical Standards, and Is Inconsistent With This Court's Decision.

The CCA's decision flouts this Court's decision, conflicts with medical standards, and distorts the clinical record in this case to re-impose its previous conclusion. Five principal flaws permeate the CCA's decision and highlight its inconsistency with this

Court's decision. All five relate to the CCA's reliance on lay stereotypes and non-clinical evidence, rather than clinical standards.

The CCA's insistence that Moore be executed despite his intellectual disability violates the Eighth Amendment and raises, again, the specter that Texas's standard unconstitutionally will permit the execution of those with "mild" intellectual disability even though "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders." *Moore*, 137 S. Ct. at 1051.

A. The CCA Relied on Lay Stereotypes and Non-Clinical Criteria.

Despite this Court's rejection of the CCA's reliance on "lay stereotypes of the intellectually disabled," *Moore*, 137 S. Ct. at 1052, the CCA's decision is rife with renewed reliance on its own lay stereotypes. This reliance includes stereotypes that the CCA had used in its previous decision, and it includes factors that are "eerily reminiscent of the seven *Briseno* factors," App. 97a (Alcala, J., dissenting).

For example, the CCA emphasized, as its evidence of an absence of intellectual disability, that Moore once had a girlfriend; that he once had a menial job at a restaurant; that he survived on the streets; and that he knew how to play pool. App. 30a, 33a, 35a. These, however, are among the very stereotypes explicitly rejected by this Court. *See, e.g.*, *Moore*, 137 S. Ct. at 1050 (rejecting the CCA's reliance on the fact that "Moore lived on the streets, mowed lawns, and played pool for money" as a basis for denying his intellectual-disability claim); *id.* at 1047 (similar); *id.*

at 1052 ("[T]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled.").

Indeed, the CCA's comments in invoking its lay stereotypes include language identical or very similar to the *Briseno* factors unanimously repudiated by this Court. *Compare, e.g.*, App. 34a (CCA's statement on remand that Moore "influences others and stands up to authority") *with Briseno*, 135 S.W.3d at 8 (third factor: "Does his conduct show leadership or does it show that he is led around by others?"); *compare* App. 20a–22a (Moore's testimony at trial "was coherent and sometimes lengthy" and he "responded rationally and coherently to questions") *with Briseno*, 135 S.W.3d at 8 (fifth factor: "Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?"); *compare* App. 36a–37a (emphasizing circumstances of Moore's criminal offense and finding that they "'indicate a level of planning and forethought'") *with Briseno*, 135 S.W.3d at 8–9 (seventh factor: "[D]id the commission of that offense require forethought, planning, and complex execution of purpose?").

By relying on lay stereotypes and resurrecting the *Briseno* factors (in all but name), the CCA once again engaged in an analysis "that is incompatible with the Eighth Amendment." *Moore*, 137 S. Ct. at 1060 (Roberts, C.J., dissenting).

B. The CCA Ignored or Disregarded Important Clinical Evidence.

The CCA also ignored or dismissed clinical evidence that this Court (like the state habeas trial

court) emphasized as probative of intellectual disability under current medical standards.

For example, this Court summarized various evidence that "revealed that Moore had significant mental and social difficulties"—(1) his struggles at the age of 13 with basic concepts like time, days, months, seasons, and addition and subtraction; (2) his inability to keep up with lessons; (3) his separation from the rest of the class; (4) his castigation by his father, teachers and peers as "stupid" for his deficiencies; (5) his academic failures; and (6) his eating from trash cans even after food poisoning. *Moore*, 137 S. Ct. at 1045. Remarkably, however, the CCA majority entirely ignored three of these facts emphasized by this Court: Moore's struggles at the age of 13; his separation from the rest of the class; and his castigation for being "stupid." And it summarily dismissed the three others based on its own assumptions: Moore's record of academic failures, App. 25a; his failure to keep up with the rest of class, *id.*; and his eating from trash cans, App. 36a.

