No. 15-____

IN THE
Supreme Court of the United States

BOBBY JAMES MOORE,
Petitioner,

v.

TEXAS,
Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Atkins v. Virginia*, 536 U.S. 304 (2002) to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

2. Whether execution of a condemned individual more than three-and-one-half decades after the imposition of a death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobby James Moore respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals under review (App. 1a-126a) is reported at 470 S.W.3d 481 (Tex. Crim. App. 2015). The findings of fact and conclusions of law of the state habeas trial court (App. 127a-203a (regarding claims one through three); App. 204a-287a (regarding claims four through forty-eight, *see* App. 287a)) are unreported.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals issued its judgment on September 16, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. On April 25, 1980, Bobby James Moore and two other individuals set out to rob a grocery store in Houston, Texas. During the course of the bungled robbery, one of the store's employees was shot and killed. The State charged Moore with capital murder as the shooter. The jury returned a guilty verdict on July 15, 1980, and, in the punishment phase, returned affirmative answers to the two special issues required under Texas law for imposition of the death penalty. R02621.[1] Moore was sentenced to death. R02622. The Texas Court of Criminal Appeals ("CCA") affirmed Moore's murder conviction and death sentence. *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1113 (1986).

2. Following habeas proceedings in state and federal courts, a federal district court found that Moore was deprived of his right to the effective assistance of counsel during his trial and punishment phase, with prejudice in the punishment phase, and granted his habeas petition regarding his death sentence. The Fifth Circuit affirmed. It held that the failure of Moore's counsel to "investigate, develop or present mitigating evidence, including exculpatory evidence that the offense was accidental, during either phase of Moore's capital trial, constituted constitutionally deficient performance that prejudiced the outcome of the punishment phase of Moore's trial." *Moore v. Johnson*, 194 F.3d 586, 593 (5th Cir. 1999).[2] The court

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[1] All record citations ("R") are to the Clerk's Record for the state habeas proceedings.

[2] The Fifth Circuit's decision was issued after this Court granted Moore's certiorari petition, vacated a previous decision,

ordered that Moore be given a new punishment proceeding or a sentence less than death.

The state court conducted a new sentencing hearing. On February 14, 2001, Moore again was sentenced to death. R02624-02625. He filed a motion to set aside the new sentence, which was denied. The State returned Moore to death row, where he was placed in highly isolated confinement—what the State calls "administrative segregation"—in Texas's Polunsky Unit on April 11, 2001. *See*, *e.g.*, R01825; R01827; *see infra*, 8-9 & n.4 (discussing administrative segregation).

Moore appealed. He also filed a motion to stay his appeal until the Texas legislature enacted legislation pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), on the ground that the Eighth Amendment barred the imposition of a death sentence against him in light of his intellectual disability. The CCA denied Moore's motion, and later affirmed his death sentence. It concluded, among other things, that it would not be cruel and unusual to execute him after decades on death row. *Moore v. State*, No. 74,059, 2004 Tex. Crim. App. Unpub. LEXIS 11, at *28 (Tex. Crim. App. Jan. 14, 2004), *cert. denied*, 543 U.S. 931 (2004).

3. On June 17, 2003, Moore filed a state court writ challenging his 2001 punishment retrial and death sentence. Moore raised forty-eight claims, including that the Eighth Amendment barred his execution because he was intellectually disabled, R00048-00061, and that execution after his prolonged

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and remanded in light of *Lindh v. Murphy*, 521 U.S. 320 (1997). *See Moore v. Johnson*, 521 U.S. 1115 (1997).

confinement on death row would constitute cruel and unusual punishment. R00202-00215. Regarding the latter claim, Moore emphasized the psychologically traumatic conditions that he experienced in administrative segregation in Polunsky. R00209-R00210.

Following a January 2014 evidentiary hearing on Moore's *Atkins* claim, the state habeas court determined on February 6, 2014 that Moore's petition should be granted in part and denied in part. Regarding Moore's *Atkins* claim, the court concluded that Moore had established "that he meets the definition of mental retardation under the current guidelines of the [American Association on Intellectual and Developmental Disabilities ("AAIDD")], under both the [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders IV ("DSM-IV") and V ("DSM-V")], and under the prevailing legal standards per [*Atkins*]." App. 202a ¶183; App. 203a ¶186.

The court determined that (i) Moore's "mean full-scale IQ score of 70.66 is within the range of mild mental retardation as recognized by the [American Association on Mental Retardation ("AAMR")]," App. 201a ¶180; (ii) Moore's intellectual disability was supported by "the determination[s] of three highly qualified expert witnesses . . . that Mr. Moore has significant deficits in adaptive functioning in the conceptual, social and practical realms that place him approximately two standard deviations below the mean in adaptive functioning," App. 201a ¶181; and (iii) "[t]here is ample evidence that Mr. Moore suffered from significant deficits in adaptive functioning . . . before the age of 18," App. 201a ¶178. *See also* App. 202a ¶183 ("The record is replete with clear indications from his early childhood risk factors,

sub-normal intellectual functioning, and adaptive deficits that would qualify Mr. Moore as mentally retarded."). The court observed that Moore failed first grade twice (and was held back) and failed every grade thereafter (but was "socially promoted" each year) until he dropped out of school in ninth grade. App. 183a-190a. At the age of 13, Moore required "daily drills" from his teacher on topics such as the days of the week, the months of the year, and the ability to tell time. App. 187a ¶153.

The state habeas court denied Moore's requests for relief on non-*Atkins* grounds, including his claim that executing him decades after imposition of his initial death sentence would constitute cruel and unusual punishment. App. 279a-281a. The court stated that Moore could not "complain or show prejudice based on any alleged inordinate delay from the time of his conviction to his . . . [forthcoming] execution due to his multiple and continued efforts to attain appellate review and/or post-conviction relief in state and federal courts." App. 279a ¶149. The court did not mention that the appellate and post-conviction litigation had been necessary to remedy one constitutional violation (ineffective assistance, which rendered the first death sentence unconstitutional) and attempting to remedy another constitutional violation (the *Atkins* claim, which the habeas court found meritorious).

