

A P P E N D I X

Ex parte Wood, __ S.W.3d __, 2018 WL 6521581
(Tex. Crim. App. Dec. 12, 2018)
 (“*Wood II*”)

2018 WL 6521581

Only the Westlaw citation is currently available.
Court of Criminal Appeals of Texas.

EX PARTE David WOOD, Applicant

NO. WR-45,746-02

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Delivered: December 12, 2018

Synopsis

Background: Petitioner, who had been sentenced to death, filed subsequent application for writ of habeas corpus. The Court of Criminal Appeals remanded case. The 171st District Court, El Paso County, No. 58486-171-2, denied relief. The Court of Criminal Appeals again denied relief. Petitioner filed suggestion of reconsideration.

Holdings: On grant of reconsideration, the Court of Criminal Appeals, [Keller](#), P.J., held that:

^[1] petitioner did not meet test for intellectual disability, and

^[2] remand was not warranted for petitioner to put on new evidence or for additional findings of fact.

Relief denied.

[Newell](#), J., filed concurring opinion in which [Keller](#), P.J., and [Hervey](#) and Keel JJ., joined.

[Alcala](#), J., filed dissenting opinion.

Walker, J., dissented.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (2)

^[1]

Sentencing and Punishment

🔑 **Mentally ill or incompetent persons**

Capital murder defendant did not meet test for intellectual disability, which would have precluded imposition of death penalty, where low end of error range for his comprehensive IQ test was above 70 and there was evidence of malingering.

[Cases that cite this headnote](#)

^[2]

Habeas Corpus

🔑 **Sentence and punishment**

Remand was not warranted for habeas petitioner, who had been sentenced to death, to put on new evidence or for additional findings of fact after legal analysis for reviewing intellectual-disability claims had changed; petitioner's defense team failed to offer expert testimony at habeas hearing, evidence relating to intellectual disability was already in record, and there was no reasonable likelihood that habeas court's recommendation to deny relief would change.

[Cases that cite this headnote](#)

ON APPLICATION FOR A WRIT OF HABEAS CORPUS, IN CAUSE NO. 58486-171-2 IN THE 171ST DISTRICT COURT, EL PASO COUNTY

Attorneys and Law Firms

[Gregory W. Wiercioch](#), Houston, [Matthew L. Byrne](#), for David Leonard Wood.

Opinion

[Keller](#), P.J., delivered the opinion of the Court in which

Keasler, Hervey, Yeary, Newell and Keel, JJ., joined.

*1 Applicant filed a subsequent application claiming that he was exempt from the death penalty due to intellectual disability¹ and that due process required that he be given tools and a hearing to more fully establish his intellectual-disability claim. We remanded the case for the habeas court to consider these claims.² Upon receiving the case back from the habeas court, we considered Applicant's allegations and denied relief upon the habeas court's findings and our own review.³ After the Supreme Court's decision in  *Moore v. Texas*,⁴ Applicant filed a suggestion that we reconsider his application on our own initiative. Having reviewed the record in this case in light of  *Moore v. Texas* and our own subsequent decision of  *Ex parte Moore*,⁵ we conclude that no further record development or fact findings are needed and that Applicant is not entitled to relief.

The habeas court's findings of fact were extensive. Some of those findings, 280 through 322, discussed the  *Briseno*⁶ factors and possible alternate causes of any adaptive deficits and are no longer viable after the *Moore* cases.⁷ Nevertheless, the habeas court's denial of relief remains amply supported by findings 1 through 279. We further explain our reasoning below.

IQ Tests

^[1]In findings 1 through 73, the habeas court discussed Applicant's IQ tests. His IQ scores ranged from 64 to 111. However, the only test that the habeas court could conclude was comprehensive and conducted properly was the one conducted by Dr. Thomas Allen in 2011. This test yielded a full scale IQ score of 75,⁸ with a measurement error range of 71 to 80 (-4, +5).⁹ Because the low end of the error range is above 70, Applicant's score does not meet the first prong of the DSM-5 test for intellectual disability (deficits in general mental abilities).¹⁰

