

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMAAL HOWARD,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

**THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR OCTOBER 7, 2026**

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Capital Case

Question Presented

In *Atkins v. Virginia*, *Hall v. Florida*, and *Moore v. Texas*, this Court held that a State's determination of whether a prisoner is intellectually disabled must be informed by the medical community's current diagnostic framework. The current framework no longer requires—as it once did—that person's adaptive deficits be “directly related” to his intellectual impairment; in addition, the current framework now recognizes that the developmental period extends to age 22. These two significant changes to the diagnostic criteria for assessing intellectual disability lead to the following question:

When an inmate's *Atkins* claim was rejected under obsolete diagnostic criteria but the inmate returns to the state court with evidence demonstrating he satisfies the existing criteria, do this Court's precedents or the Eighth Amendment require that the inmate's claim of intellectual disability be newly assessed in light of currently prevailing clinical standards?

**List of Parties and
Corporate Disclosure Statement**

All parties to the proceeding in the Texas Court of Criminal Appeals are listed in the caption.

Petitioner is not a corporate entity.

**List of All Directly Related
Proceedings in State and Federal Courts**

Trial:

State v. Jamaal Howard, No. 15,114-B (356th Dist. Ct., Hardin County, Tex. 2001)

Direct appeal:

Jamaal Howard v. State, No. AP-74,138, 153 S.W.3d 382 (Tex. Crim. App. Oct. 13, 2004)

Jamaal Howard v. Texas, No. 04-10093, 546 U.S. 1214 (2006)

State habeas proceedings:

Ex parte Jamaal Howard, No. WR-77,906-01, 2012 WL 6200688 (Tex. Crim. App. Dec. 12, 2012)

Ex parte Jamaal Howard, No. WR-77,906-02 (Tex. Crim. App. Oct. 5, 2026)

Federal habeas proceedings:

Jamaal Howard v. Director, TDCJ-CID, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. Sept. 20, 2019)

Jamaal Howard v. Lorie Davis, No. 19-70018, 959 F.3d 168 (5th Cir. 2020)

Jamaal Howard v. Lumpkin, No. 20-5996 (U.S. Jan. 11, 2021)

In re Jamaal Howard, No. 26-40605 (5th Cir. Oct. 5, 2026)

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Appendix B	Subsequent Application for Post-Conviction Writ of Habeas Corpus, filed September 28, 2026, with Exhibits 1–7

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Introduction

Jamaal Howard is scheduled to be executed on Wednesday, October 7, 2026. Two days before that date, the Texas Court of Criminal Appeals (“CCA”) dismissed, without explanation, his claim that he is intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002).

This Court has already recognized the significance of changes in clinical standards for prisoners raising *Atkins* claims. See *Guerrero v. Johnson*, No. 25-1003 (U.S. cert. granted June 15, 2026). Although *Guerrero* concerns a federal statute, not the Eighth Amendment question presented here, it reflects the Court’s interest in the effect of changing clinical standards on *Atkins* claims.

No court has ever decided whether Howard is intellectually disabled under the clinical standards that govern today. The CCA rejected Howard’s *Atkins* claim on direct appeal in 2004 because the evidence was “not sufficiently developed to establish that appellant was” intellectually disabled “under the guidelines we set in *Briseño*.” *Howard v. State*, 153 S.W.3d 382, 386–87 (Tex. Crim. App. 2004). The *Briseño* guidelines were the judge-made factors this Court rejected in *Moore v. Texas*, 581 U.S. 1 (2017). The CCA denied the claim again in 2012, adopting findings that attributed Howard’s adaptive deficits to attention-deficit disorder rather than intellectual disability. And in 2017, when an expert retained by Howard’s federal habeas counsel found significant deficits in Howard’s adaptive behavior beginning around the time he was fifteen, the expert attributed those deficits to the severe mental illness that emerged at about the same time, because the diagnostic manual then in force required that adaptive deficits be “directly related” to intellectual impairment.

That nexus requirement no longer exists. The 2022 text revision of the DSM-5 removed it, and the CCA itself has acknowledged the change. *Ex parte Mays*, 686 S.W.3d 745, 748 n.5 (Tex. Crim. App. 2024). The American Association on Intellectual and Developmental Disabilities (“AAIDD”) now recognizes that the developmental period extends until a person reaches age 22. That means sworn testimony from Howard’s 2001 trial, describing his adaptive deficits when he was 20 and 21, now describes deficits within the developmental period. Howard’s full-scale IQ is 74. Measured against the clinical framework that governs today, Howard made far more than the threshold showing required to have his claim heard. Indeed, the factual details of the record showing that Howard satisfies the current clinical criteria for diagnosing intellectual disability are undisputed.

