MOORE V. TEXAS: BALANCING MEDICAL ADVANCEMENTS WITH JUDICIAL STABILITY

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INTRODUCTION

In the 2016 election, voters in California, Nebraska, and Oklahoma reviewed the death penalty through referenda.[1] The initiative in California, which was to remove the death penalty altogether, failed.[2] This was the second time that such a measure has failed there.[3] Oklahoma voters were deciding whether or not to preserve the death penalty within the state's constitution.[4] This constitutional amendment passed.[5] In Nebraska, where voters were deciding whether to overturn the state legislature's ban on the death penalty, the death penalty again prevailed.[6] Public approval for the death penalty remains fairly high, and a pro-death penalty sentiment among the electorate seems to predominate.[7]

The trend at the United States Supreme Court tells a different story. Generally, the Supreme Court has carved away at the death penalty with each new case it takes up.[8] In *Atkins v. Virginia*,[9] the Court

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1. Josh Sanburn, *The Future of the Death Penalty Will Be Decided in These 3 States*, TIME MAGAZINE (Nov. 7, 2016), http://time.com/4561649/death-penalty-referendum-california-nebraska/.

2. *Id.*

3. Liliana Segura, *The Death Penalty Won Big on Election Day, But the Devil is in the Details*, INTERCEPT (Nov. 11, 2016), https://theintercept.com/2016/11/11/the-death-penalty-won-big-on-election-day-but-the-devil-is-in-the-details/.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Elizabeth Schumacher, *Texas on Trial for Using Fictional Character in Death Penalty Cases*, DEUTSCHE WELLE (Oct. 29, 2016), http://dw.com/p/2Rsq6.

9. 536 U.S. 304 (2002).

recognized that the Eighth Amendment bars the execution of an individual who is intellectually disabled.[10] In *Hall v. Florida*,[11] the Court required that a State's legal determination of intellectual disability must be "informed by the medical community's diagnostic framework."[12] Because of continued public support, however, many believe that it will still be a while before the Court considers a nationwide ban.[13] This was evident when the Court decided to hear *Moore v. Texas*.[14] Initially, the Court considered addressing the constitutionality of the death penalty,[15] but quickly limited review to one question: whether the Eighth Amendment requires States to adhere to a particular organization's most recent clinical definition of intellectual disability in determining whether a person is exempt from the death penalty under *Atkins* and *Hall*.[16]

This commentary argues that the Supreme Court should find for Texas because the state's intellectual disability determination is consistent with the Eighth Amendment under *Atkins* and *Hall*.[17] Further, requiring states to change their frameworks based on the current medical definition at the time will cause judicial instability. Part I summarizes the factual and procedural history of *Moore v. Texas*, and Part II explains the legal background of the death penalty and intellectual disability. Part III presents the Texas Court of Criminal Appeals (CCA) holding and rationale, and Part IV explores the arguments set forth by the Petitioner and the Respondent. Part V then analyzes how the Supreme Court should rule on *Moore* based on the Court's precedent and the associated policy implications.

I. FACTUAL AND PROCEDURAL HISTORY

On April 25, 1980, Petitioner Bobby James Moore and two other individuals robbed the Birdsall Super Market in Houston, Texas.[18]

10. *Id.* at 320.
11. 134 S. Ct. 1986 (2014).
12. *Id.* at 2000.
13. Schumacher, *supra* note 8.
14. Order Granting Cert., Moore v. Texas, No. 15-797 (U.S. June 6, 2016) [hereinafter Orde Granting Cert.].
15. Adam Liptak, *Supreme Court to Hear Death Penalty Cases*, N.Y. TIMES (June 6, 2016), http://www.nytimes.com/2016/06/07/us/politics/supreme-court-to-hear-two-major-death-penalty-cases.html?_r=1.
16. Brief for the Respondent at i, Moore v. Texas, No. 15-797 (U.S. Sept. 6, 2016) [hereinafter Brief for Respondent].
17. Hall v. Florida, 134 S. Ct. 1986 (2014).
18. *Ex parte* Moore, 470 S.W.3d 481, 490 (Tex. Crim. App. 2015).

