APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for a Writ of Habeas Corpus
in Cause. No. 314483-C in the 185th
Judicial District Court From Harris County

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, YEARY, and KEEL, JJ., joined. ALCALA, J., filed a dissenting opinion in which RICHARDSON and WALKER, JJ., joined. NEWELL, J., did not participate.

In a punishment retrial that was held before the Supreme Court decided that intellectual disability exempted offenders from the death penalty,[1] Applicant claimed that he was not intellectually disabled and that any adaptive difficulties he had were due to the abusive environment in which he grew up, emotional issues resulting therefrom, and his lack of opportunities to learn. In this habeas proceeding, Applicant now seeks to be exempted from the death penalty on the

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[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting intellectually disabled persons from the death penalty).

ground that he is intellectually disabled. The habeas court agreed with Applicant, citing what it considered to be the contemporary standards for an intellectual disability diagnosis. We disagreed with the habeas court for a variety of reasons falling within two overarching categories: (1) because the habeas court failed to follow standards set out in our caselaw,[2] and (2) because the habeas court failed to consider, or unreasonably disregarded, "a vast array of evidence in this lengthy record that cannot rationally be squared with a finding of intellectual disability."[3] The Supreme Court vacated our decision, concluding that some of the standards in our caselaw did not comport with the Eighth Amendment's requirements regarding an intellectual disability determination.[4]

Having received guidance from the Supreme Court on the appropriate framework for assessing claims of intellectual disability, we now adopt the framework set forth in the DSM-5.[5] Although the Supreme Court has vindicated some of the habeas court's analysis with respect to the proper framework to apply to intellectual disability claims, it remains true under our newly adopted framework that a vast array of evidence in this record is inconsistent with a finding of intellectual disability. Reviewing Applicant's claims under the DSM-5 framework, we conclude that he has failed to demonstrate adaptive deficits sufficient to

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[2] *Moore v. State*, 470 S.W.3d 481, 486-89 (Tex. Crim. App. 2015), *vacated by Moore v. Texas*, 137 S. Ct. 1039 (2017).

[3] *Id.* at 489.

[4] *See Moore v. Texas*, 137 S. Ct. 1039 (2017).

[5] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF DISORDERS, 5th ed. (2013) ("DSM-5").

support a diagnosis of intellectual disability. Consequently, we disagree with the habeas court's conclusion that Applicant has demonstrated intellectual disability, and we deny relief.[6]

A. The Murder

On April 25, 1980, Applicant and his companions, Ricky Koonce and Everett Pradia, were driving around Houston, looking for a place to commit their third robbery in two weeks. They chose the Birdsall Super Market after seeing that it was manned by two elderly people and a pregnant woman. Jim McCarble and Edna Scott were working in the courtesy booth. Koonce entered the booth and told McCarble and Scott that they were being robbed and demanded money. Applicant stood outside the booth, pointing a shotgun through the courtesy booth window. When Scott shouted out that they were being robbed and dropped to the floor, Applicant pointed the shotgun at McCarble, looked down the barrel at him, and shot his head off.

B. Standard for Assessing Intellectual Disability

1. From Atkins to Briseno

In *Atkins v. Virginia*, the Supreme Court found that a national consensus had developed against the practice of executing mentally retarded offenders, with the only serious disagreement about the issue being determining which offenders were in fact retarded.[7]

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[6] Although it opposed granting relief on original submission, the State now contends that Applicant is entitled to relief in light of the Supreme Court's opinion. Because we conclude that Applicant has failed to show that he is intellectually disabled under the DSM-5 framework, we disagree with that assessment.

[7] 536 U.S. at 316, 317.

While holding that the Eighth Amendment prohibited the execution of mentally retarded offenders, the Court acknowledged that not all people claiming to be mentally retarded would "fall within the range of mentally retarded offenders about whom there is a national consensus."[8] The Court left to the States the task of developing appropriate ways to enforce this constitutional restriction.[9] In the absence of legislative direction, we set out what we considered to be interim guidelines in *Ex parte Briseno*.[10]

Briseno adopted the then-existing framework for determining mental retardation set out by the American Association on Mental Retardation (AAMR).[11] Under that framework, an individual was mentally retarded if a three-pronged test was satisfied: (1) significantly subaverage general intellectual functioning (an IQ of approximately 70 or below, which is approximately two standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurred prior to age 18.[12] To help courts assess adaptive functioning, and determine whether adaptive deficits were due to mental retardation or a personality disorder, we suggested a list of non-exclusive evidentiary factors:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that

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[8] *Id*. at 317.

[9] *Id. See also Moore*, 470 S.W.3d at 486.

[10] 135 S.W.3d 1, 4-5 (Tex. Crim. App. 2004). *See also Moore*, *supra*.

[11] *Briseno*, 135 S.W.3d at 7-8.

[12] *Id*. at 7 & nn.24-26.

time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[13]

2. The Habeas Court's Approach

Changes have occurred since our decision in *Briseno*. What used to be referred to as "mental retardation" is now labeled "intellectual disability," and the AAMR has renamed itself the American Association on Intellectual and Developmental Disabilities (AAIDD).[14] The habeas court in this case reasoned that

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[13] *Briseno*, 135 S.W.3d at 8-9.

[14] *See Ex parte Cathey*, 451 S.W.3d 1, 11 n.23 (Tex. Crim. App. 2014) (noting change from "mental retardation" to "intellectual

more has changed than names and labels and that, in assessing whether a person is intellectually disabled, courts should use the most current standards of psychological diagnosis.[15] The habeas court further concluded that, under the current standards, use of the *Briseno* factors was discretionary, and, because it perceived no evidence that Applicant had a personality disorder, unnecessary in this case.[16]

3. Our Prior Opinion

In our prior opinion reviewing the present habeas application, we adhered to the framework for determining intellectual disability that was set out in *Briseno*.[17] We said that, absent legislative action, the decision to modify the legal standard for intellectual disability "rests with this Court," and we believed that the legal test we established in *Briseno* remained adequately informed by the medical community's diagnostic framework.[18] We concluded that we should continue to adhere to the AAMR definition of intellectual disability that existed when *Briseno* was decided, even if the positions of the American Psychiatric Assocation (APA) and the AAIDD had changed since then.[19]

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disability"); Ex parte Sosa, 364 S.W.3d 889, 893 n.17 (Tex. Crim. App. 2012) (noting change from AAMR to AAIDD).

[15] Addendum Findings of Fact and Conclusions of Law on Claims 1-3 ("Findings"), paragraph 66 ("As our standards of decency evolve, so too do the standards of psychological diagnosis."). *See also Moore*, 470 S.W.3d at 486.

[16] Findings, paragraphs 93-94.

[17] *Moore*, 470 S.W.3d at 486-89, 514, 526-27 (citing and discussing *Briseno*, 135 S.W.3d at 7 & n.25, 8-9).

[18] *Id*. at 487.

[19] *Id*. at 486-87.

Regarding the subaverage-intellectual-functioning prong of the *Briseno* inquiry, we disagreed with Applicant's reliance upon all the various tests he had taken with scores ranging from 57 to 78.[20] We held that only two of the tests resulted in scores that were relevant and reliable enough to warrant consideration: a WISC test taken in 1973 at age 13 with a score of 78 and a WAIS-R test taken in 1989 at age 30 with score of 74.[21] Taking into account the standard error of measurement of five points for each test resulted in IQ score ranges of 73-83 and 69-79 respectively.[22]

We criticized the habeas court for subtracting points from IQ scores based on the so-called "Flynn Effect" (the concept that IQ tests become outmoded with the passage of time, causing purported IQ scores on the test to rise).[23] Rather, we held that the outmoded nature of the test is simply something that might be considered in determining whether a person's actual IQ likely fell in the lower end of the standard error range for the test in question.[24] We also suggested that factors that tend to depress an IQ score—family violence, an impoverished background, drug use, and depression—would tend to place a person's actual IQ within the higher portion of the standard error range.[25] Considering these factors, we concluded that we had no reason to doubt that Applicant's IQ scores on both tests were accurate reflections of his actual IQ, and because both were above 70, that would place

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[20] *Id*. at 518-19.

[21] *Id*.

[22] *Id*. at 519.

[23] *Id*. at 487-88. *See* Findings, paragraphs 85-87.

[24] *Moore*, 470 S.W.3d at 519.

[25] *Id.*

Applicant in the range of borderline intelligence rather than intellectual disability.[26] We concluded that Applicant had failed to prove significantly subaverage general intellectual functioning and therefore failed to meet the first prong of the three-pronged test.[27]

Nevertheless, we also assessed the second prong of the test, regarding adaptive deficits.[28] We criticized the habeas court for relying upon a definition of intellectual disability presently used by the AAIDD that omits a requirement that an individual's adaptive deficits be related to significantly subaverage intellectual functioning.[29] We also held that the *Briseno* evidentiary factors remained relevant to assessing adaptive deficits, and we held that we must look to all of the person's functional abilities, including those that show strength as well as those that show weakness.[30] We concluded that the *Briseno* factors weighed heavily against a finding that any adaptive deficits were related to significantly subaverage intellectual functioning.[31] In rejecting Applicant's claim that he had shown sufficient adaptive deficits,[32] we made a number of other observations, but we will discuss those later in the application section of this opinion.

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[26] *Id.*

[27] *Id.* at 513.

[28] *Id*. at 520.

[29] *Id*. at 486. See Findings, paragraph 67 (outlining current AAIDD framework). But *see id*., paragraph 92 (referring to "relatedness" requirement).

[30] *Moore*, 470 S.W.3d at 489.

[31] *Id*. at 526-27.

[32] *Id*. at 520-26.

4. The Supreme Court's Response

The Supreme Court held that we were wrong to conclude that Applicant's IQ scores were, by themselves, a sufficient basis for rejecting his claim of intellectual disability.[33] The Court did not dispute our decision to rely upon scores from only two of the tests, so that we considered only the scores of 74 and 78, but the Court stated that, because of the standard error of measurement, a score of 74 was not high enough to rule out intellectual disability.[34] The Court criticized our reliance on various factors (family violence, an impoverished background, drug use, and depression) to disregard the lower end of the standard error of measurement range.[35] The Court admonished that, if any part of the range of scores yielded by the standard error of measurement was 70 or below, then an examination of adaptive functioning was required to resolve the issue of intellectual disability.[36] Because the five-point standard error of measurement applicable to the test with a score of 74 yielded a range of 69-79, an examination of adaptive functioning was required.[37]

The Court also criticized some of our analysis of adaptive functioning. The Court said that we were wrong to suggest that adaptive deficits in certain

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[33] *Moore*, 137 S. Ct. at 1049 ("The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*[, 134 S.Ct. 1986 (2014)].").

[34] *Id.*

[35] *Id.* ("But the presence of other sources of imprecision in administering the test to a particular individual, cannot *narrow* the test-specific standard-error range.") (citation omitted, emphasis in original).

[36] *Id*. at 1049-50.

[37] *Id.*

areas could be offset by strengths in unrelated areas.[38] The Court also concluded that we overemphasized Appellant's behavior in prison, and it cautioned against relying on adaptive strengths developed in a controlled setting, "as a prison surely is."[39] The Court further suggested that we erroneously viewed Appellant's record of academic failure and his childhood abuse as detracting from a finding of intellectual disability because the medical community counts traumatic experiences "as 'risk factors' *for* intellectual disability."[40] And the Court held that we departed from clinical practice by requiring Applicant to show that his adaptive deficits were not related to a personality disorder because personality disorders often co-occur with intellectual disability.[41]

Perhaps most importantly, the Supreme Court criticized our reliance on *Briseno*'s evidentiary factors for assessing adaptive functioning.[42] These factors, the Court found, merely advanced lay stereotypes of the intellectually disabled and were an outlier in comparison to other states' handling of intellectual disability claims and even to Texas's own practices in other contexts.[43] Even the dissenting opinion, by Chief Justice Roberts, criticized our reliance on the *Briseno* factors.[44]

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[38] *Id*. at 1050 & n.8.

[39] *Id.*

[40] *Id*. at 1051.

[41] *Id*.

[42] *Id.* at 1051-52.

[43] *Id*. at 1051-53.

[44] *Id.* at 1053 (Roberts, C.J., dissenting) ("I agree with the Court today that those factors [seven 'evidentiary factors' from *Ex parte Briseno*] are an unacceptable method of enforcing the

5. Our Response: Adopting the DSM-5 Approach

"The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."[45] In *Moore*, the Supreme Court indicated that the DSM-5 embodies "current medical diagnostic standards" for determining intellectual disability.[46] When observing that the *Briseno* factors were inconsistent with Texas's own practices in other contexts, the Court referred to Texas's reliance on "the latest edition of the DSM."[47] The Supreme Court also observed that the DSM-5 retains a requirement that adaptive deficits be related to intellectual functioning deficits[48]—a requirement no longer explicitly retained by the AAIDD manual.[49] Given Texas's reliance on the DSM-5 in other contexts, and the logic of requiring that adaptive deficits be related to deficient intellectual functioning, we conclude that the DSM-5 should control our approach to resolving the issue of intellectual disability.[50]

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guarantee of *Atkins*, and that the CCA therefore erred in using them to analyze adaptive deficits.").

[45] *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).

[46] 137 S. Ct. at 1045 (Court's op.). *See also id*. at 1048, 1053.

[47] *Id.* at 1052 (citing 37 TEX. ADMIN. CODE §380.8751(e)(3) (2016)).

[48] *Id.* at 1046 n.5.

[49] *See id*. at 1055 (Roberts, C.J., dissenting).

[50] Although we specifically adopt the DSM-5, nothing in this opinion suggests that a court must reject an expert's testimony if the expert relies upon the AAIDD manual. The standards in the DSM-5 and the AAIDD manual are largely the same, with the AAIDD manual exploring the issue of intellectual disability in greater detail. Nothing in this opinion should be construed to prevent a court from relying upon portions of the AAIDD manual

Although we retain a "relatedness" requirement in conformity with the DSM-5, we abandon reliance on the *Briseno* evidentiary factors in determining whether such a requirement is met.

The DSM-5 retains the three-pronged approach to intellectual disability but refines it. The three criteria for finding someone to be intellectually disabled are: (A) deficits in general mental abilities, (B) impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally matched peers, and (C) onset during the developmental period.[51]

"Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding."[52] Components of these functions include "verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy."[53]

The typical method of assessing these functions is through "individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence."[54] A score is indicative of intellectual disability if it is "approximately two standard deviations or more below the

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to the extent that they amplify or clarify standards contained in the DSM-5. But if there is a conflict between the two publications, a court must decide which to adhere to, and our decision is that, in the event of a conflict, the DSM-5 controls.

[51] DSM-5 at 37.

[52] *Id.*

[53] *Id.*

[54] *Id.*

population mean, including a margin for measurement error (generally +5 points)."[55] When the standard deviation of the test is 15 and the mean is 100, a score that is two standard deviations below the mean will be "a score of 65-75 (70 ±5)."[56] Practice effects and the "Flynn effect" may affect test scores.[57] Invalid scores may result from brief screening tests or group administered tests or when there are highly discrepant individual subtest scores.[58] Tests must also be normed for the individual's sociocultural background and native language.[59]

Criterion B, deficits in adaptive functioning, refers to "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background."[60] This involves adaptive reasoning in three domains: "conceptual, social, and practical."[61] The conceptual domain is also referred to as "academic" and involves things like "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations."[62] The social domain involves things such as "awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities, and social

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

judgment."[63] The practical domain involves such things as "learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization."[64]

Adaptive functioning is assessed by both clinical evaluation and testing.[65] Testing should be culturally appropriate and psychometrically sound.[66] Such tests should use standardized measures with knowledgeable informants such as family members, teachers, counselors, and care providers, as well as the individual being assessed, if possible.[67] Other sources of information include "educational, developmental, medical, and mental health evaluations."[68] All of this information "must be interpreted using clinical judgment."[69] "Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."[70]

Criterion B is met "when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 38.

more life settings at school, at work, at home, or in the community."[71]

For school-age children and adults with mild intellectual disability, "there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations."[72] In adults with mild intellectual disability, "abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility) and short-term memory, as well as functional use of academic skills (e.g. reading, money management), are impaired."[73] Individuals with mild intellectual disability may have difficulty perceiving peers' social cues, tend to use more concrete or immature language in communicating, and are at risk of being manipulated by others.[74] "To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A."[75]

Criterion C recognizes that the intellectual deficits must have been "present during childhood or adolescence."[76]

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[71] *Id.*

[72] *Id.* at 34.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 38.

[76] *Id.*

B. Application

1. Adaptive Deficits Inquiry Required

The two IQ tests that we accepted on original submission as having validity with respect to assessing Applicant's general intellectual functioning yielded scores of 74 and 78.[77] Because the score of 74 is within the test's standard error of measurement for intellectual disability (being within five points of 70), we must assess adaptive functioning before arriving at a conclusion regarding whether Applicant is intellectually disabled.[78]

2. Dr. Compton's Opinion is Credible and Reliable

On original submission we found the State's expert Dr. Compton to be "far more credible and reliable" on the issue of adaptive functioning than the experts presented by the defense.[79] We pointed out that the record showed Dr. Compton's considerable experience in conducting forensic evaluations.[80] Dr. Compton "thoroughly and rigorously reviewed a great deal of material concerning applicant's intellectual functioning and adaptive behavior," administered comprehensive "gold-standard" IQ testing, and personally evaluated Applicant.[81] By contrast, we observed that the defense psychologists—Borda, Greenspan, and

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[77] *Moore*, 470 S.W.3d at 519.

[78] Dr. Compton testified that the IQ score of 78 on the WISC was the most reliable because it was the only full scale IQ test administered during Applicant's developmental period. *See id*. at 517.

[79] *Id*. at 524.

[80] *Id.*

[81] *Id.* at 524-25.

Anderson—reviewed relatively limited material.[82] Greenspan did not personally evaluate Applicant, Borda's personal evaluation of Applicant was brief, and Anderson's personal evaluation was for a purpose other than evaluating intellectual disability.[83] And we would add that Borda's current conclusion that Applicant is intellectually disabled differs from the conclusion he arrived at in 1993, when he talked to Applicant's attorneys and testified in connection with an earlier habeas hearing.[84] Notes from Applicant's attorneys at that time show Borda saying that he did not consider Applicant to be intellectually disabled.[85]

Dr. Compton's methodology is consistent with the Supreme Court's dictates for evaluating intellectual disability. She explained that the major emphasis in an intellectual disability inquiry is "with adaptive deficits or adaptive functioning. That is primary. It supersedes the, you know, raw intelligence score." She further explained that "somebody could have an IQ of 75 but have exceedingly low adaptive functioning and qualify for a diagnosis of intellectual disability." She pointed to the three criteria for evaluating intellectual disability as well the three domains for evaluating adaptive deficits, and she referred to various adaptive areas that are cited in the DSM-5. She also talked about the various risk factors for intellectual disability and acknowledged that Applicant had some of those.

Dr. Compton rarely testified for the prosecution with respect to intellectual disability litigation in death penalty cases. Forty percent of the time she

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[82] *Id.* at 525.

[83] *Id.*

[84] *Id*. at 506.

[85] *Id*.

worked for the defense, and fifty percent of the time she worked directly for a court. She worked for the prosecution only ten percent of the time. She testified that she was not a fan of the death penalty and "took no joy" in giving her opinion in this case.

3. Dr. Compton's Opinion: Adaptive Functioning Does Not Support Intellectual Disability Diagnosis

As we explained on original submission, Dr. Compton testified that, even before he went to prison, the level of Applicant's adaptive functioning was too great to support an intellectual-disability diagnosis.[86] Specifically, Dr. Compton concluded:

> I think there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning. I do not believe – I do not have the data to support a diagnosis of mental retardation, simply because the adaptive functioning, I think, has been too great. Even before prison, I mean, there's indications of adaptive skills. So, I just – I do not have the adaptive deficits for a diagnosis.
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> I believe that I don't have enough information on his adaptive deficits or adaptive – I do not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis.

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[86] *Id*. at 526.

A substantial amount of evidence in the record substantiates Dr. Compton's conclusion and is contrary to various findings made by the habeas court. In the area of conceptual skills, the habeas court found that applicant had deficits in the area of communication, citing a speech impediment,[87] that he had deficits in reading and writing,[88] that he had difficulty with math,[89] and that he was in general a "slow learner."[90] As will be discussed below, a good deal of evidence contradicts these conclusions. The habeas court found Applicant lacking in the area of social skills based on his withdrawn behavior as a child and low conduct scores on his report card. As will be discussed below, the evidence relied upon by the habeas court is limited and does not account for the social skills that Applicant has shown as an adult. In the area of practical skills, the habeas court concluded that Applicant lacks many practical life skills, cannot maintain a safe environment, and cannot live independently. As we shall see, some of the cited lack of skills are due to the lack of opportunity to learn while other conclusions about Applicant's practical skills conflict with the record.

4. Communication Skills

To begin with, a conclusion that Applicant had difficulty communicating is at odds with his ability to testify at trial and to advocate for himself after trial. Applicant testified both at a hearing on a motion to suppress his written statement and during the

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[87] Findings, paragraphs 141, 172(d).

[88] *Id*., paragraph 142.

[89] *Id*., paragraph 153.

[90] *Id*., paragraph 158.

defense's case-in-chief at the guilt phase.[91] His testimony was coherent and sometimes lengthy.[92] Dr. Compton said that Applicant's responses to questions during his trial showed that he could "conceptualize what was being asked and form exculpatory statements or responses" and indicated "an ability to engage in abstract reasoning to some degree."[93]

When Applicant became dissatisfied with his appellate representation, he filed a *pro se* petition for a writ of mandamus, and a hearing was held on the matter.[94] At that hearing, Applicant advocated on his own behalf and presented five exhibits.[95] The exhibits included letters Applicant had written to his attorneys, several of which he read aloud at the hearing

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[91] *Moore*, 470 S.W.3d at 491.

[92] For example, at one point in the hearing on a motion to suppress his written statement, Applicant testified,

> They took me to a little room and told me that I may as well sign the statement since these dudes had identified me as being with them. I told them I wouldn't. The one; so he told me I was going to make it or else it would be up to him to make this statement on whatever it called for me to make a statement.

When asked what happened at that point, Applicant stated,

> Well, one officer, he told one officer to leave the room and go do something. I don't know what he went to do; but, he got to hitting me upside the jaw and everything; and I still refused to sign the statement and everything; so he took me to another room where there was some typewriters and everything and asked me would I sign. I told him, no, I wouldn't sign it.

[93] *See also Moore*, 470 S.W.3d at 522.

[94] *Id*. at 492.

[95] *Id.* at 492, 522. Applicant did not have a lawyer to coach him for this hearing. *Id*. at 522.

without any apparent difficulty.[96] When it became evident that Applicant was unaware that his attorney had filed a brief, the hearing was recessed to allow Applicant to review it.[97] Although Applicant did not understand all of the legal arguments in his attorney's brief, he responded rationally and coherently to ques-

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[96] *Id.* at 492. For example, Applicant read into the record a handwritten letter to his attorney that was dated February 13, 1983:

> Dear sir: Through the forgoing letter, I respectfully request unto you, sir, to be notified as to whether or not have yet the Appellant's Brief was filed on February 9, 1983, or if you has requested another extension of time in which to file said brief in the above reference cause number 314483.
>
> However, Mr. Bonner, sir, please be advised that I have filed three different motion with the court to review the record on Appeal and Prose Supplemental Brief to be considered along with your brief and the State's brief when sames are orally argued in accordance with Art. 44.33 V.A.C.C.P. and the rules of procedure of the Court of Criminal Appeals. I do not attempt to bump heads with you in any kind of way. All I wish to do is have the opportunity to defend my own life.
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> However, again, sir, in the above three motions that I have filed to the Court of said, I respectfully request you, sir, to enter into judge of said presence, George Walker. In the favor behalf of myself in you asking Judge of said to grant my motions. For you consideration in attending to this causing matter request will be grately appreciated as I enter your presence I enclosed three motions in this letter. I pray that you, sir, will get in touch with me as soon as possible.

(Passage as it appears in court reporter's record).

[97] *Id*. at 492-93.

tions regarding whether he understood and was satisfied with the issues his attorney had raised.[98] The trial court ultimately granted Applicant the relief he sought in his *pro se* pleading and appointed a new appellate attorney.[99] And although this new attorney filed a brief, Applicant also filed his own supplemental *pro se* brief, which made cogent arguments based on applicable caselaw, including then-recent Supreme Court caselaw.[100]

Applicant's communication skills were also shown in various letters he wrote and in his ability to influence others, which we will discuss in detail later in connection with other adaptive traits. At the 1993 habeas hearing, Borda had testified that he saw nothing to indicate "really severe deficits in communication skills" and that Applicant was "able to communicate adequately."[101]

5. Language Skills (Reading and Writing)

Regarding Applicant's ability to read and write, the evidence showed that, in prison, he progressed from being illiterate to being able to write at a seventh-grade level. Compton testified that seventh-grade level writing was demonstrated by Applicant's personal handwritten correspondence.[102] The pro se motions and pleadings that Applicant filed—some of which were handwritten—evidenced an even greater level of writing ability. And according to Dr. Compton, even if it were assumed that someone else composed

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[98] *Id*. at 493.

[99] *Id.*

[100] *See also id*.

[101] *Id*. at 495.

[102] *Id*. at 522.

those documents, Applicant's ability to copy such documents by hand would indicate an understanding and ability to write that would be within the realm of only a few intellectually disabled people.[103]

Cloteal Morris, Applicant's mother's cousin, testified at Applicant's 2001 punishment retrial that Applicant had written her beautiful letters from prison about church and religion.[104] Alice Moore, Applicant's maternal aunt, said that Applicant wrote letters to her from prison and described them as "just normal letters."[105] Jo Ann Cross began corresponding with Applicant in 1993. She testified that Applicant's writing style, spelling, grammar, and use of language improved during their period of correspondence.[106] Cross arranged for Applicant to receive newspapers and articles, which they discussed during the correspondence, and Applicant exhibited "a greater deal of understanding of all sort of issues, be it culture issues [or] politics" than he had at the beginning of their correspondence.[107] When Cross's mother died in 1996, Applicant wrote Cross "a very moving letter" about her death.[108] At the 2014 habeas hearing, Colleen McNeese, one of applicant's sisters, testified that Applicant's reading

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[103] *Id*. at 522-23. In addition, Applicant testified that a typewritten *pro se* brief was familiar to him as a document someone had helped him prepare and that he had a part in researching it. *Id*. at 497.

[104] *Id*. at 501.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] *Id*.

and writing ability had greatly improved since his imprisonment.[109]

Dee Dee Halpin, an educational diagnostician called by the defense at the 2001 retrial, stated that a letter Applicant had recently written, though containing some errors, was "certainly coherent," "fairly complex," and "adult like."

When Dr. Compton went to evaluate Applicant, there were books (including a copy of the Qu'ran), a newspaper, and newspaper articles in Applicant's prison cell.[110] One of the newspaper articles was about winning an appeal, and many of the books and newspaper articles contained underlining.[111] Dr. Compton stated that underlining was often an indication that the person read and understood the text.[112] But, she said, even if the underlining was taken as a sign that the person did not fully understand the text and wished to review it later, doing so would still involve processing and conceptualizing and would imply understanding of the surrounding text.[113] Applicant's cell also contained a composition notebook, in the same handwriting throughout, that contained some material that could have been copied and some material that could have been a product of Applicant's independent thought.[114] The notebook also contained a handwritten table matching the Wechsler Scales's normal distribution of IQ scores, which indicated to

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[109] *Id*. at 510.

[110] *Id*. at 524.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*.

Dr. Compton that Applicant was investigating IQ scores from his cell.[115]

6. Math and Money Skills

Although Applicant had poor grades in elementary school and struggled with both language and math on testing in the early elementary years, his math score in fifth grade on the Iowa Test of Basic Skills was within the average range.[116] Colleen McNeese testified that, in second and third grade, Applicant could not tell a $1 bill from a $5 or $10 bill.[117] However, she acknowledged that after Applicant learned to read, he was able to distinguish the denominations on bills.[118] She further acknowledged that, in prison, his ability to count had greatly improved.[119]

The prison commissary records indicated that Applicant's math skills were fairly well-developed. Jerry LeBlanc had worked at the commissary unit for fourteen years and had interacted with Applicant numerous times. LeBlanc did not help Applicant complete commissary forms, and to his knowledge, no one else did.[120] Although there was a cell adjacent to Applicant's on death row, the unit moved death row inmates frequently, so Applicant did not have the same neighbor for significant periods.[121] According to LeBlanc, there were recent examples of Applicant

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[115] *Id*.

[116] *Id*. at 502.

[117] *Id*. at 509-10.

[118] *Id.* at 510.

[119] *Id*.

[120] *Id. at 513.*

[121] *Id*.

composing orders that came within the $85 spending limit.[122]

The habeas court found that the commissary slips contained "numerous mathematical and spelling errors," that the goods requested for Applicant often were well in excess of the spending limit, that Applicant was only within the $85 spend limit on two occasions, and that Applicant "orders almost the same thing every time."[123] This was based on the habeas court's examination of what it characterized as "the 24 commissary order slips in evidence," which included examples ranging from 2012 to 2013.[124] We conclude that these findings, though in accord with the record in some respects, are also at odds with the record in some respects.

To begin with, the habeas court appears to have reviewed only the commissary slips in State's Exhibit 23, which contained twenty-four commissary slips ranging from 2012 to 2013. But State's Exhibit 26 was also admitted into evidence, and it contained twenty-two commissary slips ranging from 2010 to 2011. Further, the habeas court's conclusion that Applicant ordered almost the same thing every time does not to us seem consistent with a review of the slips in evidence. There are many items that recur from time to time, and some of the prices are the same, but nearly every slip seems to have a unique combination of items and prices. LeBlanc testified that the commissary price list changed frequently.[125]

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[122] *Id*.

[123] Findings, paragraph 169.

[124] *Id*.

[125] *Moore*, 470 S.W.3d at 513. On cross-examination, defense counsel had asked, "So, your price list does not change all that

To what extent Applicant's commissary slips met the $85 spend limit is a more complicated question than we appreciated on original submission, but it is also more complicated than was appreciated by the habeas court. Most of the slips contain some items that are marked through with a line. LeBlanc testified that the commissary staff would mark a line through an item if the item was out of stock. Many of the slips also show quantity reductions in various items. Some of the slips also contain a dollar sign ("$") on items marked through, which suggests a recognition by someone—Applicant or the commissary staff—that items were being struck out due to exceeding the spend limit. To what extent items were marked through by Applicant versus by the commissary staff is unknown. If one counts only the items that are not marked through in calculating the "spend total," and accounts for any quantity reductions, Applicant was more often than not within the spend total for commissary slips contained in State's Exhibit 23 and nearly always within the spend total for commissary slips contained within State's Exhibit 26. If items that were marked through are counted (and quantity reductions ignored), then most commissary slips exceeded the spend total.[126]

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much, does it?" LeBlanc responded, "Oh, yes, sir, it does. Quite often."

[126] The habeas court may have overlooked a commissary slip from 2/03/2013 that would appear to be within the spend total, regardless of whether marked-out items are included. Also, the 12/19/2012 commissary slip that the habeas court calculated as requesting $196.50 worth goods appears, by our calculations, to request only $100.50 worth of goods, if all marked-through items are included.

Even if we concluded that all of the mark-throughs and quantity reductions were made by commissary staff, that does not necessarily show that any failure to abide by the spending limit was due to adaptive deficits on Applicant's part. Applicant might have purposefully requested excess items to account for the possibility that some of his items would turn out to be out of stock. Inmates were allowed to specify substitute items, which seems to be a recognition that an item might not currently be in stock even if it was on the list. In addition, LeBlanc testified that certain types of property items (such as a hot pot) required special approval. Once the item was approved, then it would appear on the commissary request. It is unclear from the testimony whether these specially approved items are supposed to be part of the spend total. And there may be other reasons for Applicant to make requests in excess of the spend limit that do not indicate a lack of understanding on Applicant's part.

What we can say about the commissary slips is that they required Applicant to add or multiply when he ordered multiple quantities of a particular item. For each line item, there is a box for the quantity, a box for the unit price, and a box for the total price. The vast majority of the time, Applicant's calculations of the total price from the quantity and the unit price are correct. Many of his commissary slips contain no math errors at all. And at least some of the calculations would in practical terms require multiplying a two-digit number by another two-digit number.[127]

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[127] Examples of correct calculations include: 25 x 0.25 = 6.25, 14 x 0.80 = 11.20, 20 x 0.19 = 3.80, 15 x 1.70 = 25.50, 15 x 0.22 = 3.30.

A few of the commissary slips contain what appear to be up to three possible errors, but many of these may not be errors at all. Sometimes a line item specifies a quantity that may actually be a pack or two packs of an item. For example, Applicant would specify twelve Ibuprofen tablets, but the unit price and the total price would be the same—suggesting that what is being ordered was a twelve-pack.[128] Or Applicant would order ten bars of soap, and the total price would be twice the unit price, which appears to mean that the soap came in packs of five.[129] Also, Applicant would often specify substitute items on the same line, and they were not necessarily in the same quantities, which could complicate an attempt at a straightforward calculation of the final price from the quantity and the unit price. Some ostensible errors may also be writing legibility issues rather than actual errors in calculation.

A few entries appear to be errors but would not be if Applicant had ordered a different quantity of the item—suggesting the likelihood that Applicant changed his mind about how many of an item he wanted and did not recalculate the price.[130] A few entries are

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[128] Our conjecture is supported by the cost of the Ibuprofin. Several receipts show a request for 12 of this item, a unit price of $1.20 and a total price of $1.20. It seems to us more likely that a single Ibuprofin pill would cost ten cents than $1.20. It also seems unlikely that an inmate would order twelve pills at a time if they really cost $1.20 each.

[129] There is at least one commissary slip in which soap was ordered when the quantity of two is marked out in favor of a quantity of ten, and the total price ($4.00) is twice the unit price ($2.00). Other slips simply order ten bars of soap where the total price is twice the unit price.

[130] In at least some of these cases, the relative complexity of the calculation suggests that the error was not caused by a simple

clearly calculation errors. But these relatively few errors are not consistent with the habeas court's conclusion that the mathematical errors were "numerous." Overall, the commissary slips support the conclusion that Applicant has well-developed math skills.

Moreover, LeBlanc testified that Applicant had occasionally brought mistakes made by the commissary to his attention, when Applicant had been charged for more items than he received.[131] LeBlanc never had the impression that Applicant did not understand "what's going on with his commissary."

Further support for the conclusion that Applicant had well-developed math skills can be found in Dr. Compton's testing. One of the tests she conducted, the WRAT-4, was a test of academic abilities.[132] Applicant was able to perform relatively complex math calculations on one portion of that test but failed to correctly perform simpler math calculations elsewhere on the test.[133] These inconsistent results led Dr. Compton to conclude that there was an increased probability that Applicant was not exerting full effort on the test.[134]

Dr. Compton also noted that Applicant's practice of playing pool for money and mowing lawns before he went to prison shows "some ability to understand

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failure to know times-tables. For example, on the September 17, 2013 slip, Applicant specified a quantity of two peanut butter items with a unit price of $2.25 and a total price of $6.75. The correct total price was $4.50, but the price of $6.75 would be correct if Applicant had ordered three items.

[131] *See also id*. at 513.

[132] *Id.* at 522.

[133] *Id.* Applicant demonstrated math ability included being able to add three-digit or four-digit numbers together.

[134] *Id.*

money concepts and work."[135] And after he went to prison, Applicant played dominoes, a game that requires counting.[136]

7. Learning Ability

Dr. Compton testified that IQ tends to remain constant over time and that it is unlikely that a person who is intellectually disabled at one point in his life will reach a point at which he is no longer intellectually disabled. As we have observed above, the DSM-5 indicates that even people with "mild" intellectual disability have difficulty learning to read, write, do math, and handle money.[137] We take into account the warning from the Supreme Court, as well as the DSM-5, that we should be cautious about relying upon adaptive strengths developed in a controlled setting such as prison. Nevertheless, even taking into account the controlled nature of the setting, the amount and pace of Applicant's improvement in reading and writing is simply inconsistent with the habeas court's description of Applicant as a "slow learner."

Even as early as 1971, Applicant was evaluated (in response to IQ testing) as possibly being "a child who has not been taught, but who can learn."[138] Halpin testified at Applicant's 2001 retrial that Applicant "definitely had some ability to learn that wasn't

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[135] *See also id.*

[136] *Id.* at 524. In a disciplinary report, an offender who was questioned after being found in Applicant's cell stated that he was there to play dominoes. Applicant also told the defense team in May 2000 that he played dominoes with another inmate. *See id*. at 508, 523 & n.55.

[137] *See supra* at n.72 and accompanying text.

[138] *Moore*, 470 S.W.3d at 494. This evaluation was done by Marcelle Tucker, M.Ed. *Id*.

tapped early in his school years."[139] Bettina Wright, a clinical social worker called by the defense at the 2001 retrial, testified at that time that Applicant was "nowhere near retarded" and that his ability to learn was "very intact."[140] Dr. Compton found that both Halpin and Wright attributed Applicant's withdrawn behavior to emotional problems that were not recognized or dealt with appropriately in childhood and that the progression of Applicant's abilities in prison indicated "a strong ability to learn."

In fact, defense counsel argued in closing at the 2001 retrial that "we learned later from the experts and other people who looked at [applicant's school records] that he wasn't really [intellectually disabled] at all, he was capable of learning."[141] Defense counsel further asserted that it was not until Applicant went to prison, away from his abusive family environment, that he was "safe enough to be able to learn and grow and become the kind of person that he could have become had he come from a safe environment."[142]

8. Social Skills

The habeas court's discussion of Applicant's social skills is brief, spanning little more than a page in the findings. The habeas court found Applicant to be deficient in the area of "interpersonal relations" on the basis of three brief and isolated statements: (1) a statement in a kindergarten evaluation that Applicant was "very withdrawn—maybe retarded but most likely emotional problems" and a recommendation

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[139] *Id.* at 503.

[140] *Id.*

[141] *Id.* at 504 (brackets in the opinion)

[142] *Id.*

that he be referred for psychological testing and to a counselor, (2) a statement in a psychological evaluation report conducted approximately seven years later that the reason for the referral was that Applicant was "below grade level; withdrawn; takes no part in class unless called on," and (3) a statement by Applicant that "it always seemed like people disliked me" and that a teacher singled him out for special treatment by placing his desk alongside hers to stop other children from teasing him.[143] The habeas court found that Applicant was deficient in the area of "following rules" because he had a general conduct grade of "Unsatisfactory" on an elementary school report card that was based on below-average scores in the categories of "Disciplines Himself," "Is Courteous," "Respects Property Rights," "Is Attentive," "Follows Directions," "Participates Well in Class Activities," and "Does Neat and Orderly Work."[144]

The evidence upon which the habeas court relied is a minimal basis upon which to conclude that Applicant lacks social skills. And even this evidence fails to suggest that the cause of Applicant's deficient social behavior was related to any deficits in general mental abilities, suggesting instead that the cause was "most likely emotional problems."

Evidence from Applicant's adult life indicates that he has progressed beyond being withdrawn and is able to have significant social interactions. He had a girl-friend, Shirley Carmen, and he played pool, dice, and dominoes with peers.[145] The manager of a restaurant wrote in a disciplinary report that Applicant was

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[143] Findings, paragraph 161(a)-(c).

[144] *Id*., paragraph 162.

[145] *Moore*, 470 S.W.3d at 490, 497, 508.

"capable of influencing others to dissent, likes confrontation."[146] Although Dr. Compton addressed the idea of influencing people as a conceptual skill, it also shows social skill in interacting with people. Applicant also displayed a social ability to interact with and stand up to authority when he refused to mop up some spilled oatmeal, saying that he was not a hall porter and mopping was not his job.[147] And while in prison, Applicant had two pen pals, Cross and her mother. Dr. Compton noted that Applicant had responded in an emotionally appropriate way in letters to Cross and "had grown immensely as a person."

Some of the habeas court's statements about Applicant's practical skills might also be relevant to his social skills. The habeas court cited testimony from family and friends that Applicant was "always a follower," "always allowed those around him to make decisions for him," was "impressionable," and was "easily led."[148] But this evidence cannot be squared with the testimony of more objective witnesses that Applicant influences others and stands up to authority. In addition to the mopping incident, there were a number of incidents in prison in which Applicant refused to follow orders. [149] Although adaptive behavior may in general be expected to be higher in the controlled setting of the prison environment than in the "free world," standing up to authority is one trait

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[146] *See id*. at 523.

[147] *See id*. at 498-99.

[148] Findings, paragraph 167(a)-(d).

[149] At least twice, Applicant refused an order to shave, once saying that he had a "shaving pass" and the other time citing a medical condition. *Moore*, 470 S.W.3d at 498. One time, Applicant refused to get a haircut. *Id*. Another time, Applicant refused to sit down with a group of inmates in the day room. *Id.*

that the prison environment would be expected to suppress. Applicant's willingness to stand up to authority in prison (and at times give reasoned explanations for doing so) is at odds with the claim that he is an impressionable, easily-led follower.

9. Practical Skills

The habeas court found that there was no evidence that Applicant was able to live independently of his family.[150] But the record shows that, at age fourteen, Applicant lived in the back of a pool hall for a while and stole food from stores.[151] Dr. Compton cited this as an indication of adaptive behavior.[152] Even the habeas court cited the fact that Applicant "'lived on the streets' for most of his teenage years" or slept "on neighborhood porches or in cars" without asking for family help.[153] Dr. Compton testified that "in order to survive on the streets, obviously he had to engage in some adaptive behavior." In addition, Applicant had enough independence to possess his own guns: he was the one who supplied the weapons—a shotgun and a .32 caliber pistol—for the robbery that led to the capital murder in this case.[154]

The habeas court also found that Applicant had "never held a real job,"[155] but the record shows that he worked at the Two-K restaurant.[156] And even if the record did support the habeas court's finding, there is

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[150] Findings, paragraph 167(f).

[151] *Moore*, 470 S.W.3d at 497.

[152] *Id*. at 522.

[153] Findings, paragraph 172(b).

[154] *See Moore*, 470 S.W.3d at 490.

[155] Findings, paragraph 165.

[156] *See Moore*, 470 S.W.3d at 523.

nothing to suggest that any failure by Applicant to get a job would be related to intellectual deficits rather than to the fact that he did not need a job because he was making his living by robbing people. The habeas court faulted Applicant for getting ptomaine poisoning twice from eating out of the neighbors' trash cans when he was a child because he should have learned from the first time.[157] But the testimony showed that he was hungry, and a hungry child of normal or slightly below normal intelligence could also ignore the risk of getting sick because of the immediate need for food. The habeas court found that Applicant did not have a driver's license and had never learned to drive.[158] That is a factor to consider, but is by no means dispositive, especially given his family's poverty and his relative youth (twenty years old) prior to incarceration. The habeas court also referred to Applicant being easily led, but as we explained above, those conclusions, from interested witnesses, are at odds with more objective evidence showing Applicant's ability to stand up for himself and to influence others.[159]

Some of the trial court's findings suggest that Applicant had defects in executive functioning (planning, strategizing, priority setting, and cognitive flexibility).[160] But Dr. Compton testified that the instant

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[157] Findings, paragraph 166.

[158] *Id*., paragraph 164.

[159] *See supra* at part B.8 (social skills).

[160] Findings, paragraphs 132 (low score on test that included evaluating "one's ability to plan ahead"—score of "1"—the lowest Borda had ever recorded), 169(h) (concluding that Applicant lived

crime displayed Applicant's ability to plan—"[w]earing a wig, covering up the gun and going to Louisiana all indicate a level of planning and forethought and ability to appreciate the need to do something not to be apprehended."[161]

Dr. Compton testified that some of the skills that her testing showed that Applicant lacked were things that he simply had not had the opportunity to learn.[162] She had to assign zeroes to questions asking about areas for which Applicant had no exposure, such as writing a check or using a microwave oven.[163] As we explained above, Applicant displayed considerable skill with writing and math, employed in practical uses such as reading books and newspaper articles—some of which related to the claims being made in his legal proceeding—writing letters, composing or at least copying legal motions, filling out commissary slips (which required both math and writing), and playing dominoes.

We also conclude that Applicant's low scores on adaptive skills testing, in the practical area or otherwise, lack reliability, not only because of the skewing effect of Applicant's lack of exposure to certain skills, but also due to lack of effort or malingering on Applicant's part in taking the tests. We view with extreme skepticism one test resulting in the lowest

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so well in prison because it "leaves little room for independent decision-making" and that practical food, shelter, job, and bill-paying activities "would in all likelihood perplex him.").

[161] *See also Moore*, 470 S.W.3d at 522.

[162] *Id*. at 470 S.W.3d at 521-22.

[163] *Id. See also id*. at 509 (testimony that Applicant's family did not have kitchen appliances such as a microwave oven, and meals were cooked on a hot plate).

score the examiner has ever recorded.[164] Applicant made exceedingly low scores on some IQ tests, such as a score of 57, that are inconsistent with scores on other tests that are in the 70s or even higher,[165] and he made inconsistent scores in the mathematical portions of one of the recent tests he had taken.[166] Dr. Compton noted that various testing she conducted suggested that Applicant was exerting suboptimal effort.[167] On an information subtest that asks general knowledge questions, Applicant stated that he did not know what a "thermometer" was, but he was able to describe what a thermometer was on a test he took in 1989.[168] Dr. Compton testified that memory of the meaning of such a word is "crystallized knowledge" and that it is "rare to just forget it and not know what it is."[169] Dr. Compton explained that that response caused her concern: "I found that disturbing. I'll be honest with you, I did."

C. Conclusion

After reviewing the case under the standards set forth in the DSM-5, we conclude that Applicant has failed to show adaptive deficits sufficient to support a

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[164] *See supra* at n.160.

[165] *See Moore*, 470 S.W.3d at 503, 514 (e.g., score on Slosson test was 57, score on WAIS-IV was 59, overall score on WISC was 78, with a performance score of 83).

[166] *See supra* at nn.132-34.

[167] *See Moore*, 470 S.W.3d at 518 (suboptimal effort on WAIS-IV and Test of Memory Malingering).

[168] *See id.*

[169] *See also id*. at 518.

diagnosis of intellectual disability.[170] Consequently, we deny relief.

Delivered: June 6, 2018

Publish

[170] The dissent contends that our present opinion continues to employ *Briseno*-type factors and focuses on adaptive strengths rather than adaptive weaknesses. We disagree. We go into detail about Applicant's adaptive abilities to explain why the trial court's findings of fact are not supported by the record.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Post-Conviction Writ of Habeas Corpus Cause No. 314483-C in the 185th Judicial District Court Harris County

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ALCALA, J., filed a dissenting opinion in which RICHARDSON and WALKER, JJ., joined.

DISSENTING OPINION

The sole issue in this case is whether Bobby James Moore, applicant, has established that he is intellectually disabled such that his execution for capital murder would be prohibited by the Eighth Amendment to the federal Constitution. I conclude that, under current medical standards described in the Diagnostic and Statistical Manual of Mental Disorders[1] and the manual of the American Association on Intellectual and Developmental Disabilities,[2] applicant has met

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[1] *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (2013) (hereinafter DSM-5).

[2] *See* American Association on Intellectual Disability, Intellectual Disability: Definition, Classification, and Systems of Supports (2010) (hereinafter AAIDD–11).

his burden to show that he is intellectually disabled. He is, therefore, categorically exempt from the death penalty because his execution would violate the Eighth Amendment's prohibition on cruel and unusual punishment. *See Atkins v. Virginia*, 536 U.S. 304 (2002).[3] I'm in good company in reaching this conclusion. The State's prosecutor has agreed with this conclusion in his brief to this Court.[4] The habeas court that considered the live testimony of the expert witnesses has recommended that this Court grant applicant relief on the basis of this conclusion. In its opinion reviewing this Court's prior decision in this case, the Supreme Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017), also made numerous observations indicative of its view that it too agrees with the conclusion that applicant is intellectually disabled such that his execution would violate the Eighth Amendment.[5] And

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[3] At the time that *Atkins* was decided, courts used the then-prevailing term "mental retardation," but since that time, courts and clinicians now use the term "intellectual disability." I will utilize only the latter term in this opinion unless quoting prior precedent.