Yet the CCA nonetheless dismissed his application, stating only that he “failed to show that his allegation satisfies the requirements of Article 11.071 § 5.” App. A at a4. To reach that result, the CCA had to conclude that Howard’s allegations do not make out a prima facie Eighth Amendment violation.¹ That conclusion is sound only if obsolete clinical criteria can constitutionally be used to deny an *Atkins* claim; on the contrary, the CCA’s conclusion cannot be reached under current clinical standards. In *Moore*, this Court did not directly address the significance of changed clinical standards. It should do so in this case to provide guidance to the states and lower federal courts, and thereby insure that Texas not carry out the execution of a man whose claim of intellectual disability has never been evaluated under the correct standard.

Opinion Below

The CCA’s order of October 5, 2026, dismissing Howard’s subsequent application for a writ of habeas corpus and denying his motion for a stay of execution, is unpublished. It is attached as Appendix A. Howard’s subsequent application, with its exhibits, is attached as Appendix B.

¹ The CCA had to reach that conclusion because Howard’s claim was reviewable under section 5(a)(1) of Article 11.071, which asks only whether the legal basis for the claim was previously unavailable and whether the application makes a prima facie case. Since *Moore* was decided, the CCA has repeatedly held that it supplies a new legal basis for an *Atkins* claim raised by an applicant whose previous application predates it. *See, e.g., Ex parte Bushy*, No. WR-70,747-06 (Tex. Crim. App. Feb. 3, 2021); *Ex parte Escobedo*, No. WR-56,818-03, 2020 WL 3469044 (Tex. Crim. App. June 24, 2020); *Ex parte Butler*, No. WR-41,121-03, 2019 WL 4464270, at *2 (Tex. Crim. App. Sept. 18, 2019) (authorizing post-*Moore* claim of applicant whose earlier *Atkins* claim had been rejected under *Briseño*); *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019); *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018). Howard’s only previous application was filed in 2003. *Ex parte Gonzales*, No. WR-40,541-07 (Tex. Crim. App. Aug. 20, 2026), is not to the contrary; that applicant had never raised an intellectual disability claim, and the CCA did not address whether *Moore* is a new legal basis. Under section 5(a)(1), an applicant need only make “a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Ex parte Rivera*, No. 27065-02, 2003 WL 21752841, at *2 (Tex. Crim. App. July 25, 2003). Had the CCA instead concluded that *Moore* was not a new legal basis for Howard, it would be treating him differently from the applicants in each of these cases, which would, of course, represent a violation of Howard’s right to equal protection.

Statement of Jurisdiction

The CCA entered its order on October 5, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

Statement of the Case

A. The homicide and subsequent arrest

On May 12, 2000, a co-worker discovered Vickie Swartout’s body at the gas station where both worked in Silsbee, Texas. 20 R.R. 25.² The store’s security camera recorded Ms. Swartout’s being shot by a young Black man, who was quickly identified as Jamaal Howard. 20 R.R. 20, 25, 42-45.

Shortly after the murder, a local resident saw Howard coming out of a shed where the gun used to kill Ms. Swartout was later found. 20 R.R. 33, 53, 60. The man described Howard as looking nervous and visibly shaking, with eyes that looked wild, glazed over, and teary. 20 R.R.

² Citations to the Reporter’s Record of Howard’s 2001 capital murder trial appear herein as [volume number] R.R. [page number].

37, 142. Law enforcement officers soon responded to the house where Howard lived with his grandfather and found Howard hiding in a vacant house next door to his house. 20 R.R. 119-20.

Howard was arrested and taken to the Silsbee Police Department where he was interrogated by a Texas Ranger and soon confessed. 20 R.R. 122-26.

B. Trial

Because a question had been raised as to whether Howard was competent to stand trial, prior to the commencement of the trial, the court appointed psychologist James Duncan, Ph.D., to evaluate Howard's competency to stand trial. 1 C.R. 126-28.³ As part of his work, Duncan administered the verbal portion of the WAIS-R to Howard in March 2001. Exhibit 1.⁴ Duncan believed Howard's IQ to be somewhere between 65 and 70. Exhibit 1.

