No. 18-443

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,
v.
TEXAS,
Respondent.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association (ABA) is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States and other jurisdictions. They include prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, non-profit organizations, and government agencies. The ABA's membership also includes judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

Since its founding in 1878, the ABA has advocated for the improvement of the justice system. Although the ABA takes no position on the death penalty itself, it has a well-established concern that the death penalty be enforced in a fair and unbiased manner, with appropriate procedural protections. In 1986, the ABA founded the ABA Death Penalty Representation Project to provide training and technical assistance to judges and lawyers in death-penalty jurisdictions. In 1989, the ABA passed a policy stating "that no person with mental retardation, as now defined by the American Association on Mental Retardation [AAMR],

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this amicus brief.

[2] Neither this brief nor the decision to file it should be interpreted as reflecting the views of any judicial member. No member of the ABA Judicial Division Council participated in this brief's preparation or in the adoption or endorsement of its positions.

should be sentenced to death or executed." ABA House of Delegates Resolution 110 (adopted 1989).[3] In 2001, the ABA Section of Individual Rights and Responsibilities issued a set of recommended protocols to improve the administration of the death penalty. See ABA, Section of Individual Rights & Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (June 2001). The protocols included recommendations that the death penalty not be imposed upon "individuals who have mental retardation, as that term is defined by the [AAMR]," and that "[w]hether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure." *Id.* at 63.

Following this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the ABA developed guidelines and best practices for implementing *Atkins*. In 2003, the ABA published *Mental Retardation and the Death Penalty*, which included model legislation for States implementing *Atkins*. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11 (2003). The ABA also established the Task Force on Mental Disability and the Death Penalty, composed of lawyers, mental-health practitioners, and academics, to examine the imposition of the death penalty on persons with

[3] Consistent with medical and legal practice prior to this Court's decision in *Hall* v. *Florida*, the ABA previously used the terms "mental retardation" and "mentally retarded" to refer to what is now termed "intellectual disability." See 572 U.S. 701, 704 (2014) (noting "change in terminology").

intellectual disability and other mental or psychiatric conditions and limitations. In 2006, the ABA reiterated its opposition to executing the intellectually disabled, and it adopted as additional policy the Task Force's conclusion that the death penalty should not be imposed on persons with "significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation." ABA House of Delegates Recommendation 122A, at 1 (adopted 2006). Finally, the ABA filed amicus briefs in support of the petitioners in *Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), explaining that Florida's and Texas's schemes for determining intellectual disability violated clinical standards and the rule of *Atkins*.

Of particular significance to this brief, between 2003 and 2013, the ABA's Death Penalty Due Process Review Project conducted comprehensive assessments of the operation of the death penalty in twelve States, including Texas, that to date have collectively carried out nearly 75% of all executions since *Gregg* v. *Georgia*, 428 U.S. 153 (1976). ABA, *State Death Penalty Assessments*, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited Nov. 8, 2018); see Death Penalty Info. Ctr., *Number of Executions by State and Region Since 1976*, https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Nov. 8, 2018). The assessments were conducted by teams including current or former judges, prosecutors, and defense attorneys; state bar representatives; state legislators;

and law professors, who evaluated each State's administration of the death penalty against uniform benchmarks for fairness and accuracy set out in the ABA's 2001 protocols. Each assessment includes an evaluation of the State's procedures for determining whether a capital defendant has an intellectual disability and is thus exempt from the death penalty.

Notably, the *ABA's Texas Assessment* found that Texas did not determine intellectual disability according to clinical standards. Rather, Texas employed standards that were "not supported by any medical authority and instead rel[ied] on popular misconceptions regarding how persons with mental retardation behave." ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, at x (Sept. 2013) (*ABA Texas Assessment*), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf. The *ABA Texas Assessment* warned that this approach "create[d] an unacceptable risk that persons with mental retardation will receive the death penalty or be executed," in large part because Texas's process for making such determinations was informed by stereotypes about the behavior of those with intellectual disability rather than proper clinical criteria. *Ibid.*

These issues were subsequently presented to the Court in *Moore I*. As noted above, the ABA submitted an amicus brief in that case discussing the recurring categories of error arising from Texas's nonclinical standard for determining intellectual disability under *Atkins*. See ABA Amicus Br. at 7–18, *Moore I*, 137 S.

