No. 05-70038

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ERIC LYNN MOORE,
Petitioner-Appellee,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellant.

On Appeal from the United States District Court
For the Eastern District of Texas, Tyler Division

RESPONDENT-APPELLANT'S SUPPLEMENTAL EN BANC BRIEF

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STATEMENT OF THE ISSUES

The lower court held that Petitioner-Appellee Eric Lynn Moore[1] is mentally retarded and categorically exempted from the death penalty within the meaning of *Atkins v. Virginia,* 536 U.S. 304 (2002). Initially, the district court erroneously disregarded an independent and adequate state procedural bar concerning Moore's failure to factually exhaust the evidence supporting his mental-retardation claim. Further, notwithstanding this procedural default, the court below applied the wrong standard of review in adjudicating Moore's claim. Moreover, the lower court erred by relying on wholly incompetent evidence of deficits in intellectual functioning, as well as specious evidence of deficits in adaptive functioning. Additionally, by basing its clearly erroneous decision on this dubious evidence, the district court improperly shifted the burden of proof to the Director to prove that Moore was *not* mentally retarded.

As a result, the district court's order conditionally granting habeas

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[1] Respondent-Appellant Nathaniel Quarterman will be referred to as "the Director." The following abbreviations are used herein: "R" refers to the record on appeal, followed by page numbers; "RE" refers to the Record Excerpts filed by the Director followed by a tab letter and page references where necessary; "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by a volume number and followed by page numbers; "CR" refers to the Clerk's Record of pleadings and documents filed with the trial court; "EH" refers to the transcription of the evidentiary hearing conducted in the lower court, preceded by volume number and followed by page numbers; "PX" and "RX" refer to the numbered exhibits offered by Moore and the Director, respectively followed by page references, where necessary.

corpus relief presents three issues for review:

I. Did the lower court erroneously disregard an independent and adequate state procedural bar concerning Moore's failure to factually exhaust the evidence supporting his mental-retardation claim?

II. Did the district court err when it applied a de novo standard of review rather than the deferential standard of 28 U.S.C. § 2254(d)?

III. Did the court below err when it found that Moore is mentally retarded in the absence of a single, valid IQ score and, instead, based its decision solely on subjective, anecdotal testimony from biased family members, thereby implicitly shifting the burden of proof to the Director to prove that Moore is *not* mentally retarded?

STATEMENT OF JURISDICTION

This is a successive habeas proceeding authorized by this Court pursuant to 28 U.S.C. § 2244(b). On July 13, 2005, the lower court — United States District Judge Leonard Davis presiding — conditionally granted habeas relief regarding Moore's *Atkins* claim *for the second time. Moore v. Dretke,* No. 6:03cv224, 2005 WL 1606437 (E.D. Tex. 2005); R 533-62; RE Tabs C-D. The Director filed a timely notice of appeal on August 12, 2005. R 574-75; RE Tab B. The Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

I. Direct Appeal and the Initial Round of Postconviction Proceedings in the State and Federal Courts

Moore's 1991 capital-murder conviction and death sentence — for the brutal home invasion, robbery, and murder of Helen Ayers — were affirmed by the Court of Criminal Appeals of Texas and certiorari review was denied by the Supreme Court of the United States. *Moore v. State,* 882 S.W.2d 884 (Tex. Crim. App. 1994), *cert. denied,* 513 U.S. 1114 (1995). Moore's initial state application for habeas relief was then denied based on the trial court's findings and conclusions. *Ex parte Moore,* No. 38,670-01 (Tex. Crim. App. 1998) (unpublished order). Likewise, his federal habeas petition was denied by the lower court and this Court affirmed. *Moore v. Cockrell,* No. 1:99cv018 (E.D. Tex. 2001) (unpublished order), *aff'd,* No. 01-41489, 54 Fed.Appx. 591 (5th Cir. 2002) (unpublished opinion). Moore's petition for writ of certiorari was again denied by the Supreme Court. *Id.,* 538 U.S. 965 (2003).

II. Postconviction Proceedings Relating to Moore's *Atkins* Claim

Moore then filed a six-page subsequent state application for habeas relief based on *Atkins,* containing less than three pages of argument and no supporting documentation. RE Tab J.[2] Moore did not reference the

[2] Moore's subsequent state habeas application contains two sets of page numbers: Moore's own (beginning at one) and the state court's (beginning

three criteria for establishing mental retardation noted by *Atkins*;[3] nor did he explain how he met — or would meet — these three criteria. *Id.* at 3-5. Moore also erroneously stated that "[t]o date, there have been no published cases from the Court of Criminal Appeals giving guidance to what constitutes retardation under Texas law." *Id.* at 5. In fact, the state court had previously published a postconviction, death-penalty opinion recognizing the definition of mental retardation under Texas law, and the necessity of meeting all three criteria. *See Ex parte Tennard,* 960 S.W.2d 57, 60-61 (Tex. Crim. App. 1997) ("Texas has adopted the AAMR three-part definition of mental retardation in the 'Persons With Mental Retardation Act'") (citing Tex. Health & Safety Code § 591.003(13)).

Compounding these omissions, Moore also misrepresented the trial record and withheld essential information from the state court. For instance, Moore reported that trial expert Dr. Jay Douglas Crowder testified Moore's IQ score was 74, but neglected to mention that Crowder

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at four). To avoid confusion, the Director will refer to Moore's pagination, which is located at the bottom center of each page.

[3] *See Atkins,* 536 U.S. at 308 nn.3 & 22 (explaining the nearly identical three-part definitions of mental retardation established by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000) (DSM-IV), and noting that "[t]he [various state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth ... *supra*"); *Penry v. Lynaugh,* 492 U.S. 302, 308 n.1 (1989) (also recognizing AAMR three-part test).

also testified — on the same page of the record — that Moore's IQ was tested at 76. *Cf.* RE Tab J at 3 and 23 RR 586. Moore also falsely claimed he "was in special education throughout school" and "suffered damage to the frontal and temporal lobes of his brain." RE Tab J at 4. However, neither Crowder nor the school records he relied upon confirm Moore's special-education allegations. 23 RR 612-13; 3 CR 494, 498. And Crowder specifically ordered electroencephalogram testing on Moore and the results indicated no brain damage. 23 RR 594-95.

The state court dismissed Moore's application as an abuse of the writ because "it fails to contain sufficient specific facts which would satisfy the requirements of [Tex. Code Crim. Proc.] Art. 11.071, Sec. 5(a)." *Ex parte Moore,* No. 38,670-02 (Tex. Crim. App. 2003) (unpublished order); RE Tab E. Subsequently, this Court granted Moore's request for authorization to file a second federal habeas petition raising an *Atkins* claim. *In re Moore,* No. 03-40207 (5th Cir. 2003) (unpublished opinion); R 15-17; RE Tab F.

The lower court then summarily granted habeas relief, concluding that Moore's "procedural" *Atkins* rights were violated by the state-court disposition. *Moore v. Cockrell,* No. 6:03cv224 (E.D. Tex. 2003) (unpublished order); R 129-34; RE Tab G. But this Court reversed and remanded for further proceedings, including a determination of whether Moore's *Atkins* claim is procedurally defaulted. *Moore v. Dretke,* 369 F.3d 844, 846 (5th Cir. 2004); R 196-99.

The court below then conducted an evidentiary hearing and permitted depositions of four witnesses over the Director's repeated written and oral objections.[4] R 368-79, 394-63; RE Tab A. The lower court decided Moore's claim was not procedurally defaulted and that a de novo standard of review applied. RE Tab C at 4-5. As noted *supra,* the district court then concluded Moore was mentally retarded and conditionally granted habeas relief. RE Tabs C-D.

The Director appealed and a panel of this Court reversed on June 29, 2006. *Moore v. Quarterman,* 454 F.3d 484, 486 (5th Cir. 2006). The panel held that Moore's state-court *Atkins* application was "sparse to the point of amounting to a brief, conclusional allegation of mental retardation." *Id.* at 491. Because "Moore made no allegations and offered no evidence before the [state court] with regard to his limitations in adaptive skill areas," his "presentation of such allegations and evidence for the first time in federal court fundamentally alters Moore's *Atkins* claim, rendering it unexhausted." *Id.* The panel concluded that an *Atkins* claim would not be adequately presented unless an inmate, "at the very least, (1) outlined either the AAMR criteria or the substantially equivalent § 591.003(13) definition of mental retardation and (2) either alleged why he satisfies

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[4] The Director objected on the basis of exhaustion and failure to develop the state-court record pursuant to § 2254(b)(1) & (e)(2). *See, e.g.,* RE Tab A at Docket Entries 15, 17, & 63; 1 EH 27.

each criterion or asserted reasons why he is currently incapable of presenting any evidence on a particular prong." *Id.* at 493. Because of Moore's failure to exhaust state-court remedies, the panel vacated the district-court judgment and remanded with instructions to dismiss without prejudice. *Id.* at 494.

Moore petitioned for rehearing en banc. On June 27, 2007, the panel withdrew its prior opinion and substituted a new one. *Moore v. Quarterman,* 491 F.3d 213, 215 (5th Cir. 2007). This time the panel "decline[d] to excuse Moore's failure to exhaust" because "nothing 'external to the petitioner' prevented him from at least referring to the test for mental retardation that had been discussed by the Supreme Court and had appeared in two other Texas authorities at the time of his petition, or from supplying school records or affidavits from family members attesting to his adaptive limitations." *Id.* at 223. Thus, the panel vacated and remanded with instructions to dismiss *with prejudice. Id.* at 224.

Moore again petitioned for rehearing en banc. On March 12, 2008, the Court granted Moore's petition. *Moore v. Quarterman,* — F.3d —, 2008 WL 660420 (5th Cir. 2008). This brief follows.

