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In the Court of Criminal Appeals of Texas

EX PARTE BOBBY JAMES MOORE

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE
NO. 314483-C IN THE 185th JUDICIAL DISTRICT COURT OF HARRIS COUNTY

BRIEF OF AMICI CURIAE THE ARC OF THE UNITED STATES AND THE ARC OF TEXAS IN SUPPORT OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS

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STATEMENT OF INTEREST OF AMICI[1]

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports to which they are entitled by law, and that courts and administrative agencies employ scientific principles for the diagnosis of intellectual and developmental disabilities. The Arc has appeared as amicus curiae in a variety of cases involving intellectual disability and the death penalty, including *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and, most recently, *Moore v. Texas,* 137 S. Ct. 1039 (2017).

The Arc of Texas is an affiliate of The Arc of the United States and serves more than half a million Texans with intellectual and developmental disabilities each year through 31 local chapters throughout the state.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. *See* TEX. R. APP. P. 11.

SUMMARY OF ARGUMENT

As with any field of scientific inquiry, our understanding of intellectual disability is improved and enhanced over time by continuing, rigorous study and analysis. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the U.S. Supreme Court held that executing defendants with intellectual disability [2] violates the Eighth Amendment's ban on cruel and unusual punishment. Subsequently, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the U.S. Supreme Court rejected an arbitrary cutoff for IQ scores in making the intellectual disability determination and emphasized the importance of courts consulting the appropriate clinical standards in their analysis.

Most recently, in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishments requires that adjudications of intellectual disability in death penalty cases be "informed by the views of medical experts" and that the standards adopted in *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004) that were previously utilized by this Court in the instant case, can no longer be used because they create an unacceptable risk that persons with intellectual disability will be executed. After a

[2] Amici use the term "intellectual disability" in place of "mental retardation" except where directly quoting others. Although the latter term appears in some recorded evidence and relevant case law, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As the U.S. Supreme Court stated in *Hall v. Florida*: "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon." 134 S. Ct. 1986, 1990 (2014) (citing Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability")).

full review of the record before it, the Supreme Court found that the habeas trial court had properly applied prevailing medical clinical standards "in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty." Therefore, the Supreme Court vacated the judgment of this Court and remanded the case for further proceedings not inconsistent with its opinion.

Amici respectfully offer their expertise on the appropriate clinical methodology for diagnosing intellectual disability. As outlined below, the framework laid out by the Supreme Court requiring courts to consult clinical standards in making intellectual disability determinations, combined with the Supreme Court's specific discussion of Mr. Moore's diagnosis, lays a sound foundation for this Court to determine that Mr. Moore meets the criteria for intellectual disability and, therefore, cannot be executed.

ARGUMENT

I. THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT FORBIDS THE EXECUTION OF INDIVIDUALS WITH INTELLECTUAL DISABILITY.

The U.S. Supreme Court has unequivocally held that "the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability." *Hall,* 134 S. Ct. at 1990 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)).

In assessing whether an individual has intellectual disability, a court must ensure that its determination is informed by relevant medical and scientific findings: "It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability . . . is informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000.

As defined by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"), intellectual disability has three basic elements: (1) significantly impaired intellectual functioning; (2) adaptive behavior deficits in conceptual, social, and/or practical skills; and (3) onset of the disability before age 18.[3] *See* AAIDD, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1, 5 (11th ed. 2010) ("AAIDD 2010 Manual"); APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) ("APA, DSM-5").

In *Atkins*, *Hall*, and in the present case, the Supreme Court expressly relied on the foregoing framework as the appropriate one for courts to use in assessing whether an individual facing a death sentence qualifies for a diagnosis of intellectual disability. *Atkins*, 122 S. Ct. at 2250; *Hall*, 134 S. Ct. at 1994; *Moore*, 137 S. Ct. at 1044; *see also In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (applying *Moore*).

[3] There is no dispute that Mr. Moore meets the third prong of the intellectual disability diagnosis. *Moore*, 137 S. Ct. at 1039 n.3.