Moore supplied the weapons for the robbery and agreed to guard the courtesy booth while one of the accomplices planned to take the money.[19] As they entered the store, one of the accomplices demanded money from the two clerks.[20] Moore pointed a gun at the two clerks, causing one of the clerks to cry out that the store was being robbed.[21] Moore then pointed the gun at the clerk and shot him in the head.[22] He died instantly.[23] Moore and his accomplices quickly fled the scene.[24]

Witnesses gave the police the license-plate number and a description of the getaway car, which allowed law enforcement to apprehend and arrest one of the accomplices.[25] The car was searched, and the police found the other accomplice's wallet, causing him to turn himself into the police.[26] Based on interviews with the two accomplices, law enforcement issued a warrant for Moore's arrest, but Moore evaded police until he was found at his grandmother's house in Louisiana several weeks later.[27] Moore admitted to the robbery and the clerk's death, but insisted the death was an accident.[28] The jury found him guilty of capital murder.[29] At the punishment phase, Moore accepted the stipulation in his penitentiary packet, which outlined his medical and familial history, and the jury sentenced him to death.[30] Over the next twenty years, Moore filed several *habeas corpus* petitions, motions for a stay of execution, and applications alleging ineffective assistance of counsel, but received no relief.[31]

Then, in August 2002, "[d]espite having argued at the punishment retrial that [he] was not intellectually disabled[,] and having presented the testimony of two experts to support that theory," Moore claimed that he was intellectually disabled and sought relief under *Atkins*.[32] The CCA denied Moore's motion to stay his execution until the Texas legislature responded to the *Atkins* ruling.[33] On June 17, 2003, Moore's

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 491.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 492.
31. *See id.* at 492–504 (detailing Moore's motions).
32. *Id.* at 504.
33. *Id.*

counsel filed a final habeas petition stating that he was intellectually disabled and thus could not be executed.[34] However, Moore filed a *pro se* motion to waive further appeal and to set his execution date, and he refused any psychological examinations.[35] The district court ordered that the habeas proceeding continue and appointed a pool of mental health experts for both parties to use.[36] Moore put on three experts: two found him intellectually disabled, one did not; and the State put on one expert, who found him sane and competent.[37] After a two-day *Atkins* hearing, the habeas court found that Moore was intellectually disabled and recommended that CCA grant relief on Moore's *Atkins* claim, but the CCA denied relief.[38] On June 6, 2016, the Supreme Court granted certiorari.[39]

II. LEGAL BACKGROUND

A. Atkins v. Virginia

The first case to address how states handle intellectual disability with regards to the death penalty was *Atkins v. Virginia*.[40] In *Atkins*, the Supreme Court held that the execution of intellectually disabled individuals violates the Eighth Amendment.[41] The Court found that while mentally disabled people should be tried and punished for their crimes, "their disabilities in areas of reasoning, judgment, and control of their impulses" do not allow them to act with the "level of moral culpability that characterizes the most serious adult criminal conduct."[42] The Court went on to say that the "dignity of man" is the "basic concept underlying the Eighth Amendment," and so the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[43] The Court

34. *Id.*
35. *Id.* at 505.
36. *Id.* at 506, 508–09.
37. Brief for Petitioner at 8–10, Moore v. Texas, No. 15-797 (U.S. July 28, 2016) [hereinafter Brief for Petitioner].
38. *Ex parte* Moore, 470 S.W.3d at 513.
39. Order Granting Cert., *supra* note 14.
40. 536 U.S. 304 (2002).
41. *See id.* at 317, 320 (prohibiting the execution of persons with intellectual disability, but leaving to the states "the task of developing appropriate ways to enforce the constitutional restriction").
42. *Id.* at 306.
43. *Id.* at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

concluded that "pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate."[44]

The Court then noted that the medical community at the time had a three-factor definition of intellectual disability: (1) "significantly sub average intellectual functioning," (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)," and (3) "onset of these deficits during the developmental period."[45] Nevertheless, the Court left it to the states to determine the best way to enforce this constitutional restriction.[46] These state statutory definitions do not need to be identical, but must "generally conform to the clinical definitions."[47] After *Atkins*, some state courts and legislatures, including Texas, adopted the three-prong test outlined in *Atkins*, but others formulated their own standards.[48]