[4] The State's brief concludes, "[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."

[5] Although it is not expressly stated as its holding, in my view, the Supreme Court's decision in *Moore* has already effectively determined that applicant meets the requirements for intellectual disability so as to preclude his eligibility for execution under *Atkins*. *See Moore v. Texas*, 137 S. Ct. 1039 (2017). Specifically, in *Moore*, the Supreme Court observed that the habeas court that recommended granting applicant relief had "consulted current medical diagnostic standards"; that applicant's IQ score would place him within the range of mild intellectual disability; and that there was "considerable" and "significant" evidence of

this Court has received six amici curiae briefs from various individuals and groups, some of whom are mental health experts and capital punishment experts, all also opining that applicant is intellectually disabled. There is only one outlier in this group that concludes that applicant is ineligible for execution due to his intellectual disability, but unfortunately for applicant, at this juncture, it is the only one that matters. Today, in solitude, a majority of this Court holds that applicant is not intellectually disabled, and it denies his application for habeas relief. I respectfully disagree with this Court's analysis and its ultimate decision to deny applicant relief.

Although this Court is correct in its overall position that Texas courts must consult and be informed by current medical standards as reflected in the DSM-5 and AAIDD-11 manuals in evaluating whether a person is intellectually disabled, this Court's majority opinion does not accurately set forth the detailed substance of those clinical standards, and then the majority opinion further errs in its application of those standards to the facts of this case. Specifically, in rejecting applicant's intellectual disability claim on the basis that he has failed to establish deficits in his adaptive functioning, this Court's majority opinion makes five critical mistakes. First, it implicitly suggests that it is not enough for applicant to show that he has adaptive deficits in one of three adaptive-skills domains, instead focusing on applicant's strengths in

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applicant's adaptive deficits based on evidence showing that he fell "roughly two standard deviations below the mean in all three skill categories." *Id.* at 1045, 1046, 1050. Although I would grant applicant relief on the basis of the Supreme Court's analysis in *Moore* alone, I will proceed to analyze the majority opinion's analysis of the evidence of intellectual disability.

the other two domains for which deficits need not be shown for him to qualify for a diagnosis of intellectual disability. Second, relatedly, it suggests that it is proper to weigh applicant's adaptive strengths against his adaptive weaknesses to find that he is not intellectually disabled. But this is not an accurate approach under current medical standards. Third, it gives considerable weight to evidence of applicant's adaptive strengths in the controlled environment of death row, but according to clinical standards, that type of evidence should be given limited weight. Fourth, it fails to defer to the habeas court's determination on the credibility of the expert witnesses who opined that applicant meets the clinical requirements for a diagnosis of intellectual disability. Fifth, by imposing a heightened burden for establishing adaptive deficits, it essentially continues to determine that mildly intellectually disabled people are subject to the death penalty in contravention of the Supreme Court's holding in *Moore*.

In contrast to the majority opinion's flawed approach, I would set forth a comprehensive standard for evaluating intellectual disability in a manner that fully comports with current medical standards. Specifically, with respect to the adaptive functioning inquiry that is at issue in this case, I would hold that that inquiry may not place undue emphasis on a person's adaptive strengths as a basis for offsetting clear evidence of his deficits; it may not place undue weight on a person's behavior while incarcerated; and it may not impose a heightened burden for establishing adaptive deficits that essentially operates to permit the execution of mildly intellectually disabled people. Applying the proper standard to applicant's case, I would defer to the habeas court's findings of fact and conclusions of law that correctly determined that applicant has

established deficits in his adaptive functioning so as to warrant a determination that he is intellectually disabled and thus exempt from the death penalty. Because I conclude that the majority's analysis fails to comport with current medical standards, the Supreme Court's holding in *Moore*, and ultimately, the requirements of the Eighth Amendment, I respectfully dissent.

I. Background

To fully understand the current posture of the instant habeas proceedings, it is necessary to review the previous state and federal litigation concerning applicant's intellectual disability claim. I will address each in turn.

A. The State Litigation

Nearly forty years ago, in 1980, applicant was convicted of capital murder and sentenced to death. The facts underlying applicant's offense show that, while robbing a store along with two others, applicant shot one of the store clerks with a shotgun, killing him.[6] After applicant's conviction and sentence were affirmed by this Court on direct appeal, he later sought federal habeas relief on the basis of ineffective assistance of counsel. In 1999, the federal habeas court granted him relief as to the punishment phase only.[7] Applicant subsequently received a new punishment trial, after which he was again sentenced to death. In

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[6] The facts underlying applicant's offense are more fully set forth in this Court's opinion affirming his conviction and sentence on direct appeal. *See Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985).

[7] *See Moore v. Collins,* 1995 U.S. Dist. LEXIS 22859, *35 (S.D. Tex. Sept. 29, 1995), *affirmed by Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999).

2004, applicant's new death sentence was affirmed by this Court on direct appeal.[8] Following that decision, applicant filed the instant application for a post-conviction writ of habeas corpus that is the subject of the current litigation.

Applicant's habeas application contends that he is categorically exempt from the death penalty due to his intellectual disability. Addressing this claim, the habeas court held a two-day evidentiary hearing at which four expert witnesses and several lay witnesses testified. Applicant presented the testimony of three expert witnesses, two of whom had examined him and determined that he meets the current clinical criteria for a diagnosis of intellectual disability; the third expert did not directly examine applicant but opined that his behavior is consistent with intellectual disability. To support their conclusions, applicant's experts cited evidence showing that, throughout his youth, applicant exhibited signs of developmental delays. One expert, Dr. Borda, observed that, even at the age of thirteen, applicant's academic records reflected that he lacked a basic understanding of simple concepts such as measurements, telling time, days of the week, or seasons. Dr. Borda additionally noted that applicant's history of being physically abused at home and suffering from malnutrition could have contributed to his intellectual disability. Another expert, Dr. Anderson, concluded after conducting extensive testing that applicant has a substantially limited ability to perform basic math computations, severely impaired verbal memory skills, and deficiencies in cognitive processing speed. In contrast to applicant's defense experts, one expert, the State's expert, Dr.

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[8] *Moore v. State*, No. 74,059, 2004 WL 231323 (Tex. Crim. App. Jan. 14, 2004).

Compton, determined that applicant was in the "borderline" range of intellectual functioning rather than intellectually disabled. Although the results of her tests were consistent with the defense experts' conclusions that applicant exhibited subaverage general intellectual functioning, Dr. Compton determined that he was not intellectually disabled based on her assessment of the totality of his perceived adaptive skills.

After the culmination of the hearing, the habeas court made findings of fact and conclusions of law recommending that relief be granted. In reaching its decision, the habeas court relied upon current medical diagnostic standards as set forth in both the DSM-5 and the AAIDD-11 manuals. By applying these standards, the habeas court determined that applicant had demonstrated sub-average general intellectual functioning, noting that the average of his IQ scores across several testing instruments was 70.66, which is within the range of mild intellectual disability by applying the standard error of measurement of five points. The habeas court further determined, based on the testimony of applicant's experts, that applicant had presented evidence of significant deficits or limitations in his adaptive functioning. The habeas court recommended that applicant's death sentence either be reformed to a sentence of life imprisonment, or, alternatively, that he be granted a new trial on intellectual disability.

In a split decision, this Court rejected the habeas court's recommendation and denied relief. *See Ex parte Moore*, 470 S.W.3d 481, 527 (Tex. Crim. App. 2015); *see also id.* at 528 (Alcala, J., dissenting). This Court's majority opinion held that applicant was not intel-

lectually disabled by applying this Court's 2004 precedent in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), in which this Court had held that certain non-clinical "evidentiary factors" could be used to evaluate a claim of intellectual disability.[9] Because the habeas court had declined to apply the *Briseno* framework, this Court's majority opinion rejected its recommendation to grant habeas relief. *Moore*, 470 S.W.3d at 527-28. Furthermore, this Court's majority

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[9] In *Briseno*, this Court adopted seven "evidentiary factors," purportedly to aid this Court in deciphering between those individuals who were experiencing adaptive deficits consistent with intellectual disability and those who were merely experiencing the symptoms of a personality disorder. Those factors are as follows:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Ex parte Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

opinion explained that the habeas judge had erred by applying current medical-diagnostic standards from the DSM-5 and AAIDD-11 to applicant's claim, when this Court's precedent in *Briseno* instead required adherence to the 1992 definition of intellectual disability stated in the ninth edition of the American Association on Mental Retardation (AAMR) manual and the similar definition of intellectual disability contained in section 591.003(13) of the Texas Health and Safety Code. *Id*. at 486.[10] Applying the *Briseno* standard to the facts of applicant's case, this Court concluded that the evidence failed to show that he had met any of the three prongs for a diagnosis of intellectual disability. *Id.* at 519, 525-28.

With respect to the first prong, subaverage general intellectual functioning, this Court determined that applicant's range of reliable IQ scores from two testing instruments was between 69 and 83. *Id.* at 519. Although a score of 69 falls within the range that is recognized by medical professionals as indicating subaverage general intellectual functioning, this Court nevertheless concluded that applicant had failed to meet that prong of the inquiry. *Id.* In reaching that

[10] The American Association on Mental Retardation (AAMR) is the former name of the American Association on Intellectual and Developmental Disabilities (AAIDD). At the time that this Court decided *Briseno*, the AAMR defined intellectual disability as "(1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18." *Briseno*, 135 S.W.3d at 7. The Texas Health and Safety Code, in turn, defined intellectual disability as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." TEX. HEALTH AND SAFETY CODE § 591.003(13).

conclusion, this Court explained its view that applicant's true IQ score was in fact in the higher end of this range, given that, during the developmental period, he had been traumatized by family violence, he came from an impoverished and minority cultural background, and he had a history of drug abuse and academic failure. *Id.* The Court also observed that, when he scored a 74 on the WAIS-R at age 30, applicant was already on death row and had exhibited withdrawn and depressive behavior. *Id.* In view of these subjective considerations, the Court determined that applicant's IQ score was beyond the range for intellectual disability. *Id.*

Turning to the adaptive functioning prong, the Court similarly concluded that applicant had failed to demonstrate that he had "significant and related" limitations in adaptive functioning. *Id.* at 520. To meet this requirement, the Court explained, a defendant would be required to show a score of at least two standard deviations below either (1) the mean in one of the three adaptive behavior skills areas or (2) the overall score on a standardized measure of conceptual, social, and practical skills. *Id.* at 488. And he would also be required to show that his adaptive behavior deficits were "related to" his significantly sub-average general intellectual functioning, rather than some other cause, such as a personality disorder. *Id.* The Court held that applicant had failed to meet these requirements by relying on the opinion of Dr. Compton, while discounting the opinions of the other experts who had found that he did have significant adaptive deficits. *Id.* at 524-25. This Court's majority opinion explained its holding with four particular reasons that I discuss next.

First, this Court was persuaded by Dr. Compton's opinion that applicant's adaptive strengths outweighed his adaptive deficits. This Court observed that, even if Dr. Compton's testimony established that applicant had some limitations in academic and social-interaction skills during the developmental period, his level of adaptive functioning had been "too great, even before he went to prison," to support an intellectual-disability diagnosis. *Id.* at 526.

Second, this Court considered applicant's improved behavior and functioning in prison as a means to offset a determination that he had adaptive deficits. For example, the Court cited the fact that he had learned to read and write in prison; he had written letters to various individuals; and he was found to have newspapers and books in his cell. *Id.* at 522-24, 526. Based on these observations, the Court determined that applicant had made "significant advances . . . while confined on death row." *Id.* at 526.

Third, even assuming that applicant had shown some evidence of adaptive deficits, this Court reasoned that those deficits were not sufficiently "linked to" his subaverage general intellectual functioning but were instead attributable to causes other than intellectual disability. *Id.* The Court observed that the record "overwhelmingly supports" the conclusion that applicant's social and academic difficulties were "caused by" a variety of other factors, such as trauma from his abusive and unstable home life as a child, a possible undiagnosed learning disorder, social and academic problems in school, or drug use. *Id.*

Fourth, this Court cited the *Briseno* evidentiary factors to explain its conclusion that applicant's evidence failed to show that any deficits in his adaptive functioning were directly related to his subaverage

general intellectual functioning. *Id.* Applying the seven factors, the Court observed that (factor 1) no testimony showed that those who knew applicant during the developmental period thought he was intellectually disabled, and applicant had never been formally diagnosed as intellectually disabled as a child; (factor 2) the evidence showed that applicant had "formulated plans and carried them through," including his attempts at earning money as a child so that he could buy food for himself and his siblings when they were hungry, his presentation of an alibi defense at trial, and his involvement in various aspects of his legal proceedings; (factor 3) applicant's prison disciplinary records demonstrated "leadership"; (factors 4 and 5) the record showed that applicant responds rationally and appropriately to external stimuli and responds coherently, rationally, and on point to oral or written questions, given the "many instances" in the record of applicant's testimony and interactions with courts over the course of this case; and (factors 6 and 7) applicant's varying statements to police about the offense and the facts of the offense itself show that he can hide facts or lie effectively in his own interest and undertake activities requiring forethought, planning, and moderately complex execution of purpose. *Id.* at 526 27.

Having determined that applicant failed to show either subaverage general intellectual functioning or significant deficits in adaptive functioning, this Court summarily determined that he had not met the third prong of the inquiry, onset of intellectual disability prior to the age of eighteen. *Id.* at 527. The Court rejected applicant's claim by concluding that applicant is a "person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior," and, thus, he

failed to show that he was exempt from execution under the Eighth Amendment. *Id.*

B. The Federal Litigation

Subsequent to this Court's former decision in this case, applicant sought a writ of certiorari in the Supreme Court, which was granted. The Supreme Court vacated this Court's judgment and remanded the case to this Court for further proceedings. *Moore*, 137 S. Ct. at 1053. The Supreme Court addressed four topics to resolve the case; it was unanimous on one and split as to the other three.

First, the unanimous Supreme Court held that this Court had erred by using the *Briseno* evidentiary factors to evaluate intellectual disability in a manner that conflicted with the requirements of the Eighth Amendment and Supreme Court precedent. *Id.* at 1051. The Supreme Court's majority opinion observed that the *Briseno* factors were not aligned with the medical community's information and thus, "[b]y design and in operation, the *Briseno* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014)). By resorting to lay perceptions and stereotypes to determine whether a person is intellectually disabled, this Court's approach deviated not only from clinical practice but also from the practices of other states in handling intellectual-disability claims. *Id*. at 1052. The Supreme Court ruled that, going forward, the *Briseno* factors "may not be used, as [this Court] used them, to restrict qualification of an individual as intellectually disabled." *Id.* at 1044, 1052.

Second, a majority of the Supreme Court held that the determination of whether someone is intellectually

disabled should be "'informed by the views of medical experts'" and guided by the "'medical community's diagnostic framework.'" *Id.* at 1044, 1048 (quoting *Hall*, 134 S. Ct. at 2000). The Court explained that in its decision in *Hall*, it had rejected Florida's practice of using a strict IQ-score cutoff to reject claims of intellectual disability, and it explained that that decision clarified that states have limited discretion in determining how to enforce the restriction on executing the intellectually disabled. *Id*. at 1048 (citing *Hall*, 134 S. Ct. at 1998). Citing *Hall*, the *Moore* majority stated, "Even 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.'" *Id*. (quoting *Hall*, 134 S. Ct. at 2000). The Court further observed that, in *Hall*, it had relied on "the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11." *Id*.; *see Hall*, 134 S. Ct. at 1991, 1993-95, 2000-2001. In explaining the basis for its holding in *Hall*, the Court indicated that the flaw in Florida's approach was that it had disregarded "'established medical practice'" and parted ways with practices and trends in other States. *Moore*, 137 S. Ct. at 1049 (quoting *Hall*, 134 S. Ct. at 1995). Relying on *Hall*, the Court in *Moore* stated that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." *Id*.

Third, a majority of the Supreme Court clarified that *Atkins*'s prohibition on the execution of intellectually disabled offenders extends to any person who meets the clinical diagnostic criteria for intellectual disability, and this includes a categorical prohibition against the imposition of the death penalty even

against mildly intellectually disabled people. *Id.* at 1051. The *Briseno* Court had been wrong, the majority explained, to suggest that individuals with mild intellectual disability might be eligible for execution in Texas, so long as a consensus of Texas citizens agreed that such a practice was permissible. *Id*. Rejecting this reasoning, the Supreme Court stated, "Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities, and States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Id*. (citing *Hall*, 134 S. Ct. at 1998-99; *Atkins*, 536 U.S. at 308 and n.3; and quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

Fourth, the *Moore* majority specifically explained the various ways in which this Court's majority opinion had erred in its analysis of two of the prongs for deciding whether applicant was intellectually disabled by applying reasoning that was incompatible with current medical principles. With respect to this Court's analysis of applicant's general intellectual functioning, the Supreme Court rejected this Court's determination that applicant's two IQ scores that it deemed reliable—a 74 and a 78—were alone a sufficient basis upon which to reject his claim of intellectual disability. *Id.* at 1049-50. The Supreme Court explained that, contrary to this Court's analysis, clinical standards would require the application of the standard error of measurement of five points, and thus applicant's correct range of scores, adjusted accordingly, would yield an IQ score range of 69 to 79. *Id.* at 1049 (citing *Hall*, 134 S. Ct. at 1995; DSM-5, at 37; AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 22–23 (11th ed. 2012)). Because the low end of applicant's range of IQ scores fell below a score of 70, which is generally accepted in the clinical community as the dividing line for

establishing subaverage general intellectual functioning, the Supreme Court indicated that it was improper for this Court to reject his claim on the basis of his IQ score alone. Rather, the Supreme Court explained that, when the low end of a person's range of IQ scores falls "within the clinically established range for intellectual-functioning deficits," clinical standards require that a court must continue the inquiry and consider other evidence of intellectual disability, namely, evidence of adaptive deficits. *Id*. at 1050. Thus, the Supreme Court held that applicant had adequately established the first prong and that the outcome of the case would depend on the evidence on the second prong, which, if proven, would also establish the third prong in this case.[11]

Regarding the second prong addressing evidence of adaptive deficits, the Court observed that this Court's analysis was incompatible with clinical standards

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[11] Explaining its holding that applicant had established the first prong, the Supreme Court stated,

> The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall* . . . . Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning . . . . [I]n line with *Hall*, we require 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.

Moore, 137 S. Ct. at 1049-50. Furthermore, the Court observed that there was no dispute that applicant met the third prong of onset of intellectual disability during the developmental period. *Id*. at 1039 n. 3. According to the Supreme Court's analysis of this case, therefore, our decision today rests solely on our assessment of the second prong pertaining to adaptive functioning.

in numerous respects. This Court's analysis of the evidence had "overemphasized Moore's perceived adaptive strengths," including evidence that he had lived on the streets, mowed lawns, or played pool for money. *Id.* at 1050. The *Moore* majority explained that it was improper for this Court to rely upon evidence of applicant's perceived adaptive strengths as a basis to "overcome the considerable objective evidence of Moore's adaptive deficits[.]" *Id.* By doing so, this Court's analysis had deviated from the clinical standards because "the medical community focuses the adaptive-functioning inquiry on adaptive deficits," not on strengths. *Id*. (citing AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, 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)).[12] Next, the Supreme Court criticized this Court's focus on applicant's improved behavior and functioning while in prison. The Court noted that reliance on this type of evidence to reject a claim of intellectual disability was flawed, given that "clinicians [ ] caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id*. (quoting DSM-5, at 38) ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons,

[12] Although the Supreme Court recognized that there may be some disagreement regarding the precise role of adaptive strengths in the adaptive-functioning inquiry, such that some clinicians might consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, this Court's approach was nevertheless improper because no "clinical authority" appeared to permit "the arbitrary offsetting of deficits against unconnected strengths[.]" *Moore*, 137 S. Ct. at 1050 n.8.

detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."); AAIDD-11 User's Guide 20 (counseling against reliance on "behavior in jail or prison")). Additionally, the Supreme Court criticized this Court's assessment that applicant's record of academic failure, along with the childhood abuse and suffering he had endured, detracted from a determination that his intellectual and adaptive deficits were "related." *Id.* at 1051. The Supreme Court explained that such experiences "count in the medical community as 'risk factors' for intellectual disability" which would prompt a clinician to further explore the prospect of intellectual disability, rather than operate to foreclose a diagnosis. *Id.* (citing AAIDD-11, at 59-60). This Court's use of such considerations to speculate regarding possible causes for applicant's adaptive deficits other than subaverage general intellectual functioning, and ultimately, to reject a finding of adaptive deficits, was thus out of sync with clinical standards. *Id.* Furthermore, the Supreme Court reasoned that this Court had also "departed from clinical practice" by requiring applicant to show that his adaptive deficits were not related to a personality disorder. *Id*. This error, the Court explained, was also incompatible with clinical standards because mental-health professionals recognize that "many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism." *Id*. (citing DSM-5, at 40) ("[c]o-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population"); AAIDD–11, at

58–63). The Court instructed that "[t]he existence of a personality disorder or mental-health issue, in short, is not evidence that a person does not also have intellectual disability." *Id*. (quotation marks and citation omitted).

In view of all these considerations, the *Moore* majority rejected this Court's former approach to evaluating claims of intellectual disability, and it held that this Court had erred by applying this constitutionally flawed standard to applicant's case. The Supreme Court concluded, "By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the 'medical community's diagnostic framework.'" *Id.* at 1053. In view of the many specific errors that it had identified in this Court's analysis, including this Court's use of the *Briseno* factors which had "pervasively infected" this Court's analysis, the Supreme Court vacated this Court's judgment rejecting applicant's intellectual-disability claim, and it remanded the case "for further proceedings not inconsistent with this opinion." *Id.*

II. Analysis

As explained above, given that the Supreme Court has already expressly determined the first and third prongs of the criteria for establishing intellectual disability in applicant's favor, the only remaining matter for this Court to determine is the second prong, so that is the primary focus of the remainder of this opinion. There are two important questions for this Court to determine in this case to resolve whether applicant should prevail as to the second prong addressing adaptive behavior deficits. First, now that the *Briseno* framework must be abandoned, what is the proper

standard for deciding whether adaptive deficits have been proven? Second, has applicant shown that he meets the requirements for establishing adaptive deficits under that correct standard? As to the first question, I agree with this Court's majority opinion to the extent that it holds that the Texas standard for evaluating deficits in adaptive functioning must be adequately informed by, and may not substantially deviate from, the current medical standards for diagnosing intellectual disability as set forth in the current versions of the DSM and AAIDD manuals. I, however, disagree with this Court's majority opinion's description of the specific criteria in the current diagnostic framework applicable to the assessment of adaptive functioning as described by those sources. As to the second question regarding the application of the proper standard to the facts of this case, I agree with all of the parties involved in this case that applicant has met the requirements for establishing deficits in his adaptive functioning, and thus he has shown that he is intellectually disabled under prevailing clinical standards. I explore each of my conclusions in more detail below.

A. The DSM-5 and AAIDD-11 Set Forth General Requirements that Make Up the Proper Standard for Evaluating Intellectual Disability

This Court's majority opinion holds that intellectual disability must be determined by consultation of the standards set forth in the DSM-5 and the AAIDD-11, but in the event of a conflict between the two sources, then the DSM-5 will control. Because it is highly unlikely that there will be a conflict between these two sources which are largely overlapping and consistent, this Court's general holding as to the proper standard

governing intellectual disability determinations is correct. Although the DSM-5 and the AAIDD-11 utilize different terminology in several areas, they are widely recognized as being complementary sources, rather than two competing systems for evaluating intellectual disability.[13] Thus, there is nothing inconsistent or incompatible about utilizing both sources interchangeably. The two manuals, although somewhat different in terms of scope and focus, both set forth the same three essential criteria for a diagnosis of intellectual disability: (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. *See Moore*, 137 S. Ct. at 1045 (citing AAIDD–11, at 1, 27; *Hall*, 134 S. Ct. at 1994).[14]

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[13] *See, e.g.*, *Smith v. Ryan*, 813 F.3d 1175, 1209 (9th Cir. 2016) (observing that both the DSM-5 and the AAIDD-11 "retain[ ] the essential premise and characteristic of the clinical definition cited in *Atkins*"); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015) ("The [AAIDD and DSM–V definitions of intellectual disability] have not materially altered the diagnosis of intellectual disability [cited in *Atkins*] but have provided new terminology."); *Com. v. Hackett,* 99 A.3d 11 (Pa. 2014) (observing that a defendant seeking to establish *Atkins* claim may rely on the DSM or AAIDD criteria); *Coleman v. State,* 341 S.W.3d 221, 248 (Tenn. 2011) (describing both DSM and AAIDD as "authoritative texts"); *United States v. Davis*, 611 F.Supp.2d 472, 474-75 (D.Md. 2009) ("Since *Atkins*, other federal courts have applied these same definitions, noting that the two definitions are essentially identical.").

[14] *See also* DSM-5, at 33 (defining intellectual disability generally as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning

By citing both the DSM-5 and the AAIDD-11 interchangeably in recent decisions, the Supreme Court has recognized that both sources are widely accepted and reflective of the medical community's general three-prong framework for diagnosing intellectual disability. *See Moore*, 137 S. Ct. at 1048 (describing both sources as constituting "leading diagnostic manuals"); *see also Hall*, 134 S. Ct. at 1995, 2000 (citing both manuals in support of its analysis of the general intellectual functioning prong). In view of the Supreme Court's endorsement of both manuals as being medically valid sources, I conclude that it is proper to permit experts to rely upon both manuals in providing expert testimony in *Atkins* cases.

Because this Court's majority opinion essentially makes this same determination, its acceptance of the DSM-5 and AAIDD-11 as valid sources and its general description of the three prongs of an intellectual disability diagnosis are correct. However, because the majority opinion's description of the particular manner in which the adaptive deficits prong should be analyzed fails to conform to current medical standards, I turn to that matter next.[15]

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deficits in conceptual, social, and practical domains"); AAIDD-11, at 5 ("Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.").

[15] Although I do not fully agree with this Court's description of the standards governing the inquiry into the first prong, subaverage general intellectual functioning, I do not address that matter in detail in this opinion, given that the Supreme Court has already decided the first prong in applicant's favor, and this Court's majority opinion accordingly does not conduct any analysis of that issue. *See Moore*, 137 S. Ct. at 1050. Similarly, there is no dispute that applicant has established the third prong

B. The Majority Opinion Errs in its Description of the Adaptive Functioning Prong

As I will explain further below, I disagree that this Court's majority opinion accurately sets forth the proper specific framework for evaluating deficits in adaptive functioning. I will review the standard that I view as being compliant with current medical standards, and then I will explain the various ways in which this Court's majority opinion fails to fully incorporate those standards into its analysis.

1. Proper Manner of Evaluating Deficits in Adaptive Functioning

According to the DSM-5, the adaptive functioning prong is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. DSM-5, at 38. The adaptive deficits prong considers how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. DSM-5, at 37; *see* AAIDD-11, at 15, 43 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."). Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as

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regarding onset of intellectual disability during the developmental period. For those reasons, this case hinges on the second prong pertaining to applicant's adaptive functioning, and I limit my opinion to addressing that matter.

home, school, work, and community. DSM-5, at 33. In further discussing the adaptive behavior prong, I turn to the specifics of the three skill domains that apply to this assessment, and then I address some particular considerations that are essential to an assessment of adaptive behavior but which the majority opinion has failed to adequately incorporate into its standard.[16]

a. The Conceptual Domain

The conceptual domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. DSM-5, at 37; *see* AAIDD-11, at 44 (conceptual skills include "language, reading and writing; and money, time, and number concepts").

For those with mild intellectual disability, the DSM-5 provides that impairments in the conceptual domain may manifest as difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. DSM-5, at 34 (Table 1). Abstract thinking, executive function (i.e., planning,

[16] The DSM-5 sets forth a classification system based on severity of intellectual disability with the levels of severity ranging from mild to profound. Although classification is not essential to a diagnosis of intellectual disability, the DSM-5 system of "specifiers" assigns a severity level and provides some useful information regarding the typical presentation of adaptive deficits in each of the three domains. DSM-5, at 33. Because most disagreement in this area surrounds the diagnosis of those with mild intellectual disability, in the discussion above I focus on the "specifiers" for that severity level to the exclusion of the more severe levels, given that it is unlikely there would be any serious disagreement regarding the diagnosis of a person with moderate to severe intellectual disability in any given case.

strategizing, priority setting, and cognitive flexibility), and short term memory, as well as functional use of academic skills (e.g., reading, money management) may be impaired. *Id*.

b. The Social Domain

The social domain involves awareness of other people's thoughts and feelings; empathy; communication skills; relationship abilities; and social judgment, among others. DSM-5, at 37; *see* AAIDD-11, at 44 (social skills consist of interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving).

In the social domain, mildly intellectually disabled individuals may be immature in social interactions as compared with typically developing age-mates. DSM-5, at 34 (Table 1). For example, there may be difficulty in accurately perceiving peers' social cues, and communication skills are more concrete or immature than expected for age. *Id.* There may be difficulties in regulating emotion and behavior in an age-appropriate manner, and the person may have limited understanding of risk in social situations, making him vulnerable to being manipulated by others (gullibility). *Id.*

c. The Practical Domain

The practical domain involves learning and self-management across various life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. DSM-5, at 37; *see* AAIDD-11, at 44 (practical skills involve activities of daily living (personal care), occupational skills, use of money, safety, health care,

travel/transportation, schedules/routines, and use of the telephone).

In the practical domain, a person with mild intellectual disability may function age-appropriately in personal care, but individuals need some support with complex daily living tasks in comparison to peers. DSM-5, at 34 (Table 1). Recreational skills resemble those of age-mates, although judgment related to well-being and organization around recreation requires support. *Id.* Such individuals may succeed in job settings that do not emphasize conceptual skills. *Id.* Individuals generally need support to make health care and legal decisions and to learn a skilled vocation competently. *Id.* Support is typically needed to raise a family. *Id*.

2. The Specifics Underlying the Proper Substantive Standard for Evaluating Adaptive Functioning as Compared to the Majority Opinion's Unconstitutional Approach

I part with this Court's majority opinion in its description of the legal standard because it fails to accurately describe the specific requirements of the diagnostic framework for evaluating adaptive functioning. I conclude that, for that reason, this Court has 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. Ultimately, although this Court suggests that it is setting forth a legal standard that adheres to the current medical framework in the DSM-5 and AAIDD-11, in actuality, it is modifying that medical criteria to omit or distort at least five of the current framework's many requirements. As a

result, this Court continues to apply a standard that fails to adequately incorporate current medical standards in conflict with the Supreme Court's holding in *Moore*. I will discuss each of the flaws in the majority's standard below by addressing the following clinical principles that pertain to an assessment of adaptive functioning: (1) adaptive strengths may co-exist with deficits, (2) the focus for assessment of adaptive functioning is on a person's typical rather than optimal performance, (3) the proper assessment of the "directly related" association between adaptive deficits and intellectual functioning does not require proof of a causal link, (4) information obtained within controlled settings should be corroborated and should not be heavily relied upon, and (5) use of standardized measures is key to the overall assessment of adaptive functioning.

a. Adaptive Strengths

This Court's majority opinion fails to expressly recognize that clinical standards require that an assessment of adaptive functioning should not focus on a person's perceived adaptive strengths, but should instead focus on evidence of a person's deficits. As the AAIDD-11 states, adaptive skill limitations often coexist with strengths in other adaptive skill areas; thus, in the process of diagnosing intellectual disability, "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." *See* AAIDD-11, at 16, 45, 47. Because individuals "may have capabilities and strengths that are independent of their [intellectual disability]," it is improper to focus on a person's strengths as a basis for discounting significant evidence of limitations. *Id.* at 7 (explaining that intellectually disabled people may have "strengths

in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation"). The Supreme Court emphasized this point in its *Moore* analysis, but this Court's majority opinion fails to mention this principle in describing the relevant standard for evaluating adaptive deficits. *See Moore*, 137 S. Ct. at 1050 (criticizing this Court's former analysis as overemphasizing applicant's "perceived adaptive strengths," and observing that the medical community "focuses the adaptive-functioning inquiry on adaptive *deficits,*" not on strengths).[17] By failing to incorporate this key principle into the standard for evaluating adaptive

[17] *See also Brumfield v. Cain,* 135 S. Ct. 2269, 2281 (2015) ("intellectually 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-10, at 8); *Hill v. Anderson,* 881 F.3d 483, 492 (6th Cir. 2018) (rejecting Ohio court's determination that defendant had failed to establish adaptive deficits; state court "veered off track when it disregarded the prevailing clinical practice documented in the medical literature by placing undue emphasis on Hill's adaptive strengths, as opposed to his adaptive weaknesses"); *Commonwealth v. VanDivner,* 178 A.3d 108, 117 (Pa. 2018) ("[T]he focus should be on an individual's weaknesses—not his or her strengths—as [intellectually disabled] people can function in society and are able to obtain and hold low-skilled jobs, as well as have a family"; current clinical standards permit an individual to be classified as intellectually disabled "even though he may have relatively strong skills in distinct categories"); *Williams v. State,* 226 So.3d 758, 769 (Fla. 2017) (in evaluating adaptive deficits, a court "does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers 'the findings of experts and all other evidence,' it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a defendant's limitations, as well as evidence that may rebut those limitations") (citations omitted).

deficits, the majority opinion appears to hold that it is permissible to focus on a defendant's perceived adaptive strengths rather than focusing primarily on his limitations, thereby deviating from the clinical framework.

b. Typical Performance

The majority's recitation of the standard further errs by failing to recognize that an assessment of adaptive behavior is based on an individual's typical performance, not his maximum or atypical performance. AAIDD-11, at 16, 47 ("The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance. Thus, what the person typically does, rather than what the individual can do or could do, is assessed when evaluating the individual's adaptive behavior."). By failing to incorporate this principle into the standard for evaluating adaptive deficits, the majority opinion's analysis is further flawed because it appears to permit courts to offset evidence of deficits in everyday functioning by citing evidence of a person's perceived functioning under extraordinary or unusual circumstances. This type of analysis is incompatible with clinical standards.[18]

c. Directly Related

As the majority opinion correctly notes, the DSM-5 states that, to meet the adaptive deficits prong, a

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[18] *See* Caroline Everington & J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Prac., no. 1, 2008, at 1, 11 ("[P]erhaps most important, adaptive behavior is the individual's typical performance in his/her community setting. The details of the crime cannot be considered to be a sample of typical behavior.").

person's deficits in adaptive functioning must be "directly related" to the deficits in general intellectual functioning. The majority opinion also notes that the AAIDD11 does not contain an express "relatedness" requirement, and in highlighting this distinction, it implicitly appears to suggest that the two sources are distinct in this regard. Although some have suggested that this "relatedness" requirement from the DSM-5 imposes a heightened burden for establishing adaptive deficits, clinicians have explained that this language from the DSM-5 simply reflects the requirement that the deficits are concurrent or coexisting with deficits in general intellectual functioning. *Compare* DSM-5, at 38, *with* AAIDD-11, at 49, 52.[19] But, by emphasizing

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[19] Some legal scholars have suggested that the DSM-5 relatedness requirement represents a significant departure from other diagnostic frameworks and imposes an additional burden on a person seeking to establish intellectual disability. *See, e.g.*, *Moore,* 137 S. Ct. at 1055 (2017) (Roberts, C.J., dissenting) (noting that, under the DSM-5, applicant would be required to show relatedness, in contrast to other frameworks that do not expressly include such a requirement). Clinicians, however, have largely rejected as incorrect this legal understanding that the "relatedness" language in the DSM-5 was intended to impose some additional or heightened burden on a person seeking to establish adaptive deficits; rather, the purpose of that language was to place greater emphasis on the adaptive functioning prong as compared to the IQ prong of the inquiry. *See* Tasse, Luckasson, and Schalock, *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 2016 Vol. 54, No. 6, 381, 383; *see also United States v. Wilson,* 170 F. Supp.3d 347, 370-71 (E.D.N.Y. 2016) (rejecting interpretation of DSM-5 as imposing some heightened causation burden on a defendant; "where an individual has demonstrated significantly subaverage intellectual functioning, along with significant adaptive deficits that relate to such intellectual impairment, that individual has satisfied the first two diagnostic criteria for intellectual disability. To require this individual to further prove that he

this language from the DSM-5 without properly explaining its significance, this Court's majority opinion suggests that the DSM-5 requires proof of direct causation between subaverage general intellectual functioning and deficits in adaptive behavior, while excluding other possible causes for adaptive limitations. This is essentially the same flaw that the Supreme Court highlighted in *Moore* when it criticized this Court's analysis of the "relatedness" issue. *See Moore*, 137 S. Ct. at 1051. Specifically, the Supreme Court in *Moore* criticized this Court's assessment that applicant had failed to make this showing of "relatedness" in light of possible alternative causes for his adaptive deficits, such as his record of academic failure, a history of being abused as a child, or the possibility of a personality disorder. *Id.* The *Moore* Court explained that all of these considerations were risk factors for intellectual disability and could not reasonably be used as evidence that a person is not intellectually disabled. *Id.* In spite of the Supreme Court's guidance in this regard with respect to the types of considerations that may not be used to reject a finding of intellectual disability due to a lack of "relatedness," this Court's majority opinion appears to persist in requiring defendants to provide affirmative proof that their deficits in adaptive functioning are caused by their subaverage general intellectual functioning and not attributable to some other cause, such as a personality disorder or a troubled upbringing.

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satisfies these criteria because he is intellectually disabled would render the criteria meaningless. . . . [A] defendant is not required to rule out other contributing causes of his adaptive deficits in order to meet the standard for intellectual disability.").

d. Controlled Settings

Citing the DSM-5, this Court's majority opinion recognizes generally that adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers) and that if possible, corroborative information reflecting functioning outside those settings should be obtained. DSM-5, at 38. The AAIDD-11, in turn, provides that "[t]he diagnosis of [intellectual disability] is not based on the person's street smarts, behavior in jail or prison, or criminal adaptive functioning." AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 20 (11th ed. 2012) ("AAIDD User's Guide").[20] The Supreme Court has interpreted these standards in conjunction as signaling that any assessment of adaptive functioning should not be heavily dependent upon evidence of a person's functioning in prison. *See Moore*, 137 S. Ct. at 1050 (noting that this Court had erred by stressing applicant's improved behavior while in prison, and noting that "[c]linicians [ ] caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is").[21] But, by citing this language from the DSM-5 without adequately explaining that evidence of adaptive functioning while in prison should be afforded minimal weight, this Court's majority opinion suggests that it is proper to

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[20] *See also Rodriguez v. State*, 219 So.3d 751, 757 (Fla. 2017) ("Medical standards indicate that experts cannot accurately evaluate adaptive functioning in a prison setting.") (citing AAIDD, *The Death Penalty and Intellectual Disability*, at 189 (Edward A. Polloway, ed., 2015)).

[21] *See also Hill,* 881 F.3d at 492-93 (criticizing Ohio courts for "relying too heavily on the observations of prison guards concerning Hill's behavior in the highly regimented environment of his prison block").

consider this evidence as being highly relevant to the assessment of adaptive functioning. Moreover, as I will discuss further below, this Court's continued emphasis on applicant's improved adaptive functioning while incarcerated in the highly controlled environment of death row conflicts with this principle from the clinical standards and the Supreme Court's reasoning in *Moore*.

e. Standardized Measures

The AAIDD provides that, to support a diagnosis of intellectual disability, significant limitations in adaptive behavior should be established through the use of standardized measures normed on the general population, including people with and without disabilities. AAIDD-11, at 49; *see also* DSM-5, at 37 (discussing use of standardized measures to evaluate adaptive functioning). Significant limitations in adaptive behavior are shown by "performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills." AAIDD-11, at 10, 27, 47.[22] The assessment instrument's standard error of measurement

[22] This Court received an amicus brief filed by the 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. They observe that there are currently four contemporary scales used to diagnose limitations in adaptive behavior along with a forthcoming instrument. *See* J. Gregory Olley, *Adaptive Behavior Instruments* in THE DEATH PENALTY AND INTELLECTUAL DISABILITY, at 187-88 (Edward A. Polloway, ed., 2015). The four contemporary scales are the Adaptive Behavior Diagnostic Scale (Pearson, Patton & Mruzek, 2016); the Scales of Independent Behavior-Revised (Bruninks, Woodcock,

must be considered when interpreting the individual's obtained scores. AAIDD-11, at 48.

An adequate standardized measure of adaptive behavior consists of one that provides a robust standard score across the three domains of adaptive behavior, has current norms developed on a representative sample of the general population, and involves evaluation using multiple respondents and multiple sources of converging data. AAIDD-11, at 49-50; *see also id.* (Table 5.1, listing technical standards for selecting standardized assessment of adaptive behavior); *id.* at 54 (Table 5.2, guidelines for selecting an adaptive behavior assessment instrument). Although every effort must be made to select an instrument that is appropriate to the person being assessed, clinicians must recognize that adaptive behavior instruments are imperfect measures of personal competence. *Id.* at 60. Further, because there are currently no standardized measures related to credulity and gullibility, these characteristics must be considered in the clinical judgment of adaptive behavior limitations. *Id.* And, because individuals with mild intellectual disability are prone to a degree of bias in self-reporting their adaptive behaviors, self-reports should be interpreted with caution, and clinicians should not rely heavily

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Weatherman& Hill, 1996); the Adaptive Behavior Assessment System (Harrison & Oakland, 2015); and the Vineland Adaptive Behavior Scales (Sparrow, Cicchettif & Saulnier, 2016). The forthcoming instrument is the Diagnostic Adaptive Behavior Scale (Tasse et al, in press). Each of these instruments meets "contemporary standards for standardization, reliability, and validity." *Id*. at 189. When done according to the accepted clinical standards, these instruments help to ensure that the assessment of adaptive functioning is not wholly subjective.

on information obtained from the individual himself. *Id.* at 61.

Although the majority opinion briefly acknowledges that an assessment of adaptive functioning should be based on standardized measures, its recitation of the standard fails to clarify that use of standardized measures is the preferred means of evaluating adaptive behaviors under the current clinical framework. Moreover, the majority's standard fails to expressly recognize that a defendant's score on a standardized measure of adaptive functioning of two standard deviations or more below the mean in any single domain is widely considered as establishing adaptive deficits.[23] The majority's approach fails to comport with clinical standards because, under the clinical framework, the use of standardized measures is viewed as being essential to the assessment of adaptive functioning and as serving as a safeguard against wholly subjective determinations of adaptive functioning. *See* amicus brief of American Psychological Association, et. al ("The clinical diagnosis of deficits in adaptive functioning is *not* a wholly subjective assessment. In a clinical assessment of deficits in adaptive behavior, mental health professionals use standardized measures."). By failing to adequately recognize the importance of standardized measures in the evaluation of adaptive functioning, this Court's majority opinion deviates from the clinical framework and appears to

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[23] *See United States v. Hardy,* 762 F.Supp.2d 849, 879-80, 901 (E.D. La. 2010) (noting that "use of standardized instruments is preferable when assessing a person's level of adaptive behavior"; the AAIDD standard "repeatedly emphasizes that a diagnosis of significant limitations should be made whenever a person has performance at least two standard deviations below the mean in any of the three domains (or in the total score)").

permit continued reliance on subjective or lay considerations to reject a finding of intellectual disability.[24]

C. Applicant's Evidence Shows that He is Intellectually Disabled

Having reviewed the proper standard for evaluating applicant's claim and the reasons why the majority's standard fails to adhere to the clinical framework, I now explain why I conclude that, in light of the prevailing clinical criteria, applicant has established that he meets the clinical requirements for a determination of intellectual disability and thus is entitled to relief from his death sentence. A close reading of the record in this case shows that applicant has established that he has significant deficits in his adaptive functioning so as to support the habeas court's determination that he is intellectually disabled under current medical standards. The majority opinion's rejection of the habeas court's recommendation here is flawed due to its numerous mistakes in applying an erroneous view of the clinical standards and due to its failure to defer to the habeas court's credibility determinations. As a result of these mistakes, this Court's majority opinion essentially repeats the same errors as in its original opinion in this case, ultimately rejecting applicant's claim by injecting non-clinical considerations into its analysis. To explain why I conclude that applicant is entitled to relief, I briefly address the standard of review for habeas applications. After that, I review the evidence that the habeas

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[24] There are other considerations for evaluating adaptive deficits that do not appear to be directly applicable to this case or that this Court's majority opinion has accurately taken into account in this case and that do not need further discussion, such as cultural appropriateness, comprehensive review of underlying information, and co-occurring conditions.

court determined was credible and supported its assessment that applicant is intellectually disabled, and then I examine the evidence that the habeas court rejected for lack of its credibility.

1. The Standard of Review Requires that this Court Defer to the Habeas Court on Matters Involving Credibility of the Witnesses

Although this Court is the ultimate fact finder in habeas cases involving the death penalty, we have repeatedly noted that we will abide by a habeas court's recommendation when it is supported by the record. *See Ex parte Flores*, 387 S.W.3d 626, 634 (Tex. Crim. App. 2012) ("The habeas judge is '[u]niquely situated to observe the demeanor of witnesses first-hand,' and his findings and conclusions are generally accorded great deference," unless those findings fail to resolve the disputed issues or are not supported by the record) (quoting *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)); *see also Ex parte Navarijo*, 433 S.W.3d 558, 567 (Tex. Crim. App. 2014) ("This Court ordinarily defers to the habeas court's fact findings, particularly those related to credibility and demeanor, when those findings are supported by the record.").

In analogous circumstances to the instant case, this Court has recognized the importance of deferring to the habeas court as the original factfinder, "particularly in those matters with regard to the weight and credibility of the witnesses and, in the case of expert witnesses, the level and scope of their expertise." *Ex parte Van Alstyne*, 239 S.W.3d 815, 817 (Tex. Crim. App. 2007) (per curiam) (in intellectual disability determinations, "we have typically deferred to the recommendation of the convicting court, whatever that might be"). In *Van Alstyne*, we noted that, based

on the consideration of conflicting evidence from records from the Texas Department of Criminal Justice (TDCJ), affidavits from various experts and lay people, and an evidentiary hearing, the convicting court found that the applicant was intellectually disabled and recommended relief be granted. *Id*. Because that finding was supported by the record, notwithstanding competing evaluations by expert witnesses, we found "no compelling reason to reject that recommendation." *Id*.

In the instant case, this Court ignores this consistent principle from our precedent while failing to present any compelling reason for rejecting the habeas court's findings and conclusions. *See id.* Contrary to this Court's determination, the habeas court's assessment that applicant is intellectually disabled has extensive support in the record. Here, the habeas court heard from four expert witnesses, found three experts' testimony credible, and disregarded the outlier opinion by Dr. Compton that, as explained below, largely relied on speculation and failed to correctly apply current medical standards. This Court, therefore, should defer to the habeas court's factual findings and conclusions in this case that determine that applicant is intellectually disabled.

2. The Record Supports the Habeas Court's Factual Findings that Applicant is Intellectually Disabled

In concluding that applicant was entitled to relief on his *Atkins* claim, the habeas court noted that its decision was "guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ('AAIDD') and the American Psychiatric Association ('APA')." *See Ex parte Moore*, No. 314483-C (185th

Dist. Ct., Harris County, Tex. Feb. 6, 2015), Findings at ¶ 58 (citing AAIDD (11th ed.); DSM-4 (4th ed.)). The court noted, "Each organization recognizes that mental retardation is a disability characterized by (1) 'significantly subaverage' general intellectual functioning, (2) accompanied by 'related' (AAMR) or 'significant' (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18." *Id*. The habeas court determined that the defense's experts were "highly qualified," and it adopted their testimony that applicant had "significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning." *Id*. at ¶ 181. Below, I detail the evidence and the habeas court's factual findings addressing testimony by applicant's experts Dr. Borda, Dr. Greenspan, Dr Anderson, and the lay witnesses. After that, I explain why the habeas court was correct to conclude that these witnesses' testimony establishes that applicant exhibits adaptive deficits.

a. The Habeas Court Determined that Dr. Borda's Opinion that Applicant is Intellectually Disabled was Credible

One of the defense experts found credible by the habeas court was Dr. Borda, a clinical neuropsychologist, who testified that applicant is intellectually disabled. Dr. Borda discussed four matters to support his conclusion that applicant had adaptive deficits meeting the medical criteria in the DSM and AAIDD for intellectual disability.

