NO. WR-13,374-05

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE BOBBY JAMES MOORE,
Applicant.

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 314483-C IN THE 185TH JUDICIAL DISTRICT HARRIS COUNTY

BRIEF OF PROMINENT TEXANS AS AMICI CURIAE IN SUPPORT OF BOBBY JAMES MOORE'S APPLICATION

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STATEMENT OF INTEREST OF AMICI

Amici are proponents and opponents of the death penalty, comprising individuals from across the political spectrum, including prominent Texans and conservatives. Some amici have taken oaths of office to protect and defend the United States Constitution and file this brief because imposition of a death sentence in this case would violate that oath. Other amici are private citizens who have long sought to rein in unfair and inefficient government practices and who file this brief in support of Bobby James Moore's claim for relief because of the important judicial economy issues raised by this case.

Fred Baca was the jury foreman in the *State of Texas v. Bobby J. Moore*. Mr. Baca's continuing interest in this case is not ideological, he has neither been an opponent of the death penalty nor lobbied for criminal justice reform. Mr. Baca's interest is in seeing that justice is served.

Doug Deason is the President of the Deason Foundation.

Christian Ehmling is the former Texas State Chair of Young Americans for Liberty.

Joseph "Joe" Moody is Chairman of the Committee on Criminal Jurisprudence in the Texas House of Representatives.

Patrick Monks is the former Republican Precinct Chairman for Harris County, Texas, Precinct 718.

Kenneth W. Starr is a former Solicitor General of the United States (1989-1993) and a former Judge on the U.S. Court of Appeals for the D.C. Circuit (1983-1989).

James White is Chairman of the Committee on Corrections in the Texas House of Representatives.[1]

[1] No person other than amici or their counsel made a monetary contribution to its preparation or submission. *See* TEX. R. APP. P. 11. No counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Earlier this year, the United States Supreme Court vacated this Court's denial of Bobby James Moore's intellectual disability claim, holding that this Court's prior ruling conflicted with Supreme Court precedent and improperly disregarded prevailing clinical standards. After observing that substantial objective evidence supported Moore's claim, the Supreme Court remanded this case, instructing that further proceedings not be inconsistent with its opinion. That instruction—and the rule of law principle inherent in it—controls this remand. Under the Supreme Court's reasoning, the outcome here is clear: Moore's habeas application should be granted because his intelligence quotient ("IQ") of 74, adjusted for the IQ test's standard error, falls within the clinically established range of significantly subaverage intellectual functioning and substantial evidence shows that he suffers from deficits in adaptive functioning. Confirming the habeas court's finding that Moore has an intellectual disability will advance the rule of law by showing this Court's respect for the Supreme Court's determination that the medical community's consensus must inform adjudications of intellectual disability.

Judicial economy reinforces that conclusion. The habeas court applied current medical standards to this case, as the Supreme Court noted, and substantial evidence supports the habeas court's recommendation to grant relief. The habeas

court held a two-day hearing, considered testimony from nine witnesses, and determined that Moore has an intellectual disability, applying a standard the Supreme Court has since affirmed. Accordingly, this Court should follow the approach it has taken in another post-*Moore* decision and grant relief.

ARGUMENT

I. The Supreme Court's Decision in This Case Obligates This Court to Grant Relief.

Under the Eighth Amendment, the Supreme Court has concluded that the Constitution restricts the State's power to take the life of any intellectually disabled individual. *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017); *see also Hall v. Florida*, 134 S. Ct. 1986, 1990, 1992 (2014); *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002). This is because executing intellectually disabled individuals is contrary to a national consensus against the practice, serves no penological purpose, and creates a risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. *Atkins*, 536 U.S. at 313-320. "[T]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall*, 134 S. Ct. at 1992. And this prohibition applies with equal force to Texas through the Fourteenth Amendment. *See id.*

To determine whether an individual qualifies as "intellectually disabled," it is proper to consult the medical community's opinions, because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the

mental condition at issue." *Id.* at 1993. Although the views of medical experts do not "dictate" a court's decision on what is ultimately a legal issue, "[t]he legal determination of intellectual disability . . . is informed by the medical community's diagnostic framework." *Id.* at 2000. "That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore*, 137 S. Ct. at 1044. Both the Supreme Court and the States "have placed substantial reliance on the expertise of the medical profession" in determining intellectual disabilities, *Hall*, 134 S. Ct. at 2000, and Texas must take the same approach here.

