No. 18-443

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

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS TEXAS CHAPTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

NATHALIE F.P. GILFOYLE
DEANNE M. OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, NE
Washington, DC 20002
(202) 336-6100

JESSICA RING AMUNSON
Counsel of Record
JAMES T. DAWSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

**Not admitted in D.C.; admitted only in Texas.*

Counsel for American Psychological Association
Additional Counsel Listed on Inside Cover

AARON M. PANNER
KELLOGG, HANSEN,
TODD, FIGEL &
FREDERICK, P.L.L.C.
1615 M Street, NW # 400
Washington, DC 20036
(202) 326-7921

Counsel for American Psychiatric Association and the American Academy of Psychiatry and the Law

ANNE CAMPER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS
750 First Street, NE
Suite 800
Washington, DC 20002
(202) 336-8217

Counsel for National Association of Social Workers and National Association of Social Workers Texas Chapter

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment and this Court's decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017), prohibit relying on non-clinical criteria and lay stereotypes, rather than current medical standards, to determine whether a capital defendant is intellectually disabled.

2. Whether it violates the Eighth Amendment to proceed with an execution when the prosecutor and the defendant both agree that the defendant is intellectually disabled and may not be executed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge. It is the world's largest professional association of psychologists, with 120,000 members. Among the Association's major purposes are to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns.

The American Psychiatric Association, with more than 37,800 members, is the Nation's leading organization of physicians who specialize in psychiatry. Association members engage in psychiatric treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. In 2013, the American Psychiatric Association published the Fifth Edition of its *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5"). The DSM-5 provides a revised definition for intellectual disability (intellectual developmental disorder) based on expert consensus, review of the scientific literature, and contributions from other professional societies.

---

[1] Pursuant to this Court's Rule 37.2(a), *amici* timely notified all parties of their intention to file this brief. Counsel for all parties have consented to the filing of this *amicus* brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

American Academy of Psychiatry and the Law, with approximately 2,000 psychiatrist members, is dedicated to excellence in practice, teaching, and research in forensic psychiatry.

The National Association of Social Workers ("NASW") is a professional membership organization with 130,000 social workers in chapters in every state, the District of Columbia, and internationally. The NASW Texas Chapter has approximately 5,600 members. Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education, and enforces the *NASW Code of Ethics*.

The issue at the heart of this case—the identification of individuals with intellectual disability—has been the subject of significant research by *amici* and their members. *Amici* have collectively filed hundreds of briefs advising courts on specific scientific issues, including numerous briefs specifically addressing professionally accepted criteria for diagnosing intellectual disability. This Court cited a brief filed by *amici* when this case was last before it. *See Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017). *Amici* submit this brief to present relevant scientific knowledge that can provide context for the Court's review of whether the Texas Court of Criminal Appeals' approach to identifying individuals with intellectual disability in capital cases comports with the relevant clinical standards.

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 134 S. Ct. 1986 (2014), this Court held that the Eighth Amendment prohibits the execution of individuals with intellectual disability. Both *Atkins* and *Hall* recognized that, when assessing intellectual disability, courts can and should consult clinical standards and other literature promulgated by mental health professionals. *See Atkins*, 536 U.S. at 308 n.3, 318; *Hall*, 134 S. Ct. at 1993. This Court reaffirmed that principle in its prior opinion in this very case, noting that "adjudications of intellectual disability should be 'informed by the views of medical experts'" and that this "instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017) (quoting *Hall*, 134 S. Ct. at 2000).

On remand from this Court's decision, the Court of Criminal Appeals of Texas ("CCA") stated that in assessing whether Bobby James Moore is intellectually disabled, the court was adopting and applying the approach set forth in the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition ("DSM-5"), published by *amicus* the American Psychiatric Association. Pet. App. 11a-15a. The DSM-5 is the principal authority for diagnoses of intellectual disability. Pursuant to the DSM-5, the diagnostic criteria for intellectual disability are not evaluated separately, in disjunctive inquiries, but rather are considered together during a clinical evaluation by a mental health professional. *See* DSM-5 at 37 ("The diagnosis of intellectual disability is based on both

clinical assessment and standardized testing of intellectual and adaptive functions."); *accord* Am. Ass'n on Intell. & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 29 (11th ed. 2010) ("AAIDD Manual") ("Clinical judgment is essential."). *Amici* write to clarify the way in which the DSM-5 should be applied to assess intellectual disability.

The consensus among mental health professionals is that accurate diagnosis of intellectual disability requires clinical judgment based on a comprehensive assessment of three criteria: (1) general intellectual functioning; (2) adaptive functioning in conceptual, social, and practical domains; and (3) whether the relevant deficits were onset during the developmental period. *See* Pet. App. 12a. An appropriate analysis of an individual's adaptive functioning is an important element of the diagnosis of intellectual disability. As explained below, any such analysis should appreciate the nuances of the approach set forth in the DSM-5 and current clinical criteria. *Amici* file this brief in support of Petitioner's request that the Court either summarily reverse or grant plenary review of the decision below, and write to particularly stress two points with respect to application of these criteria.