4. The CCA held that the state habeas court erred by relying on current medical standards governing intellectual disability rather than a superseded twenty-three-year-old standard, and accordingly refused to grant Moore habeas relief on his *Atkins* claim. App. 5a-6a. The CCA explained that it "continue[s] to follow the . . . 1992 definition of intel-

lectual disability that [it] adopted in [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." App. 5a. Despite its recognition that the medical community's "conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided," the CCA determined that the habeas court erred in "us[ing] the most current position, as espoused by the AAIDD, regarding the diagnosis of intellectual disability rather than the test that [the CCA] established in *Briseno*." App. 6a. The CCA asserted that the obligation to "implement *Atkins*'s mandate" rests with the State's legislature, not the judiciary. App. 5a. With this threshold issue resolved, the court proceeded to consider Moore's claim.

First, the court determined that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning," based solely on its consideration of two of the seven IQ scores in the record: Moore's "78 IQ score on the WISC at age 13 in 1973 and his 74 IQ score on the WAIS-R at age 30 in 1989." App. 63a, 73a. The CCA determined that these two scores placed him "above the intellectually disabled range," and that, for that reason alone, he was not intellectually disabled. App. 75a. Although the CCA stated that it would apply a "standard error of measurement" of five points, App. 74a, it decided not to credit the below-70 low end of the range for the 74 IQ score, App. 74a-75a. The CCA also chose to disregard several other IQ scores in the record, including Moore's 57 IQ score at age 13 and his 59 IQ score at age 54. *See* App. 63a-74a. And, although the CCA acknowledged *Hall v. Florida*, 134 S. Ct. 1986 (2014) at the

outset of its opinion, App. 7a, it did not comply with *Hall*'s holding that IQ results are not mechanically determinative, or considered in isolation. App. 63a-75a. Nor did the CCA consider that *Hall* applied current medical standards, rather than the abandoned medical standards invoked by the CCA.

Second, the CCA held that "[e]ven if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning, his *Atkins* claim fails because he has not proven by a preponderance of the evidence that he has significant and related limitations in adaptive functioning." App. 75a. The court explained that its *Briseno* evidentiary factors "weigh[ed] heavily against a finding that applicant's adaptive deficits, of whatever nature and degree they may be, are related to significantly sub-average general intellectual functioning." App. 89a.

The CCA affirmed the trial court's denial of relief on the remaining grounds—including Moore's claim that executing him after prolonged confinement under sentence of death would violate the Eighth Amendment—without explanation. *See* App. 92a-93a.

One CCA judge dissented from the *Atkins* holding. Judge Alcala disagreed that the CCA "properly 'continue[s] to follow the AAMR's 1992 definition of intellectual disability.'" App. 99a-100a (quoting App. 5a). She explained that, under *Atkins* and *Hall*, the CCA "must consult the medical community's current views and standards in determining whether a defendant is intellectually disabled and . . . [the CCA's] reliance on a decade-old standard no longer employed by the medical community is constitutionally unacceptable." App. 104a. The dissent emphasized that "the continued application of the *Briseno* standard . . .

does not conform to the requirements of the federal Constitution," App. 125a, and explained, among other things, that the CCA "improperly applies a strict cut-off based on IQ scores" and "erroneously applies unscientific criteria to assess whether a defendant has adaptive deficits," App. 100a-101a. The dissent also criticized the majority for "[m]erely lamenting the Texas Legislature's failure to act in the decade since *Atkins* was decided," which "abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas." App. 95a n.2.

5. Moore, now 56 years old, first was sentenced to death over 35 years ago, at the age of 20. Twice in the three-and-one-half decades since that imposition of the death sentence, the State signed death warrants and set his execution date: one death warrant was stayed less than 24 hours before he was to be executed, and the other only five days before the scheduled execution date. *Moore v. McCotter*, No. H-86-835, Order Granting Stay of Execution (S.D. Tex. Feb. 25, 1986); *Moore v. Collins*, No. H-93-3217, Order Granting Stay of Execution (S.D. Tex. Oct. 21, 1993).

For nearly fifteen years (since April 2001), Moore has been held almost continuously in "administrative segregation" in Texas's Polunsky Unit. *See*, *e.g.*, R01825; R01827; R02582-R02597.[3] As one element of his state habeas claim that it would be cruel and un-

[3] During sixty-nine days of this period, at the direction of the state habeas judge, Moore was in a county jail, not death row, for a court-ordered psychological exam. App. 46a. He also was held in a county jail for several weeks in the run-up to his January 2014 evidentiary hearing.

usual to execute him after his prolonged period on death row, Moore emphasized the isolated conditions he had experienced in administrative segregation on death row in the Polunsky unit: "inmates held in administrative segregation by the Texas Department of Criminal Justice [("TDCJ")] are deprived of even the most basic psychological needs and suffer 'actual psychological harm from their almost total deprivation of human contact, mental stimulus, personal property and human dignity.'" R03537-R03538 (citation omitted); *accord* R00209-00210. Pursuant to the Death Row Plan of the TDCJ, a death row segregation inmate spends approximately 22.5 hours per day alone in his cell and is ineligible for contact visits.[4]

[4] The TDCJ's plan is available online (http://tifa.org/wp-content/uploads/2014/02/Administrative-Segregation-Death-Row-Plan-1.pdf). *See also Scheanette v. Riggins*, No. 05-cv-00034, Docket No. 20-2, Aff. of Billy Hirsch, Assistant Warden for Death Row at the Polunsky Unit, ¶¶ 6, 9, 13 (Sept. 7, 2005) (death row inmates at Polunsky "are kept in their cells for 22½ hours per day"; "[c]ontact between inmates is not allowed as all death row assigned inmates are assigned to death row segregation"; "out of cell time is limited to recreation time and showers"; "televisions are not made available to offenders on death row"; and "death row inmates are not allowed physical access to the law library").