STATEMENT OF FACTS

I. Facts of the Crime

This Court succinctly summarized the evidence supporting Moore's capital-murder conviction in its opinion affirming the denial of Moore's initial habeas petition:

> In 1990, Moore and three other men stopped at the rural home of Richard and Helen Ayers. On the pretext of needing jumper cables, the four men gained access to the Ayers' residence and robbed the couple at gunpoint, then ushered them into the master bedroom. After ordering them to lie down on their mattress, the men fired five shots from a single weapon, shooting Mrs. Ayers in the head and Mr. Ayers in the shoulder. Mrs. Ayers died. Moore confessed to shooting Mr. Ayers but claimed that one of the other three fired the shot that killed Mrs. Ayers.

Moore v. Cockrell, 54 Fed.Appx. at *1.

II. Facts Relating to Moore's History of Violence

During the punishment phase of trial, the State outlined Moore's history of violence and criminal activity. For example, Moore assaulted 2 separate, unarmed victims with a knife in November 1985 and June 1986, cutting their faces in each incident. 22 RR 347-48. A third assault occurred after Moore and his former girlfriend, who was only sixteen-years old at the time, became engaged in a quarrel. During this altercation, he dragged her from an automobile by her hair, struck her repeatedly with a baseball bat, and smashed the windows of her car. *Id.*

at 349-50. In October 1990, Moore was picked up because of outstanding warrants and resisted arrest, insulted the officers, and repeatedly banged his head against the Plexiglas barrier in the patrol car until he suffered lacerations which required medical treatment. *Id.* at 350-51. He was again arrested for discharging a firearm in his father's home and resisting arrest during an incident in February 1990 that required 5 officers to subdue and apprehend him. *Id.* at 352. In July 1990, Moore was apprehended for fighting and resisting arrest when police were called to a house regarding a disturbance. Once again, Moore quarreled with and swore at officers. *Id.* at 353-54.

On one occasion when no arrest occurred, Moore confronted an officer and suggested that the police use larger caliber weapons because, "that is what we are carrying." 22 RR 354. A witness testified to an assault that occurred in the summer of 1987, when Moore stabbed his victim with a broken beer bottle. *Id.* at 355-56. Moore was known for carrying and discharging firearms on numerous occasions. *Id.* at 358-59. In late 1987 or early 1988, Moore was driving a car with 4 or 5 other occupants when he made an aggressive move toward a family crossing the street. *Id.* at 360. In response, the father made a disparaging gesture at Moore, who then began to pursue the fleeing family through residential yards, striking two other parked automobiles and then fleeing the scene. *Id.* at 360-61. Moore was also known to regularly abuse alcohol and other

drugs. *Id.* at 364.

III. Facts Relevant to Moore's Mental-retardation Claim

A. Trial evidence

An audiotape of a pretrial interview with Moore was played for the jury at the guilt-innocence phase of trial. 17 RR 197-230. During that interview, Moore coherently admitted to shooting Mr. Ayers because he knew he "was going to be an accessory" in any event and to avoid identification. *Id.* at 201, 221, 224. However, Moore repeatedly shifted the blame for Mrs. Ayers's death onto his accomplice Anthony Bruce. *Id.* at 201-02, 207-09, 222-23. Moore noted, however, that the victims were compliant with the perpetrators' demands and Moore lamented that his accomplice Sam Andrews "just fucked everything up" by shooting Mr. Ayers in the first place. *Id.* at 225. Yet Mr. Ayers later testified that Moore was the leader of the four men. 19 RR 450.

In keeping with his ringleader status, Moore disposed of the guns and stolen property — several telephones, jewelry boxes, and Mr. Ayers's wallet — after the murder. 18 RR 314-17, 332-36; 19 RR 202-03. The wallet — containing $150.00 — was initially taken from Mr. Ayers by Moore but only $10.00 remained when Moore later showed it to his accomplices. 17 RR 203; 19 RR 444-45. Moore also admitted to "playing spades and dominoes" with his friends afterwards. 17 RR 226-28.

During the punishment phase of trial, defense expert Dr. Crowder

testified that he examined Moore on June 21, 1991, "spoke with several people by telephone about their experiences with [Moore]," and "read the most important documents" relating to the case, including school records, a prior psychological examination, and contemporaneous psychological and IQ testing. 23 RR 582-84, 587. Crowder concluded that Moore's intellectual abilities were "clearly below average" and "borderline," but did not opine that Moore was mentally retarded. *Id.* at 586, 588. Rather, Crowder stated that Moore's IQ was recently tested at 76. *Id.* Crowder also requested that an electroencephalogram be performed and the results indicated no brain damage. *Id.* at 594-95.

B. Evidence from the federal hearing regarding intellectual functioning

Texas law, as well as the AAMR's *Mental Retardation* (10th ed. 2002), and the DSM-IV, indicate that **significantly subaverage intellectual functioning** prior to the age of 18 is a defining characteristic of mental retardation. *Ex parte Briseño,* 135 S.W.3d 1, 7-8 (Tex. Crim. App. 2004) (citing Tex. Health & Safety Code § 591.003(13)); PX 7 at 57-58; PX 8 at 37, 39; *see also Atkins,* 536 U.S. at 308 n.3. Significantly subaverage intellectual functioning is defined by Texas law and the DSM-IV as an IQ of "about 70 or below" on a standardized, individually administered intelligence test. *Briseño,* 135 S.W.3d at 7-8 & n.24 (citing DSM-IV at 39); PX 8 at 39. However, a low IQ is, in itself, insufficient to

support a diagnosis of mental retardation. 2 EH 66, 245.

1. Moore's 2004 IQ test

Dr. Antolin Llorente,[5] a licensed — but not board-certified — psychologist, evaluated Moore on August 6, 2004 and administered the Wechsler Adult Intelligence Scale (WAIS-III). 1 EH 137-38; 2 EH 3; PX 1 at 1, 6-7. Moore was thirty-seven years old on this date. *Cf.* RX 4 at 3. Llorente reported that Moore's full-scale IQ score was 66. 1 EH 154; PX 1 at 6-7. According to Llorente, it is very important that an IQ test be administered and scored according to the procedure established by the test manual. 1 EH 167. Moreover, verbal subtests have a high correlation with the full-scale IQ score; if an error on such a subtest occurs, the full-scale IQ score is invalid. *Id.* at 168-69, 173. Yet Llorente erred in his administration of the WAIS-III by discontinuing the information subtest — a verbal subtest — in violation of the test rules. 2 EH 217-18; PX 1 at 7. As a result, the full-scale IQ score of 66 obtained by Llorente is invalid by his own admission. 1 EH 168-69.

Additionally, Llorente was unable to rule out the possibility that

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[5] Dr. Llorente stated that he is opposed to the death penalty under almost all circumstances, and would oppose the death penalty in Moore's case even if he is not mentally retarded. 2 EH 92-94. Llorente also admitted that he had never before testified in a criminal case on the issue of mental retardation. *Id.* at 5. In the three criminal cases Llorente had testified in, concerning issues other than mental retardation, he had never testified on behalf of the prosecution. *Id.* at 4-6.

Moore was not motivated to perform well on the WAIS-III and may have dishonestly answered some questions incorrectly in order to appear mentally retarded. 2 EH 57, 60, 62, 71. Llorente averred the "consistency" between the 1973 Primary Mental Abilities (PMA) test score, discussed *infra,* and the 2004 WAIS-III would indicate that Moore was not dishonest. 1 EH 161-62. Yet, according to Llorente's own testimony, the PMA score was wholly invalid. Moreover, Llorente admitted that numerous questions Moore answered incorrectly on the WAIS-III were correctly answered during a 1991 administration of the Wechsler Adult Intelligence Scale (WAIS-R). 2 EH 57-61.

For example, Moore knew the meaning of the words "assemble" and "terminate" on the 1991 test but feigned ignorance of those same words on the 2004 test. 2 EH 55-57. Moore also correctly identified the concepts "leaf" and "mirror" on the 1991 test but not in 2004. *Id.* at 58. Further, Moore's picture-completion and arithmetic subtest scores from 2004 were substantially lower than his scores on the 1991 test.[6] *Id.* at 58-59; *cf.* PX 1 at 7 *and* RX 7 at 4; 2 EH 59. One question, concerning the concept of a

[6] These subtests are considered to be "no hold" tests because an individual's ability to perform on such tests diminishes with age, artificially lowering overall IQ scores. 2 EH 246-49. Other subtests, *e.g.,* vocabulary and information, are considered to be "hold" tests because an individual's score should remain fairly constant with age. *Id.* Moore's scores on the hold tests show no major discrepancies. *Cf.* PX 1 at 7 *and* RX 7 at 4. The difference between Moore's WAIS-III score and his WAIS-R score, if the tests are deemed reliable, is explained in part by this phenomenon. 2 EH 246-49.

"marriage license," was answered incorrectly by Moore despite the fact that he knew the meaning of the term.[7] 2 EH 61-62; RX 2 at 163.

Llorente was also unable to rule out the possibility that antidepressant and high-blood-pressure medications taken by Moore at the time of the test could have negatively affected his full-scale IQ score. 2 EH 63-64; PX 1 at 1. Auditory hallucinations and depression, from which Moore suffers, could also have affected the validity of the test and could lower the full-scale IQ score obtained. 2 EH 65; PX 1 at 1. Finally, Llorente did not attempt to correct for Moore's age or educational level, despite the fact that Moore is well outside the demographic group to which the WAIS-III is normally applied, and advanced age or lack of education artificially lowers IQ scores. 2 EH 68-70, 228-30.