Malingering

*2 Moreover, the habeas court believed Dr. Allen's testimony that the validity of Applicant's score of 75 was in question due to strong evidence that Applicant exerted poor effort during the tests.¹¹ This belief was supported by the results of two tests for malingering—results that were not even close to what would be expected to show adequate effort on the tests. This poor effort could affect IQ scores by as much as a standard deviation (fifteen points) or more.¹² Applicant's writing and vocabulary in various letters also appeared to be at odds with his low test scores.¹³ The habeas court found that Applicant was malingering during the test conducted by Dr. Allen and that the IQ score of 75 under-reports Applicant's true intelligence.¹⁴

Because the only test with any validity yielded an IQ score that, even accounting for standard measurement error, is not within the range for intellectually disabled persons and because even that score appears to understate Applicant's intelligence due to the strong evidence of malingering, Applicant has failed the first prong of the intellectual-disability framework, and there is no need to conduct an adaptive-deficits inquiry.¹⁵ But even if we were required to engage in such an inquiry, the habeas court's findings make clear that Applicant also fails to show the requisite adaptive deficits.

Adaptive Deficits

In findings 102 through 279,¹⁶ the habeas court comprehensively discussed Applicant's adaptive functioning. The habeas court concluded that the record fails to support the existence of adaptive deficits in the areas of functional academics,¹⁷ communication,¹⁸ self-care,¹⁹ home living and money management,²⁰ social and interpersonal skills,²¹ use of community resources,²² self-direction,²³ work,²⁴ leisure activities,²⁵ and health and safety.²⁶ The habeas court also explained specifically why the testimony of Applicant's witnesses—a fourth grade teacher, a childhood friend, and Applicant's sister—failed to support a conclusion that Applicant suffered from adaptive deficits.²⁷ On this record and under the habeas court's findings, Applicant has failed to show adaptive deficits indicative of intellectual disability.

Remand for a New Hearing or Findings

^[2]Sometimes we allow an applicant to put on new evidence on remand when there was no reason or opportunity to put on the relevant evidence earlier. There is no reason to allow Applicant to put on new evidence. The *Moore* decisions changed the legal analysis for reviewing intellectual-disability claims in Texas, but Applicant's evidence relating to intellectual disability is already in the record. Applicant had plenty of incentive during the proceedings associated with his second habeas application to present all available witnesses to support his intellectual-disability claim. As the habeas court pointed out, Applicant's defense team was given funds to hire an expert witness but failed to offer expert testimony at the habeas hearing.²⁸ Even now, in his suggestion that the Court grant rehearing on its own initiative, Applicant does not contend that he should be given the opportunity to submit new evidence. A remand to allow the opportunity to further develop the evidence is simply unwarranted.

***3** Nor is a remand warranted for additional findings of fact. Striking findings 280 through 322 would bring the habeas court's findings in compliance with the *Moore* decisions, and given the extensive nature of the fact finding contained in findings 1 through 279, there is no reasonable likelihood that the habeas court's recommendation to deny relief would change, nor would there be any support for such a change in light of those findings.

Conclusion

We grant reconsideration on our own initiative to consider Applicant's case in light of  *Moore v. Texas* and  *Ex parte Moore*.²⁹ We adopt findings 1 through 279, reject findings 280 through 322, and deny relief.

Newell, J., filed a concurring opinion in which *Keller*, P.J., and *Hervey* and *Keel*, JJ., joined. *Alcala*, J., filed a dissenting opinion. *Walker*, J., dissented. *Richardson*, J., did not participate.

Newell, J., filed a concurring opinion in which *Keller*, P.J., *Hervey* and *Keel* JJ., joined.

In deciding that intellectually disabled individuals are categorically exempt from the death penalty, the United States Supreme Court effectively held that a clinical determination of intellectual disability lessens the moral culpability of a defendant. In  *Atkins v. Virginia*, for example, the Court explained that the only disagreement about the execution of intellectually disabled offenders was determining who is, in fact, intellectually disabled.¹ The Court acknowledged that “[n]ot all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.”² Later, in  *Hall v. Florida*, the Court observed that defining “intellectual disability” is necessary to implement the principles and holding of  *Atkins*, including the principle that “[t]he diminished capacity of the intellectually disabled lessens moral culpability.”³ In short, the Court believes that deficiencies attendant to intellectual disability do not warrant exemption from criminal sanctions; they simply diminish the personal culpability of the intellectually disabled.⁴ 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.”⁵

I.