"[T]he medical community defines intellectual disability 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." *Id.* at 1994; *see also Moore*, 137 S. Ct. at 1045. Previously, this Court considered certain factors specified in its decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), but the Supreme Court has now rejected that approach. *Moore*, 137 S. Ct. at 1051 ("By design and in operation, the *Briseno* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed[.]'" (quoting *Hall*, 134 S. Ct. at 1990)). That ruling precludes relying on the *Briseno* factors now. *See, e.g.*, *Ex parte Sosa*, No. ap-76,674, 2017 WL 2131776, at *1 (Tex. Crim. App.

May 3, 2017) (acknowledging *Moore*'s holding "that the *Briseno* factors, based upon superseded medical standards, create an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment").[2]

Accordingly, this Court must consider the medical community's current definition of intellectual disability and its application here, and the Supreme Court has already effectively decided how those criteria apply to the facts of Moore's case. Based on the Supreme Court's analysis, this Court should conclude that Moore is intellectually disabled as a matter of law and grant him relief.

A. The Supreme Court Determined That Moore's IQ, Adjusted for the IQ Test's Standard Error, Falls Within the Clinically Established Range of Significantly Subaverage Intellectual Functioning.

The Supreme Court decided that this Court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*." *Moore*, 137 S. Ct. at 1049. This is because "*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.'" *Id.*; *see Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015). That concept recognizes the "statistical fact" that an IQ test is "inherent[ly] imprecise[e]"

[2] Even before the Supreme Court's decision in *Moore*, a member of this Court doubted whether *Ex parte Briseno* was an appropriate approach for analyzing claims of intellectual disability. *See Ex parte Cathey*, 451 S.W.3d 1, 28 (Tex. Crim. App. 2014) (Price, J., concurring in result) ("For present purposes, suffice it to say that I continue to disagree with the Court's decidedly non-diagnostic approach to evaluating the adaptive-deficits prong of the standard for determining intellectual disability *vel non*. Particularly after the recent opinion of the United States Supreme Court in *Hall v. Florida*, I should think that the writing is on the wall for the future viability of *Ex parte Briseno*.") (footnote omitted).

as "[a]n individual's IQ test score on any given exam may fluctuate for a variety of reasons." *Hall*, 134 S. Ct. at 1994-95. Consequently, "an individual's score is best understood as a range of scores on either side of the recorded score" and "an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* at 1995. Thus, an individual's IQ score should be adjusted for the IQ test's standard error and, if the resulting range overlaps with the clinically established range for intellectual-functioning deficits, a court must continue its inquiry and consider other evidence of intellectual disability. *Moore*, 137 S. Ct. at 1050.

Here, it is undisputed that, as both the State's retained expert and this Court acknowledged, "Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79." *Id.* at 1049; *see Ex parte Moore,* 470 S.W.3d 481, 519 (Tex. Crim. App. 2015). The lower end of Moore's score range thus falls at or below 70. *Moore*, 137 S. Ct. at 1049. As such, Moore's IQ, "adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 1050. Accordingly, this Court must consider the substantial objective evidence Moore presented in support of his intellectual disability claim. *Id.* at 1049-50.[3]

[3] That Moore took multiple tests does not obviate the need to assess each separate score using the standard measurement of error. *See Hall*, 134 S. Ct. at 1995.

B. The Supreme Court Concluded That This Court Applied an Improper Standard for Determining Deficits in Adaptive Functioning and Clearly Indicated That Moore Had Such Deficits Under Prevailing Clinical Standards.

