**WR-13,374-05**

In the
Court of Criminal Appeals
For the
State of Texas

———♦———

**No. 0314483**
In the 185th District Court
Of Harris County, Texas

———♦———

**BOBBY JAMES MOORE**
*Applicant*
V.
**THE STATE OF TEXAS**
*Respondent*

———♦———

# RESPONDENT'S BRIEF

———♦———

**KIM K. OGG**
District Attorney
Harris County, Texas

**TOM BERG**
First Assistant District Attorney
Harris County District Attorney
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
Tel.: 713/755-5826
FAX No.: 713/755-5809

*Counsel for the State of Texas*

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## IDENTITY OF PARTIES AND COUNSEL

BOBBY JAMES MOORE ("the applicant")

COUNSEL FOR THE APPLICANT:

Patrick F. McCann
THE LAW OFFICES OF PATRICK F. MCCANN
700 Louisiana Street
Suite 3950
Houston, Texas 77002
Telephone: 713-223-3805
writlawyer@justice.com

Clifford M. Sloan
Donald P. Salzman
Lauryn K. Fraas
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue NW
Washington, DC 20005
Telephone: 202-371-7000
cliff.sloan@skadden.com

Warren S. Huang
Layne E. Kruse
Anne M. Rogers
NORTON ROSE FULBRIGHT US LLP
Fulbright Tower
1301 McKinney Street, Suite 5100
Houston, TX 77010
Telephone: 713-651-3633
warren.huang@nortonrosefulbright.com

COUNSEL FOR THE STATE OF TEXAS:

Tom Berg
First Assistant District Attorney
HARRIS COUNTY DISTRICT ATTORNEY
1201 Franklin Street
Suite 600
Houston, TX 77002
Telephone: 713-274-6037
berg_tom@dao.hctx.net

## STATEMENT OF THE CASE

In 1980, the applicant was convicted of capital murder and sentenced to death. *Moore v. State*, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985). In 2001, following a grant of federal habeas corpus relief, the applicant was again convicted of capital murder and sentenced to death. *Moore v. State*, No. AP-74,059, slip. op., 2004 WL 231323, *1 (Tex. Crim. App. Jan. 14 2004)(not designated for publication). Following his 2001 retrial, the applicant filed a writ of habeas corpus alleging that he is intellectually disabled and thus ineligible to be executed under *Atkins v. Virginia*, 536 U.S. 304, 311-21 (2002).

Applying the test it set forth in *Ex parte Briseno*, 135 S.W. 3d 1, 4-8 (Tex. Crim. App. 2004), the Court of Criminal Appeals determined that the applicant did not meet his burden of proof to demonstrate that he is intellectually disabled. *Ex parte Moore*, 470 S.W. 3d 481, 514-28 (Tex. Crim. App. 2015). The United States Supreme Court vacated and remanded, concluding that *Briseno* was based on superseded medical standards, application of which created an "unacceptable risk" that a person with intellectual disabilities will be executed in violation of the Eighth Amendment. *Moore v. Texas*, 137 S. Ct. 1039, 1048-53 (2017).

## ISSUE PRESENTED

In *Moore*, the United States Supreme Court determined that the legal standard for intellectual disability in capital sentencing established in *Briseno* was unconstitutional. Now that *Briseno* has been abrogated, what new legal standard should the Court of Criminal Appeals establish?

## STATEMENT OF THE FACTS

In *Moore*, the United States Supreme Court vacated this Court's *Ex parte Moore* judgment and remanded for further proceedings.

> In Moore's case, the habeas court applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty. The CCA, however, faulted the habeas court for disregarding [the CCA's] case law and employing the definition of intellectual disability presently used by the AAIDD. The CCA instead fastened its intellectual-disability determination to the AAMR's 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases. By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the medical community's diagnostic framework. Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand.

137 S. Ct. 1039, 1053 (internal quotations and citations omitted). In reaching this conclusion, six points of error in this Court's analysis were

found to demonstrate a "disregard of current medical standards." *Id*. at 1049.

First, the nonclinical *Briseno* adaptive behavior factors were improperly grounded in "lay stereotypes of the intellectually disabled." *Id*. at 1051-53.