2. Moore's prior IQ tests

The evidence showed that the PMA test was administered to Moore in 1973, when he was 6 years and 6 months of age. 1 EH 139-40; RX 4 at 7. The PMA is not an individually administered test and, thus, does not meet the DSM-IV diagnostic criteria. 2 EH 137; *cf. Briseño,* 135 S.W.3d at 7-8 & n.24 (citing DSM-IV at 39) *and* PX 8 at 39. There was no information concerning who administered the PMA to test to Moore,

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[7] Moore married Kim Butler while incarcerated on death row, as evidenced by a Collin County marriage license. RX 2 at 165. Soon thereafter, Moore requested in writing that his wife be placed on his visiting list and submitted a copy of the marriage license as proof of the marriage. RX 2 at 163.

whether such persons were qualified to do so, or how many errors occurred during administration. 2 EH 41-44. According to Dr. Llorente, such a test does not meet DSM-IV diagnostic criteria, and test results should be discarded if there is no underlying data. *Id.* at 42-45.

The evidence also established that Dr. Richard Fulbright, a licensed psychologist, evaluated Moore on June 22, 1991 and administered the WAIS-R. RX 7 at 1, 3-4, 7. Moore was twenty-four years old on this date. *Cf.* RX 4 at 3. Fulbright reported that Moore's full-scale IQ score was 76, and that he was not mentally retarded. RX 7 at 3-4, 6. To the extent this score is reliable,[8] it should be corrected for age and educational level. 2 EH 228-30; RX 8 at 45. Dr. Gary Mears,[9] a licensed and board-certified neuropsychologist, adjusted Moore's WAIS-R score for these factors according to generally accepted principles and determined that the full-scale score should be 82. 2 EH 239-40.

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[8] Dr. Llorente testified that this score was invalid based on an error in Dr. Fulbright's administration of a vocabulary subtest. 1 EH 167-68. As explained above, Llorente made a similar error in administering the 2004 test.

[9] Unlike Dr. Llorente, Dr. Mears has been involved in hundreds of criminal cases, including approximately 100 capital cases, for both the defense and the prosecution. 2 EH 203-06. Some of those capital cases have involved the issue of mental retardation. 3 EH 15. Mears opposes the death penalty for all mentally retarded offenders, including those who are mildly mentally retarded. *Id.* at 68-69.

C. Evidence from the federal hearing regarding adaptive functioning

Texas law, as well as the AAMR and DSM-IV, indicate that **significant deficits in adaptive behavior** prior to the age of 18 are also a defining characteristic of mental retardation. *Briseño,* 135 S.W.3d at 7-8 (citing Tex. Health & Safety Code § 591.003(13)); PX 7 at 76; PX 8 at 39-40; *see also Atkins,* 536 U.S. at 308 n.3. Impairments in adaptive behavior are defined by Texas law, the DSM-IV, and the AAMR as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales. *Briseño,* 135 S.W.3d at 7 n.25; Tex. Health & Safety Code § 591.003(1); PX 7 at 76; PX 8 at 39-40. The DSM-IV lists the following adaptive-functioning skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. PX 8 at 39; RX 8 at 6.

Dr. Mears examined Moore on November 23, 2004 and noted that Moore was a very good historian, providing considerable detail about his early home life, academic history, work history, and criminal record. 2 EH 209-16; RX 8 at 6-8. Mears was also able to evaluate Moore's

communication abilities, self-care standards, social/interpersonal skills, and health. 2 EH 209-16; RX 8 at 6-9. Mears considered a variety of records as well, including previous psychological testing reports, employment records, confession transcripts, school records and prison records. 2 EH 208-09; RX 8 at 2-3. Mears also attended the entire hearing and heard the testimony of all witnesses. 3 EH 12-13, 36.

1. Moore's communication and social/interpersonal skills

Dr. Mears opined that Moore's communication and social/interpersonal skills were better than any other capital offender he had evaluated for mental retardation, and were not significantly deficient. 2 EH 215-16, 250-53, 257; PX 8 at 7-9. Dr. Llorente, on the other hand, identified no credible, objective evidence of significant deficits in the communication- or social/interpersonal-skill areas. 2 EH 73. Rather, the extent of Llorente's testimony was that, based on anecdotal evidence, Moore was quiet and isolated as a child. 1 EH 193; 2 EH 73. The basis of Llorente's opinion seems to be nothing more than repeated, self-serving claims by Moore's family members that Moore stuttered or sometimes preferred to be alone. *See, e.g.,* 1 EH 38, 44-45, 64, 66, 84. Yet both experts testified that stuttering is a physical problem, does not constitute a deficit in communication skills, and is not related to mental retardation. *Id.* at 198; 2 EH 15, 226, 240.

Indeed, Larry Lambert, a science and math teacher in the Celina Independent School District (CISD), remembered Moore from approximately 1979-81 and believed that he communicated effectively and interacted well with his classmates during his seventh-grade year. 2 EH 145-46; RX 4 at 8. Mary Hughes, a teacher in the CISD, remembered Moore and believed that he interacted well with his classmates. Deposition at 10-11; RX 4 at 9. Tyrone Brown testified Moore was a leader when he was a child. Deposition at 11.

Brandon Daniel, Kyle Rains, Robert Moss, and Roger Dale Burks, all correctional officers at the Polunsky Unit in Livingston, Texas, interact with Moore on a regular basis and believe that he communicates effectively, is well liked, and socializes with others. 2 EH 166-68, 177-78, 182-87, 193-94. As noted above, Moore married Kim Butler while incarcerated on death row. *Id.* at 60; RX 2 at 165. Moore previously conducted romantic relationships and fathered a child. 2 EH 80, 212, 251, 253, 256.

2. Moore's use of community resources, self-care, home-living, health, and self-direction skills

Dr. Mears opined that Moore's use of community resources, self-care, home-living, health, and self-direction skills were not significantly deficient. 2 EH 250-53, 256-57; PX 8 at 7-9. According to Mears, Moore

made an effort to succeed in life despite his difficult childhood. 2 EH 254, 257; RX 8 at 7-9. For example, Moore obtained a driver's license. 2 EH 87-88; RX 6. As with other adaptive-skill areas, Dr. Llorente identified no credible, objective evidence of significant deficits in the use of community resources, self-care, home-living, health, or self-direction skill areas. 1 EH 201-02; 2 EH 78-80, 97-89. Instead, Llorente relied again on suspiciously similar statements by Moore's family members that Moore had trouble dressing himself. *See, e.g.,* 1 EH 36, 69, 103. Llorente also testified that he "couldn't find any records showing ... that [Moore] ever paid rent," leased an apartment, managed money, or that he ever sought "assistance for drug use," and opined that this lack of evidence indicated significant deficits in Moore's home living and use of community resources skills. 1 EH 199, 201; 2 EH 79. Yet Llorente was totally unable to explain how Moore left home at age fifteen or lived independently with his girlfriend and child. 2 EH 80-81. Llorente also dismissed Moore's procurement of a driver's license by speculating, without any evidence, that "someone assisted him." *Id.* at 196.

However, Joan McKnight, Moore's fifth-grade teacher in the CISD in 1978-79, believed that Moore's hygiene was good and that he was generally clean. 2 EH 121-22, 124; RX 4 at 8. McKnight did not remember Moore frequently leaving his shoes untied. 2 EH 128-29. Mary Bradshaw, Moore's first-grade teacher in the CISD in 1973-74,

remembered Moore being able to tie his shoes. Deposition at 10. Jerry Moore, who was Moore's school principal in the CISD, remembered Moore from approximately 1979-81 and believed that his hygiene was decent. 2 EH 150-51; RX 4 at 8. Importantly, neither McKnight, Bradshaw, nor Jerry Moore suspected that Moore was mentally retarded in 1973-74 or 1978-81. 2 EH 124, 151; Deposition at 8. Furthermore, Moore was never referred to the school nurse for poor hygiene. 2 EH 151. Daniel, Rains, and Moss testified that Moore exhibits good hygiene and keeps his cell relatively clean, neat, and organized. *Id.* at 167, 176, 178, 184-86.

3. Moore's functional academic skills

Dr. Mears testified that Moore's functional academic skills were not significantly impaired. 2 EH 254; 3 EH 63-64; RX 8 at 4-5, 7-9. Dr. Llorente also identified no credible, objective evidence of significant deficits in the functional-academic-skill area. 2 EH 49-51, 82-84. Rather, Llorente based his opinion on the fact Moore was receiving "large portions" of special education and speculation, again without any evidence, that he was socially promoted until the eleventh grade. 1 EH 197; 2 EH 82. But while Moore was held back in first grade and referred to "special education," the credible evidence establishes that he never attended a special-education program. *Id.* at 49-51, 122, 137, 139-43, 147-48, 154, 158-59, 162-65; RX 4 at 9. The records and testimony reflect that Moore participated in only two remedial — rather than special-education

— classes throughout his academic career, and received "Bs" in those classes. 2 EH 49-51, 122-23, 127-29, 139-43, 147, 154, 158-59, 162-65; RX 4 at 4, 8-9. Further, referrals to special education were not uncommon for first graders in the CISD, and many were held back. 2 EH 159.

McKnight testified that Moore's performance would have improved if he had applied himself. 2 EH 123. McKnight also noted that Moore's academic performance was affected by his frequent transfers from one school district to another.[10] *Id.* at 139. Hughes testified that Moore had some behavioral problems and could be very disruptive. Deposition at 6, 11. Hughes also stated that Moore was often tired and sleepy in class. *Id.* at 10-11.