B. Hall v. Florida

After *Atkins*, Florida implemented a rigid IQ cut-off for determining intellectual disability: "If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed."[49] The Court in *Hall v. Florida* found that this rigid requirement "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."[50] The Court considered the fact that only nine of the thirty-two states that allow the death penalty mandate a strict IQ cut-off, which suggests an "objective indicia of society's standards" leaning away from a rigid IQ test.[51]

Further, the Court considered the medical community's understanding of intellectual disability.[52] In *Hall*, the Court again stressed that state statutory definitions do not need to be identical, but do need to "generally conform to the clinical definitions" by stating that a state's legal determination of intellectual disability must be

44. *Id.* at 319.
45. *Id.* at 308 n.3.
46. *See id.* at 317 (internal citations omitted) (declaring that it left "to the States the task of developing appropriate ways to enforce the constitutional restriction").
47. *Id.*
48. Brief for Respondent, *supra* note 16, at 25–27.
49. Hall v. Florida, 134 S. Ct. 1986, 1990 (2014).
50. *Id.*
51. *Id.* at 1997.
52. *Id.* at 2000.

"informed by the medical community's diagnostic framework."[53] The question that remained, which is addressed in *Moore*, is how closely state frameworks must conform to current medical standards for intellectual disability.

Justice Alito, in his dissent in *Hall*, found that because the views of professional medical associations often change and fluctuate, "tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation."[54]

C. The Current Situation in Texas

The seminal case in Texas after *Atkins* was *Ex parte Briseno*.[55] The CCA in *Briseno* adopted the definition of intellectual disability stated in *Atkins* and in the ninth edition of the American Association on Mental Retardation (AAMR) manual, published in 1992.[56] Because it found that "determining what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used," the court provided seven additional factors to assist courts in assessing death penalty habeas petitions:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?

53. *Id.*
54. *Id.* at 2006 (Alito, J., dissenting).
55. 135 S.W.3d 1 (Tex. Crim. App. 2004).
56. *Id.* at 8 (citing *Atkins*, 536 U.S. at 308 n.3 (citing THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) [hereinafter AAMR 9th])).

- Can the person hide facts or lie effectively in his own or others' interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[57]

In *Ex parte Cathey*,[58] the CCA explicitly stated that these "factors are not part of the definition of 'intellectual disability,' and trial and appellate courts may ignore some or all of them if they are not helpful in a particular case."[59] The Texas legislature has not taken up the issue of how to define intellectual disability, so the framework established in *Briseno* still stands as Texas's legal framework today.[60]

D. The Current Situation in Other States

Applying the "evolving standards of decency" test for the Eighth Amendment, the Court in both *Atkins* and *Hall* found the trends among the states probative to its decisions.[61] Since *Hall*, most state courts have held that "current medical standards should be considered in resolving *Atkins* claims."[62] Today, four states have adopted the latest clinical definition of the American Psychological Association (APA) or the American Association on Intellectual and Developmental Disabilities (AAIDD) wholesale,[63] while twenty-four states, including Texas, continue to use an earlier articulation of the test.[64]

Furthermore, a majority of federal circuit courts have accepted that *Atkins* does not require any particular clinical definition as the legal standard.[65] There is no consensus among states about which medical