Second, the full range of the applicant's multiple IQ scores were not considered. *Id*. at 1049.

Third, the applicant's adaptive strengths were overemphasized while the "medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Id*. at 1050.

Fourth, the applicant's "improved behavior in prison" was stressed while clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting' as a prison surely is." *Id*. at 1050.[1]

Fifth, departing from clinical practice, the applicant was required to show that his adaptive deficits were not related to a personality disorder, thus failing to take into account that intellectually disabled individuals also

[1] The scope of this critique is unclear. The United States Supreme Court cites to evidence of the applicant's prison behavior considered by the State's expert, Dr. Kristi Compton. *Id*. citing *Ex parte Moore*, 470 S.W. 3d at 522-24, 526-27. However, the cited pages of *Ex parte Moore* also detail the facts of the underlying capital murder, the applicant's 1980 trial testimony, and his 1983 *Faretta* hearing. All three were considered by Dr. Compton and none occurred in a controlled setting. 470 S.W.3d at 522. Moreover, the facts of a crime are fair to consider as evidence of adaptive behavior. *Brumfield v. Cain*, 135 S. Ct. 2269, 2280-81 (2015).

potentially suffer from a range of mental health or physical co-morbidities. *Id*. at 1051.

Sixth, this Court was faulted for concluding that the applicant's "record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive functioning were related. Those traumatic experiences, however, count in the medical community as '*risk factors' for* intellectual disability." *Id*. at 1051 (emphasis in original).

## SUMMARY OF THE ARGUMENT

Examination of *Moore* reveals an emerging legal doctrine of "unacceptable risk" and the Eighth Amendment. An "unacceptable risk" is created when a court evaluating an *Atkins* claim strays from current medical practice.

The "unacceptable risk" doctrine presents three implications for this Court to consider as it establishes a new legal standard for intellectual disability in capital sentencing. First, States must strictly adhere to the definitions of intellectual disability contained in the most current clinical manuals. Second, States should not develop bifurcated legal tests that seek to establish whether an individual is intellectually disabled but it would not be cruel and unusual punishment to execute them. Third, an emphasis on

current medical practice requires that experts in *Atkins* litigation exercise clinical judgment based upon a thorough and detailed retrospective diagnostic analysis.

This Court should adopt the definition of intellectual disability set forth in the American Psychiatric Association (APA) DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (APA, 5th ed. 2013) (DSM-5). Application of the DSM-5 criterion will achieve three important ends. First, the DSM-5 will pass constitutional scrutiny. Second, the DSM-5 maintains legal precedent by permitting an inquiry into whether deficits in adaptive behavior are "directly related" to intellectual functioning. Third, the DSM-5 contains a flexible age of onset criterion that avoids a possible "unacceptable risk" posed by a hard numerical cutoff.

## ARGUMENT

### I. AN EMERGING DOCTRINE OF "UNACCEPTABLE RISK" AND THE EIGHTH AMENDMENT MUST BE CONSIDERED BY THE COURT.

In his *Moore* dissent, Chief Justice Roberts voiced concern that the States were being provided with little if any guidance as to what legal standard for intellectual disability in capital sentencing will survive Eighth Amendment scrutiny.

> A second problem with the Court's approach is the lack of guidance it offers to States seeking to enforce the holding of *Atkins*. Recognizing that we have, in the very recent past, held that "'the views of medical experts' do not 'dictate' a court's intellectual-disability determination," the Court assures us that it is not requiring adherence "to everything stated in the latest medical guide"; States have "some flexibility" but cannot "disregard" medical standards. Neither the Court's articulation of this standard nor its application sheds any light on what it means.

137 S. Ct. at 1058 (Roberts, C.J., dissenting) (internal citations omitted).[2]

[2] Legal commentators have expressed similar frustration. Clinton M. Barker, Note, *Substantial Guidance Without Substantive Guides: Resolving The Requirements Of Moore v. Texas and Hall v. Florida*, 70 Vand. L. Rev. 1027, 1028-69 (2017); Kent Scheidegger, *Death Penalty Symposium: United States Supreme Court Marks Time for a Term on Capital Punishment* (June 28, 2017 4:11 PM) http://www.scotusblog.com/2017/06/death-penalty-symposium-supreme-court-marks-time-term-capital-punishment.