First, Dr. Borda testified that tests performed on applicant revealed that he exhibited evidence of deficient adaptive functioning. Because there was evidence suggesting that applicant had frontal lobe

damage, which impacts adaptive functioning, Dr. Borda administered the "Tinkertoy Test" where applicant was tasked with assembling structures from Tinkertoy pieces. Dr. Borda explained that this test "is almost a pure frontal lobe test" and measures "the ability to plan ahead . . . [and] have some idea of what you want to get out of this and take pieces to get to that goal." Dr. Borda agreed that applicant's exceedingly poor performance indicated "severe impairment."[25] Dr. Borda also administered a Mini-Mental State exam that asked applicant basic questions, such as "who are you, where are we today, and what day is it," as well as asked him to remember three words. After about twenty minutes, applicant could recall only one of the three words. Dr. Borda characterized this performance as "not good." Dr. Borda noted in his report that applicant "appeared to give a good effort on all tasks."

Second, in addition to the results of testing on applicant, Dr. Borda considered other facts that supported his conclusion that applicant had adaptive deficits. Dr. Borda cited applicant's failure to seek outside intervention from neighbors or relatives for his physically and emotionally abusive family environment, instead choosing to sleep on neighborhood porches or in cars before eventually living on the street. He further cited applicant's poor academic history and noted that, by age thirteen, applicant's school had recommended daily drills on basic things such as days of the week, months of the year, seasons, standards of

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[25] Dr. Borda explained that a score below seven indicates severe impairment and "generally equates with very poor likelihood of gainful employment and poor ability to live independently[.]" Applicant had a score of one, which Dr. Borda testified was the lowest score he had ever recorded.

measure, and telling time. Dr. Borda opined that this indicates that applicant suffered profound intellectual limitations. Dr. Borda additionally noted that applicant had suffered several head traumas as well as malnutrition which could have contributed to intellectual deficiencies. The fact that applicant continued to eat from garbage cans after contracting food poisoning suggested an inability to learn from past experiences.

Third, Dr. Borda explained why he was unpersuaded that evidence purporting to show applicant's abilities in prison, evidence of his troubled upbringing, and evidence of his other strengths would serve to undermine his conclusion that applicant is intellectually disabled. Dr. Borda observed that applicant's ability to function in prison does not disprove intellectual disability. He stated,

> [W]e've heard a lot of testimony today of how well [applicant] has done in the extreme structure of his current environment and to his credit, he has – has found a way to do well in that environment and to enhance his ability to do academic skills. And I don't mean to discount that in any way but, you know, it's taken him, what? [thirty] years to develop skills that normally would be done in elementary school. So, although that certainly is to his credit, I don't know that that necessarily speaks to his having gotten brighter. I think he's just learned to do more tasks than he was able to do before.

Dr. Borda agreed that taking thirty years to learn to do simple addition and to write a legible letter and to read at an elementary school level "does not indicate normal intellectual functioning[.]" Moreover, the prison environment provided the opportunity for

repetitive practice of basic skills, such as filling out a commissary sheet or practicing cursive lettering.

Dr. Borda was unpersuaded that applicant's troubled upbringing, prior employment experience, or ability to hustle pool were factors that would negate his diagnosis. He noted that applicant's impoverished and abusive upbringing likely compounded his learning difficulties, but it did not negate a diagnosis of intellectual disability. On cross-examination, the State asked whether the fact that, as a child, applicant mowed grass for money and hustled pool suggested that he had some adaptive skills. Dr. Borda explained that applicant is not wholly without adaptive skills but rather they were "probably below average for someone of that age."

Fourth, Dr. Borda explained the inconsistency between his prior testimony and his testimony at the habeas hearing regarding his conclusion that applicant was intellectually disabled by noting that the changes to the diagnostic criteria in the DSM-5 and AAIDD-11, in conjunction with other reasons, led to his changed opinion. In his affidavit summarizing his evaluation of applicant, Dr. Borda noted that, at one point, his professional opinion was that applicant was likely only borderline intellectually disabled based on a review of applicant's IQ scores. However, under the more recent guidelines set forth in the DSM-5 and AAIDD manuals that require a lesser showing to establish deficits in adaptive functioning (requiring significant limitations in only one domain, as opposed to two) and that place a reduced emphasis on IQ scores, Dr. Borda revised his opinion and determined that applicant meets the current diagnostic criteria for intellectual disability. Dr. Borda also explained that his revised opinion was based on a more thorough

review of applicant's history and the testing done by Dr. Anderson. Dr. Borda ultimately opined that, by any current standard, applicant is intellectually disabled, given that applicant "clearly had marked deficits in adaptive functioning."

b. The Habeas Court Determined that Dr. Anderson's Opinion that Applicant is Intellectually Disabled was Credible

Another defense expert was Dr. Anderson, a neuropsychologist, who also concluded that applicant was intellectually disabled under either the DSM-4 or AAIDD standard. Dr. Anderson explained that she is "a clinical psychologist by training that has specialty training in either [traumatic brain injury] or some anomaly of the brain" and that she was retained to conduct an evaluation to determine if there was any organicity (*i.e.*, whether applicant was born with any sort of brain anomaly) and possible traumatic brain injury. Dr. Anderson interviewed applicant for a five-hour period during which she administered multiple tests to evaluate his intellectual abilities.[26] She

[26] In her affidavit detailing her assessment of applicant, Dr. Anderson stated that she was retained to "help determine [applicant's] overall level of functioning. Specifically, the evaluation was conducted to determine the possibility and effects of organicity and/or acquired brain injuries." Dr. Anderson listed the following assessment tools: (1) unstructured clinical interview with applicant and his family; (2) review of records; (3) Mini-Mental Status Exam (MMSE); (4) Rey Complex Figure Test (RCFT); (5) Symbol Digit Modalities Test (SDMT); (6) Trails A and B; (7) Hooper Visual Organization Test (HVOT); (8) Controlled Oral Word Association Test (COWA); (9) California Verbal Learning Test-II (CVLT-II); (10) Delis-Kaplan Executive Functioning System (DKEFS); (11) Wide Range Achievement

testified that applicant's performance ranged from low average to significantly below average.

On some of the tests that applicant performed, applicant was in the deficit range. Dr. Anderson observed deficits in applicant's "processing speed," which "is how fast the brain fires," as well as "problems with reasoning and judgment." Based on his performance on the Trails A and Trails B tests,[27] Dr. Anderson stated that applicant's processing speed fell in "what we call a deficit range, so it's pretty low" and was "more than two standard deviations below the mean." Based on applicant's performance on the Trails A and B tests, Dr. Anderson classified applicant's processing speed as "severely deficient when compared to individuals his age." She noted in her report that this performance "suggests that [applicant] may make errors when he has to process differing and/or complex information quickly." Furthermore, Dr. Anderson administered selected Delis-Kaplan Executive Functioning System (DKEFS) subtests[28] to assess several areas of applicant's executive functioning abilities.

Test-4th edition (WRAT-4) math subtest; and (12) Wechsler Adult Intelligence Test-IV (WAIS-IV) math subtest.

[27] In her affidavit, Dr. Anderson explained that the Trails A tests visual-motor processing speed by prompting the examinee to draw lines to connect consecutively numbered circles as quickly as possible. The Trails B tests visual-motor scanning, divided attention, and cognitive flexibility by requiring the examinee to draw lines to consecutively connect alternating numbers and letters as quickly as possible.

[28] The DKEFS subtests administered were the Verbal Fluency tests and the Twenty Questions Test. Applicant scored in the moderately impaired range on each. The Verbal Fluency subtest required applicant to verbally give words that were associated with a stimulus, such as animals, in an allotted time. The Twenty Questions subtest is a measure of deductive reasoning.

She testified that executive functioning concerns higher order learning and frontal lobe judgment, reasoning, and more abstract thought. In her report, she noted that applicant demonstrated great difficulty on higher order tasks such as reasoning and verbal fluency. Although able to complete the tests, applicant scored in the deficient range and his scores were "indicative of deficits that would require formal interventions." Dr. Anderson tested applicant's verbal memory using the California Verbal Learning Test II (CVLT-II)[29] and found his performance to fall in the severely impaired range, suggesting "a reduced capacity to learn."[30]

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[29] In her affidavit, Dr. Anderson explained that the California Verbal Learning Test II (CVLT-II) is a test of verbal memory that requires the examinee to recall a list of sixteen words after a time delay that is repeated across five trials. Applicant was able to recall as many as six of the sixteen words from the original list after the fifth trial during some rounds. That level of ability indicates mild impairment and suggests a limited capacity to store information. During later rounds, applicant could recall only one of sixteen words. This performance is in the severely impaired range. Dr. Anderson noted that, although applicant has fairly intact memory skills, he may be able to retain only a definitive amount of information, as opposed to being able to employ strategies to recall beyond his limits, which suggests a reduced capacity to learn.

[30] With respect to applicant's "verbal memory," Dr. Anderson found that his "performance was in the low average range, which it's not below average, it's just low average." She concluded that "what [applicant] learned, he actually could hold onto, it just took him several times to actually learn it. So, it's not the retention or the recall or the memory that's impaired; it's the acquisition, it's the brain's capacity to hold onto those 16 words and actually learn them." She continued by explaining, "[I]n my opinion, it speaks to the capacity of the brain to learn."

Dr. Anderson determined that applicant had moderate to severe impairment in his ability to perform everyday mathematical computations. She administered the Wechsler Adult Intelligence Test-IV (WAIS-IV) and Wide Range Achievement Test-4th Edition (WRAT-4) to determine his ability to perform mathematical computations as they relate to daily functioning.[31] Applicant's scores fell at the bottom fourth percentile on the WAIS-IV, indicating moderately impaired ability, and at the bottom first percentile on the WRAT-4 (equivalent to a third grader), indicating moderate to severe impairment.

On some of the tests that he was administered, applicant performed in the borderline-moderately impaired or low-average range. Dr. Anderson noted that applicant's performance on the Symbol Digit Modalities Test (SDMT),[32] also a measure of cognitive

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[31] Dr. Anderson noted that the WAIS-IV math subtest is a clinical instrument used to assess cognitive abilities in adults age 16 to 90 years old. She used the test to gain a quantitative measure of applicant's abilities rather than to derive an IQ score. Similarly, the WRAT-4 math subtest measures an ability to perform basic computations through counting, identifying numbers, solving simple oral problems, and calculating written mathematics problems.

[32] In her affidavit, Dr. Anderson explained that the Symbol Digit Modalities Test (SDMT) measures cognitive processing speed and requires visual scanning, visual discrimination, visual memory, fine motor skills, and cognitive speed. The SDMT employs two response trials consisting of written and oral response modes. The examinee is required to write a number associated with a novel symbol, with visual stimulus cues being continuously given. Applicant completed 32 of the 110 items, when writing responses. This score is in the borderline impaired range. Applicant did not make errors when completing this task but was slow when doing so.

processing speed, indicated applicant is in the borderline impaired range. Dr. Anderson administered the Rey Complex Figure Test (RCFT) and Hooper Visual Organization Test (HVOT) to evaluate applicant's visual perception and visual memory, and he scored in the borderline-moderately impaired range on the RCFT and average on the HVOT.[33] Dr. Anderson also administered the Controlled Oral Word Association (COWA) test to evaluate applicant's language abilities, and he scored in the low-average range.[34]

Dr. Anderson testified that interviews with several of applicant's family members indicated that the deficits applicant exhibited were longstanding and chronic. She further observed that the family members' accounts of applicant's developmental deficiencies in childhood comported with the deficits noted in his school records. Lastly, Dr. Anderson testified that it is possible for people with either intellectual disability or organic brain damage to improve some skills such as reading and writing. Dr. Anderson also noted that

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[33] The RFCT requires the examinee to copy an abstract figure with a visual stimulus card to assess visual processing and perceptual abilities; the HVOT provides a measure of visual organization and mental rotation ability by asking the examinee to view thirty items that are cut into puzzle-like pieces and determine what the stimulus might be when put together. Applicant completed the RCFT in 412 seconds, which is "very slow" compared to his normative group and placed him in the borderline-moderately impaired range. Applicant scored average on the HVOT.

[34] The COWA entails giving verbal responses that begin with a particular letter within a one minute timeframe over several trials with different letters. Applicant produced a total of seventeen words yielding a raw score falling in the first percentile and in the deficient range. Dr. Anderson noted that when corrected for lack of education and grade attainment, applicant's score then fell in the eleventh percentile and in the low-average range.

physical abilities, including the ability to play a game that requires physical dexterity such as pool, can coexist with intellectual disability or impairment.

Dr. Anderson concluded that, although he has demonstrated "some abilities as they relate to self-care, motor skills, and daily living," applicant has "equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition." Dr. Anderson continued by observing that "there is historic information that accounts for [applicant's] intellectual, developmental, and adaptive deficits; and [this] indicates that he met full criteria for a diagnosis of mental retardation as a child." Moreover, Dr. Anderson determined that, "taking into account the records reviewed, prior intelligence test findings, and [applicant's] performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for [intellectual disability]; and this clinician would be justified in assigning said diagnosis."

Dr. Anderson assessed whether applicant's performance on the administered tests represented his true abilities rather than some artificially diminished ability due to lack of effort on his part. She testified on cross-examination that "symptom validity tests" are built into the tests that she administered to applicant that evaluate whether applicant was putting forth maximum effort. When asked by the State if she felt that she had evaluated applicant for effort, Dr. Anderson answered, "Yes."[35] She noted that a layperson observing her examination of applicant would

[35] Clinicians use the term "effort" to judge whether a person is feigning an inability to perform on a test. When a diagnostician determines that a person is exerting suboptimal effort, the diagnostician may undertake measures to determine whether the

think he was "cooperative and trying to do his best" and that "they would definitely see deficits."

c. The Habeas Court Determined Dr. Greenspan's Testimony was Credible Regarding His Opinion that Applicant's Behavior is Consistent with Intellectual Disability

Another defense expert was Dr. Greenspan, a former professor of educational psychology. Although he did not directly evaluate applicant, he also concluded that applicant's behavior was consistent with being intellectually disabled. Dr. Greenspan noted that the "Tinkertoy Test" administered by Dr. Borda is a good indicator of problems with executive functioning. Dr. Greenspan explained that in all of the clinical manuals, "global incompetence is not a requirement for a diagnosis of intellectual disability, particularly in the range of mild retardation, which is, for the most part, what we're talking about with most *Atkins* cases." Dr. Greenspan also testified that

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person is malingering. *See* PSYCHOLOGICAL TESTING IN THE SERVICE OF DISABILITY DETERMINATION 157, Committee on Psychological Testing, Including Validity Testing for Social Security Administration Disability Determinations, Institute of Health of the National Academies (2015) (discussing various performance validity measures and explaining that such measures assess the extent to which an individual is providing valid responses during cognitive or neuropsychological testing). "PVTs are typically simple tasks that are easier than they appear to be and on which an almost perfect performance is expected based on the fact that even individuals with severe brain injury have been found capable of good performance. On the basis of that expectation, each measure has a performance cut-off defined by an acceptable number of errors designed to keep the false-positive rate low. Performances below these cutoff points are interpreted as demonstrating invalid test performance." *Id.* at 155.

intellectually disabled people try to "mask" their deficits by attempting "to act more competent than they are." He noted that, because "people with mild mental retardation look normal and they can carry on a conversation," it is often not obvious that a person suffers from an intellectual disability. As a general rule of thumb, Dr. Greenspan explained,

> [P]eople with mild intellectual disability have a mental age that doesn't really progress past [age eleven]. And when you think of what 11-year-olds can do, they can carry on a conversation, they can do addition, they can do subtraction. What they are not really able to do is deal with complex situations involving abstract reasoning. They could even drive a car but you wouldn't want to get in a car driven by an 11-year-old because they lack the judgment to deal with novel situations.

Dr. Greenspan testified that "everything I've seen is certainly congruent with a diagnosis of intellectual disability." He stated that one of the obstacles to accepting a valid diagnosis of intellectual disability is "a tendency to cherry-pick particular behaviors and say, well, in my opinion, somebody with mental retardation can't do that[.]"

d. The Habeas Court Found Credible Lay Witness Testimony Describing Facts Showing Applicant's Deficits and Was Unpersuaded by His Abilities Gained During Confinement

In addition to the expert testimony described above, applicant presented the testimony of several lay witnesses regarding his behavior during the developmental period. These witnesses were applicant's

younger brother, his younger sister, and a childhood friend. The cumulative testimony of the defense's three lay witnesses provided a description of applicant as having done poorly in school, lacking in social and other skills, failing to understand television and denominations of money, and performing only simple tasks during employment. Although there was some evidence that applicant had gained limited abilities while confined, the habeas court was unpersuaded that that evidence would outweigh the other substantial evidence of his deficits in adaptive functioning.

Applicant was held back two grades and was "in the same classroom most of the time" with his younger sister. Throughout these years, applicant had "trouble reading" and "never could read well." His sister said applicant "didn't comprehend early on" as compared to the other children. He could not write his letters without his sister's help, and it took him "forever to spell 'cat.'" One of applicant's elementary school teachers "suggested that he was retarded." His sister "always" assisted him with his schoolwork and "actually did" most of his homework. When applicant was fourteen years of age, applicant's father "called him dumb" and whipped him because "he still didn't know how to read." Applicant dropped out of school, moved away from his house, and became homeless.

Socially, as a child, applicant, was easily misled, did not interact very well with people he did not know, was very shy, and "not really trusting." Sometimes, people in his neighborhood called applicant "dummy." When they played football or baseball, applicant had difficulty following instructions for the plays and he would be repeatedly admonished for "slinging" the bat towards the catcher when he hit a baseball. It was easy to take advantage of applicant, and some people

tried. For example, at one point, a stranger tried to get applicant to steal a gym bag for him at a neighborhood gymnasium until applicant's friend intervened on applicant's behalf.

Applicant did have a "backbone" when he needed one and he would try to stand up for his mother when his father would beat her. Although he would try to stand up for himself when he could, applicant just "stood there" and "he wouldn't cry" while his father was "whipping him" for not knowing how to read.

Regarding his capacity to grasp ordinary events that occurred when he was a child, applicant did not understand "a lot" of the television shows the children in his family watched together. He was able, however, to have manual-labor type jobs as a child, such as mowing lawns and mopping floors at a restaurant. Although he could earn some money, applicant was incapable of identifying the denominations of the cash money he earned, and "it was a long time before he actually understood the value of money."

The habeas court heard evidence that applicant had gained some abilities while confined on death row. For example, after he had been confined in prison for six years, applicant, as an adult, learned how to read and write. From prison, applicant has written letters to people and he has "nice handwriting now." A neighborhood friend believed applicant appears to be more "intelligent" as an adult than he was as a child, but he also noted that he sometimes has to reread the letters written by applicant to understand what applicant is trying to convey.

While confined, applicant has been able to obtain items from the commissary with an order form that he has numerous hours to fill out. Death row inmates

generally are allowed $85 to spend on commissary each two week period. The commissary request forms describe the requested item, the number of items, and the cost for the items. Applicant's commissary forms were often substantively correct and came close to the maximum amount, suggesting that the person who filled out the form was able to do simple addition to a sum of $85. The commissary supervisor at the Polunsky Unit who testified as to these matters has been familiar with applicant for about the most recent fourteen years of applicant's confinement (applicant has been confined for almost forty years). The commissary supervisor agreed that even a first grade child at six or seven years of age could perform some of the simple addition required to fill out a commissary request by simply adding up the amounts for the requested items. He also agreed that the forms have not changed in fourteen years and that applicant had the opportunity to spend numerous hours filling out a commissary form prior to turning it in, providing plenty of time to do any required math. Also, it was unknown whether another inmate or jail guard assisted applicant in filling out the forms. The commissary supervisor believed that applicant did not appear to be unable "to understand what's going on with his commissary" and was able to respond to questions.

While confined in prison, applicant has demonstrated more aptitude than he did as a child. He has made beautiful clocks and picture frames. He filed some pro se motions, but he had also received help from jailhouse writ lawyers who assist inmates with court filings. He also testified at his former trial, but he may have extensively practiced this testimony in an effort to appear coherent. Amongst the possessions in his cell were books and court-related documents

with underlinings that either he read and marked up or that someone else read and sent to him already marked up.

e. Overall, the Habeas Court's Recommendation that Applicant is Intellectually Disabled is Supported by the Record

Viewing the entirety of this evidence, including the lay witness testimony and the defense expert testimony and reports, this evidence demonstrates that, notwithstanding evidence of some limited adaptive strengths, applicant clearly exhibits significant adaptive deficits, at a minimum, in the conceptual domain under the current medical criteria. As the defense experts observed, his impairment manifested as deficits in abstract thinking, executive functioning (*i.e.*, planning, strategizing, priority setting, and cognitive flexibility), and short-term memory. His conceptual skills lagged markedly behind those of his peers throughout the developmental period. When he was a young child, his language and pre-academic skills developed slowly. When he was in school, his progress in academics as well as related concepts such as an understanding of time and money occurred more slowly as compared to his peer group and was markedly limited compared with that of his peers. As an adult, his academic and cognitive skills are typically at an elementary level. These observations are all entirely consistent with the diagnostic criteria for establishing deficits or limitations in the conceptual domain so as to support a diagnosis of intellectual disability. *See* DSM-5, at 34, 37; AAIDD-11, at 43-46.

The habeas court's findings of fact that relate to applicant's conceptual adaptive deficits addressed language, reading and writing, and academics in general.

The court found, based on statements from applicant's family members, that applicant "didn't know how to communicate with people," "'could not follow simple instructions,'" and "'had trouble verbally with people.'" The fact findings noted that applicant's father would often beat him for failing to speak because he did know how to respond. Additionally, the findings noted that applicant was "quiet" and that applicant's father "was always cruel to [applicant] for his poor grades and speech." The court found that applicant's ability to read and write was impaired. Its findings noted that applicant was unable to read or write when he left school and he "could not read the sports page." The findings further noted that applicant was kept separate from the rest of class throughout his schooling because he could not keep up with the work and was allowed to draw pictures instead of reading. The court also found that "because of [applicant's] slowness and his inability to read or write, his father would pick on him by threatening him and beating him more than any of the other children." The court noted that teaching staff who came into contact with applicant recognized that he was much slower than his peers, that he failed first grade twice, and that he was "socially promoted" to subsequent grades to be kept with similar-age peers despite repeated failures. The court noted that during the repeated year of first grade, applicant's "student records show that he was below average in his ability to respond 'promptly and willingly' to directions and it is indicated that he was not self-reliant," and he was below average in attentiveness and ability to discipline himself. After being socially promoted to fourth grade, applicant scored in the fifth percentile nationally on the Iowa Test of Basic Skills, confirming significantly below average intellectual functioning. The court observed

that applicant continued to perform below average and test behind his grade level consistently until dropping out of school in the ninth grade. The court noted that, in ten years of school in special education classes, applicant received over thirty "F's," twenty five "D's," approximately fourteen "C's," five "B's," and no "A's." The court stated that, in evaluating applicant's claim, it has "placed substantial weight in [applicant's] well-documented academic limitations[.]"

The habeas court's ultimate assessment that applicant exhibited deficits in adaptive behavior that satisfy the criteria set forth in the AAIDD and DSM guidelines for intellectual disability is supported by the record. The habeas court found the experts qualified to testify about intellectual disability generally and credible as to their conclusions in this case. The defense experts each agreed that, although he exhibited some adaptive strengths and improvements in certain skills, applicant is at least mildly intellectually disabled based on significant adaptive deficits in pertinent areas. There is nothing in the record to indicate that the defense experts did not adhere to the prevailing accepted medical framework for diagnosing intellectual disability or that their conclusions are inherently lacking in credibility or unreliable. Although it is true that the State presented a competing expert, the habeas court was more persuaded by the credible testimony presented by the defense experts and by the testimony of lay witness who knew applicant during the developmental phase. It is proper, therefore, for this Court to follow the recommendation of the habeas court that applicant is intellectually disabled under the current medical framework.

3. The Majority Opinion Errs By Failing to Apply Current Medical Criteria in a Constitutionally Compliant Manner and by Deferring to Dr. Compton's Opinion that Fails to Conform to the Proper Medical Criteria

In its misunderstanding of the current medical diagnostic criteria, this Court reaches an incorrect ultimate determination in this case by holding that applicant is not intellectually disabled. It reaches this mistaken conclusion by applying its newly created improper standard for deciding intellectual disability claims, and as a result, it erroneously finds Dr. Compton's testimony more persuasive than the three other experts in this case. I discuss these mistakes in turn.

a. This Court's Application of an Erroneous Standard Pervasively Infects Its Analysis of Applicant's Claim

As I have explained above, despite its contention that it is applying a new constitutionally compliant standard for evaluating adaptive deficits, this Court'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. Specifically, the majority's current approach, though purporting to reflect the standards set forth in the DSM-5, instead fails to comport with current standards because 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. I discuss these flaws in this Court's application of the law to applicant's case in greater detail below.

First, I disagree with this Court's excessive reliance on an assessment of applicant's strengths as a basis for finding that he does not have adaptive deficits. Individuals with mild intellectual disability may be able to carry out many normal tasks but nevertheless have significant deficits in one of the three domains of adaptive functioning. The 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. Furthermore, I disagree with the majority opinion's application of a *Briseno*-style subjective review in a manner that appears as if this Court is independently evaluating the quality of the adaptive deficits in a lay-person's assessment wholly apart from the medical diagnostic framework. This Court's majority opinion's approach uses a non-medical understanding of adaptive functioning to undermine credible medical testimony of adaptive deficits that was shown by the defense experts. This is particularly a problem where, as here, a person who is mildly intellectually disabled has some strengths and weaknesses, even in the same domain of skills. This Court's approach of listing qualities and examining all of applicant's strengths for each quality is eerily reminiscent of the seven *Briseno* factors that were held to be unconstitutional by the Supreme Court.

Second, I disagree with this Court's majority opinion's emphasis on applicant's ability to survive under extreme circumstances and on his behavior in prison, when instead this Court should examine his

typical behavior in a non-prison setting. For example, applicant repeatedly ate neighbors' trash when he was starving and became sick as a result, but this Court suggests that that is evidence that shows he was not intellectually disabled because someone who had borderline intellectual functioning may have done the same thing. Resorting to eating trash in an effort to respond to extreme starvation cannot fairly be considered behavior indicative of typical adaptive functioning and the majority opinion's suggestion should be wholly disregarded. Similarly, this Court observes that Dr. Compton noted that applicant "had to engage in some adaptive behavior" "in order to survive on the streets." Suggesting that applicant was not intellectually disabled because he was able to survive homeless on the streets for a period of time is hardly the type of behavior indicative of typical adaptive functioning, and it should have little to no probative value in determining whether he has adaptive deficits.

This Court's analysis is similarly flawed in its excessive focus on applicant's ability to enhance his reading, writing, math and other performance in the controlled prison setting because that evidence is suspect. Applicant had numerous hours while confined to fill out a commissary form, the same form he has seen for fourteen years, and it still contained mistakes. Furthermore, applicant could have received assistance filling out the form from other inmates or jail guards. Applicant had newspapers, books, and court documents in his cell, but someone had to send him those things and they may have been underlined or marked when applicant received them. Or applicant could have underlined and marked the things he did not understand. Applicant wrote letters that people could understand, particularly when the letter was re-read, but so do elementary-school-aged children and he had

unlimited time to write and rewrite any letters he chose to send. This Court's improper focus on applicant's abilities while he is confined in prison is precisely the type of analysis that the Supreme Court cautioned against in *Moore* because of the excessive amount of time he has to perform simple, repetitive tasks, and the large degree of uncertainty surrounding the amount of assistance or support he received in accomplishing various tasks.

Third, I disagree with this Court's majority opinion's inclusion of language indicating that "deficits in adaptive functioning must be directly related to the intellectual impairments," without adequately explaining that clinicians do not require a causal relationship between intellectual deficits and adaptive deficits. To the extent that this Court requires applicant to present evidence that his adaptive deficiencies are directly caused by his subaverage general intellectual functioning, this Court's analysis improperly disregards the Supreme Court's description of the applicable law and imposes an additional burden of proof on applicant not required by the clinical criteria. Furthermore, in requiring a causal link between an adaptive deficit and an intellectual deficit, this Court's majority opinion determines that, even if the record did support the habeas court's finding that applicant never held a real job, "there is nothing to suggest that any failure by Applicant to get a job would be related to intellectual deficits rather than to the fact that he did not need a job because he was making a living by robbing people." This is precisely the type of speculative reasoning regarding possible alternative explanations for deficits that the Supreme Court instructed this Court to avoid. Similarly, this Court's majority opinion disregards the habeas court's finding that applicant was intellectually disabled due to

his repeated consumption of obviously spoiled food. The habeas court opines that applicant should have learned after he ate out of the neighbors' trash cans the first time that he would get ptomaine poisoning again if he ate out of trash cans a second time, which he did. This Court's majority opinion speculates an alternative reason other than intellectual disability by stating, "But the testimony showed that he was hungry, and a hungry child of normal or slightly below normal intelligence could also ignore the risk of getting sick because of immediate need for food." This type of speculation that reaches for alternative hypothetical explanations for an adaptive deficit for some reason other than intellectual disability is precisely what the Supreme Court instructed had been incorrectly analyzed by this Court in its prior opinion in this case. Current scientific standards do not require this type of causal link, and it is improper for this Court to use alternative hypothetical speculation to avoid finding that applicant has shown adaptive deficits.

Fourth, as I have explained above, the application of the current diagnostic framework permits mental health professionals to use standardized measures to evaluate adaptive functioning. Despite the Supreme Court's reliance on testing that was done demonstrating that applicant has adaptive deficits, this Court's majority opinion fails to mention standardized testing in its discussion of the applicable standard and in its review of the record. In *Moore*, the Supreme Court stated, "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 skills sets (conceptual, social, and practical)." *Moore*, 137 S. Ct. at 1046 (citing AAIDD-11, at 43). Here,

applicant's and the State's experts agreed that applicant's adaptive functioning test scores fell more than two standard deviations below the mean in all three skill categories. *Id*. at 1046 (citing to App. to Pet. for Cert. 200a-201a), 1047 (citing *Moore*, 470 S.W.2d at 521). I, therefore disagree with this Court's majority opinion because I would expressly include the standardized testing criteria in the applicable standard and consider that evidence in applicant's favor in the same manner as the Supreme Court.

b. This Court Incorrectly Defers to Dr. Compton's Opinion

This Court's majority opinion determines that Dr. Compton was more credible than the defense experts regarding her suggestion that applicant probably has "borderline intellectual functioning" rather than intellectual disability. Importantly, her testing shows that applicant does have adaptive deficits and is intellectually disabled. Dr. Compton administered the Texas Functional Living Scales to assess applicant's adaptive deficits and he scored more than two standard deviations below the mean, indicating that applicant is intellectually disabled. Dr. Compton, however, unlike the other experts, disregards the result that applicant has adaptive deficits under her theory that he did not put forth an adequate amount of effort and displayed adaptive strengths both before and during incarceration. For three reasons, I would defer to the habeas court's implicit assessment that Dr. Compton's conclusion is less reliable than the opposing experts' conclusions.

First, I would defer to the habeas court's implicit conclusion that Dr. Compton was mistaken in her assessment that applicant was not putting forth adequate effort to ensure results indicating intellectual

disability were valid. Dr. Compton administered the Memory Malingering Test and embedded effort testing in the Advanced Clinical Solutions test to evaluate that applicant was making a genuine effort to provide valid test results. Although she determined that applicant lacked effort in taking the tests, Dr. Compton's conclusion was inconsistent with the determinations by Dr. Borda and Dr. Anderson who each indicated that applicant did exert adequate effort during their tests. Because Dr. Compton offers little support for her assessment of applicant's purported lack of effort beyond her expectation that applicant would perform better, I would defer to the habeas court's decision to disregard that conclusion. In the absence of that conclusion that applicant did not exert adequate effort, Dr. Compton's test results are consistent with the other experts' test results showing that applicant has adaptive deficits.

Second, the habeas court's implicit rejection of Dr. Compton's opinion is supported by the record because her assessment of applicant's adaptive functioning appears to be less credible than the other experts due to her heavy reliance on unsubstantiated speculative facts. There are numerous examples of her speculative assumptions about applicant's abilities to perform tasks. Dr. Compton opined that applicant had "some ability to understand money and work concepts" because he was able to "survive on the street" while homeless by hustling pool, mowing lawns, and performing simple tasks like mopping at a restaurant. Additionally, she considered his ability to play dominoes, fill out commissary slips, write letters, create court pleadings, attempts to influence others or challenge authority, and his potential skills in arithmetic, communication, and socialization. But as she largely acknowledged during cross-examination, she operated

under the assumption that, because applicant attempted to engage in these activities, he was able to reasonably perform them proficiently without assistance from others. With respect to the suggestion that applicant played dominoes and that this showed he had an ability to count and to socialize with others, Dr. Compton agreed that there was no direct evidence that applicant actually played dominoes. Additionally, Dr. Compton stated that the facts of the offense, such as wearing a wig, concealing the weapon, and fleeing to Louisiana afterwards "indicated a level of planning and forethought and ability to appreciate the need to do something not to be apprehended and that relates to abstraction." But the habeas court could have reasonably disregarded this view given that very young children who misbehave also know to attempt to conceal their misbehavior and hide themselves from discovery, and there was nothing to show that applicant's efforts were overly complicated or that he was not led by others to perform these tasks. Dr. Compton noted that applicant testified during his first trial and that he was able to respond to questions posed by both the attorneys, demonstrating that he was "able to conceptualize what was being asked and form exculpatory statements or responses at times, indicating an ability to engage in abstract reasoning to some degree." But the habeas court would be well aware of young children who testify responsively to questions presented by attorneys at trial so the court reasonably may have been unpersuaded by this fact. Dr. Compton also indicated that applicant had adaptive functioning because, while he has been confined in prison, he has been able to turn in commissary forms and write letters. But given that he is almost always confined to his solitary prison cell, applicant has an unlimited opportunity to spend numerous

hours to undertake tasks that it might take others minutes to conduct. The record also shows that his commissary forms did have mistakes and that they required only addition like many children learn in elementary school. Additionally, applicant's letters lacked clarity and had to be re-read to be understood, and he may have repeatedly written the letters or taken an extensive amount of time to prepare them. Furthermore, he could have obtained assistance from other inmates or guards to perform these tasks. It thus appears that the events that took place in applicant's jail cell would have exceedingly limited value in assessing whether he has adaptive deficits. Similarly, Dr. Compton suggested that applicant's pro se motions, possession of court documents and books, and underline marks shown on the written materials indicate that he read and understood them. But the record does not show whether applicant merely copied his motions from form motions or whether they were legal documents prepared by a writ-writer prisoner. Furthermore, these materials and books may have been sent to him already underlined so applicant's comprehension of the materials cannot be ascertained from that fact alone.

Third, the habeas court's implicit rejection of Dr. Compton's opinion is supported by the record because her assessment of applicant's adaptive functioning appears to be unreliable due to its heavy reliance on his purported adaptive strengths. For example, Dr. Compton suggested that applicant could stand up to authority and that this was inconsistent with an adaptive deficit. But she acknowledged that instances of applicant's confrontational behavior are "not specifically indicative of anything except oppositional behavior." However, because an issue with intellectually disabled people is a failure to stand up for themselves,

Dr. Compton noted that applicant's ability to stand up to authority added another "small piece of my opinion." Nonetheless, the habeas court reasonably could have determined that this "small" piece of evidence showing a minor strength had little to no probative value with respect to whether applicant had adaptive deficits within a single domain of skill sets, especially, as Dr. Compton acknowledged, without any knowledge of the context or surrounding circumstances.

Furthermore, this Court's majority opinion appears to adopt the mistaken view that any strengths exhibited by applicant disqualify him from a diagnosis of intellectual disability. This Court's majority opinion and Dr. Compton appear to focus exclusively on stereotypes about intellectually disabled people, even suggesting that such a person could not legibly copy text from one document to another document. This Court's majority opinion states, "And according to Dr. Compton, even if it were assumed that someone else composed those documents, Applicant's ability to copy such documents by hand would indicate an understanding and ability to write that would be within the realm of only a few intellectually disabled people." Dr. Compton and this Court's majority opinion suggest that someone who is intellectually disabled could not even copy words from one piece of paper onto another piece of paper. That type of stereotype of intellectually disabled people as entirely non-functional people is unsupported by the medical framework and should be completely disregarded as lacking in probative value. In its amici curiae brief, the Arc of the United States and the Arc of Texas correctly observe that "there is a wide gap between the clinical definition and expectations that many laypeople have

about intellectual disability."[36] The brief explains that these "[c]ommon misimpressions include beliefs that people with intellectual disability are essentially identical to one another and that all are incapable of any but the most rudimentary tasks." Furthermore, it notes that "lay assumptions sometimes include an imagined list of things that people with intellectual disability cannot achieve, such as employment, meaningful relationships, or driving a car. But the clinical literature is abundantly clear that many of the people who have been properly diagnosed with intellectual disability can perform one or more of these tasks." This view of intellectual disability was also unanimously expressed by the testifying experts at the habeas hearing.

A clinician's diagnostic focus should not center on balancing deficits against abilities or strengths that a person may also possess, but that is precisely what Dr. Compton improperly did in this case and what this Court's majority opinion defers to. In justifying her opinion that applicant did not have adaptive deficits, Dr. Compton explained that applicant "showed evidence of adaptive functioning skills during the commission of the offense and after the offense, which questions the validity of a mental retardation diagnosis." *Ex parte Moore*, No. 314483-C (185th Dist. Ct., Harris County, Tex. Feb. 6, 2015), Findings at ¶ 175; *see also Moore*, 470 S.W.3d at 522. This testimony by Dr. Compton appears to have applied the outdated *Briseno* analysis for adaptive functioning by weighing applicant's abilities against his deficiencies, and

[36] The Arc of the United States represents that it is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc of Texas is an affiliate of that group.

thus, the habeas court properly rejected her opinion. This type of weighing of strengths against deficits is precisely why this Court erred in the past and continues to err today by adhering to an expert's opinion who formed her conclusions based on an outdated standard that is counter to current diagnostic guidelines.

I conclude that the majority opinion's reliance on Dr. Compton's testimony to find, contrary to both the habeas court and the defense expert witnesses, that applicant is not intellectually disabled is incorrect. The habeas court implicitly found Dr. Compton's opinion that applicant is not intellectually disabled unpersuasive. This determination is reasonable and supported by the record. In short, two defense experts found applicant exhibited adaptive deficits sufficient to support a diagnosis of intellectual disability and a third defense expert, although not offering a diagnosis, found that applicant exhibited features consistent with the criteria for intellectual disability. The defense experts' conclusions are more reliable than Dr. Compton's assessment that was based on assumptions and her application of the *Briseno*-style strength-weakness balancing rather than on current medical standards alone. For all of these reasons, I disagree with this Court's analysis of applicant's claim. In my view, applicant has clearly established that he meets the definition for intellectual disability based on the views of credible experts applying the current medical criteria. The majority opinion's assessment of the evidence in this record is wholly divorced from the diagnostic criteria that it claims to adhere to, and its analysis is instead based upon numerous erroneous assumptions and reasoning.

III. Conclusion

Texas should abide by the Supreme Court's holding in *Moore* and its admonishment to this Court to consult current medical diagnostic criteria for deciding intellectual disability claims. Unlike this Court's majority opinion, I would not deviate from the current medical framework by failing to fully incorporate the requirements of the prevailing clinical standards and by continuing to use non-clinical, subjective factors as a basis to reject applicant's claim. Applying the current diagnostic criteria to this case, it is abundantly clear that the credible experts have determined that applicant is intellectually disabled, and that determination has been endorsed by the habeas court and the parties in this case. I respectfully disagree with this Court's majority opinion's disregard of Supreme Court precedent, the current medical diagnostic criteria, and the agreed conclusion of the interested parties. I, therefore, respectfully dissent.

Filed: June 6, 2018

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APPENDIX B

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus
in Cause No. 314483-C in the 185th
Judicial District Court Harris County

JOHNSON, J., delivered the opinion of the Court in which KELLER, P.J., MEYERS, KEASLER, HERVEY and RICHARDSON, JJ., joined. ALCALÁ, J., filed a dissenting opinion. YEARY, J. concurred. NEWELL, J., did not participate.

OPINION

In 1980, appellant was convicted of capital murder and sentenced to death for fatally shooting a seventy-year-old grocery clerk, James McCarble, in Houston, Texas, while committing or attempting to commit robbery. *See* TEX. PENAL CODE ANN. § 19.03(a). We affirmed the 1980 conviction and sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985). Following a grant of federal habeas corpus relief, the trial court held a new punishment hearing in February 2001. Appellant again received a death

sentence. We affirmed the trial court's judgment on direct appeal. *Moore v. State*, No. AP-74,059, slip op. (Tex. Crim. App. Jan. 14, 2004) (not designated for publication).

In this initial writ application challenging his 2001 punishment retrial and death sentence, applicant raises forty-eight claims for relief. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071. In January 2014, the habeas judge held a two-day evidentiary hearing on applicant's first claim for relief—the allegation that he is intellectually disabled and therefore exempt from execution under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).[1]

Following the evidentiary hearing, the parties filed proposed findings of fact and conclusions of law. Applicant's proposed findings and conclusions were contained in a document entitled, "Addendum Findings of Fact and Conclusions of Law on Claims 1-3" (Addendum Findings). Despite the document's caption, applicant's proposed findings and conclusions addressed only his *Atkins* claim (i.e., his first claim for relief). The State's proposed findings of fact and conclusions of law addressed all of applicant's alleged grounds for relief.

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[1] Mental-health advocates now generally favor the term "intellectually disabled" over the older term "mentally retarded," which they deem to carry pejorative connotations. *See Ex parte Cathey*, 451 S.W.3d 1, 4 n.4 (Tex. Crim. App. 2014). However, the terms refer to the same condition and may be used interchangeably. *See id.* In this opinion, we substitute the terms "intellectual disability" and "intellectually disabled" for "mental retardation" and "mentally retarded."

The habeas court signed applicant's proposed Addendum Findings. The Addendum Findings applied the definition of intellectual disability presently used by the American Association on Intellectual and Developmental Disabilities (AAIDD),[2] concluded that

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[2] The DSM-IV states the diagnostic criteria for intellectual disability as follows:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test . . . .

B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46 (APA, 4th ed. 1994) (DSM-IV).

The DSM-V defines intellectual disability as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (APA, 5th ed. 2013) (DSM-V). The DSM-V states that the following three diagnostic criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing [Criterion A].

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social

applicant is intellectually disabled under that definition, and recommended that we grant relief on his *Atkins* claim. [3] The Addendum Findings also concluded that applicant had established by a preponderance of the evidence that he is intellectually disabled under the diagnostic criteria stated in the fourth and fifth editions of the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual of Mental Disorders (DSM), i.e., the DSM-IV and DSM-V.

The habeas court also signed the State's proposed findings of fact and conclusions of law after making certain handwritten alterations to the final page. Through its alterations, the habeas court: (1) indicated that applicant's grounds for relief should be granted in part and denied in part; and (2) adopted the State's

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participation, and independent living, across multiple environments, such as home, school, work, and community [Criterion B].

C. Onset of intellectual and adaptive deficits during the developmental period [Criterion C].

See id. To meet the DSM-V's diagnostic criteria for intellectual disability, "the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A." *See id.* at 38.

[3] The AAIDD, which until 2007 was called the American Association on Mental Retardation (AAMR), is a professional non-profit association that advocates for the rights of the mentally impaired and those with developmental disabilities. *See Cathey*, 451 S.W.3d at 15 n.40. The AAIDD currently defines intellectual disability as a condition "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." INTELLECTUAL DISABILITY 5 (AAIDD AD HOC COMM. ON TERMINOLOGY AND CLASSIFICATION, 11th ed. 2010).

proposed findings and conclusions concerning claims four through forty-eight, as well as its recommendation that we deny relief concerning those claims. The habeas court made no findings or conclusions regarding applicant's claims two and three.

We filed and set the case to address applicant's *Atkins* allegation. We now deny relief on all of applicant's claims.

In *Atkins*, the Supreme Court determined that the execution of intellectually disabled individuals violates the Eighth Amendment, but left it to the States to develop appropriate ways to enforce the constitutional restriction. *See Atkins*, 536 U.S. at 317, 320. In *Ex parte Briseno*, citing the absence of legislation to implement *Atkins*'s mandate, we adopted the definition of intellectual disability stated in the ninth edition of the AAMR manual, published in 1992, and the similar definition of intellectual disability contained in section 591.003(13) of the Texas Health and Safety Code. *See Ex parte Woods*, 296 S.W.3d 587, 589 & n.4 (Tex. Crim. App. 2009); *Briseno*, 135 S.W.3d at 7.

Because our Legislature has not enacted legislation to implement *Atkins*'s mandate, we continue to follow the AAMR's 1992 definition of intellectual disability that we adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases. *See In re Allen*, __ S.W.3d __, __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8 (Tex. Crim. App. May 13, 2015); *Woods*, 296 S.W.3d 587, 589. Thus, to demonstrate that he is intellectually disabled for Eighth Amendment purposes and therefore exempt from execution, an applicant must prove by a preponderance of the evidence that: (1) he suffers from significantly subaverage general intellectual functioning, generally

shown by an intelligence quotient (IQ) of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014); *Ex parte Sosa*, 364 S.W.3d 889, 894 (Tex. Crim. App. 2012); *Briseno*, 135 S.W.3d at 7 n.25.

The habeas judge therefore erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be "related to" significantly sub-average general intellectual functioning.[4] The habeas court reasoned that, in *Briseno*, we derived our legal test for intellectual disability in capital cases from the AAMR's 1992 definition of intellectual disability. Because the AAMR's and APA's conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided, the habeas court concluded that it should use the most current position, as espoused byAAIDD, regarding the diagnosis of intellectual disability rather than the test that we established in *Briseno.*

It may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno* were decided. Indeed, we have recently discussed the subjectivity surrounding the medical diagnosis of intellectual

[4] The diagnostic criteria set forth in the DSM-IV similarly does not require that an individual's adaptive deficits be related to significantly sub-average intellectual functioning. *See* DSM-IV 46.

disability and some of the causes for that subjectivity. *See Cathey*, 451 S.W.3d at 10 & nn. 22–23. But although the mental-health fields and opinions of mental-health experts inform the factual decision, they do not determine whether an individual is exempt from execution under *Atkins*. *See id.* at 9–10 (stating that we must apply our own judgment on the appropriate ways to enforce the ultimately legal prohibition on executing intellectually disabled offenders). The decision to modify the legal standard for intellectual disability in the capital-sentencing context rests with this Court unless and until the Legislature acts, which we have repeatedly asked it to do. *See Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010); *see*, *e.g., Allen*, __ S.W.3d at __, Nos. WR-82,265-01 & WR-82,265-02, slip op. at *7–8. We conclude that, at this juncture, the legal test we established in *Briseno* remains adequately "informed by the medical community's diagnostic framework." *See Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).[5]

Regarding *Briseno*'s first prong, "general intellectual functioning" is "defined by the [IQ]" and "obtained by assessment with a standardized, individually administered intelligence test." *See Ex parte Hearn*,

[5] We derived *Briseno*'s legal definition of intellectual disability from a medical definition that the AAMR had previously advocated. *See Woods*, 296 S.W.3d at 589 & 589 n.4; *Briseno*, 135 S.W.3d at 7 & n.26. *Briseno*'s legal definition remains generally consistent with the AAIDD's current definition of intellectual disability. Further, *Briseno*'s requirement—that any significant adaptive behavioral deficits be "related" to significantly subaverage general intellectual functioning—is consistent with the APA's current position on the issue. *See* DSM-V 38 (emphasizing that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments" to meet the diagnostic criteria for intellectual disability).