REASONS FOR GRANTING THE WRIT

This case presents two important questions, both of which raise fundamental Eighth Amendment issues: (1) the permissibility of prohibiting the use of current medical standards in assessing intellectual disability under *Hall* and *Atkins*, and (2) the permissibility of executing an individual after decades of confinement under a death sentence.

1. In *Hall* and *Atkins*, this Court established a fundamental constitutional principle: the Eighth Amendment bars the execution of persons who are intellectually disabled according to current medical standards. Faithfully applying the current medical definition of intellectual disability, the state habeas trial court determined that Moore is intellectually disabled and constitutionally ineligible for the death penalty.

In a startling decision, the CCA rejected the habeas court's determination, concluding that the court "erred by . . . employing the definition of intellectual disability presently used." App. 6a. It held instead that an outdated, superseded twenty-three-year-old definition of intellectual disability governed the constitutional inquiry and that Moore was not intellectually disabled under that standard.

The CCA's ruling sharply conflicts with this Court's decisions in *Atkins* and *Hall*, which emphasize that it is the duty of the judiciary to enforce the Eighth Amendment by relying on current medical standards when conducting the intellectual-disability inquiry. It also augurs the all-too-real possibility that intellectually disabled prisoners across the State of Texas will be condemned to their death—in violation of the Constitution—simply because they might

not have been considered intellectually disabled a quarter-century ago. And it conflicts with decisions of other state and federal courts, which apply current medical standards to *Atkins* claims. Review is needed to vindicate the constitutional prohibition against executing intellectually disabled persons and to ensure that *Atkins* and *Hall* do not become dead letters in the State that carries out far more executions than any other State. *See* Death Penalty Information Center, Executions by State and Year, http://www.deathpenaltyinfo.org/node/5741.

2. The Court also should now resolve the important issue whether execution after an excessively long period of confinement under a death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment. Forcing a prisoner to endure decades on death row raises profound constitutional concerns. These concerns are even more pronounced when, as here, the condemned individual is forced to spend many years on death row largely confined alone in his cell. And because such prolonged death-penalty confinement thwarts the purposes that the death penalty is designed to serve, executing a prisoner initially sentenced to death decades ago would represent needless pain and suffering in violation of the Eighth Amendment.

These grave constitutional problems have particular force here because Moore originally was sentenced to death more than thirty-five years ago—giving rise to an exceptionally long period on death row. The ever-increasing frequency of extraordinarily long periods of confinement under a sentence of death underscores the need for this Court to address an issue it has not resolved: whether the Constitu-

tion permits executing prisoners after decades of sentenced-to-death confinement.

I. This Court Should Hold That A Prohibition On The Use Of Current Medical Standards In Determining Whether A Capital Defendant Is Intellectually Disabled Violates The Eighth Amendment.

Applying current medical standards, the state habeas trial court held that Moore is intellectually disabled and ineligible for the death penalty under *Atkins*. But the CCA reversed on the ground that Texas courts are *required* to apply a decades-old definition of intellectual disability to an *Atkins* challenge and that, under that standard, Moore is eligible for the death penalty.

This Court's review is necessary to ensure the continued vitality of a bedrock constitutional requirement first announced in *Atkins* and expounded two Terms ago in *Hall*: the Eighth Amendment bars the execution of a prisoner who is intellectually disabled under current medical standards. The CCA eschewed this core principle in favor of applying an outdated definition of intellectual disability that conflicts with the prevailing medical consensus. Abdicating its obligation to enforce the Eighth Amendment to bar the execution of intellectually disabled prisoners, Texas's highest criminal court has decided that Texas courts must continue to apply a 1992 standard of intellectual disability unless and until the State's legislature sees fit to enact a statute, even though the applicable medical standards for diagnosing intellectual disability have changed since that time. The State's approach defies both the Con-

stitution and common sense, conflicts with the approach taken by other state and federal courts, and warrants review by this Court.

1. In *Atkins*, this Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. Citing the impairments described in clinical definitions, *Atkins* concluded that defendants with intellectual disability bear diminished personal culpability "by definition." 536 U.S. at 318. The Court cited two clinical definitions with which those states already barring the execution of persons with intellectual disability "generally conform[ed]": the definitions adopted by the AAMR – since renamed the AAIDD – and the APA. *Id.* at 309 n.3, 317 n.22.

This Court subsequently reiterated that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. Because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability, *id.* at 1993, a state's legal determination must be "informed by the medical community's diagnostic framework," *id.* at 2000. States may not "go[] against the unanimous professional consensus," *id.*, nor "disregard[] established medical practice," *id.* at 1995.

Both *Atkins* and *Hall* thus require courts to consult current medical standards. In each case, this Court defined the relevant medical standards by consulting the then-current views of the AAIDD/AAMR and the APA. Thus, whereas *Atkins* had looked to the AAMR's 1992 definition of intellectual disability, *Hall* was guided by the AAIDD's 2010 definition. *See Hall*, 134 S. Ct. at 2000; *Atkins*, 536 U.S. at 309 n.3.