While it shares these concerns, the State believes a clearer picture of what the Eighth Amendment and due process require under *Atkins* is more apparent than might appear to be the case.

Collectively reading *Moore* and *Hall v. Florida*, 134 S. Ct. 1986 (2014), a doctrine of "unacceptable risk" and the Eighth Amendment emerges. *Moore*, 137 S. Ct. at 1045 (application of nonclinical *Briseno* factors created an "unacceptable risk" that persons with intellectual disability would be executed as they were not "aligned with the medical community's information"); *Hall*, 134 S. Ct. at 1989 (failure to take the standard error of measurement (SEM) into account in evaluating an IQ score disregarded established medical practice and created an "unacceptable risk" that persons with intellectual disability would be executed).

This emerging jurisprudence carries three implications for this Court's consideration as it establishes a new legal standard to replace *Briseno*.

## A. States Possess Limited Flexibility To Define Intellectual Disability For Capital Sentencing.

*Moore* made clear that States have little to no flexibility or discretion as to what definitional standard should apply to evaluate an *Atkins* claim.

The United States Supreme Court determined that the current American Psychiatric Association (APA) DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (APA, 5th ed. 2013) (DSM-5) and the

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES DEFINITION MANUAL (AAIDD, 11th ed. 2010) (AAIDD-11) constitute "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore*, 137 S. Ct. at 1053 quoting DSM-5 at xli. Thus, Texas must make a binary choice and pick one of the definitions set forth in the two clinical manuals. *See Petetan v. State*, No. Ap.-77,038, 2017 WL 4678670, at *1 (Tex. Crim. App. Oct. 18, 2017)(Newell, J., concurring)(order, not designated for publication) (*Moore* requires that Texas "re-work our standard for determining intellectual disability").

Moreover, "unacceptable risk" necessitates that the States should strictly adhere to the definitions of intellectual disability as contained within the most current versions of the clinical manuals. *See Moore*, 137 S. Ct. at 1053 quoting DSM-5 at xli ("current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'"); *Hall*, 134 S. Ct. at 1990-91 (employing current clinical standards); *Atkins*, 536 U.S. at 308, n.3 (relying on then current clinical standards).

Conservatively interpreting *Moore* and *Hall*, this will mean that every time the definition of intellectual disability changes in one of the clinical

manuals, the States' definition of intellectual disability for capital sentencing will have to change as well.[3] As such, the State cautions against adopting a hybrid *Atkins* definition that combines elements of the DSM-5 and AAIDD-11 as this would likely necessitate more frequent revisions of the law.

### B. States Should Avoid Unique *Atkins* Tests That Distinguish Between Factual Sufficiency And Moral Culpability.

The States should not draw a distinction between the factual and legal sufficiency of intellectual disability, i.e., an individual is intellectually disabled but it would not be cruel and unusual punishment in violation of the Eighth Amendment to execute them. *See Ex parte Moore*, 470 S.W. 3d at 530 (Alcala, J., dissenting)(suggesting a bifurcated Eighth Amendment inquiry). *Moore* made clear that all intellectually disabled offenders are per se protected under the Eighth Amendment. "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (emphasis in original) citing *Roper v. Simmons*, 543 U.S. 551, 563-64 (2005). Indeed, *Moore* contains an ominous warning regarding the States' apparent lack of flexibility: "The medical community's current

[3] This argument is not advanced lightly as it may cause protracted litigation. *Hall*, 134 S. Ct. at 2006 (Alito, J., dissenting) (identifying "serious practical problems" caused by "tying Eighth Amendment law" to the changing views of the AAIDD and APA). However, application of anything other than a current clinical manual appears to pose an "unacceptable risk" under the Eighth Amendment.

standards supply *one* constraint on States' leeway in this area." *Id*. at 1053 (emphasis added).

Therefore, a conservative interpretation of *Moore* and *Hall* leads to the conclusion that the States should not become creative and establish new or unique Eighth Amendment tests that seek to distinguish between factual sufficiency and moral culpability as these would create a possible "significant risk" akin to *Briseno*. Simply put, for capital sentencing purposes, an applicant alleging that he is intellectually disabled either satisfies the burden of proof or he does not.

