No. _____

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

PETITION FOR WRIT OF CERTIORARI

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

In *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), this Court found that Texas's criteria for deciding a death row inmate's claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), violated the Eighth Amendment. *Moore I* held that the Texas Court of Criminal Appeals (TCCA) had impermissibly disregarded the medical community's diagnostic framework, and instead relied on non-clinical criteria and lay stereotypes—most notably the seven factors set out in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)—to deny the *Atkins* claim of Bobby James Moore. The Court unanimously rejected the use of the *Briseno* factors to analyze adaptive deficits, because they "creat[e] an unacceptable risk that persons with intellectual disability will be executed." *Moore I*, 137 S. Ct. at 1051; *see id.* at 1053 (Roberts, C.J., dissenting, joined by Thomas, and Alito, JJ.) ("I agree with the Court today that those factors are an unacceptable method of enforcing the guarantee of *Atkins,* and that the CCA therefore erred in using them to analyze adaptive deficits."). The Court held that the TCCA improperly "fastened its intellectual-disability determination to the AAMR's 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases." *Id.* at 1053 (internal quotation marks omitted, alteration in original).

Since 2017, the TCCA has, in unanimous per curiam decisions, remanded at least eight cases seeking reconsideration in light of *Moore I*. In all eight cases, the TCCA has ordered further fact-finding by the trial court. The TCCA's remand order

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

> This cause is remanded to the habeas court to allow it the opportunity to develop evidence, make new or additional findings of fact and conclusions of law, and make a new recommendation to this Court on the issue of intellectual disability. The habeas court may receive evidence from mental health experts and any witnesses whose evidence the court determines is germane to the question of intellectual disability. The court should consider all of the evidence in light of the *Moore v. Texas* opinion. The habeas court shall then make findings of fact and conclusions of law regarding the issue of intellectual disability and any other issue the court deems pertinent to the resolution of this claim.

Id. at *1.[1] In only a single case has the TCCA granted rehearing in light of *Moore I* and then denied relief without first remanding to the trial court for further evidentiary proceedings: *Ex parte David Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018). App. A.

In *Wood*, a 6–2 decision, the TCCA rejected the 43 findings of fact that explicitly relied on the *Briseno* factors or mentioned possible alternative causes of any adaptive deficits. *Id.* at 680, 682. Finding the habeas court's denial of the *Atkins* claim

[1] *See Ex parte Cathey*, No. WR-55,161-02, 2018 WL 5817199 (Tex. Crim. App. Nov. 7, 2018) (per curiam); *Ex parte Segundo*, No. WR-70,963-02 (Tex. Crim. App. Oct. 31, 2018) (per curiam); *Ex parte Henderson*, No. WR-37,658-03, 2018 WL 4762755 (Tex. Crim. App. Oct. 3, 2018) (per curiam); *Ex parte Long*, No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018) (per curiam); *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018) (per curiam); *Ex parte Williams*, No. WR-71,296-03, 2018 WL 2717039 (Tex. Crim. App. June 5, 2018) (per curiam); *Ex parte Davis*, No. WR-40,339-09, 2017 WL 6031852 (Tex. Crim. App. Dec. 6, 2017) (per curiam); *see also Ex parte Jean*, No. WR-84,327-01, 2017 WL 2859012 (Tex. Crim. App. June 28, 2017) (per curiam) (on initial habeas application); *Thomas v. State*, AP-77,047, 2018 WL 6332526 (Tex. Crim. App. Dec. 5, 2018) (on direct appeal) (granting new sentencing trial).

"amply supported" by the findings that remained, *id.* at 680 n.7, the TCCA denied relief, holding that no remand was necessary for further record development or fact findings. *Id.* at 679–80, 681–82.

Despite the TCCA's assertion that the excision of the findings tainted by *Briseno* brought the *Wood* decision "in compliance" with *Moore I*, *id.* at 682, scores of the remaining findings reveal that *Briseno* continues to "pervasively infect[ ]" the decision. *Moore I*, 137 S. Ct. at 1053. Moreover, as the *Wood* dissent pointed out, other findings that the majority left intact "improperly focus[ed] on applicant's adaptive strengths and his abilities in a controlled prison setting." *Id.* at 687 (Alcala, J., dissenting). In addition, the dissent noted that the TCCA did not reject other findings that concluded that "applicant's troubles in school could be due to factors other than intellectual disability, such as dyslexia or trouble reading, a poor home life, or being held back a grade." *Id.* at 688 (internal quotation marks omitted).

Two months after the TCCA denied relief on rehearing in Mr. Wood's case, this Court issued a summary reversal of the TCCA's decision on remand in Bobby Joe Moore's case. *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). *Moore II* held that the TCCA's re-examination of the evidence on remand was "inconsistent" with *Moore I*: "We have found too many instances in which, with small variations, [the TCCA] repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion." *Id.* at 670. In particular, this Court faulted the TCCA for: (1) downplaying Moore's adaptive deficits while overemphasizing his adaptive strengths; (2) relying heavily upon adaptive improvements Moore made in prison; (3)

requiring Moore to show that his adaptive deficits were not related to a personality disorder or mental health issue; and (4) continuing to rely on lay stereotypes of intellectual disability by using the *Briseno* factors in all but name. *Id.* at 670–72.

Moore II unequivocally confirms that the TCCA's decision in *Wood* on rehearing violates the Eighth and Fourteenth Amendments. This Court made clear constitutional holdings in *Moore I*; the TCCA failed to abide by them. For that reason, the Court should grant certiorari, vacate the decision below, and remand for further proceedings in light of *Moore I* and *Moore II*. But the Court should ensure that the TCCA treats Mr. Wood's *Atkins* claim as it has all other requests for reconsideration in light of *Moore I*—by ordering the TCCA to remand the claim to the trial court for the presentation of additional evidence and the issuance of new findings of fact.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals under review is reported at *Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018). App. A. The initial *Atkins* opinion of the Texas Court of Criminal Appeals in this case is unpublished, *Ex parte Wood*, WR-45,746-02 (Tex. Crim. App. Nov. 26, 2014). App. B. The habeas court's findings of fact and conclusions of law are unreported. App. C.

JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on December 12, 2018. *Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018) (App. A). On March 8, 2019, Justice Alito extended the time to file this petition until May 11, 2019. *See Wood v. Texas*, No. 18A914. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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, § 1.

STATEMENT OF THE CASE

A. Conviction and Prior Habeas Corpus Proceedings

At Mr. Wood's capital trial—a decade before *Atkins*—psychiatrist Donald T. Lunde testified that:

> [Mr. Wood] has somewhat below average intelligence, and that's not only apparent by, again, my own examination, but by repeated IQ tests that have been administered to him by professionals everywhere from the Texas Correctional System to the El Paso school system to consultants that were brought in by basically the welfare department. He had a caseworker when he was in grammar school, a social worker who worked for the City and County of El Paso, and she had him tested. He was repeatedly tested, and his IQ runs on the average about 68. I would say that that's—there is a range from 64 to 71 and a few others.

72 RR 7707–08.[2]

In November 1992, Mr. Wood was convicted of capital murder and sentenced to death. The TCCA affirmed the conviction and sentence on direct appeal. *Wood v. State*, No. 71,594 (Tex. Crim. App. Dec. 13, 1995) (unpublished). No petition for writ of certiorari was filed.

[2] "[vol.] RR [page number]" refers to the reporter's record of the capital murder trial.

Mr. Wood filed his first application for state post-conviction relief in 1997. The TCCA denied the application in 2001. *Ex parte Wood*, No. 45,746-01 (Tex. Crim. App. Sept. 9. 2001) (unpublished).

In 2002, Mr. Wood filed his federal habeas petition in the United States District Court for the Northern District of Texas. The district court denied the petition in 2006. *Wood v. Dretke*, No. 3:01-2103 (N.D. Tex. June 2, 2006) (unpublished). Mr. Wood sought a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. In 2007, the Fifth Circuit denied COA. *Wood v. Quarterman*, 503 F.3d 408 (5th Cir. 2007). In 2008, this Court denied his petition for writ of certiorari. *Wood v. Quarterman*, No. 07-8610 (Apr. 14, 2008). The trial court set Mr. Wood's execution date for August 20, 2009.