Ct. 1039 (No. 15-797). This Court in *Moore I* held that the intellectual disability standard employed by Texas violated the Eighth Amendment. See 137 S. Ct. at 1044, 1050–1053. The ABA submits that the Texas Criminal Court of Appeals's (CCA) decision on remand to again deny relief from a death sentence, based on criteria this Court explicitly rejected in *Moore I*, raises important rule of law concerns. The ABA has long worked to strengthen and promote the integrity of judicial systems through the rule of law, both in the United States and abroad.[4] Central to this rule of law principle is the recognition of this Court's unique authority on matters of federal constitutional interpretation.

The issues raised in this case are important, urgent, and worthy of the Court's consideration. The ABA therefore respectfully requests that the Court grant the petition for a writ of certiorari, summarily reverse the CCA's decision, hold that petitioner Bobby James Moore (Moore) is intellectually disabled, and once again hold that the CCA's nonclinical standard for implementing *Atkins* violates the Eighth Amendment.

SUMMARY OF ARGUMENT

This is now the second time the CCA has upheld Moore's death sentence in contravention of this

[4] The ABA has established a Rule of Law Initiative that works, particularly in developing countries, to "promote justice, economic opportunity and human dignity through the rule of law." ABA, *Rule of Law Initiative Program Book* 4 (2016). No practice is more vital to preserving the rule of law – and ensuring that the ABA's promotion of that rule is legitimized in the eyes of developing countries – than the following by lower courts of binding precedent of this Court.

Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment categorically prohibits the execution of intellectually disabled persons. The CCA previously rejected the state trial court's recommended finding that Moore is intellectually disabled by relying on an outdated, nonclinical standard first articulated in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) (*Briseno*) to uphold Moore's death sentence. See *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015). This Court vacated and remanded that decision as incompatible with Eighth Amendment standards for determining intellectual disability. *Moore* v. *Texas*, 137 S. Ct. 1039, 1044, 1053 (2017) (*Moore I*).

This Court has recognized three prongs of the intellectual disability inquiry: (i) "significantly subaverage intellectual functioning"; (ii) "deficits in adaptive functioning"; and (iii) "onset of these deficits during the developmental period." *Hall* v. *Florida*, 572 U.S. 701, 710 (2014); see also *Moore I*, 137 S. Ct. at 1045. In *Briseno*, the CCA established a framework for assessing intellectual disability. But rather than relying on clinical criteria to make this determination, the CCA instead created its own approach – thereafter known as the "*Briseno* factors" – for assessing whether an individual shows deficits in adaptive behavior. *Briseno*, 135 S.W.3d at 6; see *Moore I*, 137 S. Ct. at 1044, 1046–1047.

In 2017, after granting certiorari to review the CCA's 2015 decision, this Court unanimously recognized that the *Briseno* factors lack any clinical foundation or support and serve only to perpetuate lay stereotypes about intellectual disabilities. See *Moore*

I, 137 S. Ct. at 1046, 1051–1052; *id.* at 1053, 1060 (Roberts, C.J., dissenting). As the Court explained, the *Briseno* factors, both "[b]y design and in operation," "'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* at 1051 (second set of brackets in original) (quoting *Hall*, 572 U.S. at 704). The Court thus held that the CCA's use of the *Briseno* framework to determine if Moore is intellectually disabled violates the Eighth Amendment's protection against cruel and unusual punishment. See *id.* at 1044, 1053. The dissent in *Moore I* similarly agreed that the *Briseno* factors are "incompatible with the Eighth Amendment." *Id.* at 1060 (Roberts, C.J., dissenting). This Court then remanded the case for proceedings not inconsistent with its opinion. *Id.* at 1053.