57. *Id.* at 8–9.
58. 451 S.W.3d 1 (Tex. Crim. App. 2014).
59. *Id.* at 10 n.22.
60. *Ex parte* Moore, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015).
61. Atkins v. Virginia, 536 U.S. 304, 317 (2002); Hall v. Florida, 134 S. Ct. 1986, 1996 (2014).
62. Brief for Petitioner, *supra* note 37, at 48; *see, e.g.*, Oats v. State, 181 So. 3d 457, 467–68 (Fla. 2015); State v. Agee, 364 P.3d 971, 989–91 (Or. 2015); Chase v. State, 171 So. 3d 463, 471 (Miss. 2015); *cf.* Commonwealth v. Bracey, 117 A.3d 270, 273–74 nn.4–5 (Pa. 2015) (holding that an Atkins claim resolved using AAIDD or DSM manual current at time of Atkins hearing).
63. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 905.5.1(H) (2016) (adopting DSM-5); Chase v. State, 171 So. 3d 463, 471 (Miss. 2015) (en banc) (adopting DSM-5 and AAIDD 11th); State v. Agee, 364 P.3d 971, 990 (Or. 2015) (adopting DSM-5); Commonwealth v. Bracey, 117 A.3d 270, 273 (Pa. 2015) (approving AAIDD 11th as alternative to DSM-IV-TR).
64. Brief for Respondent, *supra* note 16, at 17.
65. *Id.* at 22; *see* Hooks v. Workman, 689 F.3d 1148, 1172 (10th Cir. 2012); Chester v. Thaler, 666 F.3d 340, 347 (5th Cir. 2011); Hill v. Humphrey, 662 F.3d 1335, 1351–52 (11th Cir. 2011) (en banc); Sasser v. Norris, 553 F.3d 1121, 1125 n.3 (8th Cir. 2009), *abrogated on other grounds by* Wood v. Milyard, 132 S. Ct. 1826 (2012); Larry v. Branker, 552 F.3d 356, 369 (4th Cir. 2009).

definition of intellectual disability should be used, but there is a consensus that medical expertise must be taken into account when determining intellectual disability in the context of the death penalty.[66]

III. HOLDING

The CCA found that Moore is not intellectually disabled under the *Briseno* framework and thereby concluded that it is not unconstitutional to execute him.[67] The CCA first determined that the *Briseno* framework remains adequately "informed by the medical community's diagnostic framework."[68] In particular, the *Briseno* framework states:

> To demonstrate that he is intellectually disabled for Eighth Amendment purposes and therefore exempt from execution, an applicant must prove by a preponderance of the evidence that: (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of 70 or less; (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and (3) the onset of the above two characteristics occurred before the age of eighteen.[69]

The court noted that, while the AAIDD and APA have modified their definitions since *Briseno*, the authority to change the legal framework rests in the Texas legislature or the CCA, so the habeas court must follow the CCA's precedent.[70]

Next, the CCA analyzed each prong of the *Briseno* test to determine whether Moore is intellectually disabled. For the first prong, Moore has failed to prove by a preponderance of the evidence that he "ha[d] significantly sub-average general intellectual functioning."[71] After careful analysis of the several IQ tests administered to Moore throughout his life and the positives and negatives of each type of test, the CCA determined that his Wechsler Intelligence Scale for Children (WISC) IQ score of 78 and his Wechsler Adult Intelligence Scale-

66. *See Hall*, 134 S. Ct. at 2000 ("[T]his Court and the States have placed substantial reliance on the expertise of the medical profession.").

67. *Ex parte* Moore, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015).

68. *Id.* at 487 (quoting *Hall*, 134 S. Ct. at 2000).

69. *Id.* at 486; *see Ex parte* Briseno, 135 S.W.3d 1, 7 n.25 (Tex. Crim. App. 2004); *see also Ex parte* Cathey, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014).

70. *See id.* at 486 (holding that the habeas judge erred by employing the present definition used by the AAIDD).

71. *Id.* at 514.

Revised (WAIS-R) IQ score of 74 accurately and fairly represented his intellectual functioning.[72] Applying the standard error of measurement (SEM), the CCA determined Moore's SEM IQ range to be 73 to 83.[73] For the second prong, Moore had "not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning."[74] After reviewing each of the experts' findings, the CCA found that Dr. Kristi Compton's assessment that Moore was not intellectually disabled was the most credible and reliable.[75] Further, the CCA found that the non-clinical *Briseno* factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, [were] related to significantly sub-average general intellectual functioning."[76] Concerning the third prong, the CCA found that he had not established that he was intellectually disabled before the age of eighteen.[77] Thus the CCA upheld Moore's execution because he failed to show that he suffered "from significantly sub-average general intellectual functioning" or that any significant deficits in his adaptive behavior were "related to significantly sub-average general intellectual functioning."[78]