And whereas *Atkins* had looked to the most recent text revision to the fourth edition of the APA's DSM (DSM-IV), published in 2000, *Hall* was guided by the fifth edition (DSM-5), published in 2013. *See Hall*, 134 S. Ct. at 1990, 1994-95, 2000-01; *Atkins*, 536 U.S. at 309 n.3. Indeed, *Hall* not only adopted the new standards' revised terminology but also relied on their shift of focus away from rigid reliance on IQ scores alone and toward a conjunctive and interrelated assessment of intellectual disability, with a greater emphasis on adaptive functioning. *See* 134 S. Ct. at 2000-01.[5]

The CCA reversed the state habeas court for complying with this Court's mandate in *Atkins* and *Hall* that courts must apply currently accepted medical standards in assessing a capital defendant's intellectual disability claim. *See* App. 6a-7a (while "[i]t may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability" have changed, any relevant scientific and medical developments "do not determine whether an individual is exempt from execution under *Atkins*"). Accordingly, Texas courts are now required to apply abandoned medical standards in assessing intellectual disability claims in capital cases. Such an outcome cannot be reconciled with *Atkins* and *Hall*, which make clear

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[5] Although the basic diagnostic framework for intellectual disability has consistently looked to intellectual functioning, adaptive functioning, and age of onset, there have been major changes over time in the relationship between these factors and how they are evaluated. *See generally* Nancy Haydt et al., *Advantages of DSM–5 in the Diagnosis of Intellectual Disability: Reduced Reliance on IQ Ceilings in Atkins (Death Penalty) Cases*, 82 UMKC L. Rev. 359, 362-67 (2014).

that the legal standard *must* be informed by current medical criteria.

Notably, the CCA did not even seriously consider the substance of the clinical changes acknowledged in *Hall*—much less apply them to Moore's claim. Instead, the court merely asserted mechanically that the legal standard it established in *Briseno* remains "adequately 'informed'" by medical standards and is "generally consistent with the AAIDD's current definition of intellectual disability," and that the state habeas court "erred by . . . employing the definition of intellectual disability presently used by the AAIDD." App. 6a, 7a n.5. The court cited no authority for its "cling-to-an-abandoned-medical-standard" approach to protecting Eighth Amendment rights, and elided entirely the significant changes to prevailing medical standards since *Briseno*.[6]

Moreover, it is clear that, under the CCA's decision, outdated medical standards will be the basis of Texas's evaluation of intellectual disability indefinitely. The CCA emphasized that it will maintain its previous standard for intellectual disability irrespec-

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[6] The one aspect of the updated medical standards that the court briefly mentioned—the DSM-5's statement that an individual's "deficits in adaptive functioning must be directly related to [his] intellectual impairments," App. 7a n.5—ignores not only the marked shift of the DSM-5 toward greater emphasis on adaptive functioning, but also that the DSM-5 defines intellectual impairments in terms of particular deficits, and deemphasizes IQ-score test results that *Briseno* requires be "related" to deficits in adaptive functioning. *Compare Briseno*, 135 S.W.3d at 7, *with* DSM-5 at 37-38; *see also* Haydt, *supra*, 82 UMKC L. Rev. at 379 ("The DSM-5 links deficits in adaptive functioning with co-occurring deficits in intellectual functioning and requires a careful examination of adaptive behavior for reliable interpretation of IQ scores.").

tive of any changes in medical standards "unless and until the Legislature acts, which [the CCA] ha[s] repeatedly asked it to do," App. at 7a, and which the Legislature has declined to do for more than a decade. Thus, intellectually disabled persons convicted of capital offenses under Texas law will have to seek relief under anachronistic medical standards that will only become even more outdated over time. It is clear, of course, that whether the Texas legislature acts or does not act has nothing to do with the state judiciary's Eighth Amendment obligation under *Atkins* and *Hall*.[7]

Compounding this problem and further stacking the deck against intellectually disabled prisoners is the fact that outdated medical standards are "very difficult (if not impossible) to apply in practice" with reliability, since clinicians testifying as expert witnesses are obligated to "set aside much of their training in psychological standards and to train themselves (for *Atkins* purposes alone) in the outdated standards existing" at some past date. *United States v. Wilson*, 922 F. Supp. 2d 334, 340 (E.D.N.Y. 2013) (rejecting argument that court should apply outdated standard). This problem is especially alarming because factfinders in the judicial process rely heavily on the expert testimony of clinical professionals to explain the nature of intellectual disability and to help them assess whether a particu-

[7] In *Briseno*, the CCA stated that it was providing "temporary judicial guidelines" pending legislative action. 135 S.W.3d at 5. As the dissent here explained, judicial calls for legislative action do not satisfy the court's "responsibility to ensure that federal constitutional rights are fully protected in Texas" by "uphold[ing] the federal Constitution as it has been interpreted by the Supreme Court." App. 95a n.2.

lar individual meets diagnostic criteria. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (emphasizing professionals' role in advising factfinders regarding insanity).

The CCA's decision also creates a conflict and disagreement among state courts. If allowed to stand, it could persuade other states similarly to maintain standards for assessing intellectual disability that are not medically informed. Prior to *Hall*, some state courts diminished the significance of medical standards and rejected reliance on them. *See Williams v. Cahill ex rel. Cty. of Pima*, 303 P.3d 532, 543–44 (Ariz. Ct. App. 2013), *review denied* (Nov. 26, 2013). Since *Hall*, however, state courts addressing the issue consistently have held that current medical standards should be considered. *See, e.g., State v. Agee*, ---P.3d---, 358 Or. 325, 353-54 (2015) (remanding for a new *Atkins* hearing where "the trial court did not apply now-current medical standards in determining that [the] defendant had not met his burden of proof to show that he has an intellectual disability"); *Chase v. State*, 171 So.3d 463, 471 (Miss. 2015) (acknowledging "new definitions of intellectual disability" that have been promulgated "[a]s part of the medical community's evolving understanding of intellectual disability and its diagnosis"; "adopt[ing] the 2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of [Mississippi] in addition to the definitions promulgated in *Atkins* . . . .").