B. Current Habeas Corpus Proceedings

On August 18, 2009, Mr. Wood filed a subsequent habeas corpus application in state court. He raised a claim that his execution would violate the Eighth Amendment because he is intellectually disabled. On August 19, 2009, the TCCA stayed Mr. Wood's execution and remanded the case to the habeas court for an evidentiary hearing. *Ex parte Wood*, No. 45,7406-02 (Tex. Crim. App. Aug. 19, 2009) (unpublished). In January 2011, visiting Senior Judge Robert (Bert) Richardson was assigned to preside over the *Atkins* proceedings.[3]

[3] In 2014, Judge Richardson won election to the TCCA. He continues to preside over Mr. Wood's case in the habeas court.

The habeas court held an evidentiary hearing on the *Atkins* claim over four days in October and two days in December 2011. At the *Atkins* hearing, the habeas court heard about Mr. Wood's IQ scores of 64, 71, and 75 obtained from the administration of WAIS instruments; that Mr. Wood flunked the first grade, the third grade, and the ninth grade; that he attended special education classes; and that he dropped out of high school in the ninth grade at age seventeen and a half, three years behind his peers. 5 AH 191–98; 6 AH 17–21.[4]

Mr. Wood's fourth grade teacher, Coletta DeArman, testified that she insisted he sit directly next to her desk for an entire year to ensure that he "learn something." 2 AH 26. Despite having taught approximately 900 students during 35 years of teaching, DeArman had never required a student to sit next to her desk, because no other student needed such specialized attention as Mr. Wood. 2 AH 39. DeArman testified that she would personally explain the lessons to Mr. Wood, two or three times if necessary. 2 AH 29, 43, 53–54.

Mr. Wood presented additional evidence that he was teased and bullied by other children. He did not have any close friends, and the majority of children he did interact with were three or four years younger. 2 AH 61–62, 122–23. He could not read a clock or tell time, even as a teenager. 2 AH 63, 78–79.

In 2013, the habeas court issued its findings and conclusions, and recommended the denial of relief on the *Atkins* claim. In 2014, the TCCA adopted the

[4] Citations to the *Atkins* hearing are noted as "[vol.] AH [page]."

habeas court's findings and denied the claim. *Ex parte Wood*, WR-45,746-02 (Tex. Crim. App. Nov. 26, 2014) (unpublished) (App. B).[5]

HOW THE ISSUES WERE DECIDED BELOW

On December 12, 2018, the TCCA granted rehearing on Mr. Wood's *Atkins* claim in light of *Moore I*. *Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018) (App. A). Ostensibly relying on *Moore I* and the TCCA's recent opinion on remand in *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018), the TCCA held that no further record development or fact findings were needed and denied relief. *Wood*, 568 S.W.3d at 679–80. The TCCA concluded that 43 findings of fact that directly relied on the *Briseno* factors or possible alternative causes of any adaptive deficits were "no longer viable" after *Moore I* and *Ex Parte Moore*. *Id.* at 680. According to the TCCA, the findings that remained "amply supported" the habeas court's denial of relief. *Id.* at 680 n.7.

Despite IQ scores of 64 and 71 from the administration of WAIS instruments predating *Atkins* by two decades, the TCCA noted that the habeas court found only a 75 IQ test score valid. *Id.* at 680. Because the standard error of measurement on that test yielded an IQ range of 71 to 80, the TCCA held that Mr. Wood did not meet the first prong of the diagnosis for intellectual disability. *Id.* As for the second prong of the diagnosis, the TCCA held that the findings untainted by *Briseno*

[5] In 2015, Mr. Wood sought federal habeas review of his *Atkins* claim. He filed a motion for authorization in the Fifth Circuit. In 2016, the Fifth Circuit denied the motion, finding that Mr. Wood was not entitled to equitable tolling of AEDPA's statute of limitations. *In re Wood*, 648 Fed. App'x. 388 (5th Cir. 2016).

"comprehensively" discussed Mr. Wood's adaptive functioning and found that he had failed to show significant deficits in adaptive skills. *Id.* at 681.

The TCCA concluded that a remand to develop the record further was "simply unwarranted." *Id.* at 682. The TCCA explained that *Moore I* and *Ex parte Moore* changed only the legal analysis for reviewing *Atkins* claims. *Id.* at 681. Moreover, Mr. Wood had been given the opportunity to present all of his evidence at the hearing. *Id.* Finally, the TCCA held that a remand for additional findings of fact from the habeas court was unnecessary. *Id.* at 682. Striking the findings tainted by *Briseno* would, according to the TCCA, bring the habeas court's findings "in compliance with the *Moore* decisions." *Id.* And, according to the TCCA, the extensive nature of the remaining findings indicated that the habeas court would not reasonably likely change its recommendation denying relief. *Id.*

Four judges of the six-member majority signed a concurring opinion. *Id.* at 682–86 (Newell, J., concurring, joined by Keller, P.J., and Hervey and Keel, JJ.). Two judges dissented. *Id.* at 686–88 (Alcala, J., dissenting); *id.* at 682 (Walker, J., dissenting without opinion). Judge Richardson did not participate. *Id.*[6]

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[6] Judge Richardson did not participate, because he presided over the *Atkins* proceedings in the trial court and authored the findings of fact, before winning election to the TCCA in 2014.

Mr. Wood's attempt to disqualify Judge Richardson failed. While presiding over the post-conviction proceedings in this high-profile death penalty case, Judge Richardson decided to run for the Texas Court of Criminal Appeals. Several months before the Republican primary and only two days after formally declaring his candidacy, Judge Richardson issued his ruling, finding that Mr. Wood is not intellectually disabled and denying *Atkins* relief.

Judge Richardson then used his ruling in Mr. Wood's case to persuade visitors to his campaign website to vote for him in the upcoming Republican primary election for the TCCA. Less than one month before the primary, Judge Richardson posted a hyperlink on his campaign website that directed visitors—and potential voters—to a television news story

REASONS FOR GRANTING THE WRIT

MOORE II UNEQUIVOCALLY CONFIRMS THAT THE TCCA'S REHEARING DECISION IN MR. WOOD'S CASE AFTER *MOORE I* VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

On rehearing after *Moore I*, the TCCA excised the habeas court's 43 findings of fact that expressly applied each of the seven *Briseno* factors to Mr. Wood and found the evidence wanting in each instance. *See Wood*, 568 S.W.3d at 682 (rejecting FOF Nos. 280–322).[7] The TCCA called its repair of the findings a success, holding that the

about his decision in Mr. Wood's case. The link on Judge Richardson's campaign website is entitled, "Judge says El Paso's 'Desert Killer' not mentally retarded." Clicking on the hyperlink took viewers to a television news report that praised Judge Richardson's ruling and featured an interview with the mother of one of the victims, who called the ruling "great news." *See* http://www.electjudgerichardson.com/news.php (last visited May 2, 2019). The hyperlink on Judge Richardson's campaign website to the television news report is currently broken. The video can be accessed directly from the KVIA-TV website. *See* http://www.kvia.com/news/judge-says-el-pasos-desert-killer-not-mentally-retarded/55122912 (last visited May 2, 2019).

Judge Richardson never notified Mr. Wood or his counsel or the State's attorney that he had posted news of his *Atkins* ruling on his campaign website. Most puzzling, Judge Richardson did not recuse himself from Mr. Wood's case after he won the general election to the TCCA in November 2014.

Judge Richardson continues to preside over proceedings in the trial court involving Mr. Wood's request for DNA testing. *See* Part F, *infra* (discussing exculpatory results of DNA testing, pending motions for additional DNA testing, and claims of actual innocence). If Judge Richardson should deny the motions for DNA testing—which have been pending for over two years—Mr. Wood will have to appeal that ruling to Judge Richardson's eight colleagues on the TCCA.

In the meantime, in a terribly misguided attempt to force Judge Richardson to rule on the long-pending DNA motions, the State recently asked Judge Richardson to set Mr. Wood's execution date for October 16, 2019. Judge Richardson has not yet ruled on the State's motion.