In her dissent, Judge Elsa Alcala argued that the CCA was effectively using a strict IQ cut-off and merely cherry-picked the scores it desired.[79] She further argued that "[i]n light of both *Atkins* and *Hall*, a court reviewing an intellectual-disability claim is compelled to consult current medical standards in determining whether a particular offender falls within the medical definition of an intellectually disabled person."[80]

IV. ARGUMENTS

A. Moore's Arguments

Moore argues that the legal framework in Texas established under *Briseno* does not consider current medical expertise and therefore violates the Eighth Amendment.[81] Moore has three primary arguments

72. *Id.* at 517–19.
73. *Id.* at 519.
74. *Id.* at 520.
75. *Id.* at 524–25.
76. *Id.* at 526.
77. *Id.* at 527.
78. *Id.*
79. *Id.* at 529, 535 (Alcala, J., dissenting).
80. *Id.* at 531 (Alcala, J., dissenting).
81. *See* Brief for Petitioner, *supra* note 37, at 49.

supporting his claim that his execution must be overturned.

First, Moore argues that when courts determine intellectual disability by ignoring current standards, they violate the Eighth Amendment.[82] According to Moore, *Atkins* does not give states "unfettered discretion"[83] in defining the scope of intellectual disability; rather *Atkins* and *Hall* "made clear that (1) the Eighth Amendment-mandated inquiry into intellectual disability must be informed by the medical diagnostic framework and (2) the medical diagnostic framework is determined by current medical standards."[84] Additionally, Moore highlights the practical problems associated with states applying past standards, namely that medical experts would need to diagnose and evaluate individuals artificially based on old standards.[85]

Second, Moore argues that even if prohibiting the use of current medical standards in intellectual disability determinations in death penalty cases is acceptable under *Atkins* and *Hall*, it still violates the Eighth Amendment.[86] According to Moore, the CCA conflicted with the "medical community's 'diagnostic framework,' by (1) rejecting consideration of current medical standards and (2) relying on its own clinically unsound *Briseno* factors."[87] The CCA allegedly erred when it put too much weight on the IQ cut-off to determine intellectual functioning[88] and erred when it required Moore "to prove that his deficits in adaptive functioning were caused specifically and exclusively by his intellectual deficits."[89]

Third, Moore argues that the non-clinical *Briseno* factors used by the CCA conflict with current medical consensus.[90] According to Moore, the *Briseno* factors "arose from the CCA's explicit distrust of the clinical framework, which it viewed as "exceedingly subjective."[91] "By relying on lay impressions, stereotypes and non-diagnostic criteria, the *Briseno* standard risks allowing the execution of individuals with intellectual disability—like Moore—whose impairments, though constitutionally significant, may be less obvious and less severe than

82. *Id.* at 27.
83. *See id.* at 29.
84. *Id.* at 30.
85. *Id.* at 31.
86. *See id.*
87. *Id.* at 32 (internal citations omitted).
88. *Id.* at 36.
89. *Id.* at 46.
90. *Id.* at 49.
91. *Id.* at 50.

those of other individuals."[92] While Texas states that the *Briseno* factors are merely an optional aspect of the analysis,[93] Moore argues that the CCA erroneously used the factors too heavily in its determination and that lower courts have often relied exclusively on them in making intellectual disability determinations.[94]

B. Texas's Arguments

Texas argues that the CCA correctly analyzed and determined that Moore is not intellectually disabled, and thus it is not unconstitutional for the state to execute him.[95] Texas further argues that the CCA did not prohibit the use of current medical standards and that Moore's actual grievance is that he disagrees with the CCA's determinations of the most reliable IQ scores and most credible medical expert.[96] Texas offers four arguments that its legal framework defining intellectual disability remains constitutional.