The CCA did not follow this Court's mandate. Notwithstanding this Court's rejection of the *Briseno* framework, and in the face of the Texas state prosecutor's concession on remand that Moore is intellectually disabled, the CCA resurrected *Briseno* under the guise of a new standard for intellectual disability. See *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018). Although the CCA purported to adopt a new standard for assessing intellectual disability, its most recent decision, in substance, "repeats the same errors as in its original opinion in this case" and "continues to apply a standard that fails to adequately incorporate current medical standards in conflict with the Supreme Court's holding in *Moore* [*I*]." *Id.* at 585, 590 (Alcala, J., dissenting). Like its opinion struck down by this Court in *Moore I*, the CCA's decision on remand relies on lay stereotypes, overemphasizes adaptive strengths, looks to behavior

while incarcerated, and imposes the same onerous requirement that a defendant prove that his intellectual and adaptive deficits are related. In many instances, the CCA's most recent opinion restates the precise language of the *Briseno* factors, while omitting only the *Briseno* case name. Such a result cannot stand in light of this Court's prior disposition of these same issues in *Moore I.*

Not only does the CCA's decision fail to comport with the Eighth Amendment's guarantees, it raises broader constitutional concerns. The CCA's failure to heed this Court's mandate undermines the rule of law and the supremacy of this Court, both of which are at the core of this country's founding principles.

The ABA urges this Court to remedy the CCA's constitutional errors and safeguard the rule of law by granting the petition for a writ of certiorari and summarily reversing the CCA's decision.

ARGUMENT

On remand, the CCA once again found that Moore is not intellectually disabled, adopting a mode of analysis that not only conflicts with prevailing medical standards, but also flouts this Court's decision in *Moore I*. If permitted to stand, the CCA's decision would undermine the guarantees of *Atkins*, *Hall*, and *Moore I*, and would raise rule of law concerns that only this Court can redress.

I. THE CCA'S DECISION ON REMAND CONFLICTS WITH THIS COURT'S MANDATE IN *MOORE I*, WHICH PROVIDED CLEAR INSTRUCTIONS, BASED ON CLINICAL STANDARDS, FOR DETERMINING INTELLECTUAL DISABILITY FOR EIGHTH AMENDMENT PURPOSES.

A. This Court Provided The CCA With A Clear Mandate Regarding The Constitutional Standard For Diagnosing Intellectual Disability.

This Court's first review of Moore's capital sentence gave the CCA clear instructions on how to re-evaluate Moore's sentence on remand. These clear directives were necessary to safeguard the Eighth Amendment's absolute prohibition on the execution of intellectually disabled individuals.

This Court explained in *Atkins* that "[e]xecuting intellectually disabled individuals * * * serves no penological purpose, runs up against a national consensus against the practice, and creates a risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Moore I*, 137 S. Ct. at 1048 (citing *Atkins*, 536 U.S. at 313–320 (internal citations and quotation marks omitted)). To ensure that *Atkins* is properly implemented, this Court has stressed that state courts should examine "[t]he medical community's current [intellectual disability] standards." *Id.* at 1053; see *id.* at 1048–1049. Without clinically based standards, "States [would] have complete autonomy to define intellectual disability as they wished," "*Atkins* could become a

nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1053 (quoting *Hall*, 572 U.S. at 720–721).

In *Moore I*, this Court held that the CCA's intellectual disability standard violated the Eighth Amendment.[5] First, the Court held that the CCA erred by refusing to use a "standard error of measurement" in Moore's IQ tests.[6] *Moore I*, 137 S. Ct. at 1049–1050. Second, this Court found that the CCA's previous evaluation of Moore's adaptive functioning "deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id.* at 1050. As the Court explained, the modern medical community "focuses the adaptive-functioning inquiry on adaptive *deficits*," as opposed to adaptive *strengths*. *Ibid.* (emphasis in original) (citing Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definitions, Classification, and Systems of Supports* (11th ed. 2010) (AAIDD–11)). This Court admonished

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[5] In contrast, this Court lauded the state trial court's reliance on *current* medical criteria to support its conclusion Moore is intellectually disabled, as those sources offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore I*, 137 S. Ct. at 1053 (citation omitted).