In explaining why it rejected this Court's analysis of Moore's intellectual disability claim, the Supreme Court indicated that Moore suffers from deficits in adaptive functioning under prevailing clinical standards. That conclusion effectively controls this Court's analysis here.

To begin, the Supreme Court identified multiple ways in which this Court's approach to determining deficits in adaptive functioning "deviated from prevailing clinical standards." *Id.* at 1050. First, the Supreme Court held that this Court "overemphasized Moore's perceived adaptive strengths." *Id.* In its prior decision, this Court considered Moore's adaptive strengths as evidence adequate to overcome the objective evidence of Moore's adaptive deficits. *See Ex parte Moore*, 470 S.W.3d at 522-24, 526-27. Yet the medical community does not concentrate on adaptive strengths; rather, it focuses on adaptive *deficits*. *Moore*, 137 S. Ct. at 1050 (collecting medical authorities). And the medical community does not permit the "arbitrary offsetting of deficits against unconnected strengths." *Id.* at 1050 n. 8. Thus, the Supreme Court's decision requires this Court to focus on whether Moore has provided adequate evidence to establish that he suffers from adaptive deficits, not whether those deficits might be outweighed by unrelated adaptive strengths.

Second, the Supreme Court also warned against placing reliance on "adaptive strengths developed in a controlled setting." *Id.* at 1050 (quotation omitted). As such, this Court's conclusion that "[t]he significant advances [Moore] 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" should be discounted. *Ex parte Moore*, 470 S.W.3d at 526. Rather, like clinicians in the field, this Court must take care not to rely on Moore's adaptive strengths developed during his time in the controlled setting of imprisonment on Texas's death row. *Moore*, 137 S. Ct. at 1050. Again, this Court's focus should be on evidence of Moore's adaptive deficits and not on unrelated adaptive strengths.

Likewise, Moore's intellectual and adaptive deficits may not be dismissed even if they result in part from causes, such as his childhood abuse and the suffering he endured, other than a preexisting intellectual disability. *Id.* at 1051. Previously, this Court reasoned that Moore's deficits were not necessarily linked to significantly sub-average general intellectual functioning because these deficits "were caused by a variety of factors." *Ex parte Moore*, 470 S.W.3d at 526. The Supreme Court rejected such an approach, because traumatic experiences such as Moore's do not establish the absence of a connection between intellectual and adaptive deficits. To the contrary, they "count in the medical community as '*risk*

factors' for intellectual disability." *Moore*, 137 S. Ct. at 1051. Consequently, such experiences are cause to explore the prospect of intellectual disability further, rather than reason to discount a disability determination. *Id.*

Finally, this Court may not require Moore to show that his adaptive deficits were not related to a "personality disorder." *Ex parte Moore*, 470 S.W.3d at 488; *see id.* at 526. Mental-health professionals recognize that many intellectually disabled people also have other mental or physical impairments, including attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism. *Moore*, 137 S. Ct. at 1051. Indeed, coexisting conditions occur frequently enough in intellectually disabled individuals that the clinical literature refers to them as "comorbidities." *Id.* Citing the existence of a personality disorder or mental-health issue to decide that a person does not have an intellectual disability thus bases a conclusion on an unsupported premise. Simply put, the conditions described here are coexisting—not exclusive—and so "[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 omitted).

In sum, it is clear that the adaptive deficits inquiry should be primarily focused, as its name suggests, "on adaptive *deficits*." *Id.* at 1050. So, having removed the above-mentioned issues from this case, the key inquiry is thus whether Moore has provided sufficient evidence to establish that he suffers from

adaptive deficits under current medical standards. Here, again, the Supreme Court's decision provides clear guidance: the Supreme Court observed that there is "considerable objective evidence of Moore's adaptive deficits[.]" *Id.* Having recognized this considerable objective evidence in support of Moore's adaptive deficits and having rejected this Court's reasons for discounting it, the Supreme Court's reasoning compels the conclusion that Moore suffers from adaptive deficits.

