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

PETITIONER-APPELLEE'S SUPPLEMENTAL *EN BANC* BRIEF

THIS IS A DEATH PENALTY CASE.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

State-Court Proceedings

Honorable Curt Henderson presided at trial and postconviction proceedings.

David K. Haynes represented Mr. Moore at trial and on direct appeal.

Sandra Trent represented Mr. Moore in his initial state postconviction proceedings.

Federal Habeas Corpus Proceedings

Honorable John Hannah. The late Judge Hannah presided over Mr. Moore's initial *Atkins* proceedings.

Honorable Leonard Davis presided over Mr. Moore's subsequent *Atkins* proceedings.

Greg Abbott, Attorney General of Texas.

Edward L. Marshall, Assistant Attorney General of Texas, represented the State in the District Court and Fifth Circuit proceedings.

Thomas Scott Smith was Mr. Moore's counsel in his federal and second state habeas proceedings, and remains Mr. Moore's counsel.

Gregory W. Wiercioch has entered an appearance and is assisting Mr. Smith with the briefing and oral argument.

Thomas Scott Smith
with express
permission by
Greg Wiercioch

Thomas Scott Smith
Attorney of record for Mr. Moore

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PETITIONER-APPELLEE'S SUPPLEMENTAL *EN BANC* BRIEF

Petitioner-Appellee Eric Lynn Moore asks this Court to affirm the judgment of the District Court that found him mentally retarded and, therefore, ineligible for capital punishment under *Atkins v. Virginia*, 536 U.S. 304 (2002).

STATEMENT OF THE ISSUES

This appeal presents four issues for the Court's consideration:

I. Did Mr. Moore fail to exhaust available state-court remedies? If so, is exhaustion excused because circumstances rendered Texas's corrective process ineffective to vindicate his rights under *Atkins*?

II. If Mr. Moore failed to exhaust available state-court remedies and is not excused from exhaustion, would the state court dismiss his second successive *Atkins* claim on adequate and independent state law grounds, preventing the federal courts from reaching the merits? If the *Atkins* claim is procedurally defaulted, can Mr. Moore show cause-and-prejudice to overcome the default, or a fundamental miscarriage of justice?

III. Did the District Court err when it applied a *de novo* standard of review and did not defer to the state-court decision that Mr. Moore had failed to make a *prima facie* case of mental retardation?

IV. Is the District Court's finding that Mr. Moore is mentally retarded clearly erroneous?

STATEMENT OF THE CASE

After exhausting all challenges to his capital murder conviction and death sentence in his initial round of state and federal proceedings, Mr. Moore filed a subsequent application for writ of habeas corpus in the state court, alleging that he is mentally retarded and entitled to relief under *Atkins*. RE Tab J.[1] The Texas

[1] References to the Record Excerpts are abbreviated "RE Tab __ at __." References to the Record on Appeal are noted as "ROA __." Citations to the transcripts of the federal evidentiary hearing are noted as "__ EH __."

Court of Criminal Appeals ("CCA") dismissed the application as an abuse of the writ. RE Tab E.

Mr. Moore then sought authorization from this Court to file a successive federal habeas petition. Finding that Mr. Moore had made a *prima facie* showing of mental retardation, the Panel permitted him to file a successive petition. RE Tab F. After some preliminary proceedings, the District Court held an evidentiary hearing and concluded that Mr. Moore had proven by a preponderance of the evidence that he is mentally retarded. RE Tab C.

On June 29, 2006, a divided Panel of this Court vacated the District Court's grant of relief and remanded with instructions to dismiss the claim without prejudice. *Moore v. Quarterman*, 454 F.3d 484 (5th Cir. 2006) ("*Moore I*"). Mr. Moore petitioned the Court for rehearing *en banc*. On June 27, 2007, the Panel treated the petition for rehearing *en banc* as a petition for panel rehearing, withdrew its earlier opinion, and substituted a new one. This time, a divided Panel found that Mr. Moore had failed to exhaust state-court remedies, vacated the District Court's judgment, and dismissed the *Atkins* claim with prejudice. *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007) ("*Moore II*"). Mr. Moore again sought rehearing *en banc*. On March 12, 2008, a majority of the Court agreed to rehear the case *en banc*.

STATEMENT OF FACTS

A. Texas's Subsequent Application Procedures

For a death row inmate like Mr. Moore, who had already filed his first state habeas petition before the Supreme Court decided *Atkins*, a subsequent habeas application pursuant to Article 11.071 of the Texas Code of Criminal provided the only available state-court remedy to vindicate his substantive Eighth Amendment right. However, Article 11.071 contains no provisions "for the appointment of counsel, or for investigative or expert funding, for the preparation of subsequent writ applications, as it does for preparation of an initial writ application." *Ex parte Blue*, 230 S.W.3d 151, 166-67 (Tex. Crim. App. 2007). In *Blue*, the CCA admitted its inability to resolve the dilemma facing volunteer counsel representing indigent death row inmates in successive habeas proceedings:

> This means that *pro bono* subsequent writ counsel is put in the unfortunate position of having to choose whether to personally bear the costs of expert and investigative assistance, raise the costs himself from private charitable sources, file a writ application without such assistance that will almost surely fall short of the statutory burden, or file no writ application at all despite his good faith suspicions. This is a regrettable dilemma for any attorney to have to face who is already giving generously and commendably of his own time. But it is one we are not at liberty to solve for him, in light of the legitimate legislative judgment as expressed in the statute. Counsel for the applicant, and others similarly situated, must present their dilemma for the consideration of the Legislature.

Id. at 167.

In *Blue*, the CCA noted that the subsequent application provisions do not pose a problem for legitimate *Atkins* applicants who had filed their first habeas petitions before the Supreme Court decided *Atkins*: "Subsequent applicants ***who can make the requisite threshold showing*** have been able to rely upon Article 11.071, Section 5(a)(1) for authority to proceed on the merits." 230 S.W.3d at 156 n.20 (emphasis added).[2] One CCA judge sought to define the threshold showing:

> [A]n applicant must, at a bare minimum, provide evidence of at least one I.Q. test (preferably taken before the age of 18) from which a reasonable trier of fact could conclude that the person is mentally retarded under *Atkins*. Better yet is evidence of several such I.Q. tests, coupled with supporting school and medical records, and record evidence or affidavits from qualified experts (or laymen with sufficient personal knowledge of specific conduct) that at least raise an issue concerning applicant's lack of adaptive skills and the onset of mental retardation before age 18.

Ex parte Williams, 2003 WL 1787634, at *2 (Tex. Crim. App. Feb. 26, 2003) (Cochran, J., concurring) (unpublished). A few months later, in another opinion

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[2] Section 5(a)(1) provides:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application [.]

Tex. Code Crim. P. art. 11.071 § 5(a)(1) (West 2008).

concurring in the dismissal of a successive *Atkins* petition, Judge Cochran reiterated her position in *Williams* but this time acknowledged that "an indigent death row inmate usually does not have the financial or investigative resources necessary to provide full documentation of an *Atkins* claim when filing a subsequent application." ROA 74 (*Ex parte Jacobs*, No. 34,253-04 (Tex. Crim. App. May 12, 2003) (Cochran, J., concurring) (unpublished)).

By contrast, a death row inmate challenging his conviction and sentence in a first state habeas application need not make any threshold showing to be entitled to appointed counsel to prepare the application. *See* Tex. Code Crim. P. art. 11.071 § 2(a) (providing that "[a]n applicant shall be represented by competent counsel"). To obtain prepayment of funds for investigators or experts to develop a claim for a first petition, an applicant need only state "specific facts that suggest that a claim of possible merit may exist." Tex. Code Crim. P. art. 11.071 § 3(b)(2). The applicant would, of course, have the assistance of appointed counsel to prepare the motion for funds. The State of Texas reimburses the counties for compensation of appointed habeas counsel and payment of expenses on a first habeas application up to $25,000. Tex. Code. Crim. P. art. 11.071 § 2A(a). Counties may reimburse appointed counsel for fees and expenses exceeding that amount. Tex. Code Crim. P. art. 11.071 § 2A(c).

B. The State-Court *Atkins* Proceedings

Only six months after *Atkins*, and eight days after this Court denied his petition for rehearing in his initial federal habeas corpus proceedings, Mr. Moore filed a successive state habeas petition raising an *Atkins* claim. RE Tab J. Because Mr. Moore was indigent, and Article 11.071 did not entitle him to counsel to prepare the successive petition, his federal habeas counsel represented him *pro bono*. Counsel relied solely on the reporter's record of the capital murder trial to support the *Atkins* claim, because Article 11.071 did not give Mr. Moore the right to fact-development resources, and because *pro bono* counsel was unable to finance an investigator or expert.

Mr. Moore referred repeatedly to the Supreme Court's recent decision in *Atkins*, in both the title of his pleading ("Successor Application for Post-Conviction Relief Pursuant to Article 11.071 § 5 and *Atkins*") and throughout the body. *See*, *e.g.*, *id.* at 1, 2, 4. He specifically alleged that his execution "would violate the Eighth Amendment as cruel and unusual punishment, as he is retarded and mentally impaired." *Id.* at 3. Citing the trial record, Mr. Moore set out concrete allegations of mental retardation. Dr. Jay Crowder, a psychiatrist, testified that Mr. Moore's intellectual abilities were "clearly below average." *Id.* He testified that Mr. Moore scored a 74 on a school-administered I.Q. test. *Id.* Mr.