In  *Atkins v. Virginia*, the Court relied upon the “consistency of the direction of change” by state legislatures regarding the execution of intellectually disabled offenders to conclude that the only “serious disagreement” on the issue centered around how to

determine whether a capital-murder defendant is intellectually disabled.⁶ Then, the Court gave two reasons why intellectually disabled offenders should be categorically excluded from execution. First, the Court explained that executing a defendant who has been clinically diagnosed as intellectually disabled does not further the goal of “retribution” normally used to justify imposing the death penalty.⁷ This argument assumes the lessened moral culpability of someone who is intellectually disabled.⁸

***4** The second justification offered by the Court was that executing a defendant diagnosed as a intellectually disabled would not further the goal of “deterrence.”⁹ The Court gave the following explanation:

Exempting the [intellectually disabled] from that punishment will not affect the “cold calculus that precedes the decision” of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of [intellectually disabled] offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.¹⁰

The Court also pointed to the danger that intellectually disabled defendants could face wrongful execution. According to the Court, “[Intellectually disabled] defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”¹¹

II.

But the methodical way in which Applicant, by himself,

carried out his crimes paints the exact opposite picture. Applicant raped and murdered six women between September 4, 1987 and March 14, 1988.¹² All of the victims’ bodies were found buried in shallow graves in the same desert area northeast of El Paso. They were all approximately 30 to 40 yards from one of the dirt roadways in the desert. Four of the bodies were found in various states of undress, indicating that the killer had sexually abused them. Five of the victims were seen by witnesses on the day of their disappearance accepting a ride from a man with either a red Harley-Davidson motorcycle or a beige pickup truck. Applicant owned two vehicles matching those descriptions. Witnesses identified Applicant as the last person seen with four of the victims. Applicant also kept a burnt orange blanket and some shovels in the back of his pickup truck. Orange fibers found on one of the victim’s clothing matched orange fibers taken from a vacuum cleaner bag that Applicant and his then-girlfriend left in their old apartment.

***5** But a seventh victim survived. Judith Kelly, a prostitute and heroin addict, testified that in July 1987 she had been walking outside a convenience store in the northeast part of El Paso when Applicant asked her if she needed a ride. Kelly got in Applicant’s truck, but Applicant did not drive her home. Instead, he stopped at an apartment complex and went inside while she stayed in the truck. When he returned, she noticed a piece of rope hanging from one of his pockets. Applicant drove towards the desert, and, after driving around awhile, stopped the truck, got out, and ordered Kelly out as well.

Kelly saw Applicant get a “brownish red” blanket and shovel out of the back of his truck. Applicant then tied Kelly to the front of his truck while he proceeded to dig a hole behind some bushes. This took ten to fifteen minutes. Applicant then returned with the blanket and forced Kelly to the ground, ripping her clothes. However, Applicant stopped when he heard voices. He ordered Kelly back into the truck and drove to a different location in the desert.

Applicant stopped his truck again, ordered Kelly out, spread the blanket on the ground, and forced Kelly to remove her clothes. He then gagged her, tied her to a bush, and raped her. Immediately afterwards, Applicant stated he heard voices again. He threw his belongings back into the truck and drove away. He left Kelly naked in the desert. His last words to her were “[A]lways remember, I’m free.”

Applicant told his cellmate, Randy Wells, about the

murders. Applicant described the victims as topless dancers or prostitutes and detailed how he would lure each girl into his pickup truck by offering her drugs. Then, according to Applicant, he would drive out into the desert, tie the victim to his truck, and dig her grave. Then, he would tie her to a tree and rape her. James Carl Sweeney, Jr., another cellmate, testified that Applicant had kept news clippings about the murders. Applicant confessed to Sweeney, Jr., that he had committed those murders.

III.