In short, by (1) determining that Moore's IQ score, adjusted for the IQ test's standard error, falls within the clinically established range for intellectual-functioning deficits and (2) recognizing the "considerable objective evidence of Moore's adaptive deficits," the Supreme Court has effectively decided that Moore falls within the definition of intellectual disability.[4] Accordingly, his request for relief should be granted.

[4] The Supreme Court did not address the onset of Moore's adaptive deficits because that element was not at issue. *Moore*, 137 S. Ct. at 1045 n.3. This makes sense, given that, as the Court noted, evidence in the record "revealed that Moore had significant mental and social difficulties beginning at an early age." *Id.* at 1045. For instance, "[a]t 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition." *Id.* Accordingly, that factor weighs in favor of granting relief here.

II. Moore's Case Has Already Been Considered—and Decided—Under the Most Current Medical Standards, so, in the Interest of Judicial Efficiency, That Decision Should Be Followed.

Even putting the Supreme Court's clear guidance aside, judicial economy concerns and appropriate recognition of the habeas court's extensive findings also favor a grant of relief here.

The "medical community's current standards supply one constraint on States' leeway" in the area of defining intellectual disability. *Moore*, 137 S. Ct. at 1053. And it is undisputed that the habeas court made "detailed factfindings" and "applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty." *Id.*; *see id.* at 1045. Indeed, this Court expressly faulted the state habeas court for "employing the definition of intellectual disability presently used by the [American Association on Intellectual and Developmental Disabilities]" rather than the *Briseno* standard. *Ex Parte Moore*, 470 S.W.3d at 486. Given the extensive consideration of this issue by the habeas court, revisiting its determination now would needlessly squander time and resources.

The habeas court's evidentiary hearing lasted two days and included testimony from nine witnesses. Both parties submitted lengthy findings of fact and conclusions of law. And the habeas court issued its 186-paragraph recommendation only after considering all of the exhibits and testimony from the

hearing along with the trial court and appellate records. Reevaluating these extensive findings would be unnecessary and inappropriate. Although the Court of Criminal Appeals is "the ultimate factfinder" in habeas proceedings, s*ee, e.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008), this Court ordinarily "will defer to and accept a trial judge's findings of fact and conclusions of law when they are supported by the record." *Id.* Given that the Supreme Court itself recognized the "substantial objective evidence" that supports Moore's claim here, there should be more than sufficient evidence to support the state habeas court's recognition of Moore's intellectual disability under the new standard.

This Court has already acted in accord with these judicial economy principles in another post-*Moore* case. *See Ex parte Sosa*, No. ap-76,674, 2017 WL 2131776 (Tex. Crim. App. May 3, 2017). In *Ex parte Sosa*, a convicting court recommended the grant of relief on an intellectual disability claim. This Court then remanded the case to the habeas court to reconsider its recommended finding that the applicant was intellectually disabled in light of the *Briseno* factors. While the case was pending before this Court a second time, however, *Moore* was decided. This Court then recognized that *Moore* "held that the *Briseno* factors, based upon superseded medical standards, create[d] an unacceptable risk that a person with intellectual disabilities [would] be executed in violation of the Eighth Amendment." *Id.* at *1. And, in a single-page *per curiam* opinion, this Court

"reviewed the record in this case," "determine[d] that the trial court's findings [were] supported by the record," and granted relief. *Id.* So too, here, this Court—like the Supreme Court—need only review the substantial evidence in support of Moore's intellectual disability claim, conclude that the trial court's findings are supported by the record, and grant Moore's requested relief.

CONCLUSION

For the foregoing reasons, Moore's request for relief based upon his intellectual disability claim should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the word-limit requirements for amicus briefs contained in the Texas Rules of Appellate Procedure, because it contains a total of 2,980 words, excluding the portions that can be excluded pursuant to those same rules.

/s/ *Catherine Maggio Schmucker*
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CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2017, a true and correct copy of the foregoing was served via electronic mail on the following counsel of record for all parties in this case:

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