Moore attached the testimony of a psychiatrist in an unrelated case that indicated that such an I.Q. score was within the range of mental retardation. *Id.* Dr. Crowder also testified that Mr. Moore was in special education throughout his schooling. *Id.* Referring to the trial record, Mr. Moore alleged that he had suffered multiple head injuries, which compounded his low level of intellectual functioning. *Id.* Dr. Crowder testified that Mr. Moore had probably sustained damage to his brain that could cause violent, irritable, uncontrolled, or disinhibited behavior. *Id.* at 4. In sum, Mr. Moore presented evidence relating to each of the elements defining mental retardation: his 74 I.Q. score is within the range of significantly subaverage intellectual functioning; his attendance in special education classes indicates an adaptive deficit in conceptual skills; and both his I.Q. score and participation in special education classes occurred while he was in school, suggesting onset before the age of eighteen.[3]

Quoting *Atkins*, Mr. Moore explicitly called to the state court's attention the

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[3] The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) significantly subaverage general intellectual functioning (*i.e.*, an IQ of approximately 70 to 75 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992). The 2002 edition of the AAMR Manual redefines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002).

Supreme Court's command that the States "'develop appropriate ways to enforce'" the Eighth Amendment's categorical rule exempting the mentally retarded from capital punishment. *Id.* at 4. He noted that this Court had held that *Atkins* applied retroactively, *id.* at 2, but that the Supreme Court had not provided any guidance on how to apply its ruling to prisoners who had already been convicted and sentenced to death before *Atkins* was decided. *Id.* at 4.

In his subsequent application, Mr. Moore reminded the state court of his indigence, *id.* at 1, and asked the court to provide him with "an opportunity to be evaluated." *Id.* at 5. He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation." *Id.* Finally, Mr. Moore asked the court to hold an evidentiary hearing. *Id.*

In a separate motion filed simultaneously with his subsequent application, Mr. Moore attached an Affidavit of Inability to Pay Court Costs and asked the state court to appoint counsel "to prepare and file a successor writ of habeas corpus ordering that his death sentence be vacated." Eric Lynn Moore's Motion for Appointment of Counsel at 1.[4] He asked the court to appoint his federal habeas

[4] For the Court's convenience, Mr. Moore attached this motion as Appendix A to Appellee's Brief.

counsel, who was "willing [to] accept and pursue Mr. Moore's case in the Courts in the State of Texas under appointment." *Id.* at 2. Finally, Mr. Moore asked the state court to allow him to continue to proceed *in forma pauperis*. *Id.* at 3.

The CCA implicitly denied Mr. Moore's request for appointed counsel, an expert evaluation, an opportunity to amend the application, and an evidentiary hearing. Dismissing the *Atkins* claim, the CCA stated:

> We have reviewed the application and find it fails to contain sufficient facts which would satisfy the requirements of Art. 11.071, Sec. 5(a), V.A.C.C.P. Accordingly, the application is dismissed as an abuse of the writ.

Tab E at 2.

C. <u>The Federal-Court *Atkins* Proceedings</u>

1. <u>The Authorization Proceedings</u>

On February 11, 2003, only six days after the CCA dismissed his *Atkins* claim, Mr. Moore filed a motion seeking permission from this Court to file a successive habeas petition in federal district court. The motion for authorization, and the attached proposed successive petition, contained the same evidence of mental retardation that he presented in state court. On February 19, 2003, the convicting court scheduled Mr. Moore's execution for May 21, 2003. After the State filed its opposition to authorization, a staff attorney at Texas Defender Service ("TDS"), a small non-profit, non-governmental agency, provided *pro bono*

assistance to Mr. Moore and obtained some of his school records.[5] Mr. Moore attached these records to his response to the State's opposition to authorization. *See* Exhibit 1 to Reply to State's Opposition in *In re Moore*, No. 03-40207 (5th Cir. Apr. 22, 2003); ROA 49-52.[6] The records confirmed that Mr. Moore had been tested with an I.Q. of 74 when he was six years old and revealed that he had been referred to special education classes almost immediately upon entering school. *Id.* at 50, 52. In addition, the records showed that, by the time he was in the fourth grade, Mr. Moore was functioning at only a second-grade level and that, by the fifth grade, he functioned at a third-grade level. *Id.* at 50. It appears that Mr. Moore failed the fourth grade, because the records reflect that he was "promoted" to the fifth grade and was a year older than his classmates. *Id.* at 51. He did not

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[5] In the wake of *Atkins*, TDS lawyers attempted to assist numerous potentially mentally retarded death row inmates. TDS staff attorneys provided *pro bono* assistance to uncompensated counsel of record or became directly involved in cases where the attorney of last resort abandoned the client. *See, e.g.*, *Ex parte Hearn*, WR-50,116-02 (Tex. Crim. App. Mar. 3, 2004); *Ex parte Hines*, WR-40,347-02 (Tex. Crim. App. Dec. 9, 2003); *Ex parte Van Alstyne*, WR-33,801 (Tex. Crim. App. Feb. 13, 2003); *Ex parte Taylor*, WR-48,498-02 (Tex. Crim. App. Jan. 22, 2003); *Ex parte Clark*, WR-37,288-02 (Tex Crim. App. Nov. 20, 2002); *Ex parte Modden*, WR-11,364-05 (Tex. Crim. App. Sept. 11, 2002); *Ex parte Davis*, WR-40,339-05 (Tex. Crim. App. Aug. 8, 2002). Due to the volume of cases with execution dates, along with the lack of staff and resources, TDS was often unable to conduct the type of in-depth investigation necessary to develop *prima facie* evidence of mental retardation sufficient to satisfy the subsequent application provisions of Article 11.071. Because TDS did not become aware of Mr. Moore's case until after he had received an execution date, it did not provide any assistance to him until well after the CCA had dismissed the *Atkins* claim as abusive and the motion for authorization was pending in this Court.

[6] Mr. Moore also attached these school records as Exhibit C to the successive petition he filed in the District Court after the Panel granted authorization. *See* ROA 49-52.

graduate from high school. *Id.* at 36.

Mr. Moore reminded the Court about the limited scope of its review at the request-for-authorization stage and explained his attempt to develop the facts in state court:

> To require Mr. Moore to provide further proof he is mentally retarded in order to have the opportunity to demonstrate the same in the district court would ignore the plain language of the statute and would improperly place this court in the role of a trier of fact. Further support for such a claim will be developed once counsel is appointed for Mr. Moore and expert and investigative assistance is provided. Such assistance was requested in Mr. Moore's state habeas application, but was denied on unexplained procedural grounds.

Reply at 10-11.

On May 12, 2003, the Panel granted Mr. Moore permission to file a successive habeas petition in the District Court. RE Tab F. Acknowledging that "[t]he facts surrounding Mr. Moore's alleged retardation have not been developed," the Court nonetheless found that he had presented sufficient evidence to make a *prima facie* showing that he is mentally retarded. *Id.* at 2. The Court granted Mr. Moore's motions to proceed *in forma pauperis* and for appointment of counsel. *Id.* at 1 n.1.

2. <u>The District Court Proceedings</u>

Mr. Moore filed his successive petition in the District Court the next day, ROA 30, and the District Court granted his motion for stay of execution. ROA 22.

He promptly sought authorization from the District Court for a mental health expert to review the evidence and evaluate him, and a mitigation specialist to investigate his background, locate pertinent witnesses, and determine whether he suffers from deficits in his adaptive behavior. ROA 89-99. The State opposed Mr. Moore's request for an expert and investigator, contending that any new evidence developed through such assistance would be unexhausted. ROA 104. In the alternative, the State argued that the District Court should provide funding only for an investigator, who would be limited to obtaining records of the I.Q. scores, school records, and head injuries mentioned in the successive state habeas petition. *Id.* at 105. The District Court denied Mr. Moore's motion as premature and ordered the parties to address whether Mr. Moore should have received an evidentiary hearing in state court. ROA 100.

Mr. Moore argued that Texas's refusal to afford him the "tools" to present his claim of mental retardation was unexplained, arbitrary, and unconstitutional, ROA 110-01, and left him "with no avenue for relief in the State courts." *Id.* at 113. He noted that cases in which the CCA found the applicant to have met the threshold involved applicants who were financially able to retain the assistance of experts to review records and suggest a diagnosis of mental retardation. *Id.* at 111-12. Mr. Moore emphasized that he did not have access to these resources. *Id.* at

111. He argued that because Texas "has abdicated its responsibility to protect its citizens from unconstitutional execution, the remedy lies in this Court." *Id.* at 115. Urging the District Court to hold an evidentiary hearing, Mr. Moore explained that he did not fail to develop the facts of his *Atkins* claim in state court; through no fault of his own, the CCA deprived him of the ability to develop the facts. *Id.* at 115, 116. Finally, he renewed his request for the tools needed to develop evidence of his mental retardation. *Id.* at 116-17.

The District Court concluded that the CCA incorrectly dismissed Mr. Moore's successive application and did not provide him with "constitutionally adequate procedures for determining whether he was mentally retarded." ROA 133. The court ordered the State of Texas to commence appropriate postconviction proceedings within 180 days or reform Mr. Moore's sentence to life imprisonment. *Id.* at 134, 166.