[7] "FOF No. __" refers to "Finding of Fact," followed by the number that appears in the habeas court's findings of fact and conclusions of law. The habeas court's findings and conclusions are attached as App. C.

habeas court's denial of *Atkins* relief was "amply supported" by the findings that remained untainted by *Briseno*. *Id.* at 680.

But the TCCA did a slipshod job. First, by focusing solely on the findings that expressly relied on the *Briseno* factors, the TCCA overlooked scores of other findings grounded on the same harmful lay stereotypes of the intellectually disabled that *Moore I* denounced. Second, the TCCA disregarded the other errors that *Moore I* identified in the TCCA's adaptive functioning analysis. The TCCA left untouched findings of fact that: (1) overemphasized Mr. Wood's perceived adaptive strengths at the expense of his adaptive deficits; (2) relied heavily on adaptive improvements made in prison; and (3) faulted Mr. Wood for failing to prove that his adaptive deficits stemmed from his intellectual disability. Third, the TCCA relied on a "cherry-picked" IQ score of 75, *Wood*, 568 S.W.3d at 687 (Alcala, J., dissenting), and applied a strict IQ cut-off score, ignoring the consensus of the medical community and this Court's holding in *Hall v. Florida*, 572 U.S. 701 (2014). Finally, in an astounding concurring opinion, four judges of the six-member majority meticulously reviewed the facts of the crime—the most prejudicial of the seven *Briseno* factors—to conclude that Mr. Wood is not intellectually disabled. *See Wood*, 568 S.W.3d at 682–86 (Newell, J., concurring, joined by Keller, P.J., and Hervey and Keel, JJ.).

In short, the TCCA's opinion on rehearing is inconsistent with *Moore I* and *Moore II*. As this Court held in *Moore II*, "we have found in [the TCCA's] opinion too many instances in which, with small variations, it repeats the analysis we previously

found wanting, and these same parts are critical to its ultimate conclusion." 139 S. Ct. at 670.

A. The TCCA continued to rely heavily on the *Briseno* factors even after *Moore I* found them unconstitutional.

The *Briseno* factors provided extensive guidance to the State's expert and the habeas court in their analysis of Mr. Wood's adaptive functioning. In *Briseno*, the TCCA created seven evidentiary factors to be used in determining whether a condemned inmate's adaptive deficits are "related" to deficits in intellectual functioning. *Ex parte Briseno*, 135 S.W.3d at 9.[8]

Like a surgeon removing a cancerous tumor, the TCCA simply excised the 43 findings of fact that expressly applied each of the seven *Briseno* factors to Mr. Wood. But the TCCA did not realize that *Briseno* had infected scores of other findings that remained. First, as it did in Bobby Joe Moore's case, the TCCA "fastened" its intellectual-disability determination to the 1992 AAMR's definition of intellectual disability that the court adopted in *Briseno*. *Moore I*, 137 S. Ct. at 1053. The habeas court in Mr. Wood's case expressly set out the improper *Briseno* definition of intellectual disability in its findings, which the TCCA left intact on rehearing. *See*

[8] The *Briseno* factors are: (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?; (2) Has the person formulated plans and carried them through or is his conduct impulsive?; (3) Does his conduct show leadership or does it show that he is led around by others?; (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?; (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?; (6) Can the person hide facts or lie effectively in his own or others' interests?; (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose? *Briseno*, 135 S.W.3d at 8–9.

Habeas Court's Findings at 39 (FOF No. 102). Second, as this Court noted in *Moore II*, the TCCA on rehearing continued to apply many of the *Briseno* factors in all but name. *See* 139 S. Ct. at 672 (noting that "the similarity of language and content between *Briseno*'s factors and the court of appeals' statements suggests that *Briseno* continues to 'pervasively infec[t] the [appeals courts'] analysis.'" (quoting *Moore I*, 137 S. Ct. at 1053)).

On rehearing after *Moore I*, the TCCA left untouched findings based on incorrect stereotypes of the intellectually disabled that the *Briseno* factors perpetuate:

- The testimony of Mr. Wood's witnesses "fail[ed] to illustrate adaptive deficits related to mental retardation," Habeas Court's Findings at 42 (FOF No. 115), because not one of them had treated Mr. Wood as "mentally retarded" during the developmental stage. *See*, *e.g.*, *id.* (FOF No. 114) (Coletta DeArman, Mr. Wood's fourth grade teacher, "never stated that she believed [Mr. Wood] was mentally retarded, nor did she indicate that his problems in school had anything to do with mental retardation or a low IQ."); *id.* at 44 (FOF No. 127) (Keith Springer, Mr. Wood's childhood friend, "could not say he believes [Mr. Wood] is mentally retarded, only that he felt [Mr. Wood] was slow and behind his age group."); *id.* at 48 (FOF No. 149) (Debbie Galvan, Mr. Wood's sister, "did not believe [Mr. Wood] was mentally retarded."). The State's witnesses testified similarly. Shaun Munson, a TDCJ escort officer, testified that he "does not consider [Mr. Wood] to be mentally retarded." *Id.* at 57 (FOF No. 183). Joanne Blaich, the woman Mr. Wood dated when he was 30 years old, "never gave any indication that [Mr. Wood] was slow, let alone mentally retarded." *Id.* at 61 (FOF No. 204).[9]

- Mr. Wood communicated rationally and coherently with others. *See*, *e.g.*, *id.* at 41 (FOF No. 112) (DeArman testified that Mr. Wood "was able to sufficiently communicate with her."); *id.* at 52 (FOF No. 169) (Mr. Wood "shows adequate capacity to concentrate when someone is speaking to him and can follow instructions. He has good articulation and an

[9] This is the very same factor that *Moore I* singled out as exemplifying the *Briseno* factors' substitution of lay stereotypes for scientific judgment. 137 S. Ct. at 1051–52.

adequate vocabulary, he uses words in proper context, and he speaks in full sentences."); *id.* at 56 (FOF No. 176) (When the death row property secretary "converses with [Mr. Wood], he understands what he needs to do, pays attention to what she's saying, has no problems talking to her, and will speak in long sentences. [Mr. Wood] does not have trouble expressing himself, and he conveys his needs in a normal fashion."); *id.* at 58 (FOF No. 185) (Herbert Wilbanks, a TDCJ correctional officer, "never had any difficulty conversing with [Mr. Wood]."); *id.* at 66 (FOF No. 221) (Shaun Munson, a TDCJ correctional officer, "has had regular conversations with [Mr. Wood] and [Mr. Wood] will initiate conversations. [Mr. Wood] typically follows commands, understands what Munson tells him, pays attention to Munson, has no speech or vocabulary problems, will talk in long sentences, and does not have trouble expressing himself.").

- "[Mr. Wood] routinely dresses and grooms himself, shaves, brushes his teeth, showers, and gets haircuts when needed, and handles the common activities of daily living adequately." *Id.* at 58 (FOF No. 190).

- '[Mr. Wood] can be manipulative, in that he behaves in a very polite manner when he wants something out of the ordinary but then gets very upset if his request is rejected." *Id.* at 56 (FOF No. 177).

- Mr. Wood can "order from menus," "apply for a job," "pay for meals," "do housework," and wash vehicles." *Id.* at 60, 61, 75 (FOF Nos. 198, 204, 265). He "dated women, initiated family visits, went to barbeques, bought clothing, and dressed properly…." *Id.* at 68, 75 (FOF No. 232, 265).[10]

- "[Mr. Wood] has had visitations with his father and step-mother and…the meetings are just typical conversations between family members." *Id.* at 66 (FOF No. 218).

- Mr. Wood "obtained a driver's license," "could read street signs," and "go to stores to purchase items he needed." *Id.* at 67 (FOF No. 227). He could drive a car and a motorcycle. *Id.* (FOF No. 230).