310 S.W.3d 424, 428 n.7 (Tex. Crim. App. 2010). There is a measurement error of approximately five points in assessing IQ, which may vary from instrument to instrument. *Id.* at 428. Therefore, when determining whether an applicant has met *Briseno*'s first prong, we consider the fact that any IQ score could actually represent a score that is five points higher or five points lower than the score that he actually obtained. *See id.*

In *Cathey*, we examined whether mental-health experts or factfinders should adjust IQ scores for the "Flynn Effect"[6] in making a determination of intellectual disability under *Atkins*. *See Cathey*, 451 S.W.3d at 14. We concluded that, although factfinders may consider the concept of the Flynn Effect in assessing the validity of a score obtained on a now "outmoded" or "outdated" version of an IQ test, they may consider that effect only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, etc. *Id.* at 5, 18 n.54 (explaining that "outmoded" in this context "means simply that the test [at issue] was designed and normed several years earlier" and "not that there was a newer, 'better' test available" at the time). We stated that the IQ test score itself may not be changed. *Id.* at 18. In analyzing whether applicant's general intellectual functioning is significantly sub-average, the habeas court therefore erred by subtracting points from applicant's IQ scores for the Flynn Effect and considering both applicant's unadjusted and Flynn-Effect-adjusted IQ scores.[7]

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[6] The "Flynn Effect" refers to the tendency of scores on IQ tests normed on a particular date to increase over time, as the tests' norms age. *See Cathey*, 451 S.W.3d at 12 -- 13.

[7] We recognize that the habeas court did not have the benefit of our opinion in *Cathey* when it entered its Addendum Findings.

For purposes of the Eighth Amendment, "adaptive behavior" refers to the ordinary skills that are required for people to function in their everyday lives. *Id.* at 19. We have cited with approval the AAIDD's grouping of adaptive behavior into three areas (conceptual skills, social skills, and practical skills) for purposes of making a clinical diagnosis of intellectual disability.[8] *See Hearn*, 310 S.W.3d at 428. Limitations in adaptive behavior can be determined by using standardized tests. *See id.* We have also recognized the APA's position, expressed in the DSM-IV, that for purposes of clinical diagnosis, a "significant limitation" is defined by a score of at least two standard deviations below either (1) the mean in one of the three adaptive behavior skills areas or (2) the overall score on a standardized measure of conceptual, social, and

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However, neither the record in applicant's case nor the law on which the habeas court relied support its findings and conclusions concerning the Flynn Effect. In particular, the record does not support the habeas court's representation of the AAIDD's present stance on the Flynn Effect. *See* INTELLECTUAL DISABILITY 35, 37 (describing the Flynn Effect as one of the "challenging issues" in the measurement of intelligence and interpretation of IQ scores, and noting the limited circumstances in which the AAIDD approves of adjusting an IQ score downward for the Flynn Effect).

[8] In *Hearn*, we noted the AAIDD's breakdown of these behavioral areas:

> Conceptual skills include skills related to language, reading and writing, money concepts, and self-direction. Social skills include skills related to interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, and avoiding victimization. Practical skills are skills related to activities of daily living and include occupational skills and maintaining a safe environment.

Hearn, 310 S.W.3d at 428 n.9.

practical skills. *See id.* Although standardized tests are not the sole measure of adaptive functioning, they may be helpful to the factfinder, who has the ultimate responsibility for determining intellectual disability in the *Atkins* context. *See id.*

In the Eighth Amendment context, it is not sufficient for an applicant to establish by a preponderance of the evidence that he has significantly sub-average general intellectual functioning and significant limitations in adaptive functioning. *See id.* An applicant must also demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause. *Cf. id.* (stating that the applicant must show that his adaptive deficits were related to significantly sub-average general intellectual functioning rather than a personality disorder); *Ex parte Blue*, 230 S.W.3d 151, 163–64 (Tex. Crim. App. 2007) (determining that the applicant had not made a prima facie case concerning adaptive deficits because his expert conceded that learning disabilities or an impoverished family background, or both, may have been responsible for applicant's alleged deficit). The habeas court in this case failed to make the relatedness inquiry.[9]

[9] The habeas court concluded that applicant was intellectually disabled under the DSM-V's diagnostic criteria. As we have discussed, *Briseno* is the applicable standard for the *Atkins* determination. But like *Briseno*, the DSM-V requires that an individual's adaptive behavior deficits are directly related to his significantly sub-average intellectual functioning. Because the habeas court did not engage in the relatedness inquiry, the record does not support its finding that applicant meets the DSM-V's diagnostic criteria.

In making the relatedness determination, the factfinder may consider the seven evidentiary factors that we developed in *Briseno*:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9. We look to the entirety of the record before us in an *Atkins* inquiry. *See Cathey*, 451 S.W.3d at 26–27 (stating that factfinders should "consider *all* possible data that sheds light on a person's adaptive functioning, including his conduct in a prison society, school setting, or 'free world' community"). In addition, we "consider *all* of the person's functional abilities," including "those that show strength as well as those that show weakness."

See id. at 27. The habeas court therefore additionally erred to the extent that it found that applicant's prison records were "not appropriate tools by which to exclude intellectual disability in capital murder cases" and considered only weaknesses in applicant's functional abilities. *See id.*

In failing to make the relatedness inquiry, the habeas judge's factual findings and legal conclusions left the second prong of the *Briseno* test unresolved. *See Ex parte Flores*, 387 S.W.3d 626, 634–35 (Tex. Crim. App. 2012) (stating that the rationale for the deference we generally accord to habeas courts disappears when the factual findings fail to resolve the necessary factual issues). In addition, our independent review of the record reveals that it does not support the habeas judge's findings or conclusions concerning applicant's *Atkins* claim. *See id.* (noting that the rationale for deference also disappears when the record does not support the habeas court's findings). In short, the habeas judge appears to have either not considered, or unreasonably disregarded, a vast array of evidence in this lengthy record that cannot rationally be squared with a finding of intellectual-disability. *Cf. Sosa*, 364 S.W.3d at 894. For these reasons, we do not adopt the habeas court's findings and conclusions regarding applicant's *Atkins* claim, but instead assume our role as the ultimate factfinder in this case. *See Flores*, 387 S.W.3d at 634–35; *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

We hold that applicant has not established by a preponderance of the evidence that he is intellectually disabled under *Atkins* and *Briseno*. Accordingly, applicant is not exempt from the death penalty, and we deny him relief on his first ground.

I. Factual and Procedural Background

The lengthy factual and procedural history of applicant's case is relevant to our adjudication of his *Atkins* claim and provides context for the testimony elicited by the parties at his 2014 evidentiary hearing.

A. Applicant's 1980 Capital Murder Trial

The evidence at applicant's 1980 trial showed that, on April 25, 1980, Anthony Pradia and Willie Albert "Ricky" Koonce visited applicant at Betty Nolan's house,[10] where applicant lived when he was not staying with his girlfriend, Shirley Carmen. Pradia testified that he, Koonce, and applicant each needed money for car payments. While the three men were playing dice, Koonce suggested that they commit a robbery, and Pradia and applicant agreed. Applicant provided the weapons for the robbery, specifically, a shotgun and a .32 caliber pistol. Applicant and Pradia hid the weapons in the trunk of Koonce's car. The three men then drove around various areas of Houston in Koonce's car, looking for a place in which to commit the robbery.

After taking turns casing the Birdsall Super Market, the three men settled on it as the place in which they would commit the robbery and negotiated how they would divide the proceeds. Because they were using his car, Koonce wanted a larger share of the proceeds. After some argument, Pradia and applicant agreed that they would each pay Koonce $200 from their shares. The men then discussed their roles in the robbery. They agreed that Koonce would

[10] Applicant and various other witnesses at his 1980 trial described Nolan as applicant's "play mother" or "play aunt." In 1980, applicant's trial counsel described a "play mother" as someone "that a young man in the black community . . . turn[s] to in times of need."

enter the courtesy booth and take the money that was inside. Applicant would carry the shotgun and position himself at the courtesy booth so that he could guard the booth and watch the store's front entrance. Pradia would carry the pistol and empty the checkout registers.

The three men then entered the store. Pradia entered first, with the pistol in his pants. Koonce entered next. Applicant entered last.[11] The shotgun he was carrying was obscured by two plastic bags. Applicant and Pradia wore wigs. Applicant also wore sunglasses.

Applicant and Koonce approached the courtesy booth, which was staffed by store employees McCarble and Edna Scott. Koonce entered the booth, told McCarble and Scott that they were being robbed, and demanded money. Applicant, who by this time had removed the plastic bags from the shotgun, pointed the weapon at McCarble and Scott through the booth's window. When Scott screamed that the store was being robbed, applicant pointed the shotgun at McCarble, looked down the barrel, and shot him in the head. McCarble died instantly.

Applicant, Pradia, and Koonce ran from the store and got back into Koonce's car, where applicant stated

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[11] In a written post-arrest statement dated April 28, 1980, Koonce asserted that applicant wanted to walk behind him so that no one would see the shotgun that applicant was carrying. Koonce did not testify at applicant's 1980 trial and his statement was not offered into evidence at that proceeding. However, in 1992, applicant filed his second application for a writ of habeas corpus pursuant to Article 11.07. The State included Koonce's statement as an exhibit to its response.

that he had shot the man in the booth.[12] The men fled the scene. Koonce drove back to Nolan's house to drop applicant off and to allow Pradia to retrieve his car. The men then split up. Applicant spent the night of the offense at Nolan's house.

Witnesses provided a license-plate number and descriptions of the getaway vehicle and perpetrators, which quickly led Houston Police Department (HPD) homicide detectives to arrest Koonce. While searching Koonce's vehicle, officers discovered Pradia's wallet and identification, which Pradia had inadvertently left behind. Following Koonce's arrest, Pradia turned himself in. Based on information in Koonce's and Pradia's statements, detectives obtained a warrant for applicant's arrest. During a consensual search of Nolan's house, investigators found a shotgun hidden between the mattress and box springs of applicant's bed.

Applicant, who left Houston on the day after Koonce gave his statement, remained at large. HPD detectives were unable to ascertain applicant's whereabouts until May 2, 1980, when they received a tip that he could be found at his grandmother's residence in Louisiana. On May 5, 1980, ten days after the offense, Louisiana authorities arrested applicant at his grandmother's house pursuant to a fugitive warrant. Incident to the arrest, Louisiana officers discovered a small suitcase containing a pistol and $612 in cash. Applicant, who previously had a full head of hair, had shaved his hair down to the scalp.

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[12] According to Koonce's statement, *see supra* note 11, applicant asserted that he shot McCarble because he believed that McCarble had been reaching for a gun.

HPD detectives traveled to Louisiana, took applicant into custody, and returned him to Houston. In Houston, applicant gave a written statement in which he admitted to participating in the robbery and to killing McCarble, although he asserted that McCarble's death was accidental.[13] According to applicant, during the screaming and panic that ensued after Scott cried out, he "suddenly fell backwards and the butt of the gun hit [his] arm and the gun went off." Applicant claimed that he later learned that the man in the booth had been shot. Applicant "[swore that he] was not trying to kill the old man and the whole thing was a[n] accident."

Applicant testified twice at his trial, first at a hearing on his motion to suppress his statement and later during the defense's guilt-innocence case-in-chief. The State cross-examined applicant on both occasions. At the suppression hearing, applicant denied giving or signing the statement. He asserted that one or more of the interrogating officers had beaten him when he refused to cooperate. Although he acknowledged that his signature was on the statement, applicant argued that his interrogators must have traced it from a blank piece of paper that

[13] The record shows that this was not the first account of the offense that applicant gave to law-enforcement authorities. At applicant's 2001 punishment retrial, former Louisiana State Trooper Charles Webb II testified that he participated in applicant's May 5, 1980, arrest in Louisiana. Webb stated that, before Texas detectives arrived, he administered *Miranda* warnings to applicant and conducted a tape-recorded interrogation. Webb testified that applicant made an oral statement in which he admitted participating in the robbery, but denied being the shooter.

he signed after being told that he would be released if he did so.

When he later testified in front of the jury, applicant again denied giving or signing the statement. Applicant testified that he was "quite sure" that someone who had been to prison before (as he had) would know better than to sign a confession. Applicant also denied any involvement in the offense, asserting that he was in Louisiana when the robbery and McCarble's death occurred. Applicant's eldest sister, Clara Jean Baker, also testified for the defense and corroborated applicant's alibi.

With the third perpetrator's identity at issue, the State presented rebuttal evidence that applicant had committed robberies at two other grocery stores just days before McCarble's murder. The earlier robberies occurred in a similar manner to the robbery in which McCarble died, with applicant wielding a shotgun and guarding the stores' courtesy booths while accomplices took money.

The jury found applicant guilty of capital murder. At the punishment phase, pursuant to applicant's stipulation, the State introduced his penitentiary packet. The penitentiary packet showed that applicant had four 1977 felony convictions (three for burglary of a habitation with the intent to commit theft and one for aggravated robbery) for offenses he committed in December 1976 and January 1977. Before accepting the stipulation, the trial court questioned applicant directly to determine whether his stipulation was voluntary, knowing, and intelligent.

Applicant's trial counsel did not call any witnesses or present any evidence at the punishment phase.

Based on the jury's answers to the special issues, the trial court sentenced applicant to death.

B. Applicant's Initial Direct Appeal

The trial court appointed Richard Bonner, one of applicant's trial counsel, to represent applicant on direct appeal. After receiving multiple extensions of time, Bonner filed an appellate brief for applicant in July 1983.

Between October 1980 and July 1983, the trial court and this Court received numerous *pro se* motions and pleadings from applicant. The documents concerned applicant's desire to participate in his appeal; need for access to the record; growing displeasure with Bonner's appellate representation; and dissatisfaction with the trial court's failure to appoint another attorney or to allow applicant to represent himself on appeal pursuant to *Faretta v. California*, 422 U.S. 806 (1975). In October 1983, applicant's dissatisfaction culminated with his filing of a *pro se* petition for a writ of mandamus, in which he asked us to require the trial court to dismiss Bonner and to allow applicant to represent himself on appeal.

We remanded the case to the trial court for a *Faretta* hearing, which the trial court held on November 2, 1983. *See Ex parte Moore*, No. WR-13,374-01 (Tex. Crim. App. Oct. 5, 1983) (not designated for publication). George L. Walker, the 1980 trial judge, presided. Applicant advocated on his own behalf and presented five exhibits in support of his request to proceed *pro se*. Applicant's exhibits, which were admitted into evidence, included letters that he had written to Bonner regarding the appeal.[14] At the

[14] In addition to correspondence between applicant and Bonner regarding the appeal, applicant's exhibits included

hearing, applicant read several of those letters aloud without any apparent difficulty. When it became evident that applicant was unaware that Bonner had filed a brief, the trial court recessed the hearing for an hour to allow applicant to review the pleading. When the hearing resumed, the trial court questioned applicant to ascertain whether he understood and was satisfied with the legal issues that Bonner had raised. Applicant responded rationally and coherently, although he struggled somewhat to explain Bonner's legal arguments to the trial court. At the hearing's conclusion, after applicant reaffirmed that he was willing to accept new appellate counsel, the trial court allowed Bonner to withdraw and appointed John H. Ward. After considering the claims raised by Bonner and Ward, as well as claims raised by applicant in a "Supplemental *Pro-Se* Brief For The Appellant," filed-stamped February 26, 1985, we affirmed the conviction and sentence. *Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985). The trial court set applicant's execution for February 26, 1986.

C. Applicant's Previous State and Federal Habeas Proceedings

In February 1986, the Supreme Court denied applicant's out-of-time petition for a writ of certiorari and application for a stay of execution filed through

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correspondence between applicant, who is African American, and an attorney for the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund regarding Bonner's many requests for additional time to file a brief; correspondence between the NAACP attorney and Bonner concerning Bonner's delay in filing an appellate brief for applicant; applicant's *pro se* pleadings in the trial and other courts; and a docket sheet from this Court showing multiple extension requests filed by Bonner and *pro se* motions filed by applicant.

new appellate counsel, Carolyn Garcia. *See Moore v. Texas*, 474 U.S. 1113 (1986). We subsequently denied applicant leave to file an application for an original writ of habeas corpus, denied his first application for a writ of habeas corpus filed pursuant to Article 11.07, and denied his accompanying motion for a stay of execution. *See Ex parte Moore*, No. WR-13,374-02 (Tex. Crim. App. Feb. 25, 1986) (not designated for publication) (original writ application); *Ex parte Moore*, No. WR-13,374-03 (Tex. Crim. App. May 19, 1986) (not designated for publication) (first Article 11.07 application).

After we denied the motion for stay of execution, applicant's counsel filed a petition for a writ of habeas corpus and motion for a stay of execution in federal district court. The federal district court granted a stay. In June 1987, after determining that applicant's petition contained an unexhausted claim, the federal district court dismissed applicant's petition without prejudice to refiling upon exhaustion of the claim in state court. *See Moore v. Johnson*, 194 F.3d 586, 601 (5th Cir. 1999).

On April 6, 1992, now represented by attorneys Rick G. Strange, Richard R. Fletcher, and Kristi Franklin Hyatt, applicant filed his second Article 11.07 application. In relevant part, applicant alleged that trial counsel rendered ineffective assistance by pursuing an alibi defense and, in furtherance of that defense, persuading applicant and his sister, Clara Jean Baker, to perjure themselves at the 1980 trial. Applicant further alleged that trial counsel were ineffective for failing to investigate, discover, and present mitigating evidence at the punishment phase. Relying in part on *Penry v. Lynaugh*, 492 U.S. 302 (1989), which the Supreme Court decided after his

federal habeas petition's dismissal, applicant for the first time alleged that trial counsel should have discovered and presented evidence that he experienced a troubled childhood, as well as evidence that his intellectual functioning fell in the intellectually disabled or borderline range. To support the allegations, habeas counsel attached some of applicant's school and prison records, as well as affidavits executed in 1992 by three of applicant's siblings (Clara Jean Baker, Colleen McNeese, and Ronnie Moore) and applicant's brother-in-law, Larry Baker.

The school records attached to applicant's 1992 writ application included his academic, attendance, and cumulative health records, as well as scores that he obtained on the Iowa Test of Basic Skills (ITBS) given in third through sixth grades. The records also included the report of applicant's 1965 pre-kindergarten school medical examination. The examining doctor recommended psychological testing, commenting, "Child is very withdrawn—maybe retarded but most likely emotional problems."

The school records additionally included two IQ scores. In 1971, when he was twelve years old and in fifth grade, applicant obtained an IQ score of 77 on an Otis-Lennon Mental Abilities Test (OLMAT). When he was thirteen years old and in sixth grade, applicant was referred to Marcelle Tucker, M.Ed., for a psychological evaluation because he was performing below grade level, was withdrawn, and took no part in class unless called upon. In her report, Tucker stated that, on January 24, 1973, she gave applicant a Wechsler Intelligence Test for Children (WISC) and two tests of perceptual-motor coordination, specifically, a Bender Visual Motor Gestalt (Bender Gestalt)

test and a Goodenough Draw-a-Man test.[15] Tucker reported that applicant obtained a full scale IQ score of 78 on the WISC and "mental age" scores of eight years, eleven months on the Bender Gestalt and nine years, six months on the Goodenough.

Tucker noted in her report that applicant was then attending his third elementary school. In describing applicant's appearance and test behavior, Tucker described him as "nice looking" and "neatly dressed -- very up-tight -- did not use left hand even to hold paper when it skidded." In remarks concerning applicant's test results, Tucker again noted his test behavior: "During testing, [applicant] was extremely controlled. He made only the barest minimum of movements. His answers were given in as few words as possible." Tucker continued:

> The disparity between [the] "Information" (4) and "Comprehension" (8) [subtests] on the WISC indicated that perhaps this is a child who has not been taught, but who can learn.
>
> Low scores on the Bender and Goodenough [tests] seem to be negated by the average scores on "Block Design" (9) and "Object Assembly" (9) [subtests] on the WISC.

Tucker recommended that applicant stay in regular classes, but suggested that the school modify his

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[15] Witnesses variously refer to the Goodenough Draw-a-Man test administered to applicant by Tucker in 1973 (sixth grade) as "the Goodenough," "the Draw-a-Man," and "the Draw-a-Person." For consistency, we refer to the test as "the Goodenough." We note that the record shows that applicant also took a Goodenough test in first grade. Unless otherwise specified, references to "the Goodenough" in this opinion refer to the 1973 test.

program by using certain specific teaching techniques to strengthen his areas of academic weakness.

The Texas Department of Criminal Justice (TDCJ) records attached to applicant's 1992 writ application included a February 28, 1984 report of applicant's psychological evaluation by psychologist George Wheat. Wheat stated that he was conducting the review at the request of the Psychological Screening Committee to assist it with determining applicant's work-capable status.[16] Wheat stated that applicant self-reported "fairly regular [past] employment as [a] construction laborer and clothing sales clerk." Wheat also noted that applicant was neatly dressed and exhibited no hesitancy in answering questions. He stated that applicant's responses "were appropriate to his 9th grade educational level and indicated [an estimated full scale] IQ of 71." Wheat concluded that applicant was work-capable.

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[16] In anticipation of the 2014 evidentiary hearing, the State filed applicant's complete TDCJ records. Those records included a Psychological Review Committee report of its January 11, 1984, interview with applicant, who was then twenty-four years old, to determine his work capability. The report and associated test forms reflected that applicant had been preliminarily screened with a psychological interview; an abbreviated Wechsler Adult Intelligence Scale-Revised (WAIS-R), on which he obtained an estimated full scale IQ score of 71; and a Minnesota Multiphasic Personality Inventory (MMPI), a personality test, which "revealed a valid profile which was consistent with significant probability of psychiatric disturbance. [Two-point-high] scale elevations were found on the psychotic scales." Based on its interview with applicant and his MMPI result, the committee found that applicant was "not psychologically clear" and ordered "[a] formal psychological and psychiatric work up." Wheat's evaluation followed.

The TDCJ records attached to applicant's 1992 application also showed that, in January 1989, following an internal quality-assurance audit, applicant was given a complete WAIS-R by a TDCJ psychologist. Applicant, who was thirty years old at the time, obtained a full scale IQ score that was reported as "not [falling within the] retarded range." The record currently before us shows that applicant obtained a full scale IQ score of 74 on the 1989 WAIS-R.

The habeas court held an evidentiary hearing on April 23, 1993, to address applicant's ineffective-assistance allegations. Judge Carl Walker Jr. presided. Dr. Robert J. Borda, a clinical neuro-psychologist, reviewed applicant's school and TDCJ records and testified for applicant. Borda stated that applicant's scores on the 1973 WISC and 1989 WAIS-R fell within the borderline range of intelligence (70–79) but asserted that applicant's "mental age" at the time of the offense was no greater than fourteen years.[17] Borda further asserted that applicant's failure to reach for falling papers during Tucker's 1973 WISC testing was unusual and consistent with behavior sometimes seen in brain-injured people. However, Borda acknowledged that the records he reviewed did not mention a head injury.

Despite his opinions regarding applicant's mental age at the time of the offense, Borda did not purport to diagnose applicant as intellectually disabled. Borda testified that IQ tests were developed to measure a

[17] At the 1993 hearing, Borda testified that "[m]ental age is the individual's intellectual functioning at any particular point in time referenced to what would be the average performance for a given age." He stated that IQ scores were originally defined as a person's "mental age divided by the chronological age in months typically times 100."

person's potential to succeed in an academic setting and acknowledged that someone who obtained IQ scores in the borderline range of intelligence might well be capable of functioning successfully in the everyday world. On cross-examination, the State asked Borda whether applicant was capable of formulating complex arguments concerning his trial representation. Borda testified that, based on the documents he had reviewed, he "[saw] nothing that would indicate that [applicant] has really severe deficits in communication skills. I think he's . . . able to communicate adequately."

Applicant's sisters, Clara Jean Baker and Colleen McNeese, and his brother-in-law, Larry Baker, also testified at the 1993 evidentiary hearing.[18] They testified that applicant's father, Ernest Moore Jr. ("Junior"), was a neglectful, physically and verbally abusive alcoholic who beat his wife, Marion, and their nine children, and threw applicant out of the family home when he was fourteen years old.

Clara Jean testified that applicant would watch their parents when they fought, which was often. Clara Jean asserted that applicant's observation made Junior angry and caused him to beat applicant. Clara Jean stated that Junior also beat applicant because applicant tried to protect the other children.

McNeese asserted that, although Junior beat her and her other brothers, he beat applicant the most. She testified that Junior threw applicant out of the house because applicant could not spell and Junior

[18] To distinguish Clara Jean and Larry Baker, we refer to them by their first names.

thought he was stupid.[19] McNeese stated that, after applicant was thrown out of the house, she and her siblings would sneak food to him at night until Junior discovered what they were doing and made them stop. McNeese acknowledged that Junior also forced her and her other brothers to leave home.[20]

Larry, who lived next to the Moore family as a teenager, stated that he had seen Junior strike applicant, as well as two of applicant's brothers. Larry testified that he could otherwise tell that applicant was suffering from some sort of physical abuse because applicant had bruises and appeared hungry, haggard, and unrested. Larry said that applicant was generally secretive about the abuse and reluctant to discuss his family situation, but he did talk to Larry about it a couple of times.

Concerning the allegation that Bonner was ineffective as trial counsel by suborning perjury, Clara Jean testified that her family retained Bonner after learning his name from a young woman whom applicant was dating at the time. Clara Jean admitted that she lied at the 1980 trial when she testified that applicant was with her in Louisiana at the time of the

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[19] Although Ronnie Moore, the youngest of applicant's brothers, executed an affidavit in 1992 in support of applicant's ineffective-assistance claims, he did not testify at the 1993 hearing. In his 1992 affidavit, Ronnie stated that Junior forced applicant to leave home at age fourteen because applicant told Junior to stop beating their mother.

[20] In her 1992 affidavit, McNeese stated that the Moore children grew up in extreme poverty and that there never seemed to be enough to eat. She asserted that she and applicant twice suffered ptomaine poisoning after scavenging food from the trash. McNeese stated that, after the food-poisoning incidents, applicant solicited odd jobs from neighbors when he and his siblings were hungry and bought food with the money he earned.

offense. Clara Jean asserted that she lied because Bonner convinced her it was necessary for applicant to avoid the death penalty and because she wanted to help applicant.

Applicant also testified at the 1993 evidentiary hearing and was cross-examined. Regarding the allegation that trial counsel suborned perjury, applicant admitted that he signed the written statement offered against him at the 1980 trial and asserted that the statement recounted the offense exactly as it happened. Applicant stated that, although he also told trial counsel the truth about the offense, they advised him to testify at trial and deny giving the confession, which he did.

Applicant also testified that, after his arrest, he falsely told another inmate that he had a cache of jewelry. Applicant surmised that trial counsel heard the story because they spontaneously asked him if the story were true and wanted to know the jewelry's location and worth. Applicant stated that trial counsel implied that giving them the jewelry could increase his chances of a life sentence. To secure a good effort from trial counsel, applicant maintained the lie, telling counsel that the hidden jewelry was worth close to $1 million. Applicant initially avoided specifying a location for the jewelry by telling counsel that he did not think it would be a good idea to disclose it to them. Eventually, applicant told counsel that the jewelry was at his grandmother's house in Louisiana.

Regarding his background, applicant testified that his father, Junior, was an alcoholic who physically abused him as a child and threw him out of the house permanently at age fourteen. Applicant stated that he was beaten and ejected from the family home because he tried to prevent Junior from beating Marion.

Applicant stated that he needed to find a way to survive after Junior permanently threw him out of the house. Because it was difficult to simultaneously care for himself and attend school, he dropped out and became part of "street life." Applicant testified that he frequented pool halls and similar establishments; slept in the restroom or back of the pool hall; did not immediately try to live with anyone else because his siblings were helping him without their father's knowledge; obtained food by stealing it from stores; and later moved in with a friend.

Applicant testified that school had been difficult for him. As a student, he "really couldn't comprehend words as most kids would" and "it was difficult for [him] to read and write." Applicant asserted that he still had problems with reading and writing, but since being imprisoned, he had spent a lot of time studying and trying to develop himself. As a result, his skills had improved. When shown State's Exhibit 1, a typewritten *pro se* pleading titled, "Supplemental *Pro-Se* Brief For The Appellant," which was filed-stamped February 26, 1985, and a handwritten cover letter addressed from applicant to the Harris County Clerk, applicant testified that the brief looked familiar to him as a document that someone had helped him prepare. He stated that he knew the contents and purpose of the document and that he had a part in researching it.[21]

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[21] At the 1993 hearing, McNeese acknowledged that applicant wrote to her from prison and that she would recognize his handwriting and signature. She identified applicant's handwriting in the cover letter.

Bonner testified at the hearing and denied the allegations made against him.[22] Bonner stated that applicant insisted before and throughout trial that he had an alibi and that counsel pursue such a defense. Bonner said that he spent a great deal of time talking with applicant during the course of his trial representation and that their conversations included discussions of trial strategy. Bonner never received the impression that applicant failed to understand the gravity of his situation or was unable to assist in his own defense; Bonner opined that applicant had assisted counsel very well.

On August 31, 1993, the habeas court entered findings of fact and conclusions of law and recommended that we deny relief on applicant's allegations. We determined that the record supported the habeas court's findings and conclusions and denied relief. *See Ex parte Moore*, No. WR-13,374-04 (Tex. Crim. App. Oct. 4, 1993). Meanwhile, the trial court set applicant's execution date for October 26, 1993.

On October 12, 1993, applicant filed his second petition for a writ of habeas corpus in federal court, raising the same claims that he advanced in his second Article 11.07 writ application. *See Moore*, 194 F.3d at 602. He additionally filed a motion for stay of execution, which the federal district court granted. In 1995, the federal district court found that trial counsel performed deficiently at both phases of trial, but that applicant suffered prejudice only as to punishment. *See Moore v. Collins*, No. H-93-3217, slip op. at 32 (S.D. Tex. Sept. 29, 1995). In 1999, the Fifth Circuit

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[22] The record shows that applicant's other trial attorney, C.C. Devine, died shortly after applicant's 1980 trial and that, by the time of the 1993 evidentiary hearing, Bonner had been disbarred for reasons unrelated to his representation of applicant.

Court of Appeals affirmed the federal district court's determination that applicant was entitled to punishment relief. *See Moore*, 194 F.3d at 622.

D. 2001 Punishment Retrial

In February 2001, the trial court held a new punishment trial. The current habeas judge, Susan Baetz Brown, heard certain pretrial matters, but Judge Larry Fuller presided over jury selection and the evidentiary portion of the punishment retrial.

At trial, the State reintroduced the evidence that it had presented at the guilt-innocence and punishment phases of applicant's 1980 trial. It also introduced applicant's disciplinary reports for the period he was confined on death row before his original death sentence was vacated.

Those reports showed that, on June 24, 1983, after showering, applicant stopped at a cell to talk to another inmate and ignored three orders to return to his own cell. After refusing the third order, applicant told the reporting officer, "[Y]ou can't tell me what to do, come on out from behind those bars and make me get in my cell. You aren't man enough to put me down." During a later security check at applicant's cell, applicant told the officer, "[Y]ou get out from in front of my cell, you motherfucker, I wish these bars weren't here." On September 23, 1983, while being let out for recreation, applicant stopped at four different cells to talk to other inmates and ignored eleven orders by the escorting guard to proceed.

On January 23, 1984, applicant ignored orders to stop talking to another inmate and enter the day room. On March 9, 1984, applicant failed to report to his assigned work. When confronted, applicant falsely stated that an officer had given him the day off.

On April 18, 1986, applicant was found to possess a large quantity of pills for which he did not have a prescription. On April 23, 1986, when ordered to shave, applicant told the guard that everyone knew that he had a shaving pass. When ordered to show the pass, applicant refused. On October 3, 1986, while giving inmates their meal, a guard ordered applicant to move from a bench in the day room to a table. Applicant stood up, stated that he "just had to fuck with somebody," and then refused an order to return to his bunk.

On January 3, 1987, applicant refused an order to get a haircut, stating, "I'm not going to get one." On January 22, 1987, applicant was among a group of inmates brought to the day room and told to sit down facing the wall. Applicant created a disturbance by jumping up and yelling, "[F]uck this, we don't have to do this," and trying to get the other inmates in the day room to join him. When ordered to sit, applicant repeated, "No! [W]e don't have to do this!" As the guard approached him, applicant returned to the spot where he had been sitting but refused to sit down. Ultimately, the guard grabbed applicant by both arms and placed him face down on the day-room floor.

On November 17, 1987, a prescription-only pill was found in applicant's cell, wrapped in toilet paper. Applicant did not have a prescription for the medication. On June 23, 1988, applicant refused an order to shave, citing a medical condition.

On September 6, 1990, a stinger (an altered electrical cord used to boil water) was found in applicant's cell. On August 12, 1992, applicant, who was working as a death-row porter, refused an order to clean up a spill in the main hallway. He stated that it was not his job because he was a death-row porter,

not a hall porter. On March 30, 1995, applicant was found to possess matches and rolling papers, which inmates were prohibited from having.

Applicant did not testify at his punishment retrial. However, the defense called nine of applicant's family members to testify about applicant's background and the changes they had seen in applicant since he had been imprisoned on death row.

Marion Moore, applicant's mother, testified that the family had financial problems. She stated that she worked forty hours per week outside the home when applicant was small and that her husband, Junior, worked construction jobs on and off. She testified that Junior developed a drinking habit and would become frustrated with the children when he had been drinking. Marion testified that, in December 1971, applicant was hit in the head by a brick when he was on a school bus and that he received medical treatment for the injury a few days later.

Larry Baker gave testimony similar to that which he gave at the 1993 evidentiary hearing concerning Junior's verbal and physical abuse of the Moore children. Regarding Junior's verbal abuse, Larry elaborated that Junior treated the male Moore children differently than the female children. Larry stated that Junior would tell all of his sons that they were "worthless" and "no good."

When asked to describe what kind of person applicant was between the ages of thirteen and seventeen, Larry testified that applicant was athletic, had a dog and "really had a special relationship with it," and "was a quiet kind of guy sometimes." Larry asserted that he had seen changes in applicant since that time. Larry stated that he "felt initially that

[applicant] was not as intelligent as he ha[d] displayed lately." Larry said that applicant "shows advance [sic] toward intelligence. He reads a lot. His handwriting is excellent. His grasp of vocabulary has improved considerably. His presentation of himself is much better."

McNeese testified that the Moore family moved a lot and that they had been evicted on one occasion. As to Junior's physical abuse of applicant, McNeese gave testimony similar to that which she gave at the 1993 evidentiary hearing. She again acknowledged that Junior beat all of the children, but testified that Junior treated applicant differently from her other brothers and said that applicant did not seem like he was Junior's son.

McNeese also testified that she and applicant attended the same schools when they were young. She said that they first attended Atherton Elementary, at which the student body was predominately black. When applicant was about twelve, as part of a racial integration effort, they were bussed to Scroggins Elementary. McNeese testified that "it was really hard for us to attend [Scroggins] because the people didn't want us there." She testified that, when they were first attending Scroggins, applicant was hit in the head with a brick because the other students wanted them off the bus. She said that applicant missed school because of the brick incident.

McNeese, who is about eleven months younger than applicant, testified that she and applicant were placed in the same classroom at Scroggins so that she could help him. McNeese stated that applicant did not respond to the teachers, who did not realize that he could not read, and he would not participate in anything. McNeese attributed applicant's behavior in

class to the fact that he did not understand what was going on. She said that she overheard teachers discussing applicant and asking each other whether he were intellectually disabled or had a hearing problem. McNeese testified that when she was doing seventh-grade-level work, the teachers would give applicant third-grade-level work to do, and she would stay after class to help applicant with it.

McNeese testified that Hester House, a community center serving Houston's Fifth Ward, was a place where she and her siblings escaped from their situation. McNeese thought that applicant did better at Hester House than at school because "[i]t was the only place where he could really go without my dad messing with him." McNeese testified that applicant learned to swim at Hester House, became very good at swimming and enjoyed it, entered into swimming competitions, and at age thirteen, won an award for saving a deaf and mute boy from drowning.

Paravena Richardson, applicant's cousin, testified that she spent a lot of time in the Moore household as a child and attended school with applicant and some of his siblings. Richardson stated that they first attended Atherton Elementary but then were bussed to Scroggins Elementary, at which the student body was primarily Hispanic. Richardson stated that she was in the same classes with applicant at Scroggins and that the Hispanic students there treated him badly—calling him names, picking fights, and once hitting applicant in the side of the face with a brick. Richardson testified that, as a result of his treatment by the Hispanic students, applicant was withdrawn in class and kept to himself.

Richardson said that she had seen Junior, who was quite controlling and could be set off by the most minute things, become physically violent with his children. Richardson stated that Junior targeted applicant more than the other boys. Richardson did not know why and noted that Junior and applicant's older brother, Charles, had almost as poor a relationship.

Applicant's brother, Lonnie Moore, testified that he was a couple of years younger than applicant. When Lonnie was ten years old, he attended Scroggins Elementary with applicant. Lonnie testified that he and applicant were part of a group of students who were bussed to Scroggins to integrate it. Lonnie was aware at the time of racial tensions at Scroggins and of things that happened to applicant there.

Lonnie stated that his parents treated him and his younger siblings differently than they treated the older children. Unlike the older children, Lonnie and his younger siblings had to stay in the backyard. They were not allowed to play out in the streets with friends and would be watched over by their eldest sibling, Clara Jean. Lonnie testified that applicant and his other older brothers were not subject to the same restrictions. Lonnie saw Junior physically abuse applicant when applicant stood up for what he thought was right, which included protecting their mother from Junior's abuse. Lonnie testified that, due to the tension between applicant and Junior, applicant was not comfortable or able to relax at home.

Lonnie testified about gifts that applicant had made in prison for him, which included: clocks in the design of a church and a church cross, a jewelry box, and

picture frames.[23] Lonnie further testified that he had seen a big change in applicant since applicant had been on death row. Lonnie thought that applicant had gained direction and developed compassion, and noted that they now talked a lot about religion.

Applicant's brother, Johnny B. Moore, testified that he was four years younger than applicant. Johnny saw Junior hurt applicant, sometimes for no apparent reason, and at other times, because applicant was trying to stop their parents from fighting. When applicant was still living in the family home, applicant earned money by cutting grass. When the children did not have enough to eat, applicant would use his earnings to help feed his siblings.

Ronnie Moore, the youngest of applicant's brothers, testified that when their parents were gone, the older children—primarily applicant, Clara Jean, and McNeese—took care of the younger children. Ronnie stated that there was often no food in the house. On one occasion when applicant and McNeese were in charge of the younger children and there was no food, Ronnie saw applicant and McNeese eating from the neighbors' trash cans. He recalled that they contracted food poisoning.

Ronnie further testified that applicant worked on the weekends for a man named Collier, who mowed lawns, and that applicant also worked in a rest home. Ronnie testified that applicant used his earnings to help support the family. Applicant gave Ronnie money for lunch and their mother money for bills. Ronnie testified that, in addition to beating applicant, Junior would call applicant "stupid" and "dummy."

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[23] Photographs of these items were admitted into evidence.

Cloteal Morris, applicant's mother's cousin, testified that applicant was quiet and well behaved as a young boy, but he was not an open child and never talked very much. She stated that applicant had written her beautiful letters from prison about church and religion. Alice Moore, applicant's maternal aunt, testified that applicant was quiet as a child and "seemed like a regular kid." She stated that applicant wrote letters to her from prison and described them as "just normal letters."

The defense also called Jo Ann Cross, a London solicitor. Cross became acquainted with applicant through her mother, who began corresponding with applicant in 1990. Cross began corresponding with applicant in 1993. Cross testified that applicant's writing style, spelling, grammar, and use of language had all improved during the period of their correspondence and that it continued to improve.

Cross further stated that applicant now showed "a greater deal of understanding of all sort of issues, be it culture issues [or] politics" than he had at the beginning of the correspondence. Cross explained that she had arranged for applicant to receive newspapers and articles and that they had discussed these materials in their correspondence. She testified that applicant had "absolutely" demonstrated an ability to understand and comprehend the events that she was discussing with him and that he had shown sympathy and happiness for her when it was appropriate. After her mother died in 1996, applicant wrote Cross a very moving letter about her mother's death. Applicant had also made and sent gifts for Cross and her mother, including a jewelry box with a prayer for peace inlaid in the lid and a musical jewelry box.

TDCJ guards testified that, while on death row, applicant obtained the status of a staff-support inmate, which allowed him to apply for jobs within the prison and enjoy certain privileges during his non-working time. Applicant's records showed that he successfully applied for jobs as a wing porter and barber and that he also worked in the shoe and garment factories.

A Harris County Jail guard, Jeff Dixie, testified that, while applicant had been in jail awaiting the retrial, he had seen applicant reading a newspaper. Another Harris County jailor, Kenneth Wayne Young, testified that he had written a motivational book, "Wakeup Call," and that the chaplain had given a copy to applicant. Young testified that applicant read "all the time" and that applicant introduced newly arrived or troubled jail inmates to Young's book.

The defense also called two expert witnesses to testify, Dee Dee Halpin and Bettina Wright. Halpin was an educational diagnostician with a master's degree in special education. Wright was a clinical social worker who held a bachelor's degree in psychology and a master's degree in social work.

Halpin stated that, at the defense's request, she reviewed applicant's educational records. These records reflected applicant's attendance, conduct and academic grades, academic achievement test scores, and IQ test results.[24] Halpin testified that applicant attended Atherton Elementary School from kindergarten through fourth grade. She stated that there was a recommendation during the kindergarten year that

[24] Halpin prepared a written summary of applicant's educational records, which was admitted into evidence at the punishment retrial.

applicant receive psychological testing because he was very withdrawn. Although the person who recommended testing commented that intellectual-disability was a possible cause for applicant's presentation, that person thought that emotional problems were the more likely explanation.

Halpin testified that applicant was promoted to first grade, but he made very poor grades that year, especially in all of the language areas, he tested "poorly" in reading and math readiness, and his eye-hand coordination was immature.[25] When applicant was retained a year in first grade, his grades remained weak, with the only significant change being that his conduct grade dropped from "good" to "needs improvement." When applicant was socially promoted to second grade at age eight, his grades remained about the same. Applicant attended summer school and was promoted to third grade, where his poor grades continued and his conduct dropped to "unsatisfactory," the lowest possible conduct grade. Halpin testified that applicant's score that year on the Iowa Test of Basic Skills (ITBS), a group-administered standardized achievement test, indicated that he was a third grader performing at a second-grade level.

Halpin testified that applicant was promoted to fourth grade, but his grades remained poor, and he continued to perform below grade level on the ITBS. He was promoted "on appeal" to fifth grade and began attending a new school, Scroggins Elementary. Applicant's grades improved from Fs to Ds, and his conduct grades for that year showed significant

[25] Halpin's written summary indicated that applicant took a Metropolitan Readiness Test (MRT) and a Goodenough Draw-a-Man test in first grade, obtaining a "low normal" result on the MRT and an "immature" result on the Goodenough.

improvement. When he took the ITBS that year, applicant's math score was within the average range, although his language score remained below average. When noting applicant's result on the OLMAT that applicant took that year (77 IQ), Halpin described the OLMAT as a group-administered IQ test.

Halpin stated that applicant attended a third elementary school for sixth grade. She testified that attending three different schools within three years would be difficult for any child. Halpin explained that, in the era in which applicant attended school, the grade in which certain skills were taught often varied between schools. As a result, a student who changed schools frequently in that era might miss being taught certain skills. In addition, changing schools disrupted continuity in a child's learning and required the student to make a social adjustment to the new environment.

Halpin stated that applicant's ITBS scores for sixth grade showed him to be performing two years below grade level. Applicant's records also showed that he took a Slosson Intelligence Test that year, at age thirteen.[26] Halpin testified that applicant "came out with a mental age of seven-and-a half and so his IQ was 57," which fell within the intellectually disabled range. But Halpin noted that the Slosson is an individually administered IQ test that strongly favors verbal skills. She asserted that a student with any kind of language difficulty would typically perform poorly on the Slosson and that applicant had consistently shown such language difficulties. In addition, Halpin testified that a notation in applicant's records

[26] The records that applicant submitted with his 1992 writ application did not mention a Slosson Intelligence Test.

stated that his Slosson IQ score of 57 was "minimal." Halpin explained that a "minimal" notation typically meant that the test administrator felt that the person actually functioned at a higher level.

Halpin was additionally skeptical of applicant's score on the Slosson because he subsequently took the individually administered WISC, which separately assessed verbal and nonverbal abilities. Within the overall IQ score of 78 that applicant obtained on the WISC, he obtained a verbal IQ score of 77 and a nonverbal or performance IQ score of 83. Halpin testified that, according to his school records, applicant remained in a regular classroom following the WISC testing.

Halpin testified that she had also reviewed a letter that applicant had recently written. She stated that, although the letter contained some errors, the language was "certainly coherent," "fairly complex," and "adult[-]like." Based on all the materials she reviewed, Halpin opined that applicant functioned in the low-average range of intellectual functioning and that he "definitely had some ability to learn that wasn't tapped early in his school years."

Wright testified that she had reviewed applicant's educational records and Dr. Borda's 1993 evidentiary hearing testimony. She also interviewed applicant twice, for a total of four hours. Wright concluded that applicant "was nowhere near retarded." She opined that applicant had an average IQ and that his ability to learn was "very intact."

Wright attributed applicant's difficulties in school to undiagnosed learning disabilities and emotional problems. She opined that his emotional problems stemmed from his learning disabilities, academic

failure, and self-described "scary" childhood. She concluded that the quietness and constrained movement noted in applicant's records were due to his fear rather than to any diminished intellectual functioning. She explained that applicant was a very vigilant and watchful child who carefully assessed situations before acting.

Wright testified that applicant's drug use exacerbated his difficulties in school. Applicant told Wright that he began to use drugs in fifth grade to "escape the pain." He began by using marijuana. By the time he was of junior-high and high-school age, Wright testified, applicant was using marijuana, alcohol, amphetamines, tranquilizers, and whatever else he could obtain.

In closing argument, defense counsel emphasized applicant's background. Defense counsel asserted that applicant did so poorly in school that he "was considered to be possibly [intellectually disabled]." But counsel asserted that "we learned later from the experts and other people who looked at [applicant's school records] that he wasn't really [intellectually disabled] at all, he was capable of learning." Counsel argued that "mostly what [applicant's] young life was about" was "lack of food, violence in the home[,] and one failure after another in school. . . . It was a cycle of violence in which there was no peace and no safety in the home." Counsel asserted that, in addition to physically abusing applicant, Junior Moore emotionally abused applicant by conveying the idea that he "wasn't any good, he wasn't smart, [and] he couldn't learn." Counsel argued that applicant "[was] not retarded, he was just treated like somebody that was retarded" and that it was not until applicant "[went] to prison[,] away from his family environment that [he

was] actually safe enough to be able to learn and grow and become the kind of person that he could have become had he come from a safe environment."

The trial court charged the jury pursuant to Article 37.0711. On February 14, 2001, in accordance with the jury's answers to the special issues, the trial court again sentenced applicant to death.

E. Direct Appeal from 2001 Punishment Retrial

Robert Morrow, applicant's punishment-retrial counsel, also represented applicant on the automatic direct appeal to this Court. *See* Art. 37.0711, § 3(g). On August 20, 2002, Morrow filed a brief on applicant's behalf. On the same date, he filed "Appellant's Motion To Stay Proceedings Under [*Atkins*] Pending Legislative Action, As An Alternative To Relief Requested In Appellant's Brief." Despite having argued at the punishment retrial that applicant was not intellectually disabled and having presented the testimony of two experts to support that theory, Morrow now asserted that applicant "ha[d] a strong claim of [intellectual-disability]" under the June 2002 Supreme Court opinion in *Atkins*. Morrow urged us to stay applicant's direct appeal until the Texas Legislature enacted legislation to implement *Atkins*'s mandate. We denied the motion on September 11, 2002.