After both parties appealed the District Court's ruling, the Panel reversed and remanded for further proceedings. *Moore v. Dretke*, 369 F.3d 844 (5th Cir. 2004). On remand, the District Court concluded that Mr. Moore was entitled to an evidentiary hearing and authorized $7,500 for appointment of a mental retardation expert and social history investigator. ROA 192-95. The District Court granted Mr. Moore's motion for issuance of subpoenas and payment of his lay witnesses'

travel expenses related to the hearing. ROA 242-43, 389. In the weeks leading up to the hearing, the District Court granted Mr. Moore's request for an additional $10,000 for expert services, ROA 282-83, and approved payment of over $15,000 for appointed counsel's services. ROA 315. Over the course of the three-day evidentiary hearing, the District Court heard testimony from eleven lay witnesses and two expert witnesses, and admitted 26 exhibits offered by the parties. ROA 368-79. The District Court also approved Mr. Moore's request to conduct videotaped depositions of four additional witnesses after the hearing, ROA 377, and authorized payment of the court reporter transcribing the depositions. ROA 356-57. The District Court granted Mr. Moore's motion to provide without cost a transcript of the evidentiary hearing. ROA 387-88. Appointed counsel received an additional $17,000 for his services in the District Court, ROA 13 (Docket Entry 98), 469, and his social history investigator received over $11,000 for her work. *See Moore v. Quarterman*, No. 6:03-cv-0224-LED, Docket Sheet Entry No. 99 (12/13/05).[7]

On July 1, 2005, the District Court granted Mr. Moore's petition for writ of habeas corpus after finding that he had established by a preponderance of the

[7] The last entry contained on the District Court docket sheet in the Record on Appeal is dated October 16, 2005. For that reason, entries made on the docket sheet after that date do not appear in the Record on Appeal.

evidence that he meets all three prongs of the AAMR definition for mental retardation. RE Tab C.

STANDARD OF REVIEW

This Court reviews for clear error the district court's finding that Mr. Moore is mentally retarded. *Rivera v. Quarterman*, 505 F.3d 349, 361-63 (5th Cir. 2007). This Court reviews *de novo* the legal question of whether he exhausted available state-court remedies. *Morris v. Dretke*, 413 F.3d 484, 491 (5th Cir. 2005).

SUMMARY OF ARGUMENT

Eric Lynn Moore is mentally retarded. The District Court conducted a lengthy *Atkins* hearing, made credibility determinations, and sifted through the documentary and testimonial evidence. The court concluded that Mr. Moore is mentally retarded and granted him relief from his death sentence. The evidence revealed that Mr. Moore suffers from significantly subaverage intellectual functioning. He has taken three I.Q. tests over the years and scored 74, 76, and 66. Testimony and records showed that Mr. Moore has significant adaptive deficits, particularly with conceptual skills. He flunked the first grade and attended special education and "corrective" classes. Standardized achievement tests showed that he never functioned academically at his actual grade-level – despite being a year older than most of his classmates – and fell further behind every year. He had difficulty

learning new skills, following directions, counting money, and telling time. The onset of these intellectual and adaptive limitations occurred before age 18. The District Court appropriately reviewed the merits *de novo*. Its findings are adequately supported by the record and are not clearly erroneous.

The State argues that the adaptive deficit evidence Mr. Moore developed in federal court is unexhausted and that he can provide no justification for his failure to present it to the state courts first. Any attempt by Mr. Moore now to exhaust the evidence in state court would result in an abuse-of-the-writ dismissal, the State contends, insulating the *Atkins* claim from federal merits review. Consequently, the State argues, this Court should declare the claim procedurally defaulted and dismiss it with prejudice. This draconian outcome would allow the State to execute a mentally retarded prisoner, one who is, by definition, constitutionally ineligible for capital punishment under any circumstances. Such a decision would stand the exhaustion requirement on its head, allowing comity to trump the vindication of a federal constitutional right.

Although the Supreme Court applied the newly-recognized *Atkins* right retroactively, Texas's corrective process did not entitle death row inmates like Mr. Moore, whose first state habeas application predated *Atkins*, to appointed counsel and expert and investigative assistance to develop evidence of mental retardation

and prepare a subsequent state habeas application. Nevertheless, with the help of *pro bono* counsel – who lacked the financial means to retain an expert or an investigator – Mr. Moore exhausted the available state remedies by filing a successive habeas application that contained sufficient, concrete factual allegations of mental retardation warranting a fuller exploration by the convicting court. That the CCA concluded Mr. Moore did not satisfy its stringent threshold showing does not mean that he failed to exhaust available state-court remedies. Though the State of Texas complains that funding experts and investigators in federal habeas proceedings frustrates its interest in finality, it alone bears responsibility for failing to provide these resources in its courts. It has no cause to complain now about exhaustion and comity when it has chosen to protect its fisc over finality.

The unique character of the *Atkins* right – a substantive restriction on the State's power to punish ***and*** a right made retroactive by the Supreme Court to cases on collateral review – starkly reveals the inadequacy of the Texas postconviction statute to enforce the right. The Texas corrective procedure creates a lethal Catch-22 for indigent death row inmates like Mr. Moore: Without appointed counsel and fact-development resources, it will be nearly impossible for these inmates to make the threshold showing of mental retardation that entitles them to the appointed counsel and fact-development resources needed to prove that they are mentally

retarded. Such a system violates procedural due process.

Accordingly, even if this Court should find that Mr. Moore did not exhaust available state-court remedies, it should excuse exhaustion because circumstances rendered Texas's corrective process ineffective to protect his *Atkins* right. The rule of exhaustion is founded on the assumption that a state's judicial process is entitled to respect from the federal courts precisely because state remedies are adequate and effective to vindicate federal constitutional rights. It was never intended to permit the state courts to put a choke-hold on federal review of constitutional violations.

ARGUMENT

I. THE STATE'S ARGUMENT THAT MR. MOORE FAILED TO EXHAUST STATE-COURT REMEDIES RESTS UPON A FLAWED UNDERSTANDING OF THE EXHAUSTION DOCTRINE, A FAILURE TO APPRECIATE THE UNIQUE CHARACTER OF THE *ATKINS* RIGHT, AND A REFUSAL TO ACKNOWLEDGE THE INADEQUACY OF TEXAS'S CORRECTIVE PROCESS TO VINDICATE MR. MOORE'S FEDERAL CONSTITUTIONAL RIGHT.

A. Mr. Moore exhausted "the remedies available in the courts of the State."

Section 2254(b)(1)(A) of Title 28 prohibits a federal court from granting an application for writ of habeas corpus unless it appears that "the applicant has exhausted the remedies available in the courts of the State." The State argues that Mr. Moore did not exhaust available state-court remedies, because he did not

outline the AAMR or Texas Health & Safety Code definition of mental retardation, and he did not provide the state court with the evidence of adaptive deficits he developed in federal court, or at least explain why he could not present that evidence in state court. Respondent-Appellant's Supplemental *En Banc* Brief [hereinafter "State's Supplemental Brief"] at 28-34. The State's stringent pleading requirement conflicts with the leading Supreme Court cases on legal and factual exhaustion, as well as prior decisions of this Circuit.

1. Mr. Moore exhausted the legal basis of his claim.

In *Baldwin v. Reese*, 541 U.S. 27 (2004), the Supreme Court explained that a litigant can easily exhaust the legal basis of a federal claim in state court "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" *Id.* at 32.

Mr. Moore clearly satisfied the requirements of *Baldwin*. He explicitly asserted, both in the title of his state habeas application and in the text of that document, that his claim was based on the Supreme Court's decision in *Atkins*. RE Tab J at 1, 2, 4. He explained that *Atkins* held that the Eighth Amendment prohibits the execution of the mentally retarded. *Id.* at 3. He alleged that he was mentally retarded and that, therefore, his execution would violate the Cruel and

Unusual Punishments Clause of the United States Constitution. *Id.* at 3-4. His failure to include the AAMR definition of mental retardation set out in the *Atkins* decision itself did not change the federal constitutional basis of his claim or deprive the state court of material information. Under *Baldwin*, Mr. Moore's reference to *Atkins* was sufficient to give the state court notice of the AAMR definition of mental retardation and its relevance to his claim.

2. Mr. Moore exhausted the factual basis of his claim.

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), the Supreme Court held that supplemental evidence that does not "fundamentally alter the ***legal*** claim already considered by the state courts" does not require the habeas petitioner to return to state court to exhaust that evidence. *Id.* at 260 (emphasis added). In applying this standard and finding the petitioner's new evidence exhausted, the Supreme Court emphasized that the petitioner did not "attempt[] to expedite federal review by deliberately withholding essential facts from the state courts." *Id.* This Circuit has summarized the *Vasquez* standard: "[T]he petitioner exhausts the factual basis of the claim as long as she did not either fundamentally alter the legal claim already considered by the state courts or attempt to expedite federal review by deliberately withholding essential facts from the state courts." *Anderson v. Johnson*, 338 F.3d 382, 387 n.8 (5th Cir. 2003) (internal quotation marks and citation omitted).

