No. 18-9262

In The
Supreme Court of the United States

DAVID LEONARD WOOD,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITIONER'S REPLY TO STATE'S OPPOSITION

THIS IS A CAPITAL CASE.

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CAPITAL CASE
QUESTION PRESENTED

Do the Eighth and Fourteenth Amendments tolerate the execution of a person whose claim of intellectual disability has been expressly decided under an analytical framework that this Court has now twice rejected as unconstitutional in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*)?

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INTRODUCTION

Instead of disavowing the seventh *Briseno* factor as an unconstitutional means of assessing intellectual disability, the State of Texas embraces it. The very first words in its Brief in Opposition emphasize the nature of the crime in an attempt to convince this Court that *Moore I* and *II* have no application in this case: "David Leonard Wood is a serial killer." Opposition at 1; *see id.* at 3 ("[T]he facts of Wood's serial murders belie any notion that he is intellectually disabled, and acknowledging this obvious fact is not barred by *Moore I* and *II*."); *id.* at 3–5 (setting out detailed recitation of the facts of the crime); *id.* at 26 ("[T]he lower court could not disregard the facts of Wood's crimes—six murders he nearly got away with but for his admission to a fellow inmate—given the extent they speak to his lack of adaptive deficits."). Although the State floats other arguments in an attempt to account for the exceptional treatment the Texas Court of Criminal Appeals (TCCA) gave David Wood's case on reconsideration after *Moore I*, there is no other satisfactory explanation for why the TCCA refused to remand his *Atkins* claim for further proceedings in the habeas court. Evidence related to the seventh *Briseno* factor overwhelms any probative evidence of adaptive deficits. The Eighth Amendment unequivocally prohibits its use in determining intellectual disability under *Atkins*.[1]

[1] The very circumstances in which the State alleges the "Desert Serial Murders" case was cracked should give the Court pause: After three years of steadfastly maintaining his innocence, David Wood suddenly confessed to a cell mate. Opposition at 1. The State refuses to address the arguments pointing to David Wood's innocence, because it asserts the issue is not before the Court. *Id.* at 26 n.6. But much of the evidence of innocence is in the record—the deal received by the jailhouse informant Randy Wells that resulted in the dismissal of capital murder charges against him in exchange for his testimony; the $26,000 reward that motivated the cooperation and testimony of jailhouse informant James Sweeney; the criminal

In addition to ignoring *Moore*'s unanimous rejection of the *Briseno* factors, the State overlooks a major development that calls for a remand so that David Wood may develop and present new evidence. The American Psychiatric Association released the fifth edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-5), two years after David Wood's *Atkins* hearing. The DSM-5 made "significant changes" in the diagnosis of intellectual disability, shifting the focus from specific IQ scores to clinical judgment. APA, *DSM-5: Intellectual Disability Fact Sheet* (2013).[2] While intelligence testing remains one tool to aid in the assessment of intellectual functioning, IQ scores are no longer part of the DSM-5 definition of intellectual disability. DSM-5, 33. In other words, exclusive reliance on IQ tests is inappropriate. *Id.* at 37. The DSM-5 also officially recognized, for the first time, the phenomenon of

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record and heroin addiction of Judith Brown Kelling, who testified about an incredibly similar extraneous offense under Rule 404(b); and the post-conviction DNA test on the clothing of one of the victims that revealed a partial male DNA profile not attributable to David Wood. This case has all the hallmarks of a wrongful conviction: (1) A high-profile crime put enormous public pressure on the police to solve it; (2) the police rushed to judgment regarding David Wood's guilt, resulting in a premature shift from an evidence-based investigation to a suspect-based investigation; (3) the premature shift to a suspect-based investigation led to confirmation bias; and (4) the police failed to investigate a number of important evidentiary leads that did not fit their theory of the case. *See generally*, D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 N.E. Univ. L. Rev. 790 (2019); *see also* Sheri Lynn Johnson, John H. Blume & Amelia Courtney Hritz, *Convictions of Innocent People with Intellectual Disability*, 82 Albany L. Rev. 101, 108, 130–31 (2019) (identifying 172 people, including David Wood, with documented claims of intellectual disability and innocence). Although David Wood's motions for additional DNA testing have been pending for more than two years, the State has asked the trial court to set an execution date. That motion, too, remains pending. Should this Court remand the case, no *Atkins* hearing should take place until the courts below rule on David Wood's pending motions for additional DNA testing.

[2] Available at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf (last visited Aug. 27, 2019).

test norm obsolescence—the Flynn Effect. *Id.* Adjusting Mr. Wood's 75 IQ score on the WAIS-IV for norm obsolescence produces an IQ range under the standard error of measurement (SEM) whose lower end falls below 70.