On October 3, 2002, applicant filed a *pro se* "Motion for Leave to File Appellant's [*Pro Se*] Supplemental Brief." In the motion, applicant acknowledged that he was not entitled to hybrid representation, but stated that he wished to file a supplemental *pro se* brief to raise an additional point of error. In his *pro se* supplemental brief, applicant argued that Article 37.0711 was unconstitutional because it implicitly

placed the burden on the defendant to show that sufficient mitigating factors exist to warrant a life sentence rather than death. We denied applicant's motion on October 4, 2002, and later affirmed his sentence. *See Moore v. State*, No. AP-74,059, slip op. at *2 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication), *cert. denied*, 43 U.S. 931 (2004).

II. Current Habeas Proceedings

A. Applicant's Application and Supporting Exhibits

On June 17, 2003, through appointed habeas counsel Stephen Morris, applicant filed his current application pursuant to Article 11.071. In support of his request for an evidentiary hearing on his *Atkins* claim, applicant attached affidavits executed in 2003 by Gina Vitale, a social worker and his mitigation investigator, and Dr. Richard Garnett, a clinical psychologist. Vitale and Garnett each asserted that there was sufficient evidence of applicant's intellectual-disability, as defined in the tenth (2002) edition of the AAMR Manual or the DSM-IV, or both, to warrant an evidentiary hearing.[27] According to their affidavits, although Vitale interviewed applicant's relatives, neither Vitale nor Garnett personally assessed applicant. Instead, they based their opinions on their review of Vitale's interviews with applicant's family; affidavits and interview notes compiled by applicant's previous defense team; and some of applicant's records. Neither Vitale nor Garnett actually diagnosed applicant as intellectually disabled.

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[27] The definitions of intellectual-disability contained in the tenth edition of the AAIDD Manual and the DSM-IV do not require that an individual's adaptive behavior deficits be linked or "related" to deficiencies in intellectual functioning. *See* INTELLECTUAL-DISABILITY 8; DSM-IV 37.

Vitale discounted applicant's 77 IQ score on the OLMAT, describing that instrument as a state-mandated, group-administered IQ screening tool, and she emphasized the 57 IQ score that he obtained on the Slosson. Vitale acknowledged applicant's WISC score (78 IQ), but asserted that his mental age scores on the concurrently administered Bender Gestalt and Goodenough tests reflected much lower IQ scores of 67 and 71, respectively.[28]

Garnett stated that the OLMAT is a group test that requires one to read. Due to evidence of applicant's inability to read, Garnett questioned the validity of applicant's OLMAT score. Garnett also asserted that applicant obtained a 67 IQ score on the Bender Gestalt and a 72 IQ score on the Goodenough test that he took in conjunction with the 1973 WISC.

B. Applicant's *Pro Se* Requests to Waive Further Appeals

The State filed an original answer in December 2003, followed by a supplemental answer in January 2004. On June 23, 2005, direct appeal counsel Morrow wrote to the current habeas judge, stating:

> It is my understanding that you recently received a request from [applicant] to discontinue his appeals and or [sic] pending writs. I received the same request. However, immediately after that, I received instruction from [applicant] that he no longer wishes to withdraw his writs or appeals. [Applicant] is dealing with the stress of Death Row and was

[28] According to her affidavit, Vitale arrived at these IQ scores for the Bender Gestalt and Goodenough tests by comparing applicant's mental-age score on those instruments against his chronological age at the time of testing.

> understandably upset when he wrote the first letter. [Applicant] wants to continue his post conviction efforts.

Despite Morrow's assertions, on October 3, 2005, applicant filed a "*Pro Se* Ex Parte Motion to Waive Further Appeal" in the trial court. Applicant correctly stated that he had been sentenced to death on February 14, 2001, after a new punishment trial; that the trial court had subsequently appointed Morrow to represent him on direct appeal; and that it had appointed Morris to prepare a postconviction application for a writ of habeas corpus. Applicant moved the trial court to dismiss Morrow and Morris, to find that he waived further appeals of his capital-murder conviction and death sentence, and to set his execution date.

On May 30, 2006, the current habeas judge held a hearing concerning applicant's *pro se* motion. Direct-appeal counsel Morrow appeared on behalf of applicant, who, by the parties' agreement, was not present. The court stated that, in response to applicant's 2005 letter and motion, it had ordered him moved from death row to the Harris County Jail for a psychological examination to determine his competency to withdraw his application. The court further stated that, as of the 2006 hearing date, applicant had been at the jail for sixty-nine days but had refused to speak with doctors. Therefore, the court said, no psychological examination could be completed. Counsel for both parties agreed to the court's factual recitation. Because no psychological examination could be completed, the court ordered applicant's habeas proceeding to continue, directed that he be returned to death row, and instructed Morrow to write

to applicant to explain why the court could not proceed with the *pro se* motion.

C. Applicant's Supplemental Filings in Support of His *Atkins* Claim

In 2009, current writ counsel, Pat McCann, substituted for Morris, who was permitted to withdraw. In late 2011, McCann filed a lengthy "Factual Supplement" in support of applicant's *Atkins* allegation. The Factual Supplement included documents that appeared to be notes taken by applicant's 1992 writ and 2001 punishment-retrial defense-team members, specifically, Kristi Franklin Hyatt, Anthony S. Haughton, Patrick Moran, and Jemma Levinson. The notes memorialized their interviews with applicant, various relatives, and Dr. Borda.

According to those notes, on November 14, 1991, applicant told Haughton that Junior Moore physically terrorized and abused applicant's mother and siblings just as badly as he did applicant; applicant was a slow learner who did not do well in school; and due to family moves and racial integration efforts, he attended several different schools. Applicant said that, when he dropped out of school around age fifteen or sixteen, he could barely read and started living "a street life." He had his first drink at age thirteen, and before going to prison at age seventeen, he regularly abused alcohol and drugs. In junior-high school, he started smoking marijuana and taking 7 to 14 Quaalude pills per day, and he tried methamphetamine. Applicant also reported that, after his first stint in prison, he started cooking and injecting "preludes."[29] Applicant stated

[29] We understand "preludes" to refer to phenmetrazine. *See United States v. Green*, 246 F.3d 433, 434 (5th Cir. 2001).

that he got stoned regularly, often combining preludes, marijuana, and alcohol.

According to the notes, in April 1993 (i.e., before the 1993 evidentiary hearing), Borda told Hyatt that he did not consider applicant intellectually disabled, although he believed that physical abuse, neglect, and substance abuse may have affected applicant's mental status at the time of the offense. Because applicant had never been tested for a personality disorder, Borda told Hyatt that he could not rule out schizophrenia or personality disorders. However, Borda said that he felt comfortable describing applicant as having at least below average intelligence, a learning disorder, and compromised social development. Borda believed that applicant had some sort of brain dysfunction, possibly from a frontal-lobe injury, which would result in a lack of impulse control and a diminished ability to think through the consequences of his actions. But Borda acknowledged to Hyatt that amphetamine abuse could cause "this personality defect."

The notes in applicant's Factual Supplement indicated that defense-team members interviewed applicant four times in 2000. Moran interviewed applicant in February and March of that year. During the interviews, applicant stated that his mother, Marion, would send him to look for Junior, who was often absent. Applicant would usually find Junior drunk and with another woman. Applicant observed that it probably angered Junior for applicant to find him in such a compromising position and that Junior may have beaten applicant harder than the other children to deter him from telling Marion.

Applicant stated that, after being permanently thrown out of the house, he could have stayed with

nearby friends. But because applicant felt ashamed, he instead spent the first night in a neighbor's garage.

Applicant said that his earlier period of incarceration would show two disciplinary matters. One was for making gambling dice from paper and soap. The other was for fighting a bullying inmate named "Cadillac." Applicant recalled that he had been in the day room talking to an inmate who was known as an easy rape victim. When Cadillac began taunting both of them, a fight ensued. Applicant said that a guard who witnessed the incident corroborated his assertion of self-defense.

Jemma Levinson interviewed applicant twice in May 2000. According to her notes, applicant stated that he looked after his older brother, Charles, who sometimes got into trouble when drinking, and that he broke up fights between Charles and their brother Jessie. Applicant also said that it fell to him and his sister, Clara Jean, to look after the younger siblings. At school, applicant's sister, Colleen, told him that a boy was bothering her.[30] Applicant told the boy to leave Colleen alone and fought with him.

Applicant described himself to Levinson as the kid in the neighborhood that everyone liked and recalled that he would clean houses and cut yards. Applicant told Levinson that, when he was around eleven or twelve years old, he would sneak out of the house between 1:00 and 2:00 a.m. to see friends. Applicant said that he lacked guidance and became attracted to "things on the street."

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[30] This is the same Colleen McNeese who testified at the 1993 evidentiary hearing and the 2001 punishment retrial.

Applicant also stated that he did not do well in school, did not like it, and was frustrated by his inability to read or write. To escape class, at first he would go to the school nurse, pretending to be sick. He started skipping school in fourth grade, skipped school a few times in sixth grade, and by seventh grade, almost entirely stopped going. Applicant told Levinson that he also started drinking in the seventh grade.

Applicant reported that, in seventh grade, he wanted to be a football or baseball player and tried out for school sports teams, but he had to stop playing when he ran over a wire hanger while mowing lawns and suffered a cut to his leg. The hospital put a cast on his leg, which he ultimately removed himself because he was determined to walk on his leg. Applicant said that he met his first girlfriend at school and that he would sneak from his house at night to see her. Applicant stated that he got into trouble at school for fighting and had a reputation for it, such that people wanted to fight with him. Applicant thought that the fights came about because he was shy and did not know how to communicate.

Applicant also told Levinson that he began hanging around the pool hall, where he learned to gamble and steal. Another guy around his same age showed him how to shoot pool, rob people, steal cars, and break into houses. Applicant told Levinson that he later began doing those things on his own.

Applicant further stated that he started injecting preludes when he was between fifteen and sixteen years old, but he later stopped because it scared him, and he knew that he would end up dead or doing something that he would regret. Applicant also stopped drinking alcohol after seeing the effect it had on him, but he continued smoking marijuana.

Applicant reported that he paid for drugs with money that he made from stealing and selling cars, breaking into houses, and hustling pool.

Applicant also told Levinson that during his earlier period of incarceration, he made friends with an inmate named Swan. Applicant and Swan would stay out of the day room to avoid the fights that frequently occurred there. Instead, he and Swan would play dominoes elsewhere and applicant had a disciplinary report for one of those occasions. Applicant recalled that, around 1997, he went through "a bad period" on death row, during which all he did was sleep and gain weight. Applicant further told Levinson that he had ordered and read a book written by a jail officer.

The notes contained in applicant's Factual Supplement indicate that Moran and Levinson separately interviewed Clara Jean Baker in 2000. According to those notes, Clara Jean reported that both of applicant's parents regularly beat all of the children except for her. Clara Jean recalled that, as applicant grew older, he would intervene when his parents fought, causing Junior to throw him out. Clara Jean said that applicant knew about Junior's many extramarital affairs and that Junior was always angry with applicant for catching him in infidelity. Clara Jean further stated that applicant and their brother, Jessie, would sneak out of the house. In his early years, applicant was quiet, shy, and did not spend much time with other people, but otherwise was happy, artistic, and always working. In summer, applicant would cut yards all day until Marion came home. Applicant liked wearing nice things and cared a lot about his appearance. Clara Jean recalled that applicant had a girlfriend at school named Robin, who

was "very cute," and other boys envied him because of it.

The notes also indicate that Levinson interviewed Larry Baker in 2000. Larry reported that, as a child, applicant was "personable and impressionable, . . . a very good athlete," liked animals, was obedient, attended school, and "was just the same as the rest of us." Applicant trained the Moore family's dog and put on "shows" with the animal. The dog was very well trained and did whatever applicant said. Larry recalled that applicant followed clothing trends, was pleasant and well-mannered, and was always helpful, doing odd jobs and selling newspapers. He described applicant as enterprising and having a lot of friends. As they grew older, Larry started noticing changes in applicant's choice of associates and in applicant's attitude towards attaining things. Larry stated that applicant developed the attitude that he did not want to work his whole life and have nothing. Larry told Levinson that applicant always looked neat and tidy, had good hygiene, and worked in a fish market and cut grass to buy his clothes.

D. Appointment of Mental-health Experts

The current habeas court appointed mental-health experts for both parties in anticipation of the 2014 evidentiary hearing. Dr. Borda again assisted applicant, as did Dr. Shawanda Williams Anderson, a clinical neuro-psychologist, and Dr. Stephen Greenspan, a retired professor of educational psychology. Dr. Kristi Compton, a clinical and forensic psychologist, assisted the State. Before the hearing, habeas counsel filed

Borda's affidavit and Anderson's "Forensic Neuropsychological Report."[31]

According to her report, on November 22, 2013, and December 6, 2013, over a period of four hours, Anderson conducted an initial diagnostic interview of applicant at TDCJ's Polunsky Unit and administered various neuropsychological tests to him. She thereafter interviewed applicant's family members for approximately two hours. On December 19, 2013, Anderson administered math subtests of the WAIS-IV and Wide Range Achievement Test-4 (WRAT-4) to applicant at the Harris County Jail, solely to determine his computational ability.

According to Borda's affidavit, he administered "a very limited test battery" to applicant on December 12, 2013. That battery consisted of three neuropsychological tests and one formal measure of IQ, a Raven's Colored Progressive Matrices (RCPM) test. Applicant obtained an IQ score of 85 on the RCPM.

On January 1, 2014, Compton conducted a six-hour assessment of applicant. After interviewing applicant about his personal history, she administered a Test of Memory Malingering (TOMM); a WAIS–IV; a Wechsler Memory Scales, 4th Edition; a complete WRAT-4; and a Texas Functional Living Scales, a test of adaptive functioning. Applicant obtained a full scale IQ score of 59 on the WAIS-IV.

E. January 2014 Evidentiary Hearing

Lonnie Moore, Colleen McNeese, Larry Baker, Mark Fronkiewicz, Borda, Greenspan, and Anderson testified for applicant at the 2014 evidentiary hearing.

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[31] Although habeas counsel described Anderson's report as a sworn affidavit, the report is not sworn or notarized.

Through applicant's relatives, applicant again presented evidence of Junior's alcoholism and physical abuse, the family's limited financial means, and applicant's poor grades and reading difficulties.

Lonnie Moore testified that applicant was shy, quiet, and athletically talented as a child, especially at swimming, but he received poor grades in school and never read well. While still living with the family, applicant made money in the summer by cutting grass and helping a man with household projects. After being thrown out of the house, applicant worked at the Galleria for a place that sold sausages.

Lonnie and McNeese testified that their mother, Marion, cooked the family's meals on a hot plate and that the family did not have kitchen appliances such as a microwave oven. McNeese asserted that applicant did not know how to cook and did not help prepare food. However, McNeese and Lonnie both testified that only the female children were enlisted to help Marion with meal preparation.

McNeese had testified at applicant's 1993 evidentiary hearing and his 2001 punishment retrial. She now remembered that the incident on the school bus, in which applicant was hit in the head with a brick, was a much more violent event than she had described in her prior testimony, asserting that it involved the bus being set on fire with Malotov-cocktail-like devices. McNeese also now remembered that, when applicant was in second and third grade, he could not tell a $1 bill from a $5 or $10 bill, was not allowed to go places by himself because he did not know how much change he was supposed to receive, and that she had to accompany him and handle the money. But McNeese acknowledged that, after he learned to read, applicant was able to distinguish the

denominations on bills. McNeese also acknowledged that she had recently received letters from applicant and that his counting, reading, and writing ability had greatly improved since his imprisonment.

Through McNeese, habeas counsel attempted to show that Junior treated applicant more harshly than his siblings and that he did so because he perceived applicant to be intellectually disabled. Habeas counsel elicited testimony from McNeese that Junior was more cruel to applicant than to her other siblings. McNeese stated that Junior would call applicant "dumb," bend applicant's hand back, and whip him when applicant could not spell words or read on command. McNeese stated that Junior would get especially angry when school representatives visited the house to say that applicant needed help. McNeese testified that she was present when Junior "ran off" two such representatives, one of whom suggested that applicant was intellectually disabled and needed a different educational setting. But McNeese stated that, at the time, she did not think that applicant was intellectually disabled. She also testified that, while applicant was "left behind" in school, he was always in regular classrooms. In contrast to her 2001 testimony that applicant functioned better and participated more when he was at places like Hester House, where Junior "could[n't] . . . [mess] with him," McNeese now asserted that applicant functioned the same whether Junior was present or absent.

Contrary to his earlier statements, Larry Baker now remembered that applicant was the slowest kid in a group of neighborhood boys who played sports together and that the other boys teased applicant for being a "dummy" until Larry made them stop. Larry testified that, when they played football, applicant

could not follow verbal play instructions very well and that Larry had to diagram plays in the dirt for him. When they played baseball, he had to repeatedly tell applicant not to sling the bat. Larry also now remembered that people tried to take advantage of applicant, although he recalled that applicant would stand up for himself. Although Larry did not dispute his 2001 testimony concerning the advances applicant had made while in prison, he asserted that applicant's letters did not reflect a mature, thoughtful person with a normal state of mind.

Through the testimony of Mark Fronkiewicz, who acknowledged that he had an extensive criminal record and was on parole for murder at the time of the hearing, habeas counsel attempted to minimize the evidence of applicant's many *pro se* filings and other writings included in the record. Fronkiewicz testified that he spent 1988 to 1993 on death row, before inmates received appointed counsel, and he worked as a writ writer, assisting inmates with legal and personal correspondence and writ preparation. Fronkiewicz stated that he recognized applicant from death row, but had never talked to him. Fronkiewicz asserted that David Harris was another writ writer on death row when Fronkiewicz was there. Fronkiewicz said that Harris sought his assistance on a *pro se* writ that Harris was preparing for applicant. Fronkiewicz remembered discussing applicant's case with Harris, but could not recall the date.

Borda, who acknowledged in his 2013 affidavit that forensic psychology "is not [his] specialty," testified that he now concluded that applicant met the criteria for a intellectual-disability diagnosis.[32] In forming his

[32] In his 2013 affidavit, Borda acknowledged that, in 1993, he concluded that applicant's intellectual functioning fell within the

current opinion, Borda relied on: the records he reviewed in preparation for his 1993 evidentiary-hearing testimony; unspecified other medical records and affidavits provided by current writ counsel; unspecified other records, provided by unspecified other sources; "some family history"; Vitale's and Garnett's affidavits; Anderson's written report; the 2014 evidentiary hearing testimony of applicant's relatives; and his own "really . . . very, very brief" assessment of applicant in December 2013, which did not involve giving applicant "a [full scale] IQ test." Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony. Borda asserted that Vitale, Garnett, and Anderson had also diagnosed applicant as intellectually disabled.

Greenspan testified that he had a practice related to diagnosing intellectual disability in the forensic setting and that he performed the vast majority of his work for defense attorneys. In the roughly fourteen years since the *Atkins* decision, he had actually performed 10 to 12 clinical evaluations for intellectual disability and diagnosed intellectual disability in about two-thirds of them. Greenspan further testified that his clinical evaluations are not comprehensive because he focuses on the adaptive-deficits criterion. Greenspan stated that he taught IQ courses many years ago, but when working in his clinical capacity, at most, he only occasionally administers an IQ

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borderline range (an IQ of 70–79). But Borda asserted that he had since reviewed "extensive additional records." Borda also stated that the Flynn Effect was now widely accepted in the field of psychology and that the definition of intellectual disability had changed. Borda stated that these developments also contributed to his present opinion. *Id.*

screening test. When determining whether a defendant satisfies the sub-average intellectual-functioning criterion, Greenspan relies on IQ test scores in the defendant's records. If none exist, then he requests that someone who is "more current" with IQ testing conduct such testing.[33]

Greenspan stated that he was testifying in applicant's case as a teaching expert and acknowledged never having met or communicated with applicant. Greenspan also acknowledged that he had not read the transcript of either of applicant's two trials. Although Greenspan did not offer a diagnosis, he testified that he had no reason to doubt Borda's intellectual-disability diagnosis and saw no basis for any other diagnosis.[34]

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[33] Greenspan acknowledged that, about a year before applicant's hearing, a federal judge issued an opinion in the Alexis Candelario Santana case, warning courts across the country to be cautious when reviewing Greenspan's testimony in future intellectual-disability cases. *See United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 203–06 (D.P.R. 2013) (finding Greenspan to be "completely lacking in credibility" and stating that due to "bias[]," "considerable careless errors and slipshod disregard for the seriousness of the [court's] inquiry," continued "combative[ness] and evasive[ness] despite being admonished to be more forthcoming with his answers," "unwilling[ness] or [inability] to explain evidence that tended to refute his conclusions[,] and . . . little explanation . . . as to why he thought the government's experts' assessments were incorrect," Greenspan's testimony in an *Atkins* evidentiary hearing "suffered from extreme deficits" such that it "was fundamentally unreliable" and should be disregarded).

[34] Applicant elicited no testimony concerning precisely what records Greenspan reviewed in preparation for his testimony. In response to State questioning, Greenspan mentioned that he had been given roughly 200 pages consisting of "all the different pleadings." Greenspan, however, acknowledged that he did not

Anderson testified that current writ counsel originally asked her to determine whether applicant was born with a brain anomaly ("organicity") or evidenced a traumatic brain injury (TBI). To make those two determinations, Anderson reviewed unspecified school and medical records that current writ counsel provided, conducted an initial diagnostic interview, and administered various neuropsychological tests. Anderson testified that the neuropsychological tests she gave were not IQ tests.

Anderson stated that applicant's scores on the tests she gave indicated language deficits, slowed processing speed (but an intact memory), and problems with reasoning and judgment. Anderson testified that applicant's verbal memory score fell in the low-average range, reflected a weakness in his ability to acquire words (versus the ability to recall them once learned), and implicated his capacity to learn. She stated that applicant's scores on the executive-functioning assessments she gave were all in the "severe" range.[35]

Anderson testified that, after she conveyed her findings on organicity and TBI to current writ counsel, he asked her to review the criteria for intellectual disability.[36] Anderson testified that she has made intellectual-disability determinations at least a few

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review State's Exhibits 1–35, which were admitted into evidence before the beginning of Borda's testimony.

[35] Notably, Anderson stated in her report that applicant "reported that he used reading glasses for corrected vision, but did not have them at the time of testing. However, he reported being able to see all test stimuli accurately and without incident."

[36] At the hearing, Anderson did not state what conclusions she drew, if any, concerning whether applicant was born with a brain anomaly or suffered a TBI.

times in her practice. Anderson stated that, in making her intellectual-disability determination, she did not conduct any further evaluation except for a two-hour group interview of applicant's relatives. Anderson opined that applicant would meet the DSM-IV's and AAIDD's criteria for intellectual disability. [37]

Jerry LeBlanc and Compton testified for the State at the 2014 evidentiary hearing. LeBlanc testified that he had worked at the Polunsky Unit's commissary for fourteen years and and personally dealt with the commissary on a daily basis. LeBlanc explained the procedure by which death-row inmates request commissary items, described the kind of mathematical computations required to successfully complete a commissary form, and described his interactions with applicant regarding commissary transactions.

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[37] In her report, Anderson stated:

> It seems [applicant] exhibited developmental and intellectual delays early in his life that were significant enough for him to require consistent monitoring and elicit help from his teachers. These deficits were demonstrated much prior to age 18, which would satisfy criteria for a formal diagnosis of [intellectual disability]. Adaptively, he had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition. . . .
>
> Taking into account the records reviewed, prior intelligence test findings, and [applicant's] performance on more stratified and task-specific neuropsychological tests, he more likely than not meets full criteria for [intellectual disability]; and this clinician would be justified in assigning said diagnosis.

While looking at applicant's commissary records, LeBlanc testified to specific, recent examples of applicant having correctly computed multiple-unit order totals and having composed orders that came within 5¢ of the $85 limit. In one example, applicant used his funds to purchase fifteen postage stamps. LeBlanc also noted two examples of applicant having requested substitute items (one being a request for aspirin or dental floss in place of ibuprofen). LeBlanc testified that he did not help applicant complete commissary forms, and to his knowledge, no one else did. LeBlanc asserted that the commissary's price list changed frequently and that, although there was another cell adjacent to applicant's, the unit moved death-row inmates frequently, and thus, applicant did not have the same neighbor for significant periods.

LeBlanc additionally testified about his interactions with applicant regarding commissary transactions. LeBlanc stated that he and applicant had discussed what the commissary carried and whether it had correctly filled applicant's order. When the commissary had charged applicant for undelivered or damaged items, applicant had noticed, brought it to LeBlanc's attention, and been able to discuss the discrepancy or damage. LeBlanc had never received the impression that applicant was unable to understand what was going on with his commissary order or that he was unable to respond to LeBlanc's questions.

Compton stated that she had testified as an expert over seventy times and had conducted over 3,000 forensic evaluations, with about 50% of her work having been directly for the courts, 40% for defense attorneys, and 10% for the State. In preparation for her testimony, Compton reviewed applicant's school

records; past psychological testing results; TDCJ records (including commissary and disciplinary records); transcripts from applicant's 1980 trial (including applicant's testimony), 1983 *Faretta* hearing, and 2001 punishment retrial (including Halpin and Wright's expert testimony); letters from applicant to his attorney and others; motions filed by applicant; and recent photographs of items inside applicant's cell. Compton also personally assessed applicant by interviewing him and administering standardized tests, including effort tests. Compton additionally attended the entire evidentiary hearing and listened to the other witnesses' testimony.

Compton testified that the data she reviewed did not support an intellectual-disability diagnosis. Based on applicant's Flynn-Effect-adjusted scores on IQ tests that she considered valid, Compton concluded that there was a greater probability than not that applicant's intellectual functioning fell within the borderline range. But Compton noted that, when the standard error of measurement was applied to the mean of his valid, Flynn-Effect-adjusted IQ scores, the lower end of the scoring range could dip into the mild intellectual-disability range. Nevertheless, Compton opined that applicant's level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis.

After receiving the habeas court's findings of fact and conclusions of law recommending that we grant relief on applicant's *Atkins* claim, we filed and set the case to consider that allegation.

III. Analysis

To prevail on the allegation that he is intellectually disabled for Eighth Amendment purposes and,

therefore, exempt from execution, applicant must prove by a preponderance of the evidence that (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by significant and related limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen. *See Cathey*, 451 S.W.3d at 9; *Sosa*, 364 S.W.3d at 894; *Briseno*, 135 S.W.3d at 7.

A. Significantly Sub-average General Intellectual Functioning

Applicant has failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning. The IQ scores before us are: a 77 IQ score obtained by applicant in 1971 (age 12) on the OLMAT; a 57 IQ score obtained in 1972 (age 13) on the Slosson; a 78 IQ score obtained in 1973 (age 13) on the WISC; an estimated full scale IQ score of 71 obtained in 1984 (age 30) on an abbreviated WAIS-R; a 74 IQ score obtained in 1989 (age thirty) on a complete WAIS-R;[38] an 85 IQ score obtained in 2013

[38] There appears to be an uncorrected scoring error associated with the 1989 WAIS-R. A raw score of 7 appears on the Digit Span subtest. Per the scoring table, the corresponding scaled score should be 4, but the test administrator wrote 5. At the 2014 evidentiary hearing, applicant offered no testimony about a scoring error or its effect on the reported IQ score of 74. In Addendum Finding 112, the habeas court noted the scoring error and stated, "The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a [full scale] IQ score of 73."

There was no testimony at the 2014 evidentiary hearing about the WAIS-R manual, nor was the WAIS-R manual admitted into

(age 54) on the RCPM administered by Dr. Borda; and a 59 IQ score obtained in 2014 (age 54) on the WAIS-IV administered by Dr. Compton. Applicant also asks us to rely on the IQ scores that Borda and Garnett derived from the mental-age scores that he obtained in 1973 (age 13) on the Bender Gestalt and Goodenough tests administered by Marcelle Tucker.

At the 2014 evidentiary hearing, Borda identified the 57 IQ score on the Slosson as the first and most accurate assessment of applicant's IQ[39]. Borda reached that conclusion because, due to "practice effects in IQ testing, usually the most accurate assessment is the first test that's done."[40] He also cited applicant's lack of incentive to do poorly. Borda initially acknowledged that, like the RCPM, the Slosson is a group-administered test and not one that is widely used. On further redirect examination, Borda asserted that, like the RCPM, the Slosson could also be individually administered, but he acknowledged that the Slosson was not a test that he would use.

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evidence at the hearing or filed with the habeas court. Thus, the record does not support the habeas court's finding that applicant's WAIS-R score was actually 73 rather than 74. But even if we were to assume that applicant's WAIS-R score was actually 73, it does not change our determination that he has failed to prove significantly sub-average general intellectual functioning.

[39] In his affidavit, Borda acknowledged that applicant took the OLMAT in 1971, but asserted that the OLMAT is "a test used primarily to assess academic needs and is not accepted as an instrument appropriate for the assessment of [intellectual disability]."

[40] The AAIDD states that the "practice effect" refers "to gains in IQ scores on tests of intelligence that result from a person being retested on the same instrument." INTELLECTUAL DISABILITY 38.

Borda discounted applicant's 78 IQ score on the WISC. First, Borda asserted that applicant's WISC score should be adjusted to 70 for the Flynn Effect. Second, Borda noted that applicant contemporaneously took Bender Gestalt and Goodenough tests. Although he acknowledged that the Bender Gestalt and Goodenough tests are not IQ tests, Borda explained that he used applicant's mental-age scores on those instruments to derive IQ scores. Borda stated that he calculated an IQ score of 67 on the Bender Gestalt and an unspecified IQ score on the Goodenough. He then adjusted both derived scores for the Flynn Effect, arriving at a 56 IQ for the Bender Gestalt and a "mid-60s" IQ score for the Goodenough. Borda testified that the derived, Flynn-Effect-adjusted IQ scores on the Bender Gestalt and Goodenough tests indicated that the WISC score overstated applicant's level of intellectual functioning.

Borda also discounted applicant's 74 IQ score on the 1989 WAIS-R, asserting that it should be adjusted to 71 for the Flynn Effect.[41] Borda asserted that applicant's 85 IQ score on the RCPM could be artificially high due to the practice effect because the RCPM is very similar to the matrices portion of the Wechsler Scale IQ tests. But Borda acknowledged that, when he gave the RCPM, applicant had not been subjected to any meaningful IQ testing for over a decade. Borda also acknowledged that the AAIDD is the commonly accepted national authority on intellectual disability and that, per the AAIDD, the practice effect is nonexistent after seven years.

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[41] In response to a question that apparently referred to Compton's WAIS-IV testing, Borda acknowledged that applicant's IQ had been tested more recently, but stated that he had not reviewed those results.

Borda acknowledged that he did not conduct effort testing when he assessed applicant. Borda asserted that no good effort test exists for people with below-average IQs because most such tools gauge memory; therefore, people with memory problems will not score well on them. He also testified that effort tests are not normed for the below-average IQ population. Borda further asserted that, for a person with as much experience as he possessed, any malingering would be obvious from simple observation. But Borda denied taking the position in his testimony that effort testing is inapplicable to intellectually disabled people.

Borda agreed that applicant had a difficult childhood, describing it as "a horrible background" in which "a very authoritarian father" created "a very dependent" and "fearful" child. Although he acknowledged that applicant's childhood environment did not help his intellectual development, Borda asserted that applicant was "very limited" to begin with. Borda acknowledged that a learning disability is not the same as intellectual disability and that emotional disturbances (including depression) and environmental conditions (including living in an abusive household or having parents who are not intellectually curious) can adversely affect a person's learning ability and IQ scores. Borda also acknowledged that facing the death penalty could adversely affect motivation or cause depression and negatively affect test performance.

Borda acknowledged that others testified that applicant had done well and improved his academic skills while on death row. However, Borda did not find this testimony persuasive. Borda concluded that applicant was able to develop these skills on death row

because he had abundant time to practice very specific and essentially unchanging tasks.

Greenspan disregarded applicant's 77 IQ score on the OLMAT, asserting that the OLMAT is a group-administered test. He stated that group-administered tests are not comprehensive and do not yield a full-scale measure of intelligence. Greenspan also discounted applicant's 57 IQ score on the Slosson. Greenspan testified that, while the Slosson could be individually administered, it is a screening test that is not as comprehensive as the WISC and it is not considered a gold-standard test for diagnostic purposes. Greenspan also stated that the version of the Slosson test given to applicant derived IQ scores by the unreliable and now-abandoned ratio method that compared chronological and mental age. He testified that the Slosson is now scored using the more valid statistical-deviation method. Greenspan further indicated that the degree of statistical deviation from the mean is the currently accepted method of evaluating an individual's intellectual functioning.

Greenspan testified that the Wechsler scale is considered the gold standard. But Greenspan testified that applicant's 78 IQ score on the WISC should be reduced for the Flynn Effect to below 70, if applicant took the original WISC, or to between 70 and 71, if applicant took the WISC-R. Greenspan testified that, even without correcting for the Flynn Effect, the standard error of measurement (SEM) meant that applicant's WISC score could have been as low as 73. But Greenspan also volunteered that the score obtained on the WISC by someone who, like applicant, came from a poor, African-American family could underestimate the actual level of intellectual functioning.

Greenspan testified that the WAIS-IV is the current gold standard for IQ tests, and he emphasized that applicant obtained an IQ score of 59 on the WAIS-IV that Dr. Compton had recently administered. Although he had earlier testified that applicant's Slosson score was unreliable, Greenspan emphasized that applicant's WAIS-IV score was almost identical to applicant's Slosson score.[42]

On direct examination, Greenspan testified that the validity of effort tests for people in the intellectually disabled range had not been adequately established. Greenspan asserted that the two best indicators of effort for intellectually disabled people are (1) the clinical judgment of an experienced evaluator; and (2) whether current test results are congruent with past test results, especially on tests given when the subject had no incentive to do poorly. Based on the testimony given at the 2014 evidentiary hearing by applicant's relatives, Greenspan concluded that a lack of ability was a more likely explanation for applicant's poor test scores than a lack of good effort.

On cross-examination, however, Greenspan acknowledged that the recommended practice in forensic psychology is to conduct effort testing, especially when one is administering cognitive measures. Greenspan denied taking the position, on direct examination, that effort testing is less applicable to someone with intellectual disability. He clarified that the results of effort tests given to intellectually disabled people are more difficult to interpret, because of problems validating effort tests for low IQ individuals. Greenspan agreed that it is

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[42] Neither party elicited testimony from Greenspan regarding applicant's 85 IQ score on the RCPM given by Borda.

important to analyze the results of IQ testing to ensure validity, especially when an external motive to exaggerate symptoms might exist. Greenspan also agreed that, for many people, facing the death penalty would be a significant external motivating factor. Greenspan volunteered that "there are all kinds of reasons why someone would give a poor effort and one of them is if you have a history of failure in academic settings[;] you might go too quickly or you might not give optimal effort because you just assume it's not going to make any difference."

Anderson did not administer any IQ testing when she examined applicant. She did not testify about the reliability of any particular IQ test or IQ score reflected in the record. [43] She acknowledged that factors unrelated to a person's actual mental ability can lower test scores, including depression, psychosis, and external motivations to obtain a lower score, such as facing the death penalty.[44]

Compton disregarded applicant's OLMAT and Slosson scores, stating that those instruments were

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[43] Anderson's report contains a paragraph discussing some of applicant's IQ test scores, identifying the IQ test by the year of administration. The record does not support Anderson's representation of applicant's IQ scores, including her assertion that, in 1989, applicant obtained "a full scale IQ of 71" which "did not deviate much from prior scores." The record before us indicates that the only IQ score of 71 that applicant obtained was an estimated full scale IQ score of 71 on an abbreviated WAIS-R administered to him by TDCJ in 1984. Anderson appears to challenge the validity of applicant's IQ scores on the 1973 WISC (78 IQ) and 1989 WAIS-R (74 IQ), but the basis for her criticism is unclear.

[44] The MMPI administered by TDCJ in 1984 concurrently with the abbreviated WAIS-R revealed elevations on the psychotic scales and a significant probability of psychiatric disturbance.

group tests and lacked high validity. Compton indicated that applicant's 1972 Slosson score was particularly problematic due to research suggesting that, in the 1970s, the Slosson had extremely poor validity in determining intellectual disability. Compton also disregarded the Bender Gestalt and Goodenough tests because they were neuro-psychological screening instruments rather than IQ tests.

Compton testified that applicant's 78 IQ score on the WISC was the most reliable IQ score reflected in his records because it was the first and only full scale, individually administered IQ test given during the developmental period. Compton stated that, because she could not tell whether applicant took the original WISC or the WISC-R, she made alternative Flynn Effect adjustments to his reported score: 69 to 70 IQ, assuming that applicant took the original WISC, and 73 to 74 IQ, assuming that he took the WISC-R. Compton noted that applicant's IQ might be higher than his Flynn-Effect-adjusted WISC score because family reports suggested that he was traumatized as a child by paternal abuse. Compton explained that childhood trauma can cause low IQ scores because the stressful environment makes it difficult for the child to get enough rest, focus, and learn.

Compton, who testified that she had worked in a prison system, doubted the validity of applicant's IQ scores on TDCJ-administered tests because prison IQ assessments do not typically include effort testing. Compton asserted that effort testing is important when assessing cognitive deficits because, if the subject is not exerting effort, the assessment will inaccurately represent his ability.

Compton also stated that many inmates are depressed and that depression can lower IQ scores. Although TDCJ never formally diagnosed applicant with depression, he exhibited withdrawn and depressive behavior throughout his time on death row, and he demonstrated similar behavior earlier in his life. Compton also noted a 2005 TDCJ report stating that applicant wrote a suicide note, although the report indicated that applicant denied having written it.[45] Compton testified that applicant's affect was flat during her evaluation and he seemed a little depressed. Although he denied being currently depressed, applicant admitted that he had experienced some depression in the past. And while applicant was not formally diagnosed with depression during his schooling, school officials twice recognized that he was experiencing emotional disturbances.

Compton did not consider applicant's 59 IQ score on the WAIS-IV that she administered to be valid due to persistent indicators throughout her assessment that applicant was exerting suboptimal effort.[46] After interviewing him about his personal history, Compton gave applicant the Test of Memory Malingering (TOMM), an effort test. Compton testified that applicant's results suggested that he was not exerting full effort, even when she gave him the benefit of the doubt by assuming that he was intellectually disabled and applying only the specific norms for intellectually

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[45] The record shows that 2005 is the same year in which applicant wrote a letter to the habeas court, asking the court to allow him to withdraw his appeals and to set his execution date, and later filed a *pro se* motion requesting the same relief.

[46] Compton testified that she adjusted applicant's WAIS-IV score to 57 to account for the Flynn Effect.

disabled individuals.[47] When Compton subsequently administered the WAIS-IV, applicant obtained a full scale IQ score that was significantly lower than she had expected.[48] Further, Compton stated, her analysis of applicant's WAIS-IV results revealed pervasive internal discrepancies that indicated suboptimal performance.

Compton testified that her analysis of applicant's WAIS-IV results also revealed a significant discrepancy between the crystallized knowledge that applicant had demonstrated in 1989 intelligence testing and what he currently professed to know. When Compton asked applicant what a thermometer was, he told her that he did not know, although he had answered the same question correctly when an examiner had asked it in 1989. Compton stated that it was rare to simply forget the meaning of a previously known word and noted that both her own and Dr.

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[47] Compton disagreed that it was inappropriate to give effort tests to intellectually disabled individuals. She also testified that, according to the primary research, the TOMM has good reliability when administered to intellectually disabled people. Compton also assessed applicant's effort through embedded measures in the IQ and memory tests she administered. She stressed that, contrary to the assertions of applicant's experts, these embedded measures were normed on intellectually disabled people. And to give applicant the greatest benefit of the doubt, Compton did not compare his scores to the overall clinical sample when interpreting his results on the embedded effort measures. Instead, Compton compared applicant's scores to the norms for individuals who were known to be intellectually disabled, those for individuals with traumatic brain injuries (TBIs), those for people with only eighth-grade educations, and those for people of different ethnicities and cultures.

[48] Compton testified that she had expected applicant to obtain a full scale IQ score in the 70s, based on what she had seen, applicant's history, and his education level.

Anderson's testing had placed applicant's memory in the low-average range. When Compton checked the validity of her WAIS-IV testing with additional effort testing, the results (lower than expected scores and indications of suboptimal effort) were very similar to applicant's WAIS-IV results.

The record does not support considering applicant's IQ scores on the OLMAT, Slosson, 1984 abbreviated WAIS-R, 2013 RCPM, or derived IQ scores on the Bender Gestalt and Goodenough tests given in 1973, because of the evidence that these instruments were noncomprehensive screening or group IQ tests, neuropsychological tests rather than IQ tests, or derived IQ scores using the ratio method and concept of mental age rather than the degree of statistical deviation from the mean.[49] The record additionally does not support considering applicant's IQ score on the WAIS-IV, given the compelling evidence of his suboptimal effort on that instrument. We are left with applicant'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.

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[49] According to the AAIDD,

> It is important to note that IQ scores derived from an intelligence test are now developed on the basis of a deviation (from the mean) score and not on the older conception of mental age. Thus, in reference to the significant limitations in intellectual functioning criterion for a diagnosis of [intellectual disability], a valid diagnosis of [intellectual disability] is based on how far the person's score deviates from the mean on the respective standardized assessment instrument and *not* on the ratio of mental age to chronological age.

INTELLECTUAL DISABILITY 35; *see also Penry*, 492 U.S. at 339–40 (O'Connor, J.) (noting that the "mental-age" concept is problematic in several respects).

Taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83. The fact that applicant took a now-outmoded version of the WISC in 1973 might tend to place his actual IQ score in a somewhat lower portion of that 73 to 83 range. *See Cathey*, 451 S.W.3d at 18. However, the evidence that applicant was traumatized by paternal violence, was referred for testing due to withdrawn behavior, came from an impoverished and minority cultural background, and started to abuse drugs by the time of testing might tend to place his actual IQ in a somewhat higher portion of that 73–83 range. *Cf. id.* "Taken altogether, there is no reason to think that applicant's obtained IQ score" of 78 on the WISC "is inaccurate or does not fairly represent his borderline intelligence during the developmental stage." *Id.*

The score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period.[50] Applicant's score range on the WAIS-R is between 69 and 79. As with the WISC, the fact that applicant took a now-outmoded version of the WAIS-R might tend to place his actual IQ score in a somewhat lower portion

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[50] In Addendum Findings 111 and 113, the habeas court asserted that applicant's score on the 1989 WAIS-R was likely affected by the practice effect because he was given an abbreviated WAIS-R the previous day. The findings are not supported by the record, which shows that, on January 26, 1989, TDCJ psychologist James Majors gave applicant the Vocabulary and Block Design subtests of the WAIS-R. On the following day, January 27, 1989, Majors administered the WAIS-R's remaining subtests. As such, the record does not support a finding that there was a duplication of subtests within a short period of time that resulted in an artificially high score on the 1984 WAIS-R.

of that 69 to 79 range. *See id.* However, by the time he took the WAIS-R, applicant had a history of academic failure, something that his own expert stated could adversely affect effort. Applicant also took the WAIS-R under adverse circumstances; he was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range. *Cf. id.* Considering these factors together, we find no reason to doubt that applicant's WAIS-R score accurately and fairly represented his intellectual functioning as being above the intellectually disabled range. *See id.*

B. Significant, Related Deficits in Adaptive Behavior

Even if applicant had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning.

At the 2014 evidentiary hearing, Borda defined adaptive functioning as the ability to successfully do everyday things on one's own. But Borda also asserted that adaptive functioning describes a concept that is more complicated than being able to perform a certain specific task, such as balancing a checkbook. He characterized adaptive functioning as neuro-psychological or executive frontal-lobe functioning, such as the ability to make a decision, implement the decision, assess whether one is getting to a correct solution, and if not, to modify his behavior.

On direct examination, Borda agreed with habeas counsel's statement that applicant's family history

indicated that applicant had "strong" problems adapting, as to social behaviors and the academic realm. But Borda gave no more specific testimony about deficits in adaptive behavior. [51] On cross-examination and redirect, Borda acknowledged that standardized measures of adaptive functioning exist, that many adolescents with poor adaptive skills—for example, homeless teenagers—are not intellectually disabled, and that just because someone lacks certain skills does not mean that the person is intellectually disabled. Borda also acknowledged that applicant had adaptive skills during the developmental period, but opined that they were probably below average for someone of his age.

The State asked Borda whether evidence that applicant mowed grass for money and hustled pool suggested that he had money skills, knowledge that he needed to earn money, and the self-direction to obtain a job to make it. Borda suggested that he did not have sufficient information to render an opinion because he did not know whether applicant had independently thought of these ways to make money. Borda initially suggested that the offense facts did not indicate that applicant possessed adaptive skills, due to Borda's impression that others dragged applicant into it, that applicant went along because he was afraid to say no, and that no particular planning went into the offense. Borda stated that intellectually disabled people are

[51] To the extent that, in his affidavit, Borda identified certain "marked" or "severe" deficits in applicant's adaptive behavior, the record does not support several of his factual assertions. In addition, Borda did not contend in his affidavit that the deficits he identified were related to significantly sub-average general intellectual functioning. In any event, the record does not support such a conclusion.

suggestible and, if told to do something, they will do it. But Borda acknowledged that he did not know much about the offense and had not read applicant's confession or trial testimony.

Greenspan testified that, for purposes of diagnosing intellectual disability, "adaptive functioning" concerns how one functions in the world. He stated that adaptive functioning is not the same as executive functioning, which is a cognitive measure that looks at certain underlying reasoning skills. On direct examination, Greenspan asserted that he saw no evidence of applicant's competence in any of the adaptive behavior areas. On cross-examination, Greenspan acknowledged that applicant had areas "of greater ability," but asserted that they did not exclude an intellectual-disability diagnosis. Although Greenspan stated that he was generally familiar with the facts of applicant's offense, he acknowledged that he had not read the transcript of either of applicant's two trials.

Greenspan testified that the Texas Independent Living Scale (TILS) given to applicant by Dr. Compton is a standardized test that is generally accepted within the psychological community and considered a direct measure of adaptive behavior. He emphasized that applicant scored two-and-a-half standard deviations below the mean on the TILS.

Greenspan minimized the evidence that applicant had learned to survive on the street and in prison. Despite his earlier definition of adaptive behavior, Greenspan asserted that applicant's ability to function in prison and street environments did not necessarily reflect "adaptive" behavior, as that term is understood by the psychological community. Greenspan did not think that any of applicant's performance on the

following activities evidenced adaptive skills: (1) in preparation for his new punishment trial, consulting with counsel about whether to inform the jury that he had been on death row; (2) concealing a shotgun in a shopping bag when entering a store to rob it; (3) attempting to conceal his appearance during the offense by wearing a wig and sunglasses, and after the offense, changing his appearance by shaving his head; (4) arguing with accomplices over how to divide the proceeds of the crime; (5) deciding to stipulate that he had prior criminal convictions and responding appropriately to questioning by the court to determine whether the stipulation was voluntary, knowing, and intelligent; (6) writing four letters to his appellate lawyer that escalated from, "When are you going to file my appeal?," to "I object to you getting any extensions" to "Why won't you respond to any of my letters?" to "I object to you being my lawyer from this point forward"; (6) hustling pool; and (7) working as a barber and a porter in prison.

Anderson testified that she conducted a group interview of applicant's relatives to determine whether applicant had any longstanding, chronic deficits. From applicant's relatives, Anderson learned that he had unspecified deficits that were seen early and reported by his school. Applicant's relatives also told Anderson that he was never left alone, someone had to "hold his hand," and he needed help with his homework.[52]

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[52] In her report, Anderson stated that, during the developmental period, applicant "had some abilities as they relate to self-care, motor skills, and daily living. However, he had equally as many deficits in the adaptive domains which fall primarily under socialization, communication, and cognition."

Anderson acknowledged that, if a person donned a wig before entering a business to commit robbery, it indicated some forethought and planning, but she could not say whether the behavior showed an ability to protect one's self-interest. Anderson had no opinion on whether walking into the business with a shotgun concealed in shopping bags demonstrated an ability to plan ahead and protect one's self-interest. Anderson testified that committing a crime and then fleeing to another city did not necessarily demonstrate the ability to form and execute a plan for self-preservation. Anderson denied seeing evidence that applicant had excelled in any way since being imprisoned.