First, Texas argues that its definition of intellectual disability adheres to *Atkins*.[97] According to Texas, *Atkins* did not require states to adopt a certain definition for intellectual disability,[98] and *Hall* did not abolish the states' role in determining intellectual disability for *Atkins* claims.[99] The state of Texas specifically adopted and continues to use the definition from the ninth edition of the AAMR, which is directly cited in *Atkins*.[100] Additionally, Texas points out that there is no nationwide consensus among the states as to which clinical definition ought to be used.[101] Further, "[r]equiring States to strictly adhere to either the APA's or AAIDD's latest clinical definition would be unworkable and unwarranted" because medical organizations' clinical definitions differ among themselves.[102] Finally, Texas argues that its legal framework, as laid out in *Briseno*, remains adequately "informed by the medical community's diagnostic framework."[103] Texas claims

92. *Id.* at 57.
93. Brief for Respondent, *supra* note 16, at 52.
94. *See* Reply Brief for Petitioner at 3, Moore v. Texas, No. 15-797 (U.S. Oct. 6, 2016) (citing *Ex parte* Sosa, 364 S.W.3d 889 (Tex. Crim. App. 2012)).
95. Brief for Respondent, *supra* note 16, at 19.
96. *Id.* at 2.
97. *Id.* at 19.
98. *Id.* at 21.
99. *Id.* at 22.
100. *Id.* at 33.
101. *Id.* at 25.
102. *Id.* at 27–28.
103. *Id.* at 36 (citing Hall v. Florida, 134 S. Ct. 1986, 1993, 2000 (2014) (emphasis omitted)).

that the medical standards have not changed significantly enough or uniformly to warrant a change in its legal framework.[104] Further, because Texas courts rely heavily on medical experts in determining each individual case, the most up-to-date standards influence each decision.[105]

Second, Texas argues that the CCA properly found Moore did not adequately show he was intellectually disabled.[106] Concerning the first prong of the legal framework, Texas argues that the CCA correctly narrowed down the list of IQ scores to the most reliable in determining Moore's intellectual functioning.[107] Concerning the second prong, Texas argues that the CCA correctly based its findings on the expert testimony of Dr. Compton.[108] Because the experts varied in their assessments of Moore, the CCA relied primarily on Dr. Compton because her "qualifications and depth of review made her expert opinion the most credible."[109] Concerning the third prong, Texas argues that Moore "failed to meet his burden to show that his asserted adaptive functioning deficits are directly 'related' to his asserted intellectual functioning deficits"[110] because when the factors affecting Moore's adaptive functioning were removed from his life due to imprisonment, he "showed 'significant advances' in adaptive behavior."[111]

Third, Texas argues that the non-clinical *Briseno* factors do not render its three-prong framework unconstitutional.[112] According to Texas, the *Briseno* factors are an optional inquiry to assist courts in determining an individual's adaptive functioning, and were used in this case merely to bolster the CCA's determination that Moore is not intellectually disabled.[113]

Finally, Texas argues in the alternative that, if the Court determines that Texas's legal framework does not adequately consult current medical standards, then the Court should establish a national *Atkins* standard and remand the case for further review by the CCA.[114] Texas

104. *Id.* at 31.
105. *Id.* at 35–36.
106. *Id.* at 38.
107. *Id.* at 41.
108. *Id.* at 44.
109. *See id.* at 45–46 (discussing the weights given to the experts).
110. *Id.* at 48.
111. *Id.* at 49 (citation omitted).
112. *Id.* at 51.
113. *Id.* at 52–53.
114. *Id.* at 50–51.

argues that even if a new standard were adopted, Moore would still be found not to be intellectually disabled based on the expert testimony already set forth.[115]

V. ANALYSIS

The Court should hold for Texas and rule that Texas's legal framework for determining intellectual disability with regards to the death penalty adequately conforms to medical standards and thus follows *Atkins* and *Hall*. Holding for Texas would respect the Court's precedent established in *Atkins* and *Hall* and ensure greater judicial stability in the face of ever-changing medical standards. Finally, the trend among the states regarding intellectual disability and the death penalty shows that the current consensus of decency encompasses Texas's legal framework.