Anderson explained that new evidence may be presented in federal court as long as it does not place the claim in a "significantly different ***legal*** posture." *Id.* at 387 (emphasis added, internal quotation marks and citation omitted).[8]

This Court applied the principles of *Vasquez* to an *Atkins* claim in *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005), a case remarkably similar to Mr. Moore's, and one the State tries to distinguish. *See* State's Supplemental Brief at 30-32. In *Morris*, the petitioner presented the state court with evidence of his adaptive deficits but supplied no I.Q. scores in support of his *Atkins* claim. 413 F.3d at 487-88. In federal proceedings, the petitioner developed extensive evidence of mental retardation after the district court appointed counsel and granted funds for expert and investigative assistance. *Id.* at 489. In his amended federal habeas petition, Morris presented two affidavits from a clinical psychologist, who conducted adaptive behavior and intellectual functional testing, found that Morris had an I.Q. of 53, and concluded that he was mentally retarded. *Id.* at 489-90. Morris also presented two affidavits from a disabilities and special education expert, who

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[8] *Anderson* also recognized the importance of *Vasquez*, explaining that cases addressing exhaustion "issued prior to (or soon after and without reference to) the Supreme Court's decision in *Vasquez* [] are of limited relevance." *Id.* at 388 n.24. For this reason, the State's reliance on *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003), is misplaced. The State characterizes Mr. Moore's state habeas petition as containing the same type of conclusional allegations that this Court found insufficient to support exhaustion in *Kunkle*. State's Supplemental Brief at 32-33. However, as this Court explained in *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2003), *Kunkle* did not cite either *Vasquez* or *Anderson*. *Id.* at 497.

diagnosed Morris with mental retardation. *Id.* Finally, Morris introduced a new affidavit from Dr. Garnett, a psychologist who had previously provided an affidavit in the state habeas proceedings and now asserted that his review of the new evidence strengthened his opinion that Morris was mentally retarded. *Id.* at 490.

The district court dismissed the petition without prejudice for failure to exhaust state court remedies. *Id.* at 490. This Court vacated the district court's decision and remanded for an evidentiary hearing, holding that:

> [T]he new I.Q. evidence presented for the first time in federal court, although it indeed factually bolstered his sole *Atkins* claim, did not render Morris's *Atkins* claim – which same legal Eighth Amendment claim he presented to the state courts and supported with pertinent, if not conclusive, evidence of low intellectual functioning and adaptive deficits, from childhood on – as fundamentally altered and thus unexhausted.

Id. at 495. Several factors weighed in favor of exhaustion. Morris "unquestionably" brought his Eighth Amendment claim pursuant to *Atkins*. *Id.* at 496. He explained that the absence of I.Q. evidence in his state petition was due to his lack of funds, and that, "given the opportunity and resources," he would prove his mental retardation through intellectual testing. *Id.* Moreover, nothing in the record indicated that Morris "attempted to expedite federal review by deliberately withholding essential facts from the state courts," or "chose to forego any provided opportunity for the proper I.Q. testing." *Id.* The state court's failure to hold an

evidentiary hearing caused Morris's facts to be undeveloped, not any lack of diligence on his part. *Id.* at 496, 497. Finally, the Court noted that "no binding authority . . . requires an I.Q. test specifically, that is, entirely alone, at the core, or as any singular threshold to provide the basis for a finding of mental retardation." *Id.* at 497. Under these circumstances, the Court explained that I.Q. evidence alone cannot provide the "180-degree turn" that would significantly transform the legal posture of the *Atkins* claim in federal court. *Id.* In short, Morris had already presented to the state court "the crucial fact that [he] possessed sufficient indicators for a diagnosis of mental retardation." *Id.* at 498.

a. **Mr. Moore did not present his *Atkins* claim to the federal court in a significantly different legal posture than in the state court.**

Despite the State's efforts, *Morris* is indistinguishable from Mr. Moore's case. With specific citations to the trial record and the testimony of Dr. Jay Crowder, a psychiatrist, Mr. Moore alleged in his state habeas application "that [he] was clearly below average intelligence," that school tests showed he had an I.Q. of 74, and that this was within the range for mental retardation. RE Tab J at 3. Based on Dr. Crowder's testimony, Mr. Moore alleged that he was in special education throughout school, that he had multiple head injuries that compounded his low level of intellectual functioning, and that he demonstrated behavior

consistent with damage to the temporal lobes. *Id.* at 3-4.

Mr. Moore explicitly called to the state court's attention that the Supreme Court had ordered the states to enforce the Eighth Amendment categorical rule of *Atkins*, and that Texas had not yet provided any guidance to litigants pursuing *Atkins* relief. He reminded the court of his indigence, and asked it to grant him an opportunity to be evaluated. He also asked the state court to "allow him a constitutionally sufficient period within which to file such amendments to [his] application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation," and to hold an evidentiary hearing. RE Tab J at 5. In a motion accompanying his subsequent application, Mr. Moore sought appointment of counsel "to prepare and file a successor writ of habeas corpus." App. A to Appellee's Brief.

In federal court, Mr. Moore presented additional evidence of adaptive deficits in conceptual, social, and practical skill areas through documentary evidence and the testimony of family members, friends, and teachers. *See* RE Tab C at 11-27. The District Court heard evidence that Mr. Moore had difficulty following directions, learning new skills, filling out job application forms, telling time, and counting money; and that he was victimized as a child, socially ostracized by other children for being "slow," disruptive in school, unable to

resolve disagreements or misunderstandings without resorting to violence, and unable to maintain lasting relationships. *Id.* at 24-26. The District Court found that Mr. Moore had the most significant adaptive deficiencies in the conceptual skills area, demonstrated persuasively by standardized achievement test scores found in his school records that showed him falling further behind his actual grade-level every year. *Id.* at 24-25.

Like Morris's new I.Q. evidence, Mr. Moore's new adaptive deficit evidence "factually bolstered" his claim, but did not fundamentally alter his ***legal*** claim and render it unexhausted. Mr. Moore's federal claim was the same Eighth Amendment claim he unquestionably presented to the state courts pursuant to *Atkins*. It was the same claim he supported in state court with "pertinent, if not conclusive, evidence of . . . adaptive deficits, from childhood on," *Morris*, 413 F.3d at 495, as demonstrated primarily by his placement in special education classes, but supported as well by his history of head injuries and evidence of brain damage that could cause violent, uncontrolled, or disinhibited behavior. *See Moore II*, 491 F.3d at 226 (Dennis, J., dissenting) (finding that the federal-court evidence of limited adaptive functioning "merely supplemented Moore's [state-court] claim that he was in special education classes"). Despite the new evidence of adaptive deficits in federal court, the state-court evidence already demonstrated

that Mr. Moore "possessed sufficient indicators for a diagnosis of mental retardation." *Id.* at 498. Because the additional adaptive deficit evidence merely supplemented the existing state-court evidence of mental retardation, the new evidence alone did not cause the *Atkins* claim to take a hairpin turn or place it in a significantly different legal posture.

Mr. Moore's exhaustion argument is actually stronger than Morris's. Morris failed to present any I.Q. evidence to the state court, while the Panel held that Mr. Moore failed to present sufficient adaptive deficit evidence. *Moore II*, 491 F.3d at 222.[9] Mr. Moore presented the state court with some evidence on each of the three elements defining mental retardation. RE Tab J at 3-4; *see Moore II*, 491 F.3d at 222 (noting that "Moore's contention that he was in special education throughout his schooling arguably could be construed as an allegation that he was only minimally functional in an academic setting"); *id.* at 225 (Dennis, J., dissenting) ("Clearly, Moore touched on all three of the criteria for mental retardation in his subsequent state habeas petition."). Morris, on the other hand, presented absolutely no evidence in state court of an I.Q. score indicating significantly

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[9] The State criticizes Mr. Moore for not abiding by the elements of the *prima facie* threshold set out in the *Williams* concurrence – requiring at least one I.Q. test score – even though *Williams* had not been decided at the time he filed his successive petition. *See* State's Supplemental Brief at 33 n.15. Morris, on the other hand, had the benefit of *Williams* when he filed his *Atkins* successor on April 10, 2003. *See Morris*, 413 F.3d at 487. Yet the Court there discounted the unpublished *Williams* concurrence as "fail[ing] to establish any threshold factual burden based on I.Q. alone for *Atkins* claims." *Id.* at 498.

subaverage intellectual functioning.

b. **Mr. Moore did not deliberately withhold essential facts from the state court.**

The State faulted Mr. Moore for not obtaining an expert opinion about mental retardation from his trial experts or presenting affidavits of family members to establish deficits in adaptive functioning. State's Supplemental Brief at 32, 36. In contrast, according to the State, Morris acknowledged the lack of I.Q. scores in his state petition, but argued that "he did not have the resources to obtain testing." *Id.* at 31. Morris also sought the appointment of counsel in the state habeas proceedings, requested resources to establish his claim, and argued that an evidentiary hearing "was necessary to develop and fully present all available evidence supporting his claim." *Morris*, 413 F.3d at 488. The State disregards Mr. Moore's identical efforts to develop the facts of his *Atkins* claim in state court.

Relying on *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000), the State insists that it would not have been "cost prohibitive" for Mr. Moore to provide affidavits from family members. State's Supplemental Brief at 36. Emphasizing the ease with which Mr. Moore could have obtained these affidavits, the State mentions that the lay witnesses who eventually testified on his behalf at the federal evidentiary hearing "resided within fifty miles of counsel." *Id.* This reasoning is profoundly uninformed.