- Based on nine summaries of witnesses' testimony from the capital murder trial, Mr. Wood "does not lack the ability to socialize with others,

[10] *See Moore II*, 139 S. Ct. at 672 ("criticizing the 'incorrect stereotypes' that persons with intellectual disability 'never have friends, jobs, spouses, or children'") (quoting AAIDD–11 at 151).

regardless of whether the interactions are positive or negative." *Id.* at 63–65 (FOF No. 212).[11]

- Based on a quotation from a *newspaper article*, Mr. Wood does not have any significant deficits in social and interpersonal skills, because the mother-in-law of one of the women who disappeared (but whose body was never found and whose death Mr. Wood was never charged with) said of Mr. Wood: "'Girls loved him and he loved girls….He was good-looking and women were attracted to him.'" *Id.* at 65 (FOF No. 213).

- Mr. Wood's capital crime "involved multiple, well thought out and planned murders that took place over a significant period of time. The murders were all committed by [Mr. Wood] himself. In other words, this was not a case involving the law of parties or a single impulsive act, lacking forethought or planning…." *Id.* at 37–38 (FOF No. 99).[12]

The TCCA also adopted without change or comment the habeas court's conclusions of law that relied on the *Briseno* factors:

- "Based on [Mr. Wood's] possession of and regular demonstration of adaptive skills, based on [Mr. Wood's] records at TDCJ, and based on [Mr. Wood's] demonstrated abilities to care for himself, to carry out plans, to respond rationally and appropriately to external stimuli (albeit in a socially unacceptable manner), to respond coherently, rationally,

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[11] One witness the habeas court relied on could not identify Mr. Wood as the man on the motorcycle she saw Angelica Frausto, one of the victims, speak to for ten minutes. *See id.* at 64 (FOF No. 212d) Veronica Minjarez testified on direct and on cross examination that she never saw the face of the man on the motorcycle. 61 RR 6391, 6394, 6403.

Another witness cited by the habeas court, Patricia Von Maluski, testified that "she saw Karen Baker [one of the victims] at a Chinese restaurant with [Mr. Wood] and her two children shortly before Baker disappeared. Patricia believed that Karen was prone to become involved in dangerous situations with men." Habeas Court's Findings at 63 (FOF No. 212b).

After Von Maluski testified, she called the district attorney's office to admit that she had lied under oath during her testimony. 62 RR 6431. She said that the prosecution had told her to do so. 62 RR 6431–32. At an in-chambers hearing, the prosecution characterized Von Maluski as "intensely angry" and "tremendously inconsistent." 62 RR 6432. Mr. Wood's attorneys asserted that Von Maluski was "obviously unstable" and incompetent. 62 RR 6433, 6434. At the conclusion of the in-chambers hearing, the trial judge overruled Mr. Wood's motion to strike Von Maluski's testimony. 62 RR 6438.

[12] Besides leaving intact the habeas court's adoption of *Briseno*'s discredited definition of intellectual disability, *id.* at 39 (FOF No. 102), the TCCA forgot to excise the habeas court's direct quotation of the seven *Briseno* factors. *Id.* (FOF No. 103).

and on point to questions, to lead and manipulate others, to lie for his own interests, and to plan acts that require forethought and purpose, [Mr. Wood] fails to show by a preponderance of the evidence that he has significant deficits in adaptive behavior attributable to mental retardation and not a personality disorder." *Id.* at 92–93 (citing *Briseno*, 135 S.W.3d at 12).[13]

- [Mr. Wood] fails to show that his apparent learning disability establishes mental retardation, *i.e.*, significantly sub-average intellectual functioning along with deficits in adaptive behavior originating before the age of 18. *See Chester v. Thaler*, 666 F.3d 340, 343, 346-7 (5th Cir. 2011) (noting that Court of Criminal Appeals found that defendant failed to show significant deficits in adaptive behavior after hearing evidence he was classified as learning disabled, rather than mentally retarded; expert testified that learning disability designation does not imply mental retardation; evidence presented that defendant planned, acted independently, could converse on wide range of topics and could lie and hide facts to protect himself)." Habeas Court's Findings at 92–94.

In addition to infecting the findings on Mr. Wood's adaptive behavior, the *Briseno* factors tainted the findings about his intellectual functioning. Dr. Allen, the State's expert who extensively applied the *Briseno* factors in assessing Mr. Wood's intellectual disability claim, found that Mr. Wood's 75 IQ score does not meet the diagnostic criteria of significantly sub-average general intellectual functioning, because the score "doesn't make sense when you look at his level of adaptive behaviors in the absence of adaptive behavior deficits." Habeas Court's Findings at 25 (FOF No. 73) (quoting Dr. Allen). The habeas court agreed with Dr. Allen's conclusion. *Id.* Similarly, the habeas court found that Dr. Allen did not believe Mr. Wood met the intellectual functioning prong of the diagnosis of intellectual disability in part

[13] As additional support for this conclusion of law, the habeas court cited cases that relied on the *Briseno* factors. *See Ex parte Woods*, 296 S.W.3d 587 (Tex. Crim. App. 2009); *Moreno v. Dretke*, 450 F.3d 158 (5th Cir. 2006).

because of "all the other evidence considered under the *Briseno* factors." *Id.* at 36 (FOF No. 98).[14]

B. The TCCA left untouched findings that relied less on Mr. Wood's adaptive deficits than on his perceived adaptive strengths.

Moore I found that the TCCA "overemphasized Moore's perceived adaptive strengths" while "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." 137 S. Ct. at 1050 (emphasis in original); *see id.* at 1050 n.8 (noting that, "even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths in which the CCA engaged"); AAIDD–11 at 47 ("[S]ignificant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills."); DSM-5 at 33, 38 (stating that inquiry should focus on "[d]eficits in adaptive functioning;" deficits in only one of the three adaptive-skills domains suffice to show 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." (internal quotation marks and citation omitted)).

[14] The habeas court refused to apply the Flynn Effect to Mr. Wood's case. However, the court noted that, even if the Flynn Effect applied, [Mr. Wood's] IQ would still not be in the range of mental retardation due to the high scores on malingering *and other evidence that fails to satisfy the requirements under Briseno. Id.* at 39 (FOF No. 101c) (emphasis added).

The same emphasis on strengths—as opposed to deficits—tainted the habeas court's analysis of Mr. Wood's *Atkins* claim. In particular, the habeas court placed great weight on Mr. Wood's mechanical abilities:

- "[Mr. Wood's] mechanical and conceptual abilities with maintaining automobiles while working in the bus barn indicate functional academic skills that exceed those expected of a mentally retarded person, specifically his conceptual understanding of the operation of complex tools, his diagnostic skills, and his ability to correctly repair the tools with the appropriate parts." Habeas Court's Findings at 51 (FOF No. 166); *see id.* at 71–74 (FOF Nos. 246–57) (describing Mr. Wood's work servicing and repairing tools at the bus barn); *id.* at 72 (FOF No. 256) ("[W]hile working at the bus barn, [Mr. Wood] demonstrated skills and behavior not indicative of a person with mental retardation.").

- Mr. Wood performed well in a welding instruction class and "worked safely without close supervision." *Id.* at 69–70 (FOF No. 233).

- Michael Maxwell's testimony at the capital murder trial in which he "characteriz[ed] [Mr. Wood] as 'slow' lacks credibility because it is not consistent with the complexity of the work he performed at the bus barn and his welding class." *Id.* at 75 (FOF No. 261).[15]

Contrary to *Moore I*, the TCCA left intact these findings that offset Mr. Wood's obvious and significant adaptive deficits with his unconnected strength in repairing tools and learning how to weld. *Moore II* unequivocally confirms that this analysis is constitutionally flawed. 139 S. Ct. at 670.

C. The TCCA improperly relied on Mr. Wood's adaptive improvements in prison.

Further demonstrating the TCCA's improper reliance on evidence of Mr. Wood's strengths, the findings emphasized Mr. Wood's current behavior in prison—

[15] *Cf. Ex parte Cathey*, 451 S.W.3d 1, 20 (Tex. Crim. App. 2014) (noting that "[n]o one who testified at [pre-*Atkins*] trial suggested that applicant was intellectually disabled or suffered from adaptive deficits").

even though clinicians "caution against reliance on adaptive strengths developed in controlled settings." *Moore I*, 137 S. Ct. at 1050 (citing DSM–5 at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (*e.g.*, prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."); AAIDD–11 User's Guide at 20 (advising against reliance on "behavior in jail or prison")).