Moore was eventually expelled from high school for fighting. 2 EH 19, 83; PX 5 at 9. He then attended six months of vocational training with the Job Corps in automotive mechanics, paint, and body work. 2 EH 16-17, 83; PX 5 at 5. Moore did not complete this program because he was again expelled for fighting. 2 EH 17-18, 83; PX 5 at 5. As both experts admitted, antisocial or maladaptive behavior and resulting poor performance in an academic setting does not meet the criteria for significant deficits in functional academics. 2 EH 83, 252; 3 EH 63-64; PX

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[10] The evidence shows that Moore attended first grade in Celina, third grade in Plano, and fourth through seventh grades back in Celina. RX 4. All other years are unaccounted for.

7 at 79. Thus, Moore's failure to complete high school or vocational training is not credible evidence of deficits in his functional academic skills.

In any event, Moore possesses and reads numerous books, newspapers, and magazines in his cell at the Polunsky Unit. 2 EH 88-90, 168, 176, 179, 185, 194-95, 212, 218; RX 2 at 114-121; RX 5. Moore also reads and writes personal letters. 2 EH 168, 176.

4. Moore's work skills

Dr. Mears also opined that Moore's work skills were not significantly impaired. 2 EH 213-14, 250-54. This is because the evidence established Moore was employed at several jobs for 4 years between 1985-89. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. During his employment at Mervyn's, Moore operated a mobile lift or forklift. 2 EH 32, 35, 82, 214; RX 8 at 6. Moore was not terminated from any of these jobs, for poor performance or otherwise. *Id.* at 18, 27-35, 213-14, 254; PX 5 at 5; RX 8 at 6. In fact, Moore was repeatedly commended for good performance during his years of employment, and was rehired by some employers after quitting. 2 EH 27-35; RX 3 at 46-47, 63-66, 80-82. None of Moore's employment records reflect that he was mentally retarded during 1985-89. RX 3. Moore also worked in the garment factory at the Ellis Unit prior to his transfer to Polunsky Unit. 2 EH 32. In light of these facts, it is not surprising that Dr. Llorente identified no credible, objective evidence of

significant deficits in the work-skill area. *Id.* at 27-35, 80-82. In fact, Llorente admitted that even poor work performance would not be evidence of deficits in this area. *Id.* at 81.

5. Moore's leisure and safety skills

Initially, there was no credible evidence or opinion concerning significant deficits in the leisure skill area. 2 EH 202; RX 8 at 7-9. Further, Dr. Mears opined that Moore's safety skills were not significantly impaired, and Dr. Llorente identified no evidence of significant deficits in the safety-skill area. 1 EH 201-03; 2 EH 85-86, 250-557; 3 EH 42; RX 8 at 7-9.

SUMMARY OF THE ARGUMENT

After this Court authorized Moore to litigate a successive federal habeas petition, the lower court erroneously held that he is mentally retarded. This despite the fact that Moore denied the state court a fair opportunity to consider his *Atkins* claim, as required by § 2254(b)(1), *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992), and *Picard v. Connor,* 404 U.S. 270 (1971). Moore failed to exhaust his mental-retardation claim when he entirely failed to allege or present evidence of significantly impaired adaptive functioning to the state court. Moreover, Moore did not acknowledge the necessity of meeting this requirement, which is well established in both state and federal law, and neglected to provide any justification external to his defense for his failure to do so. As a result, it

is clear that his *Atkins* claim is procedurally defaulted under *Gray v. Netherland,* 518 U.S. 152 (1996), and *Nobles v. Johnson,* 127 F.3d 409 (5th Cir. 1996).

Further, notwithstanding this procedural default, the court below wrongly applied a de novo standard of review in adjudicating Moore's claim, when it is clear under *Rivera v. Quarterman,* 505 F.3d 349 (5th Cir. 2007), that the district court owed deference to the state-court decision as required by§ 2254(d).

Finally, the lower court clearly erred when it found Moore to be mentally retarded. First, the court based its intellectual-functioning findings on incompetent evidence: three invalid and improperly administered IQ tests, two of which were given after Moore was charged with capital murder and had every reason to perform poorly. Second, the district court relied upon vague and subjective adaptive-functioning evidence that could apply to almost anyone, while roundly ignoring the trial record and most of the evidence brought by the Director.

A federal court should not irrevocably upset a state-court death sentence on such unreliable evidence and nothing more. Indeed, it appears the court below actually *presumed* Moore to be mentally retarded and then shifted the burden to prove otherwise to the Director. If Moore is so impaired that he falls within the ambit of *Atkins* on the basis of bad grades and a spotty work history, then conceivably the majority of death-

row inmates would also qualify for *Atkins* relief. This cannot be true. After all, few of them turned to violent crime because they were good students and industrious citizens.

As a result, this Court should reverse the lower court and render judgment for the Director.

ARGUMENT

A district court's findings on mental retardation are reviewed for clear error. *United States v. Webster,* 421 F.3d 308, 310-12 (5th Cir. 2005); *Id.,* 162 F.3d 308, 352-53 (5th Cir. 1998). The district court's conclusion of law — that Moore is "so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" — should be reviewed de novo. *Atkins,* 536 U.S. at 317; *Martinez v. Johnson,* 255 F.3d 229, 237 (5th Cir. 2001). The question of "whether a federal habeas petitioner has exhausted state court remedies" is also reviewed de novo. *Morris v. Dretke,* 413 F.3d 484, 491 (5th Cir. 2005) (citing *Wilder v. Cockrell,* 274 F.3d 255, 259 (5th Cir. 2001)).

Further, a federal court "may not issue a writ of habeas corpus for a defendant convicted under a state judgment unless the adjudication of the claim by the state court '(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State Court proceeding.'" *Riddle v. Cockrell,* 288 F.3d 713, 716 (5th Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)-(2)).

A state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 420, 405-06 (2000). This standard "does not require citation of [Supreme Court] cases — indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer,* 537 U.S. 3, 8 (2002) (emphasis in original). In the instant case, the state court did not announce or apply a rule contradicting *Atkins,* and did not face facts that were indistinguishable from *Atkins. See* 536 U.S. at 308-09 (noting that Atkins was diagnosed as "mildly mentally retarded" based upon a full scale Wechsler IQ score of 59). As noted below, Moore advanced only an unverified IQ score of 74 and no diagnosis of mental retardation to the state court. Thus, the "contrary" prong does not apply under the circumstances.

A state court "unreasonably applies" clearly established federal law if it unreasonably applies the governing precedent to the facts of a particular case. *Williams,* 529 U.S. at 407-09. This inquiry focuses on the

state court's "ultimate decision" denying relief, not "every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001). Moreover, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002); *Williams,* 529 U.S. at 411.

I. The Lower Court Erred When it Disregarded the Fact That the Bulk of Moore's Evidence Was Factually Unexhausted and Procedurally Defaulted.

It is well settled that habeas relief "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b); *Rose v. Lundy,* 455 U.S. 509, 518 (1982). The exhaustion doctrine is more than a procedural hurdle; it reflects a long-standing policy of comity between state and federal courts in order to provide the state courts "an initial opportunity to pass upon and correct" alleged constitutional violations. *Tamayo-Reyes,* 504 U.S. at 9; *Connor,* 404 U.S. at 275. Moreover, "[e]xhaustion means more than notice," and requires a petitioner to fairly present a constitutional claim *and* its supporting factual allegations to a state court before seeking federal habeas relief. *Tamayo-Reyes,* 504 U.S. at 9-10; *Connor,* 404 U.S. at 276. Accordingly, when material, additional evidentiary support that fundamentally alters or significantly bolsters a claim is presented for the

first time in federal court, exhaustion is not satisfied. *Vasquez v. Hillery,* 474 U.S. 254, 259-60 (1986); *Dowthitt v. Johnson,* 230 F.3d 733, 745-46 (5th Cir. 2000).

A. Moore denied the state court a fair opportunity to evaluate his *Atkins* claim.

In the three pages of argument in his state habeas application, Moore presented nothing more than the bald assertion that he was "clearly below average intelligence" based on: (1) his invalid PMA IQ score of 74;[11] (2) the false allegation that he was in special education "throughout school;" (3) the disingenuous claim that he "was hit in the head with a baseball bat at around age nine or ten;"[12] and (4) an undocumented and unproven head injury suffered in an automobile accident. RE Tab J at 3-4. Moore made no allegations and presented no evidence concerning his adaptive-functioning skills. Nor did he cite to the tripartite clinical definition of mental retardation recognized in *Atkins* or codified in Tex. Health & Safety Code § 591.003(13). Perhaps most egregiously, he erroneously stated that the state court had not yet defined mental retardation under Texas law. RE Tab J at 5; *but see Tennard,* 960 S.W.2d at 60-61 ("Texas has adopted the AAMR three-part definition of

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[11] As noted above, Moore neglected to mention that his IQ was tested at 76 in 1991. 23 RR 586-88.