[6] This issue is not in dispute in the present appeal. On remand, the CCA found that Moore's IQ test score of 74 fell within the standard error of measurement for intellectual disability and concluded that an analysis of adaptive functioning was therefore required. *Ex parte Moore*, 548 S.W.3d at 562 ("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 [Moore] is intellectually disabled.").

the CCA for marginalizing Moore's adaptive deficits by balancing them against his ostensible adaptive "strengths" and purported adaptive improvements while incarcerated – considerations discounted by clinicians. *Ibid.*

The Court next turned to the CCA's conclusion that Moore's record of academic failure and his suffering of childhood abuse "detracted from a determination that his intellectual and adaptive deficits were related." *Moore I*, 137 S. Ct. at 1051. Again relying on modern medical standards as set forth by the clinical diagnostic manuals, the Court noted that "[t]hose traumatic experiences * * * count in the medical community as '*risk factors*' *for* intellectual disability" and therefore do not "counter the case for a disability determination." *Ibid.* (emphasis in original) (quoting AAIDD–11, at 59–60). The Court further criticized the CCA for attributing Moore's adaptive deficits to a personality disorder and concluding that such a disorder precludes a finding of intellectual disability. As the Court noted, according to contemporary medical understanding, an intellectual disability and a personality disorder are not mutually exclusive diagnoses. *Ibid.* (citing Am. Psychological Ass'n Amicus Br. at 19, *Moore I*, 137 S. Ct. 1039 (No. 15-797)).

Finally, this Court addressed the CCA's reliance on the multi-factor framework for intellectual disability that the CCA first employed in *Briseno*, 135 S.W.3d 1. As this Court rightly noted, the *Briseno* framework "advances lay perceptions of intellectual disability." *Moore I*, 137 S. Ct. at 1051 (citing *Briseno*, 135 S.W.3d at 8). It does so by, for example, basing a

finding of intellectual disability on lay stereotypes and perceptions of whether a subject was "mentally retarded" during the developmental stage. *Id.* at 1051–1052 (citation omitted). The Court deemed the CCA's use of the *Briseno* framework – and its embrace of lay opinion as opposed to informed medical opinion – an "outlier," and the Court thoroughly rejected the use of *Briseno* or anything approaching the antiquated *Briseno*-like analysis. *Ibid.* The dissent in *Moore I* agreed that use of the *Briseno* factors was an unconstitutional and "unacceptable method of enforcing the guarantee of *Atkins*" and that the CCA "erred in using [those factors] to analyze [Moore's] adaptive deficits." *Id.* at 1053 (Roberts, C.J., dissenting).

This Court's ruling in *Moore I* affirmed the importance of determining intellectual disability in a way that is "informed by the medical community's diagnostic framework" – as well as a categorical rejection of the use of lay stereotypes and perceptions regarding individuals with intellectual disability in capital cases. *Id.* at 1048 (quoting *Hall*, 572 U.S. at 721). Although States need not adhere "to everything stated in the latest medical guide," this Court emphasized that "neither does our precedent license disregard of current medical standards." *Id.* at 1049. This Court therefore made clear that the CCA on remand should not "reject[] * * * medical guidance and cling[] to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors." *Id.* at 1053.

B. The CCA's Analysis On Remand Is Infected By The Same Risks Of Error And Nonclinical Considerations That Led This Court To Declare The *Briseno* Framework Unconstitutional.