Except for brief periods in 1980 and 1987, Mr. Wood has been in prison since 1977, when he was 19 years old. And for the past 27 years, Mr. Wood has been in the highly-restrictive environment of Texas's death row. Contrary to *Moore I*, the TCCA did not excise numerous findings relying on Mr. Wood's adaptive functioning as an adult in prison to conclude that he is not intellectually disabled:

- "[Mr. Wood] had the ability to write coherent, correct sentences with decent punctuation." Habeas Court's Findings at 22 (FOF No. 61).

- "[Mr. Wood] checked out a quantity of books while incarcerated and that this pattern is inconsistent with the functional academics of someone with mild mental retardation." *Id.* at 50 (FOF No. 158).

- "[Mr. Wood] performs sufficient arithmetic, writes orders to publishers for books, and works out puzzles such as 'Crostics.'" *Id.* (FOF No. 160).

- "[Mr. Wood's] request for a Scrabble dictionary indicates functional academic skills exceeding those of a person with mild mental retardation." *Id.* at 51 (FOF No. 164).

- "He understands orders from correctional officers, and expresses his needs, wants and desires in both oral and written form, as demonstrated by his TDCJ records. *Id.* at 51–52 (FOF No. 169).

- "[Mr. Wood] utilizes the grievance procedure to effectively communicate his objections to mailroom actions and disciplinaries he received, in a manner inconsistent with the communications abilities expected of a person with mild mental retardation." *Id.* at 55 (FOF No. 171).

- "[Mr. Wood] has no problem writing or filling out forms to designate who should receive his property…." *Id.* at 57 (FOF No. 179).

- The mail Mr. Wood's sister receives from him "shows he is aware of current events, for example economic conditions in the United States and criminal activity in Mexico." *Id.* at 47 (FOF No. 145); *see id.* at 50 (FOF No. 159) (noting that Mr. Wood's letters "reveal awareness and understanding of current events").

- "His TDCJ records reflect his ability to discuss dental and medical care. He regularly purchases hygiene items." *Id.* at 58 (FOF No. 190).

- "[Mr. Wood] keeps his cell clean and orders what he wants and needs from the commissary." *Id.* at 59 (FOF No. 197); *see id.* at 60 (FOF No. 198) (Mr. Wood can "calculate the cost of commissary items.").

- "[I]n numerous letters to pen pals, [Mr. Wood] expresses his affection for them and addresses the relationships he has with them." *Id.* at 65 (FOF No. 215).

- Mr. Wood "completes his own requests for medical care, stating he knows what form to obtain and he completes the form himself…" *Id.* at 77 (FOF No. 273).

- "[Mr. Wood] has filed grievances against TDCJ for not receiving proper medical attention." *Id.* at 78 (FOF No. 278).

By leaving untouched findings discounting Mr. Wood's adaptive deficits and instead choosing to focus on the adaptive strengths that Mr. Wood exhibited in a highly controlled environment, the TCCA engaged in the kind of assessment that *Moore I* and *Moore II* rejected.

D. The TCCA left intact findings that Mr. Wood's adaptive deficits could be explained by family dysfunction, learning disability, ADHD, or a personality disorder.

The habeas court made numerous findings, which the TCCA adopted wholesale, that dismissed Mr. Wood's childhood trauma and learning disabilities as

alternative explanations, rather than risk factors, for his adaptive deficits. *Moore I* squarely rejects this analysis, 137 S. Ct. at 1051, and *Moore II* reiterates it. 139 S. Ct. at 671.

Mr. Wood's school records clearly demonstrate significant adaptive deficits in the conceptual domain. He flunked the first grade, the third grade, and the ninth grade; attended special education classes; and, eventually, dropped out of high school after the first semester of his second attempt at ninth grade. Mr. Wood failed his freshman year of high school, obtaining only five credits out of thirteen available. He failed every quarter of English and every class in the last quarter—English I, Fundamental Math, Art I, and Reading. He failed two quarters of arithmetic and made a "D" in the other. In his second attempt at ninth grade, he again failed English I and Fundamental Math.

Contrary to the scientific consensus of the medical community and the admonitions of *Moore I* and *Moore II*, the TCCA did not excise findings that asserted numerous reasons besides intellectual disability to account for Mr. Wood's abysmal academic performance:

- Mr. Wood's fourth grade teacher agreed that his "troubles in school could be due to factors other than intelligence, including dyslexia or trouble reading, a poor home life, or being held back a grade." Habeas Court's Findings at 42 (FOF No. 113).

- "[T]he credible evidence indicates [Mr. Wood] suffered from emotional problems, hyperactivity, an unstable home life, and frequent absences from school which likely impaired his opportunity for education and contributed to his poor academic performance." *Id.* at 48–49 (FOF No. 154).

- "[Mr. Wood] had a learning disability as a child, not mental retardation. For instance, Mrs. DeArman had to place [Mr. Wood] by her desk to control him. She had to repeat information to [Mr. Wood], which is consistent with [Mr. Wood's] having ADHD. Moreover, her accounts of seeing [Mr. Wood] playing alone in the sand pile indicate that the school did not know how to properly handle [Mr. Wood], which led to gaps in his learning and, consequently, made it difficult for [Mr. Wood] to advance to the next level." *Id.* at 49 (FOF No. 155).

- Mr. Wood's school records indicate "learning problems." *Id.* (FOF No. 156).

- "One teacher stated: '[Mr. Wood] is severely disturbed, paranoid, pathological liar, steals or destroys anything, extremely insecure.' [T]his remark is indicative of a conduct disorder which would impair his educational progress." *Id.*

- "[T]here are numerous reasons [Mr. Wood] could have been retained to repeat a grade, including emotional problems, a learning disorder, conduct disorder, and ADHD. The fact that [Mr. Wood] was retained does not indicate a functional academic deficit due to mental retardation." *Id.* at 51 (FOF No. 165).

Similarly, the habeas court discounted evidence of Mr. Wood's childhood difficulties as "primarily the result of family dysfunction and that his behavior was otherwise normal." *Id.* at 44 (FOF No. 128); *see id.* at 48 (FOF No. 147) ("The Court finds that the troubles [Mr. Wood] faced growing up are not indicative of mental retardation but are primarily due to family dysfunction and a chaotic household."). Mr. Wood's "otherwise normal" behavior as a child included evidence that he was withdrawn, bullied, unable to make friends, spent time with children three or four years younger than he, could not read a clock or tell time, count change, or read a tape measure, and had to be constantly reminded to do his chores. *Id.* at 43–44, 45–47.

Finally, the TCCA left untouched findings attributing Mr. Wood's significant deficits in social and interpersonal skills not to intellectual disability but to antisocial personality disorder:

- "[Mr. Wood] had a few friends in school but often got in fights and had trouble getting along with people because of his antisocial personality disorder. *Id.* at 62 (FOF No. 208).

- "His social and interpersonal skills are impaired by his personality disorder and aggression." *Id.* (FOF No. 209).

- "[Mr. Wood] has antisocial personality disorder. People with antisocial personality disorder can have good social skills. They lack a conscience and empathy, but they develop a knack for communication that can be initially endearing. However, they do not keep friends for long because others eventually become dissatisfied with the repeated manipulation and aggressive behavior." *Id.* (FOF No. 210).

- "[Mr. Wood's] personality disorder notwithstanding, Dr. Allen did not hear or read any evidence indicating [Mr. Wood] had significant deficits in social and interpersonal skills attributable to mental retardation." *Id.* at 63 (FOF No. 211).

- "[Mr. Wood] does not have significant deficits in social and interpersonal skills caused by a lack of intelligence. Any deficits he does display are a result of his antisocial personality disorder and not mental retardation." *Id.* at 67 (FOF No. 226).

If poverty, childhood trauma, and learning disabilities preclude a finding of deficits in social, practical, and conceptual skills, the entire inquiry on adaptive functioning—as well as the prohibition on executing the intellectually disabled in *Atkins*—would be pointless.