The CCA, moreover, manufactured its own reasons, based on its own views, to reject important clinical evidence. For example, Dr. Robert Borda, one of Moore's experts, testified unequivocally that Moore had scored the lowest score on executive functioning—a key component of adaptive functioning—that Dr. Borda had ever recorded, and a score far below the standard for living independently. App. 284a. In *Moore*, this Court emphasized, consistent with current clinical standards, that test results regarding adaptive functioning are fundamental. 137 S. Ct. at 1046. The CCA, however, rejected the important clinical evidence reflected in Dr. Borda's test result *on a ground that no expert supported*—the CCA's own

supposition that Moore was "malingering" or engaging in "lack of effort" on that test. App. 37a–38a ("We view with extreme skepticism one test resulting in the lowest score the examiner has ever resulted."); App. 37a (expressing CCA's view about "lack of effort or malingering"). While the State's expert expressed doubts about her *own* adaptive-functioning test, App. 38a, she expressed no suggestion of malingering regarding Dr. Borda's test result. Nor did any other clinician or expert. Only the CCA judges in the majority, on their own assumption and for their own reasons, rejected this fundamental clinical evidence on that ground. And, in the process, the CCA ignored this Court's "reliance on testing that was done demonstrating that [Moore] has adaptive deficits." *See* App. 100a (Alcala, J., dissenting).[7]

Similarly, while the CCA extensively relied on the testimony and opinions of the State's expert, it simply ignored the fact that the State's expert had expressly relied, in part, on the *Briseno* framework in reaching her conclusions. *See* JA 163–64; App. 106a–107a (Alcala, J., dissenting).

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[7] Clinical standards, moreover, establish that issues about "malingering" or "lack of effort" present a complex clinical issue to be addressed by the clinician administering the test. *See, e.g.*, American Association on Intellectual and Developmental Disabilities, *Clinical Judgment* 37 (2d ed. 2014). Thus the CCA's assertion of its own "extreme skepticism" as the basis for discarding the Borda test results is a stark departure from—and glaring conflict with—medical standards. Dr. Borda—the clinician who actually administered the test—stated that, in his clinical evaluation, Moore "appeared to give a good effort on all tasks," JA 15—the very opposite of the CCA majority's unsupported statement as its basis for rejecting the test.

The CCA's decision on remand thus omits and jettisons important clinical evidence that bears heavily on the interpretation and application of this Court's decision.

C. The CCA Overemphasized Adaptive Strengths.

This Court previously held that the CCA "overemphasized Moore's perceived adaptive strengths" in concluding that Moore "did not suffer significant adaptive deficits," explaining that the proper focus is on "adaptive *deficits*." *Moore*, 137 S. Ct. at 1050. In particular, the Court rejected the CCA's reliance on purported strengths—including that Moore "lived on the streets, mowed lawns, and played pool for money"—as evidence "adequate to overcome the considerable objective evidence of Moore's adaptive deficits." *Id.*; *see also*, *e.g.,* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 151 (11th ed. 2010) (highlighting harmful and "incorrect stereotypes that . . . individuals [with intellectual disability] never have friends, jobs, spouses").[8]

On remand, the CCA essentially ignored this Court's holding and proceeded to focus almost exclusively on Moore's alleged adaptive strengths. Indeed,

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[8] *See also*, *e.g.*, *id.* ("Those [individuals] with [intellectual disability] who have higher IQ scores comprise about 80 to 90% of all individuals diagnosed with [intellectual disability]. Frequently, they have no identifiable cause for the disability, they are physically indistinguishable from the general population, they have no definite behavioral features, and their personalities vary widely, as is true of all people.").

the CCA stated that it was relying on what it viewed as a "vast array of evidence" of Moore's purported adaptive strengths that, in its approach, outweighed the evidence of adaptive deficits cited by the habeas court (as well as by this Court). App. 2a–3a. The CCA catalogued evidence of what it viewed as Moore's adaptive strengths. In addition to an extensive discussion of the skills that Moore purportedly had exhibited while incarcerated, App. 19a–34a; *see also infra* pp. 23–24, the CCA relied on pieces of evidence that it claimed showed Moore's adaptive strengths prior to his imprisonment—including the same evidence of living on the streets, playing pool for money, and mowing lawns that this Court held could not counterbalance the evidence of Moore's adaptive deficits, *see* App. 30a, 33a, 35a.