And yet, Applicant argues that he is categorically exempt from the death penalty because, under clinical diagnostic criteria, he is intellectually disabled. As the habeas court noted, Applicant's IQ scores range between 64 to 111. The Supreme Court has recently explained that we are not allowed to look at "sources of imprecision in administering the test to a particular individual" to narrow the test-specific standard-error range.¹³ The Court made this observation to reject the argument that courts can consider factors "unique" to the test-taker when evaluating multiple IQ tests.¹⁴

Here, the habeas court relied primarily upon the test administered by Dr. Thomas Allen resulting in an IQ score of 75 because it was the only test that was comprehensive and conducted properly. The habeas court's observations in this regard seem to place weight on the score of 75 not because of factors "unique" to the test-taker, but because the methodology for that test was the most scientifically reliable. But Dr. Allen also questioned whether that test undersold Applicant's actual IQ because of the possibility that Applicant was malingering. This would seem to rely upon the type of factors "unique" to the test-taker that the Supreme Court believes we should not consider. So would placing less weight on the other tests for similar reasons.

With regard to the evidence of adaptive deficits, the habeas court thoroughly details the evidence related to adaptive deficits in the areas of functional academics, communication, self-care, home-living and money management, social and interpersonal skills, use of

community resources, self-direction, work, leisure activities, and health and safety. Certainly this evidence shows how Applicant has many adaptive *strengths*. But the Supreme Court, in rejecting our reliance upon the infamous " *Briseno* factors," noted that we are supposed to avoid lay perceptions and stereotypes regarding intellectual disability.¹⁵ Further, we are required to focus upon adaptive deficits without placing "undue emphasis" upon adaptive strengths.¹⁶

*6 Here, the habeas court noted a great amount of evidence showing Applicant's adaptive strengths, but a dearth of evidence demonstrating adaptive deficits. If we completely ignore the existence of evidence demonstrating adaptive strengths, then this aspect of the inquiry becomes nothing more than a legal choice to credit only mitigation evidence that provides "a basis for a sentence less than death"¹⁷ regardless of the strength of evidence demonstrating a defendant's moral blameworthiness. It 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.¹⁸ On the other hand, we cannot rely solely upon the testimony of "a fourth grade teacher, a childhood friend, and Applicant's sister"¹⁹ to determine adaptive deficits because that approach is built upon lay stereotypes of the intellectually disabled.²⁰ Ultimately, *Moore* does not prohibit courts from considering adaptive strengths; it only prohibits placing "undue" emphasis upon them.²¹ I do not believe that the habeas court, or this Court, has placed undue emphasis on Applicant's adaptive strengths in this case.

IV.

In the end, I join this Court's opinion because I do not believe Applicant has proven that the categorical exemption from the death penalty applies to him. The Court rejects Applicant's intellectual disability claim by applying current diagnostic standards. But to the extent that Applicant can build a claim of intellectual disability upon the shifting sands of clinical psychological standards detailed in *Moore*, this 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](#). Applicant is not intellectually disabled. He is a serial killer.

With these thoughts, I join the Court.

DISSENTING OPINION

[Alcala](#), J., filed a dissenting opinion.

Unlike this Court's majority opinion that declines to reconsider the -02 habeas application filed by David Wood, applicant, I would instead reopen the application on our own motion and remand it to the habeas court for further proceedings. I conclude that applicant's intellectual disability claim that was rejected by this Court in 2014 must be reconsidered in light of the Supreme Court's recent decision in [Moore v. Texas](#), — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). Because I would order the habeas court to address applicant's instant claim that the prior assessment of his intellectual disability failed to conform with the diagnostic framework endorsed by the Supreme Court in [Moore](#), I respectfully dissent.¹ I explain my conclusion by reviewing applicant's arguments and why I find the majority opinion's analysis unpersuasive.

I. Applicant's Arguments

Applicant asserts that he has significantly subaverage general intellectual functioning and adaptive deficits such that his execution would violate the Eighth and Fourteenth Amendments. Applicant presented evidence at

the 2011 [Atkins](#)² hearing before the convicting court showing that he had IQ scores of 64, 71, and 75, obtained from the administration of WAIS instruments.³ These low IQ test results are consistent with his performance as a young student. He failed the first, third, and ninth grades, he attended special education classes, and he eventually dropped out of school in the ninth grade at the age of seventeen, at which time he was three years behind his peers in school. He could not read a clock or tell time, even as a teenager. His fourth grade teacher testified that in her thirty-five years of teaching approximately 900 students, applicant was the sole person whom she had required to sit next to her desk because he needed her to personally explain things to him repeatedly. Applicant's problems in school included the absence of close friends and his association with children who were several years younger than him.