E. The TCCA's analysis of Mr. Wood's intellectual functioning based on a "cherry-picked" IQ score and a strict cut-off is irreconcilable with *Hall* and *Moore I*.

The evidence at Mr. Wood's *Atkins* hearing showed that he was administered six IQ tests between 1977 and 2011:

1. 111 IQ: In 1977, when Mr. Wood was 19 years old and entering prison for the first time, an intake sheet from the Texas Department of Criminal Justice (TDCJ) simply listed his IQ as 111. The record contained no information about the kind of intelligence test that TDCJ administered, or whether it was administered individually or in a group setting.

2. 64 IQ: On May 23, 1980, Dr. Dale T. Johnson, a psychologist, administered the Wechsler Adult Intelligence Scale ("WAIS") to Mr. Wood as part of a court-ordered evaluation to determine his competency to stand trial on an earlier offense.

3. 71 IQ: On June 13, 1980, a second court-appointed psychologist, Dr. Richard W. Walker, Jr., administered a short-form WAIS to Mr. Wood.

4. 101 IQ: On August 21, 1980, when Mr. Wood entered TDCJ for the second time, his IQ was listed as 101. As on the 1977 TDCJ intake sheet, the record contained no information about the kind of intelligence test that TDCJ administered, or whether it was group-administered.

5. 67 IQ: In 1988, when Mr. Wood entered prison for the third time, TDCJ listed his IQ as 67. As in 1977 and 1980, the TDCJ summary sheet contained no additional information about the intelligence testing.

6. 75 IQ: In 2011, the State's expert, Dr. Allen, administered the WAIS-IV.

Dr. Allen conceded that nothing was known about the TDCJ tests and the circumstances of their administration that led to IQ scores of 111 and 101. But he nevertheless found those scores probative and used them to challenge the validity of

the 64 IQ score Mr. Wood obtained on the WAIS in May 1980. Dr. Allen insisted that the 111 IQ score accurately represented the "ceiling" of Mr. Wood's intellectual functioning, 4 AH 95, because a person cannot "fake smart" on an intelligence test. 4 AH 68. Consequently, Dr. Allen concluded that an IQ score of 64 or 75 is a "gross underestimation" of Mr. Wood's true intellectual capacity. 4 AH 96.

The habeas court dismissed the WAIS scores from 1980, viewed the 75 IQ score from 2011 as the product of malingering, and found the 101 and 111 TDCJ scores as the most accurate assessment of Mr. Wood's intellectual functioning. *See* Habeas Court's Findings at 12–25 (FOF Nos. 5–73). The habeas court found that Mr. Wood's IQ score of 64 on the WAIS instrument Dr. Johnson administered in 1980 was not credible because, among other reasons: (1) Mr. Wood failed to provide the court with either the tests or the raw data; (2) Dr. Johnson did not perform any effort testing to determine if Mr. Wood was malingering; (3) "Dr. Johnson is no longer living and thus, was not able to testify about the specific testing conducted;" and (4) Mr. Wood's "obtained IQ scores conflict with others in the record demonstrating his IQ is not in the mentally-retarded range." *Id.* at 12–13 (FOF No. 11).

On rehearing, the TCCA agreed that only the 75 IQ score from the test administered by Dr. Allen passed muster. Because this test score had a standard error of measurement range of 71 to 80, the TCCA held that Mr. Wood failed—by a single point—to meet the intellectual functioning prong of the intellectual disability diagnosis. *Wood*, 568 S.W.3d at 680. In reaching its decision, the TCCA relied on the

habeas court's findings, which radically departed from medical consensus, contrary to *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore I*.

In *Hall*, this Court recognized that an IQ score is imprecise and should not be read as a single, fixed, infallible number but as a range determined by a standard error of measurement ("SEM"). *Id.* at 712, 722. *Hall* commanded courts to consider the professional consensus of the medical community in evaluating intellectual disability:

> Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability.

Id. at 722–23 (citations omitted).

In *Brumfield*, the Court found unconstitutional a state court's foreclosing further inquiry into intellectual disability based on Brumfield's reported IQ score of 75. 135 S. Ct. at 2278. The flaws and imprecision in IQ scores make them a poor vehicle for diagnosis. *See Hall*, 572 U.S. at 723. Low IQ scores should lead to a full, multi-factored consideration of adaptive functioning to reduce the risk of wrongful execution. *Brumfield*, 135 S. Ct. at 2278; *see Hall*, 572 U.S. at 722 ("[A]n individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." (quoting *Atkins*, 536 U.S. at 309 n.5)).

Moore I held that "the presence of other sources of imprecision in administering the test to a particular individual" (that may not be accounted for by a test's standard error of measurement) does not allow courts to rule against an *Atkins* claimant on the intellectual deficits prong where the scores suggest that the person's IQ may be below 70. 137 S. Ct. at 1049. The Court thus gave full effect to its recognition in *Hall* that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." 572 U.S. 723.

The TDCJ IQ scores do not meet the AAIDD's professional requirements for assessing intellectual functioning. It is inappropriate to give such inscrutable test scores any diagnostic weight, especially in the context of determining a person's eligibility for execution. For purposes of diagnosing intellectual disability, the AAIDD states that practitioners "should employ an individually administered, standardized instrument that yields a measure of general intellectual functioning." AAIDD–11 at 41.

The TDCJ records provide no information about the IQ scores listed on Mr. Wood's prison intake sheets. There is no record regarding the type of intelligence test administered, who administered the test, whether the test was a standardized instrument designed to obtain a full scale IQ or a screening measure, whether the test was administered individually or in a group setting (where cheating or help could have occurred), or whether Mr. Wood was supervised while taking the test. *See* DSM–5 ("Invalid scores may result from the use of brief intelligence screening tests or group tests…."); *Wood*, 568 S.W.3d at 687 (Alcala, J., dissenting) ("[The majority's opinion]

uncritically assumes the validity of [Mr. Wood's] higher IQ scores without addressing whether the methods used to obtain those scores would still comport with current medical diagnostic criteria."). Notably, weeks before its initial decision denying Mr. Wood's *Atkins* claim, the TCCA rejected findings that relied on identical TDCJ records listing only the applicant's IQ score. The TCCA held that "[w]e know nothing more about this TDCJ entry,…and therefore, given its unknown reliability, will not consider it." *Ex parte Cathey*, 451 S.W.3d 1, 18 n.55 (Tex. Crim. App. 2014).

In contrast to the TDCJ scores, the 1980 WAIS scores are supported by several indicia of reliability. Dr. Marc J. Tassé, Mr. Wood's expert, stated that the IQ scores of 64 and 71 were obtained using the WAIS, considered the "Gold Standard" when assessing intellectual functioning. Affidavit of Dr. Marc J. Tassé at 3 (attached as Ex. E to Application for Postconviction Writ of Habeas Corpus); *see* 5 AH 40 (State expert's testimony that the WAIS is one of "the top two" tests for determining intellectual functioning). The tests were administered individually, not in a group setting. The tests were administered by psychologists. The tests were conducted as part of a court-ordered evaluation of Mr. Wood's competency to stand trial. Dr. Johnson was the court's expert, not a defense expert. Finally, because the 1980 WAIS scores predate Mr. Wood's capital conviction by more than a decade—and the *Atkins* decision by more than 20 years—they also predate any incentive to perform poorly. Texas courts have repeatedly recognized that an inmate's scores prior to the capital murder conviction more accurately reflect IQ. *See*, *e.g.*, *Taylor v. Quarterman*, 498 F.3d 306, 308 (5th Cir. 2007); *Woods v. Quarterman*, 493 F.3d 580, 587 (5th Cir. 2007);

Ex parte Clark, No. 37,288-02, 2004 WL 885583, at *2 (Tex. Crim. App. Mar. 3, 2004). Dr. Tassé concluded that:

> Mr. Wood's performance on both WAIS administrations [in 1980] indicate that he presented with significant deficits in general intellectual functioning. Intelligence is a stable psychological construct. It is highly likely that if Mr. Wood's intellectual functioning was significantly subaverage at age 23, that it would continue to be significantly subaverage today.