By disregarding and downplaying Moore's adaptive deficits and instead centering the analysis on his supposed adaptive strengths, the CCA engaged in a mode of analysis already rejected by this Court.[9]

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[9] The CCA also repeatedly emphasized positions taken in Moore's pre-*Atkins* sentencing hearing in 2001. The CCA ignored, however, this Court's repeated decisions holding that, before *Atkins*, it was understandable that capital defendants did not urge intellectual disability in sentencing hearings. *See, e.g., Brumfield v. Cain*, 135 S. Ct., 2269, 2281 (2015) (at "pre-*Atkins* trial," capital defendant had "little reason to . . . present evidence relating to intellectual disability"; if he had "done so at the penalty phase, he ran the risk that it would 'enhance the likelihood . . . future dangerousness [would] be found by the jury'" (quoting *Atkins*, 536 U.S. at 321)); *Bobby v. Bies*, 556 U.S. 825, 836–37 (2009) (distinguishing intellectual disability as a mitigating factor from an intellectual-disability claim under *Atkins*, and recognizing that *Atkins* changed parties' interests with respect to intellectual-disability determinations); *Atkins*, 536 U.S. at 321 ("[R]eliance on mental retardation as a mitigat-

D. The CCA Extensively Relied on Conduct in Prison.

In its previous decision, this Court explained that "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is," and rejected the CCA's emphasis on Moore's "improved behavior in prison." *Moore*, 137 S. Ct. at 1050.

Despite this Court's holding, and despite the clinical standards, the CCA extensively relied on its view of Moore's improved behavior in prison as support for its rejection of Moore's intellectual-disability claim. App. 19a–34a. As the dissenting judges emphasized, and as medical standards require, the clinically required focus should be on an individual's "typical behavior in a non-prison setting," App. 97a–98a, rather than on the highly regimented prison setting in which food, shelter, and other life necessities are provided and in which individual choices and options are severely constrained. *See* App. 301–302a.

As Dr. Borda testified, moreover, the fact that it took Moore thirty years in the "extreme structure" of prison to learn certain skills that most people learn in elementary school (such as reading, writing, and arithmetic at simple levels) "certainly is to his credit," but it in no way undermines a conclusion that he is intellectually disabled. App. 80a (Alcala, J., dis-

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ing factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness may be found by the jury."). The CCA likewise ignored the fact that Dr. Borda stated that his views had been refined in part because of changes in the governing medical standards, JA 8—changes in the standards that the CCA unconstitutionally found irrelevant in its previous decision, *see Moore*, 137 S. Ct. at 1053.

senting); *see also* JA 36. As with other important clinical evidence, the CCA simply ignored the expert testimony on this point and proceeded instead to rely on its own view of Moore's conduct in prison, even though that view conflicts with this Court's decision and with medical standards. *See also* App. 301a–302a (state habeas trial court concluding that, under current medical standards, purported strengths developed in prison do not outweigh findings of adaptive deficits).

E. The CCA Imposed an Onerous Non-Clinical Relatedness Requirement.

In its previous decision, this Court rejected the CCA's imposition of its notion of relatedness as a formidable barrier to finding that Moore is intellectually disabled. *Moore*, 137 S. Ct. at 1051. This Court emphasized that a capital defendant need not exclude the possibility that factors other than deficits in intellectual functioning caused his adaptive deficits. *Id.* The American Psychiatric Association, which is responsible for the DSM-5, explained to this Court and to the CCA on remand that relatedness in the DSM-5 is meant only to exclude "obvious limits to adaptive functioning imposed by other ailments," including "physical disabilities that impair sensory abilities (*e.g.*, blindness or deafness)." *See, e.g.*, Brief of American Psychiatric Association et al. as Amici Curiae Supporting Petitioner at 8–9, *Moore v. Texas* (No. 15-797); *see also* Brief of American Psychiatric Association et al. as Amici Curiae Supporting Applicant at 15–17, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2017); *see also Moore*,

137 S. Ct. at 1051 (citing discussion of relatedness in APA *amicus* brief).

Despite this Court's holding regarding relatedness, and despite the actual clinical meaning of the term, the CCA again applied its own non-clinical conception of relatedness to find against Moore on adaptive functioning. *See, e.g.*, App. 33a (dismissing evidence of Moore's deficits in the areas of interpersonal relations and societal rules because the evidence "fails to suggest that the cause of [Moore's] deficient social behavior was related to any deficits in general mental abilities"); App. 35a–36a (rejecting reliance on evidence that Moore "'never held a real job'" because "there is nothing to suggest that any failure by [Moore] to get a job would be related to intellectual deficits"); App. 36a (disregarding evidence that Moore ate food from the garbage even after suffering food poisoning because that behavior could be related to hunger instead of deficits in intellectual functioning).