II. THE U.S. SUPREME COURT RECOGNIZED THAT MR. MOORE'S IQ FALLS WITHIN THE INTELLECTUAL DISABILITY RANGE.

In *Hall*, the U.S. Supreme Court reminded that "[i]ntellectual disability is a condition, not a number." *Hall*, 134 S. Ct. at 1986. The Supreme Court further clarified that determinations of significantly impaired intellectual functioning must account for measurement errors. *Hall*, 134 S. Ct. at 1995. In *Brumfield v. Cain*, the Supreme Court observed that it was unreasonable for a state court to conclude that a petitioner's IQ score of 75 precluded an intellectual disability diagnosis. 135 S. Ct. 2269, 2277 (2015). Here, in *Moore*, the Supreme Court recognized that Mr. Moore's IQ falls within the clinically established range for intellectual functioning deficits:

> The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*. . . . Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning . . . [I]n line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.

Moore, 137 S. Ct. at 1049-50.

III. UTILIZING CLINICAL STANDARDS, MR. MOORE MEETS THE SECOND PRONG OF THE INTELLECTUAL DISABILITY DIAGNOSIS.

A. An individual must demonstrate significant adaptive behavior deficits to meet the second prong of the intellectual disability diagnosis.

The second prong of an intellectual disability diagnosis considers adaptive behavior deficits in conceptual, social, and practical skills and abilities.[4] This requirement reflects the consensus among clinicians and professional organizations that "intellectual limitation is a necessary but not a sufficient condition" for intellectual disability.[5] The adaptive behavior requirement is designed to restrict the diagnosis of intellectual disability to those individuals who, in addition to a low IQ score, face significant challenges in their ability to function independently in their daily lives and in society. *See Hall*, 134 S. Ct. at 1999 (These individuals have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.")

However, there is a wide gap between the clinical definition and expectations that many laypeople have about intellectual disability. Common misimpressions include beliefs that people with intellectual disability are essentially identical to one another and that all are incapable of any but the most rudimentary tasks. These lay

[4] AAIDD 2010 Manual at 5.
[5] Anne Anastasi & Susana Urbina, PSYCHOLOGICAL TESTING 248 (7th ed. 1997).

assumptions sometimes include an imagined list of things that people with intellectual disability cannot achieve, such as employment, meaningful relationships, or driving a car. But the clinical literature is abundantly clear that many of the people who have been properly diagnosed with intellectual disability can perform one or more of these tasks.[6]

As a result, the clinical definition of adaptive functioning has long focused exclusively on adaptive *deficits*.[7] Accordingly, each diagnostic evaluation explores those things that an individual cannot or struggles to do in everyday life. In the absence of such functional deficits, clinicians cannot diagnose the individual as having intellectual disability. The clinician's diagnostic focus does not—and cannot—involve any form of "balancing" deficits against the abilities or strengths which the particular individual may also possess. This focus on adaptive deficits is essential to the diagnostic process, because clinicians universally recognize that, in the lives of individuals with intellectual disability, weaknesses in functioning almost always co-exist with relative strengths. As the AAIDD 2010 Manual explains, the finding of "significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills."[8]

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[6] *See, e.g.*, Robert L. Schalock & Ruth Luckasson, CLINICAL JUDGMENT 38–39 (2d ed. 2014); Roger J. Stancliffe & K. Charlie Lakin, Independent Living, in HANDBOOK OF DEVELOPMENTAL DISABILITIES 429, 430 (Samuel L. Odom et al. eds., 2007).

[7] *See, e.g.*, AAIDD 2010 Manual at 1 ("significant limitations . . . in adaptive behavior"); DSM-5 at 33 ("[d]eficits in adaptive functioning").

[8] AAIDD 2010 Manual at 47.

As the Supreme Court explained in *Hall*:

> [A]n individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability . . . . In the context of a formal assessment, "the existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability."

134 S. Ct. at 1991, 1994.

It is these functional limitations that create a "special risk of wrongful execution" for individuals with intellectual disability. *Hall*, 134 S. Ct. at 1993 (citing *Atkins*, 536 U.S. at 320-21).