Affidavit of Dr. Marc J. Tassé at 7.

In *Hall*, the Court warned that "[a] State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability." *Hall*, 134 S. Ct. at 2001. That risk cannot be understated here. The TCCA's determination that Mr. Wood does not meet the intellectual functioning prong based on the single 75 IQ score from 2011 cannot be reconciled with *Hall* and *Moore I* given: (1) the IQ score relied on by the TCCA meets the *Atkins* requirement of "75 or below," 536 U.S. at 309 n.5; (2) the undisputed evidence of court-ordered IQ tests pre-dating the capital offense and *Atkins* that resulted in scores of 64 and 71 on the WAIS; and (3) the inherent inscrutability and unreliability of the TDCJ IQ scores of 101 and 111. In short, Mr. Wood's intellectual functioning is squarely in the range of intellectual disability. *See Wood*, 568 S.W.3d at 687 (Alcala, J., dissenting) ("[T]he medical community would not find that applicant is not intellectually disabled merely because his low-end result on one IQ test placed him one point above the range for a diagnosis of intellectual disability.").

F. The Problem of the Potentially Innocent *Atkins* Claimant and the Seventh *Briseno* Factor

It is unnecessary to read between the lines to figure out why the TCCA treated Mr. Wood differently from every other *Atkins* claimant seeking reconsideration in light of *Moore I*. The *Wood* concurring opinion put it bluntly: "Applicant is not intellectually disabled. He is a serial killer." *Wood*, 568 S.W.3d at 686 (Newell, J., concurring opinion, joined by Keller, P.J., and Hervey and Keel, JJ.). That stunning concurrence is, of course, founded solely on the last and most prejudicial of the *Briseno* factors:

> Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9.

Although *Moore I* declared the use of the *Briseno* factors unconstitutional, four judges of the six-member majority in Mr. Wood's case concluded on rehearing that the commission of the capital offense alone was sufficient reason to ignore this Court's holding and find that Mr. Wood could not possibly be intellectually disabled. Such a conclusion calls into question the foundation of the majority opinion. Its two primary reasons for refusing to remand for further factual development—(1) that *Moore I* and *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018) (since overruled by *Moore II*), changed only the legal analysis for reviewing *Atkins* claims; and (2) that Mr. Wood had already been given ample opportunity to present his evidence in the habeas

court—apply to *all* of the claimants seeking reconsideration after *Moore I*.[16] Instead, what truly drives the TCCA's singular treatment of Mr. Wood's claim is clearly identified in the concurrence: the nature of the crime alone. *See Wood*, 568 S.W.3d at 683–84 (Newell, J., concurring) (describing details of commission of capital offense).[17]

But what if Mr. Wood is innocent? *Atkins* recognized that the intellectually disabled may be more susceptible not only to wrongful execution but also wrongful *conviction*. The intellectually disabled are more likely to make false confessions, "may be less able to give meaningful assistance to their counsel, and are typically poor witnesses," 536 U.S. at 320 n.25, 320–22—factors that can lead to the conviction of the innocent.

Nearly a century ago, Judge Learned Hand famously observed that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted" but

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[16] The majority also found it prejudicial that Mr. Wood did not present expert evidence. *Wood*, 568 S.W.3d at 681. But, as he pointed out in Part E, *supra*, he did present the affidavit of Dr. Tassé, an expert who stated that Mr. Wood's IQ scores of 64 and 71 on WAIS instruments showed that his intellectual functioning was significantly sub-average. *Cf.* Habeas Court's Findings at 65 (FOF No. 213) (indicating habeas court's reliance on a quotation from a newspaper article attached to State's Motion to Dismiss Successive Application to make its findings).

[17] In her dissenting opinion, Judge Alcala rebuked the concurring judges for their approach:

> It may be suggested that the facts of this offense are so extenuating and horrific that this Court should be permitted to ignore Supreme Court precedent to ensure that bad people are punished regardless of their possible intellectual disability. The determining factor for intellectual disability is not the type of crime or horrific nature of it. Rather, the issue is whether the defendant is intellectually disabled under the appropriate legal framework pursuant to current medical diagnostic criteria. The proper way to handle this case is to remand it to the habeas court so that the court that heard the facts can analyze it under the proper legal framework as set out by the Supreme Court.

Id. at 686 n.1 (Alcala, J., dissenting).

"[i]t is an unreal dream." *United States v. Garrison*, 291 F. 646, 649 (S.D.N.Y. 1923). Today, with the advent of DNA technology that has increased exponentially the reliability of forensic identification over earlier techniques and resulted in the exoneration of hundreds of innocent people, Judge Hand's unfounded optimism has given way to the stark reality of wrongful convictions.

Prior to the *Atkins* hearing, Mr. Wood filed a motion under Chapter 64 of the Texas Code of Criminal Procedure, seeking post-conviction DNA testing of three items of evidence that the prosecution and defense both subjected to independent testing before Mr. Wood's 1992 trial without success. The State did not oppose the motion and, in 2010, the trial court granted testing.

In 2011, Orchid Cellmark completed the DNA testing. Two of the items again came back inconclusive. However, testing of the third item revealed that:

> The partial DNA profile obtained from the cutting from the yellow sun suit (Smith) is a mixture of at least two individuals, including at least one unknown male. David Leonard Wood is excluded as a possible donor to the DNA detected from this sample.

Orchid Cellmark, Report of Laboratory Examination (June 8, 2011).

Judge Richardson ruled that it was not reasonably probable that Mr. Wood would not have been convicted if this exculpatory DNA test result had been presented to the jury. *See* Tex. Code Crim. Proc. art. 64.04. After the Chapter 64 hearing, Mr. Wood sought testing of over 100 additional pieces of evidence that had never been subjected to DNA testing. Despite agreeing to DNA testing of the sun suit (and two other items), the State adamantly opposed any further testing. Mr. Wood repeatedly

asked the habeas court to resolve the DNA testing issues before proceeding with the *Atkins* litigation, to no avail.

In light of the exculpatory DNA result on the yellow sun suit, the State's opposition to DNA testing of additional items in Mr. Wood's is troubling. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (recognizing that the government "is the representative not of an ordinary party to a controversy, but of a sovereignty…whose interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done."). Even more troubling, the State has asked that an execution date be set for October 16, 2019, in an effort to compel Judge Richardson to rule on the DNA motions that have been pending for over two years.

In 1992, five years after the first bodies were discovered in the Northeast Desert of El Paso, Mr. Wood was sentenced to death for the murder of Ivy Williams and the murder of at least one other of five named victims—Desiree Wheatley, Karen Baker, Angelica Frausto, Rosa Maria Casio, and Dawn Smith—during different criminal transactions but pursuant to the same scheme or course of conduct. *See* Tex. Penal Code § 19.03(a)(7)(B). Despite the examination of hundreds of pieces of evidence by the El Paso Police Department (EPPD) and the Texas Department of Public Safety (DPS), no biological material tied Mr. Wood to the six murders. Indeed, EPPD sent many of the items Mr. Wood now seeks to subject to DNA testing to DPS

for forensic review precisely because law enforcement officials believed the items could link Mr. Wood to the crime scenes.[18]

The question of the assailant's identity was not simply *an* issue in this case, it was the *only* issue in dispute. Three years passed from the discovery of the first bodies in the desert until the day Mr. Wood was indicted for capital murder. The critical piece of evidence that the State eventually obtained was not a reluctant eyewitness finally stepping forward, or a confession from Mr. Wood, or biological evidence tying him to one of the crime scenes. It was the testimony of two jailhouse informants, James Sweeney and Randy Wells, who claimed Mr. Wood had confessed to them that he was the Northeast Desert Serial Killer. They came forward shortly after the City Commissioners of El Paso, along with Crime Stoppers, offered a $26,000 reward for information leading to the arrest and conviction of the Northeast Desert Serial Killer.