Coupled with the publication of the DSM-5 after David Wood's *Atkins* hearing, the TCCA's continued use of the seventh *Briseno* factor weighs strongly in favor of remanding the case to allow the habeas court "the opportunity to develop evidence, make new or additional findings of fact and conclusions of law, and make a new recommendation to [the TCCA] on the issue of intellectual disability" using the most current medical standards. *Ex parte Lizcano*, No. WR-68,348-03, 2018 WL 2717035 (Tex. Crim. App. June 6, 2018) (per curiam). David Wood only seeks to be treated no differently than all of the other *Moore*-reconsideration claimants in Texas.

A. The State of Texas and the TCCA continue to evade *Atkins* and defy this Court by insisting on using the seventh *Briseno* factor to assess adaptive functioning.

The State concedes that *Moore I* held that the collective use of the *Briseno* factors is "impermissible." Opposition at 12. But the State then argues that this Court did not hold that evidence about the level of forethought and planning involved in the commission of the capital crime—the seventh *Briseno* factor—may never be considered in evaluating adaptive functioning. *Id.* at 3, 12–13, 25–26.[3] In attempting to revive the seventh *Briseno* factor, the State of Texas confoundingly defies this

[3] The seventh *Briseno* factor asks: "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).

Court and evades the categorical Eighth Amendment prohibition on executing the intellectually disabled.

The *Briseno* factors arose from the TCCA's explicit distrust of the clinical framework, which it viewed as "exceedingly subjective." *Briseno*, 135 S.W.3d at 8. The TCCA created the seven factors after it expressed its erroneous view that not all individuals who meet the clinical definition of intellectual disability should necessarily be exempt from the death penalty in Texas. As the TCCA explained:

> We…must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty. Most Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a "mental retardation" bright-line exemption from our state's maximum statutory punishment?

Id. at 6. *Moore I* and *II* unequivocally rejected the non-diagnostic *Briseno* factors, exempting from capital punishment *all* defendants found to be intellectually disabled using the medical community's current diagnostic framework.

The State looks to Judge Newell's concurring opinion in *Ex parte Wood*, 568 S.W.3d 678, 682–86 (Tex. Crim. App. 2018), to support its assertion that the facts of the crime remain fair game in assessing intellectual disability even after *Moore I* and *II*. Opposition at 26. But Judge Newell crafted his opinion from the losing arguments

in *Atkins* and *Moore I*. Quoting Chief Justice Roberts's dissenting opinion in *Moore I*, Judge Newell contended that:

> [T]he United States Supreme Court effectively held that a clinical determination of intellectual disability lessens the moral culpability of a defendant.…But a clinical diagnosis has nothing to do with determining moral culpability. This case is a prime example of why "clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."

Id. (quoting *Moore v. Texas*, 137 S. Ct. 1039, 1054 (2017) (*Moore I*) 137 S. Ct. 1039 (Roberts, C.J., dissenting)). After setting out the rationale of *Atkins*—that "the cognitive and behavioral impairments" of the intellectually disabled "make these defendants less morally culpable," *Atkins v. Virginia*, 536 U.S. 304, 320 (2002)—Judge Newell argued that "the methodical way in which Applicant, by himself, carried out his crimes paints the exact opposite picture." *Wood*, 568 S.W.3d at 683. Judge Newell took issue with downplaying evidence of adaptive strengths, because such an approach "would seem to contradict the Supreme Court's requirement that the definition of intellectual disability be calibrated to only include those whose degree of intellectual disability falls within a national consensus regarding moral blameworthiness." *Id.* at 685. In closing, Judge Newell complained that David Wood's case "demonstrates that the determination of intellectual disability has become untethered from the original rationale for the exception to the imposition of the death penalty announced in *Atkins*." *Id.* at 686.

Judge Newell and the State's position cannot be squared with this Court's precedent. Although the Eighth Amendment gives the states "some flexibility" in enforcing *Atkins*, *Moore I*, 137 S. Ct. at 1052, the determination of intellectual

disability must be "informed by the medical community's diagnostic framework." *Id.* at 1048 (internal quotation marks omitted). Using the facts of the offense to assess adaptive functioning bestows unconstitutional flexibility on the State of Texas in implementing *Atkins*. The amorphous and prejudicial character of the seventh *Briseno* factor gives a factfinder uncabined discretion to evade *Atkins*. If this Court was clear in *Moore I*, it was crystal clear in *Moore II*: the TCCA on remand "repeated its improper reliance" on the *Briseno* factors, *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*) (Roberts, C.J., concurring), when it specifically noted that "Moore's crime required a level of planning and forethought." *Id.* at 671 (majority opinion) (quoting *Ex parte Moore*, 548 S.W.3d 552, 572 (Tex. Crim. App. 2018) (internal quotation marks omitted)).