[12] The trial record established that this incident occurred in 1987, when Moore was twenty-years old. 23 RR 589.

mental retardation in the 'Persons With Mental Retardation Act'") (citing Tex. Health & Safety Code § 591.003(13)).[13]

But circuit precedent is clear that state court remedies are not exhausted pursuant to § 2254(b) when "material additional evidentiary support [is presented] to the federal court that was not presented to the state court," even if the evidence "came into existence after the state habeas relief had been denied." *Dowthitt,* 230 F.3d at 745-46 (quoting *Graham v. Johnson,* 94 F.3d 958, 968 (5th Cir. 1996), and *Joyner v. King,* 786 F.2d 1317, 1320 (5th Cir. 1986)). "[A]s a general rule dismissal is not required when evidence presented for the first time in a habeas proceeding *supplements,* but does not *fundamentally alter,* the claim presented to the state courts." *Morris,* 413 F.3d at 491 (quoting *Anderson v. Johnson,* 338 F.3d 382, 386-87 (5th Cir. 2003)) (emphasis in original). The exhaustion inquiry that courts perform — determining whether

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[13] Judge Dennis's dissent from the panel opinion suggests that Moore was not obligated to recognize the AAMR mental-retardation definition in *Tennard* and § 591.003(13) because *Tennard* disposed of a *Penry* claim, not an *Atkins* claim. *Moore v. Quarterman,* 491 F.3d at 224-25. But this argument is specious. The AAMR and its definition of mental retardation were discussed in the *Penry* opinion itself thirteen years before *Atkins. Penry,* 492 U.S. at 308 n.1, 333-39. Clearly, because Penry's lawyers perceived and litigated the *substantive* issue of mental retardation more than a decade earlier, and did so on the basis of the AAMR definition, that definition was available to Moore. *Engle v. Isaac,* 456 U.S. 107, 134 (1982); *see also Poyner v. Murray,* 964 F.2d 1404, 1424 (4th Cir. 1992) (reasoning claim was available when "the legal tools, *i.e.,* case law, necessary to conceive and argue the claim" were already in existence).

additional evidence fundamentally alters or merely supplements the state petition — is necessarily case and fact specific.[14] *Id.* (citing *Anderson,* 338 F.3d at 388 n.24).

This Court has addressed the factual-exhaustion issue in the context of mental retardation. In *Morris,* the Court held that an *Atkins* claim was not fundamentally altered by "IQ scores and expert assessment of those scores," presented for the first time in federal court, where "sufficient indicators for a diagnosis of mental retardation had already been presented to the state courts." 413 F.3d at 498. *Morris,* which bears remarkable procedural similarities to the instant case, is nevertheless distinguishable.

Much like Moore, Morris unsuccessfully challenged his conviction and death sentence on direct appeal and through state and federal postconviction proceedings prior to the Supreme Court's opinion in *Atkins. Morris,* 413 F.3d at 486. Also like Moore, Morris raised an *Atkins* claim in a subsequent state habeas application shortly before his execution date. *Id.* at 487. Morris first outlined the three-part AAMR standard for

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[14] It is important to note that the "material additional evidentiary support" standard of *Dowthitt* and *Joyner* is identical to the "fundamentally alters" standard of *Morris* and *Anderson,* a principle this Court has long recognized. *See, e.g., Morris,* 413 F.3d at 491; *Anderson,* 338 F.3d at 386-87; *Dowthitt,* 230 F.3d at 745-46; *Graham,* 94 F.3d at 968-69; *Joyner,* 786 F.3d at 1320; *Brown v. Estelle,* 701 F.2d 494, 495-96 (5th Cir.1983); *Burns v. Estelle,* 695 F.2d 847, 849-50 (5th Cir. 1983); *Hart v. Estelle,* 634 F.2d 987, 989 (5th Cir. 1981); *Knoxson v. Estelle,* 574 F.2d 1339, 1340 (5th Cir. 1978).

diagnosing mental retardation. *Id.* Morris acknowledged the lack of available IQ scores, but argued he did not have the resources to obtain testing. *Id.* at 488. Instead, he supported his mental retardation claim with, *inter alia*: (1) school records reflecting poor grades, special-education experience, and a learning disability; (2) affidavits from family members and friends concerning his inferior adaptive skills; and (3) an affidavit from a psychologist who opined Morris was probably mentally retarded. *Id.* at 487-88. Morris specifically argued that this evidence demonstrated his deficient conceptual, social, and practical skills. *Id.* at 488. As in Moore's case, the state court dismissed Morris's application as an abuse of the writ. *Id.*

In federal court, Morris submitted additional expert affidavits detailing an IQ score of 53 and multiple expert opinions that he was mentally retarded. *Morris,* 413 F.3d at 489-90. Although the district court dismissed the claim without prejudice for failure to exhaust, so that Morris could return to state court, this Court disagreed. *Id.* at 495. First, the Court reasoned that Morris's state habeas claim was "remarkably detailed in both fact and law." *Id.* at 496 (quoting *Anderson,* 338 F.3d at 388). Second, the Court noted that Morris presented an expert affidavit which "provided a psychologist's acknowledgment of and support" for his claim. *Id.* Third, the Court also reasoned that "[t]here is no evidence that Morris intentionally withheld any previous IQ testing results." *Id.*

Moore, on the other hand, did not present a detailed *Atkins* claim in state court. Indeed, he did not "properly outline[] the AAMR's definition for mental retardation" or discuss "the necessity to meet all three essential prongs of the definition." *Morris,* 413 F.3d at 496. He did not provide such a definition or discuss the adaptive functioning prong *at all,* despite the fact that both are addressed in *Atkins, Tennard,* and Tex. Health & Safety Code § 591.003(13). RE Tab J at 3-5. Nor did he obtain an expert opinion although the defense experts at trial, Drs. Crowder and Fulbright, and their reports were readily available. Finally, Moore actually *withheld* a prior IQ score of 76 in an effort to misrepresent his actual level of intellectual functioning. Consequently, it cannot be argued that Moore's case is anything like Morris's.

Rather, Moore's claim is much more akin to *Kunkle v. Dretke,* 352 F.3d 980 (5th Cir. 2003). There, Kunkle presented only "a conclusory affidavit from trial counsel" to the state court. *Morris,* 413 F.3d at 497 (quoting *Kunkle,* 352 F.3d at 987). "Only at the federal level did Kunkle produce an affidavit from his mother and a psychological report." *Id.* Moore's five-page state habeas application contains *nothing but* a conclusory allegation of mental retardation. Yet Moore could have obtained affidavits from his trial experts or from his family members. He could have submitted his trial experts' written reports. As in *Kunkle,* Moore's claim is materially and fundamentally altered by the evidence he

presented in federal court.

The Supreme Court's recent opinion in *Baldwin v. Reese,* 541 U.S. 27 (2004), supports this conclusion. Although *Reese* addressed a claim of *legal* exhaustion, the Court made it clear that merely citing a federal source of law or labeling a claim "federal" did not constitute exhaustion. In fact, *Reese* held that a petitioner does not "fairly present" a claim to a state court if that court must read beyond the pleadings in order to find the substance of the claim. 541 U.S. 31-32. Here, Moore clearly failed to exhaust his *Atkins* claim because the state court could not have found sufficient specific facts establishing a threshold showing of significantly subaverage intellectual and adaptive functioning originating prior to the age of eighteen in his application.[15] Rather, the state court would have

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[15] In his dissent to the panel opinion, Judge Dennis argues that it was unfair to require that Moore make a prima facie showing to the state court — that he could meet the three *Atkins* criteria — in order to exhaust his claim. *Moore v. Quarterman,* 491 F.3d at 228-29. Judge Dennis suggests that this threshold standard should not be retroactively applied against him. *Id.* (citing *Ex Parte Williams,* No. 43,907-02, 2003 WL 1787634 (Tex. Crim. App. 2003) (unpublished order); and *In re Morris,* 328 F.3d 739 (5th Cir. 2003)). But Art. 11.071, § 5(a) has — as a threshold matter — required a sufficient showing of specific facts since its enactment in 1995. And § 2254(b)(3)(c) has mandated — as a gateway requirement — a prima facie showing since 1996. Moreover, it was not *Morris* that explained this standard in 2003, it was *Reyes-Requeña v. United States* that did so in 2001. 243 F.3d 893, 899 (5th Cir. 2001).

Finally, the real thrust of Judge Dennis's opinion appears to be an endorsement of the Tenth Circuit's approach in *Ochoa v. Sirmons,* 485 F.3d 538 (10th Cir. 2007). *Moore v. Quarterman,* 491 F.3d at 228. But *Ochoa* relies on a disastrous policy rationale. Namely, without any kind of merits assessment by the gate-keeping court, "literally any prisoner under a death sentence could

had to look deep into hundreds of pages of state-court records to find more, something the *Reese* Court held was unnecessary. Indeed, the court would have been obligated to look elsewhere just to find *the definition* of mental retardation. Thus, it is clear that Moore did not fairly present his claim to the state court and it is unexhausted.

B. Moore's claim is now procedurally defaulted.

Moore's unexhausted claim is procedurally defaulted in federal court because, if it is raised again in a subsequent state habeas application, it would be dismissed as an abuse of the writ. *Gray,* 518 U.S. at 161-62; *Coleman v. Thompson,* 501 U.S. 722, 735 n.1 (1991); *Martinez,* 255 F.3d at 239; *Nobles,* 127 F.3d at 420. Because Moore previously raised an *Atkins* claim in state court, he may no longer take advantage of the new-rule exception for subsequent applications. *Ex parte Blue,* 230 S.W.3d 151, 153 & n.2 (Tex. Crim. App. 2007) (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)(1)); *Ex parte Hood,* 211 S.W.3d 767, 776 (Tex. Crim. App.),

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bring an *Atkins* claim in a second or successive petition regardless of his or her intelligence." *In re Holladay,* 331 F.3d 1169, 1173 n.1 (11th Cir.2003). *Ochoa* sidesteps this problem by pointing to the narrowness of the category of cases such a ruling would affect. 485 F.3d at 540, 545. But this "narrow" category includes virtually all death-row inmates sentenced prior to *Atkins.* It might also include all inmates sentenced prior to *Roper v. Simmons,* 543 U.S. 551 (2005), as well. Surely, this represents the *majority* of the nation's death-row inmates. It is only the fact that most courts require *some* evidence of mental retardation (or juvenile status) that has prevented a deluge. The Tenth Circuit's reasoning in *Ochoa* is simply not sound.

cert. denied, 128 S. Ct. 48 (2007).