Jailhouse informant testimony is the leading cause of wrongful convictions in capital cases: Almost half (45.9%) of all wrongful convictions in such cases were due to false informant testimony. *See* Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, Center on Wrongful Convictions, Northwestern University School of Law 3 (2004–05).[19] Jailhouse informant testimony is perhaps the most unreliable form of evidence that

[18] Had this crime occurred today, Mr. Wood would have the right to DNA testing of items collected by law enforcement. In 2013, the Texas Legislature amended Article 38.43, requiring DNA testing of biological evidence in capital trials in which the State is seeking the death penalty. Tex. Code Crim. Proc. art. 38.43(i)-(m).

[19] Available at https://www.aclu.org/other/snitch-system-how-snitch-testimony-sent-randy-steidl-and-other-innocent-americans-death-row (last visited May 6, 2019).

can be introduced at a criminal trial. *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the serious questions of credibility informers pose.") (citation and internal quotation marks omitted).

Jailhouse informant testimony is not only the least credible type of evidence, but it is also among the most persuasive to jurors because jailhouse informants claim to have personally heard defendants confess their guilt to the crimes charged. Introduction of a defendant's confession—from any source—radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime, like David Wood's case. Studies demonstrate that jurors are simply ill-equipped to evaluate the credibility of jailhouse informant testimony and that they consistently give such testimony far more weight than it is due, even if they are aware of the incentives jailhouse informants receive or expect in exchange for their testimony. Moreover, the context in which jailhouse-informant evidence is presented to jurors exacerbates the prejudicial effect of unreliable jailhouse informant testimony. Jailhouse informants are usually prosecution witnesses, and prosecutors bolster such testimony simply by putting the informants on the witness stand, signaling to the jury that they believe the informants' testimony is trustworthy. *See generally*, Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 40 Wake Forest L. Rev. 1375 (2014); Jessica A. Roth, *Informant Testimony and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737 (2016); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cinn. L. Rev. 645 (2004).

After Mr. Wood's conviction and death sentence, Sweeney filed a lawsuit against El Paso County to collect his share of the reward. One year later, he settled the lawsuit and received $13,000.[20]

Wells fared even better than Sweeney. The District Attorney in Eastland County agreed to dismiss capital murder charges against Wells in exchange for his truthful testimony against his two co-defendants and for his truthful testimony against Mr. Wood. Wells breached the deal after his testimony in Mr. Wood's trial: Wells was unable to keep his stories straight when he testified in separate trials against his co-defendants. The Eastland County District Attorney eventually indicted Wells for aggravated perjury for his false testimony against his co-defendants. Despite breaching the plea deal, Wells never served a day in prison for his role in the Eastland County capital murder.

Sweeney and Wells were the linchpin witnesses for the prosecution. They were the final witnesses the prosecution called during its case-in-chief. They shored up the ineffectual "eyewitness" testimony of persons who claimed to have seen Mr. Wood—or someone who looked like him or who drove a pickup truck or a motorcycle like his—with the victims before they disappeared. Sweeney and Wells bolstered the

[20] Sweeney had a reputation as a prison "writ writer." Shortly after Mr. Wood began serving his sentence for the sexual assault of Judith Brown Kelling in 1988, he asked Sweeney to file a lawsuit against El Paso County law enforcement officials for continuing to investigate and harass him as the prime suspect in the Northeast Desert Serial Murders case. By that time, Mr. Wood had received from his sister approximately 200 newspaper articles about the murders. Mr. Wood provided these articles to Sweeney so that he could draft Mr. Wood's lawsuit. Consequently, by the time Sweeney arrived in El Paso to appear before the Grand Jury, he was familiar with the details of the case.

suspect fiber comparison evidence[21] and turned it into a strong forensic link to Mr. Wood. And, most important, Sweeney and Wells provided the prosecution with the legal means of introducing Kelling's otherwise inadmissible extraneous offense testimony to the jury. As the TCCA noted in its direct appeal opinion:

> Testimony revealed that the location, time, and circumstances of the assault upon Kelly[22] were *strikingly similar* to that of the six murders at issue here. The State asserts that the evidence is relevant to prove both identity and the existence of a common scheme or plan.

Wood v. State, No. 71,594 slip op. at 2 (Tex. Crim. App. Dec. 13, 1995) (unpublished) (emphasis added). The TCCA also recognized that Kelling's testimony "demonstrates that the offense against her was committed by a method matching that used in the commission of the crimes charged. The method was so distinctive that it may be considered as the defendant's 'signature.'" *Id.* at 6. The TCCA found that the trial court did not err in admitting Kelling's testimony as evidence of identity, "[g]iven the obvious similarities between the details of the sexual assault upon Judith Kell[ing] and the evidence surrounding the murders…." *Id.* The salient point is that the jailhouse informants provided the *only* testimony about the circumstances of the

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[21] On October 20, 1987, the body of Desiree Wheatley was discovered in the desert. No fibers were found at the crime scene that day. The police did not return to the Wheatley crime scene until October 29. In the interim, Mr. Wood was arrested for the sexual assault of Judith Brown Kelling, and his beige pickup truck was impounded. The police conducted a search of the truck on October 24 and collected orange acrylic fibers from the interior. When police officers returned to the Wheatley crime scene on October 29, they found fibers that were chemically consistent with the fibers from the truck. Adding to concerns about the source of the fibers, the detective in charge of the Wheatley scene testified falsely about the date he found the fibers. He said he returned to the scene with other officers the day after discovering the body. Defense counsel impeached the detective on this point. *See* 58 RR 5717–23

[22] Judith Brown Kelling's name mistakenly appears as "Kelly" in the reporter's record of the capital murder trial.

murders. The jury would never have heard from Kelling without the testimony from Sweeney and Wells. In short, the jailhouse informants enabled the prosecution to secure a conviction—and a death sentence—against Mr. Wood in a case that was *unindictable* before their appearance.[23]

The proper assessment of the strength of the prosecution's case cannot be divorced from the collective wisdom gained from over 400 DNA exonerations. If the State's evidence was based largely or exclusively on the types of evidence that have been a major factor in past wrongful convictions, courts must carefully scrutinize this evidence to determine its reliability. DNA exonerations have repeatedly exposed the unreliability of judicial assessments of the prosecution's evidence. Reviewing courts tend to focus on the perceived persuasiveness of certain categories of evidence (*e.g.*, a confession) or focus solely on the sheer volume of evidence presented at trial (*e.g.*, the number of eyewitnesses). DNA exonerations have proven that this analysis can be fatally flawed and does not consistently expose wrongful convictions. In numerous DNA exonerations, a reviewing court's assessment of the State's case as "overwhelming" was later proven to be inaccurate when subsequent DNA testing showed to a scientific certainty that the defendant was factually innocent. *See*

[23] Additional evidence speaks to Mr. Wood's innocence. First, the State suppressed EPPD memos that showed Mr. Wood was under police surveillance on the very same days that two victims went missing. The surveillance memos indicate that Mr. Wood had no contact with the victims. Second, because of defense counsel's ineffectiveness, the jury never heard that Mr. Wood's beige pickup truck had been in a traffic accident in late July 1987 and sat in an auto salvage yard for the entire month of August—when three victims were last seen. According to the jailhouse informants (and confirmed by Judith Brown Kelling), Mr. Wood *always* used the pickup truck to drive his victims into the desert, tie them to the bumper of the truck, take a shovel from the bed of the truck to dig a grave, and take a blanket from the bed of the truck to place on the ground before sexually assaulting his victims.

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107-09 & n.198 (2008) (citing numerous DNA exoneration cases where the court's pre-DNA assessment of the merits of the case characterized the proof of guilt as "overwhelming").

In a case like Mr. Wood's, in which his conviction was based primarily on the uncorroborated testimony of two jailhouse snitches, the weakness of the prosecution's proof of guilt should give the TCCA pause before it uses the "facts" of the commission of the crime as definitive proof that Mr. Wood is not intellectually disabled.

CONCLUSION

The Court should grant certiorari, vacate the decision below, and remand to the Texas Court of Criminal Appeals with an order that the habeas court hold a new *Atkins* hearing at which Mr. Wood may present additional evidence and the habeas court may make additional findings of fact.

Respectfully Submitted,

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