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 SUPPLEMENTAL BRIEF

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*)?

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI[1]

On September 18, 2019, the Texas Court of Criminal Appeals (TCCA) granted a death-sentenced person authorization to file a subsequent habeas corpus application in light of this Court's decisions in *Moore I* and *Moore II*. *Ex parte Butler*, No. WR-41,121-03 (Tex. Crim. App. Sept. 18, 2019) (per curiam) (unpublished).[2] In *Butler*, the TCCA remanded the applicant's twice-denied *Atkins* claim to the trial court for further proceedings. The TCCA permitted the trial court to receive new evidence and ordered it to make new findings of fact and conclusions of law regarding the issue of intellectual disability. *Id.* at 4.

Butler now brings to nine the number of cases the TCCA has remanded—in unanimous per curiam decisions—so that the trial court can consider new evidence and make new findings in light of *Moore I* (and now *Moore II*). The other eight cases are:

1. *Ex parte Cathey*, No. WR-55,161-02, 2018 WL 5817199 (Tex. Crim. App. Nov. 7, 2018) (per curiam) (unpublished).

2. *Ex parte Segundo*, No. WR-70,963-02 (Tex. Crim. App. Oct. 31, 2018) (per curiam) (unpublished).

3. *Ex parte Henderson*, No. WR-37,658-03, 2018 WL 4762755 (Tex. Crim. App. Oct. 3, 2018(per curiam) (unpublished).

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[1] Supreme Court Rule 15(8) states, in relevant part, that: "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."

[2] For the Court's convenience, a copy of the *Butler* decision is attached to this brief as Appendix D.

4. *Ex parte Long*, No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018) (per curiam) (unpublished).

5. *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018) (per curiam) (unpublished).

6. *Ex parte Lizcano*, No. WR-68,348-03, 2018 WL 2717035 (Tex. Crim. App. June 6, 2018) (per curiam) (unpublished).

7. *Ex parte Williams*, No. WR-71,296-03, 2018 WL 2717039 (Tex. Crim. App. June 5, 2018) (per curiam) (unpublished).

8. *Ex parte Davis*, No. WR-40,339-09, 2017 WL 6031852 (Tex. Crim. App. Dec. 6, 2017) (per curiam) (unpublished).

As far as undersigned counsel is aware, David Wood's case is the only one in which the TCCA has granted authorization or reconsideration of an *Atkins* claim in light of *Moore I* and *Moore II* and then denied the claim without first remanding it to the trial court for the development of additional evidence and the issuance of new findings of fact and conclusions of law.

CONCLUSION

David Wood asks to be treated like all the other *Moore*-reconsideration claimants: that he be given the opportunity to develop new evidence and that the trial court review that evidence using the current medical standards found in the DSM-5. This Court should grant certiorari, vacate the decision below, and remand with instructions.

Respectfully Submitted,

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September 20, 2019

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-41,121-03

EX PARTE STEVEN ANTHONY BUTLER, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS CAUSE NO. 511112 IN THE 185TH DISTRICT COURT HARRIS COUNTY

***Per curiam*.**

O R D E R

On May 10, 1988, a jury convicted Applicant of capital murder. *See* TEX. PENAL CODE ANN. § 19.03. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death.[1] This Court affirmed Applicant's conviction and sentence on direct appeal. *Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994). On April 28, 1999, we denied his initial post-conviction application for a writ of habeas corpus pursuant to

[1] Unless otherwise specified, all references in this order to "articles" refer to the Texas Code of Criminal Procedure.

APP. D

Article 11.071. *Ex parte Butler*, No. WR-41,121-01 (Tex. Crim. App. Apr. 28, 1999) (not designated for publication).

This Court received Applicant's first subsequent post-conviction application for a writ of habeas corpus on May 19, 2004. Therein, Applicant raised a claim that he was intellectually disabled and therefore categorically exempted from execution under the Supreme Court's holding in *Atkins v. Virginia*.[2] We determined that Applicant's *Atkins* claim satisfied Article 11.071, § 5, and remanded the allegation to the habeas court for further consideration.

After a lengthy evidentiary hearing at which Dr. George Denkowski testified for the State, the habeas court entered findings of fact and conclusions of law and a recommendation that we deny relief. Based on those findings and conclusions and our own independent review of the record, we denied habeas relief on Applicant's *Atkins* claim. *Ex parte Butler*, No. WR-41,121-02 (Tex. Crim. App. June 27, 2007) (not designated for publication).

In April 2011, Dr. Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists in which his license was "reprimanded." Under the settlement's terms, Denkowski agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings.

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[2] 536 U.S. 304 (2002).

In light of this Settlement Agreement, Applicant submitted a suggestion that we reconsider, on our own initiative, our 2007 denial of his *Atkins* claim.[3] In a written order dated December 14, 2011, we exercised our authority to reconsider our initial disposition of Applicant's *Atkins* claim. We remanded this cause to the habeas court to allow it the opportunity to re-evaluate its initial findings, conclusions, and recommendation in light of the Denkowski Settlement Agreement. *Ex parte Butler*, No. WR-41,121-02 (Tex. Crim. App. Dec. 14, 2011) (not designated for publication).

On February 28, 2012, the trial court signed an order adopting the State's Proposed Findings of Fact and Conclusions of Law which recommended that we deny relief. On June 27, 2012, based upon our own independent review of the record and the trial court's February 2012 findings of fact and conclusions of law, we again denied habeas relief. *Ex parte Butler*, No. WR-41,121-02 (Tex. Crim. App. June 27, 2012) (not designated for publication).

The Supreme Court subsequently decided *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). In those two cases, in relevant part, the Supreme Court rejected various aspects of this Court's analytical

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[3] Although the Rules of Appellate Procedure do not permit the filing of a motion for rehearing following the denial of a post-conviction application for a writ of habeas corpus, we may on our own initiative choose to exercise our authority to reconsider our initial disposition of a capital writ. *See Ex parte Moreno*, 245 S.W.3d 419, 427–29 (Tex. Crim. App. 2008) (stating that we may choose to exercise this authority only "under the most extraordinary of circumstances.").

approach to *Atkins* claims, including our use of the *Briseno*[4] factors.

Applicant filed the instant habeas application in the trial court on August 29, 2018. Applicant raises a single claim in the application in which he asserts that, "when the analysis is guided by the medical community's consensus" the record will show that he "has intellectual disability, and is thus ineligible for the death penalty." We find that, in light of *Moore I* and *Moore II*, Applicant has satisfied the requirements of Article 11.071, § 5(a)(1).

We accordingly remand this cause to the habeas court to consider evidence in light of the *Moore I* and *II* opinions and to make a recommendation to this Court on the issue of intellectual disability. If the habeas court deems it necessary, it may receive evidence that it determines to be relevant to the question of intellectual disability. The habeas court shall then make findings of fact and conclusions of law regarding the issue of intellectual disability, which it shall thereafter forward to this Court.

IT IS SO ORDERED THIS THE 18th DAY OF SEPTEMBER, 2019.

Do Not Publish

[4] *Ex parte Briseno*, 135 S.W.3d 1 (2004).