B. The U.S. Supreme Court unanimously held that by adhering to the *Briseño* factors, the decision of this Court in *Ex parte Moore* does not comport with the Eighth Amendment, *Atkins*, and *Hall.*

1. The *Briseño* factors led this Court to erroneously conclude that Mr. Moore possesses a level of adaptive deficits inconsistent with intellectual disability.

Ex parte Briseño outlines seven evidentiary factors for determining whether in capital cases, a defendant possesses deficits in adaptive functioning that are indicative of intellectual disability. This Court has repeatedly required that habeas trial courts apply these factors in adjudicating intellectual disability under Texas law in the death penalty context.

In *Moore,* the Supreme Court noted that *Briseño* failed to comport with the mandate of *Atkins* because: "By design and in operation, the *Briseno* factors 'creat[e]

an unacceptable risk that persons with intellectual disability will be executed.'" 137 S. Ct. at 1051 (internal citations omitted).[9] Specifically, the Court noted that the *Briseño* factors are "[n]ot aligned with the medical community's information" and "advanced lay perceptions of intellectual disability," finding that they are an "outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts." *Id.* at 1044. The *Briseño* factors were rejected in their entirety unanimously by the Court. *Id.* at 1053.[10]

These factors, however, guided the opinion rendered by the State's expert in Mr. Moore's *Atkins* hearing, Dr. Kristi Compton. As the habeas trial court noted, Dr. Compton's conclusion that Mr. Moore's adaptive functioning was inconsistent with intellectual disability was focused on the facts of the crime. Her assessment concluded that "Mr. Moore showed evidence of adaptive functioning skills during the commission of the offense and after the offense, which questions the validity of a mental retardation diagnosis." *Ex parte Moore*, No. 314483–C (185th Dist. Ct., Harris County., Tex., Feb. 6, 2015), Findings at ¶ 175; *see also Ex parte Moore*, 470

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[9] Amici note that in the case of *Wright v. Florida*, 213 So.3d 881 (Fla. 2017) the Florida Supreme Court used an analysis similar to this Court's analysis in the proceedings below with regards to both prong one and prong two of the intellectual disability determination; on October 16, 2017 the U.S. Supreme Court granted certiorari, vacated the judgment of the Florida Supreme Court, and remanded the case back to that court, for further consideration in light of *Moore v. Texas*. *Wright v. Florida*, No. 17-5575, 2017 WL 3480760 (U.S. Oct. 16, 2017).

[10] The dissent also stated: "I agree with the Court today that [the *Briseño*] factors are an unacceptable method of enforcing the guarantee of *Atkins*, and that the CCA therefore erred in using them to analyze adaptive deficits." *Moore*, 137 S. Ct. at 1053.

S.W.3d 481, 522 (Tex. Crim. App. 2015). Relying on stereotypes, Dr. Compton also found Mr. Moore's ability to seemingly understand what was asked of him, "respond to questions," and communicate in a "coherent fashion," as this Court noted, precluded a finding of intellectual disability. *Id.* at 522. Similarly, Dr. Compton determined that his "ability to write" demonstrated that he did not have intellectual disability. *Id.* at 523. These are just some examples of how the *Briseño* analysis superseded current medical standards in Dr. Compton's determination. This analysis is wholly inconsistent with the clinical requirement that the intellectual disability diagnostic inquiry be focused exclusively on adaptive deficits.

2. The habeas trial court's application of the adaptive deficits inquiry utilizing clinical standards revealed that Mr. Moore possesses adaptive functioning deficits consistent with intellectual disability.

The Supreme Court found that there was "considerable objective evidence of Moore's adaptive deficits" upon which the habeas trial court based its finding of intellectual disability. *Moore*, 137 S. Ct. at 1050. Relying on testimony from several intellectual disability experts, the habeas trial court found that Mr. Moore experienced significant adaptive deficits. This evidence regarding Mr. Moore's functional limitations is consistent with a diagnosis of intellectual disability. *Id.* at 1050-51.