### C. Current Clinical Standards In *Atkins* Cases Demand Strict Adherence To The Exercise Of Clinical Judgment Based Upon A Thorough And Detailed Retrospective Analysis.

Currency with prevailing clinical standards cuts both ways. All *Atkins* experts — for the applicant and the State — must exercise and demonstrate clinical judgment based upon a thorough retrospective analysis of IQ and adaptive functioning. DSM-5 at 37 ("Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. . . . Scores from standardized measures and interview sources must be interpreted using clinical judgment.").

*Atkins* claims rely heavily on consideration of competing opinions among forensic clinicians. Accordingly, these experts should be expected to

detail with specificity how they exercised clinical judgment and why they arrived at their professional conclusion. *Hall*, 134 S. Ct. at 1993 ("Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue"). Indeed, in light of the United States Supreme Court's emphasis on current clinical standards, it remains absolutely appropriate for courts to assess the merits of an *Atkins* claim through an inquiry into whether the forensic clinicians assessing the applicant exercised clinical judgment in accord with professional norms. *See* DSM-5 at 25 ("In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability . . . does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard").

## II. TEXAS SHOULD ADOPT THE DSM-5 DEFINITION OF INTELLECTUAL DISABILITY.

For capital sentencing, Texas should adopt the definition of intellectual disability set forth in the DSM-5[4] rather than the AAIDD-11.[5]

Adoption of the DSM-5 will pass constitutional scrutiny and immediately remedy *Briseno*. Moreover, the DSM-5 criteria present two distinct advantages as compared to the AAIDD-11 standard. First, the DSM-5 permits Texas to continue to examine whether deficits in intellectual functioning and adaptive functioning are "related." Second, the DSM-5

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[4] Intellectual disability (intellectual developmental disorder) is a disorder with onset during the diagnostic period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following criteria must be met:

> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5 at 33.

[5] Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18. AAIDD-11 at 5.

avoids the potential "unacceptable risk" posed by the AAIDD-11 hard age of onset cutoff.

### A. The DSM-5 Definition Of Intellectual Disability Is Adequately Informed By The Medical Community.

The DSM is the touchstone for mental health experts. "With successive editions over the past 60 years, it has become a standard reference for clinical practice in the mental health field. . . . [T]he current diagnostic criteria are the best available description of how mental orders are expressed and can be recognized by trained physicians." DSM-5 at xli. Released in 2013, the current edition is the outgrowth of a twelve year review process involving multiple working groups, public and professional reviews, and field trials. DSM-5 at 5-10.

The DSM-5 was repeatedly cited as authority by the United States Supreme Court in *Moore*. 137 S. Ct. at 1051-52. Indeed, *Moore* specifically criticizes Texas for requiring the intellectual disability diagnoses of juveniles in the criminal justice system to be based on the most current edition of the DSM, yet applying "superseded standards when an individual's life is at stake." *Id*. at 1052 (citing 37 TEX. ADMIN. CODE § 89.1040(c)(5)(2015)).

Accordingly, adoption of the definition of intellectual disability as set forth in the DSM-5 would unquestionably pass Eighth Amendment "unacceptable risk" scrutiny. Moreover, it would hold the additional benefit

of harmonizing with Fifth Circuit law, as both Louisiana and Mississippi now apply the DSM-5 criteria in capital sentencing. LA. CODE CRIM. PROC. art. 905.5.1(H); *Chase v. State*, 171 S. 3d 463, 471 (Miss. 2015).

### B. The DSM-5 Requires Examination Of Whether Adaptive Deficits Are "Directly Related" To Intellectual Disability.

The DSM-5 and AAIDD-11 differ in their approach to adaptive deficits. The DSM-5 requires: "To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A." DSM-5 at 38 (emphasis added). By contrast, the AAIDD-11 possesses no relatedness requirement. AAIDD-11 at 43; *see Moore*, 137 S. Ct. at 1055 (Roberts, C.J., dissenting)("By the time Moore's case reached the CCA, the AAIDD no longer included the requirement that adaptive deficits be 'related' to intellectual functioning.").