A. Atkins *and* Hall *Support a Finding for Texas*

In *Atkins*, the Court explicitly left it to the states the ability to determine "appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[116] The only caveat was that states must "generally conform" to clinical definitions and standards.[117] In *Ex parte Briseno*, Texas established that an intellectual disability "is a disability characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."[118] Thus, Texas did just as the Court required in *Atkins* when it adopted the definition from the ninth edition of the AAMR, which was cited in *Atkins*,[119] as its legal framework for determining intellectual disability.

In *Hall*, the Court did not take away the states' discretion to establish their own definition for intellectual disability.[120] Although *Hall* described clinical definitions as "a fundamental premise of *Atkins*," it did not require states to adopt an identical, current medical standard.[121] "The legal determination of intellectual disability is distinct

115. *Id.* at 39.
116. 536 U.S. 304, 317 (2002) (citation omitted).
117. *Id.* at 317 n.22.
118. 135 S.W.3d 1,7 (Tex. Ct. App. 2004) (quoting AAMR 9th, *supra* note 56, at 5) (footnotes omitted); *see also Atkins*, 536 U.S. at 308 n.3.
119. *Atkins*, 536 U.S. at 308, n.3.
120. 134 S. Ct. 1986, 2000 (2014).
121. *See id.* at 1998.

from a medical diagnosis," so medical standards do not completely dictate an *Atkins* claim.[122] The issues with Florida's intellectual disability definition in *Hall* was that it employed a "strict IQ test score cutoff of 70" and that it treated all individuals on a strict number basis rather than using a SEM range.[123] Here, the CCA narrowed Moore's IQ scores to those that the experts found to be a reliable expression of his intellectual functioning and then used SEM to form his IQ range.[124] This range fell above the 70-score line set forth in the definition from the ninth edition of the AAMR.[125] The inquiry did not stop at Moore's IQ score, however, but rather the CCA went on to analyze additional evidence of Moore's intellectual capacity and adaptive functioning through the testimony of family, friends, and current medical experts.[126]

Further, Moore's claim that the CCA refused to consult any current medical standards is incorrect. Several experts testified concerning Moore's intellectual and adaptive functioning.[127] These experts applied current medical standards as they assessed and analyzed Moore's mental capacity,[128] so these current standards came into play through the testimony of the experts.

Finally, the non-clinical *Briseno* factors are merely an optional tool that Texas courts may employ to help assess an individual's adaptive functioning. As stated above, the CCA has explicitly stated that these "factors are not part of the definition of 'intellectual disability,' and trial and appellate courts may ignore some or all of them if they are not helpful in a particular case."[129] Rather, these factors merely help guide courts through the three-prong test.

B. The Trend Among the States

In *Atkins* and *Hall*, the Court considered the death penalty practices of the thirty-two states that allow the death penalty to determine society's view of the "standards of decency" associated with

122. *See id.* at 2000 ("[T]his determination is informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments.").

123. *See id.* at 1994–96 ("[T]aking the SEM into account . . . acknowledg[es] the error inherent in using a test score without necessary adjustment.").

124. *Ex parte* Moore, 470 S.W.3d 481, 518–19 (Tex. Crim. App. 2015).

125. *Id.* at 486.

126. *Id.* at 520.

127. *See id.* at 520–24 (describing the experts' testimony).

128. *See id.* at 504–05, 509 (stating that each expert used "the tenth (2002) edition of the AAMR Manual or the DSM-IV, or both").

129. *Ex parte* Cathey, 451 S.W.3d 1, 10 n.22 (Tex. Crim. App. 2014).

the Eighth Amendment.[130] Most states believe that current medical standards should be consulted when determining whether an individual is intellectually disabled. Although only four states today have established the most recent definitions of the APA or AAIDD, twenty-four states continue to use past definitions similar to the one adopted by Texas.[131] Even though there is not a complete consensus, a significant majority of states that allow the death penalty have not adopted the most current medical standards to determine intellectual disability.[132] This near consensus provides an "objective indicia of society's standards"[133] that strongly suggests Texas's legal framework is constitutional. Under the Eighth Amendment, "what counts are our society's standards—which is to say, the standards of the American people—not the standards of professional associations, which at best represent the views of a small professional elite."[134]