Nor may he avail himself of the actual-innocence-of-the-death-penalty exception discussed in *Blue.* 230 S.W.3d at 159-63 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)(3)). This is because he cannot muster "sufficient specific facts that, if true, would establish by clear and convincing evidence that no rational fact finder would fail to find him mentally retarded." *Id.* at 162 (quotations omitted). Moore's *Atkins* claim, which is based on nothing more than invalid IQ scores, poor academic performance, and impeached, inconsistent, and biased testimony from his family members, would not meet the § 5(a)(3) standard. *Cf. id.* at 164-66 (holding Blue's evidence — unreliable IQ score, "poor academic performance," and "sketchy, anecdotal ... opinions" from family members — did not satisfy § 5(a)(3) threshold). Thus, because the state court would again enter an abuse-of-the-writ order against Moore, his mental-retardation claim is barred in this Court.

C. Moore has never demonstrated cause and prejudice, nor a fundamental miscarriage of justice, that might excuse his default.

The Supreme Court has held that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S.

478, 488 (1986); *Sawyer v. Whitley,* 945 F.2d 812, 816 (5th Cir. 1991). "Objective factors that constitute cause include interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not reasonably available to counsel." *McCleskey v. Zant,* 499 U.S. 467, 494 (1991) (internal quotations omitted); *Cuevas v. Collins,* 932 F.2d 1078, 1082 (5th Cir. 1991).

In this case it is patently clear that nothing prevented Moore from referring to the well known diagnostic criteria for mental retardation. As argued above, those criteria appear in *Atkins, Tennard,* and the Texas Health & Safety Code. Similarly, Moore also failed to demonstrate that affidavits establishing deficits in adaptive functioning "could not be obtained absent an order for discovery or a hearing" or that contacting Moore's family members was "cost prohibitive." *Dowthitt,* 230 F.3d at 758. In fact, some potential witnesses were already identified by the trial record, *e.g.,* Moore's sister Kelly, his grandmother Jean Lynn, and his defense experts Drs. Crowder and Fullbright. Additionally, all of the lay witnesses who testified on Moore's behalf in the lower court resided within fifty miles of counsel. And Moore has no apparent explanation for why he did not provide school and employment records which were a part of the state court record.

Finally, Moore cannot prove "by clear and convincing evidence that

but for constitutional error, no reasonable juror would find him eligible for the death penalty." *Sawyer v. Whitley,* 505 U.S. 333, 348 (1992). As demonstrated at length below, Moore's evidence of mental retardation falls far short of even a preponderance. Even after a full-blown evidentiary hearing, he has not yet produced a valid IQ score in the mental-retardation range. Moore also fails to present any credible, objective evidence of deficits in adaptive functioning. Nor does he overcome the abundant proof of his ability to work, operate a forklift, drive a car, maintain personal and romantic relationships, to plan and execute a complex crime involving subterfuge and deceit, or to attempt to avoid responsibility. Consequently, Moore's default of his *Atkins* claim should not be excused, and this Court should reverse and render judgment in favor of the Director.

II. In Any Event, the District Court Applied the Incorrect Standard of Review.

This Court has held that a state court's dismissal of an *Atkins* claim as an abuse of the writ for failure to make a prima facie showing of mental retardation is an adjudication on the merits. *Rivera,* 505 F.3d at 355-56. As a result, the lower court was prohibited from either employing a de novo standard of review or granting habeas relief unless the state court's ruling — that Moore failed to provide "sufficient specific facts" establishing his retardation, RE Tab E — was contrary to, or involved an

unreasonable application of federal law. *Rivera,* 505 F.3d at 355-56; *see also* 28 U.S.C. § 2254(d). Unlike *Rivera,* the state court's decision in this case was not unreasonable.

In *Rivera,* this Court concluded that the state court's rejection of Rivera's mental-retardation claim for failure to make a prima facie showing was an unreasonable application of federal law. The Court identified two reasons. First, Rivera's *Atkins* claim was well developed in state court.[16] It contained an expert report analyzing medical records from TDCJ and MHMR, school records, affidavits from teachers and family members, letters written by Rivera, and various reports from medical, psychological, and educational sources. *Rivera,* 505 F.3d at 356-57. Importantly, it "went beyond mere recitation of grades to describe Rivera's sustained pattern of academic difficulties, and it analyzed Rivera's performance on various achievement tests while in school." *Id.* at 357. "The report explained why the IQ tests Rivera had taken to date could not be relied on, and also detailed deficits in adaptive functioning," specifically including the areas of "functional academic skills, work, self direction, communication, health, and self care." *Id.* Because the evidence produced in federal court was "strikingly similar" and supported a finding of mental retardation, the state court's decision that Rivera did

[16] As the Court noted, the Director "understandably" did not raise an exhaustion argument in *Rivera.* 505 F.3d at 357.

not make a prima facie showing was unreasonable. *Id.*

Second, "the finding that Rivera had not made a prima facie showing deprived Rivera of the opportunity to develop fully the substance of his claim before the state courts." *Rivera,* 505 F.3d at 357. As the Court explained, once an inmate makes a "substantial threshold showing" or "prima facie showing" of mental retardation, "the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Id.* at 358 (citing *Panetti v. Quarterman,* 127 S. Ct. 2842, 2855-56, 2859 (2007); and *Ford v. Wainwright,* 477 U.S. 399, 424-26 (1986) (Powell, J., concurring)). This echoes the Supreme Court's reasoning in *Panetti,* where the state court's failure to provide minimum due process, *e.g.,* "an opportunity to submit 'evidence and argument from the prisoner's counsel, including expert psychiatric evidence,'" or such proceedings as state law requires, obviated the need to apply § 2254(d). 127 S. Ct. at 2857-59 (quoting *Ford,* 477 U.S. at 427).

However, as detailed above, Moore's claim was not well developed in state court. He failed to provide an expert report, records of any kind, affidavits, or even *allegations* of deficits in adaptive functioning. In this sense, Moore's situation was akin to *Moreno v. Dretke,* a case distinguished in *Rivera.* 505 F.3d at 360 (citing *Moreno,* 450 F.3d 158 (5th Cir. 2006), *cert. denied,* 127 S. Ct. 935 (2007)). There, the state court's

conclusion that Moreno failed to make a prima facie showing of retardation *was* entitled to AEDPA deference. *Id.* This is because Moreno, like Moore, provided *no* credible evidentiary support for his claim of diminished adaptive functioning. *Id.* (citing *Moreno,* 450 F.3d at 164). In fact, Moreno offered *significantly more* evidence of mental retardation than did Moore, including an IQ score of 64 and an expert evaluation. *Moreno,* 450 F.3d at 164. Thus, the state court's ruling in Moore's case cannot be characterized as unreasonable and the lower court erred in applying a de novo standard of review.

Moreover, given the clinical — rather than forensic — nature of mental-retardation diagnostic criteria, and the Supreme Court's delegation of authority on the issue to the states, it follows that the state court is entitled to maximum leeway in *Atkins* cases. 536 U.S. at 317 (citing *Ford,* 477 U.S. at 405, 416-17; *see also Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) ("Applying a general standard to a specific case can demand a substantial element of judgment. ... The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations."); *Briseño,* 135 S.W.3d at 8 (noting "[s]ome might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment").

Although the court below clearly disagreed with the state court's rejection of Moore's claim, that is an insufficient reason for granting habeas relief. *Visciotti,* 537 U.S. at 27; *Williams,* 529 U.S. at 411. As a result, it is clear that this Court should reverse and render judgment for the Director.

III. The Lower Court Clearly Erred When it Found Moore to Be Mentally Retarded in the Absence of a Single, Valid IQ Score and on the Sole Basis of Subjective, Anecdotal Testimony from Biased Family Members.

The court below based its finding of mental retardation on specious evidence. First, the court relied upon the average of three invalid and unreliable IQ test scores and failed to account for Moore's advanced age, education, and his motivation to perform poorly on those tests. The lower court then improperly circumvented this problem when it presumed Moore to be retarded and faulted the Director for not rebutting that presumption. Second, the district court erred when it found significant deficits in Moore's conceptual and social skills based upon the biased, unreliable, and inconsistent testimony of his family members and little else. The court avoided this evidentiary problem by shifting the burden of proof to the Director and then simply ignoring the evidence contrary to its finding, including Moore's extensive school and work records, as well as the nature of his crime. Finally, the court below blundered when it concluded Moore was so impaired as to fall within the category of offenders defined by *Atkins,* despite the fact that Moore is objectively no

different than any other death-row inmate. Consequently, this Court should reverse and render judgment for the Director.

A. The district court's treatment of the intellectual-functioning issue is clearly erroneous and incorrectly shifts the burden of proof to the Director.

With regard to the intellectual-functioning element of mental retardation, the district court explained that "Moore has taken three IQ tests over the course of his lifetime," that "[h]is scores on theses tests were 74, 76, and 66," and that "[t]he average of these three scores is 72." RE Tab C at 8. The lower court then brushed aside all indications of test invalidity, scoring errors, and the age at which the tests were administered in order to conclude that "Moore has proven by a preponderance of the evidence that he satisfies the AAMR criterion of subaverage intellectual functioning." *Id.* at 8-9. The basis of this finding appears to be that the Director's expert, Dr. Mears, "adopted all three tests' results and agreed that Moore satisfies [the intellectual functioning] prong of mental retardation." *Id.* at 8. The grievousness of this error cannot be overemphasized.