First, the State never acknowledges that Mr. Moore had no statutory right to postconviction counsel in Texas to help him investigate and prepare his successive habeas petition – even one based on the retroactive rule of *Atkins*. *Blue*, 230 S.W.3d at 166-67; *see* Statement of Facts - Part A, *supra*. *Dowthitt* involved federal review of a ***first*** state habeas proceeding, not a subsequent one. Consequently, Dowthitt had the assistance of appointed, compensated counsel and funds for investigative and expert assistance in state habeas proceedings. *See* Tex. Code Crim. P. art. 11.071 §§ 2, 3. His failure to diligently use the opportunities for factual development that the state court provided stands in marked contrast to Mr. Moore's posture in successive state proceedings, where he was without compensated counsel or funds to hire investigators or experts, and was facing the setting of an execution date at any time.

Second, while teachers, family members, and friends are sources of information about adaptive behavior, locating and contacting them, conducting appropriate interviews, and assessing the information obtained requires substantial time and resources, as well as the assistance of persons with specialized knowledge and skills. In this very case, for example, after the District Court ordered an evidentiary hearing, it paid over $11,000 to Mr. Moore's social history investigator, primarily for developing evidence of adaptive deficits. *See* Statement

of Facts - Part C(2), *supra*.

Mr. Moore neither withheld essential facts from the state court in an attempt to expedite federal review, nor did he intentionally forego any opportunity provided by the state court to develop the facts of his claim. *See Moore II*, 491 F.3d at 227 (Dennis, J., dissenting). Like Morris, he expressly informed the state court of his indigency and asked for appointed counsel to prepare and file a subsequent application. Without a statutory right to counsel, *pro bono* counsel agreed to prepare an *Atkins* successor. In the subsequent application, Mr. Moore recognized the need to develop his *Atkins* claim further. He reminded the state courts that Texas had not yet provided any guidance for pursuing *Atkins* relief. In his prayer for relief, he specifically asked for the court to (1) "afford him an opportunity to be evaluated;" (2) "allow him a constitutionally sufficient period within which to file such amendments to [his] Application as may be necessary to bring all proper matters before the Court and avoid unnecessary piecemeal litigation;" and (3) hold an evidentiary hearing. RE Tab J at 5.

Mr. Moore's requests made it absolutely clear that he needed qualified, compensated counsel, along with additional resources, to help him fully investigate and properly develop the facts in state court in support of his *Atkins* claim. He never suggested that he could prevail on his *Atkins* claim based solely on the

evidence he presented in his successive state habeas petition. There is a difference between a petitioner who fails to take advantage of the opportunities for factual development provided by the state court and a petitioner who is never afforded those opportunities. *See Morris*, 413 F.3d at 500 (Higginbotham, J., concurring) (noting that, because Morris requested resources to further develop his *Atkins* claim, and specifically referenced the need for intellectual testing, he did not fail to develop the factual basis of his claim at the state level").

The crucial question in resolving the exhaustion issue is not whether Mr. Moore provided the state court with affidavits from family members confirming his limitations in two or more areas of adaptive functioning, but whether he "exhausted the remedies ***available*** in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (emphasis added). The degree to which a claim will be developed in state court will depend on the scope of each state's available remedies. Although constrained by Texas's limited postconviction procedures, as well as the CCA decisions applying those provisions to successive *Atkins* claims, Mr. Moore prepared and filed a subsequent habeas application pursuant to Article 11.071, the available state-court remedy. For purposes of satisfying the exhaustion requirement, it is enough that his application contained both law and fact to put the state court on notice that he "possessed sufficient indicators for a diagnosis of

mental retardation." *Morris*, 413 F.3d at 498. As Judge Dennis concluded in his dissent, it was. *Moore II*, 491 F.3d at 225.

B. If the Court should conclude that Mr. Moore failed to exhaust the available state-court remedies, it should excuse exhaustion because circumstances rendered the State corrective process ineffective to protect his federal constitutional rights.

The State ignores the reality that Mr. Moore was trapped in a fatal conundrum through no fault of his own. Without the right to appointed, compensated counsel or fact-development resources under the Texas successive postconviction procedures, indigent death row inmates who truly may be mentally retarded are unlikely to make the requisite showing of mental retardation that triggers resources and a remand to the trial court for further proceedings to resolve the claim. *Cf. McFarland v. Scott*, 512 U.S. 849, 856 (1994) (holding that federal habeas appointment statute allows for pre-petition appointment of counsel and assistance of investigators and experts); *In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004) (holding that, upon a "colorable showing" of mental retardation, the federal habeas appointment statute affords counsel to a death row inmate to investigate and prepare a motion for authorization to file a successive petition raising an *Atkins* claim); *id.* at 458 (Higginbotham, J., concurring) ("I am not prepared to hold that [a death row inmate] must first make a *prima facie* case that he is retarded to be

entitled to a lawyer to make that case."). The failure of the Texas postconviction statute to appoint and compensate counsel, or provide some fact-development resources, upon a colorable showing of mental retardation, or a showing of possible merit to warrant a fuller exploration by the convicting court, violates procedural due process. Under these circumstances, the state corrective process proved ineffective to protect Mr. Moore's Eighth Amendment right and exhaustion is not required.[10]

1. The exhaustion doctrine encourages comity but, ultimately, seeks to ensure the vindication of federal constitutional rights.

The exhaustion doctrine rests on principles of comity essential to the smooth functioning of a system of dual sovereignty: As a matter of judicial discretion, federal courts should allow the state courts the first opportunity to vindicate federal constitutional rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971). By acknowledging that state courts are "equally bound to guard and protect rights secured by the Constitution," *Ex parte Royall*, 117 U.S. 241, 251 (1886), the

[10] It bears emphasizing that Mr. Moore is not asserting that the Texas remedy is ineffective to vindicate the *Atkins* right for the vast majority of death-sentenced prisoners. Prisoners who had yet to file their initial state habeas application on June 20, 2002, are entitled to the assistance of counsel and access to expert and investigative assistance under Article 11.071. However, Mr. Moore falls within a more limited category of prisoners who were sentenced to death ***and*** had already filed their first state habeas petition before the decision in *Atkins*. This class of prisoners was definitively closed on June 20, 2002, but – given the typical interval between sentencing and the filing of state habeas application – was more likely closed several years before *Atkins* was decided.

doctrine encourages respect for state institutions and "serves to minimize friction between state and federal systems of justice." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981).

Although the exhaustion doctrine's comity principles involve "a delicate balance and compromise of both state and federal interests," they do not demand "unthinking subservience" to state sovereignty at the expense of protecting federal constitutional rights. *Carter v. Estelle*, 677 F.2d 427, 442-43 (5th Cir. 1982). To avoid blind deference to state interests, the federal courts created exceptions to the exhaustion requirement. The assumption at the core of the exhaustion doctrine is that state procedures are adequate and effective for correcting violations of a prisoner's federal constitutional rights. *Carter v. Procunier*, 755 F.2d 1126, 1131 (5th Cir. 1985). Consequently, exhaustion is not required where an unfairly applied state procedural rule or practice frustrates the vindication of federal rights. *Brown v. Estelle*, 530 F.2d 1280, 1284 (5th Cir. 1976). Under these circumstances, comity's delicate balance "tips in favor of immediate consideration of petitioner's claims through federal habeas proceedings." *Carter*, 677 F.2d at 445. Congress eventually codified the exceptions to exhaustion rule. The federal habeas corpus statute now provides that exhaustion of state-court remedies is excused if "there is an absence of available State corrective process," or "circumstances exist that

render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B).

2. **Ineffective procedures prevented Mr. Moore from vindicating his *Atkins* right in state court.**

Despite the CCA's belief that the requisite threshold showing for successive *Atkins* claimants like Mr. Moore would pose few impediments to merits review, *Blue*, 230 S.W.3d at 156, the showing in practice can create a nearly impassable roadblock for indigent death row inmates without counsel, or with only volunteer counsel lacking the financial means to pay investigators and experts out-of-pocket without assurance of reimbursement by the state courts. Texas's corrective process is clearly inadequate, because it leaves to serendipity the vindication of a prisoner's Eighth Amendment right not to be subjected to an unconstitutional punishment.

Atkins ordered the States to "'develop[] appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986)). Because the Eighth Amendment rule categorically excluding the mentally retarded from capital punishment is retroactive, it applies equally to defendants awaiting trial on capital charges as well as those petitioners already sentenced to death. Accordingly, it is imperative that Texas develop procedures at all stages of the criminal justice system to ensure that no person with mental retardation is sentenced to death.

The Supreme Court's recent decision in *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), provides a measuring stick for determining whether Texas's postconviction procedures adequately protect the *Atkins* rights of death row inmates like Mr. Moore. *See Rivera*, 505 F.3d at 358 ("Even though *Atkins* did not specifically mandate any set of procedures, it was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence."). *Panetti* involved a review of the minimum procedural due process requirements that a State must provide to a death row inmate raising a an execution competency claim under *Ford*. The Supreme Court held that the due process guaranteed to *Ford* petitioners includes a "fair hearing in accord with fundamental fairness" and "an opportunity to be heard." *Id.* at 2856 (internal quotation marks omitted). In the specific context of developing evidence of incompetency for execution, *Panetti* found that "these basic requirements include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id.* (internal quotation marks omitted). After making the requisite threshold showing of incompetency, Panetti filed motions for appointment of counsel and funds to hire a mental health expert, along with a request for an evidentiary hearing in an attempt to develop the facts of his *Ford* claim. *Id.* at 2857. Because the state court denied these motions,

and refused Panetti even the "rudimentary process" of "an opportunity to submit psychiatric evidence as a counterweight to the report filed by the court-appointed experts," the Supreme Court concluded that Texas deprived Panetti of "a constitutionally adequate opportunity to be heard." *Id.* at 2858.