At trial, Duncan testified as the first witness for the defense, and, consistent with his belief that Howard's IQ falls between 65 and 70, Duncan testified that Howard's intellectual functioning was at "a borderline to mildly impaired kind of level." 21 R.R. 26. Regarding his opinion about whether Howard was competent to stand trial, Duncan now testified he believed it was questionable. 21 R.R. 42.

Counsel for both sides agreed that because Duncan's testimony had raised a question regarding whether Howard was competent to stand trial, the court should recess the trial and convene a competency trial before a separate jury. 21 R.R. 45-51. That jury deadlocked, and the court declared a mistrial. 30 R.R. 36-37. A second competency trial resulted in a finding that

³ Citations to the Clerk's Record of Howard's 2001 trial appear herein as [volume number] C.R. [page number].

⁴ Howard's subsequent state habeas application and its exhibits are reproduced in Appendix B. Citations to the exhibits appear herein as Exhibit [number].

Howard was competent, and the guilt phase resumed. 32 R.R. 134, 137. The jury rejected Howard's insanity defense and convicted him of capital murder. 24 R.R. 53-54.

Fred Fason, M.D., who was employed by Howard's trial attorney to evaluate Howard to assist in determining whether he was competent to stand trial, testified during the punishment phase of trial. Fason testified that he attempted to administer a psychological inventory known as the MMPI-2 to Howard but was forced to abandon the attempt because Howard could not read at the sixth-grade level the test requires; Howard did not know the words "mechanics" or "appetite" in the first two questions. 26 R.R. 22; *see also* S.H.C.R. 125.⁵ Fason testified that at that point the question of whether Howard is intellectually disabled "really entered my mind." 26 R.R. 22. The jury answered the special issues in favor of death, 27 R.R. 57, and the court sentenced Howard to death.

C. Direct appeal and state habeas proceeding

Even though direct appeal counsel filed Howard's direct appeal brief eight days before this Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), the second point of error raised in the brief was that it violated the Eighth Amendment's prohibition against cruel and unusual punishment to execute an intellectually disabled defendant.

On October 13, 2004, the CCA issued its opinion affirming Howard's conviction and sentence. Applying the framework it had announced only months earlier in *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), the CCA acknowledged that "experts for both the State and the defense testified that the appellant's intellectual functioning and adaptive behavior were

⁵ Cites to the main volume of the State Habeas Clerk's Record appear herein as S.H.C.R. [page number]. Cites to the supplemental volume appear as Suppl. S.H.C.R. [page number].

impaired to some degree,” but held that the testimony “was not sufficiently developed to establish that appellant was” intellectually disabled “under the guidelines we set in *Briseño*.” *Howard v. State*, 153 S.W.3d 382, 386-87 (Tex. Crim. App. 2004). The CCA noted that evidence of adaptive behavior was presented at trial, including Howard’s lack of attention to personal hygiene, but also noted that it was presented by defense counsel at trial as evidence that Howard suffers from a schizoaffective disorder. *Id.* at 387. *But see Ex parte Mays*, 686 S.W.3d 745, 748 n.5 (Tex. Crim. App. 2024) (acknowledging that the DSM-5-TR has removed the “relatedness” requirement from its criteria required for a diagnosis of intellectual disability). This Court subsequently denied Howard’s petition for a writ of certiorari. *Howard v. Texas*, 546 U.S. 1214 (2006).

Howard’s initial state habeas counsel filed his initial application for a writ of habeas corpus in the trial court on April 24, 2003. S.H.C.R. 21. Its first claim for relief alleged that Howard’s execution would run afoul of this Court’s decision in *Atkins*. S.H.C.R. 25-35. No evidentiary hearing was held, and the application contained no expert or lay declarations and no new testing. Counsel simply attached as an exhibit to the application Fason’s 2001 letter to trial counsel recommending someone administer a WAIS to Howard so his intellectual functioning could be assessed. S.H.C.R. 125.

More than nine years later, on June 15, 2012, the convicting court signed the State’s proposed findings, which found that Howard’s “intellectual functioning and behavior are impaired to a slight degree” but “do not rise to the level of” intellectual disability. Suppl. S.H.C.R. 21-22, 38. The CCA adopted those findings and denied Howard relief on December 12, 2012. *Ex parte Howard*, No. WR-77,906-01, 2012 WL 6200688 (Tex. Crim. App. Dec. 12, 2012).