1. There is no reliable evidence of significantly subaverage intellectual functioning.

Initially, neither the 2004 WAIS-III administered by Dr. Llorente nor the 1991 WAIS-R given by Dr. Fulbright produced reliable IQ scores. *See* 1 EH 167-69, 173 (Llorente's admission that erroneous administration

of IQ test resulted in invalid score that must be disregarded). Similarly, the 1973 PMA test did not produce a reliable IQ score. *See* 2 EH 41-45, 137 (Llorente's admissions that group administration and lack of data render test score invalid). Consequently, these scores cannot support the district court's finding. RE Tab C at 8-9; *cf. Perkins v. Quarterman,* No. 07-70010, 254 Fed.Appx. 366, **2 (5th Cir. 2007) (unpublished opinion) (improperly administered IQ tests are unreliable), *pet. for cert. filed* (Mar. 14, 2008) (No. 07-9914). The average of three *invalid* IQ test scores remains an *invalid* average. To hold otherwise makes a mockery of the proceeding in the court below.

Notwithstanding the test validity issues, there is also a serious dispute concerning Moore's motivation to perform well on a post-*Atkins* IQ test. As explained above, Moore missed questions on the 2004 test that he answered correctly in 1991. There was direct evidence that Moore knew the answer to at least one question — about a marriage license — he purposely feigned ignorance of on the 2004 test. Further, entire subtest scores in 2004 were substantially lower than his scores on the 1991 test. This Court has held that such discrepancies militate against any finding of mental retardation. *Taylor v. Quarterman,* 498 F.3d 306, 308 (5th Cir. 2007), *cert. denied,* — S. Ct. —, 2008 WL 833358 (2008); *Woods v. Quarterman,* 493 F.3d 580, 586-87 (5th Cir. 2007); *Clark v. Quarterman,* 457 F.3d 441, 445 (5th Cir. 2006), *cert. denied,* 127 S. Ct.

1373 (2007); *Moreno,* 450 F.3d at 164; *Webster,* 421 F.3d at 312-13 & n.13. Moreover, Moore's age — thirty-seven — at the time of the 2004 test, and his lack of education, also render that score completely unreliable.[17] *Taylor,* 498 F.3d at 308; *Moreno,* 450 F.3d at 164; *Webster,* 421 F.3d at 313 n.13. Here, where the PMA test is facially invalid, Moore was motivated to — and did — lower his score deliberately, a finding of significantly subaverage intellectual functioning is clearly erroneous. *Cf. Green v. Johnson,* 515 F.3d 290, 300 (4th Cir. 2008) (noting that, "although a person can fake a lower IQ score, a higher IQ score cannot be faked").

2. The Director's expert's "adoption" of these scores is meaningless.

The lower court's reliance on Dr. Mears's acceptance of the IQ data is clearly incorrect. RE Tab C at 8. Mears testified that Moore had "limitations in intellectual functioning," 3 EH 3, but not *significantly subaverage* intellectual functioning prior to the age of eighteen as required by Texas law.[18] *Briseño,* 135 S.W.3d at 7-8; Tex. Health & Safety

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[17] Indeed, when Dr. Mears adjusted the 1991 WAIS-R score for such factors, Moore's IQ was 82. 2 EH 239-40.

[18] It should be noted that Dr. Mears was unable to administer an IQ test because Dr. Lllorente had given one only three months before. 2 EH 216; *see also Hall v. State,* 160 S.W.3d 24, 30 n.14 (Tex. Crim. App. 2004) (discussing "practice effect," which requires a six-month interval between tests to yield valid results).

Code § 591.003(13).

At that point, the following exchange occurred:

> Q. So you agree with Dr. Llorente that whether we use the DSM[-IV] definition or the AAMR definition, the first prong is satisfied in your professional opinion?
>
> A. The prong in terms of — *I have some questions about his accuracy of score,* but I would still, nevertheless, because of my opinion about the adaptive functioning, I will accept that.
>
> Q. You do accept that?
>
> A. I will accept it.
>
> Q. Because I don't want to spend half a day talking about it?
>
> A. Right. I will accept it — *regardless of the scoring errors,* I still will accept it.

3 EH 4 (emphasis added). The cross-examination moved to the adaptive-functioning prong from that point on.

Mears's concession alone cannot support a finding of significantly subaverage intellectual functioning. *Cf Webster,* 421 F.3d at 312-13 ("To be sure, ... 'all of the experts who testified at Webster's trial, including those who testified for the government, acknowledged that Webster has a low IQ'") (citation omitted); *Hall,* 160 S.W.3d at 30 (State's expert

accepted defense expert's IQ test results, "but differed somewhat as to their significance"). The colloquy above occurred because Mears disputed any ultimate diagnosis of mental retardation "because of [his] opinion about the adaptive functioning." 3 EH 4. Mears found the intellectual-functioning prong to be irrelevant to his opinion; he did not actually agree with Moore's interpretation of the IQ data.

Further, the Director certainly did not concede or judicially admit the issue. "A judicial admission is a formal concession in the pleadings or stipulations *by a party or counsel* that is binding on the party making them." *Martinez v. Bally's Louisiana, Inc.,* 244 F.3d 474, 476 (5th Cir. 2001) (emphasis added). Mears's opinion on the validity or invalidity of the IQ test data is merely evidence. And given the demonstrated unreliability of that data, it is not competent evidence that would support the lower court's finding because it is not based upon sufficient facts or data produced by professionally reliable methods. Fed. R. Evid. 702. But none of the proffered IQ test scores are valid in this case and Moore's own expert testified that such scores may not be reasonably relied upon. Fed. R. Evid. 703. Because a diagnosis of mental retardation requires a reliable IQ score of 70 or below on a standardized, individually administered intelligence test, no diagnosis can be made under the circumstances of this case. *Briseño,* 135 S.W.3d at 7-8 & n.24 (citing DSM-IV at 39). Consequently, it was clear error for the lower court to

accept expert opinion that Moore meets the intellectual functioning prong of the DSM-IV. *See also United States v. 319.88 Acres of Land, More or Less, Situated in Clark County, Nev.,* 498 F.Supp. 763, 766 (D. Nev. 1980) ("Where the opinion of an expert is based on erroneous assumptions of fact or law, the evidence is incompetent and insufficient to support a verdict"); *Guillory v. Domtar Industries Inc.,* 95 F.3d 1320, 1330-31 (5th Cir. 1996) (a district court's responsibility is "to ensure that an expert's testimony rests upon a reliable foundation").

This is a conclusive and unavoidable fact that no amount of clinical judgment, expert supposition, or wishful thinking will avoid. Where incompetent evidence induces a district court "to make an essential finding which would otherwise not have been made," reversible error occurs. *Goodman v. Highlands Ins. Co.,* 607 F.2d 665, 668 (5th Cir. 1979). Given such an error, the district court's marked reliance on the Director's expert's "adoption" of these data deserves added scrutiny for two additional reasons. RE Tab C at 8-9. First, it appears the court below actually shifted the burden of proof on this issue to the Director when it based its decision on the Director's expert's opinion rather than on any concrete test scores. In effect, the court *presumed* Moore to be retarded and then penalized the Director for not rebutting that presumption. Second, it appears the lower court did so in order to justify its predetermined opinion that Moore is mentally retarded and eligible for

habeas relief. Indeed, the court's prior attempt to justify relief by creating a "procedural" *Atkins* right out of whole cloth underscores the unfairness of the proceeding in the district court. RE Tab G. This Court should reverse and render judgment for the Director on this point alone.

B. The lower court's assessment of the adaptive functioning prong is also clearly erroneous and incorrectly shifts the burden of proof to the Director.

The court below found Moore had significant deficits in his conceptual skills, including language, reading and writing, money concepts, and self-direction. RE Tab C at 24, 27. The district court also found Moore had significant deficits in his social skills, *i.e.,* "interpersonal relationships, responsibility, self-esteem, gullibility, naivete, following rules, obeying laws, and avoiding victimization." *Id.* at 26-27. The lower court did *not* find significant deficits in Moore's practical skills. *Id.* at 27.

The district court based its conceptual skills finding on: (1) the "standardized achievement test results reported in Moore's elementary school records," and on his generally poor academic performance; (2) allegations that "Moore made it to eleventh grade by cheating off his sister and being ... socially promoted," had difficulty tying his shoes, and "following directions written on the chalkboard"; (3) reports Moore had trouble lifting heavy objects, filling out employment applications, counting money, and telling time; and (4) Moore's problems riding a bicycle,

operating a tractor, and driving a car. RE Tab C at 25-26.

The lower court supported its social skills finding by noting: (1) Moore "did not know to run and hide" and, thus, suffered from physical and sexual abuse; (2) other children "trick[ed] him out of his candy and money," and "ostracized [him] for being slow"; and (3) Moore too often resorted to violence. RE Tab C at 26-27.

1. The court's conceptual skills finding ignores the great weight of the evidence.

The court below completely disregarded the substantial evidence that Moore's academic performance would have improved if he had applied himself, and that his academic performance was affected by his frequent transfers from one school district to another, as well as his disruptive behavior. 2 EH 123, 139; Deposition at 6, 11. The court makes much of the fact Moore repeated the first grade and was placed in remedial classes without so much as mentioning that first graders were routinely held back and Moore attended only *two* remedial classes — and no special education classes — throughout his academic career. 2 EH 49-51, 122-23, 127-29, 139-43, 147, 154, 158-59, 162-65; RX 4 at 4, 8-9; *cf. Moreno,* 450 F.3d at 164 (failure to provide evidence of special education undermines assertion of adaptive deficits).