First, any test for intellectual disability should appreciate the current medical consensus that intellectual disability must be diagnosed where there are sufficient deficits in adaptive functioning, even where there is also evidence of adaptive strengths. A proper test for evaluating intellectual disability should focus on an individual's demonstrated deficits, and it should avoid

both over-emphasizing a person's perceived strengths and "weighing" those strengths against relative deficits. Moreover, any such test should recognize that individuals with intellectual disability are not typically incompetent across all domains, but rather have a range of abilities, some of which may be at odds with lay stereotypes about the limitations of people with intellectual disabilities.

Second, any assessment of adaptive functioning should focus on the individual's *typical* functioning in real-world settings. Although evaluators should be free to consider all information as part of a holistic analysis, they should also acknowledge the limitations of certain types of data. Clinicians agree that information concerning a person's responses to extreme events is of little probative value in assessing typical functioning. Similarly, information concerning an individual's functioning in a controlled setting such as a prison may likewise be misleading.

ARGUMENT

I. Analysis of Adaptive Functioning Should Avoid Focusing on Adaptive Strengths or "Weighing" Such Strengths Against Adaptive Weaknesses.

Clinicians recognize that persons who have intellectual disability are not typically incompetent across all domains of adaptive functioning. "Individuals with an [intellectual disability] typically demonstrate both strengths and limitations in adaptive behavior." AAIDD Manual at 47. It is therefore incorrect to assume that any demonstration of relative competence disqualifies one from having intellectual disability. On

the contrary, it is well recognized that intellectually disabled persons can exhibit strengths relative to their deficits in other areas.

The CCA opinion focused at length on Mr. Moore's adaptive strengths in the areas of communication and language skills. Pet. App. 19a-25a. However, it is inappropriate to focus exclusively on individual adaptive strengths or to conclude that the presence of such strengths precludes a finding of intellectual disability. Instead, evidence of a person's deficits should be the focus when diagnosing intellectual disability. *Accord Moore*, 137 S. Ct. at 1050.

Mental health professionals agree that intellectual disability should be diagnosed whenever there are sufficient deficits in adaptive functioning. That remains true even if the individual has relative strengths in other areas. Phrased differently, the presence of relative strengths in some spheres of behavior is ***not*** conclusive evidence that a person does not have intellectual disability. AAIDD Manual at 45 ("[A]daptive skill limitations often coexist with strengths."); *see also Moore*, 137 S. Ct. at 1050 (cautioning against "overemphasiz[ing] . . . perceived adaptive strengths" and noting with citation to the AAIDD Manual and the DSM-5 that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*"); *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually 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'" (quoting American Association of Mental

Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002))). For these reasons, courts should not place emphasis on perceived adaptive strengths as a method for offsetting adaptive deficits.

The clinical reality of mixed competencies can sometimes conflict with erroneous lay stereotypes of persons with intellectual disability that portray these individuals as comprehensively deficient. As one mental health professional has noted,

> [Relative] strengths may confound a layperson or a professional with limited clinical experience with individuals who have mild [intellectual disability]. These laypersons may erroneously interpret these pockets of strengths and skills as inconsistent with [intellectual disability] because of their misconceptions regarding what someone with [intellectual disability] can or cannot do.

Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009). Reliance on stereotypes rather than accepted clinical criteria for diagnosing intellectual disability therefore risks misdiagnosing individuals due to mistaken assumptions about persons with intellectual disability. *See* David L. Hamilton & A. Neville Uhles, *Stereotypes*, 7 Encyclopedia Psychol. 466, 466–70 (2000) (identifying the consequences of stereotyping as increased confirmation bias, in-group discrimination, and self-fulfilling prophecy). Moreover, lay interpretations of

isolated or limited communications are insufficient to diagnose a deficiency in an individual's adaptive functioning in the absence of a comprehensive clinical assessment. *See* J. Gregory Olley, *The Death Penalty, the Courts, and Intellectual Disabilities*, *in The Handbook of High-Risk Challenging Behavior: Assessment and Intervention* 229, 236-37 (J.K. Luiselli ed., 2012).