Compton stated that adaptive functioning examines everyday social, practical, and conceptual skills. She testified that she gave applicant a TILS test and acknowledged that applicant's TILS score fell two-and-a-half standard deviations below the mean. But Compton explained that the TILS score was not an accurate representation of applicant's abilities because she had to assign zeroes to questions asking about areas to which applicant had no exposure, such as writing a check and using a microwave oven.

When Compton gave applicant a complete WRAT-4, a test of academic abilities, his results fell within the second-grade level for mathematical skills and the third-grade level for reading comprehension and writing skills. Compton noted that applicant's writing ability scores on the WRAT-4 were inconsistent with the seventh-grade level ability he had demonstrated in letters he had written to friends. Compton testified that applicant's performance on the WRAT-4 math subtest was also internally inconsistent. Although applicant was able to perform advanced math at certain times, at other times, he missed very simple

questions. Applicant's performance on the WRAT-4 math subtest was also inconsistent with abilities he had demonstrated elsewhere, including in his commissary records. Compton testified that these inconsistencies increased the probability that applicant was not exerting full effort on the WRAT-4 math subtest.

Compton testified that she found some limitations in applicant's academic skills and some adaptive deficits in social interaction during the developmental period, but she also saw evidence of adaptive skills. For example, she saw evidence that applicant had lived in the back of a pool hall, as well as evidence that he had played pool and mowed lawns for money. Compton said that living on the streets in itself required applicant to engage in adaptive behavior. She opined that playing pool and mowing lawns showed some ability to understand money and work concepts.

Compton also saw evidence that applicant possessed adaptive skills at the time of the offense and original trial. Applicant's behavior surrounding the crime (wearing a wig, covering up the gun, and fleeing to Louisiana) all indicated planning, forethought, and an appreciation of the need to do something to avoid apprehension, which also related to his ability to engage in abstract thinking.

Compton added that applicant's 1980 trial testimony indicated that he had some ability to engage in abstract reasoning because he was able to conceptualize what his counsel and the State were asking and to form appropriate and exculpatory answers. Compton noted that applicant withstood both direct and cross examination and he testified in a coherent fashion. Compton stated that testifying and undergoing cross examination is a stressful experience

for most people. Applicant's 1980 trial testimony also showed that he was able to process and respond to questions without significant difficulty even under stressful conditions. Applicant's testimony showed that he could conceptualize the process and form exculpatory responses and alternative explanations, which further indicated an ability to process and manipulate information and form a response. Compton acknowledged that defense counsel may have prepared applicant for his 1980 trial testimony, but she noted that applicant had not had a lawyer to coach him for his 1983 *Faretta* hearing, at which he represented himself. Applicant had been able to understand what the trial court was asking him at the *Faretta* hearing and had responded appropriately, although he had difficulty with some of the legal issues.

Compton also saw evidence that applicant had developed adaptive skills in prison. In addition to representing himself at the 1983 *Faretta* hearing, applicant had learned to read and write in prison. His personal, handwritten correspondence demonstrated a seventh-grade writing ability. Compton indicated that applicant's writing ability could exceed a seventh-grade level if he also wrote the various handwritten and typewritten *pro se* motions presented at the evidentiary hearing. Regarding the handwritten *pro se* motions, Compton observed that the handwriting was very similar to the handwriting that she had seen throughout her review of applicant's case. Regarding the typewritten documents, Compton testified that applicant told her that he did not know how to type and that she had been told that he did not own a

typewriter.[53] Compton also acknowledged that inmates share pleadings and that Fronciewiz had testified that inmate David Harris had worked for applicant at one time.[54] But Compton testified that simply being involved in the process by copying the motions by hand would indicate understanding and require the ability to write. Compton opined that copying a legal motion would be something within the realm of only a few intellectually disabled people.

Compton found additional evidence of adaptive skills in applicant's TDCJ records. She testified that a disciplinary report stated that another inmate had been in applicant's cell to play dominoes. Compton opined that this indicated that applicant possessed social interaction skills and the ability to count because the game of dominoes required that skill.[55]

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[53] It is unclear from the record who told Compton that applicant did not own a typewriter. Regardless of the source of this information, applicant's TDCJ records filed with the habeas court include a property receipt from the commissary. The receipt, which is dated March 11, 1993, and bears applicant's name, is for an electronic word-processor.

[54] We note that Harris was not convicted of capital murder until April 29, 1986, and was executed in June 2004. *See Ex parte Harris*, 136 S.W.3d 669 (Tex. Crim. App. 2004). Although applicant's TDCJ records show requests for legal visits with other inmates, the earliest such request is dated May 21, 2002. The earliest request for a legal visit with Harris, in particular, is dated June 29, 2002. The latest request for a legal visit with Harris is dated April 20, 2004. Accordingly, it does not appear that Harris could have assisted applicant with his *pro se* filings received by this Court and the trial court between October 1980 and July 1983.

[55] On cross-examination, Compton acknowledged that the disciplinary report did not show that applicant agreed about why the inmate was present and that the reporting officer did not state that he actually saw applicant playing dominoes. But

Compton noted that applicant's TDCJ classification file included a letter and questionnaire from TDCJ to the manager of Two-K restaurant, where applicant had previously worked. Compton agreed that the manager's responses showed that applicant could function in the capacity for which he had been hired. Regarding disciplinary problems, the manager had written that applicant was "capable of influencing others to dissent [and] like[d] confrontation." Compton testified that the comment evidenced applicant's conceptual and leadership skills.

Compton agreed that applicant's classification file also included a Social Summary, dated December 1, 1983, in which applicant had cited the advice of counsel and declined to discuss his offense. Compton stated that the fact that applicant declined questioning on the advice of counsel showed that he had the ability to understand instruction, conceptualize it, and act on it. Compton testified that incidents documented in applicant's death-row disciplinary records demonstrated his ability to form the intent to influence other people and to act on it, which fell within the social-skills domain, and the ability to stand up to authority, which was inconsistent with suggestibility and gullibility.

Compton also found evidence of adaptive skills in items that had recently been found in applicant's cell. Compton stated that a packet of handwritten letters, which were all in the same handwriting, had a seventh-grade-level readability score. She testified that a composition notebook found in applicant's cell

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Jemma Levinson's notes of her May 25, 2000 interview with applicant, offered in his Factual Supplement, show that applicant told Levinson that he played dominoes with another inmate, and he referred to a disciplinary incident stemming from this activity.

contained the same handwriting throughout it. Although Compton acknowledged that applicant might have copied some of the notebook's contents from other sources, she indicated that other parts might have been the product of applicant's independent thought. The composition book contained a handwritten table matching the Wechsler Scales's normal distribution of IQ scores, which suggested to Compton that applicant was investigating IQ scores from his prison cell.

Compton agreed that books, a newspaper, and newspaper articles were found in applicant's cell. Each of the books, which included copies of the Qur'an and Know Your Islam, had applicant's name, inmate identification number, and a date written inside the cover. One of the articles concerned winning an appeal. Many of the books and newspaper articles found in applicant's cell contained underlining. Compton testified that an underlined passage could indicate that a person is reading and comprehending the underlined text. Although Compton acknowledged that people sometimes also underline passages that they do not fully understand, she testified that the action of underlining indicates the person's desire to return to the passage and review it, and thus still involves processing and conceptualization. Compton also stated that even if a person underlines passages because he does not understand them, the act implies that he has understood the surrounding text.

Other items found in applicant's cell included heavily notated calendars for the years 2012 through 2014. Compton testified that notations on the calendars indicated that applicant understood the concept of months, an understanding that he also demonstrated in Compton's testing. She agreed that

the calendars had sections for people's names, addresses, and telephone numbers, all of which were appropriately completed.

Compton also found it significant that applicant's expert witnesses at the 2001 punishment retrial (i.e., Halpin and Wright) determined that applicant's adaptive abilities had progressed since his imprisonment and that his progress indicated that he had a strong ability to learn. Compton noted that another witness at the 2001 retrial, Jo Ann Cross, had echoed Halpin's and Wright's testimony regarding applicant's ability to learn.

We find Compton's opinion far more credible and reliable than those of applicant's experts who testified at the 2014 evidentiary hearing.[56] The record shows that Compton is a forensic psychologist with considerable experience in conducting forensic evaluations. Her testimony shows that she thoroughly and rigorously reviewed a great deal of material concerning applicant's intellectual functioning and adaptive behavior. In addition, she personally evaluated applicant. During that evaluation, Compton administered comprehensive IQ testing via the WAIS-IV, a gold-standard test; various forms of effort testing to assess the validity of her IQ testing; and the TILS, a standardized measure of adaptive functioning. Compton testified in detail about why, even applying the most lenient standards, the results of her effort

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[56] Although applicant presented Garnett's and Vitale's affidavits in support of his *Atkins* claim, neither affiant personally examined applicant and neither purported to diagnose applicant as intellectually disabled. Further, neither Garnett or Vitale testified at the evidentiary hearing. The bases for the assertions in their affidavits were therefore not subject to adversarial testing through cross-examination.

testing suggested that applicant had exerted suboptimal effort on the WAIS-IV. Compton also gave persuasive and unrebutted testimony explaining why applicant's score on the TILS under-represented his adaptive skills. She further detailed numerous examples in applicant's records that demonstrated his adaptive skills.

In contrast, Borda, Greenspan, and Anderson were clinical psychologists or clinical neuro-psychologists whose credibility suffered from their review of relatively limited material. Greenspan did not personally assess applicant, and his testimony suggested that his direct experience with IQ testing was fairly limited and remote in time.

Although he personally examined applicant, Borda conceded that the assessment was extremely brief and did not include comprehensive, full-scale IQ testing with a gold-standard instrument or effort testing. Borda and Greenspan also premised many of their conclusions on the concept of mental age and used the unreliable ratio method to calculate IQ scores from instruments that were not designed for such purposes. Although Anderson personally examined applicant, she did so for a purpose other than evaluating him for intellectual disability. Further, Anderson did not administer any test for the purpose of obtaining an IQ score and, from her testimony, she appeared to have completed relatively few intellectual-disability assessments.

Further, each of applicant's experts who testified at the evidentiary hearing appear to have applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes. *See Cathey*, 451 S.W.3d at 19, 26–27.

Although Borda testified that adaptive functioning is the ability to successfully do everyday things on one's own, he also characterized it as executive functioning.[57] Greenspan defined adaptive behavior as how one functions in the world and expressly acknowledged that adaptive behavior and executive functioning are distinct concepts. However, Greenspan's application of the definition to the evidence—for example, his minimization of the evidence that applicant had learned to survive on the street and in prison—suggest that he was actually applying a more stringent standard. Alternatively, it suggests that Greenspan's opinions were not reasonable. Anderson was not asked to define adaptive functioning, but in her testimony, she often equated adaptive functioning with executive functioning.

Compton's opinion finds further support in applicant's school records, which were accurately summarized at the 2001 punishment retrial by applicant's expert witness, Dee Dee Halpin. *See Cathey*, 451 S.W.3d at 23 (stating that the best source of retrospective information concerning adaptive

[57] Borda's definition of adaptive functioning as executive functioning appears to be inconsistent with the clinical standards that he purported to follow. According to Borda's affidavit, the DSM-V recognizes executive-functioning measures as more reliable indicators of intellectual functioning than IQ tests. But his affidavit is silent concerning whether the DSM-V recognizes executive-functioning measures as more reliable indicators of adaptive functioning than a standardized measure of adaptive functioning, for example. Borda appears to have imported the DSMV's recognition of executive-functioning measures in the intellectual-functioning context into the adaptive-functioning context. In the process, Borda seems to have implicitly transformed "adaptive functioning" into something more complex than the ability to perform a task.

behavior during the developmental period is usually school records because they provide an objective, unbiased documentation of a person's abilities at the most pertinent time). Those records reflect applicant's poor academic grades (especially in areas involving language), uneven conduct grades, retention in first grade, below-grade-level scores on academic-achievement tests, and references to instances of withdrawn behavior. In kindergarten, a physician considered the possibility that applicant's withdrawn behavior was due to intellectual disability, although the physician indicated that emotional problems were the more likely cause. Subsequent IQ testing on a gold-standard instrument yielded a score that was not in the intellectually disabled range—even considering the extreme low end of the scoring range—and applicant remained in regular classrooms throughout his time in school.

Although Compton found that applicant manifested some limitations in academic and social-interaction skills during the developmental period, she testified that his level of adaptive functioning had been too great, even before he went to prison, to support an intellectual-disability diagnosis. But even assuming for purposes of argument that applicant'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. *See Hearn*, 310 S.W.3d at 428. Rather, the record overwhelmingly supports the conclusion that applicant's academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated

harassment and violence at school, a history of academic failure, drug abuse, and absenteeism. The same is true of any social difficulty that applicant experienced during the developmental period.[58]

The significant advances applicant has demonstrated while confined on death row further support the conclusion that his academic and social difficulties were not related to significantly sub-average general intellectual functioning. In addition, our consideration of the *Briseno* evidentiary factors weighs heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning.

The first *Briseno* factor considers whether those who knew applicant best during the developmental stage considered him to be intellectually disabled and acted in accordance with that determination. *Briseno*, 135 S.W.3d at 8. The evidence does not weigh in applicant's favor.

Although the physician who examined applicant before kindergarten considered intellectual disability as a possible cause for applicant's withdrawn behavior, the physician contemporaneously stated that emotional problems were the more likely cause. Applicant's records do not reflect any intellectual-disability diagnosis, and they do show that he remained in normal classrooms during his school career.

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[58] Although the record contains evidence of withdrawn behavior by applicant, we note that the record also includes abundant evidence of applicant's social success during the developmental period.

At the evidentiary hearing, habeas counsel attempted to show that applicant's father singled applicant out for abuse and threw applicant out of the house because he perceived applicant as being intellectually disabled or "slow." However, the record is replete with evidence that Junior physically and emotionally abused all of his children, as well as with evidence that Junior also drove some of applicant's siblings from the family home. Although there is evidence that applicant's inability to spell on command may have angered Junior, there is abundant evidence from multiple sources that applicant was the target of Junior's ire because he intervened in his parents' altercations, tried to protect his mother and other siblings from Junior, and often caught Junior in infidelity. The record also indicates that applicant was left in charge of his younger siblings. And applicant's sister, Colleen McNeese, testified at the 2014 evidentiary hearing that she had not considered applicant to be intellectually disabled.

Regarding the second *Briseno* factor, the evidence shows that applicant formulated plans and carried them through. *See id.* The various affidavits, testimony, and interviews that applicant's relatives have given indicate that, when he and his siblings were hungry, applicant took it upon himself to earn money from the neighbors and then used the money to buy food. During his 1980 trial, applicant insisted on presenting an alibi defense, and his testimony was consistent with that defense. He doggedly pursued his desire to obtain new appellate counsel after his 1980 trial by writing to various courts, attorneys, and organizations, filing pleadings and motions, and marshaling exhibits to present at the 1983 *Faretta* hearing. The previously mentioned conduct and incidents in applicant's prison disciplinary records

also indicate leadership, the third *Briseno* factor. *See id.*

The fourth and fifth *Briseno* factors address whether applicant responds rationally and appropriately to external stimuli and whether he responds coherently, rationally, and on point to oral or written questions. *See id.* The many instances of applicant's testimony and interactions with courts over the course of this case, as well as the testimony of witnesses at his 2001 punishment retrial, indicate that the answers to these questions are yes.

The varying statements that applicant gave to police about the offense and his 1980 and 1993 testimony indicate that he can hide facts or lie effectively in his own interest, the sixth *Briseno* factor. *See id.* The facts of the offense further indicate that it required forethought, planning, and moderately complex execution of purpose, the final *Briseno* factor. *See id.* at 8–9.

C. Onset During the Developmental Period

Given applicant's failure to prove by a preponderance of the evidence that he suffers from significantly sub-average general intellectual functioning and that any significant deficits in adaptive behavior are related to significantly sub-average general intellectual functioning, he has not established that he was intellectually disabled before the age of eighteen. *See id.*

In sum, we conclude that for Eighth Amendment purposes, applicant is a person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior. *See Cathey*, 451 S.W.3d at 26–27 (summarizing the "basic factual nature of the *Atkins* inquiry"). We

therefore reject applicant's contention that he is exempt from execution under *Atkins*.

IV. Conclusion

For the reasons discussed above, we deny relief on applicant's first claim after assuming our role as the ultimate fact-finder in this case regarding applicant's assertion that he is entitled to relief under *Atkins*. *See Flores*, 387 S.W.3d at 634–35; *Reed*, 271 S.W.3d at 727.

The habeas court did not enter findings of fact and conclusions of law regarding applicant's second and third claims for relief. In his second claim, applicant contends that he was denied due process because Texas's death-penalty statute does not contemplate intellectual disability as a bar to the execution of an intellectually disabled individual. In his third claim, applicant contends that his death sentence violated the Sixth Amendment under *Atkins* and *Ring v. Arizona*, 536 U.S. 584 (2002), because the jury's verdict did not include a determination of an essential element of capital murder—that he is not intellectually disabled. Applicant's briefing concerning his second claim is inadequate because he fails to plead and prove facts which would entitle him to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). The Court has previously rejected the *Ring* argument that applicant raises in his third claim. *See Briseno*, 135 S.W.3d at 10. Applicant's second and third claims for relief are denied.

As to applicant's remaining claims (Claims 4–48), we find that the record supports the habeas court's findings of fact, conclusions of law, and recommendation. We accordingly adopt "Respondent's Proposed Findings of Fact, Conclusions of Law, and

Order" regarding Claims 4–48, and deny relief on all of applicant's claims.

Delivered: September 16, 2015

Publish

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. WR-13,374-05

EX PARTE BOBBY JAMES MOORE,

Applicant

On Application for Writ of Habeas Corpus
in Cause No. 314483-C in the 185th
Judicial District Court Harris County

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

As recommended by the habeas judge, it is time for Texas to reevaluate the decade-old, judicially created standard in *Ex parte Briseno* in light of a shift in the consensus of the medical community regarding what constitutes intellectual disability, and in light of the Supreme Court's recent holding in *Hall v. Florida* indicating that courts are required to consider that consensus in assessing intellectual-disability claims.[1] *See Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004); *Hall v. Florida*, __U.S.__, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) . In the absence of any legislative guidance, this Court created the *Briseno* standard as

[1] Whereas older case law uses the term "mental retardation," newer statutes and cases use the term "intellectual disability." I employ the latter term whenever possible.

a temporary solution to the problem of defining "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty."[2] *Briseno*, 135 S.W.3d at 6. The standard was created in response to the Supreme Court's two-part holding in *Atkins v. Virginia* that (1) the Eighth Amendment of the federal Constitution prohibits the execution of a person with an intellectual disability as cruel and unusual punishment, and (2) each state must devise its own substantive and procedural mechanisms for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). In response to *Atkins*'s first holding, the *Briseno* Court applied the same three-pronged general standard that had been employed by the Supreme Court to define intellectual disability. *Briseno*, 135 S.W.3d at 8. The standard was based on the American Association on Mental

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[2] Merely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas. *See Atkins v. Virginia*, 536 U.S. 304, 306, 321, 122 S. Ct. 2242 (2002). This Court cannot continue to apply an outdated and erroneous standard in the wishful hope that the Legislature will act soon, particularly in light of the fact that the legislative session just ended several months ago, and the Legislature does not meet again for approximately two years. Although it would obviously be preferable for the Legislature to set forth the policy with respect to who should be exempted from the death penalty on the basis of intellectual disability, this Court is required to uphold the federal Constitution as it has been interpreted by the Supreme Court. Doing what we have always done simply because the Legislature has not told us to do it otherwise is not the right answer.

Retardation (AAMR) criteria,[3] and it required an applicant to demonstrate evidence of (1) significantly subaverage general intellectual functioning, (2) related limitations in adaptive functioning, and (3) onset of the two preceding prongs prior to the age of eighteen. *Id* at 7. In response to *Atkins*'s second holding requiring each state to develop its own mechanisms for determining which offenders should be exempt from the death penalty on the basis of their intellectual disability, the *Briseno* Court initially "decline[d] to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature,"[4] but it then went on to

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[3] *See* American Ass'n on Mental Retardation: *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992). This definition is substantively the same as the one in Texas Health and Safety Code Section 591.003(13), and *Briseno* held that these definitions were appropriate as the general standard for deciding intellectual-disability claims in capital-murder cases. *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004). Because the *Briseno* Court indicated that the definition in the Health and Safety Code was interchangeable with the definition used by the American Association on Mental Retardation, I refer only to the AAMR definition, even though the analysis would also substantively apply to the definition in the Health and Safety Code.

[4] *See Briseno*, 135 S.W.3d at 6; *see also id.* at 8 ("Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment. However, that definitional question is not before us in this case because applicant, the State, and the trial court all used the AAMR definition. Until the Legislature provides an alternate statutory definition of mental retardation for use in capital sentencing, we will follow the AAMR or Section 591.003(13) criteria in addressing *Atkins* mental retardation claims.")

discuss a standard comprising seven evidentiary considerations, which, in practice, has been applied to determine whether an applicant's intellectual disability rises to the "level and degree" that a consensus of Texas citizens would agree that the death penalty would constitute cruel and unusual punishment. *Id.* at 6, 8-9. Thus, rather than separately consider the two steps by keeping the medical considerations apart from the legal ones, *Briseno* instead has been interpreted as conflating the two steps into a single analysis. By placing the legal standard's seven evidentiary considerations into the adaptive-deficits analysis in the medical standard, as this Court's majority opinion does today, the *Briseno* Court created a novel test for assessing claims of intellectual disability that has been widely criticized as applying an unscientific standard.[5] More importantly, *Briseno*

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[5] *See*, *e.g.*, Nancy Haydt, Stephen Greenspan, & Bhushan Agharkar, *Advantages of DSM-5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 U. MISS-KANSAS CITY L. REV. 359, 384 (2014) (observing that *Briseno* set forth a "list, for which no scientific justification was given" of "vaguely specified seven behaviors . . . which the court believed could be used to rule out a diagnosis of ID"); John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 399 (2014) (Texas's *Briseno* factors make it "extraordinarily difficult to prove deficits in adaptive functioning"); Kate Janse Van Rensburg, *The DSM-5 and Its Potential Effects on* Atkins v. Virginia, 3 U. MEMPHIS SCHOOL OF L. MENTAL HEALTH L. & POL'Y J. 61, 79 (2013) ("Texas' definition has not been successful in achieving any of *Atkins*' aims but has been successful in severely limiting the number of defendants who were actually found to be intellectually disabled."); John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18

conflicts with the Supreme Court's rationale in *Hall* in that its test for determining intellectual disability is not grounded in the current consensus of the medical community. There is no authority, medical or legal, that supports this kind of hybrid assessment of intellectual disability. This Court should take this opportunity to modify the *Briseno* test to require a bifurcated inquiry.

First, a court should determine whether a defendant is intellectually disabled based on the current standards employed by the medical community in the manual of the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly known as the AAMR). Because this Court's majority opinion continues to apply the former medical standard that was in effect in 2004, rather than the prevailing views held by the medical community today, I would modify this portion of *Briseno* to reflect the current standards. In applying the current scientific standards to this case, I would hold that an IQ score is not definitive evidence of a lack of intellectual disability in a case such as this, where the majority of numerous IQ tests spanning decades have consistently indicated that applicant is in the range of an intellectually disabled person, and the habeas court

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CORNELL J.L. & PUB. POL'Y 689, 710 (2009) ("The *Briseno* factors present an array of divergences from the clinical definitions."); James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later—A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 383-84 (2014) ("The Supreme Court's emphasis on scientific and clinical understanding of intellectual disability calls into question the approach by a few courts that rest heavily on stereotypes about people with intellectual disability rather than on the scientific knowledge and experience accumulated by professionals in the field.").

found that evidence credible by determining that applicant has proven the first prong of his *Atkins* claim. Furthermore, in determining whether a defendant is intellectually disabled, I would hold that it is improper to commingle the seven evidentiary considerations that comprise the legal standard described in *Briseno* with the analysis of adaptive deficits pertinent to the medical community's standard, and I would clarify that the legal and medical inquiries are separate and should be subject to distinct analyses.

Assuming that the evidence shows that a defendant is intellectually disabled according to the current medical standards, then a court would progress to the second step that requires a determination of whether the extent of his intellectual disability is such that, as a matter of federal constitutional law, his execution for capital murder would constitute cruel and unusual punishment in violation of the Eighth Amendment. It is only at this second step that a court should consider the type of evidence that is focused on the comparison and weighing of positive skills against deficits, similar to the seven evidentiary considerations in *Briseno*, so as to determine whether there would be a national consensus that a person at that level and degree of disability should not be subject to the death penalty. Furthermore, with respect to the second step, I would reformulate the seven evidentiary considerations described in *Briseno* so that they more closely track the types of considerations that persuaded the Supreme Court to decide that the execution of an intellectually disabled person would violate the Eighth Amendment.

In sum, I disagree with the majority opinion's conclusions that this Court properly "continue[s] to follow the AAMR's 1992 definition of intellectual

disability" and that the *Briseno* standard "remains adequately 'informed by the medical community's diagnostic framework.'"[6] Because the decade-old *Briseno* standard was never intended to be permanent, it has become necessary to examine whether its continued application remains consistent both with the views currently held by the scientific community and with the societal consensus as to those offenders who, by virtue of their intellectual disability, should be exempted from the death penalty. *See Briseno*, 135 S.W.3d at 5 ("[W]e must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims."). After reformulating the standard, I would remand this case for the habeas court to consider whether, under the revised standard, it recommends granting relief to Bobby James Moore, applicant. I, therefore, respectfully dissent.

I. Step One: A Court Must Decide Whether a Defendant Has an Intellectual Disability By Applying Current Scientific Standards

In light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person. Although this Court is applying (A) the Supreme Court's same three prongs that make up the general standard for deciding whether a person has an intellectual disability, this Court's majority opinion is flawed in its substantive assessment of the first two prongs because, in contravention of current medical standards, (B) it improperly

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[6] *See* maj. op., at 5-6 (quoting *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014)).

applies a strict cutoff based on IQ scores, and (C) it erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits.

A. The Supreme Court Requires a Court to Consider Current Medical Standards in Evaluating Whether the Evidence Establishes the Three-Pronged General Standard for Intellectual Disability

Although it set forth a general standard, the Supreme Court in *Atkins* left it to the states to devise a precise test for determining which offenders are so intellectually disabled that there is a national consensus that it would be cruel and unusual to execute them. *Atkins*, 536 U.S. at 317 (explaining that prohibition on executing intellectually disabled individuals extends to those "mentally retarded offenders about whom there is a national consensus," but leaving to the states "'the task of developing appropriate ways to enforce the constitutional restriction'") (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416 (1986)). But the Court in *Atkins* did not permit States to have complete autonomy in making this determination. *See Hall*, 134 S. Ct. at 1999 ("*Atkins* did not give the states unfettered discretion to define the full scope of the constitutional protection"; "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity"). In *Hall*, the Supreme Court characterized its *Atkins* decision as providing "substantial guidance on the definition of intellectual disability." *Id.* (citing *Atkins*, 536 U.S. at 318). The *Atkins* Court observed that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as

communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. Recognizing that there is a wide range of individuals who might be characterized as intellectually disabled, and recognizing that not all such individuals would be constitutionally exempted from the death penalty, the Supreme Court described the group of people whose executions would violate the federal Constitution as those who, "[b]ecause of their impairments, [ ] by definition [ ] have 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 the reactions of others." *Id.* Further describing the class of intellectually disabled people who are exempt from the death penalty, the Court also noted that "there is abundant evidence that [such individuals] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* In providing these descriptions, the *Atkins* Court acknowledged the standards set forth in the manual of the American Association on Mental Retardation and the Diagnostic and Statistical Manual of Mental Disorders-IV (DSM-IV).[7] *Id.* at 308 n. 3.

More than a decade after the *Atkins* decision, the Supreme Court reaffirmed the general standard for determining intellectual disability in *Hall*. *See Hall*, 134 S. Ct. at 1994 ("As the Court noted in *Atkins*, the medical community defined intellectual disability

[7] *See* American Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification & Systems of Supports* (9th ed. 1992); American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000).

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."). Addressing the first prong in the general standard, the *Hall* Court held that, because the medical community's diagnostic framework does not quantify intellectual disability at an IQ score of seventy or below, it would violate the federal Constitution to limit the protections of the Eighth Amendment only to those offenders whose test scores are at or below that precise level. *Id.* at 1998. In reaching that holding, the Court considered and was persuaded by the medical community's current diagnostic framework. *Id.* at 1993, 2000 (stating that the "legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework," and further observing that "it is proper to consult the medical community's opinion").

Viewed in conjunction, *Atkins* and *Hall* reveal that, for over a decade, the Supreme Court has applied the same three-prong general standard for analyzing intellectual-disability claims. Furthermore, *Hall* in particular signals that, even if a state is applying this same general standard, as did Florida in *Hall*, the federal Constitution may nonetheless be violated based on the particular analytical measures by which the state determines each of the three prongs. Even though the purpose of Florida's statute was to provide a legal standard that would permit anyone with an IQ level above 70 to be subject to the death penalty, the Supreme Court held that Florida's standard was constitutionally invalid because it was "in direct opposition to" the current medical standard for

diagnosing intellectual disability, which does not provide for a cutoff in that manner. *See id.* at 2001. Having permitted each state to create its own test for deciding which people with intellectual disability would be exempt from the death penalty, the Supreme Court nonetheless held that, in the implementation of that policy decision, Florida had no discretion to misapply the current standards of the medical community for assessing intellectual disability. *See id.*

The present case presents a situation analogous to that in *Hall* in that, in the implementation of a policy decision describing who should be constitutionally exempted from the death penalty, Texas has no discretion to misapply the standard of the current medical community for assessing intellectual disability. *See id.* at 1999-2001. I would hold that this Court must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and that the reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable.

To this end, I would modify this Court's analysis in *Briseno* so that it conforms to the current consensus of the medical community. Like the Supreme Court in *Atkins, Briseno*'s analysis of intellectual disability was premised on the definition in the AAMR's ninth edition, but since the time that *Atkins* and *Briseno* were decided, the AAMR has been renamed to the AAIDD, and it is now in its eleventh edition.[8] Rather than rely on the older editions, the Supreme Court discussed the AAIDD's eleventh edition in *Hall*. *See Hall*, 134 S. Ct. at 1995. Similarly, like the

[8] AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010).

Supreme Court in *Atkins, Briseno*'s analysis of intellectual disability considered the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), but since the *Atkins* and *Briseno* decisions, that manual has been superseded by the Fifth Edition, the DSM-5.[9] Rather than rely exclusively on the older scientific standards as this Court does today by continuing to apply an unmodified *Briseno* standard, this Court, like the Supreme Court in *Hall*, should, at a minimum, consider how the developments in the scientific standards during the past ten years might affect a judicial determination of intellectual disability.[10] *See Hall*, 134 S. Ct. at 2000 (explaining that, as compared to the DSM-IV, the DSM-5 places less emphasis on a person's IQ score than on the person's adaptive deficits). Because the medical community's

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[9] American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

[10] The substance of Section 591.003(13) remains as it was when *Briseno* was decided, although some of the terminology has changed, such as the term "mental retardation," which is now called "intellectual disability." *See* TEX. HEALTH & SAFETY CODE § 591.003(13), (7-a) ("'Intellectual Disability' means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."); § 591.003(1) ("'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."); § 591.003(20) ("'Subaverage general intellectual functioning' refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used."). The changes to the terminology were enacted by House Bill 1481 in 2011 in order to make the language referring to intellectual disabilities more respectful, but that legislation did not alter the substance of the definitions. *See* Tex. H.B. 1481, 82nd Leg., R.S. (2011).

views on the assessment of intellectual disability have changed in the last decade, the Supreme Court in *Hall* considered the current consensus of the scientific community in deciding the merits of that case. This Court should follow suit. As I explain below, the DSM-5 has several important differences from the DSM-IV with respect to the proof of intellectual disability, and these differences require this Court to modify the *Briseno* standard.

(B) Prong One: A Strict Cutoff Based on IQ Scores is Contrary to Current Medical Standards

This Court's majority opinion is contrary to the *Hall* Court's holding that an intellectual-disability claim should not be rejected by treating an IQ score as a precise number because the medical community does not quantify intellectual disability at an IQ score of seventy or below, nor does it treat an IQ score in the marginal range as being dispositive of an intellectual-disability diagnosis. *Hall*, 134 S. Ct. at 1998-2001. In explaining its finding that applicant had significant limitations in intellectual functioning, the habeas court made finding of fact number 78, in which it noted that IQ tests are not able or even designed to produce a single and precise figure, but rather are best conceptualized as a range of scores. The habeas court's finding that IQ test results should be treated as a range rather than as a precise number is consistent with the *Hall* Court's holding, and, therefore, this finding should be upheld by this Court. *See id.*

Whereas the Court in *Atkins* had considered the views of the medical community in the then-current DSM-IV, the Court in *Hall* considered the current DSM-5 in deciding that Florida's strict IQ cutoff was unconstitutional. *Compare Atkins*, 536 U.S. at 308 n. 3 (discussing DSM-IV), *with Hall*, 134 S. Ct. at 2000

(relying on the DSM-5 and quoting it for the proposition that "'IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks'"). Furthermore, as support for its conclusion that it was "not sound to view a single factor as dispositive of a conjunctive and interrelated assessment" of intellectual disability, and citing to the DSM-5, the Supreme Court observed that "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Hall*, 134 S. Ct. at 1995, 2001. By applying a standard error of measurement but then using a strict cutoff based on IQ scores, this Court's majority opinion is effectuating the same type of standard that the Supreme Court rejected in *Hall* as constitutionally unacceptable.

Although analysis of IQ has not been completely removed from the diagnostic determination of intellectual disability in the DSM-5, its importance has been greatly reduced as compared to the DSM-IV. *See id.* Under the DSM-5, it is possible for a person with an IQ test result higher than 75 to be characterized as intellectually disabled depending on his adaptive functioning, as compared to the DSM-IV, which specifies that the 75 score would be dispositive within the margin of error. *Id.* Here, according to this Court's majority opinion, taking into account the standard error of measurement and ignoring the Flynn effect, the two tests it finds acceptable produced an IQ score range from 69-83, and this, therefore, would constitute an adequate basis for rejecting

applicant's claim.[11] For the limited purposes of this discussion, I will accept the majority opinion's conclusion that the only two valid scores are applicant's 1973 WISC score and his 1989 WAIS-R score, which are higher than the other six scores. According to the DSM-5, applicant's IQ score alone should not be enough to reject his claim because it is necessary to also consider his adaptive functioning in conjunction with his IQ score. Given the reasoning of *Hall*, which requires a court to at least consult current medical standards in reaching a determination of intellectual disability, I disagree with this Court's majority opinion as to prong one of its intellectual-disability analysis that holds that applicant's IQ scores ranging from 69-83, part of which fall below 70, are alone an independent reason for finding that he is not intellectually disabled.

I also disagree with this Court's majority opinion for the two additional reasons, as explained below, that (1) it cherry picks applicant's two higher IQ scores and (2) it disregards the other scores: the OLMAT (77), Slosson (57), WAIS-R (abbreviated) (71), 2013 RCPM (85), the WAIS-IV (59), and the derived scores on the Bender Gestalt (67) and Goodenough (72). First, I disagree with the majority opinion that it is proper to

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[11] *See* maj. op., at 71 ("taking into account the standard error of measurement, applicant's score range on the WISC is between 73 and 83"; taken altogether, there is "no reason to think that applicant's obtained IQ score of 78 on the WISC is inaccurate or does not fairly represent his borderline intelligence during the developmental stage"); *see also id.* at 71-72 ("the score that applicant obtained on the 1989 WAIS-R supports the conclusion that his WISC score accurately and fairly represented his intellectual functioning during the developmental period"; his score range on the WAIS-R "is between 69 and 79").

dismiss the WAIS-IV, the most recent and comprehensive test on which applicant scored a 59 in 2013, a score impliedly determined to be credible by the habeas court. The majority opinion's rationale for rejecting that test is that applicant put forth suboptimal effort because the State's expert, Compton, indicated that applicant had a motive to do poorly and gave suboptimal effort. The habeas court, however, impliedly found the evidence that applicant gave suboptimal effort not to be persuasive. The State's expert's testimony that applicant gave suboptimal effort was contradicted by a defense expert, Greenspan, who testified that it is difficult to interpret effort-test results as to intellectually-disabled individuals because of problems validating those tests, and such tests thus have reduced significance in this context. Furthermore, even accepting the majority opinion's analysis that the other scores are less reliable because they were based on noncomprehensive instruments, they were neuropsychological tests rather than IQ tests, and they used the now-disfavored concept of mental age to arrive at the score, these scores should not be disregarded in their entirety in that they provide some evidence that supports the habeas court's findings that applicant had significant limitations in intellectual functioning. These other tests also provide evidence that supports the habeas court's findings that applicant did not give suboptimal effort in taking his most recent IQ test and that the State's expert's testimony on suboptimal effort lacked credibility. In short, even if the five other tests showing applicant as intellectually disabled do not stand alone as definitive evidence of intellectual disability, they, in conjunction, support the habeas court's fact finding that applicant's most recent IQ score is reflective of limitations in intellectual

functioning. In the absence of the testimony from Dr. Compton, which was implicitly found not credible by the habeas court with respect to suboptimal effort, applicant's most recent IQ test places him easily within the range of IQ scores that show intellectual disability. And, although this Court is the ultimate fact finder, the credibility determinations regarding which expert was most believable should be left to the habeas court as the original fact finder in this case.

Second, even if the majority opinion is correct in disregarding the applicant's most recent IQ score, and even if it is correct that this Court should rely solely on the WISC administered at age 13 that produced a score of 78 and the WAIS-R at age 30 that produced a score of 74, these scores, under the current medical standards, would still require this Court to examine whether applicant has adaptive deficits.[12] Taking into account the standard error of measurement and ignoring the Flynn effect, these two tests produce a range from 69-83. A diagnosis of intellectual disability is often indicated by an IQ score of 70 or below, but, as the Supreme Court held in *Hall*, 70 is not a strict cutoff point beyond which the possibility of intellectual disability is foreclosed. *Hall*, 134 S. Ct. at 1996. Even disregarding most of the evidence that the habeas court found credible and relying only on applicant's two highest scores, the score range supports a finding that applicant has established the first prong.

Although I conclude that the record appears to support the habeas court's determination that applicant has significantly subaverage general intellectual

[12] When the test took place, the administrator made a slight error that caused this test score to originally be recorded as 74. The error has since been acknowledged, so we need only concern ourselves with the correct score.

functioning based on reliable IQ scores, I would not definitively decide that question today in order to permit the original fact finder to apply the correct modified standard to the evidence in this case.

(C) Prong Two: Unscientific Criteria Should Not Be Used to Assess Adaptive Deficits

The *Briseno* analysis of the adaptive-deficits prong 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 employed by the medical community. More specifically, in light of the Supreme Court's analysis on this subject, the majority opinion's continued application of the *Briseno* standard is constitutionally unacceptable because it relies on an unscientific assessment that (1) considers adaptive deficits based on the DSM-IV alone, (2) includes a comparison to the fictional character Lennie; and (3) considers seven evidentiary factors that are inapplicable in this context.

1. Adaptive Deficits Should Not Be Based on the DSM-IV Alone

The *Briseno* Court's decision to place a legal standard into the medical criteria for establishing adaptive deficits produced an unscientific standard that is inconsistent with the requirement that any standard be informed by current medical criteria. The DSM-5 altered the "adaptive functioning requirement" by describing it as how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. *See* American Psychiatric Ass'n, *DSM-5 Intellectual Disability Fact Sheet* (2013); *see also* Shelly Yeatts, Texas District and

County Attorneys Association, *Significant Changes from the DSM-IV to the DSM-5* (November 2013). The DSM-5 relies more on adaptive functioning than the DSM-IV did, both for diagnosing intellectual disability and for determining its level of severity. *Id.*; *see also* Walter Kaufmann, *Intellectual Disabilities's DSM-5 Debut*, SPECTRUM NEWS 2013. In terms of diagnosis, the DSM-5 assesses the level of adaptive functioning in three domains: social, conceptual, and practical skills,[13] and it requires at least one domain that includes several skill areas of adaptive functioning versus two or more skill areas in the DSM-IV. In short, the type of analysis for establishing adaptive functioning is different in the DSM-IV than in the DSM-5, and this Court should modify the *Briseno* test to conform to the current scientific standards. I, therefore, disagree with this Court's majority opinion as to prong two of its intellectual-disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits under a standard that is no longer employed by the scientific community in assessing intellectual-disability claims.

Furthermore as to prong two, the DSM-5 appears to more readily acknowledge that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars,

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[13] *See APA Intellectual Disability Fact Sheet*, at 1. The social skills domain considers the awareness of others' experiences, empathy, interpersonal communication skills, friendship abilities, social judgment, and self-regulation, among others. The conceptual domain considers language, reading, writing, math, reasoning, knowledge, and memory, among others, used to solve problems. The practical domain considers self management across life settings, including personal care, job responsibilities, money management, recreation, managing one's behavior, and organizing school and work tasks, among others.

and supporting their families. *See Wiley v. Epps*, 625 F.3d 199, 203, 204 (5th Cir. 2010). People with intellectual disabilities may be able to (1) read, write, and perform some rudimentary math; (2) have friends; (3) maintain personal hygiene; (4) drive a car on occasion; (5) appropriately groom themselves and possess a driver's license; and (6) maintain a relationship.[14] None of these skills or abilities are necessarily inconsistent with intellectual disability. This Court's majority opinion, however, gives heavy weight to applicant's ability to perform some of the functions listed above even though the current scientific community would discount that type of behavior as dispositive evidence of adaptive functioning. I disagree with this Court's majority opinion as to prong two of its intellectual disability analysis that rejects applicant's claim based on his failure to prove adaptive deficits by giving great weight to evidence that is no longer credited by the scientific community in assessing intellectual disability claims.

Additionally as to proof of adaptive functioning or adaptive deficits, unlike the DSM-IV that permitted evidence about a defendant's behavior in prison, the DSM-V recommends that this assessment be determined outside of a prison setting. *Wiley*, 625 F.3d at 203, 204. The DSM-5 recognizes that people on death row operate within a world where choices are extremely limited, even for such basic matters as when to wake up and when to go to bed, what to eat, when to shower or change clothes, and other life basics. The

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[14] *See* John H. Blume, Sheri Lynn Johnson, Paul Marcus, & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY RTS. J. 393, 408 (2014).

DSM-5, therefore, discounts much of the evidence about a defendant's ability to function inside a prison setting. This Court's majority opinion, however, gives heavy weight to applicant's ability to function and work while on death row even though the current scientific standards in the DSM-5 would discount that type of behavior as evidence of adaptive functioning, because ordinarily the kinds of tasks that are assigned can be performed by someone who is intellectually disabled.

But, perhaps, not all evidence obtained during a defendant's prison stay is immaterial to the question of his adaptive deficits or functioning. Any decision to consider a defendant's prison behavior must be examined closely for details that might show learned behavior from the great repetition of an event or limited choices. For example, here, this Court's majority opinion considers applicant's use of commissary slips in prison to suggest that he does not have adaptive deficits because he could understand the math involved to manage his commissary. The majority opinion relies on the testimony of Jerry LeBlanc, a prison official who testified that applicant appeared to understand his commissary order and that applicant did not receive any assistance from LeBlanc. But it is apparent that the habeas court was unpersuaded that LeBlanc's testimony demonstrated applicant's lack of adaptive deficits. In finding of fact number 169, the habeas court found that applicant had significant difficulty in filling out his commissary slips and in negotiating the $85 spending limit. The habeas court further mentioned that its examination of the commissary records revealed "numerous mathematical and spelling errors" on the slips as well as commissary requests adding up to significantly more than the spending limit on fifteen out of twenty-

four slips in evidence. The habeas court found that the repeated mathematical errors and consistent excessive ordering combined with the simple, unchanging spending limit reflected a lack of understanding of these basic concepts. I disagree with this Court's majority opinion's analysis as to prong two that rejects applicant's claim based on his purported failure to prove adaptive deficits by considering his general ability to function on death row when much of that type of evidence is no longer considered probative by the scientific community in assessing intellectual disability claims due to the repetitive nature of the events and limited choices, and, to the extent that certain jail-house evidence can be probative, the habeas court found that the State's evidence was lacking in credibility and unpersuasive.

I also note that the majority opinion decides that applicant does not have adaptive deficits, in part, by considering *pro se* documents that he presented for his writ application. However, applicant's counsel presented evidence that applicant may have had help in preparing those documents. Again, the habeas court appears to have credited the applicant's evidence more than the State's evidence. Ordinarily, this Court, as the ultimate fact finder, defers to the habeas court, the original fact finder, on matters involving credibility of the evidence.

The majority opinion makes many observations that conflict with the habeas court's assessment of adaptive deficits, but it does so by applying the *Briseno* test that I conclude does not comply with the Supreme Court's requirements in *Hall*. Although I disagree with some of the majority opinion's analysis with respect to the lack of evidence of adaptive deficits, I would not decide this question here but would instead remand for the

habeas court to reconsider the evidence under a new modified test that considers current medical standards, and, as explained below, omits the Lennie standard and the seven evidentiary considerations.

2. The Second Prong on Adaptive Deficits Should Not Include a Comparison to Fictional Character

Even if the literary reference to Lennie was simply an attempt to write colorfully gone awry, its inclusion in *Briseno* suggests that people who are severely or profoundly intellectually disabled would not be subject to the death penalty; that people who are mildly intellectually disabled would be subject to the death penalty; and that people who are moderately intellectually disabled may, depending on the circumstances, be subject to the death penalty. *See Briseno*, 135 S.W.3d at 6. The *Briseno* Court discussed the then-existing DSM-IV four subcategories for mental retardation: "mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded." *Id.* This Court then stated,

> The functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance. It is thus understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support. We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from

> the death penalty. Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? . . . As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.

Id. In referring to Lennie as someone who might be exempt from execution whereas others unlike him would not be, this Court's opinion has been read as implying or holding that those individuals who are less than severely or profoundly intellectually disabled would not be exempt from execution. Under that standard, Texas law creates a blanket rule that makes it constitutionally permissible to execute someone who the DSM-IV would catagorize as mildly or moderately intellectually disabled. I conclude that, to the extent that the Texas standard categorically permits the execution of a mildly or moderately intellectually disabled person, even one whose intellectual disability is such that he has a "diminished capacit[y] 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 the reactions of others," then the Texas standard is unconstitutional. *See Atkins*, 536 U.S. at 318 (discussing the justification for holding that the federal Constitution prohibits the execution of intellectually disabled people). I would hold that the

Lennie standard does not meet the requirements of the federal Constitution because it potentially permits the execution of a mildly or moderately intellectually disabled offender who meets the legal definition of *Atkins*, and it categorically limits the protections of the Eighth Amendment to those offenders determined to be severely or profoundly intellectually disabled. I conclude that any standard set forth by Texas must at least contemplate the possibility that someone categorized as mildly or moderately intellectually disabled in the DSM-IV might have the specific type of adaptive deficits to make him ineligible for execution according to the Supreme Court's reasoning in *Atkins*. Therefore, I would set forth a standard that does not include any reference to a fictional character as a basis of comparison for deciding whether a person is exempt from the death penalty by reason of his intellectual disability.

3. Adaptive Deficits Should Not Include the Seven *Briseno* Evidentiary Considerations

The *Briseno* Court mentions seven evidentiary considerations that could be considered as part of an assessment of a defendant's adaptive deficits, but it did so without any supporting authority. This Court stated,

> [S]ome other evidentiary factors which factfinders . . . might also focus upon in weighing evidence as indicative of mental retardation:
>
> - Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?

- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8.