II. Analysis

*7 In declining to remand this claim to the habeas court for further consideration, this Court's majority opinion employs the same type of incorrect intellectual disability analysis that it has been conducting mistakenly for over a decade since issuing its opinion in [Ex parte Briseno](#), 135 S.W.3d 1 (Tex. Crim. App. 2004). The instant majority opinion continues to selectively focus on only the IQ scores and adaptive strengths that would support a determination that applicant is not intellectually disabled, despite current medical standards suggesting that this is an inappropriate approach to intellectual-disability determinations.

This Court's majority opinion cherry picks certain IQ scores and treats those scores as dispositive evidence of a lack of intellectual disability. This Court's majority opinion acknowledges that applicant's IQ scores range from 64 to 111, but it dismisses low IQ scores that would indicate subaverage general intellectual functioning as the product of malingering. It uncritically assumes the validity of applicant's higher IQ scores without addressing whether the methods used to obtain those scores would still comport with current medical diagnostic criteria. And perhaps more importantly, this Court's cherry-picked IQ score of 75 provides a worst-

case scenario IQ score of 71 based on the “measurement error range.” This score is only one point above the cutoff score that would place someone in the range of intellectually disability, when the low end of the IQ score error range is 70 or below. Under the current medical diagnostic framework, it is inappropriate to decide that someone is not intellectually disabled by using a strict cutoff score taken from a cherry picked IQ test.

I agree with applicant that  *Hall* recognized that an IQ score is imprecise and should not be read as a single, fixed, infallible number but rather as a range determined by a standard error of measurement. See  *Hall v. Florida*, 572 U.S. 701, 712, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). I also agree that  *Hall* instructed courts to consider the professional consensus of the medical community in evaluating intellectual disability and that the 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. Rather, looking at the range of scores, I conclude that it is necessary to consider whether there is also evidence of adaptive deficits before it could be ultimately determined whether applicant is intellectually disabled.  *Id.*

Furthermore, the habeas court’s fact findings regarding adaptive deficits are inadequate even if this Court disregards those findings that directly discuss  *Briseno*. This Court’s majority opinion acknowledges that the habeas court’s fact findings and conclusions took into account diagnostic standards that are no longer accepted by the medical community, as well as considered the non-medical  *Briseno* factors that the Supreme Court expressly rejected in  *Moore*. See  137 S.Ct. at 1051. The majority opinion suggests that there is enough information in the fact findings numbered one through 279 that it adopts in this case and that it suggests are not based on the  *Briseno* factors. I respectfully disagree because, despite the majority opinion’s suggestion, these findings adopted by this Court’s majority opinion improperly focus on applicant’s adaptive strengths and his

abilities in a controlled prison setting. For example, the habeas court found that someone with intellectual disability would not be able to “write coherent, correct sentences with decent punctuation,” use sophisticated “words like ‘specialist,’ ” or communicate lucid thoughts in written letters.⁴ However, clinical experts have counseled against viewing the presence of adaptive strengths as evidence of the absence of adaptive weaknesses. Further, they caution against considering adaptive strengths arising in controlled settings like a prison. Additionally, the habeas court found 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.”⁵ The Supreme Court in  *Moore* expressly recognized that other mental or physical impairments are common comorbidities in intellectually disabled persons and are “not evidence that a person does not also have intellectual disability.”  *Moore*, 137 S.Ct. at 1051. Because the convicting court’s fact findings and conclusions fail to comport with the current medical diagnostic framework, this Court’s majority opinion should not adopt them, and it should instead remand this case for further evidentiary development and factual findings under the proper standard.

III. Conclusion

***8** Because the Court declines to remand this case to the convicting court for fact findings and conclusions of law that comport with the current medical diagnostic framework, I respectfully dissent.

All Citations

--- S.W.3d ---, 2018 WL 6521581

Footnotes

¹ See  *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

² *Ex parte Wood*, No. WR-45,746-02, 2009 WL 10690712, 2009 Tex. Crim. App. Unpub. LEXIS 841 (Tex. Crim. App. August 19, 2009)

(not designated for publication).

3 *Ex parte Wood*, No. WR-45,746-02, 2014 Tex. Crim. App. Unpub. LEXIS 1055 (Tex. Crim. App. November 26, 2009) (not designated for publication).