On remand, the CCA flouted this Court's instructions in *Moore I* by relying on the same nonclinical, constitutionally infirm considerations to conclude again that Moore is not intellectually disabled. Although the CCA's opinion on remand purported to announce a new standard for diagnosing intellectual disability, its analysis, reasoning, and ultimate conclusion show that the CCA failed to faithfully follow this Court's clear mandate in *Moore I* and instead simply repeated the substance of its *Briseno* analysis.

As Judge Alcala aptly recognized in dissent, the CCA's "majority opinion essentially repeats the same errors as in the original opinion in this case" and "continues to apply a standard that fails to adequately incorporate current medical standards in conflict with the Supreme Court's holding in *Moore [I]*." *Ex parte Moore*, 548 S.W.3d at 585, 590 (Alcala, J., dissenting). The CCA's analysis thus continues to "creat[e] an unacceptable risk that persons with intellectual disability will be executed" and therefore violates the Eighth Amendment. *Moore I*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 704 (brackets in original)).

i. The CCA's analysis of intellectual disability continues to impermissibly rely on lay stereotypes.

Contrary to this Court's instruction, the CCA once again permitted stereotypes and lay perceptions about

the intellectually disabled to infect its analysis on remand. See *Moore I*, 137 S. Ct. at 1051–1052 (observing that the "medical profession has endeavored to counter lay stereotypes of the intellectually disabled," and that judicial endorsement of such stereotypes "should spark skepticism"). As the ABA noted in its amicus brief in *Moore I*, this method "allows the opinions of those without training to displace those of medical professionals." See ABA Amicus Br. at 11; see also *ABA Texas Assessment* 396.

In both of the CCA's decisions, for instance, the court stressed that before his incarceration, Moore had a menial restaurant job; played pool, dice, and dominoes with his friends; had a girlfriend; demonstrated "some ability to understand money concepts and work"; and could "conceptualize what was being" asked of him at trial and could respond with coherent answers. See *Ex parte Moore*, 548 S.W.3d at 564, 569–571; see also *Ex parte Moore*, 470 S.W.3d 481, 507–508, 522–528 (Tex. Crim. App. 2015) (relying on these same considerations to conclude that Moore is not intellectually disabled before this Court's decision in *Moore I*). Similarly, the CCA found it significant that, while on death row, Moore had some literary and legal materials in his prison cell; responded to letters from a pen pal "in an emotionally appropriate way"; and was not an "impressionable" follower simply because he refused to sit down with other inmates once, mop the floor once, get a haircut once, and shave twice. *Ex parte Moore*, 548 S.W.3d at 570–571 & n.149.

Those considerations, however, do not foreclose a clinical diagnosis of intellectual disability. The CCA's

statements rested on the flawed assumption that all intellectually disabled persons are inherently unable to perform routine tasks, form appropriate emotions, stand up for themselves, develop and maintain meaningful relationships, and demonstrate a basic sense of curiosity. Worse still, reliance on such stereotypes runs an intolerable risk of improperly subjecting persons with mild intellectual disability to the death penalty. As this Court held in *Moore I*, "[m]ild levels of intellectual disability * * * nevertheless remain intellectual disabilities, * * * and States may not execute anyone in the *entire category* of [intellectually disabled] offenders." 137 S. Ct. at 1051–1052 (emphasis in original) (citation and internal quotation marks omitted); see also *Ex parte Moore*, 548 S.W.3d at 600 (Alcala, J., dissenting) (noting that a "stereotyped view of the intellectually disabled as having to be entirely nonfunctional people has no place in the current medical diagnostic framework"). This Court therefore rejected those stereotypes, as have medical professionals. *Moore I*, 137 S. Ct. at 1051–1052.

ii. The CCA's analysis continues to overemphasize adaptive strengths.