Moreover, the lower court found "there is no evidence [Moore] was able to do any high-school work." RE Tab C at 25. Once again, the court

appears to be shifting the burden of proof and improperly looking to the Director to produce such evidence. It is not the Director's obligation to do so. The district court also found Moore was socially promoted without any competent evidence to support such a finding. *Id.* at 17, 25. The basis for the court's finding appears to be the testimony of his fifth-grade teacher and the speculation of a junior-high classmate. RE Tab C at 17-18. In fact, his fifth-grade teacher testified that Moore's grades were adequate for advancement to the sixth grade. 2 EH 129. The court completely ignored Moore's six months of vocational training with the Job Corps. 2 EH 16-17, 83; PX 5 at 5; *cf. Clark,* 457 F.3d at 441 (evidence of vocational training supports finding of no adaptive deficits). Additionally, the court disregards the fact that Moore is not illiterate. 2 EH 88-90, 168, 176, 179, 185, 194-95, 212, 218; RX 2 at 114-121; RX 5; *cf. Webster,* 421 F.3d 313 & n.15 (evidence of literacy supports finding of no adaptive deficits).

The court's findings concerning Moore's inability to tie his shoes are not supported by the evidence. His teachers did not remember Moore leaving his shoes untied. 2 EH 128-29; Deposition at 10. Similarly, the district court's finding that Moore could not fill out a job application is dubious, at best. And regardless of how Moore obtained employment, there was ample evidence *he was employed* at several jobs, was never terminated from any of these jobs, and was repeatedly commended for good performance or rehired after quitting. 2 EH 18, 27-35, 213-14, 254;

PX 5 at 5; RX 3 at 46-47, 63-66, 80-82; RX 8 at 62. Moore also worked in the prison garment factory. 2 EH 32. This Court has consistently held that evidence of successful employment supports a finding of no adaptive deficits. *Woods,* 493 F.3d at 586-87; *Clark,* 457 F.3d at 446.

In any event, one of Moore's legibly completed job applications is a part of the record, as is documentation of the worker-compensation lawsuit he initiated against his employer, Mervyn's. RX 3 at 13-44, 63-64. That the lower court discounted this evidence by suggesting Moore did not fill out the application himself, but later referred to Moore's handwriting *on another Mervyn's form* as evidence of poor functioning is truly shocking. *Cf.* RE Tab C at 20 n.11, 24. Finally, the notion Moore could not operate a tractor or drive a car is patently false. Moore operated a forklift for Mervyn's and obtained a driver's licence. 2 EH 32, 35, 82, 87-88, 214; RX 6; RX 8 at 6; *cf. Perkins,* 254 Fed.Appx. at **3 (evidence of commercial driving ability supports finding of no adaptive deficits); *Clark,* 457 F.3d at 446 (evidence of driving ability supports finding of no adaptive deficits).

Perhaps a more telling sign the district court viewed the evidence in a one-sided fashion is that the court found "the Director did not even argue or present evidence that Moore has a personality disorder that accounts for his deficiencies in adaptive functioning." RE Tab C at 9 n.6. However, Dr. Walter Quijano testified at Moore's original trial that "[t]he

elements of antisocial personality are present in the case." 22 RR 377-78. Dr. Richard Coons testified that Moore suffers from immature- or impulsive-personality disorder. 23 RR 607-08. Dr. Mears agreed. 2 EH 252.

2. Nor does the court's social skills finding find adequate support in the record.

As a threshold issue, the idea that victims of child sexual molestation should have defended themselves is odious. The idea that those victims must be mentally retarded if they do not is outrageous. Moore's own expert admitted as much and, thus, the lower court's reliance on this factor as support for a finding of significant deficits in Moore's social skills is woefully misplaced. 2 EH 85.

The court below also explained that Moore was socially isolated and unable to maintain relationships. Yet the court ignored the opinions of Moore's teachers that he communicated effectively and interacted well with his classmates. 2 EH 145-46; Deposition at 10-11; *cf. Clark,* 457 F.3d at 446 (evidence of successful socialization supports finding of no adaptive deficits); *Webster,* 421 F.3d at 313 (same). Moore's own friend, Tyrone Brown, testified Moore was a leader when he was a child. Deposition at 11. Moore also has a history of romantic relationships and has fathered a child. 2 EH 60, 80, 212, 251, 253, 256; RX 2 at 165. The court also dismissed the opinions of the corrective officers who testified at the

hearing, despite the fact that this Court has deemed such evidence relevant. *Clark,* 457 F.3d at 447; *Webster,* 421 F.3d at 313 & n.15. These witnesses believed that Moore communicates effectively, is well liked, and socializes with others. 2 EH 166-68, 177-78, 182-87, 193-94. Prison records reveal that Moore is capable of submitting request forms and filing grievances. RX 2.

The court's finding that Moore "was unable to resolve disagreements ... without recourse to violence" and was, thus, mentally retarded is detestable. RE Tab C at 26-27. The idea that Moore's extensive history of extreme violence is actually evidence of mental retardation flies in the face of conventional wisdom. The Supreme Court did not identify violent behavior as support for the reduced culpability of the mentally retarded in *Atkins. See* 536 U.S. at 318 ("There is no evidence that [the mentally retarded] are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders"). Moore's predilection towards violent behavior does *not* reduce his culpability; rather, when considered together with his leadership and planning skills, as explained below, it actually increases it.

Possibly most relevant to the social-skills domain of adaptive functioning — but ignored by the district court — is Moore's role in the

crime which landed him on death row. The trial record establishes that Moore planned and executed a home invasion and murder that involved subterfuge, deceit, and proper timing. The surviving victim of the instant capital murder, Richard Ayers, testified that Moore was the leader of the four co-defendants involved. In keeping with his ringleader status, Moore disposed of the guns and stolen property — several telephones, jewelry boxes, and Mr. Ayers's wallet — after the murder. The wallet — containing $150.00 — was initially taken from Mr. Ayers by Moore but only $10.00 remained when Moore later showed it to his accomplices.

Further, Moore's crime was not impulsive in nature, and Moore was the leader. Moore's execution of the planned crime was rational and appropriate under the circumstances, and demonstrated forethought and planning. Moore's confession was coherent, rational, and on point, and Moore lied in order to diminish his own responsibility and blame his co-defendants. 3 CR 509-36.

All of these factors have been identified by the state court as relevant to mental retardation in the criminal context, especially given the subjective nature of the adaptive-functioning prong:

- 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?

- 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?

Briseño, 135 S.W.3d at 8-9.[19]

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[19] These factors reflect the fact that "those in the mental health profession should define mental retardation broadly" for social services purposes, while the criminal law "must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseño,* 135 S.W.3d at 6; *see also Moreno,* 450 F.3d at 164-65 (*Briseño* factors are not an unreasonable application of *Atkins*); *id.,* 362 F.Supp.2d 773, 791-93 (W.D. Tex. 2005) (same); *(Curtis) Moore v. Quarterman,* No. 4:07-CV-77-A, 2007 WL 1965544, *5-6 (N.D. Tex. 2007) (recognizing and applying *Briseño* factors) (unpublished order); *Rodriguez v. Quarterman,* No. SA-05-CA-659-RF, 2006 WL 1900630, *13 (W.D. Tex. 2006) ("*Briseño* criteria represent an objectively reasonable application" of *Atkins*) (unpublished order); *Van Tran v. State,* No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, *23-24 (Tenn. Crim. App. 2006) (adopting *Briseño* factors)

This Court has also explained that an elaborately planned crime involving deceit is compelling evidence that an inmate is *not* mentally retarded. *See Perkins,* 254 Fed.Appx. at **3 (evidence that Perkins created an alibi and blamed others for his crime supports finding of no adaptive deficits); *Taylor,* 498 F.3d at 308 (evidence that Taylor learned from previous criminal mistakes, lied to interrogators, and blamed others for his crime supports finding of no adaptive deficits); *Clark,* 457 F.3d at 446 (evidence that Clark modified confession in response to identified inconsistencies and removed and concealed evidence from crime scene supports finding of no adaptive deficits); *Moreno,* 450 F.3d at 165 (evidence that Moreno planned multiple, elaborate escapes from pretrial detention by impersonating other inmates supports finding of no adaptive deficits); *Webster,* 421 F.3d at 313 n.15 (evidence Webster sneaked into women's portion of jail provided exculpatory excuses to interrogators supports finding of no adaptive deficits). But the lower court considered none of these factors. RE Tab C at 9 n.6. This Court should reverse the district court's judgment based on its clearly erroneous treatment of the adaptive-functioning issue.

(unpublished opinion).

C. The above findings notwithstanding, the court below erred when it found Moore to be so impaired that he falls within the purview of *Atkins.*

Most importantly, all of the subjective factors relied upon by the court below could apply to almost any death-row inmate. Given the dearth of objective evidence in this case, *e.g.,* valid IQ test scores, it would be very disturbing indeed if a federal court invalidated a state-court death sentence on the basis of some bad grades, a spotty work history, and problems tying shoes. As both the Supreme Court and the state court have noted, "the mentally retarded are not 'all cut from the same pattern ... they range from those whose disability is not immediately evident to those who must be constantly cared for.'" *Briseño,* 135 S.W.3d at 5 (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 442 (1985)).

Assuming the district court's findings on intellectual and adaptive functioning were not clearly erroneous, there can be no doubt Moore does not fall within the Eighth Amendment prohibition delineated in *Atkins.* To hold otherwise would signal that any death-row inmate may avoid execution by assembling a handful of family members to testify that their loved one was slow as a child. This cannot be. As a result, this Court should reverse and render judgment in favor of the Director.

CONCLUSION

For the foregoing reasons, the lower court's decision should be reversed.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief complies with Fed. R. App. Proc. 32(a)(7)(c) in that it contains 13,990 words, Corel Word Perfect 12, Century, 14 points.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing brief were served by overnight mail on this, the 10th day of April, 2008, addressed to:

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