Panetti's due process holding is derived directly from *Ford*. In *Ford*, Justice Powell held in his controlling opinion that due process for the execution competency determination does not require the full-scale adversarial procedures that Justice Marshall advocated in his plurality opinion. 477 U.S. at 425. Justice Powell provided two main reasons for this conclusion. First, because an execution competency claim can arise only after the petitioner has been validly convicted of a capital crime and sentenced to death, the State's right to carry out the execution remains. "[T]he only question raised is not ***whether***, but ***when***, his execution may take place." *Id.* (emphasis in original, footnote omitted). Although the issue of when a petitioner may be executed is important, he said, "it is not comparable to the antecedent question ***whether the petitioner should be executed at all.***" *Id.* (emphasis added). Consequently, the heightened procedural due process requirements for death penalty trials do not apply in the competency-for-execution context. *Id.* Second, a *Ford* petitioner must already have been found competent to stand trial – or his competency was never at issue – before he could be convicted

and sentenced to death. *Id.* at 425-26. Therefore, "[t]he State may properly presume that petitioner remains sane at the time sentence is to be carried out and may require a substantial threshold showing of insanity merely to trigger the hearing process." *Id.* at 426 (footnote and citation omitted).

Atkins is "a substantive restriction on the State's power" to take a life in punishment. 536 U.S. at 321. It imposes a categorical rule making mentally retarded offenders ineligible for capital punishment precisely because of their impairments: "Mentally retarded defendants in the aggregate face a special risk of wrongful execution." *Id.* at 321; *see id.* at 317 (explaining that "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards"). For that reason, it is a right that attaches before the mentally retarded offender can be put on trial for his life. Moreover, this Eighth Amendment prohibition applies retroactively to all death row inmates, even those whose cases were on collateral review, because:

> the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."

Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (citation omitted).

Unlike a *Ford* claim, an *Atkins* claim involves the core question of ***whether***

– not ***when*** – the State may put an individual to death. Consequently, the State does not have the same interest in upholding a mentally retarded offender's death sentence that it does for a *Ford* claimant. Moreover, if a mentally retarded offender's trial pre-dated *Atkins*, the State cannot presume, based on his capital conviction and death sentence, that the offender is not mentally retarded.

As in *Ford*, the *Atkins* Court left it to the states to devise procedures for enforcing the right. For potential *Atkins* claimants in Mr. Moore's specific procedural posture – those who had, prior to the *Atkins* decision, exhausted all state proceedings in which there is a right to counsel or resources – Texas's corrective procedure is ineffective to protect the right.

a. Texas's stringent threshold showing for petitioners like Mr. Moore is a fundamentally unfair procedure for vindicating *Atkins*.

The fortuity of timing is the first circumstance that renders Texas's state successor procedure ineffective to protect Mr. Moore's *Atkins* right. If he had been tried after *Atkins* was decided, he would have been able to raise the claim at trial. Mr. Moore, as an indigent defendant, would have had the right to Sixth Amendment counsel in bringing the claim. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The procedural due process principles of *Ake v. Oklahoma*, 470 U.S. 68 (1985), presumably would have given him the right to investigative and expert

assistance to develop the claim upon "a factual showing sufficient to give the trial court reasonable ground to doubt [that he is not mentally retarded]." *Williams v. Collins*, 989 F.2d 841, 845 (5th Cir. 1993).

If Mr. Moore had not yet filed his first state habeas application at the time *Atkins* was decided, he would not have been required to make ***any*** threshold showing to be entitled to counsel to prepare an initial application raising an *Atkins* claim. *See* Tex. Code Crim. P. art. 11.071 § 2(a). To obtain prepayment of funds for investigators or experts to assist in preparing an *Atkins* claim for a first petition, he would have had only to state "specific facts that suggest that a claim of possible merit may exist." Tex. Code Crim. P. art. 11.071 § 3(b)(2). Appointed counsel, of course, would have been able to assist Mr. Moore in making that showing.

Neither the trial standard nor the first-state-habeas-petition standard require an applicant to satisfy the stringent showing that the CCA applies to *Atkins* claims in subsequent habeas proceedings. *See Williams*, *supra*, at *2 (Cochran, J., concurring); *see* Statement of Facts - Part A. Considering that subsequent state habeas applicants like Mr. Moore will not have appointed counsel to assist them, it is fundamentally unfair for the State to hold successor applicants to a higher threshold showing than defendants at trial or first-time habeas applicants before providing counsel or releasing fact-development resources. *See, e.g.*, *Howell v.*

State, 151 S.W.3d 450, 463 (Tenn. 2004) (holding that it would violate due process to require a habeas petitioner filing an *Atkins* claim for the first time to plead mental retardation by "clear and convincing" evidence; instead, he need only plead a "colorable claim" to reopen his petition for postconviction relief).

Because no *Ford*-like presumption that the inmate is not mentally retarded attaches after conviction and sentence in a case that predates *Atkins*, the applicant need not make a substantial threshold showing to be entitled to counsel and fact-development resources. However, it is reasonable for states to require such applicants to make some threshold showing to eliminate frivolous claims of mental retardation. This Court struck the proper balance in *Hearn*, a case raising counsel and resource issues analogous to the ones Mr. Moore faced in state court. *Hearn* required an unrepresented death row inmate to make only a colorable showing of mental retardation to entitle him to *McFarland* counsel for the limited purpose of investigating and preparing a motion for authorization to file a successive habeas petition. 376 F.3d at 455. The Court called this showing a "modest evidentiary threshold." *Id.* Other appropriate standards may include this Court's *prima facie* showing required before authorizing a successive petition, *see Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) ("a sufficient showing of possible merit to warrant a fuller exploration by the district court"), or *Morris*'s standard for

determining exhaustion of *Atkins* claims. *See* 413 F.3d at 498 (whether the petitioner presented evidence that he "possessed sufficient indicators for a diagnosis of mental retardation").

Mr. Moore met these threshold standards. No reason exists for holding him to a higher threshold than those persons raising *Atkins* claims at earlier stages of criminal or collateral proceedings – when all are attempting to vindicate for the first time a retroactive right defining categorical ineligibility for capital punishment. Such a fundamentally unfair procedure renders Texas's corrective process ineffective to protect Mr. Moore's *Atkins* right. Exhaustion should be excused in this circumstance.

b. It is fundamentally unfair to force indigent death row inmates to rely on volunteer attorneys to pay for fact-development resources to vindicate *Atkins*.

The second circumstance that renders Texas's state corrective procedure ineffective to protect Mr. Moore's *Atkins* right is his indigency, coupled with the postconviction statute's reliance on unappointed, uncompensated counsel to develop the "sufficient specific facts" needed to meet the CCA's stringent threshold requirement. Because Mr. Moore is indigent, he was unable to hire an attorney or pay for the services of an investigator or expert to assist him. His federal habeas counsel volunteered his services and prepared the successive

application *pro bono*, relying solely on evidence contained in the trial transcript. Counsel, unfortunately, did not have the financial means to incur out-of-pocket expenses, without any assurance of reimbursement, to retain an investigator or mental retardation expert to conduct interviews, obtain affidavits, gather records, and conduct intellectual and adaptive skills testing of Mr. Moore. Counsel filed a motion for appointment of counsel, asked for an evidentiary hearing, sought to have Mr. Moore evaluated, and requested the opportunity to make amendments to the successive petition to bring additional matters before the state courts. The CCA dismissed the claim for failing to make a *prima facie* showing of mental retardation. RE Tab E.

By comparison, this Court found that volunteer state habeas lawyers in *Morris* and *Rivera* presented sufficient evidence in state court to meet the exhaustion requirement (despite failing to meet the CCA's *prima facie* threshold). Morris's attorneys were able to obtain school, medical, and probation records, affidavits from lay witnesses, and an affidavit from an expert who reviewed the documents and concluded that the evidence was sufficient to suggest mental retardation. 413 F.3d at 488, 500. Rivera's volunteer lawyers introduced TDCJ medical records, MHMR treatment facility records, school and prison records, affidavits from family members and teachers, letters written by Rivera, and

medical, psychological, and educational reports. 505 F.3d at 356. Counsel also obtained a report from an expert, who assessed the available evidence and concluded that it suggested mental retardation. *Id.*[11]

As Judge Higginbotham pointed out in *Morris*, Texas has ignored the impediments its postconviction process poses to indigent applicants trying to meet the CCA's *Atkins* threshold:

> [T]he harsh reality is that [intellectual] testing is costly, and death row inmates typically lack independent financial means, as did Morris. . . . [T]he record indicates that Morris, with the assistance of volunteer counsel, diligently sought to gather evidence of mental retardation during the time period after *Atkins* was decided, and prior to Morris' scheduled execution date.
>
> It is not a matter of an ***obligation*** to pay for intellectual testing of a prisoner raising a colorable *Atkins* claim warranting further development. It is rather that there was a barrier placed before the petitioner through no fault of his own – indigence.