In so doing, the CCA adopted the trial court's apparent belief that the deficits in Howard's adaptive behavior stemmed from his ADHD and his inconsistent use of medication to treat the disorder, and not intellectual disability. Suppl. S.H.C.R. 3 ("Applicant began as a bright student in school, but suffered from attention-deficit disorder, which responded well to medication. . . . Applicant's grades and behavior declined when he refused to take [his] medication for attention-deficit disorder.").⁶

D. Federal habeas proceeding

Howard timely filed his federal petition for writ of habeas corpus on December 12, 2013. *Howard v. Stephens*, No. 1:13-cv-256 (E.D. Tex. Dec. 12, 2013), ECF No. 16. Ground seven in the initial petition alleged that Howard is ineligible for execution because of intellectual disability. The district court authorized funding for a mitigation specialist and for three experts, including Richard O. Temple, Ph.D., a neuropsychologist. ECF No. 97 at 3. On March 6, 2017, Dr. Temple administered a WAIS-IV to Howard and found his full-scale IQ to be 74, meaning he was 95% confident Howard's IQ is somewhere between 70 and 79. Exhibit 2. As Temple's report makes clear, he believed Howard satisfied both the first and third prongs of *Atkins*.

Dr. Temple's report also explains that a formal assessment of Howard's adaptive behavior was beyond the scope of his work, and that another expert was going to handle that portion of Howard's evaluation. The expert charged with assessing whether Howard satisfied the adaptive prong of *Atkins* was Dr. James Patton. During Howard's federal habeas proceeding, Dr. Patton was not able to find Howard satisfied *Atkins*'s adaptive deficit prong, and Howard's then-

⁶ This was the view of Dr. Edward Gripon, who testified at trial for the State. 26 R.R. 101-02. Gripon believed Howard suffers from antisocial personality disorder. 26 R.R. 109.

attorney⁷ abandoned the claim in the amended petition. The Fifth Circuit denied Howard a certificate of appealability. *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020). This Court denied certiorari on January 11, 2021.

Exhibit 3 to Howard’s subsequent state habeas application is a document which undersigned counsel have confirmed Dr. Patton created for Howard’s federal habeas attorney. The document makes clear Dr. Patton believes there were significant deficits in Howard’s adaptive behavior by the time he was around fifteen but believed the deficits he observed were related to the emergence of Howard’s severe mental illness and not intellectual disability. Counsel have spoken to Dr. Patton and acknowledge this is not the sole reason Dr. Patton was unable to find Howard satisfies *Atkins*’s second prong. Consistent with the APA’s recently issued Guidelines on Diagnosis of Intellectual Disability in Forensic Settings, Dr. Patton believes finding someone satisfies *Atkins*’s second prong requires him to observe deficits in a person’s adaptive behavior at multiple points in a person’s developmental period and not a singular moment in time. APA, Guidelines on Diagnosis of Intellectual Disability in Forensic Settings, Guidelines 6.2, 6.6, <https://www.apa.org/about/policy/intellectual-disability-forensic-settings.pdf>.

E. The changes in the clinical standards and Howard’s subsequent application

In 2021 and 2022, both of the clinical authorities on which this Court and the CCA rely changed in ways that bear directly on Howard’s claim. First, the text revision of the DSM-5, published in 2022, eliminated the requirement that adaptive deficits be “directly related” to

⁷ Neither Attorney Bailey nor Attorney Newberry represented Howard during his federal habeas proceeding in the district court. Mr. Bailey was appointed to represent Howard in the U.S. Court of Appeals for the Fifth Circuit after Howard had been denied relief in the district court, and Newberry was subsequently appointed as co-counsel after certiorari had been denied.

intellectual impairment. Appl. 17–18.⁸ The CCA has acknowledged the change. *Mays*, 686 S.W.3d at 748 n.5. Second, the twelfth edition of the AAIDD’s manual, published in 2021, defines the developmental period as the period “before the individual attains age 22.” Appl. 18 (quoting AAIDD-12 ch. 3). The CCA has acknowledged that change as well but has left open whether it will apply it. *Ex parte Estrada*, No. WR-53,499-02, 2025 WL 1122323, at *1 n.2 (Tex. Crim. App. Apr. 16, 2025). Counsel suggest that, in dismissing Howard’s application on October 5, 2026, the CCA answered the question it left open in *Estrada* and declined to apply the AAIDD’s definition of the developmental period. Had the CCA considered whether the adaptive deficits that emerged when Howard was around fifteen continued until he was around twenty-one, there is little doubt it would have found that Howard made a prima facie showing of intellectual disability.