The CCA's analysis on remand further fails to heed this Court's admonition that, because "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," an assessment of intellectual disability must not "overemphasize[]" perceived adaptive strengths. *Moore I*, 137 S. Ct. at 1050 (emphasis in original); see also *ABA Texas Assessment* 396 ("[M]any of the *Briseno* factors depart from the AAIDD and other clinical definitions by

focusing on a defendant's adaptive strengths rather than his/her limitations."). Among the adaptive strengths the CCA had initially "overemphasized" were that "Moore lived on the streets, mowed lawns, and played pool for money." *Moore I*, 137 S. Ct. at 1050. Nevertheless, on remand, the CCA continued to rely on precisely the same adaptive strengths that this Court found irrelevant in *Moore I*. *Ex parte Moore*, 548 S.W.3d at 569, 571 (finding Moore's "practice of playing pool for money," "mowing lawns before he went to prison," and "liv[ing] on the streets for most of his teenage years" were probative of intellectual disability).

The CCA's repeated overemphasis of Moore's adaptive strengths reflects the testimony of Dr. Kristi Compton, the State's sole expert, who formed her opinion that Moore is not intellectually disabled by explicitly acknowledging the *Briseno* framework and by improperly balancing Moore's adaptive strengths against his adaptive deficits. See *Ex parte Moore*, 548 S.W.3d at 562–563. Indeed, Dr. Compton opined that she did not believe that Moore is intellectually disabled because he exhibits "indications of adaptive skills." *Id.* at 563; see also *id.* at 577 (Alcala, J., dissenting) (noting "Dr. Compton's opinion that [Moore's] adaptive strengths outweighed his adaptive deficits"). The CCA's continued overemphasis of perceived adaptive strengths, as well as its endorsement of Dr. Compton's pre–*Moore I* opinion, cannot be reconciled with this Court's holding that Moore's perceived strengths were not "adequate to overcome the considerable objective evidence of Moore's adaptive deficits." *Moore I*, 137 S. Ct. at 1050.

iii. The CCA fails to focus on typical performance and improperly relies on Moore's "improvements" in behavior while incarcerated.

In *Moore I*, this Court stressed the medical community's caution against "reliance on adaptive strengths developed in * * * prison." *Moore I*, 137 S. Ct. at 1050 (citation and internal quotation marks omitted). As the Court explained, clinical standards counsel against assessing adaptive strengths developed in a controlled setting, such as a prison, and instead require, wherever possible, corroborative information reflecting similar adaptive functioning outside of the prison setting. *Ibid.* (citing Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 38 (5th ed. 2013)). To support its conclusion that Moore is not intellectually disabled, the CCA nevertheless again relied heavily on perceived conceptual improvements that Moore supposedly made while incarcerated. See, *e.g.*, *Ex parte Moore*, 548 S.W.3d at 565–568 (examining Moore's mathematical ability by looking to his prison commissary slips over time). As the ABA cautioned in *Moore I*, this approach contravenes the longstanding clinical recognition that adaptive functioning concerns "the collection of conceptual, social, and practical skills that have been learned and are performed by people *in their everyday lives*." ABA Amicus Br. at 14 (emphasis in original) (quoting AAIDD–11, at 43). Yet, despite this Court's admonition, the CCA continued to stress its view that there had been purported advances in Moore's adaptive functioning while he was confined on death row. See, *e.g.*, *Ex parte Moore*, 548 S.W.3d at 565–570.

Although the CCA said it "t[ook] into account the controlled nature of the [prison] setting," *Ex parte Moore*, 548 S.W.3d at 569, the ostensible evidence of in-prison adaptive improvements on which the CCA relied shows precisely the opposite. For example, the CCA has never accounted for "the excessive amount of time [Moore] 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." *Id.* at 601 (Alcala, J., dissenting). These unaccounted-for variables undermine the purported clinical significance of Moore's supposed improvements. *Ibid.*; see also *ABA Texas Assessment* 396 ("By focusing on a particular event in the defendant's life, the *Briseno* factors may diminish other life events that more accurately reflect the defendant's skill."). The CCA's continued reliance on adaptive strengths developed in the prison setting cannot be squared with prevailing clinical standards and contravenes this Court's decision in *Moore I*.

iv. The CCA continues to improperly require Moore to show that his intellectual and adaptive deficits are related.