Texas jurisprudence requires that a habeas applicant seeking *Atkins* relief must satisfy the burden of proof that his deficits in intellectual functioning and adaptive behavior are related. *Briseno*, 135 S.W. 3d at 7 n.25; *Ladd v. Stephens*, 748 F.3d 637, 645-46 (5th Cir. 2014). Therefore, to maintain this precedent, this Court must adopt the DSM-5 criterion.

Additionally, it is recommended that this Court clarify what the "directly related" inquiry requires in order to avoid an "unacceptable risk"

caused by deviation from prevailing clinical standards. As the APA explained in *Moore*:

> The current diagnostic criteria require a connection between the deficits in intellectual functioning, but that connection need only exclude the obvious limits imposed by other ailments.[6] The most obvious of those include physical disabilities that impair sensory abilities (e.g., blindness or deafness). Whether a deficit in adaptive functioning is 'related' to intellectual impairments is a clinical judgment and cannot be reduced to a layperson's 'just so' stories.

*Brief of Amici Curiae American Psychological Association, American Psychiatric Association, American Academy of Psychiatry and the Law, National Association of Social Workers, & National Association of Social Workers Texas Chapter in Support of Petitioner* at 9, 137 S. Ct. 1039 (2017) (No. 15-797). Thus, the "directly related" inquiry is an examination of correlation and connection, not causation. Marc J. Tasse, Ruth Luckasson & Robert L. Schalock, *The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability*, 54 INTELL. & DEV. DISABILITIES 381, 387 (2016).[7]

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[6] The focus on "ailments" appears to explain the United States Supreme Court's critique that this Court improperly applied the applicant's "traumatic experiences" during childhood in its relatedness inquiry. *Moore*, 137 S. Ct. at 1051.

[7] Correlation rather than causation is further borne out by reference to the meaning of both words. "Directly" means "Without anyone or anything intervening." "Related" means "Connected by kinship, common origin, or marriage." AMERICAN HERITAGE COLLEGE DICTIONARY, 401, 1173(4th ed. 2002).

It is important to note that the United States Supreme Court did not hold that the relatedness requirement is improper; rather, this Court was faulted for discounting the role specific co-morbidities and other risk factors may have played in the applicant's adaptive deficits. *Moore*, 137 S. Ct. at 1051. This criticism is easily remedied.

Under *Moore* and *Hall*, a "risk" becomes an "unacceptable risk" when a court's analysis deviates from current clinical practice. Therefore, a court's ultimate adaptive behavior conclusion must focus less on its own interpretation of risk factors and co-morbidities and more on a credibility determination of the expert's clinical judgment as they assess direct relatedness when multiple risk factors and co-morbidities are present.[8] DSM-5 at 37-40. The scope of that which is professionally required of the forensic clinician is clear:

> [T]he task of determining the cause(s) of what may be an adaptive deficit is different than determining the cause of [intellectual disability]. Some behaviors or patterns of behavior could be related to intellectual difficulties, personality traits,

[8] Application of this approach would have avoided the criticism that this Court failed to consider the full range of the applicant's IQ scores. *Moore*, 137 S. Ct. at 1049. Per *Moore*, it was improper for this Court to not consider five of the applicant's IQ scores. *Id*. However, a forensic clinician is different. The DSM-5 permits a clinician to disregard an IQ score, and/or give greater weight to one IQ score over another, if that decision is grounded in clinical judgment. DSM-5 at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance."). Therefore, a clinician can testify as to how they exercised their clinical judgment in assessing a range of IQ scores, and the court can make an according credibility determination to assess the merits of the *Atkins* claim.

> both, or a combination of those and other factors. For example, a person might drop out of school after repeated failure to succeed no matter how hard he tried. Or a person might drop out to pursue a criminal lifestyle. Both could be true for the same person.
>
> Recognizing that deficits in adaptive functioning may arise from multiple sources, forensic clinicians in *Atkins* cases should neither assume that adaptive deficits are invariably related to intellectual impairments nor exclude intellectual impairment as an etiological factor in the presence of other contributing factors. We recommend forensic clinicians consider and be prepared to explain the role of any intellectual impairment in the observed deficiency in adaptive functioning. Review of the trajectory of adaptive deficits over time may inform this differential.

Gilbert S. Macvaugh & Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice*, 37 J. OF PSYCHIATRY & L., 131, 170-71 (2009).