As the Supreme Court recorded, the habeas trial court found that Mr. Moore had significant conceptual and social difficulties beginning at an early age. *Moore*,

137 S. Ct. at 1045. At 13, Mr. Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. *Id.* These are common challenges for individuals with intellectual disability.[11]

The habeas trial court further noted that at school, because of his limited ability to read and write, Mr. Moore could not keep up with lessons. *Moore*, 137 S. Ct. at 1045. Often, he was separated from the rest of the class and told to draw pictures. *Id.* Mr. Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. *Id.* After failing every subject in the ninth grade, Mr. Moore dropped out of high school. *Id.* Cast out of his home, he survived on the streets, repeatedly eating from trash cans, even after two bouts of food poisoning. *Id.* These evident limitations in adaptive functioning indicate, consistent with the habeas trial court's holding, that Mr. Moore has lived and struggled with intellectual disability not only during the episode that led to his conviction, but throughout his life.

These significant deficits are not overridden by selected individual strengths and skills to preclude an intellectual disability diagnosis. As the Supreme Court

[11] *See, e.g.,* Martha E. Snell & Ruth Luckasson et al., Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs, 47 INTELLECTUAL & DEVELOPMENTAL DISABILITIES 220, 228 (2009).

noted, the capacity to engage in everyday activities is not inconsistent with intellectual disability:

> In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. The CCA recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money. Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits. But the medical community focuses the adaptive-functioning inquiry on adaptive deficits.

Id. at 1050. Because prong two of the diagnostic criteria is designed to ensure that an individual is not mistakenly diagnosed based on reference to IQ alone, only adaptive deficits are relevant for diagnostic purposes, not these perceived strengths.

Ability to participate in everyday activities within a structured environment is a particularly inadequate backdrop for conducting the adaptive deficits inquiry. The Court indeed cautioned that observed prison behavior is not a proper part of a clinical diagnosis of intellectual disability: "... the CCA stressed Moore's improved behavior in prison. Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.*[12] Thus, the U.S. Supreme Court's opinion lays out a path for this Court to make a finding that

[12] Clinicians agree that prison behavior is not a valid measure of an individual's real-life functioning. While evidence of an inmate's successful adaptation to prison conditions can be probative evidence on the separate and distinct issue of future dangerousness, and therefore admissible in mitigation at capital sentencing, *see Skipper v. South Carolina*, 476 U.S. 1, 7 (1986), it is not relevant to an *Atkins* case on the issue of whether the defendant had deficits in adaptive behavior at the time of the offense. *See, e.g.,* DSM-5 at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers) . . . .").

Mr. Moore meets the second prong of an intellectual disability diagnosis utilizing accepted clinical standards.

3. There is no requirement that adaptive behavior deficits be causally related to impaired intellectual functioning.

Many individuals with intellectual disability also have other mental or physical disabilities. Co-existing conditions (sometimes referred to as "co-morbid," "co-occurring," or "dual diagnosis") do not preclude a clinical determination that the individual has deficits in adaptive behavior that satisfy the second prong of the intellectual disability definition.[13]

The U.S. Supreme Court noted in *Moore* that the adaptive deficits framework Texas courts have used since *Briseño* erroneously required a showing that adaptive deficits were causally "related" to impaired intellectual functioning:

> The CCA also departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to "a personality disorder." 470 S.W.3d, at 488, see *id.* at 526 (Moore's problems in kindergarten were "more likely cause[d]" by "emotional problems" than by intellectual disability). As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism . . . . The existence of a personality disorder or mental-health issue, in short, is "not evidence that a person does not also have intellectual disability."

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[13] *See, e.g.*, J. Gregory Olley, The Death Penalty, the Courts, and Intellectual Disabilities, in THE HANDBOOK OF HIGH-RISK CHALLENGING BEHAVIORS IN PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 229, 232 (James K. Luiselli ed., 2012) ("An understanding of dual diagnoses is important because it may be mistakenly argued in court that the defendant has a mental illness diagnosis that rules out mental retardation.").

Moore, 137 S. Ct. at 1051 (internal citations omitted).

On this point, the dissent stated : ". . . the CCA was faced with a choice in *Moore*: Keeping the relatedness requirement would be inconsistent with the AAIDD's current guidance; dropping it would be out of step with the newest version of the DSM." *Moore,* 137 S. Ct. at 1055.