In the most recent state case to address the issue, the Oregon Supreme Court reversed a trial court's determination that a defendant had not proven that he was intellectually disabled under *Atkins* because

the trial court "did not apply now-current medical standards." *Agee*, 358 Or. at 353-54. The court carefully considered the "significant change in the way that intellectual disability is diagnosed" under current medical standards, whereby "proof of 'significantly subaverage intellectual functioning'" is "no longer require[d]" and "intellectual functioning [is] interpreted in conjunction with adaptive functioning in diagnosing intellectual disability." *Id.* at 350, 353. Recognizing the "high level of scrutiny [] required in death penalty cases," the court determined that a ruling based on outdated medical standards "would 'create[] an unacceptable risk that [a] person[] with intellectual disability will be executed.'" *Id.* at 354 (quoting *Hall*, 134 S. Ct. at 1990)). Accordingly, it reversed and remanded for a new *Atkins* hearing, and directed the trial court to consider "the evidence presented in light of the standards set out in the DSM-5 and discussed in *Hall*." *Id.* The Oregon Supreme Court's decision, which requires its courts to consider current medical standards in assessing an *Atkins* claim, stands in direct conflict with the CCA's decision here, which prohibits courts from applying those same standards.

The CCA's decision also conflicts with the decisions of numerous federal courts, which, like their post-*Hall* state-court counterparts, routinely rely upon current medical standards to assess intellectual disability in capital cases. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 843-45 (8th Cir. 2013) (finding Arkansas's revised statute consistent with DSM–5); *United States v. Montgomery*, No. 2:11-cr-20044-JPM-1, 2014 WL 1516147, at *3-4 (W.D. Tenn. Jan. 28, 2014) ("federal courts have routinely and sensibly made reference to the most updated literature in the field"

when evaluating *Atkins* claims; "[t]he [c]ourt will rely on the two clinical definitions of [intellectual disability] promulgated by the AAIDD and the APA—the eleventh edition of AAIDD Manual, and the DSM-V—as they are the most current iterations of the authoritative resources on the field"); *Wilson*, 922 F. Supp. 2d at 341 & n.5 (relying on 2010 edition of the AAIDD Manual, which "reflects the AAIDD's view of the current best practices in the field"; "[t]he court is aware of no case in which a court has considered itself bound to apply outdated clinical standards in making an *Atkins* determination.").

2. The CCA's decision to prohibit consideration of current medical standards in assessing intellectual disability has life-and-death significance in this case. As reflected in the state habeas court's determination, application of the current (and constitutionally proper) standard for assessing intellectual disability compels the conclusion that Moore is intellectually disabled and exempt from the death penalty. It was only by applying outdated and non-clinical standards in its assessment of Moore's (i) intellectual functioning and (ii) adaptive deficits that the CCA was able to reach the opposite result. Review is required to ensure that Moore's life is not taken by the State in violation of the Constitution.

Intellectual Functioning. Under the first prong of its *Atkins* assessment, the CCA required Moore to prove that "he suffers from significantly sub-average general intellectual functioning, generally shown by an IQ of 70 or less." App. 63a. In conducting this inquiry, the CCA violated current medical standards by treating Moore's two above-70 IQ scores (a 74 and 78, with, according to the CCA, a standard error of measurement of five points) as dispositive of his *At-*

kins claim. *See* App. 63a, 75a (concluding that Moore "failed to prove by a preponderance of the evidence that he has significantly sub-average general intellectual functioning" based solely upon consideration of his IQ scores). This determination conflicts with the "holding in *Hall* . . . that it is unconstitutional to foreclose all further exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (internal quotation marks and citation omitted). Furthermore, current medical standards recognize that "'[a] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score.'" *Hall*, 134 S. Ct. at 2000-01 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("DSM-5")). As a result, "[i]t is not sound to view a single factor as dispositive" of "the conjunctive assessment necessary to assess an individual's intellectual ability" under those standards. *Hall*, 134 S. Ct. at 2000-01; *Agee*, 358 Or. at 350 (recognizing this "significant change in the way that intellectual disability is diagnosed"). The CCA erred, therefore, by "disregard[ing] established medical practice," *Hall*, 134 S. Ct. at 1995, in concluding that Moore failed to prove that he had significantly subaverage general intellectual functioning based on an assessment of his IQ scores of 74 and 78 alone.

Moreover, even if a strict numerical approach were acceptable under current medical standards, the CCA's analysis still would not comport with those standards because Moore's cherry-picked score of 74 falls "squarely in the range of potential intellectual

disability," and, in any event, the low-end of that score (as well as three others excluded by the CCA) falls below 70. *See Brumfield*, 135 S. Ct. at 2278 (state court's conclusion that petitioner could not possess significantly subaverage intelligence with IQ test result of 75 was "an unreasonable determination of the facts"); *Hall*, 134 S. Ct. at 2001 (rejecting Florida's "rigid rule" treating IQ score in the marginal range as dispositive). The CCA erroneously disregarded the low end of the IQ-score range produced by this test in part because of Moore's "history of academic failure," App. 75a, even though under current medical standards a finding of poor performance in school *supports* a diagnosis of intellectual disability, *see* DSM-5 at 38. The court also found that his IQ score might be in the high end of the range because he took the test while on death row, App. 75a, setting up a Catch-22 that *Hall* conspicuously avoided, *see Hall*, 134 S. Ct. at 1995 ("a score of 71 . . . is generally considered to reflect a range between 66 and 76"); Br. for Resp't at 3, 7, *Hall*, 134 S. Ct. 1986 (No. 12-10882) (test on which petitioner scored 71 was administered in 2002, long after death sentence had been imposed, with no suggestion that low end of range should be disregarded because he was on death row).

Adaptive Deficits. The CCA, while concluding that Moore "failed to prove . . . that he has significantly sub-average general intellectual functioning," App. 63a, nevertheless proceeded to analyze whether Moore suffered "significant and related limitations in adaptive deficits." App. 75a. In its analysis of this issue, the CCA likewise failed to comport with established medical practice in at least two significant ways.