C. Policy Implications Support a Finding for Texas

If the Court holds for Moore, states would have to continually update their legal frameworks to address changes in a field that is perpetually in flux.[135] As there is no consensus among medical professionals and organizations about the proper definition for intellectual disability,[136] states would have to determine which medical standard is the "correct" standard at the time.[137] For example, the

130. *See* Hall v. Florida, 134 S. Ct. 1986, 1996 (2014). The Court found:

> [A]t most nine States mandate a strict IQ score cutoff at 70. Of these, four States (Delaware, Kansas, North Carolina, and Washington) appear not to have considered the issue in their courts. On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years. In those States, of course, a person in Hall's position could not be executed even without a finding of intellectual disability. Thus in 41 States an individual in Hall's position—an individual with an IQ score of 71 — would not be deemed automatically eligible for the death penalty.

Id. at 1996 (internal citations omitted).

131. *See supra* Part II.D.

132. *See supra* note 130 and accompanying text.

133. Roper v. Simmons, 543 U.S. 551, 563 (2005).

134. *Hall*, 134 S. Ct. at 2005 (Alito, J. dissenting).

135. *See id.* at 2006 (Alito, J., dissenting) ("[T]he Court's approach implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change.").

136. Brief for Respondent, *supra* note 16, at 31.

137. *See* Hall, 134 S. Ct. at 2006 (Alito, J., dissenting) ("[T]he Court's approach requires the Judiciary to determine which professional organizations are entitled to special deference. And what if professional organizations disagree? The Court provides no guidance for deciding which organizations' views should govern.").

National Institute of Mental Health (NIMH) stated that it will be "re-orienting its research away" from the Diagnostic and Statistical Manual of Mental Disorders (DSM) categories.[138] Another example is the most recent publication of the APA, which drastically changes the first prong of the longstanding, three-pronged framework of intellectual disability established in the ninth edition of the AAMR and adopted by most states.[139] Furthermore, sometimes changes made by medical associations are rescinded several years later.[140] As medical advancements continue, grave judicial instability may ensue. And, this instability will only fuel long drawn-out litigation and extend the amount of time someone spends on death row.

The Court should allow states to keep their legal frameworks as they stand, at least until a significant trend in medical research points to a substantially different definition of intellectual disability. Trial courts and appellate courts rely on expert testimony in determining whether an individual is intellectually disabled.[141] These experts will generally be trained in the current medical standards and will employ these standards as they evaluate each individual. Thus, Texas's legal framework is designed to bring in current medical standards through the consultation of experts. This will better balance the ever-changing medical field with the need for judicial stability. Judicial stability requires the Court to find for Texas.

CONCLUSION

The decision in *Moore v. Texas* will be critical concerning the stability of death penalty cases moving forward. The Supreme Court should find for Texas because the state's intellectual disability determination follows the precedent set in *Atkins* and *Hall*. Further, because the medical field is so fluid, requiring states to constantly change their frameworks will cause judicial instability. Here, Moore was unable to meet his burden of proving that he was intellectually disabled under the standard set forth in *Atkins* and adopted by Texas in *Briseno*.

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138. Brief for Respondent, *supra* note 16, at 31.

139. *See Hall*, 134 S. Ct. at 2006 (Alito, J., dissenting) ("In this new publication, the APA discards 'significantly subaverage intellectual functioning' as an element of the intellectual-disability test.").

140. *See id.* (Alito, J., dissenting) ("It is also noteworthy that changes adopted by professional associations are sometimes rescinded[.]").

141. *See* Brief for Respondent, *supra* note 16, at 40.

While the Court has typically limited the application of the death penalty through its cases, this case should keep the status quo intact. With the Court limiting its review of the case to only one question[142] and with the trend in the recent election suggesting continued public support for the death penalty,[143] the Court will likely be disinclined to carve out a deeper intellectual disability exception to the death penalty.

142. *See* Liptak, *supra* note 15.

143. *See* Segura, *supra* note 3 (discussing how various states have continued to pass death penalty statutes).