The State's argument and Judge Newell's concurring opinion implicitly rest on Justice Scalia's dissenting opinion in *Atkins*. Recounting the facts of Daryl Atkins's offense and noting his lengthy criminal record, Justice Scalia denounced the majority opinion, because it overturned the capital sentencing jury's particularized determination that Atkins's alleged intellectual disability did not exempt him from the death penalty. 536 U.S. at 338–39 (Scalia, J., dissenting); *see id.* at 339 ("[T]he Court concludes that no one who is even slightly mentally retarded can have sufficient moral responsibility to be subjected to capital punishment for any crime.") (internal quotation marks omitted). Justice Scalia explained that:

> Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime—which is precisely why this sort of

> question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none. Once the Court admits (as it does) that mental retardation does not render the offender morally blameless, there is no basis for saying that the death penalty is never appropriate retribution, no matter how heinous the crime. As long as a mentally retarded offender knows the difference between right and wrong, only the sentencer can assess whether his retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question.

Id. at 350–51 (citations and internal quotation marks omitted).

At bottom, the TCCA's decision in David Wood's case rests on Justice Scalia's rejected position that the Eighth Amendment does not prohibit the execution of every capital defendant found to be intellectually disabled under current medical standards. It reflects the view that—despite ostensibly ignoring consideration of the heinousness or gruesomeness of the offense—particular conduct in committing the crime demonstrates that the defendant lacks "that level and degree of [intellectual disability] at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W.3d at 6; *see Moore I*, 137 S. Ct. at 1051 ("After observing that persons with 'mild' intellectual disability might be treated differently under clinical standards than under Texas' capital system, the TCCA defined its objective as identifying the 'consensus of *Texas citizens '* on who 'should be exempted from the death penalty.'") (quoting *Briseno*, 135 S.W.3d at 6) (emphasis in original). Indeed, this is the express purpose of the *Briseno* factors—to

supplant the medical community's diagnostic framework with the TCCA's own non-diagnostic factors to limit the scope of the Eighth Amendment protection to a subcategory of the intellectually disabled. But "those persons who meet the clinical definitions of intellectual disability by definition…have diminished capacities" and "[t]hus they bear diminish[ed]…personal culpability" and cannot be executed. *Hall v. Florida*, 572 U.S. 701, 719–20 (2014) (quoting *Atkins*, 536 U.S. at 318) (internal quotation marks omitted). As this Court reiterated in *Moore I*, "States may not execute anyone in the *entire category* of intellectually disabled offenders." 137 S. Ct. at 1051 (emphasis in original, internal quotation marks and brackets omitted).

B. The State of Texas and the TCCA ignored the DSM-5's significant changes regarding the role of IQ scores and the evaluation of adaptive deficits.

Two years after David Wood's *Atkins* hearing, the American Psychiatric Association made significant changes in the diagnosis of intellectual disability with the publication of the DSM-5. The APA designed the new standards to reduce excessive reliance on raw IQ scores at the expense of nuanced intelligence assessment and clinical analysis of adaptive functioning. Despite the publication of the DSM-5 in 2013, neither the State of Texas nor the TCCA relied on these advances in the medical community's understanding of intellectual disability when reviewing David Wood's initial *Atkins* claim in 2014, or on reconsideration in 2018. *Cf. In re Johnson*, __ F.3d __, 2019 WL 3814384, *5–*6 (5th Cir. Aug. 15, 2019) (authorizing a successive application under 28 U.S.C. § 2244(b)(3) after finding *Atkins* claim "previously

unavailable" prior to the publication of the DSM-5). This failure to consult current medical standards for diagnosing intellectual disability is critical for several reasons.

First, and most important, the DSM-5 expressly states that diagnosis of intellectual disability should be "based on both clinical assessment *and* standardized testing of intellectual *and* adaptive functions." DSM-5, 37 (emphases added). Second, the DSM-5 is the first diagnostic manual to classify the severity in intellectual disability according to assessments of adaptive functioning rather than an IQ score. *Id.* at 33–36. Because adaptive functioning, rather than IQ, "determines the levels of supports required," deficits in adaptive functioning have far greater practical significance. *Id.* at 33. The DSM-5 recognizes that "IQ test scores are approximations of conceptual functioning but may be "insufficient to assess reasoning in real-life situations and mastery of practical tasks." *Id.* at 37. For that reason, a person with "an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Id.* Accordingly, the DSM-5 does not require the specification of a particular IQ score as an essential feature of the diagnosis of intellectual disability. *Id.* at 33.