These seven questions do not belong in any determination about a defendant's adaptive deficits. Although they have similarity to some of the inquiries about adaptive deficits, these seven questions have a different focus from a determination on adaptive deficits in that they weigh a defendant's positives against his negatives. The weighing of positives against negatives is unlike a scientific determination of adaptive deficits, which looks solely at a person's inability to perform certain functions. Because it improperly conflated the legal standard with the medical standard in its decision permitting the injection of seven unscientific questions to evaluate adaptive deficits, the *Briseno* standard erroneously applies modern scientific principles. I, therefore,

would hold that the seven questions have no application to a decision about adaptive deficits.[15]

Rather than conflate a legal policy standard with a medical standard, this Court should limit the first step in its analysis to a determination whether the medical community would consider an individual to be intellectually disabled. If a defendant fails to meet this test, then his claim likewise fails. But if a defendant can show that the medical community would consider him to be intellectually disabled, then the Court would progress to the second step.

II. Step Two: Determination of the Legal Standard Whether There Is a National Consensus Against the Death Penalty For Someone at the Applicant's Level of Intellectual Disability

I do not suggest that the type of information in the seven *Briseno* evidentiary considerations must be entirely excluded from any analysis of intellectual disability, but instead I would confine those kinds of questions to a second step in an analysis that occurs only after finding that a defendant is, according to prevailing medical/scientific standards, intellectually disabled. Furthermore, I would modify the seven questions so that they would more closely reflect the underlying rationale for disallowing the execution of certain intellectually disabled offenders.

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[15] Because my primary disputes with the majority opinion are with respect to the first two prongs, and because I believe this case must be remanded for the habeas court to reconsider the evidence under a revised standard for deciding intellectual-disability claims, I do not, at this juncture, include an analysis of the third prong with respect to whether applicant has proven the onset of any intellectual disability prior to age eighteen.

The second, third, and fifth *Briseno* questions are appropriately founded on the Supreme Court's *Atkins* opinion. The second question asking about whether the defendant can formulate plans or exhibits impulsive conduct, the third question about whether he is a leader or a follower, and the fifth question about whether his communication is coherent or irrational all target the reasons why the Supreme Court determined that the federal Constitution prohibits the execution of intellectually disabled people. The *Atkins* Court identified those reasons, observing that "[b]ecause of their impairments, however, by definition they have 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 the reaction of others." *See Atkins*, 536 U.S. at 318. The Court also noted that "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id.* These three *Briseno* factors track the legal rationale underpinning *Atkins* and, I conclude, are appropriate considerations when deciding whether a person is legally exempt from the death penalty.

Turning to the remaining questions, the first and seventh factors may be appropriate if they are modified. The first question asks, "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at the time, and, if so, act in accordance with that determination?" One problem with this question is that it appears to invite individuals to give their subjective opinions comparing the defendant to a stereotype of how they believe an intellectually disabled person would appear or behave.

Although I conclude that it is appropriate to consider evidence by a defendant's family, friends, teachers, employers, authorities, and anyone else who the defendant had contact with during his developmental period, I conclude that the more appropriate inquiry should focus on those individuals' observations about the kinds of deficits and behaviors that made the defendant unlike his peers, what those deficits were, and how they were addressed.[16] *See Hall*, 134 S. Ct. at 1996 (factors that indicate whether the person "had deficits in adaptive functioning . . . include evidence of past performance, environment, and upbringing"). By targeting the evidence to specifically address observations of a defendant's adaptive deficits, the fact finder can decide whether the level and degree of those

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[16] In assessing adaptive functioning, clinicians focus on a variety of deficits. "AAIDD's classification manual emphasizes the actual impact of intellectual limitations on the individual's life: 'Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.' Among the tools available to clinicians in diagnosing adaptive deficits are standardized psychometric instruments known as adaptive behavior scales. Unlike IQ tests, these instruments are not administered to the person who is being evaluated, but rather focus on other sources of information, including information provided by teachers, family members, and others familiar with the individual's everyday functioning. Along with school and social service records and similar evidence, these may permit an evaluator to determine whether the reduced cognitive functioning measured by IQ tests constitutes a real-world disability in the individual's life. Since adaptive behavior inquiries in the context of a capital trial are, of necessity, retrospective in nature, a thorough individual, educational, and family history becomes essential." James W. Ellis*, Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

deficits amount to a conclusion of intellectual disability such that a defendant may not constitutionally be executed. The first *Briseno* question, therefore, may be appropriately considered if it is modified to target adaptive deficits.

The seventh *Briseno* question focuses on whether the defendant's offense required forethought, planning, and complex execution of purpose. That question could be of marginal relevance if the offense required those things but the defendant's particular role in the offense did not. A more appropriate question would align with the rationale underlying *Atkins* by asking whether the defendant's acts in the commission of the offense show that he had a diminished capacity to understand and process information, to communicate, to abstract from mistakes, to learn from experience, to engage in logical reasoning, to control impulses, to understand the reaction of others, and whether he was a follower rather than a leader (if the offense was committed by a group). *See Atkins*, 536 U.S. at 318. The seventh *Briseno* question, therefore, may be appropriately considered if it is modified to target the adaptive deficits of the defendant that may have been exhibited during the commission of the offense so as to permit a fact finder to determine whether the level and degree of his intellect warrants a legal exemption from the death penalty.

I also conclude that the remaining two questions are inappropriate and should be eliminated as irrelevant. These two questions focus on the rationality of an offender's response to external stimuli and on whether he can hide facts and lie effectively.[17] The Supreme

[17] "A feature of adaptive behavior that causes some confusion is that the focus is exclusively on deficits and not on strengths. At first blush, the exclusive focus on deficiencies may seem

Court in *Atkins* did not specifically list either of these considerations as constituting reasons why executing the intellectually disabled is unconstitutional. *See Atkins*, 536 U.S. at 318. It is unclear how information about a defendant's response to external stimuli would assist anyone is deciding whether he is constitutionally ineligible for execution. Perhaps the question about a defendant's ability to lie effectively was intended to target his ability to understand and process information in that someone who can consistently maintain a lie without contradiction might have higher intellectual reasoning. But maintaining a lie seems to include a moral compass that is immaterial to whether someone has an intellectual deficit, and the other questions seem to better reveal whatever might be relevant from this question without its prejudicial component. I fail to see any sound reason why these two questions would be proper evidentiary considerations in determining whether a particular individual has demonstrated that he is ineligible for execution under the reasoning of *Atkins*.

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counterintuitive, but clinicians have long recognized that for almost all individuals with intellectual disability, functional weaknesses coexist with strengths, and there is no 'list' of things that no individual with intellectual disability can do. With the increased focus on adaptive deficits after *Hall*, there is a substantial risk that triers of fact may fall into the trap of relying on unfounded and inaccurate stereotypes about what people with intellectual disability can and cannot do. Courts will need to be particularly careful not to rely, either directly or indirectly, on such stereotypes." James W. Ellis, *Symposium, Atkins v. Virginia: A Dozen Years Later–A Report Card: Hall v. Florida: The Supreme Court's Guidance in Implementing Atkins*, 23 WM. & MARY BILL RTS. J. 383, 388-89 (2014).

Some of these seven considerations, and perhaps other evidence, should be considered as part of a second step that is addressed only after a court has determined that a defendant has proven the three prongs in the AAIDD. The second step of an Eighth Amendment intellectual-disability analysis should focus on whether a defendant who has proven that he has an intellectual disability has also shown that, according to the reasoning of *Atkins*, the extent of his disability is such that it would constitute cruel and unusual punishment to execute him for capital murder. I would hold that only some of the seven *Briseno* factors may remain viable, and only to the extent that they provide information relevant to the legal determination whether the extent of a defendant's intellectual disability rises to the level that there is a national consensus against permitting him to be executed.

III. Conclusion

Because the habeas court's findings of fact and conclusions of law were premised on an attempt to apply parts and distinguish other parts of the *Briseno* standard, I would set forth a new modified standard for deciding intellectual disability claims and remand this case to the habeas court. I limit this dissenting opinion to voicing my concerns with the continued application of the *Briseno* standard, which I believe does not conform to the requirements of the federal Constitution, and to set forth some possibilities for a modified standard. I do not attempt to formulate a precise standard to replace the now-outdated *Briseno* standard. Any new or revised standard ultimately should be made by the Legislature, but until then, in the absence of statutory guidance, a new standard should be developed by a majority of the judges on this

Court, and taking into account the informed view of a consensus of the medical scientific community and the people of the State of Texas.

Filed: September 16, 2015

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APPENDIX C

IN THE 185 JUDICIAL DISTRICT COURT OF
HARRIS COUNTY, TEXAS

Cause No. 314483-C

EX PARTE BOBBY JAMES MOORE,

Applicant

February 6, 2015

Addendum Findings of Fact and
Conclusions of Law on Claims 1-3

This court has previously disposed all other contested matter in the above referenced cause. As there was a factual issue evident the court ordered a hearing on the *Atkins v. Virginia*[1] issues of this claim. This Court, having considered the allegations contained in the instant Application for Writ of Habeas Corpus, all exhibits and testimony admitted at hearing, all subsequent documents admitted by agreed order, the trial court records and appellate records, and Respondent's Answer and its Supplemental Answer and exhibits submitted therewith, makes the following findings of fact and conclusions of law regarding Applicant Bobby Moore's allegation that he is a person with mental retardation:

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002)

I. FINDINGS OF FACT

A. PROCEDURAL HISTORY

1. The Applicant, Bobby James Moore, was formally charged by way of indictment May 13, 1980 in the 185th District Court in Harris County, Texas, with the offense of capital murder. (Clerk's Record Vol I-116)

2. Bobby Moore was convicted of capital murder and sentenced to death on July 15, 1980, after the jury answered the special issues. The jury convicted him as the shooter in a store robbery in which a clerk was shot to death. (CR I-116)

3. The original Writ of Habeas was received on August 8, 1983.

4. The Texas Court of Criminal Appeals affirmed Bobby Moore's murder conviction and sentence on direct appeal dated October, 10 1985. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985)

5. On August 10, 1999, The United States Court of Appeals for the Fifth Circuit granted Mr. Moore a new sentencing proceeding and the case was remanded to the trial court to either vacate his death sentence and impose a sentence less than death or conduct a new sentencing hearing. *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

6. The State chose to conduct a new sentencing hearing. Jury Selection began on January 9, 2001, and concluded on February 1, 2001.

7. Punishment proceedings commenced on February 6, 2001, and both sides rested and closed on February 12, 2001.

8. After hearing argument of counsel and receiving the trial court's instructions, the jury begin its deliberations on February 13, 2001 and ended on February 14, 2001 with special issues Number One and Two being answered on the affirmative and Special Issue Three (mitigation) in the negative.

9. The trial court thereafter sentenced Mr. Moore to death.

10. On March 30, 2001, Mr. Moore's motion for new trial was considered by the trial court and subsequently denied.

11. Application for post-conviction Writ of Habeas Corpus filed was filed on June 17, 2003.

12. Factual Supplement to Writ of Habeas Corpus was filed on November 14, 2011. An additional supplement was filed the week prior to the hearing.

13. On January 2nd and 3rd, a hearing for an Application for a Writ of Habeas Corpus was held before Hon. Susan Brown, Presiding Judge of the 185th District Court of Harris County,, 2014. Texas. This court ordered argument on findings for Thursday the 23rd of January

B. RISK FACTORS FOR MENTAL RETARDATION

14. Dr. Compton, the State's expert, noted that risk factors are an indication of mental retardation and that Mr. Moore had many risk factors present before the age of 18.

15. Etiology is conceptualized in the 11th edition of the AAIDD manual [2010 AAIDD MANUAL 58-62] as a multifactorial construct composed of four categories of risk factors that interact

across time, including across the life of the individual and across generations from parent to child.

16. The manual sets forth risk factors commonly associated with intellectual disability (mental retardation). The four categories of risk factors are: (1) biomedical: factors that relate to biologic processes, such as genetic disorders or nutrition; (2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness; (3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and (4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills. [*Id*. at 126]

17. The second direction, which the manual sets forth, concerns the timing of the occurrence of causal factors according to whether these factors affect the parents of the person with ID, the person with ID, or both.

18. While the presence of risk factors does not guarantee that an individual has mental retardation, studies show that as many as 50 percent of the population of individuals with mental retardation have more than one causal risk factor. Further, mental retardation often reflects the cumulative or interactive effects of more than one risk factor. [*Id*. at 125] As the 2002 AAMR MANUAL emphasizes, "*The impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the*

presence of several risk factors that interact over time." [*Id*.]

19. However, it is important to note that the classification of an individual as intellectually disabled does not rely upon the identification of an etiology, for as the 2010 manual states: "*Even the most extensive and up-to-date genetic and biomedical testing will identify an etiology in less than half of all cases.*"[2]

20. Due to the correlation between risk factors and mental retardation, it is relevant and material to determine whether Mr. Moore's history contains any of the risk factors for retardation identified by the AAIDD. Copious evidence from the family history witnesses in this case establishes that Mr. Moore was exposed to all four categories of risk factors and across all three time periods commonly associated with mental retardation. The presence of these risk factors lends further weight to this Court's finding of intellectual disability (mental retardation) in Mr. Moore's case.

1. PRENATAL

Biomedical

21. Chromosomal Disorders: The record reflects suspicion of Mr. Moore's mother [Marion Moore] and one sister possibly had an intellectual disability.

22. Poverty: Documents received from Mrs. Marion Moore[3] confirm what is consistently recalled

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[2] Page 59 and see also, table on page, Fact Supp. 60 TAB A

[3] BOX 8: Letter from Universal Capital Mortgage (11/11/1974; Handwritten note from Financial Assistance Corporation

from the Moore family and their acquaintances; Mr. Moore was brought up within a severely impoverished environment. Food was scarce, beds were underprovided[4], rent and mortgage payments were always late, heating was often not available in the winter, clothes were shared and the family lived in some of the most impoverished areas across all of the southern states.

23. Domestic Violence: There are many reports of Ernest beating Marion. There is no evidence to indicate that he was physically aggressive to Marion while she was pregnant with Mr. Moore, but the possibility should not be excluded; Ernest had a track record for hitting women. Clara Jean Baker recalls that her father, Ernest, "*Knocked the breath out of his own mother.*"[5]

Behavioral

24. Parental Alcohol Use: Mr. Moore's father Ernest Moore Junior was known to be suffering from severe alcoholism. Ernest died prematurely in 1997 aged just 64 years and his death certificate[6] indicates that alcohol use contributed to his death. This objective evidence is supported by accounts from members of the Moore family, their friends, and neighbors, of

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(11/21/1979) ; Letter from Mortgage Banque Inc (8/17/1976) ; Letter from Raymond G. Woodard (1/18/1977) ; Letter from Frost-Arnett Company (1/5/1981) TAB B

[4] Meeting with Bobby Moore 24th May 2000: pg 7546 - 7 TAB C

[5] Meeting with Moore family 03-16-00. pg 7645 TAB D

[6] BOX 8 TAB E

alcohol-induced rages and scenes of violence. It appears that Ernest was known to have a short temper and appeared to have started drinking from the early age of 13 or 14[7]. Larry Baker, who has known Mr. Moore since they were children, stated in his affidavit: "*We grew up in the same neighborhood. I saw Bobby's Father, Ernest Moore, and knew that Ernest suffered alcohol problems. Ernest would go on alcoholic binges and disappear for days. No one would ever know when or if Ernest would ever return*"[8] Clara Jean Baker stated: "*Bobby's father had alcohol problems... Bobby's father would go on alcoholic binges and would disappear for days on end.*"[9] Bobby's younger brother, Ronnie Moore, stated: "*My father was an abusive alcoholic and much of our poverty was due to him.*[10]" Lonnie Moore remembers that their father would come home drunk and they would find him lying drunk on the porch in the mornings. Some nights they would hear him coming down the street stumbling, falling and shouting / singing loud enough for the neighbors to hear also.[11]

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[7] Meeting with Ernest Junior Moore's family 03-25-00. BOX 17 pg.7637 TAB F

[8] Affidavit of Larry Baker BOX 12 TAB G

[9] Affidavit of Clara Jean Baker BOX 12 TAB G

[10] Affidavit of Ronnie Moore BOX 12 TAB G

[11] Meeting with Lonnie Moore 02-28-00 BOX 17 pg 7674 TAB H

25. Parental Smoking: Ernest Moore Junior's death certificate[12] indicates that tobacco use contributed to his death.

Lack of Preparation for Parenthood

26. It is evident that Mr. Moore's parents had no preparation for the rigors of parenthood. Mrs. Marion Moore never sought prenatal care while pregnant and stayed with Ernest Moore, even though he beat her regularly. Meanwhile, Ernest Moore continued to drink, even with a child on the way, and did not in any way reduce his violently drunken behavior towards his wife and, later, Mr. Moore.[13]

27. Ernest Moore would strike Mr. Moore with a closed fist or an extension cord,[14] "*he [Ernest] would put our head through his legs to keep us in position so when he chastise us, he have a extension cord and had welps on us when it was all over with.*"[15]

Educational

28. Parental Cognitive Disability Without Supports: It appears quite likely that Bobby's mother, Marion Moore, may also be mentally retarded. His eldest sister Clara Jean and her husband Larry Baker believed that Marion had a traumatic childhood during which she was not afforded much love or guidance and they agreed with the interviewer that Marion may well be

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[12] BOX 8 TAB E

[13] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 10-11

[14] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

[15] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 11, 13-15

retarded.[16] Marion's behavior is frequently recalled as being out-of-the-ordinary. According to the recollections of Clara Jean Baker, Marion responded to Ernest's violence towards her (see paragraphs 28-31, below) in a strange way which may well be indicative of mental retardation. Marion would not just sit or lie back and take it, but would further provoke Ernest into hitting her.[17] Marion held a deep distrust of doctors and medicine; upon being diagnosed with cancer of the uterus in 1976 believed that she was ill because of a 'Hoodoo Curse'[18]. She was mugged at a bus stop in February 2000 and although her purse was stolen, she retained her cards and social security number. Despite knowing this, and despite protestations from Clara Jean, Marion insisted on reporting to the bank and social security office that her cards had not been stolen. She was met with an appropriate degree of bemusement.[19]

PERINATAL

Biomedical

29. Neonatal Disorders: Mr. Moore believes that when he was first born, he was sick a lot and stayed very small when he was growing up because he was ill.[20] His mother, Marion, confirmed this and described a time when

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[16] Meeting with Moore Family 03-16-00 pg. 7644 TAB D

[17] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[18] Meeting with Moore Family 03-16-00 pg 7648 TAB D

[19] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[20] Meeting with BM 25th May 2000: pg 7551 TAB C

Bobby had just started to crawl, "*We thought we might lose him*"[21]. At this time Bobby was suffering from severe diarrhea and dehydration. His younger sister Colleen, whose intellectual capacity is believed to be similarly limited, was also suffering from the same condition. Marion remembers taking both children to the hospital where their heads were shaved in order for needles to be inserted into cranial veins[22] -- it is, however, unclear from the records what this disorder might have been.

2. POSTNATAL

Biomedical

30. Traumatic Brain Injury: Around the date of 16th December 1971, Mr. Moore was hit in the left eye by a brick, which was thrown through the window of his school bus.[23] [24] Mr. Moore was also hit in the head with a chain, "*he got hit with a chain across his head, in his eye, it was bleeding, his mouth was busted and they was trying to pull him off the bus.*"[25] The bus was carrying black students and tensions were high because Scroggins Elementary was a predominantly Hispanic school. Bobby received treatment for his injury from Dr. Burman[26] and it is

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[21] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[22] Meeting with Marion Moore 05/25/00 pg 7662 TAB I

[23] Meeting with BM of March 23, 2000. pg. 7526 TAB C

[24] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[25] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 40, 2-4

[26] Dr. Richard Burman's medical notes TAB J

highly possible that Bobby sustained a traumatic brain injury.

31. However, perhaps the most likely cause of a traumatic brain injury would be the very frequent beatings Mr. Moore received from his mother, father and brothers (see below).

32. Malnutrition: Due to the Moore family's extreme poverty, which was only exacerbated by Ernest Moore's alcoholism, Mr. Moore and his siblings would often go without eating. When they did eat it would be nutrient-poor staples such as rice, beans and cornbread.[27]

33. Between the ages of 5 and 6, Bobby only gained 1 lb.[28] -- a well-nourished child would normally gain 5 -- 7 lbs. per year. A medical report from 1965 -- when Bobby was only 6 - indicated that Bobby's nutritional status was poor[29]. By this point, Mr. Moore was about 6lbs underweight -- a very significant amount for a young growing boy. Mr. Moorer's younger brother, Ronnie Moore, recalled: *"There were nine children in our family. Bobby, like the rest of us, grew up in extreme poverty. I first remember us living in the Fifth Ward of Houston. When I was about eight or nine, we moved to the South Park area. There were many nights when we did not get to eat dinner because there just was not enough money to buy food. When we did eat it was usually something like pork-bones and corn bread and*

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[27] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[28] pg 000853 TAB J

[29] pg. 000868 TAB J

stuff like that. My mother called it food that stretched a long way.... One time when I was about three or four Bobby and my sister Colleen were so hungry because we did not have any food, that they ate out of a neighbors [sic] trash can. They both got real sick, I think they got ptomaine poisoning."[30] Later in his life, when Bobby was approximately 13-14 years old and frequently being thrown out of the house, he was denied food by his father, who would tell the family: *"If any son of a bitch feed him tonight that he was going to get out, too, he was going to get them first."*[31] [32] [33]

34. Toxic-Metabolic Disorders: In late 1959 or early 1960, the Moore family moved to the 5th Ward area of Houston, Texas. This area, and others that the family subsequently moved to were notorious; not just for the poverty and violence, but for being contaminated with very harmful industrial waste.

35. On the 26th January 1999, environmental investigators accused a ship-channel area plating company [Ware Electro Plating at 630 Boyles] of allowing cyanide to foul a drainage ditch in a residential neighborhood. Mr. Moore attended Scroggins Elementary School and would have to walk past Ware Electro Plating to get to and from school. *"In 1996 ... the Texas Natural Resources Conservation Commission*

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[30] Affidavit of Ronnie Moore TAB G

[31] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[32] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14. 7

[33] Larry Baker Testimony 1-2-2014 volume 2 pg. 105, 2

told Ware that dangerous levels of cyanide and cadmium had been found in drainage ditches around the company. Instead of paying the $500-a-barrel cost of disposing of the cyanide and cadmium safely, Walsh said (Sgt. Michael S. Walsh of the Houston Police Department) *the company simply let it drain into a ditch alongside the building. 'This is one of the worst sites I've seen for environmental violations,' Walsh said. 'They have a total disregard for public health. And I mean a total disregard' Stephanie Lopez, who lives not far away, was unhappy because her 10-year-old daughter attends Scroggins Elementary School on Boyles and walks past Ware Electro Plating going to and from class."*[34]

36. Later that same year, on March 8th 1999, Mayor Lee Brown inspected a cleanup of lead-contaminated soil in the fifth ward neighborhood. The Moore family lived in this neighborhood from 1959 until 1972. "*The Texas National Resource Conservation Commission identified 86 homes as having total lead concentrations in the soil of 500 parts per million, a potential health hazard to residents, especially children... The 86 homes are located near the closed Many Diversified Interests facility at 3618 Baer Street... The facility*

[34] *"Authorities say plating company letting cyanide foul ditch / Firm located near a Ship Channel-area residential neighbourhood"* Houston Chronicle 01/27/99 Section A, Page 17; Edition: 3 Star. TAB K

operated as a steel casting company from 1926 to 1992"[35]

Social

37. Impaired Child-Caregiver Interaction: Marion Moore, Mr. Moore's mother, was rarely at home due to her being both a domestic (cleaner) and working in a day care center. Bobby's father tended to be either at work, drunk or with friends. Ernest was a construction worker and would work away from home for long periods of time. However, even when he worked locally, the family would not see him for several days after he had been paid because he would go on an alcoholic binge.[36] [37] As such, there was very little supervision of the children. When Bobby was still only a child, aged 14, he was thrown out of the family house and was never allowed to return: "*Bobby was forced to leave home when he was about fourteen. I remember that my father was beating on my mother, I was in the back room with the other younger kids. My mother would try and hide us in the back room when my father was on a rampage. I could hear the fighting in the other room. I heard Bobby tell my father to stop beating on my mother. My father started cursing Bobby out and told him to*

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[35] "*Mayor Brown Inspects Clean Up of Lead-Contaminated Soil From 86 Fifth Ward Homes*" Mayor's Office Home Page March 8, 1999 TAB K

[36] Affidavit of Larry Baker BOX 12 TAB G

[37] Anthony S. Haughton's interview with Bobby Moore 11-4-91 BOX 12 TAB C

get out of the way and then told him to get out of the house. Bobby never lived at home again."[38]

38. Family Poverty: Please see above

Behavioral

39. Child Abuse and Neglect: Mr. Moore's father, Ernest, physically terrorized the family but picked on Mr. Moore most of all.[39] *"He would beat Bobby with his fists, electrical extension cords, peeled tree branches, or anything else that came to hand. He very often left marks, welts, and other bruises. At the worst times Bobby was beaten daily, and a couple of times a week at best"*[40] Ronnie Moore recalls: *"I remember hearing Bobby screaming and crying for my dad to stop beating him, but it did not make a difference."*[41] Colleen D: McNese, Mr. Moore's younger sister, recalls: *"He [Ernest] would beat up on [Bobby] without any cause. He would beat Bobby with his fists, slap him across the face, and regularly used an extension cord to whip him with. He beat Bobby so bad with that cord that he still has the marks on his body.*[42]" Mr. Moore's mother, Marion, used to beat him just as hard as Ernest did. It appears that while Ernest would beat the family when he was drunk, it was Marion who would beat the children for disciplinary purposes: *"Mum was*

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[38] Affidavit of Ronnie Moore BOX 12 TAB G

[39] Affidavit of Colleen D. McNese TAB G

[40] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[41] Affidavit of Ronnie Moore TAB G

[42] Affidavit of Colleen D. McNese TAB G

really into discipline, she looked like she had no mercy, she did it to the boys most... she would tell them to take their shorts off... it felt like she was taking her frustrations out on them."[43] She would use an extension cord to whip the children and on one occasion, Mr. Moore remembers that blood from his back was spraying across the wall of the home with every lash of the cord.[44] Marion told an interviewer that: "*A child must really feel the whooping or it's not worth it because they will do it again*[45]." Mr. Moore's brothers, Jessie, Charles and Lonnie, would also beat him regularly when he was growing up. They too would hit him with things, often in the head: he was left bruised and injured from the many beatings they gave him.[46]

40. Domestic Violence: Colleen McNeese, Mr. Moore's younger sister, remembers that their father would frequently physically abuse their mother: "*He beat her one time with a broomstick. He had it on her neck and she was begging him because she couldn't hardly breathe.*"[47]

41. Ronnie Moore, Mr. Moore's younger brother, recalled: "*He [Ernest] would get uncontrollably mad at the slightest little thing. When he got*

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[43] Meeting with Clara Jean Baker 05-27--00 pg 7654 TAB L

[44] Meeting with Bobby Moore March 23, 2000., pg 7526 TAB C

[45] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[46] Anthony S. Haughton's interview with Bobby Moore 11-4-91 TAB C

[47] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

mad at my mother he would beat her in front of us."[48]

42. Mr. Moore recalled that on one occasion he came home to find his father threatening his mother with a handgun - a .22 or .32 caliber pistol. He further recalls that shortly after his release from prison in July 1979 he returned to the family home to find his father threatening his mother with a knife.[49]

43. Clara Jean recalls memories from her childhood when, as well as the usual punching and slapping of Marion, she would see her father pin Marion down on the floor, or on the bed, with his body while Marion would be screaming.[50] It is possible that Clara Jean may have been unknowingly witnessing the rape of her mother by her father.

44. Clara Jean recalls another incident in which Marion and Ernest were fighting outside the house; Marion was in a ditch and Ernest was kicking her.[51]

45. A doctor's note from July 4th 1972, details injuries sustained to Marion after she *"fell down flight of stairs 3 days ago"*[52]. It is important to note that, at that time, there were no stairs in the Moore household.

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[48] Affidavit of Ronnie Moore TAB G

[49] Meeting with Bobby Moore February 11, 2000., pg 7523 TAB C

[50] Meeting with Moore Family 03-16-00 pg 7646 TAB D

[51] Meeting, with Clara Jean Baker 05-27--00 pg 7653 TAB L

[52] Dr. Richard Burman's medical notes pg 4072 TAB U

46. Violence was pervasive, constant feature of family life in the Moore household. Clara Jean recalls that sometimes when her father came home drunk and fell asleep, Marion would hit him with a baseball bat.[53]

47. Just one sibling, Lonnie Moore, estimates to have personally witnessed between 50 and 100 instances of domestic violence.[54]

48. Social Deprivation: Social deprivation -- including the lack of a nonviolent surrounding community -- is a behavioral risk factor for mental retardation. This risk factor was present in Mr. Moore's young life as a result of the violence that pervaded the 5th Ward in Houston when he was a child.

49. Drug use: Drug use is a behavioral risk-factor for mental retardation. In 1971, when Mr. Moore was aged 11, he began to abuse drugs: sniffing glue and smoking marijuana.[55] By the time Mr. Moore was 15 or 16, he was taking more drugs.[56] [57]

Educational

50. Impaired Parenting: Ernest Moore had no interest in Mr. Moore's school work most of the time, *"I want to say there is not a interest or was not a concern because he didn't have education, so he couldn't realize what was good or what was bad.*

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[53] Meeting with Clara Jean Baker 05-27--00 pg 7653 TAB L

[54] Meeting with Lonnie Moore 02-28-00 pg 7674 TAB H

[55] Interview with BM 25th May 2000: pg 7552 TAB C

[56] Interview with BM 25th May 2000: pg 7552 TAB C

[57] Meeting BM October 10 2000: pg. 7623 TAB C

He didn't put interest in that."[58] Only when teachers from Mr. Moore's elementary school approached Ernest Moore about Mr. Moore's learning deficiencies did Ernest Moore a negative interest, *"And my dad would particularly get mad if someone from the school would come to the house to tell him that he needed some assistance and my dad, I remember, he ran the teacher away from the house. She only came because she had concerns trying to help Bobby and my dad wouldn't allow her to come in the house. So he never got the help that he really needed.*"[59]

51. Inadequate special education services: Records from Mr. Moore's life indicate that those people involved in his education were keenly aware that Mr. Moore suffered from some form of condition; some believed it to be mental retardation, but others simply thought it was due to emotional issues. Mr. Moore was tested very frequently, more so than the average child, and as a result was sent to summer school and received various other extra-curricular supports.

52. The fifth assumption of the current AAIDD definition[60] states that '*With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.*' Due to the consistency of Mr. Moore's IQ scores over a 20 year period, and supporting evidence as to the validity of these scores, it appears that whatever help the

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[58] Lonnie Moore Testimony 1-2-2014 volume 2 pg. 14, 22-25

[59] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 34, 4-10

[60] AAIDD pg. 7

education system did provide for Mr. Moore, it was simply inadequate.

53. Perhaps due to the nature of those times, and the fact that mental retardation was not as well understood as it is today, the teachers would tend to keep Mr. Moore occupied with menial activities, such as drawing, while the rest of the class continued with the curriculum.

54. Other teachers would simply ignore Mr. Moore, an out of sight, out of mind approach was used, "They didn't really try to help him anyway at school because they would sit him in the hallway, said that he was stupid because he didn't know how to read."[61]

55. Further, it appears from the records that, despite various scores consistently identifying his poor academic performance, Mr. Moore was only sent to a special summer school once.

56. When teachers from the elementary school actually did approach the Moore family to lend special assistance, the teachers were rebuked by Ernest Moore, *"...my dad came behind her and he wouldn't accept talking to her because he said Bobby is having -- he'd use the "stupid" word and he said that the school is aware of it, it's not like y'all trying to help him [Bobby] so don't keep bothering us, and he just slam the door. So at that time nobody else came back there."*[62]

57. **Inadequate Family Support**. The lack of family support in Mr. Moore's life is demonstrated by

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[61] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 35, 9-11

[62] Colleen McNeese Testimony 1-2-2014 volume 2 pg. 61, 6-12

his family's inability to protect him from the violence of his parents and siblings, and their inability to advocate for better educational services while he struggled in school. Repeatedly, Mr. Moore was abandoned when he was faced with violence at the hands of Ernest Moore or deprivation through being forced onto the streets; and no family member ever inquired into why he was having so much trouble in school. Poverty, illiteracy, alcoholism, cognitive impairments and general ignorance likely diminished the family's ability to advocate for Mr. Moore.

C. THE GUIDING LEGAL STANDARD

58. In determining whether Mr. Moore has mental retardation, the Court has been guided by the clinical definitions of mental retardation developed by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"). Each organization recognizes that mental retardation is a disability characterized by (l) "significantly subaverage" general intellectual functioning, (2) accompanied by "related" (AAMR) or "significant" (APA) limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18. AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

59. In *Atkins v Virginia* 536 U. S. 304 (2002), the Supreme Court of the United States construed and applied the Eighth Amendment - prohibiting

cruel and unusual punishment - in light of our "*evolving standards of decency*", to conclude that the execution of mentally retarded persons is excessive punishment; and the Constitution "*places a substantive restriction on the State's power to take the life*" of a mentally retarded offender. *Ford*, 477 U.S. at 405.

60. The Supreme Court, in *Atkins*, noted that neither of the two justifications for the death penalty, recognized in *Gregg v Georgia*, 428 U.S. 153, 183 (1976) – retribution, and deterrence of capital crimes by prospective offenders – may apply to mentally retarded offenders. It was stated that, "*unless the imposition of the death penalty on a mentally retarded person "measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund,* 458 U.S. at 798.

61. Retribution – "'*the interest in seeing that the offender gets his 'just deserts*"' – is a principle which the Court in *Atkins* recognized as necessarily depending upon the culpability of the offender. The court recognized the narrowing jurisprudence in which only the most deserving of execution are put to death. As such, and in light of their deficiencies which diminish their personal culpability, the Court ruled that exclusion for the mentally retarded was appropriate.

62. As the Supreme Court eminently noted, it is these very same cognitive and behavioral impairments that make the mentally retarded less morally culpable, which also make it less

likely that they can process information regarding the possibility of execution as a penalty and, as a result, are less able to regulate their conduct based upon that information.

63. The deficits of the mentally retarded – a diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control responses – are the very same traits displayed by young children; and, as with children, they are less able to grasp the morality and legality of their actions, and less able to arrest their impulses, despite being aware of the punishment, which of itself will be but a distant and unconnected threat.

64. In the Supreme Court's proportionality review, in light of evolving moral standards, it was noted that *'to the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.'* The Supreme Court reiterated their prior approach in *Ford v Wainwright*, with regard to insanity, *"we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."* 477 U.S. 399, 416-417.

65. In *Ex Parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004), the Court of Criminal Appeals held that Texas should adopt the *"AAMR three-part definition of mental retardation"* in the "Persons With Mental Retardation Act" (citing *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997) and HEALTH & SAFETY CODE §§ 591.003(13) & (16)). The Court then applied

that definition in determining whether the applicant presented sufficient evidence of mental retardation.

66. As our standards of decency evolve, so too do the standards of psychological diagnosis. The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). In 2010, the AAIDD published the 11th edition of their manual, which began to refer to mental retardation as intellectual disability. It should be stressed however, that the term 'Intellectual Disability' covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, and duration of the disability; every individual who is or was eligible for a diagnosis of mental retardation is eligible for a diagnosis of Intellectual Disability.

67. The Eleventh edition manual from the AAIDD provides the following definition of Intellectual Disability.

"Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18. The following five assumptions are essential to the application of this definition:

1. *Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.*

2. *Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.*

3. *Within an individual, limitations often coexist with strengths.*

4. *An important purpose of describing limitations is to develop a profile of needed supports*

5. *With appropriate personalized supports over a sustained period, the life functioning of the person with intellectual disability generally will improve."*

AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

68. Each component of the definition of mental retardation requires additional explanation:

69. **Limitations in Intellectual Functioning.** Whereas several jurisdictions have interpreted their appropriate statutes as intending for there to be a strict IQ score cutoff of 70 (notably, Florida[63], Kentucky[64] and Tennessee[65]), Texas is noted for its absence of any legislation which implements the Atkins decision and there is therefore no legislative bright-line for IQ scores. Instead it relies on the ruling in *Ex parte*

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[63] *Jones v State*, 966 So.2d 319, 329 (Fla. 2007) -- however, the US Supreme Court is due to decide whether such a bright-line cut off is constitutional and in accordance with *Atkins v Virignia*, 536 U.S. 304 n.3 (2002)

[64] *Bowling v Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005)

[65] *Howell v State*, 151 S.W.3d 450, 458 (Tenn. 2004)

Briseño in which the Texas Court of Criminal Appeals (TCCA) wisely decided to follow the AAMR definition of mental retardation: *"Until the Texas Legislature provides an alternative statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or section 591.003(13) [Texas Health and Safety Code] criteria in addressing Atkins mental retardation claims.*[66]*" Ex parte Briseño*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004) (as discussed above, the AAMR has changed its name to the AAIDD however, the definition for the disorder is largely identical; any changes in the definition reflect the current accepted scientific definition as compiled by the leading authorities on intellectual disabilities).

70. As recently as 2008, the Texas Court of Criminal Appeals has reaffirmed the position they took in *Briseno*, with the case of *Williams v State, "We have adopted the American Association on Mental Retardation (AAMR) definition of mental retardation for Atkins claims presented in Texas death penalty cases." Williams v. Texas*, 270 S.W.3d 113 (Tex. Crim. App. 2008)[67]

71. In 2010, the Texas federal district court in *Maldonado v Thaler* reaffirmed their wise rejection of 70 as cutoff and stated *"While Texas has not established 70 as a bright-line standard, it has not expressly adopted another score as the*

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[66] *Ex parte Briseno*,135 S.W.3d 1, 8 (Tex. Crim. App. 2004)

[67] *Williams v. State*, 270 S.W. 3d 112, 113 (Tex. Crim. App. 2008)

retardation threshold either.[68]*"* *Maldonadao v. Thaler*, 662 F. Supp. 2d 684, No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36). aff'd., 625f. 3d 229 (5th Cir. 2010).

72. Noting also, the Supreme Court's acknowledgement of the AAMR definition of intellectual function in Atkins that *"mild mental retardation is typically used to describe people with an IQ level of 50-55 to* ***approximately*** *70.*[69]*"* (Emphasis added), this Court is satisfied that the reasonable interpretation of *Atkins* and *Briseno*, requires the presentation of evidence that identifies the applicant's intellectual deficiencies as defined by the then AAMR, which is now the AAIDD.

73. The AAIDD provides the requirement that for a positive diagnosis of mental retardation, an IQ score should be *"approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations.*[70]*"*

74. The APA's DSM-IV-TR[71] requires *"significantly sub average intellectual functioning"* and states that, *"it is possible to diagnose Mental Retardation in individuals with IQs between 70*

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[68] *Maldonadao v. Thaler*, 662 F. Supp. 2d 684. No. H-07-2984 (S.D. Tex., Sept. 24, 2009) (slip copy at 36), aff'd., 625f. 3d 229 (5th Cir. 2010).

[69] *Atkins v Virginia*, 536 U.S. 304 n.3 (2002)

[70] AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010)

[71] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)

and 75 who exhibit significant deficits in adaptive behavior."

75. The APA's DSM-V raises it to 75 (an IQ of 75 places one at approximately the 5th percentile).

76. On a recently normed and widely accepted test -- such as the Weschler Scales -- administered under perfect conditions, the average IQ score for the population would be approximately 100 and one standard deviation is 15. Therefore, a score of two-standard deviations below the mean would equate to an IQ score of **approximately** 70.

The Standard Error of Measurement (SEM)

77. The AAIDD's instruction to consider *'the standard error of measurement*[72]*'* is a reference to the fact that any IQ score is subject to variability, as a function of a number of potential sources of error and, thus, a variation in scores may or may not represent the individual's actual or true level of intellectual functioning. The standard error of measurement is used to quantify this variability and provide a stated confidence interval within which the person's true score falls. The AAIDD manual states that *'for well-standardized measures of general intellectual functioning, the standard error of measurement is approximately 3-5 points*[73]*.'* The manual further advocates, '*understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision*

[72] AAIDD ref to consider the SEM

[73] AAIDD pg 36

concerning a diagnosis of ID (Intellectual Disability) *that is based, in part, on significant limitations in intellectual functioning. Both the AAIDD and the American Psychiatric Association (2000) support the best practice of reporting an IQ score with an associated confidence interval.'* The APA's DSM-IV-TR states that "*It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g. a Weschler IQ of 70 is considered to represent a range of 65-75)*".

78. **This Court joins with the inventors of IQ tests such as the Weschler, in recognizing that IQ tests are not designed to - nor are they able to - produce a single and precise figure; but rather it is appreciated that an IQ test result is best conceptualized as a range of scores.**

79. This Court has recognized the TCCA's past use and acceptance of the standard error of measurement (SEM) in *Ex parte Hearn*, in which they cited with approval *Wilson v Quarterman, "There is "a measurement error of approximately 5 points in assessing IQ," which may vary from instrument to instrument. [8] Id. Thus, any score could actually represent a score that is five points higher or five points lower than the actual IQ." Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex.Crim.App. 2010) *Wilson v. Quarterman*, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

80. In *Lizcano v State* (Unpublished), The State contended on appeal that the standard error of measurement was plus or minus five points and

therefore five points should be added to the applicant's IQ scores. However, the TCCA held that *'The State's contention[s] have very little merit... the State presented no evidence showing why the standard error of measure of five points should be added to the appellant's score rather than subtracted from it or even ignored, particularly in light of the testimony from Dr. Compton that the multiple scores below 70 increased her confidence in the validity of the scores.'*

81. This court is duly observant of the TCCA's line of reasoning in *Lizcano* and further, notes the wisdom of its reasoning:

    a. Firstly, it serves to uphold the Atkins direction that States should develop an *appropriate* way to enforce the restriction on executing the mentally retarded;

    b. Secondly, it recognizes the slippery slope which a contrary decision might have created -- namely that there would be a presumption against an applicant's status as mentally retarded when they have IQ scores above 66, rather than the accepted Atkins and AAIDD definitions;

    c. Thirdly, it is in line with directions from the AAMR manual -- which was available to the Supreme Court in Atkins -- which states, *'When the existence of intellectual limitations is uncertain or unequivocal, the decision should be made that would result in services that*

would be most advantageous to the individual.[74]'

d. Fourthly, the principle behind the *Atkins* decision is to prevent the cruel and unusual punishment of those with mental retardation. The standard error of measurement represents the scope of the range of IQ scores within which the Defendant's IQ score resides. The TCCA was right to appreciate that to execute all those with an IQ score anywhere within the range of SEM, would create an unacceptable risk of the unconstitutional killing of those suffering from mental retardation.

The Flynn Effect

82. The AAID manual also indicates the importance of including other psychometric statistical adjustments; which may have a profound effect upon the applicant's true IQ score. Of particular significance is the Flynn Effect; of which the manual states the following:

"The Flynn Effect refers to the observation (Flynn, 1984[75]*) that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time... Flynn reported that mean IQ increases about 0.33 points per year"*[76]

83. The manual advocates that best practice requires recognition of a potential Flynn Effect

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[74] AAMR Definition Manual (9th Edition) at 14.

[75] Flynn 1984 TAB A

[76] AA1DD pg 37 TAB A

when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score.

84. This Court however, recognizes that same truth which was stated in *Hall v Quarterman*,[77]: Federal courts cannot commit the ultimate decision of mental retardation to the experts alone. The Flynn Effect was neither considered by the Supreme Court in Atkins, nor by the Texas Court of Criminal Appeals in *Briseno*. The Court, in *Neal v State*, described the Flynn Effect as *'an unexamined scientific concept, [78]'* but it also said, *'this court has never specifically addressed the validity of the Flynn Effect. Nor will we attempt to do so now.' Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

85. However, at this time, the Flynn Effect had been examined by other courts. Most notable amongst them is an authority no less than the US Navy-Marine Corps Court of Criminal Appeals, in the case of *United States v Parker*,[79] The Court held *'We adopt the definition of mental retardation from the American Association on Intellectual and Developmental Disabilities as it applies to the imposition of the death penalty in the Navy and Marine Corps. In determining whether an offender meets this definition, standardized IQ scores scaled by the SEM (standard error of measurement) and the*

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[77] *Neal v. State*, 256 S.W.3d 273 (Tex. Crim. App. 2008)

[78] By which it meant that the scientific concept had not been examined by a court.

[79] *United States v. Parker*, 65 MJ 626,629-30 (N-M. Ct. Crim. App. 2007)

Flynn effect will be considered, along with evidence of the offender's adaptive functioning ability, and onset of the mental retardation before the age of 18.' United States v. Parker, 65 M.J. 626, 629-30 (N-M. Ct. Crim. App. 2007)

86. Further, all of the experts who contributed to this hearing -- both for the defense and the prosecution -- were guided in their assessments by their acceptance of the Flynn Effect as a vital tool in the diagnosis of mental retardation.

87. In light of the aforementioned, this Court will present the applicant's evidence of limitations in intellectual functioning, in three formats: as unadulterated scores; adjusted to give a bracket of scores, guided by the SEM; and adjusted to take into account of the Flynn effect at the rate of 0.33 points per year -- as advocated by the AAIDD manual.

Practice Effects

88. The AAIDD manual provides professional guidance on the practice effect: *"The practice effect refers to gains in IQ scores on test of intelligence that result from a person being retested on the same instrument... established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence"*[80]

89. Lichtenberger and Kaufman (2006)[81] state that *"Practice effects on Wechsler's scales tend to be*

[80] AAIDD pg 38

[81] Assessing Adolescent and Adult Intelligence (2006 edition)

profound, particularly on the performance scale ...The impact of retesting on test performance, whether using the WAIS-III, WAIS-R other Wechsler scales, or similar tests, needs to be internalized by researchers and clinicians alike. Researchers should also be aware of the routine and expected gains of about 2 ½ points in V-IQ [Verbal] for all ages between 16 and 89 years. They should also internalize the relatively large gain on P-IQ [Performance] for ages 16-54 (about 8 to 8 ½ points)."

90. **Limitations in Adaptive Functioning:** With respect to adaptive functioning, the AAIDD definition requires *"performance on a standardized measure of adaptive behavior that is normed on the general population including people with and without ID that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, and practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills"*. The APA definition requires that the limitations in adaptive functioning encompass at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work.

91. The Texas Court of Criminal Appeals in *Briseno*, provided seven *'other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder.'*

92. This Court is satisfied that it was the intention of the Texas Court of Criminal Appeal (TCCA) to provide guidance to those factfinders who would be presented with similar facts as in *Briseno*; where evidence had been presented that the applicant suffered from Anti-Social Personality Disorder rather than Mental Retardation. This Court is encouraged by a recent ruling from the TCCA in which it held, *'In addition to demonstrating that one has subaverage intellectual functioning and significant limitations in adaptive functioning, he or she must demonstrate that the two are linked -- the adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder. To help distinguish the two this court has set forth evidentiary factors that "fact-finders in the criminal trial might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." Briseno, 135 S. W.3d at 8' (Ex parte Yokamon Laneal Hearn, 2010*[82]*)*

93. This Court is further satisfied that it may treat the *Briseno* factors as discretionary, by the acceptance of such a position by the Fifth circuit in *Moore v Quaterman*.[83]

94. This Court has not found it necessary to directly consider these extra *Briseno* factors, as at no point during the case's 34 year history has the prosecution -- nor indeed any other interested

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[82] *Ex parte Hearn*, 310 S.W.3d 424, 426-27 (Tex. Crim. App. 2010) Wilson v. Quarterman, 2009 WL 900807 *4 (E.D.Tex. Mar. 31, 2009)

[83] *Moore v. Quarterman*, 454 F.3d 484, 498 (5th Cir.2006)

party -- ever alleged that Mr. Moore suffers from Anti-Social Personality Disorder. This Court must therefore assess Mr. Moore's adaptive deficits based entirely upon the stipulations provided in the AAIDD manual.