The CCA's idiosyncratic relatedness requirement, moreover, creates an insuperable obstacle. It forces capital defendants to "prove the unprovable" because there is "no scientific basis . . . to reach a diagnostic conclusion that a defendant's deficits in adaptive functioning were *caused*" by his "intellectual impairment" as apart from other factors. Brief of American Association on Intellectual & Developmental Disabilities et al. as Amici Curiae Supporting Petitioner at 22 n.26, *Moore v. Texas* (No. 15-797).

The CCA's previous use of its interpretation of relatedness as a causation barrier was rejected by this Court. The CCA's renewed deployment, on remand, of its relatedness standard to reject intellectual disability remains a concept of the CCA's own invention,

much like the discredited *Briseno* factors. And, like those *Briseno* factors, it is rooted in the CCA's own lay assumptions and stereotypes, rather than in medical and clinical standards.

* * *

This Court made clear constitutional holdings in its previous decision. The CCA failed to heed them. Reversal of the CCA is necessary to ensure adherence to this Court's constitutional holdings and fidelity to the rule of law. Particularly in light of this Court's previous decision, the manifest errors of the CCA's decision, and the agreement of the parties on the appropriate disposition, summary reversal is warranted. *See, e.g.*, *James v. City of Boise*, 136 S. Ct. 685, 686 (2016) (granting summary reversal and explaining that lower courts are "bound by this Court's interpretation of federal law"); *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (explaining that the Court "has not shied away from summarily deciding" even "fact-intensive cases where . . . lower courts have egregiously misapplied settled law"); *Marmet Health Care Ctr., Inc. v. Brown*, 563 U.S. 530, 532 (2012) (granting summary reversal where lower court's interpretation of federal law "was both incorrect and inconsistent with clear instruction in the precedents of this Court").

II. It Violates the Eighth Amendment to Proceed With a Death Sentence When the Prosecutor and Defendant Agree That the Defendant Is Intellectually Disabled and May Not Be Executed.

In the CCA following this Court's decision, there was no dispute between the parties concerning the only question before the CCA. Both parties agreed that Bobby James Moore is intellectually disabled and may not be executed. Indeed, the prosecutor stated in no uncertain terms that "Moore is intellectually disabled, cannot be executed, and is entitled to *Atkins* relief." Respondent's Brief at 28, *Ex Parte Moore*, No. WR-13,374-05 (Tex. Crim. App. filed Nov. 1, 2007).

Despite the parties' agreement, however, the CCA proceeded to construct its own analysis, rule that Moore is not intellectually disabled, and order that the execution of Moore must take place over the objection of both the State and the capital defendant. That decision violates the Eighth Amendment's requirement of reliability in the imposition of a death sentence.

As far as counsel is aware, this Court never has permitted an execution when both the prosecutor and the defendant agree that the defendant is intellectually disabled and ineligible for execution. For good reason. "Because the death penalty is unique 'in both its severity and finality,'" this Court has "recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998) (citation omitted); *see also*, *e.g.*, *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) ("The Eighth Amendment insists upon 'reliability in the determi-

nation that death is the appropriate punishment in a specific case.'" (citation omitted)); *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (noting that a process for "render[ing] a reasoned . . . sentencing determination" is required of a "state capital sentencing system"). Mandating the execution of a defendant notwithstanding the parties' agreement that the defendant is intellectually disabled fundamentally compromises this core reliability safeguard.

The CCA's decision to override the position of the State and the defendant that the execution should not take place dramatically increases the chances that a defendant unjustly will be sent to his death. The CCA's rejection of the positions of both parties that a capital defendant is intellectually disabled creates "an unacceptable risk that [a] person[] with intellectual disability will be executed." *Moore*, 137 S. Ct. at 1044.

For this reason, too, the Court should grant the petition and vacate the CCA's judgment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

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