However, the supposed substantive inconsistency between the AAIDD and DSM-5 definitions of intellectual disability is inaccurate. In the ninth edition of the AAIDD[14] manual, adopted by *Briseño* and relied upon by this Court in concluding Mr. Moore did not meet the criteria for intellectual disability, the authors clearly state that adaptive skill deficits should be "more closely related to the intellectual limitation than to some other circumstances such as cultural or linguistic diversity or sensory limitation," not that the two should be *causally* connected. AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 6 (9th ed. 1992).

Leading experts in the field also agree that proving that adaptive deficits are related to or caused by impaired intellectual functioning is not required to demonstrate intellectual disability: "[T]here is a strong correlational, but no causal

[14] At the time of the ninth edition of the manual, the organization was called the American Association on Mental Retardation, but it later changed its name, in order to be consistent with updates in terminology, to the American Association on Intellectual and Developmental Disabilities.

relation between intellectual functioning and adaptive behavior;"[15] "[t]here are no published studies supporting the notion of a causal link between intelligence and adaptive behavior."[16] Leading clinicians agree that what DSM-5 intended with its "related to" language, then, was to make the point that these factors should not be considered in silos and that no one prong should be weighed more heavily than another in the three-factor analysis. While these factors are highly correlative, proving causation is unequivocally not required. Thus, the DSM-5 "related to" language is meant to encourage equal weight and joint consideration between intellectual functioning and adaptive behavior, *not* to establish a requirement for a causal link between the two. Such a link would be "virtually impossible for clinicians to implement and is unsupported by science."[17] As Tassé, Luckasson, and Schalock note:

> The erroneous implication of causation is both an error in thinking and a notion not supported by the evidence as reflected in published definitions of . . . intellectual disability over the past five decades . . . . Throughout the past 50 years of definitions promulgated by both AAIDD and APA, any relation between intellectual functioning and adaptive behavior has repeatedly and consistently been described as a correlational relation (e.g. ''associated with,'' ''existing concurrently,'' ''including both''), and not a causal relation . . . . Demonstrating a causative relationship between these two criteria for a diagnosis of ID is clinically impossible and irrelevant, and

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[15] Mark. J. Tassé, Ruth Luckasson, and Robert L. Schalock, The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability, INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 2016, Vol. 54, No. 6, 381–390, p. 382.
[16] *Id.* at 387.
[17] *Id.* at 383.

attempting to do so would mistakenly add a fourth criterion to the diagnostic process.[18]

Accordingly, this Court should not be misled to perceive non-existent discrepancies between the AAIDD and DSM-5 definitions in assessing Mr. Moore's adaptive functioning deficits. It is well-settled that no clinicians or clinical guidelines require that adaptive behavior deficits be caused by impaired intellectual functioning or vice versa. In light of this, this Court's earlier conclusion that Mr. Moore did not meet the criteria for an intellectual disability diagnosis, in part because his intellectual and adaptive deficits were not causally related, should not stand.

CONCLUSION

For the foregoing reasons, amici respectfully offer their expertise on the appropriate clinical methodology for diagnosing intellectual disability. As outlined above, the framework laid out by the Supreme Court requiring courts to consult clinical standards in making intellectual disability determinations, combined with the Supreme Court's specific discussion of Mr. Moore's diagnosis, lays a sound foundation for this Court to determine that Mr. Moore meets the criteria for intellectual disability and, therefore, cannot be executed.

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[18] *Id.* at 383, 387. The Supreme Court's opinion in *Hall* reflects this principle, noting that "[t]he existence of *concurrent* deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability." *Hall*, 134 S. Ct. 1994 (emphasis added).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the word-limit requirements for amicus briefs contained in the Texas Rules of Appellate Procedure, because it contains a total of 4005 words, excluding the portions that can be excluded pursuant to those same rules.

/s/ *David G. Meyer*
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CERTIFICATE OF SERVICE

I hereby certify that, on November 1, 2017, a true and correct copy of the foregoing was served via U.S. mail and electronic mail on the following counsel of record for all parties in this case:

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