95. Nevertheless, despite this Court not explicitly considering the *Briseno* factors, our thorough investigation of facts based upon the AAIDD definition did consider evidence which implicated, and indeed answered, many of the *Briseno* factors.

96. **Age of Onset.** Third, with respect to the requirement that the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of 18, it is not required that there be a diagnosis of mental retardation before the person's eighteenth birthday. Rather, it is necessary only that the limitations in adaptive functioning be apparent before the age of 18, that IQ testing sometime during the person's life reliably establish an lQ of 75 or below,[84] and that there be no

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[84] The consensus among mental health professionals is that a full-scale IQ of 70 or below satisfies the requirement of significant limitations in intellectual functioning. IQ tests are considered not to be perfectly accurate, however, because of "variations in test performance, examiner's behavior, or other undetermined factors." 2002 AAMR MANUAL, at 57. Accordingly, a "standard error of measurement" must be taken into account in interpreting the IQ score obtained on any test. *Id.* The standard error of measurement is the range of IQ scores within which there is a high level of confidence that a person's "true" IQ resides. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80.

intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of eighteen.

97. Accordingly, the Court has dutifully relied on the 11th edition of the AAIDD definition of mental retardation to determine whether Mr. Moore has mental retardation.

D. DIAGNOSTIC EXPERTS

98. **Dr. Richard Garnett** has thirty-five years of professional experience working with people with mental retardation. During that time he has served as a psychologist, diagnostician, counselor, therapist, juvenile probation officer, and a consultant and trainer within the field. He holds Bachelors, Masters and Doctorate degrees in Psychology and has served on committees and Boards of Directors for local, state, and national organizations that serve or represent people with mental retardation. He is certified and licensed as a psychologist in the State of Texas. Dr. Garnett is a past president of the Texas Association on Mental Retardation, and a current member of the Mental Retardation Public Advisory Council for the Texas Department of MHMR. He was recently re-appointed by Governor Perry to the Board of Directors for the Interagency Council on Autism and Pervasive Developmental Disorders. He has interacted with hundreds of people with

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See Atkins v. Virginia, 536 U.S. at 309 ("an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition").

mental retardation, and has evaluated a number of defendants for mental retardation.

99. **Dr. Robert P. Borda** is a clinical neuropsychologist who has been in private practice since 1985. He holds a bachelor's degree from Princeton, a masters and a doctorate in Physiology from Baylor College of Medicine, and a second doctorate in Psychology from the University of Houston. He is certified and licensed as a psychologist in the State of Texas. Dr. Borda specializes in the administration of a battery of tests to people who are thought to have a mental or emotional impairment in order to determine whether the results are suggestive of neurological or psychiatric disorders. In addition to his private practice in clinical neuropsychology, Dr. Borda has also served as an expert witness for the Social Security Administration (SSA) disability claims which have been appealed. He testifies as a medical expert in the area of mental disorders, and frequently will be asked to determine if the claimant meets the criteria for mental retardation which have been established by the SSA. Dr. Borda is a member of the American Psychological Association and the National Academy of Neuropsychology, and was one of the founding members of the Houston Neuropsychological Society. He has been certified by the American Board of Professional Disability Consultants.

100. **Dr. Stephen Greenspan** is a retired professor from the University of Connecticut where he was professor of educational psychology; and he now has a clinical appointment at the University of Colorado, in the department of

psychiatry; and he also has a consulting practice around mental retardation and particularly in forensic settings such as this. Dr. Greenspan has a PhD in developmental psychology from the University of Rochester and a postdoctoral fellowship in mental retardation and developmental disabilities from UCLA Neuropsychiatric Institute in the medical school. He has held a number of academic and research positions, specifically at: George Peabody College for Teachers of Vanderbilt University, the Boys Town Center for the Study of Youth Development and the University of Nebraska, the University of Connecticut (where he remains Emeritus Professor of Educational Psychology) and the University of Colorado (where he is Clinical Professor of Psychiatry). Dr. Greenspan has also been published numerous times in the area of mental retardation, particularly around diagnostic issues in an Atkins case setting. Dr. Greenspan has co-authored four chapters of the American Association for Intellectual and Developmental Disorders (AAIDD) handbook titled *Determining Intellectual Disability for the Courts: Focus on Capital Cases*. He is also in the process having a paper published in the Journal Current Opinion in Psychiatry. It was an invited paper on the DSM-V and the paper's main focus is issues of diagnosing intellectual disability. Dr. Greenspan is also coeditor of a book titled, *What is Mental Retardation*, which is widely cited.

101. **Dr Shawanda Williams-Anderson** is neuropsychologist who specializes in Traumatic Brain Injuries and brain anomalies. Dr. Anderson

earned her bachelor's degree from Dillard University in New Orleans and also earned her master's degree from Northwestern State University. Dr. Anderson earned her doctorate in clinical psychology from Jackson State University. She has also taught at Prairie View A&M University for four years and then proceeded to work for the Mental Health Mental Retardation Authority of Harris County. Dr. Anderson is currently in private practice, in which her primary focus is Neuropsychology with adolescents, children, and the geriatric population. She is an expert in administering tests for diagnosing traumatic brain injuries.

102. **Dr Kristi Compton** is a clinical and forensic psychologist. Dr. Compton earned her M.A. and Ph.D. in clinical psychology from Wichita State University. She has been licensed to practice for 14 years in Kansas and in Texas. She has experience working with inmates at the El Dorado Correctional Facility (Maximum Security Unit) in Kansas. Presently she has a private practice in Dallas in clinical and forensic psychology. Dr. Compton specializes in mental state of the time of the offense evaluations, competency to stand trial, diminished capacity and sex offender risk assessment. She has been an expert witness over 70 times and has performed of 3,000 forensic evaluations. Dr. Compton also currently teaches forensic psychology at the University of Texas-Dallas. She has been published in the *Journal of Prevention and Intervention in the Community*, the *Journal of Drug Education*, and *Development and Psychopathology*. She is a member of the

American Psychological Association and Texas Psychological Association, as well as a board member of Dallas Challenge.

E. THE DETERMINATION OF MR. MOORE'S INTELLECTUAL FUNCTIONING

103. Mr. Moore's IQ scores establish that he has "significant limitations" in intellectual functioning or "significantly subaverage" general intellectual functioning.

104. From 1971 through 1989, Mr. Moore completed a total of seven tests of intellectual ability, several of which were administered by licensed professional psychologists.

105. In 1971, Mr. Moore obtained an IQ score of 77 on the OTIS-LENNON MENTAL ABILITIES TEST[85] [86].

106. In 1972 the Houston Independent School District (HISD) administered the SLOSSON INTELLIGENCE FOR CHILDREN on Mr. Moore and he was evaluated to have an **IQ of just 57** and a mental age of only 7.5 years -- despite being 13.1 years old.[87]

107. In 1973, Mr. Moore was administered a battery of tests by Marcelle Tucker, N.Ed., Consultant. Mr. Tucker reported that Mr. Moore obtained the following WECHSLER INTELLIGENCE SCALE FOR CHILDREN (WISC) scores:

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[85] ELEMENTARY TEST RECORD pg 000864 TAB J

[86] Iowa Test of Basic Skills: pg 000850 TAB J

[87] ELEMENTARY TEST RECORD pg 000864 TAB J

Verbal Scale IQ:	77 (borderline range)
Performance Scale IQ:	83 (dull normal range)
Full Scale IQ:	78 (borderline range)

108. As part of the test battery, Mr. Moore was administered a BENDER VISUAL MOTOR GESTALT TEST which reported his mental age as 8 years, 11 months. By dividing his mental age by his chronological age (13 years, 3 months) Dr. Garnett was able to estimate Mr. Moore's IQ to be **67**.

109. The final test in the battery was the GOODENOUGH DRAW-A-MAN TEST. It is reported that Mr. Moore was predicted to have a mental age of 9 years and 6 months. Using the same calculation as above, Dr. Garnett was able to predict Mr. Moore's IQ to be **72**.

110. In 1984 a psychological evaluation was conducted on Mr. Moore, by the unit psychologist, George B Wheat, at the request of the Psychological Screening Committee *'to assist in evaluating this death row inmate for work capable status.'* Mr. Wheat reports that *'his* [Mr. Moore's] *responses were appropriate to his 9th grade educational level and indicated IQ of 71'*. As part of his conclusion, Mr. Wheat again makes a specific reference to Mr. Moore's intelligence level: *'Considering inmate Moore's background, intellectual functioning, and' current Death Row status, he has adjusted guile well.'*

111. In 1989, Dr. Majors conducted intelligence screening on Mr. Moore using an abbreviated form of the WECHSLER ADULT INTELLIGENCE

SCALE -- REVISED (WAIS-R). Dr. Majors reported an IQ score of **71** and estimated that Mr. Moore fell within the Borderline retarded range. The following day, Mr. Moore was given the Full-Scale WAIS-R and obtained the following scores:

Verbal Scale IQ:	74
Performance Scale IQ:	76
Full Scale IQ:	74

112. Dr. Majors committed an error in scoring on the Digit Span subtest of the WAIS-R. He reported a raw score of 7, and then incorrectly put a scaled score of 5, when the correct scaled score should be 4. The correction of this error means that the scaled score for Verbal Tests is now 32, rather than 33. With reference to the WAIS-R manual, the accurate full scale score should actually be one point lower, which equates to a full scale IQ score of **73**.

113. The full scale IQ score is likely to be affected by practice effects from the test administered one day prior. The accepted adjustment to account for practice effects is discussed in more detail above -- paragraphs 48 and 49.

114. According to the information in paragraphs 48 and 59, one might reasonably have expected the Mr. Moore's scores to have increased by even more than two points; however, due to the substantial deficit in his intellectual functioning, it appears that he was unable to learn fast enough to increase his IQ score further, the following day.

115. In 2013, Dr. Compton conducted intelligence screening on Mr. Moore using the WECHSLER ADULT INTELLIGENCE SCALE-FOURTH EDITION (WAIS-IV). Dr. Compton reported an IQ score of **59**, which falls within the mentally retarded range. Mr. Moore obtained the following scale scores on the WAIS-IV:

Verbal Comprehension:	58 (Extremely Low)
Perceptual Reasoning:	73 (Borderline)
Working Memory:	66 (Extremely Low)
Processing Speed:	62 (Extremely Low)
Full Scale I.Q.:	59 (Extremely Low)

116. **Unadulterated Mean**: For the purposes of obtaining an average IQ score, the score from the abbreviated version of the 1989 WAIS-R was not included in the calculation as it measured the exact same sub-sets as the full-scale WAIS-R which was administered the following day. Therefore, the mean IQ score, calculated from Mr. Moore's six IQ scores is **70.66**

117. **Consideration of the Standard Error of Measurement:** This Court can be 95% confident that Mr. Moore's IQ scores fall within the following ranges of each test:

Otis-Lennon Mental Abilities Test:	72 – 82
Slosson Intelligence Test for Children:	52 – 62
WISC:	73 – 83
Bender Visual Motor Gestalt Test:	62 – 72
Goodenough Draw-A-Man:	67 – 77
WAIS-R:	68 – 78
WAIS-IV	56 – 64

118. **Flynn-Adjusted Scores**: It is important to be aware of the date at which the test was published and the date at which the test was administered in order to make the necessary adjustments for the Flynn effect -- as explained in paragraphs 47, 48, & 49 above. As an example of the calculation that the Court conducted: the Slosson test was published in 1964 and administered in 1972; to adjust for the Flynn effect, the proper calculation takes account of an increase in IQ of 0.33 points per year. Therefore: 57 - (8 x 0.33) = **54.36**

119. This Court has assumed that each IQ test administered was the most up to date test available at the time; if it were not then the Flynn effect would be significantly more pronounced.

Test	**Date Published**	**Date Administered**	**Flynn-Adjusted IQ**	**Flynn-Adjusted SEM**
Otis-Lennon Mental Abilities Test	4th Edition published 1967	1971	75.68	70.68 - 80.68
Slosson Intelligence Test for Children	SIT-l published 1964	1972	54.36	49.36 - 59.36
WISC	The test would have been the original 1949 version as the revised version was not published until 1974.	1973	70.08	65.08 - 75.08
Bender Visual Motor Gestalt Test	Would have used the 1938 edition as the second edition was not released until 2003	1973	55.45	50.45 - 60.45
Goodenough Draw-A-Man	Revised edition published in 1963	1973	67.7	62.7 - 72.7
WAIS-R	Published in 1981	1989	71.36	64.36 - 74.36
WAIS-IV	Published in 2008	2013	57	52 - 62

120. The mean Flynn-adjusted IQ score is **64.52** +/- 5.

121. **Dr. Garnett's Assessment of Mr. Moore's Intellectual Functioning**. Dr Garnett reviewed documents reflecting the academic, behavioral and professional records for Mr. Moore, along with reports and records from the Juvenile Probation Department, the Texas Department of Criminal Justice, Court transcripts and medical, psychological and educational resources. He conducted the review in June, 2003, in order to determine whether there was sufficient evidence to support a motion for a hearing to determine whether Mr. Moore might meet the criteria for mental retardation as defined by current psychological theory.

122. Dr. Garnett noted that Mr. Moore's records report a number of IQ scores, which are the same as listed above. He explicitly challenges the validity of the Otis-Lennon Mental Abilities test which was administered to Mr. Moore in 1971. Dr. Garnett references the fact, that records from this time indicate that Bobby's reading ability fell within the 2nd percentile -- and was a full two years below the level expected for a child of Bobby's age. Dr. Garnett, notes that: *"The test* [Otis-Lennon Mental Abilities] *is a group paper-and-pencil test of general mental abilities which requires one to read the test and answer the questions. Due to the ongoing evidence of his inability to read, this score is questionable as to its validity*[88]*."*

[88] TAB V

123. Dr. Garnett indicates that the WAIS-R tests, administered to Mr. Moore in 1989 by the Texas Department of Corrections and Justice, further underscored deficits in Mr. Moore's intellectual and mental processes.

124. Dr. Garnett concludes his section on Mr. Moore's intellectual functioning by stating that: *"It is clear that the preponderance of the indicators particularly when combined with Mr. Moore's academic record indicates substantive limitations in learning and progressing during the developmental period. Those indicators also clearly establish a pattern of significant deficits in intellectual functioning."*

125. **Dr. Borda's Assessment of Mr. Moore's Intellectual Functioning**. In 1993, Dr. Borda testified at Bobby Moore's retrial. Before giving evidence to the court, Dr. Borda had the opportunity to look at the following records: Records from the H.I.S.D. (Houston Independent Schools District); records from Hartman Middle School; records from the Texas Department of Corrections.

126. With reference to Mr. Moore's results from the WAIS-R test administered in 1989 by the TDCJ, Dr. Borda states, *"All of his scores are very uniformly within the borderline to retarded range."* He equates Mr. Moore's IQ score to a mental age of around 14 years -- Mr. Moore was 30 years old at the time of the test.

127. When asked whether Mr. Moore's IQ could potentially be within the retarded range. Dr. Borda responds by saying, *"I think there is a good possibility."*

128. Dr. Borda also made reference to the consistency of Mr. Moore's IQ scores, *"His test scores have not really differed significantly from those determined when he was in school before he was incarcerated."*

129. Based on the mental age estimates obtained from tests administered to Mr. Moore in 1973, Dr. Borda estimated that Mr. Moore's IQ in sixth grade could actually have been as low as **66**:

"This estimate is based on the average 'mental age' found in various tests done on Bobby in sixth grade, which equals 105 months. Dr. Borda then divided that number by Bobby's chronological age which gave Dr. Borda a possible IQ of 66 which, not surprisingly, is well within the retarded range."[89]

130. Despite the above statements from Dr. Borda, at the time he did not consider Mr. Moore to fulfill the clinical requirements of a diagnosis as mentally retarded. Instead, he believed that physical abuse, neglect and substance abuse may have affected his mental .status at the time of the incident[90].

131. Dr. Borda has since had the chance to review a significantly more extensive collection of documents concerning Mr. Moore. They are broadly the same documents which Dr. Garnett used to conduct his review. **After reviewing these documents, Dr. Borda expressed his clinical opinion that Mr. Moore's deficits**

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[89] Memo from Kristi Franklin Hyatt's meeting with Dr. Robert P Borda pg 5863 TAB M

[90] Memorandum April 13, 1993. TAB M

satisfy both the AAIDD and DSM-IV criteria for a diagnosis of mental retardation / intellectual disability.

132. Dr. Borda met with Mr. Moore in December 2013 and administered a function of higher frontal lobe test. It is a front lobe test in which the doctor places 50 tinkertoys on the table in front of the patient or applicant or claimant and the instructions are very simple. The test directs one to "make something." The patient can take as long as they want but the patient has at least ten minutes. This is an unstructured test designed to test motor visual skills, spatial appreciation, three-dimensional understandings and shapes, visual acuity and general intelligence. It also tests one's ability to plan ahead. A score below 7 generally equates with very poor likelihood of gainful employment and poor ability to live independently. Mr. Moore achieved a score of 1, the lowest score Dr. Borda has ever recorded.

133. Practice effects would be minimal for Mr. Moore as it had been many years since he was tested.

134. **Dr. Greenspan's Assessment of Mr. Moore's Intellectual Functioning.**

a. Flynn Effect The Flynn effect absolutely should be applied, not just if a test is ten years old but even if it's a brand-new test. The date a test is published, it's actually two years out of date in terms of the norms because there's about an average of a two-year period between the norming process, which is rather extensive, and then the publication process,

which is also about two years, so that every test is out of date the day it's published and a Flynn Effect should always be applied. When corrected for Flynn Effect, the scores that Mr. Moore received were 70 and 71. So that would be within the range of the DSM-IV and well within the range under DSM-V.

b. Standard Error of Measurement the standard error, as Dr. Borda pointed out, is 5 points standard of error. So that means any score of under 75 would qualify.

c. Consistency of Scores Mr. Moore has never tested anywhere near the average range. Mr. Moore would have had every incentive to test as high as possible as a child.

135. **Dr Williams-Anderson's Assessment of Mr Moore's Intellectual Functioning.**

Past IQ

a. Mr. Moore consistently scored in the deficit range, even when his first formal testing did not occur until he was 13 years old (1973), which is about the same time he left school.

b. If tested when deficits were first apparent (approximately age of 6/1st grade), his IQ would very likely have been below the reported standard score of 70.

c. In 1989 Mr. Moore obtained a full scale IQ of 71. This is consistent with his previous scores, suggesting that time and experience while incarcerated did not bring about new learning for Mr. Moore.

d. Current: Dr. Williams-Anderson tested and evaluated Mr. Moore for a period of 11/22/2013 to 12/19/2013.

   B. Mini-Metal Status Exam (MMSE)

   C. Rey Complex Figure Test (RCFT)

   D. Symbol Digit Modalities Test (SDMT)

   E. Trails A&B

   F. Hooper Visual Organization Test (HVOT)

   G. Controlled Oral Word Association (COWA)

   H. California Verbal Learning Test-II (CVLT-II)

   I. Delis-Kaplan Executive Functioning System (DKEFS)

   J. Wide Range Achievement Test-4th edition (WRAT-4)-Math Subtest

   K. Wechsler Adult Intelligence Test-IV WAIS-IV-Math-subtest

e. Test findings from the current evaluation indicated slowed processing speed, difficulty with reasoning and judgment, and deficits in verbal ability that cannot be solely attributable to a limited fund of knowledge.

f. The severity and characterization of the head trauma received by Mr. Moore as a child likely worsened intellectual deficits.

g. On the first of three sessions that took place at the Polunksy Unit on 11/22/2013, which consisted of mostly neuropsychological tests, Dr. Williams-Anderson found is that Mr. Moore's processing speed was slowed, although

he had intact memory, and just from observation and speaking with him for about an hour and a half, she noticed that there were some possible deficits in language and processing speed. On formal tests there were also problems with reasoning and judgment.

h. Dr. Williams-Anderson further explained at the hearing on l/3/2014, that processing speed is how fast the brain fires. This is the area where she saw the most deficits: "Mr. Moore's processing speed fell in what we call a deficit range, low. Mr. Moore's T score was a 25 that I have listed here, where 50 is the mean and the standard deviation is 10. So. 40 would be low average and then 30 would be low and then he's 25. So he's more than two standard deviations below the mean".

i. Dr. Williams-Anderson found that Mr. Moore had some difficulty with verbal fluency and word-finding. Mr. Moore's language scores if corrected for his lack of education and his grade attainment, his score is then at the 11th percentile and in the law average range.

j. In the executive function tests that Dr. Williams-Anderson administered Mr. Moore's scores fell in the deficient range, and are indicative of deficits that would require formal interventions.

k. In Dr. Williams-Anderson's mathematical tests Mr. Moore demonstrated an ability to perform simple addition. Yet on the WAIS-IV, his scores fell within the 4th percentile and is indicative of moderately impaired ability. On the WRAT-4 Mr. Moore's score is the

equivalent of a third grade level of achievement. That score is classified as falling into the moderate to severe range when compared to the normative sample.

136. **Dr. Compton**

a. Dr. Compton met with Mr. Moore on 1/l/2014, and administered a Wechsler Adult Intelligence Scale, Fourth Edition; it's the most current one, up to date. It was released in 2008. She also gave Mr. Moore him selected subtests of what's called the Wechsler Memory Scales, Fourth Edition.

b. Dr. Compton also administered what is called the Test of Memory Malingering, which is defined as an effort test, and Mr. Moore was administered the Wide Range Achievement Test, Fourth Edition. Then she administered the Texas Functional Living Scales, which is an adaptive functioning measure.

c. Mr. Moore scored a standard score of 59 on the WAIS-IV, which was then Flynn adjusted to 57. This is consistent with Mr. Moore's Slossen score that was achieve at age 13.

F. THE ASSESSMENT OF MR. MOORE'S ADAPTIVE BEHAVIOR

137. According to the AAIDD, limitations in adaptive behavior can be determined by using standardized tests that are normed on the general population, which includes people with and without mental retardation. The AAIDD manual also advocates assessment through other sources of adaptive behavior information such as, *'direct observation, review of school*

records, medical records, and previous psychological evaluations; or interviews with individuals who know the person and have had the opportunity to observe the person in the community but may not be able to provide a comprehensive report regarding the individual's adaptive behavior in order to complete a standardized adaptive behavior scale.' 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 48]

138. A "significant" limitation is established by a score of two standard deviations below the mean in one of the three adaptive-behavior skill areas described in the 2010 edition of the AAMR MANUAL. [2010 AAIDD MANUAL at 43]

139. The Court also finds as follows:

The first adaptive behavior skill-area is conceptual.

140. Mr. Moore has the following deficits in the conceptual area:

141. **Language.** Mr. Moore, as a child, was quite apparently very different from other children.

a. He didn't know how to communicate with people[91], and when he talked, his severe speech impediment was very obvious[92].

b. Mr. Moore's younger sister, Colleen McNeese, recalls how their father, Ernest, would often beat Bobby because he wouldn't talk: *"He would call Bobby's name and Bobby just stand and look at him. And sometimes he just didn't*

[91] Interview with BM TAB C

[92] Interview with Clara Jean Baker TAB L

understand what he was saying to him so he didn't know how to respond."[93]

c. This is corroborated by Mr Moore's cousin, Parvena Williams, who remembers that Mr Moore was *"quiet"* and that *"His dad was always cruel to him for his poor grades and slow speech."*[94]

d. Mr. Moore's childhood friend, Larry Baker, stated, *"Bobby could not follow simple instructions...He had trouble verbally with people."*[95]

e. Indeed, Mr. Moore's only friend at school was an elder boy who was both deaf and dumb.[96]

142. **Reading and writing**. Throughout Mr. Moore's schooling he was kept separate from the rest of the class because he couldn't keep up with the work.

a. Instead of doing reading, he was allowed to draw pictures instead.[97]

b. Mr Moore's cousin, Parvena, states that *"In third grade I did all of Bobby's schoolwork... He really could not read when we were in 3rd grade."*[98]

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[93] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[94] Parvena Williams Affidavit

[95] Larry Baker Affidavit

[96] Interview with BM TAB C

[97] Interview with BM TAB C

[98] Parvena Williams Affidavit

c. Mr. Moore's younger brother, Lonnie Moore, also remembers that Mr. Moore *"Could not do his own schoolwork"* and *"Bobby could not read the sports page"*[99]

d. Mr. Moore's elder brother, Jonny B Moore, remembers that their father would tell Mr. Moore that he (Mr. Moore) couldn't read and that he was stupid[100].

e. It seems that it was because of Mr. Moore's slowness and his inability to read or write, that his father would pick on him by threatening him and beating him more than any of the other children: *"Bobby was always slow in school and my dad would always pick on him about that. He would constantly yell at Bobby that he was dumb or stupid."*[101]

f. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[102]

143. Academics in general. As discussed in the above paragraph, teaching staff who came into contact with Mr. Moore noticed that he was much slower than the other children. According to Colleen: *"They're [the teachers] always talking to each other about it, him, in the halls*

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[99] Lonnie Moore Affidavit

[100] Meeting with Jonny B Moore 05-28-00. pg. 7687 TAB Q

[101] Affidavit of Colleen D. McNese TAB G

[102] Interview with Bobby Moore TAB C

talking, and they were asking if he was retarded."[103]

144. In 1966, he was assessed with the Metropolitan Readiness Test and was found to be functioning at the 9th percentile nationally.[104] Further results that same year confirmed Mr. Moore's below average intellectual functioning. When he was given the Draw-A-Man test, results indicated that he was *"immature"* compared to his peers.

145. Mr. Moore failed first grade twice[105]. During the repeated year, comments on his student records show that he was below average in his ability to respond *"promptly and willingly"* to directions and it is indicated that he was not self-reliant. Further, Mr. Moore had a *"below average ability to discipline himself"* and was below average in how *"attentive"* he is.[106]

146. In 1968, despite having failed first grade twice, Mr. Moore was socially promoted to second grade, in order to keep him with children of a similar age[107]. His grade card indicates that he still lacked self-discipline and had below average attention[108].

147. In 1969 the trend continued and Mr. Moore failed second grade and is socially promoted

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[103] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[104] ELEMENTARY TEST RECORD pg 000864 TAB J

[105] Houston Public Schools Elementary pg. 000862 TAB J

[106] Elementary School Report Card pg 000789 TAB J

[107] Houston Public Schools Elementary pg. 000862 TAB J

[108] Elementary School Report Card pg 000789 TAB J

again to third grade[109]. Teacher's remarks from that year indicated that Mr. Moore attended a special education program in the summer, was recommended for 'IPP LRP' and was also referred to a counselor[110]. An Iowa Test of Basic Skills puts his battery composite score within the 12th percentile nationally[111].

148. In 1970, Mr. Moore failed 3rd grade and is once again socially promoted to fourth grade[112]. The results of an Iowa Test of Basic Skills, administered in 1971, confirmed that his intellectual functioning is significantly below average: his scores placed him within the 5th percentile nationally[113]. The provided Grade Equivalent is third grade, and when one considers that Bobby was held back a year, one can see that he was performing at a level **two years** below his chronological age.

149. In 1971, Mr. Moore fails 4th grade but is socially promoted to 5th grade[114], after having spent 22 days at a summer-school. That same year, when Mr. Moore was now aged 12, he obtained an IQ score of 77 on the Otis-Lennon Mental Abilities Test[115] [116].

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[109] Houston Public Schools Elementary pg. 000862 TAB J

[110] Houston Public Schools Elementary pg. 000862 TAB J

[111] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

[112] Houston Public Schools Elementary pg. 000862 TAB J

[113] Iowa Test of Basic Skills: pg 000850 TAB J

[114] Houston Public. Schools Elementary pg. 000862 TAB J

[115] ELEMENTARY TEST RECORD pg 000864 TAB J

[116] Iowa Test of Basic Skills: pg 000850 TAB J

150. In 1972, notes from the Houston Independent School District (HISD) indicate that Mr. Moore *"needs special placement"*[117]. His Iowa Test of Basic Skills score followed the past trend and placed him in the 9th percentile nationally.[118] That same year the HISD administered the Slosson Intelligence Test for Children on Mr. Moore and he was evaluated to have an IQ of just 57 and a mental age of only 7.5 years -- despite being 13.1 years old.[119]

151. After failing the 5th grade and being socially promoted to 6th grade, the school requested that Mr. Moore's parents agree to have him considered for an evaluation of his educational needs.[120] They agreed, and on the 24th of January 1973 Mr. Moore was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[121]. The report states that the reason for referral is: *"Academic level for below grade level; withdrawn; takes no part in class unless called on"* The *'Relevant Background Information'* section confirms his poor academic performance: *"Repeated first grade -- all social promotions since that time."* They evaluated Mr. Moore's intellectual functioning by administering the Wechsler Intelligence Scale for Children (WISC) and he

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[117] pg 000853 TAB J

[118] TAB J

[119] ELEMENTARY TEST RECORD pg 000864 TAB J

[120] Parent Request pg 000857 TAB J

[121] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

achieved a Full Scale IQ of 78 which equates to a Flynn-adjusted IQ score of **70.08**.

152. The evaluation also aimed to measure his mental age. Mr. Moore's actual age was 13 but a Bender Gestalt test calculated his mental age to be just 8 years and 11 months (107 months total). And a Goodenough Draw-A-Man test calculated his maturity to be just 9 years and 6 months (114 months total).[122]

153. The psychological evaluation continues by recommending that Mr. Moore be placed in the Precision Learning Center for reading and possibly for math: despite being in sixth grade, Bobby is only reading with 84% accuracy on second grade level -- meaning he is five years below his chronological age: and although he knows addition, he does not seem to realize that subtraction is the reverse of addition. Perhaps most tellingly, **the report recommends that teachers conduct daily drills with Mr. Moore -- now aged 13 -- on such basic things as days of the week, months of the year, seasons, standards of measure and telling time.**

154. That same year, Mr. Moore's Iowa Test score composite fell within the 5th percentile nationally: 95% of the test population would have done better than him[123]. Colleen McNeese, Mr. Moore's younger sister, recalls of this time: *"We were on the seventh grade level and they would give him like third grade work to do. And*

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[122] HISD Pyschological Evaluation TAB J

[123] IOWA TEST OF BASIC SKILLS pg. 000875 TAB J

I would have to stay after so I could help him"[124] Indeed, despite being younger than Mr. Moore, Colleen had helped him in class for at least a year and a half. *"He wouldn't participate in anything. It was because he didn't understand but they [teachers] didn't know that he couldn't read. So he asked me if I can come in my class and sit by me so that I can relate to him."*[125] Mr Moore was also helped by his cousin, Parvena Williams, who remembers that, *"In third grade I did all of Bobby's schoolwork. The teacher finally separated us because she knew I was helping him. He could not do the work on his own without help."*[126]

155. In 1974, Mr. Moore failed seventh grade and is socially promoted to eighth grade.[127]

156. In 1975, Mr. Moore failed every subject in eighth grade except for science -- in which he gained a grade of 'C' -- but once again he is socially promoted to ninth grade.[128]

157. In 1976, Mr. Moore failed every single subject in ninth grade[129] and never returned to school[130].

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[124] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[125] Transcript from Punishment Proceedings 2001: Colleen McNeese TAB R

[126] Parvena Williams Affidavit

[127] Permanent Records Grade 7-9 pg. 000859 TAB J

[128] Permanent Records Grade 7-9 pg. 000859 TAB J

[129] Permanent Records Grade 7-9 pg. 000859 TAB J

[130] Permanent Record Grades 9-12. pg 00872 TAB J

158. Mr. Moore recalls that he was a slow learner who *"could not read or write when he left school."*[131] Indeed, his family point out that Mr. Moore did not fail school because he did not try, or because he lacked motivation; *"Bobby always got low report cards and it upset him because he really tried."* He would sit on the front porch with his siblings and try to do his homework but *"Bobby would get so frustrated"*[132].

159. This Court has placed substantial weight in Mr. Moore's well-documented academic limitations, and recognizes it as confirming that Mr. Moore's true intellectual limitations are best represented by IQ scores towards the lower end of the confidence interval.

160. This Court has noted the frequency of Mr. Moore's achieved grades, which are presented below:

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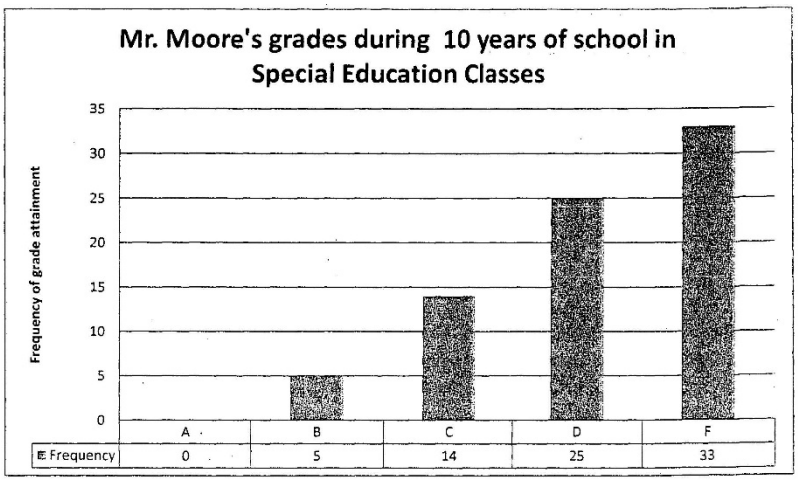
[131] Interview with Bobby Moore TAB C

[132] Interview with Clara Jean Baker pg 7655 TAB L



2. **The second adaptive behavior skill area is social.**

161. **Interpersonal relations.**

a. In 1965, when Mr. Moore was only six years old, after enrolling in Kindergarten at Atherton Elementary School, a school medical examination (at Atherton Elementary School) highlighted Mr. Moore's poor nutritional status and also stated of him: *"[The child is very] withdrawn -- psychological testing recommended. Referred to counselor."*[133] Comments regarding that same medical examination state: *"Child is very withdrawn -- maybe retarded but most likely emotional problems."*[134]

b. On the 24th of January 1973 Bobby was given a psychological evaluation by Hollis King Ph.D and Marcelle Tucker[135]. The report states that the reason for referral is: *"Academic level for*

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[133] pg 000853 TAB J

[134] pg. 000868 TAB J

[135] HISD Center for Human Resources Development pg 000855 & 000856 TAB J

below grade level; withdrawn; takes no part in class unless called on"

c. Mr. Moore remembers that *"it always seemed like people disliked me"*. And so the teacher singled him out for special treatment and put his desk alongside hers to stop the other children teasing him.[136]

162. **Following rules.** His report card from this period indicates that he is below average in the following categories: *'Disciplines Himself'*, *'Is Courteous'*, *'Respects Property Rights'*, *'Is Attentive,' 'Follows Directions'*, '*Participates Well in Class Activities'*, and *'Does Neat and Orderly Work'*. This equates to below-average marks in seven out of 12 categories, as well as a *'General Conduct Grade'* of *'Unsatisfactory'*[137].

3. **The third adaptive behavior skill area is practical.**

163. In consideration of the fact that Mr. Moore has been incarcerated for nearly all of his adult life, this Court is left somewhat restricted when seeking evidence of his adaptive behavior, especially within the practical realm.

164. **Activities of daily living – driving.** Mr. Moore never held a driving license, nor learnt to drive.

165. **Occupational skills.** After he left school, Mr. Moore never held a real job; he wanted to get a job working in a hospital so he "*got a man*

[136] Interview with BM pg. 7548 TAB C

[137] Elementary School Report Card pg 000789 TAB J

outside to fill out the form but got too scared to go in"[138]

166. **Maintaining safe environments.** The Moore household were all very impoverished and food was often lacking. One may imagine that anyone in such a desperate environment might be driven to extremes, such as eating out of garbage cans. But what makes Mr. Moore's actions different from just anyone's is that despite being treated for ptomaine poisoning, Bobby continued to eat from neighbor's garbage cans and became sick again.[139] A non-retarded individual would have learned that eating the garbage had caused them to be ill and would have attempted to find an alternative food-source.

167. **Living independently.**

a. Lonnie Moore, Bobby's brother, recalls that Bobby was *"always a follower"*[140]

b. Larry Baker, who knew Bobby from his early childhood, remembers that *"Bobby always allowed those around him to make decisions for him,* [he was] *impressionable"*.[141]

c. Larry also recalled that *"He was easily led and very impressionable. He could be distracted or misled easily. We always watched out for him because he was simple. He could not be left on*

[138] pg 802 TAB N and TAB C

[139] Affidavit of Colleen D. McNese TAB G

[140] Interview with Lonnie Moore TAB H

[141] Interview with Larry Baker pg 7695 TAB P

his own. People would take advantage if we did not watch out for him."[142]

d. Bobby lacks self-direction and this trait was clearly apparent: *"Bobby wasn't the one to decide things...he just went along with the program"*[143]

e. Interviews with Clara Jean Baker[144] and Marion Moore[145] confirm that Bobby lacked self-direction. He would never come to the family or to friends for assistance with problems. Even when he was kicked out of the house, he slept on the streets despite having friends and family who could have helped him.[146]

f. **There is no evidence that Mr. Moore was able to live independently of his family, even though he earned money through menial jobs**. Even after he was expelled from the family home he immediately sought the protection of someone he described as his 'playmama'.

g. This inability to live independently is also an adaptive deficit.

h. Since being incarcerated, Mr. Moore has been described by guards as a *'model prisoner'*. The very fact that he has adapted to life inside a prison so well, is almost certainly due to its

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[142] Larry Baker Affidavit

[143] Interview with Clara Jean Baker TAB L

[144] Affidavit of Clara Jean Baker TAB G

[145] Meeting with Marion Moore 05/27/00 pg 7664 TAB I

[146] Meeting BM 05/25/00 pg 7553 TAB C

highly regimented routine, which leaves little room for independent decision-making; all his food and shelter is provided for him and he doesn't have to maintain a job, nor be concerned with activities such as paying bills, that would in all likelihood perplex him.

168. This Court, therefore, finds that these records do not indicate a competency in Mr. Moore's intelligence or mathematical abilities for the purposes of disproving intellectual disability. It is also the view of this Court that these records are not appropriate tools by which to exclude intellectual disability in capital murder cases.

169. This Court finds that, in regards to the commissary records, although the actual goods delivered always met or nearly met the $85 spending limit, a closer examination of the records suggest this is not a valid indication of Mr. Moore's intelligence, or mathematical acumen. Throughout the 24 commissary order slips in evidence, which are the slips Mr. Moore fills out to request goods, there are numerous mathematical and spelling errors. Furthermore, the goods requested often add up to well over that which Mr. Moore is allowed to spend. For example, on the slip dated 12/19/2012 Mr. Moore requested $196.50 worth of goods -- a three-figure total seen in no fewer than 15 of the 24 slips. In fact only twice was Mr. Moore's request under the $85 spend limit (4/1/2013 and 7/5/2013). Mr. Moore has been using this form for at least 14 years, and on the 24 slips in evidence he orders almost the same thing every time. Reflecting on the evidence heard from Mr LeBanc, this Court finds that it is

impossible to discount whether or not Mr. Moore receives or previously received help filling out his forms; or whether he multiples the numbers, or simply spends all night adding the numbers. However, this Court does find that there is evidence to show that Mr. Moore has sufficient time to create the calculations on the order form out of sight of any Commissary Officer, and which on any view, cannot be considered complicated numerical calculations. And yet, despite the basic math involved and simple, unchanging spend limit, the excessive-ordering reflects a lack of understanding of these ordinary concepts.

170. Dr. Garnett's Assessment of Mr. Moore's Adaptive Functioning. Dr. Garnett states that:

a. *"In addition to having these various reported IQ scores supporting a diagnosis of Mental Retardation, Mr. Moore has exhibited significant limitations in adaptive behavior in several areas of his life for as long as records have been retrieved. There are sufficient historical references to his inability to live effectively in society and to manifest a variety of conceptual and practical skills.*

b. *"From both the perspective of the American Association on Mental Retardation and the American Psychiatric Association, Mr. Moore meets or exceeds threshold diagnostic criteria in the area of adaptive behavior deficit... From the standpoint of the American Association on Mental Retardation, 10th Edition 2002 Manual. Mr. Moore has historically manifested deficits in the "Social Adaptive Skill Area" in*

general, and in specific areas of both the Conceptual and Practical Realms.

c. *"The requirements of the AAMR Manual require significant deficits in one of the three major areas of adaptive skills. For Mr. Moore, this has primarily been in the Social Adaptive Behavior Skills Area, which includes problems in areas such as interpersonal, responsibility, naiveté, follows rules, and obeys laws. Specific deficits have also been historically recorded in self-direction, occupational skills, use of community and maintaining a safe environment. It could be argued that he has also manifested deficits in functional academics and health and safety.* ***This pervasive pattern of deficit clearly exceeds criteria.***

d. *"From the standpoint of the Diagnostic and Statistical Manual of the American Psychiatric Association -- Fourth Addition (DSM-IV), Mr. Moore has historically manifested deficits in "adaptive skill areas" such as social and interpersonal skills, use of community resources, self-direction, and work. The requirement for a diagnosis of mental retardation, self-direction, and work.*

e. ***The requirement for a diagnosis of Mental Retardation in the DSM-IV requires significant deficits in only two of eleven adaptive behavior areas. Mr. Moore has exceeded that threshold, concurrent with a variety of IQ scores within the range of diagnosis, over virtually his entire life."***

171. Dr. Garnett concludes his report by stating: ***"As a result of this assessment of the***

material submitted for review, it is my professional opinion that there is sufficient evidence to suggest that Mr. Moore has mental retardation…"

172. Dr. Borda's Assessment of Mr. Moore's Adaptive Functioning Dr. Borda. States:

a. "From the records which I reviewed recently, it appears that Mr. Moore would satisfy all of these definitions of Intellectual Disability, including those of the APA, the AAIDD, and the SSA. He clearly had marked deficits in adaptive functioning."[147]

b. "Examples of this include his being raised in a physically-and emotionally-abusive family environment, yet never seeking any outside intervention. When he would be "kicked out of the house", he would sleep on neighborhood porches or in cars rather than asking a neighbor or relative for assistance, When he finally did move out of his parent's home permanently, he "lived on the streets" for most of his teenage years; he sometimes was permitted to sleep in a back room of a pool hall in exchange for performing simple chores…"[148]

c. "His family was *very* poor and he often went without eating; Mr. Moore likely had severe nutritional deficits when he was a child, as well as numerous head injuries (from his father, from being beaten by others his age, and by jumping from a moving train) and both likely contributed to his intellectual

[147] Borda Affidavit p. 3

[148] Borda Affidavit n. 3

deficiencies. By testimony from family members, Mr. Moore would eat from garbage cans when he was famished even though he had contracted food poisoning in the past from this behavior; this shows that he was not able to learn from past experiences."[149]

d. "He also had communication deficits, with speech impediment and difficulty grasping what others said. He was a very poor student, failed the first grade twice. And apparently only received "social promotions" in school after that point. He also was noted in school records to exhibit attentional deficits. After years of academic failure, Mr. Moore's school recommended when he was 13 years of age that his teachers conduct daily drills on such basic things as days of the week, months of the year, seasons, standards of measure, and telling time. This suggests that his intellectual limitations were profound."[150]

e. "He was reported by family members to "always be a follower", and relied on others to make decisions for him. He was described by teachers as being "very withdrawn", so it is obvious that he had very limited social skills as well as deficits in adaptive functioning."[151]

173. Dr. Greenspan's Assessment of Mr. Moore's Adaptive Functioning

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[149] Borda Affidavit p.3

[150] Borda Affidavit p.3

[151] Borda Affidavit p.3

a. Dr. Greenspan noted evidence of adaptive deficits across a broad spectrum.

174. Dr. Williams-Anderson's Assessment of Mr. Moore's Adaptive Functioning

Dr. Williams-Anderson stated in her report:

a. "The current evaluation, including records review and a family interview, was conducted to assess domains of cognitive functioning. It seems that Bobby exhibited developmental and intellectual delays early in his life that were significant enough for him [Mr. Moore] to require consistent monitoring and elicit help from his teachers."

b. "These deficits were demonstrated much prior to the age of 18, which would satisfy criteria for formal diagnosis of Intellectual and Developmental Disability (IDD, formerly referred to as Mental Retardation."

c. "Adaptively, he [Mr. Moore] had some abilities as they relate to self-care, motor skills, and daily living."

d. "He [Mr. Moore] had equally as many deficits in the adaptive domains which primarily fall under socialization, communication, and cognition."

e. "Thus, there is historic information that accounts for Bobby's intellectual, developmental, and adaptive deficits; and indicates that he [Mr. Moore] met full criteria for a diagnosis of mental retardation as a child."

175. Dr. Compton's Assessment of Mr. Moore's Adaptive Functioning (From her report

a. Mr. Moore's accrued academic skills while incarcerated are a string indicator of his ability to learn and process information, which is not consistent with a diagnosis of mental retardation.

b. His ability to compose prose within the early college level exceeds the usual grade level attainment of those in the upper bounds of mild retardation.

c. Mr. Moore showed evidence of adaptive functioning skills during the commission of the offense and after the offense, which questions the validity of a mental retardation diagnosis.

Findings of Fact regarding Adaptive Behavior Deficit

176. This Court recognizes that the AAIDD manual requires *'performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills.*[152]'

177. This Court is satisfied that sufficient evidence has been provided to demonstrate that Mr. Moore's adaptive behavior in at least one of the skill-sets is approximately two standard deviations below the mean.

G. ONSET DURING THE DEVELOPMENTAL PERIOD.

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[152] AATDD pg 43

178. There is ample of evidence that Mr. Moore suffered from significant deficits in adaptive functioning -- the outward manifestations of a significant limitation in intellectual functioning -- before the age of 18.

179. An extraordinary number of the risk factors commonly associated with mental retardation were present prior to Mr. Moore's 18th birthday. Moreover, no evidence was presented that established an intervening cause after the age of 18 that could account for Mr. Moore's substandard intellectual functioning. As noted above, the adaptive behavior deficits were certainly apparent in Mr. Moore before the age of 18.

H. DETERMINATION CONCERNING MENTAL RETARDATION

180. Mr. Moore has mental retardation. His mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the AAMR, and the decisions of *Atkins* and *Briseno*.

181. The finding of retardation is further supported by the determination of three highly qualified expert witnesses -- Dr. Garnett, Dr. Borda, Dr. McGrew, and Dr. Williams-Anderson -- that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning.

182. Taking all of this into account, all three of the expert witnesses have credibly opined that Mr.

Moore meets the diagnostic criteria for mental retardation intellectual functioning.

II. CONCLUSION OF LAW

183. This court finds that Mr. Moore, by a preponderance of the evidence, has established that he meets the definition of mental retardation under the current guidelines of the AAIDD, under both the DSM-IV and DSM-V, and under the prevailing legal standards per *Atkins v Virginia*, 536 U.S. 304 (2002). The record is replete with clear indications from his early childhood risk factors, sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded.

184. Mr. Moore's evidence of improvement in elementary school level reading and writing after three decades in a controlled environment on death row are not sufficient evidence to counter the large historical record and the testimony at the hearing. The fact that he was able to improve and showed diligent effort is indicative of evolution in his character, not in a change in his limitation.

185. This court also notes that there such strong evidence of Mr. Moore's disability that is takes the unusual step of recommending to the Court of Criminal Appeals, that should it disagree with this courts review of the evidence that there is still more than enough to justify a jury being given the question of his retarding of the special issues under a new punishment proceeding. This case was decided post-*Penry* I. but before *Atkins v. Virginia*, thus it falls under

an unusual legal cusp that would merit another proceeding to determine this issue if the Court of Criminal appeals disagrees with this courts findings.

186. It is therefore the recommendation of this court that relief be GRANTED, and that the Court of Criminal Appeals either reform the judgment of death to one of life in prison under *Atkins v. Virginia*, 536 U.S. 304 (2002); in the alternative that the Court of Criminal Appeals remand this matter for new trial on punishment so that a Harris County jury may determine Mr. Moore's mental retardation under the special issues.

Signed this 6 day of Feb 2014

/s/_____
Judge Susan Brown
Judge, 185th Judicial District Courts
Houston, Texas

The clerk shall transmit a copy of this finding to the CCA upon the date of this order.