Howard is scheduled to be executed on October 7, 2026. On September 28, 2026, he filed a subsequent application raising a single claim: that he is intellectually disabled and therefore ineligible for execution under the Eighth and Fourteenth Amendments. Appl. 1. The application presented Temple’s IQ testing, Duncan’s contemporaneous estimate, Patton’s findings of significant adaptive deficits by around age fifteen, declarations from family members and others who knew Howard during the developmental period, and sworn trial testimony describing his adaptive deficits at ages 20 and 21. Appl. 19–32; Exhibits 1–7. It explained that, with the relatedness requirement gone, Patton’s findings now support rather than defeat a diagnosis, and that, under the AAIDD’s definition, the trial testimony documents deficits within the

⁸ Citations to Howard’s subsequent state habeas application, reproduced in Appendix B, appear herein as Appl. [page number].

developmental period. Appl. 13–14, 17–19, 34–35. Howard also filed a motion for a stay of execution.

F. The CCA’s order

On October 5, 2026, the CCA dismissed the application and denied the motion for a stay. In its entirety, the CCA’s reasoning was this: “We have reviewed the application and find that Applicant has failed to show that his allegation satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of his claim.” App. A at a4.

Reasons for Granting the Writ

I. The CCA’s dismissal of Howard’s *Atkins* claim is intertwined with federal law.

The CCA’s order does not rest on a ground independent of federal law, and nothing prevents this Court from reaching the question presented. Texas permits a court to consider an *Atkins* claim raised in a subsequent application if the application, among other things, makes a prima facie showing that the applicant is intellectually disabled, which is to say, that his execution would violate the Eighth Amendment. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1); *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A dismissal resting on the conclusion that the applicant has not made that showing is a ruling on federal law. *Rivera v. Quarterman*, 505 F.3d 349, 359 (5th Cir. 2007); *Busby v. Davis*, 925 F.3d 699, 706–07 (5th Cir. 2019). And “when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded.” *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *see also Foster v. Chatman*, 578 U.S. 488, 497–99 & n.4 (2016).

The CCA’s statement that it dismissed Howard’s application “without reviewing the merits of his claim,” App. A at a4, does not change that. The CCA uses the same phrase in orders dismissing federal claims expressly because the applicant failed to make a prima facie showing of a federal constitutional violation. *See, e.g., Ex parte Shore*, No. WR-78,133-02, 2017 WL 4534734, at *1 (Tex. Crim. App. Oct. 10, 2017) (finding that the applicant “failed to make a prima facie showing that a person with brain damage, like an intellectually disabled person, should be categorically exempt from execution,” and therefore dismissing “without reviewing the merits of the claim raised”); *Ex parte Davila*, No. WR-75,356-03, 2018 WL 1738210, at *1 (Tex. Crim. App. Apr. 9, 2018). In the CCA’s usage, “the merits” refers to the plenary review that follows authorization, not to the threshold federal determination that decides whether a claim is authorized. That is why the Fifth Circuit has treated the CCA’s dismissals of *Atkins* claims as decisions on federal law notwithstanding the same disclaimer. *Busby*, 925 F.3d at 706–07; *Rivera*, 505 F.3d at 359. At a minimum, because the order gives no reason for the dismissal and the federal question was at the center of the application, the Court should presume that the decision rests on federal law. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983); *Coleman v. Thompson*, 501 U.S. 722, 733 (1991).

II. The Eighth Amendment requires Texas to measure Howard’s claim against current clinical standards, and under those standards Howard made the threshold showing.

A. *Hall* and *Moore* require that a State’s assessment of intellectual disability be informed by the medical community’s current diagnostic framework.