First, the CCA departed from prevailing medical standards by using Moore's perceived adaptive strengths as a means by which to negate a diagnosis of intellectual disability. This is inconsistent with current medical standards, which place significant emphasis on adaptive *deficits*. *See Hall*, 134 S. Ct. at 2000–01; *Agee*, 358 Or. at 343–44, 353; DSM-5 at 37; Haydt, *supra*, 82 UMKC L. Rev. at 367. Indeed, under current standards, an individual's significant limitations in conceptual, social, or practical adaptive skills are not outweighed by his potential strengths in some adaptive skills. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 47 (11th ed. 2010) ("AAIDD Manual"); *see also Brumfield*, 135 S. Ct. at 2281 ("intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'") (citation omitted). The CCA, however, has chosen to disregard this prevailing approach, and instead "consider[s] all of the person's functional abilities, including those that show strength as well as those that show weakness." App. 11a; *see also* App. 12a (finding that the state habeas court "erred" in following current medical standards by "consider[ing] only weaknesses in [Moore]'s functional abilities").

Thus, notwithstanding the DSM-5's "more read[y] acknowledge[ment] that people with intellectual disabilities are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families," App. 112a-113a (dissenting opinion), and despite present AAIDD guidance that "[t]he diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail

or prison, or 'criminal adaptive functioning,'" AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* 20 (2012), the CCA found that evidence of just such "adaptive skills" negated Moore's significant adaptive deficits in academic skills and social interaction. *See, e.g.*, App. 87a (criticizing defense expert's "minimization of the evidence that [Moore] had learned to survive on the street and in prison," and crediting state's expert who "saw evidence that [Moore] had developed adaptive skills in prison"); App. 80a-83a (finding the fact that Moore lived in the back of a pool hall, played pool there, and later played dominoes with another inmate while in prison to be substantial proof that he lacked adaptive deficits). By using "evidence of adaptive skills"—and especially by using evidence of such "skills" as surviving on the streets and in prison—to offset Moore's significant adaptive limitations, *see* App. 80a, 81a, 82a, 83a, 84a, the CCA broke with current medical standards. *See, e.g.*, *Sasser*, 735 F.3d at 848 (adaptive skills prong of clinical intellectual disability definition "does not involve balancing strengths against limitations. It simply requires deciding whether the evidence establishes significant limitations in two of the listed skill areas.").

Second, the CCA departed from current medical standards by completely discounting Moore's significant adaptive deficits based on an overly broad notion of "relatedness" that effectively imposes a causation inquiry not recognized by medical standards. As noted above, the CCA requires an *Atkins* applicant to prove that "his significantly sub-average general intellectual functioning is accompanied by *related* and significant limitations in adaptive functioning." App. 6a (emphasis added). The CCA

previously had explained that this requirement meant that "adaptive limitations must be related to a deficit in intellectual functioning and not a personality disorder.'" *Ex parte Hearn*, 310 S.W.3d 424, 428-29 (Tex. Crim. App. 2010). Here, in stark conflict with current medical standards, the CCA seized upon the word "related" and summarily determined that Moore's significant academic and social deficits "were caused by a variety of [other] factors" including "trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, . . . racially motivated harassment and violence at school, [and] a history of academic failure. . . ." App. 88a-89a. In so holding, the CCA completely disregarded current clinical guidance that other disorders and environmental challenges can, and frequently do, coexist with intellectual disability. *See* DSM-5 at 40 (observing that "rates of some conditions" are "three to four times higher" in individuals with intellectual disability "than in the general population"); AAIDD Manual at 46; John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 725–29 (2009).[8]

[8] Although the CCA declared that the state habeas court erred in relying upon a definition of intellectual disability that "omits the requirement that an individual's adaptive behavior deficits, if any, must be 'related to' significantly sub-average general intellectual functioning,'" App. 6a, this statement is without merit. In its findings, the state habeas court expressly acknowledged the CCA's holding in *Hearn*, 310 S.W.3d at 428-29, that adaptive deficits must be related to subaverage intellectual functioning instead of a personality disorder, App.161a ¶92, but, noting that no party had alleged that Moore suffered from a personality disorder, App. 161a-162a ¶94, found no reason to

On these outdated and unscientific bases, the CCA rejected the habeas trial court's finding—which was made based on current medical standards—that Moore had met his burden of showing the adaptive deficits given central importance under those standards.[9] Notably, Moore scored 2.5 standard deviations below the mean on a generally accepted standardized test of adaptive behavior, *see* App. 77a; and, according to the AAIDD, for clinical diagnostic purposes a score of approximately two standard deviations below the mean indicates "significant limitations," AAIDD Manual at 43. Even the State's expert witness acknowledged "limitations in [Moore]'s academic skills and some adaptive deficits in social interaction during the developmental period." App. 80a. Under current medical standards, a significant limitation in just one area of functioning is sufficient to establish intellectual disability when coupled with concurrent

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question that Moore's adaptive deficits were related to his subaverage intellectual functioning, *see* App. 161a-162a ¶¶94-95. In any event, the state habeas court also expressly found that Moore was intellectually disabled under the DSM-5, App. 202a, which the CCA itself acknowledges, requires a determination that an individual's "'deficits in adaptive functioning must be directly related to [his] intellectual impairments' to meet the diagnostic criteria of intellectual disability.'" App. 7a n.5.

[9] As the dissent explained, the CCA also departed from established medical practice through its reliance on its "*Briseno* evidentiary factors," App. 90a-92a, which have been criticized for being based on non-medical criteria and stereotypes, such as the CCA's invocation of the fictional character Lennie from John Steinbeck's *Of Mice and Men* as the exemplar of the individual who might not be executed under *Atkins*. *See, e.g.,* App. 116a-118a; *see also* App. 97a and n.5 (citing numerous journal articles "criticiz[ing]" the *Briseno* Court for "applying an unscientific standard" to assess intellectual disability).

significant limitations in intellectual functioning, *see* DSM-5 at 33; AAIDD Manual at 46—as established by the record here.