Finally, the CCA continues to demand that Moore satisfy a "relatedness" requirement – *i.e.*, that he show that his intellectual and adaptive deficits are related – despite this Court's concerns with that requirement in *Moore I*. *Ex parte Moore*, 548 S.W.3d at 560, 569–571; see *Moore I*, 137 S. Ct. at 1051–1052. As this Court explained, that "relatedness" requirement essentially requires Moore to disprove alternative, potential causes for his adaptive deficits, such as his abusive upbringing, academic failures as a child, or

potential personality disorder. See *Moore I*, 137 S. Ct. at 1051–1052.

According to clinical standards and as recognized by this Court, Moore's traumatic childhood experiences are in fact "'*risk factors*' *for* intellectual disability," as opposed to proof that he is not intellectually disabled. See *Moore I*, 137 S. Ct. at 1051 (emphasis in original) (quoting AAIDD–11, at 59–60). Nor can the possibility that Moore has a personality disorder "counter the case for a disability determination"; to the contrary, the existence of a personality disorder is "not evidence that a person does not also have intellectual disability" because "[c]oexisting conditions" (so-called comorbidities) are "frequently encountered in intellectually disabled individuals." *Ibid.* (citation and internal quotation marks omitted).

Despite this Court's emphasis on these clinical considerations, on remand the CCA explicitly opted to retain the same onerous, nonclinical relatedness requirement. *Ex parte Moore*, 548 S.W.3d at 560. Again faulting Moore for failing to show his "deficient social behavior was related to any deficits in general mental abilities," the CCA found that "emotional problems," which Moore first began experiencing as a young child, are "most likely" the cause of such deficiencies. *Id.* at 569–571. But this reliance on "emotional problems" is simply a disguised name for the childhood "risk factors" and personality disorder on which the CCA previously relied to reject Moore's claim. This Court has already held that neither of those risk factors nor the purported personality disorder outweighs Moore's case for intellectual

disability. *Moore I*, 137 S. Ct. at 1051. Moreover, instead of acknowledging that such risk factors may in fact make a finding of intellectual disability *more likely*, the CCA again perpetuates the nonclinical view that the two cannot exist together. Along with its other flawed standards, as set forth above, the CCA's insistence on satisfaction of the same "relatedness" requirement already rejected by this Court will continue to present the unacceptable risk that individuals with mild intellectual disability will be executed in violation of the Eighth Amendment.

C. The CCA's Continued Reliance On The Testimony Of Dr. Compton Confirms That It Has Simply Repeated The Analysis That This Court Rejected.

Throughout its decision on remand, the CCA credited and relied on the opinion of Dr. Compton, the State's only expert witness. *Ex parte Moore*, 548 S.W.3d at 562–572. Tellingly, Dr. Compton provided her opinion that Moore is not intellectually disabled *before* this Court's decision in *Moore I*, and her opinion is based on the now-invalidated *Briseno* framework. See, *e.g.*, *id.* at 602–603 (Alcala, J., dissenting). Dr. Compton did not re-evaluate Moore's intellectual disability in light of this Court's rejection of the *Briseno* framework in *Moore I*.

Nonetheless, on remand, the CCA stressed Dr. Compton's original pre–*Moore I* testimony and analysis. For example, the CCA emphasized Dr. Compton's opinion that Moore's instant offense demonstrated "a level of planning and forethought," *Ex parte Moore*, 548 S.W.3d at 572 — a nod to the