The Eighth Amendment forbids the execution of a person who is intellectually disabled. *Atkins*, 536 U.S. at 321. Although *Atkins* left to the States the task of developing appropriate ways to enforce that restriction, this Court has since made clear that the States’ discretion is not

“unfettered.” *Hall v. Florida*, 572 U.S. 701, 719 (2014). The determination of intellectual disability “is informed by the medical community’s diagnostic framework.” *Id.* at 721. And in *Moore*, this Court held that “[t]he medical community’s current standards supply one constraint on States’ leeway in this area.” *Moore*, 581 U.S. at 20. A State need not adhere to “everything stated in the latest medical guide,” but neither may it “disregard . . . current medical standards.” *Id.* at 13.

Moore arose from this very court. There, the CCA had evaluated Bobby Moore’s claim under the *Briseño* factors, which this Court described as an “invention of the CCA untied to any acknowledged source.” *Id.* at 6. The CCA’s errors in *Moore* included the precise reasoning that has defeated Howard’s claim at every turn. The CCA had required Moore to show that his adaptive deficits were not related to a personality disorder. This Court rejected that requirement, explaining that the existence of a personality disorder or other mental-health issue “is not evidence that a person does not also have intellectual disability,” because many intellectually disabled people also have other mental or physical impairments. *Id.* at 17 (internal quotation marks omitted).

B. The current diagnostic framework no longer requires that adaptive deficits be related to intellectual impairment, and it extends the developmental period to age 22.

When *Moore* was decided, the DSM-5 still required that, to meet the diagnostic criteria for intellectual disability, a person’s deficits in adaptive functioning be “directly related” to his intellectual impairments. DSM-5 at 38. The medical community has since removed that requirement. The text revision of the DSM-5, published in 2022, does not contain it. DSM-5-TR at 38, 42–43. To the contrary, the DSM-5-TR recognizes that co-occurring mental disorders are

“three to four times higher” among people with intellectual disability “than in the general population.” DSM-5-TR at 46. The CCA has recognized as much. *Mays*, 686 S.W.3d at 748 n.5. Under the current framework, then, a clinician may find that a person satisfies the adaptive-deficits criterion even if the clinician believes some of those deficits are attributable to a co-occurring mental illness, which is exactly what *Moore* anticipated.

The AAIDD has also changed its definition of the developmental period, which now runs until a person reaches age 22. AAIDD-12 ch. 3. The AAIDD made that change because, although most people with intellectual disability show deficits in early childhood, an accurate diagnosis of the smaller number identified nearer the end of the developmental period depends on observing their functioning across it. Appl. 4–5. The CCA has acknowledged the change but has declined to say whether it will apply it. *Estrada*, 2025 WL 1122323, at *1 n.2.

C. Under the current framework, Howard made the threshold showing.

Howard’s evidence of significantly subaverage intellectual functioning is not reasonably disputable. His full-scale IQ on the WAIS-IV is 74, with a 95% confidence interval of 70 to 79. Exhibit 2. Duncan, who examined Howard before trial, estimated his IQ to be between 65 and 70. Exhibit 1. A score of 74 falls within the range in which, accounting for the standard error of measurement, a person may be intellectually disabled. *Hall*, 572 U.S. at 712–13, 722–23; *Moore*, 581 U.S. at 14–15; *see also Brumfield v. Cain*, 576 U.S. 305, 315 (2015) (score of 75 “squarely in the range of potential intellectual disability”).

Howard’s evidence of adaptive deficits is substantial, and the reasons it was previously found wanting are reasons the current framework has removed. Patton found significant deficits in Howard’s adaptive behavior by around the time he was fifteen. Exhibit 3. He did not find that

Howard lacked those deficits; he attributed them to Howard's emerging mental illness. Appl. 13. That attribution was a requirement of the DSM-5 that no longer exists, and it was the same reasoning this Court rejected in *Moore*. *Moore*, 581 U.S. at 17. Declarations from people who knew Howard during his adolescence, gathered by Howard's previous counsel when she was contemplating raising an *Atkins* claim, corroborate the deficits Patton found. Exhibits 5–7; Appl. 4. And sworn testimony from Howard's 2001 trial shows that the deficits persisted at ages 20 and 21: Howard could not read at a sixth-grade level, 26 R.R. 22; would not bathe unless told to, 25 R.R. 137–38; and would not get himself up in the morning, 23 R.R. 56. Under the AAIDD's current definition, those years are part of the developmental period. But even setting the AAIDD's change aside, the removal of the relatedness requirement alone means that the deficits Patton found before Howard turned 18 support a diagnosis of intellectual disability.