In short, the new standard "emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone." DSM-5 Fact Sheet. By "removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual

disability, the DSM-5 ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels." *Id.*

This Court noted that the current medical standards provide one constraint on states' flexibility in enforcing *Atkins*. *Moore I*, 137 S. Ct. at 1053; *see Moore II*, 139 S. Ct. at 668. If the Court concludes that the TCCA did not adequately consider the latest clinical guidance in resolving this *Atkins* claim, it should remand so that the TCCA may sufficiently "consult" those sources and provide further explanation regarding whether its intellectual-disability determination remains "informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 710, 721.

C. The State of Texas and the TCCA ignored the Flynn Effect.

The DSM-5 also officially recognized, for the first time, the Flynn Effect—"overly high scores due to out-of-date test norms." DSM-5 37. The Flynn Effect refers to the observation that IQ scores have been increasing from one generation to the next in the United States. American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) 37. Because an IQ test is a normed test, and population norms change over time, if aging test norms are not taken into account, average scores on an IQ test will appear to artificially increase over time. In such cases, a correction for the obsolescence of the norms is warranted. *Id.* Specifically, "any obtained IQ score should be adjusted 0.33 points for each year the test was administered" after the norming was completed. *Id.* Therefore, depending on the

length of time a test has been in use—due to rising IQ scores—the test mean will often be higher than 100.

Even after the publication of the DSM-5 and its official recognition that the Flynn Effect can influence IQ scores, the TCCA left intact the habeas court's numerous findings that the Flynn Effect is not scientifically valid and, even if it were, it would not make a difference because of the application of the seventh *Briseno* factor and evidence of malingering on the WAIS-IV. *See* Petition, Ex. C, FOF Nos. 98, 99, 101(c). On reconsideration after *Moore I*, the TCCA held that, because the administration of the WAIS-IV yielded a full scale IQ score of 75, with an SEM range of 71 to 80, David Wood's IQ does not meet the first diagnostic element of intellectual disability. *Wood*, 568 S.W.3d at 680. But the TCCA made no mention of the DSM-5's recognition of the Flynn Effect. In its Opposition in this Court, the State devotes eight pages to arguing that David Wood's IQ range—"one point above cutoff"—dooms his *Atkins* claim. Opposition at 16–24. But, like the TCCA, the State makes no mention of the DSM-5's recognition of the Flynn Effect.

The TCCA erred on reconsideration in ignoring the Flynn Effect. The WAIS-IV normative data was established using a sample collected from March 2007 to April 2008. David Wechsler *et al.*, *Wechsler Adult Intelligence Scale-Fourth Edition: Technical and Interpretive Manual* (Harriet Wiygul, Alanna Carmichael, Weslea Miller eds., 2008) 22. Dr. Allen administered the WAIS-IV to David Wood in September 2011. Because the WAIS-IV was normed approximately four years before Dr. Allen administered it, David Wood's true IQ may in fact have been overestimated

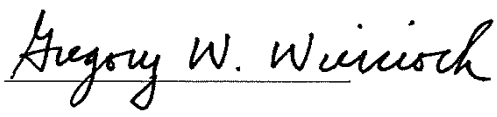
by 1.32 points (0.33 points x 4 years = 1.32 points). Consequently, David Wood's full scale IQ may actually be closer to 73.68 when the aging norms of the WAIS-IV are considered. Taking into account the SEM, his IQ scores range from 69.68 to 78.68.

Contrary to the TCCA's conclusion and the State's arguments, David Wood's full scale IQ of 75 obtained on the WAIS-IV clearly satisfies the first DSM-5 criterion of intellectual disability. The TCCA should have remanded David Wood's *Atkins* claim after *Moore I*, so that he could develop and present this new evidence.

CONCLUSION

By refusing to loosen its grasp on the seventh *Briseno* factor, the State of Texas seeks nearly "unfettered discretion" in enforcing *Atkins*. *Moore I*, 137 S. Ct. at 1052. Such "autonomy to define intellectual disability" would render *Atkins* a nullity. *Id.* at 1052–53 (internal quotation marks and citation omitted). This Court should grant certiorari, vacate the decision below, and remand to the Texas Court of Criminal Appeals with an order to allow the parties to develop and present new evidence using the most current medical standards.

Respectfully Submitted,



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