413 F.3d at 500 (Higginbotham, J., concurring) (emphasis in original, footnotes omitted). As the *Morris*, *Rivera*, and *Moore* cases illustrate, placing the onus of fact-development on *pro bono* counsel reduces the State's constitutional responsibility to vindicate a death row inmate's *Atkins* right to a lottery. Serendipity, rather than the State, determines the enforcement of the Eighth

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[11] Attorneys at TDS provided *pro bono* assistance to Rivera. This Court found that the CCA's determination that Rivera had failed to make a *prima facie* showing of mental retardation constituted an unreasonable application of clearly established federal law. 505 F.3d at 361.

Amendment. This is exactly what happened to Mr. Moore, not because his claim was without merit – as the District Court's decision demonstrates – but because he lacked the resources to develop the facts of his claim.

Mr. Moore's subsequent application contained sufficient concrete allegations of mental retardation that justified both the need for appointment of counsel, as well as the assistance of an expert and investigator. Citing to the trial record, it summarized the testimony of a psychiatrist who said that Mr. Moore: (1) had been tested in school as having an I.Q. of 74; (2) had attended special education classes; (3) had a history of head injuries; and (4) may have suffered damage to the temporal lobes of his brain. *Cf.* RE Tab J at 3-4. These are not vague or speculative allegations, phrased with sweeping generality and unsupported by specific facts. Instead, they amount to "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Reyes-Requena*, 243 F.3d at 899. They show that Mr. Moore "possessed sufficient indicators for a diagnosis of mental retardation." *Morris*, 413 F.3d at 498.

Vindicating Mr. Moore's *Atkins* right requires more from Texas's corrective procedure than merely giving him the right to file a successive petition raising the claim. It demands that the State provide putatively mentally retarded prisoners a meaningful opportunity to challenge their eligibility for capital punishment with

the tools necessary to uncover evidence of mental retardation – appointed counsel, experts, and investigators:

> Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake, 470 U.S. at 77.

The State's arguments about Mr. Moore's supposed failure to exhaust rest on an implicit assumption: that Texas's corrective procedures were effective to protect his *Atkins* right. Texas's decision to leave the representation of applicants like Mr. Moore to the vagaries of chance and to set the bar at an unreachable height to trigger release of fact-development resources gives the State no cause to complain in federal court about failure to exhaust. Mr. Moore exhausted the remedies available to him. That he did not do more is attributable to circumstances beyond his control that rendered Texas's subsequent application provisions ineffective to vindicate his *Atkins* right. Dismissing the claim would upend the exhaustion doctrine by giving greater weight to the avoidance of state-federal friction than the protection of a prisoner's federal constitutional rights.

II. MR. MOORE'S *ATKINS* CLAIM IS NOT PROCEDURALLY DEFAULTED.

Arguing that Mr. Moore's *Atkins* claim is unexhausted, the State urges the Court to find it procedurally defaulted, because the CCA would dismiss it as an abuse-of-the-writ if raised in a second subsequent application. State's Supplemental Brief at 34. The State contends that, on return to state court, Mr. Moore would have to meet the higher evidentiary threshold of Section 5(a)(3) of Article 11.071, as explained in *Blue*. *Id.* at 34-35.[12] *Blue* requires a second successive *Atkins* claimant to make "a threshold showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation." 230 S.W.3d at 163 (emphases omitted).

Based on the District Court's carefully considered determination that Mr.

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[12] Section 5(a)(3) states that:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that . . .
>
> > (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Tex. Code Crim. P. art. 11.071 § 5(a)(3) (West 2008).

Moore is mentally retarded, it is far from certain that Mr. Moore would be unable to meet the *Blue* threshold. However, assuming for the sake of argument that Mr. Moore could not meet the threshold, *Rivera* makes clear that the CCA's abuse-of-the-writ analysis is interwoven with an examination of the merits of the *Atkins* claim:

> [T]o decide whether an *Atkins* claim is an abuse of the writ, the CCA examines the substance of the claim to see if it establishes a *prima facie* case of retardation, and only upon deciding that question can the state court decide whether remand is appropriate. Thus, a decision that an *Atkins* petition does not make a *prima facie* showing – and is, therefore, an abuse of the writ – is not an independent state law ground.

505 F.3d at 359 (footnote omitted).

Although *Rivera* involved a first successive *Atkins* petition, the CCA's analysis would be identical under *Blue*'s "clear and convincing" threshold. Applying this standard, the CCA examined Blue's evidence of mental retardation and concluded that he had failed to present "sufficient specific facts" to meet the Section 5(a)(3) exception to the general prohibition on successive applications. 230 S.W.3d at 163-68. Under this scenario, a similar abuse-of-the-writ dismissal by the CCA in Mr. Moore's case would not serve as an independent state law ground barring the federal courts from reaching the merits of his *Atkins* claim on habeas review. In sum, if the Court concludes that Mr. Moore failed to exhaust

and does not excuse exhaustion, then the appropriate course is to dismiss the claim without prejudice and allow him to pursue state-court remedies.

Finally, even should the Court find the *Atkins* claim procedurally defaulted, Mr. Moore can demonstrate cause for the procedural default and actual prejudice: The State's failure to provide the minimum procedural due process protections to ensure the enforcement of *Atkins*, *see* Part I(B)(2), *supra*, constitutes an "objective factor external to the defense [that] impeded [his] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In addition, Mr. Moore can overcome any procedural default by showing a fundamental miscarriage of justice – that he is actually innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333 (1992). The District Court properly found that Mr. Moore is mentally retarded and, therefore, constitutionally ineligible for capital punishment. *See Moore II*, 491 F.3d at 230-31 (Dennis, J., dissenting).

III. THE STATE COURT'S DECISION IS NOT ENTITLED TO DEFERENCE.

The State contends that the District Court used an incorrect standard of review in assessing the merits of Mr. Moore's *Atkins* claim. State's Supplemental Brief at 37-38. The District Court employed the correct standard – *de novo* review – for the wrong reasons. It held that the CCA's dismissal of the claim for failing to satisfy the successive petition requirements of Article 11.071 was neither an

adjudication on the merits nor a procedural default. RE Tab C at 4-5. Accordingly, the District Court concluded that AEDPA's deferential standard of review set out in 28 U.S.C. § 2254(d) did not apply, and the court could determine the merits of the *Atkins* claim *de novo*. *Id.* at 5.

Prior to *Rivera*, this Court had not directly addressed whether state-court dismissals of *Atkins* claims for failure to meet the CCA's *prima facie* threshold constituted a wholly state-law based procedural ruling or, rather, a decision on the merits of the federal constitutional claim. *Rivera* definitively resolved the issue. It held that dismissing a successive *Atkins* petition as abusive does not serve as an independent state law ground, because that decision requires the CCA to assess the merits of the claim to determine if it establishes a *prima facie* case of mental retardation. 505 F.3d at 359. Consequently, the state-court decision does not insulate the claim from merits review on federal habeas, and AEDPA's deferential standard applies. *Id.* at 356.

Rivera's holding does not mean, however, that *de novo* review is never appropriate. *De novo* review is permitted if: (1) the state-court decision that the petitioner failed to make a *prima facie* showing of mental retardation involved an unreasonable application of clearly established federal law, *id.* at 361, or (2) the state court relied on constitutionally inadequate factfinding procedures in

adjudicating the merits. *Panetti*, 127 S.Ct. at 2858-59. Both occurred in Mr. Moore's case.

In assessing the state court's rejection of the claim for failing to establish a *prima facie* case, the federal court must view the decision "through the prism of *Atkins*' command that 'the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.'" *Rivera*, 505 F.3d at 357 (quoting *Atkins*, 536 U.S. at 321)). Moreover, this Court held the CCA's *prima facie* determination unreasonable in *Rivera*, in part because the federal district court eventually found the petitioner mentally retarded based on evidence that, although not presented in state court, was exhausted. *Id.* at 357.

Faced with only the threshold question of whether to allow Mr. Moore to proceed on his *Atkins* claim, the CCA's decision that he did not even make a *prima facie* showing was unreasonable. The CCA refused to consider his evidence through the prism of *Atkins* – a newly-recognized retroactive right that defines a class of individuals who are ineligible for capital punishment. In this light, Mr. Moore's evidence of a 74 I.Q. score, special education classes, multiple head injuries, and potential brain damage certainly shows possible merit to warrant a fuller exploration by the convicting court. The District Court's finding that Mr. Moore is mentally retarded, coupled with his contention that the evidence he

developed in federal court was exhausted, provides additional support that the CCA's decision was an unreasonable application of federal law.

The CCA's merits decision is not entitled to deference on federal habeas review for a second reason. The CCA failed to provide Mr. Moore "with a constitutionally adequate opportunity to be heard." *Panetti*, 127 S.Ct. at 2858. In the context of a determination of competency for execution, procedural due process protections are "rudimentary," *id.*, because the State retains the right to carry out the execution. *Ford*, 477 U.S. at 425. However, when faced with the decision whether the defendant should be sentenced to death – or whether the defendant is even eligible for capital punishment – the Supreme Court requires more elaborate due process protections to ensure the reliability of the decision. *Id.*

In the *Atkins* context, due process demands the appointment of counsel and funding for fact-development resources upon a lesser threshold showing than *Ford*, both because *Atkins* defines eligibility for capital punishment and no presumption exists – and must be overcome – that the petitioner is not mentally retarded. *See* Part I(B)(2), *supra*. Because of its unreasonable application of federal due process principles, the state court denied Mr. Moore his right to counsel and resources after he had presented sufficient evidence of mental retardation to warrant a fuller exploration by the convicting court. Accordingly, "the factfinding procedures

upon which the state court relied were 'not adequate for reaching reasonably correct results.'" *Panetti*, 127 S.Ct. at 2859 (quoting *Ford*, 477 U.S. at 423-24). The District Court correctly reviewed the merits of Mr. Moore's *Atkins* claim *de novo*, without deferring to the state court's determination.