A forensic clinician acting in conformity with prevailing standards should be up to this task. If they are not, a court should accordingly assess the lacking persuasiveness of the *Atkins* claim.

### C. The DSM-5's Age of Onset Criterion Avoids the Potential "Unacceptable Risk" Posed by the AAIDD-11's Hard Age Cutoff.

In *Hall*, the United States Supreme Court disapproved of the State of Florida's strict IQ test cutoff of 70 as it disregarded established clinical definitions of IQ scores that take the SEM into consideration in a diagnosis of intellectual disability. *Hall*, 134 S. Ct. at 2001 citing DSM-5 at 37

("Intellectual disability is a condition, not a number."). Nevertheless, the AAIDD-11 advances a numerical cutoff for age of onset. Although not an issue in the instant case, age of onset can become a contested matter in *Atkins* litigation. *Van Tran v. Colson*, 764 F.3d 594, 612-19 (6th Cir. 2014).

The DSM-5 requires a showing of intellectual and adaptive deficits "during the developmental period." DSM-5 at 33. "Developmental period" is undefined, although the manual does note that onset during the developmental period "refers to the recognition that intellectual and adaptive deficits are present during childhood or adolescence." *Id.* at 38. This definition thus appears to provide some flexibility for an applicant to demonstrate that his particular brain development did not end at 18. Stephen Greenspan, George W. Woods & Harvey N. Switzky, *Age of Onset and the Developmental Period Criterion*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 77, 78 (Edward A. Polloway ed., 2015).

By contrast the AAIDD maintains that 18 is an appropriate cutoff from both a neurological and social policy perspective. AAIDD-11 at 28. Among the reasons cited by the AAIDD for a strict cutoff is an issue inherent in the instant application: "extending to 21 would not be helpful in accurately diagnosing individuals who have not been diagnosed before 18 because any examination would likely refer to school records." *Id.*

While the AAIDD's policy rationale has merit, it must be viewed through the lens of the United States Supreme Court's determination that all intellectually disabled individuals are per se excluded from the death penalty *Moore*, 137 S. Ct. at 1051. As such, the DSM-5 criterion for age of onset avoids the potential "unacceptable risk" posed by the AAIDD-11's hard cutoff.

## PRAYER

For the foregoing reasons, the State prays that the Court of Criminal Appeals establish the DSM-5 diagnostic criterion as the new legal standard for intellectual disability in capital sentencing.

The applicant has been on death row for more than 37 years. In addition, the United States Supreme Court's ruling eliminates consideration of the applicant's adaptive behavior demonstrated while he has been incarcerated for the last three decades. *Moore*, 137 S. Ct. at 1050.

Furthermore, based on the findings of the habeas court, the clear import of the Supreme Court's conclusions in *Moore*, and our review of the applicable standards of the DSM-5, the Harris County District Attorney's

Office agrees that Moore is intellectually disabled, cannot be executed, and is entitled to *Atkins* relief.[9]

SIGNED this 1st day of November, 2017

RESPECTFULLY SUBMITTED,

KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

/S/ *Tom Berg*

Tom Berg
First Assistant District Attorney
Harris County District Attorney
1201 Franklin Street
Houston, TX 77002
713 274-6037
berg_tom@dao.hctx.net
SBOT# 02189200

[9] Remand to the habeas court is only appropriate if this Court determines that the record is insufficient to support a legal conclusion of intellectual disability under the new diagnostic criteria. *See Ex parte Moore*, 470 S.W. 3d at 531 (Alcala, J., dissenting) (urging "remand for the habeas court to reconsider the evidence under the new modified test that considers current medical standards").

## CERTIFICATE OF SERVICE AND COMPLIANCE

Service has been accomplished by sending a copy of the accompanying instrument to the applicant's counsel via e-mail and certified mail.

Pursuant to TEX. R. APP. P. 9.4, I certify that the instant document contains 3,841 words.

SIGNED this 1st day of November, 2017

RESPECTFULLY SUBMITTED,

KIM OGG
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

/S/ *Tom Berg*

Tom Berg
First Assistant District Attorney
Harris County District Attorney
1201 Franklin Street
Houston, TX 77002
713 274-6037
berg_tom@dao.hctx.net
SBOT# 02189200