People with intellectual disability may be able to "play[] pool for money" (Pet. App. 30a, 33a), have romantic relationships (*id.* at 33a), play games (*id.* at 33a), write letters (*id.* at 34a), copy text from one document to another (*id.* at 22a-23a), and perform basic math (*id.* at 25a-30a). Many people with intellectual disability carry out these tasks—and many others—yet still have significant deficits in one or more of the adaptive functioning domains. Similarly, many people with intellectual disability can hold down a basic job such as working in a restaurant (*id.* at 35a) or mowing lawns (*id.* at 30a). In fact, it is estimated that between nine and forty percent of persons with intellectual disability have some form of paid employment. *See* Joke J.H. Ellenkamp et al., *Work Environment-Related Factors in Obtaining and Maintaining Work in a Competitive Employment Setting for Employees with Intellectual Disabilities: A Systematic Review*, 26 J. Occup. Rehab. 56, 57 (2016); *see also* Kathryn K. Yamamoto et al., *Inclusive Postsecondary Education: Reimagining the Transition Trajectories of Vocational Rehabilitation Clients with Intellectual Disabilities*, 40 J. Vocational Rehab. 59, 60, 64 (2014) (identifying post-secondary opportunities for persons with intellectual disability).

Finally, adaptive functioning should be assessed using clinical evaluation *and* systematic review of existing records and pertinent standardized tests. AAIDD Manual at 47; DSM-5 at 37; *see also Moore*, 137 S. Ct. at 1046. In this case, there are standardized test scores showing that Mr. Moore fell more than two standard deviations below the mean in all three adaptive skill categories. Pet. App. 100a-101a, 287a. When available, these types of test scores should be considered as part of a holistic analysis rather than ignored.

II. Assessments of Adaptive Behavior Should Be Based on Typical Performance in Everyday Functioning Rather than Performance in Extreme Situations or Controlled Settings.

Clinicians agree that an assessment of deficits in adaptive functioning requires a focus "on the individual's typical performance and not their best or assumed ability or maximum performance." AAIDD Manual at 47 (emphasis added); *see id.* (noting the contrast between adaptive functioning (which focuses on *typical* performance) and intellectual functioning (with its assessment of *maximum* performance)); DSM-5 at 33.

A person's response to extreme conditions, such as homelessness or near-starvation, provides little evidence of *typical* functioning in everyday situations. Thus, information concerning the fact that Mr. Moore adapted to life on the streets by sleeping in cars or on porches (Pet. App. 35a) and ate food out of trash cans when he was hungry (*id.* at 36a) has little probative value in assessing his adaptive functioning.

Moreover, clinical norms caution against relying on a person's adaptive functioning in prison or in other controlled settings, especially when data from non-controlled settings is available. As this Court correctly recognized in its prior opinion in this case, clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore*, 137 S. Ct. at 1050 (quoting DSM-5); *see id.* (quoting DSM-5 for the proposition that "[a]daptive functioning may be difficult to assess in a controlled setting" such as a prison); *id.* (quoting AAIDD–11 User's Guide for the proposition that clinicians should limit reliance on "behavior in jail or prison").[2] Proper evaluation of adaptive functioning requires collecting information regarding an individual's functioning over time and in disparate settings—not relying on anecdotal information concerning a person's functioning during a single episode of incarceration.

The CCA's opinion correctly recognized that an assessment of intellectual functioning should not rely on behavior in a controlled setting (Pet. App. 14a, 31a), but went on to emphasize Moore's "improvement in reading and writing" while in prison (*id.* at 31a); his ability to "stand up to authority" figures while in prison (*id.* at 34a); and his emotional growth in prison, which has

---

[2] If there is a not a significant sample size of behavior in non-controlled settings as an adult, then data concerning adaptive behavior in controlled settings may be the only data available and thus should be used, albeit cautiously, when conducting an evaluation. That said, the limits of such data should be expressed by the evaluator and considered by courts and other consumers of the evaluation.

allowed him to correspond with pen pals (*id.*). Reliance on adaptive strengths developed in the controlled setting of a prison should be limited, especially when other information is available. *See* DSM-5 at 33. It is widely accepted that people with intellectual disability can learn, and that they are more likely to do so in a structured environment with clear rules—like a prison. *See* George S. Baroff, *Mental Retardation: Nature, Cause, and Management* (3d ed. 1999). Thus, the fact that an individual is able to develop relative strengths in prison is of limited utility when assessing that individual's *typical* adaptive functioning.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted,

NATHALIE F.P. GILFOYLE
DEANNE M. OTTAVIANO
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, NE
Washington, DC 20002
(202) 336-6100

JESSICA RING AMUNSON
Counsel of Record
JAMES T. DAWSON*
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

**Not admitted in D.C.; admitted only in Texas.*

Counsel for American Psychological Association

AARON M. PANNER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, NW # 400
Washington, DC 20036
(202) 326-7921

Counsel for American Psychiatric Association and the American Academy of Psychiatry and the Law

ANNE CAMPER
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First Street, NE
Suite 800
Washington, DC 20002
(202) 336-8217

Counsel for National Association of Social Workers and National Association of Social Workers Texas Chapter