second and seventh *Briseno* factors. See *Briseno*, 135 S.W.3d at 8–9 ("Has the person formulated plans and carried them through or is his conduct impulsive?" and "[D]id the commission of that offense require forethought, planning, and complex execution of purpose?"). The CCA further emphasized Dr. Compton's comments regarding Moore's ability to "stand up for himself and to influence others," *Ex parte Moore*, 548 S.W.3d at 571–572 — a consideration under the third *Briseno* factor. See *Briseno*, 135 S.W.3d at 8–9 ("Does his conduct show leadership or does it show that he is led around by others?"). The CCA also highlighted Dr. Compton's testimony that Moore "responded in an emotionally appropriate way in letters" while incarcerated, *Ex parte Moore*, 548 S.W.3d at 570 — a reincarnation of the fourth *Briseno* factor. See *Briseno*, 135 S.W.3d at 8–9 ("Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?"). And, reviving the fifth *Briseno* factor verbatim, the CCA noted that Moore "responded rationally and coherently to questions" posed to him in court. *Ex parte Moore*, 548 S.W.3d at 564; see *Briseno*, 135 S.W.3d at 8–9 ("Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?").

The CCA's continued reliance on an expert opinion that utilized the rejected *Briseno* framework confirms that its decision on remand has simply reinstated its prior flawed analysis. The CCA's determination therefore violates both established clinical standards and this Court's decision in *Moore I*.

II. THE CCA'S REFUSAL TO FOLLOW THE HOLDING IN *MOORE I* RAISES SERIOUS RULE OF LAW CONCERNS THAT CAN BE REMEDIED ONLY BY THIS COURT.

Because the CCA's opinion on remand is directly contrary to the decision of this Court in *Moore I*, this Court should grant the petition for a writ of certiorari and summarily reverse to preserve the legitimacy of its judgments and to underscore the importance of the rule of law. In *Moore I*, this Court provided clear instructions to the CCA to avoid the constitutional errors that had infected its earlier decision regarding Moore's sentence. The CCA ignored those instructions and reprised precisely the analysis that this Court rejected as contrary to the Eighth Amendment. But the Eighth Amendment prohibition against execution of the intellectually disabled, as articulated and interpreted by this Court, is "binding upon the States and, under the Supremacy Clause of Article VI of the Constitution, it must be obeyed." *Sims* v. *Georgia*, 385 U.S. 538, 44 (1967); see *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Ableman* v. *Booth*, 62 U.S. (21 How.) 506, 517–518 (1859).

It is axiomatic both that this Court's constitutional decisions are binding on federal and state courts, and that it is not the province of any lower court to overrule or ignore those decisions. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) ("[C]ourts of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citation and internal quotation marks

omitted)); *United States* v. *Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that we follow both the words and the music of Supreme Court opinions."). From "its earliest days this Court [has] consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v. *Pa. R.R. Co.*, 334 U.S. 304, 306 (1948) (citing cases). This Court's decisions accordingly "remain binding precedent until [it] see[s] fit to reconsider them." *Hohn* v. *United States*, 524 U.S. 236, 252–253 (1998).

The CCA's decision below disregards that core rule of law principle. Summary reversal is accordingly the necessary and appropriate relief. This Court has not hesitated to reverse state-court decisions that fail, on remand, to faithfully follow the initial decisions of this Court. See, *e.g.*, *Stanton* v. *Stanton*, 429 U.S. 501, 503–504 (1977) (summarily reversing where, on remand, a state supreme court failed to comply with this Court's mandate invalidating a law permitting differential treatment of males and females for child-support purposes); *Gen. Atomic Co.* v. *Felter*, 436 U.S. 493, 496 (1978) (granting relief where the state court, on remand "did precisely what [this Court] held that it lacked the power to do"); *Deen* v. *Hickman*, 358 U.S. 57, 57–58 (1958) (per curiam) (granting relief where a state court decision on remand failed to comply with this Court's mandate).

If this Court permits the CCA's decision to stand, it would place the CCA's rejection of this Court's decision in *Moore I* beyond review. Even worse, the

CCA's subversion of *Moore I* would give license to States simply to ignore this Court's judgments when they disagree with them. Summary reversal is the most appropriate relief when the legitimacy of the Court's judgments and the rule of law are threatened in this manner.

CONCLUSION

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

Respectfully submitted,

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