That trial testimony deserves particular weight. This is not evidence assembled on the eve of an execution. It was given in open court, by witnesses who had sworn to tell the truth, more than a year before this Court issued its opinion in *Atkins*. Appl. 4, 18–19. Those witnesses had no incentive to perjure themselves by exaggerating Howard's adaptive deficits; no one at Howard's 2001 trial could have known that evidence of those deficits would one day determine whether the Eighth Amendment permits his execution. *Id.* The testimony also describes Howard's functioning outside prison, which is the kind of evidence the clinical framework calls for: because adaptive functioning “may be difficult to assess in a controlled setting (e.g., prisons, detention centers),” “corroborative information reflecting functioning outside those settings should be obtained.” DSM-5-TR at 43. The testimony about Howard's behavior when he was 20 and 21 is consistent with the declarations describing his behavior before he turned 18, and it

confirms that the deficits in his adaptive behavior, which began when he was around fifteen, continued. *Id.* And no expert has yet had the opportunity to consider whether this portion of the trial record supports a finding that Howard satisfies *Atkins*'s second prong, because when the experts retained during Howard's federal habeas proceeding performed their work, testimony about Howard at ages 20 and 21 fell outside the developmental period. Appl. 19.

D. The CCA's dismissal cannot be reconciled with *Hall* and *Moore*.

The CCA did not explain why it concluded that Howard failed to make the required showing. But on this record, there is no explanation consistent with the Eighth Amendment. Howard's IQ evidence is within the range *Hall* and *Moore* require courts to consider. The obstacles to a finding of adaptive deficits have been the attribution of Howard's deficits to his mental illness, which the medical community no longer requires and *Moore* forbids a court to rely on, and the absence of observations at more than one point in a developmental period that, under the former definition, ended at age 18, which the AAIDD's current definition answers. The CCA could conclude that Howard failed to make a prima facie showing of intellectual disability only by measuring his evidence against a diagnostic framework the medical community has discarded.

Howard has never had a hearing on whether he is intellectually disabled. His trial took place before *Atkins* was decided, so no jury was ever asked the question; the evidence of his intellectual impairments came in only incidentally, through witnesses called on competency, insanity, and punishment. The CCA rejected his claim on direct appeal on that record, which it described as "not sufficiently developed," and measured it against the *Briseño* factors. *Howard v. State*, 153 S.W.3d 382, 386–87 (Tex. Crim. App. 2004). His initial state habeas application contained no testing and no expert or lay declarations, and the convicting court held no hearing;

more than nine years after the application was filed, it signed the State's proposed findings. In federal court, the claim was abandoned before any court ruled on it. And now the CCA has dismissed, in two sentences and without a hearing, the first state application to present Howard's claim with full-scale IQ testing and evidence evaluated under current clinical standards. No factfinder has ever weighed the evidence of Howard's intellectual disability under the standards the medical community uses today. The Eighth Amendment does not allow a State to execute a person whose claim of intellectual disability has never been measured against those standards.

III. The effect of changing clinical standards on *Atkins* claims is already before this Court.

The clinical definition of intellectual disability has changed significantly since *Atkins* was decided, and it will continue to change. This Court held in *Hall* and *Moore* that the States must keep pace with those changes. If a State may nonetheless refuse to hear a claim that satisfies the current framework, the protection *Atkins* recognized will depend on whether a prisoner's claim happened to satisfy the framework in force when he first raised it.

This Court has already recognized the significance of changes in clinical standards for prisoners raising *Atkins* claims. In *Guerrero v. Johnson*, No. 25-1003, which the Court will hear on November 4, 2026, the Court will decide whether a federal habeas petitioner who relies on changes in the clinical standards for intellectual disability may obtain review of an *Atkins* claim in a successive federal petition under 28 U.S.C. § 2244(b)(2)(A). *Guerrero* concerns a federal statute, not the Eighth Amendment question presented here. But it demonstrates that the effect of changing clinical standards on *Atkins* claims is a question this Court considers worthy of review. And its resolution may determine whether Howard can obtain federal review of his claim at all.

Conclusion and Prayer for Relief

Petitioner requests that this Court stay his execution, currently scheduled for October 7, 2026, grant certiorari, and place this case on its merits docket. Petitioner has also filed with this petition a separate application for a stay of execution.

DATE: October 6, 2026

Respectfully submitted,

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