Because there is no way to reconcile the CCA's determination that Moore is not intellectually disabled with current medical standards governing the assessment of intellectual disability, review is necessary to ensure that Moore—and many others like him—are not unlawfully executed.

II. This Court Should Consider Whether An Excessive Period of Confinement Under A Death Sentence Violates The Eighth Amendment.

"By protecting even those convicted of heinous crimes," the Eighth Amendment's prohibition on excessive punishment "reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man," and the Amendment thus "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311–12; *see also Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."). Applying these fundamental principles to prisoners languishing on death row, individual Justices have emphasized that execution after an excesexcessively long period of confinement under a death sentence presents a substantial and troubling ques-

tion regarding cruel and unusual punishment under the Eighth Amendment.[10]

The need for this Court's consideration is clear. In just the last decade, the average time between sentencing and execution has skyrocketed from eleven years to nearly eighteen years. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., joined by Ginsburg, J., dissenting). Prolonged confinement for many decades under sentence of death represents a sword of Damocles perpetually hanging just above the condemned individual's head. An excessive period of confinement under a death sentence is repugnant to the Founders' intent, and plainly contrary to the "dignity of all persons." It violates the Eighth Amendment.

The issue now is both ripe for this Court's review and urgent in light of the possibility that cruel and unusual punishment is being inflicted on condemned individuals. The Court should decide, once and for all, whether the Eighth Amendment places constraints on the amount of time that a prisoner is forced to live under the constant specter of a looming execution at the hands of the State.

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[10] *See Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting); *Correll v. Florida*, Nos. 15-6551, 15A424, 2015 WL 6111441 (U.S. Oct. 29, 2015) (Breyer, J., dissenting); *Valle v. Florida*, 132 S. Ct. 1 (2011) (Breyer, J., dissenting); *Johnson v. Bredeson*, 558 U.S. 1067 (2009) (Stevens, J., statement); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (Stevens, J., statement); *id.* (Breyer, J., dissenting); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting); *Foster v. Florida*, 537 U.S. 990 (2002) (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting); *Gomez v. Fierro*, 519 U.S. 918 (1996) (Stevens, J., dissenting); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., statement.).

1. The Court's review is particularly warranted in this case. Moore initially was sentenced to death in 1980. The more-than-three-and-one-half decades that Moore has endured since imposition of his death sentence is an exceptionally long time. It outstrips the "astonishingly long" twenty-year period, *Knight*, 528 U.S. at 993 (Breyer, J., dissenting), and the "extraordinary" thirty-two-year period, *Thompson*, 129 S. Ct. at 1300 (Stevens, J., statement), in past petitions. If Moore ultimately is executed, he "will have been punished both by death and also by more than a generation spent in death row's twilight." *See Foster*, 537 U.S. at 993 (Breyer, J., dissenting).

More than a century ago, this Court highlighted the profound problems of a prolonged period of confinement under a death sentence. *In re Medley*, 134 U.S. 160, 172 (1890). As the Court explained, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place." *Id.*; *see also id.* (noting the "immense mental anxiety amounting to a great increase of the offender's punishment" that comes from the unpredictability of the execution date).

The Court's *Medley* decision flowed from views at the Founding. The Framers and members of the Founding generation "considered even delays of several months [of confinement under a death sentence] to be cruel and unusual—which reflected the prevailing view in England and the colonies at the time of America's independence." Brent E. Newton, *The Slow Wheels of* Furman*'s Machinery of Death*, 13 J.

App. Prac. & Process 41, 55–57 & nn.64–70 (2012) (summarizing views of George Washington, Thomas Jefferson, James Wilson, and John Marshall). Indeed, as a practicing lawyer in Virginia, John Marshall argued that "it is a Consideration of some weight . . . that the prisoner hath languished a long time in jail [awaiting execution], in a situation which must have added to the misories of imprisonment & the horrors of an execution, which agony alone hath suspended." The Papers of John Marshall, vol. II, 207–08 (Charles T. Cullen and Herbert A. Johnson, eds., U.N.C. Press 1977).

The Eighth Amendment, moreover, draws extensively from the English Declaration of Rights of 1689. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., plurality op.); *Gregg v. Georgia*, 428 U.S. 153, 169-70 (1976). The English Declaration, in turn, has been interpreted to prohibit execution after excessive periods of confinement under a death sentence. *See*, *e.g., Lackey*, 514 U.S. at 1046-47 (Stevens, J., statement) (referring to the "conclusions by English jurists that 'execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights of 1689'" (citation omitted)).

The constitutional problems with excessive periods of confinement under a death sentence endure and are profound. Just last Term, Justice Breyer, joined by Justice Ginsburg, emphasized that "excessively long periods of time that individuals typically spend on death row, alive but under sentence of death" pose grave constitutional concern. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting, joined by Ginsburg, J.). "[A] lengthy delay in and of itself is especially cruel because it subjects death row in-

mates to decades of especially severe, dehumanizing conditions of confinement," including "uncertainty as to whether a death sentence will in fact be carried out" and "death warrants that have been issued and revoked, not once, but repeatedly." *Id.* at 2765-66.[11]

The constitutional problems with excessively long periods of confinement under a death sentence are severely aggravated where, as here (and as is common in death-penalty states), a prisoner on death row is kept alone in his cell for almost the entire day. "The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Both the American Bar Association and the United Nations Special Rapporteur on Torture have sought to limit or ban solitary confinement. *See Glossip*, 135 S. Ct. at 2765 (Breyer, J., joined by Ginsburg, J., dissenting). Solitary confinement "bears 'a further terror and peculiar mark of infamy'" on prisoners on death row—bringing them "'to the edge of madness, perhaps to madness itself'" and "exact[ing] a terrible price." *Davis*, 135 S. Ct. at 2209-10 (Kennedy, J., concurring). Indeed, this Court long has recognized that solitary confinement aggravates the serious problems of extended confinement under a death penalty. *See Medley*, 134 U.S. at 171 (emphasizing "the solitary confinement to which the prisoner was subjected"); *id.* at 170 (explaining that, "[i]n Great

[11] Foreign authority likewise supports the conclusion that execution after an excessive period of confinement under a death sentence is cruel and unusual. *See, e.g.*, *Foster*, 537 U.S. at 992 (Breyer, J., dissenting) (citing decisions of foreign courts, including the UK Privy Council and the European Court of Human Rights).