IV. THE DISTRICT COURT'S FINDINGS OF FACT THAT MR. MOORE IS MENTALLY RETARDED ARE NOT CLEARLY ERRONEOUS.

This Court reviews the District Court's factual determinations on mental retardation for clear error. *Rivera*, 505 F.3d at 361. "A finding is clearly erroneous only if it is implausible in light of the record considered as a whole." *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006). The State argues that the District Court clearly erred in concluding that Mr. Moore is mentally retarded. State's Supplemental Brief at 41. The State's disagreements with the District Court's findings do not amount to clear error. The District Court's decision that Mr. Moore is mentally retarded is strongly supported by reliable testing, credible expert and lay testimony, and documentary evidence.

A. The record supports the District Court's finding that Mr. Moore has significantly subaverage intellectual functioning.

The State complains that the District Court did not credit Dr. Mears's criticisms of the validity of the I.Q. test scores. *Id.* at 44-47. The District Court's

decision to credit the testimony of Dr. Llorente, instead of Dr. Mears, is not clearly erroneous.

1. <u>The Testimony of Dr. Llorente</u>

Antolin Llorente, Ph.D., a highly qualified neuropsychologist,[13] conducted a full mental retardation assessment of Mr. Moore. He administered two intelligence tests, the WAIS-III (a full-scale I.Q. test) and the TONI-2 (a non-verbal abilities test), as well as a "response bias" test designed to detect effort to perform poorly. 1 EH 153-62. Mr. Moore obtained a full-scale I.Q. of 66 on the WAIS-III and a non-verbal I.Q. of 60 on the TONI-2. *Id.* at 153-54. The "response bias" test indicated that Mr. Moore was putting forth his best effort. *Id.* at 159-62. Dr. Llorente also reviewed the results of the Primary Mental Abilities Test (PMA) given to Mr. Moore in grade school when he was six-and-a-half years old. *Id.* at 139-40. Mr. Moore obtained an I.Q. of 74 on the PMA. *Id.* at 140. According to Dr. Llorente, taking into account the standard error of measurement, the results of the PMA and the WAIS-III overlap, and both satisfy the definition for mental retardation. *Id.* at 140-41, 167-68.

Dr. Llorente also testified about the WAIS-R administered in 1991 by Dr.

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[13] Dr. Llorente has extensive training and experience in the area of mental retardation. *See* 1 EH 108-14. He formerly taught at the Baylor School of Medicine in the area of mental retardation and developmental disabilities. He has worked in numerous clinical settings with individuals who have mental retardation.

Fulbright, on which Mr. Moore obtained an I.Q. score of 76. The State argues that the WAIS-R score is invalid, relying on Dr. Llorente's testimony that errors in Dr. Fulbright's administration of the vocabulary subtest invalidate the full-scale score. State's Supplemental Brief at 42-43. The State, however, fails to note that Dr. Llorente further explained that such errors likely inflated the 76 I.Q. score by one or two points, putting the recomputed score within the mental retardation range. 1 EH 173-74. Dr. Llorente also explained that the norms for the WAIS-R were 13 years out-of-date by 1991 and, therefore, subject to a known inflation, called the "Flynn Effect," of approximately three points every ten years. Adjusting for the "Flynn Effect," Dr. Llorente testified that Mr. Moore's WAIS-R I.Q. is 72. *Id.* 178.

Dr. Llorente explained that the consistency of the I.Q. scores across different test administrations indicates the scores are reliable. *Id.* at 166-67, 178-79. Moreover, he found significant that, on two separate occasions, prison psychologists noted concerns about the possibility that Mr. Moore is mentally retarded and recommended testing. However, it appears that the tests were never conducted. *Id.* 130-131. Based on this overlapping and consistent data, Dr. Llorente found that Mr. Moore has significant limitations in general intellectual functioning that satisfy the first diagnostic component of mental retardation. ROA

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2. The Testimony of Dr. Mears

The State's expert, Fred Mears, Ph.D., raised questions about Dr. Llorente's administration of the WAIS-III and disagreed with him regarding the accuracy and significance of the other I.Q. tests. Nevertheless, on cross-examination, Dr. Mears conceded that Mr. Moore had satisfied the intellectual limitations prong of the AAMR and DSM-IV definitions of mental retardation. 3 EH 3-4. The State urges a different interpretation of Dr. Mears's concession – an interpretation that the District Court clearly rejected. RE Tab C at 8. The record supports the District Court's conclusions, but even if the State's version is plausible, it does not undermine the District Court's decision. *See St. Aubin*, 470 F.3d at 1101. Furthermore, Dr. Llorente's testimony that Mr. Moore has significant deficits in intellectual functioning, standing alone, is sufficient to uphold the District Court's findings.

3. The District Court's Findings

The District Court had the benefit of extensive testimony from Dr. Llorente and Dr. Mears regarding the reliability, validity, and significance of all the intellectual functioning tests. It also had an opportunity to observe their demeanor and assess their credibility. After giving full consideration to that testimony, the

District Court concluded that Mr. Moore had "proven by a preponderance of the evidence that he satisfied the AAMR criterion of subaverage intellectual functioning defined as an I.Q. of 'about 70 or below.'" RE Tab C at 9. This finding is not only plausible, but clearly supported by Dr. Llorente's testimony and the results of all the I.Q. tests administered to Mr. Moore. The District Court's rejection of the State's arguments regarding the validity of the I.Q. scores was not clearly erroneous.

B. The record supports the District Court's finding that Mr. Moore has related limitations in adaptive functioning.

The State argues that the District Court's adaptive deficits finding is not adequately supported in the record. State's Supplemental Brief at 49, 52. Most of the State's complaints involve disputed issues of fact and the District Court's credibility findings. The State's arguments fail to show clear error in the District Court's opinion, which is amply supported by the record.

Using the AAMR's framework for assessing adaptive functioning, the District Court evaluated the evidence related to the three domains: conceptual skills, social skills, and practical skills. RE Tab C at 9-10. According to the AAMR, significant limitations in adaptive functioning are established when an individual has deficits in at least one domain that fall two standard deviations

below the mean as measured by standardized tests. AAMR (10th ed. 2002), *supra*, at 78. The AAMR emphasizes that the presence of skills cannot preclude the appropriate diagnosis of mental retardation. *See id.* at 1 ("Within an individual, limitations often coexist with strengths.") Both experts relied on their clinical judgment, rather than standardized tests, to assess adaptive deficits, because the testing would not be appropriate to retrospectively measure Mr. Moore's functioning in the prison setting. RE Tab C at 11.

The District Court found that Mr. Moore had significant deficits in conceptual and social skills. *Id.* at 23-27. The District Court's findings are not only plausible, but well-founded. The court's opinion includes a ten-page, detailed discussion of Mr. Moore's school records and the lay witness testimony, providing insight into the basis for the court's findings, as well as its decision to credit the testimony of some witnesses more than others. *Id.* at 11-21; *see* Appellee's Brief at 7-24 (setting out in detail the hearing testimony). The District Court found Dr. Llorente's testimony and assessment more credible than Dr. Mears's, "especially" regarding Mr. Moore's adaptive deficits. RE Tab C at 23.

The District Court's view of the evidence is entitled to great weight. *See Rivera*, 505 F.3d at 363 (emphasizing that the district judge who presided over the hearing is in a better position than the court of appeals to weigh and assess the

credibility of witnesses.) "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1984); *see Myers v. Johnson*, 76 F.3d 1330 (5th Cir. 1996) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently.").

The State's arguments consist mostly of complaints that the District Court rejected the testimony of its expert in favor of the testimony of Dr. Llorente, and credited the testimony of lay witnesses that the State would have it reject. In some cases, the State's arguments would require the Court to accept those portions of a witness's testimony that are consistent with the State's position and reject other portions of that same witness's testimony that support Mr. Moore's position. In essence, the State would have this Court reject nearly all of the evidence and testimony that the District Court deemed credible, and accept without question Dr. Mears's testimony, including his implausible interpretation of Mr. Moore's school records, which completely disregards the credible testimony of teachers and family members whom he never interviewed. This goes far beyond the scope of the

Court's review for clear error.[14]

CONCLUSION

Petitioner-Appellee Eric Lynn Moore asks the Court to affirm the decision of the District Court granting him habeas relief under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Respectfully submitted,

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[14] Although Dr. Mears did not believe Mr. Moore is mentally retarded, he agreed with Dr. Llorente that the onset of Mr. Moore's deficits probably occurred before age 18. 3 EH 4.

CERTIFICATE OF SERVICE

On this 12th day of May 2008, I hereby certify that a true and correct copy of this brief was sent to the following person by placing it with Federal Express for overnight delivery to:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 11 for Windows in 14-point proportionally spaced Times New Roman font in the text, and 12-point proportionally spaced Times New Roman font in the footnotes.

Dated: May 12, 2008

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