Britain, as in other countries, public sentiment revolted against this severity" of solitary confinement under a death sentence). Notably, in this case, the CCA acknowledged, in its discussion of Moore's *Atkins*/*Hall* claim, that Moore, in his prolonged period of death-penalty confinement, has exhibited "withdrawn and depressive behavior." App. 71a; *see also*, *e.g.*, R01551 (highlighting Moore's inattentive and unresponsive behavior, which necessitated a mental health inpatient psychosocial evaluation).[12]

2. An excessive period of confinement under a death sentence violates the Eighth Amendment for an additional, independent reason: it furthers nei-

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[12] The CCA further acknowledged that, at one point during his prolonged confinement on death row, Moore actually sought to waive further appeals so that an execution date could be set (a request denied by the state habeas court). App. 46a-47a. The psychological toll of almost constant isolation led another death-row inmate at Polunsky to similarly request an execution date. *See Simpson v. Quarterman*, 341 F. App'x 68, 69-70 (5th Cir. 2009) (affirming a district court's determination that a Polunsky death-row inmate could proceed with execution and forego habeas review; recognizing inmate's statement that "being locked up in a [sic] isolated solitary cell of confinement 23/ and 24 hours per day isn't justice nor is it considered living – its cruel and unjust, therefore I'm really looking forward to my execution"); *see also* R00290-R00210, R003538 (Moore habeas submissions comparing the "similar[ity]" of his conditions to those in *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001)); *Ruiz*, 154 F. Supp. 2d at 984–85 (noting the "extreme deprivations and repressive conditions of confinement" in the Texas solitary confinement units; concluding that Texas's solitary confinement units are "virtual[ly] incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities"; and highlighting that "incidents of self-mutilation and incessant babbling and shrieking were almost daily events"), *appeal dismissed*, 273 F.3d 1101 (5th Cir. 2001).

ther of the objectives secured by the death penalty. This Court has identified "two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" *Roper*, 543 U.S. at 571. And "[u]nless the death penalty when applied to those in [a particular prisoner's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Where, as here, there has been a prolonged period of confinement under a death sentence, actually carrying out the execution promotes neither deterrence nor retribution and, as a result, violates the Eighth Amendment.

First, executing a person in circumstances like those presented here does not further the death penalty's deterrence goals. Executing Moore after thirty-five years of imprisonment under threat of death penalty would yield little (or no) deterrent value above continued incarceration for life. *See, e.g.*, *Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting) (deeming the "commonly accepted justifications for the death penalty . . . close to nonexistent in a case such as this one" and concluding that "[i]t is difficult to imagine how an execution following so long a period of incarceration [thirty-three years] could add significantly to that punishment's deterrent value"). Additionally, "the deterrent value of incarceration during that period of uncertainty [accompanying prolonged confinement under a death sentence] may well be comparable to the consequences of the ultimate step itself." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring).

Second, execution after prolonged confinement under a death sentence fails to promote the aim of retribution. In the decades that pass after the commission of the crime and imposition of the death sentence, circumstances often change dramatically. In such a situation, life in prison likely fully accomplishes society's desire for retribution. *See, e.g.*, *Glossip*, 135 S. Ct. at 2769 (Breyer, J., joined by Ginsburg, J., dissenting).

The penological justifications for the death penalty are conspicuously attenuated—and even eliminated—after excessively long periods of confinement under a death sentence. Review is important to ensure that execution after inordinate time on death row does not take place when it lacks any legitimate societal value.

3. For several reasons, this Petition presents an especially compelling vehicle in which to resolve the often-posed but never-resolved question whether execution after a prolonged period of confinement under a death-penalty sentence violates the Eighth Amendment.

First, Moore has been confined under a death sentence since 1980—a remarkably long time even in an era of startlingly long periods of confinement on death row.

Second, Moore has been subjected to highly isolated "administrative segregation" for almost half that time.

Third, the principal causes of the extended period have been very substantial constitutional claims—nearly twenty years due to his successful claim that he was denied effective assistance of counsel in 1980, and at least twelve years due to his *Atkins* claim,

which prevailed before the state habeas court (which conducted the evidentiary hearing) and garnered a powerful dissent in the CCA (and failed in that court only because the court's decision conflicted with this Court's decisions, *see supra* pp. 12-26). Thus, Moore's extraordinarily long time on death row cannot be attributed to frivolous filings or litigation abuse.

Fourth, Moore also has been subjected to the signing and subsequent staying of two separate death warrants against him—one was stayed on the very day he was to be executed, and the other a mere five days before the scheduled execution. R02982-02983; R02901; *see, e.g., Thompson*, 129 S. Ct. at 1299 (Stevens, J.) (signing and staying of two death warrants produced "dehumanizing effects").

One additional point bears emphasis. This Petition gives the Court a straightforward opportunity to address the question presented without needing first to consider the high hurdles imposed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 3009. The case comes to the Court directly from state court and allows the Court to consider this fundamental issue on the merits.

In sum, this Court should decide whether execution after an extraordinarily long period of confinement under a death sentence comports with the Eighth Amendment's prohibition against cruel and unusual punishment. As individual Justices have explained, execution of a condemned individual in circumstances like Moore's is both cruel and unusual, and does not further the purposes of the death penalty. The Court should consider and resolve this important issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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