4  — U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017).

5  548 S.W.3d 552 (Tex. Crim. App. 2018).

6  *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

7 Findings 280-322 may well contain some observations that are relevant to the issue of intellectual disability, but we need not address whether any portion of them may be salvaged because the habeas court's denial of relief remains amply supported even without all of them.

8 The verbal comprehension score was 80 and the perceptual reasoning score was 86.

9 See Finding 35. Dr. Allen testified that the standard measurement error is not automatically plus or minus five. He explained that the standard measurement error is "calculated for you in the manual" and depends on statistics.

10 See  *Moore*, 548 S.W.3d at 560 ("A score is indicative of intellectual disability if it is 'approximately two standard deviations or more below the population mean, including a margin for measurement error (*generally* +5 points).' When the standard deviation of the test is 15 and the mean is 100, a score that is two standard deviations below the mean will be "a score of 65–75 (70 ±5).") (emphasis added). See also Finding 35.

11 See Findings 40-60.

12 See Finding 37. Dr. Allen testified that it would be inappropriate to add 15 points to an IQ score to account for lack of effort in the testing, but he considered this lack of effort and its possible effect to be a legitimate concern regarding the validity of Applicant's score of 75. We likewise decline to add points to an IQ score due to lack of effort but consider it as undermining the validity of the score as an indicator of intellectual disability.

13 See Findings 61-68.

14 See Finding 70.

15 Cf.  *Moore*, 548 S.W.3d at 562 ("Because the score of 74 is within the test's standard error of measurement for intellectual disability (being within five points of 70), we must assess adaptive functioning before arriving at a conclusion regarding whether Applicant is intellectually disabled.").

16 Findings 74 through 101 discussed and rejected application of the "Flynn effect," both as a general matter and—even assuming its general validity—as applied to Applicant's case.

17 Findings 153-68.

18 Findings 169-89.

- 19 Findings 190-95.
- 20 Findings 196-207.
- 21 Findings 208-26.
- 22 Findings 227-29.
- 23 Findings 230-42.
- 24 Findings 243-64.
- 25 Findings 265-72.
- 26 Findings 273-79.
- 27 Findings 105-52.
- 28 Finding 5 (“Additionally, although Applicant was provided with funds for an expert, and actually used those funds, he did not call his own expert. Instead, Applicant attempted to impeach the State’s expert, Dr. Allen, and develop his claim thorough Allen’s examination of Applicant. Dr. Allen agreed with very little, if any of Applicant’s assertions.”).
- 29 *See supra* at nn.4-5.
- 1  [Atkins v. Virginia](#), 536 U.S. 304, 317, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).
- 2  *Id.*
- 3  [Hall v. Florida](#), 572 U.S. 701, 709, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014).
- 4  [Atkins](#), 536 U.S. at 318, 122 S.Ct. 2242.
- 5  [Moore v. Texas](#), — U.S. —, 137 S.Ct. 1039, 1054, 197 L.Ed.2d 416 (2017) (Roberts, C.J., dissenting).
- 6  [Atkins](#), at 315-17, 122 S.Ct. 2242.
- 7  *Id.* at 319, 122 S.Ct. 2242.
- 8  *Id.* (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution.”).

9  *Id.* (“With respect to deterrence—the interest in preventing capital crimes by prospective offenders—it seems likely that “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.” ’ ’”).

10  *Id.* at 319-20, 122 S.Ct. 2242 (internal citations omitted). In this regard, the Court appears to have justified its categorical exemption upon the same type of lay perceptions of intellectual disability that should have “spark[ed] skepticism.” See  *Moore*, 137 S.Ct. at 1051-52.

11  *Atkins*, 536 U.S. at 320-21, 122 S.Ct. 2242.

12 *Wood v. Quarterman*, 503 F.3d 408, 410 (5th Cir. 2007), *cert. denied*, 552 U.S. 1314, 128 S.Ct. 1874, 170 L.Ed.2d 752 (2008).

13  *Moore*, 137 S.Ct. at 1049.

14  *Id.*

15  *Id.* at 1051-52.

16  *Id.* at 1052 n.9.

17 See  *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (quoting  *Lockett v. Ohio*, 438 U.S. 586, 607, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)) (effectively defining what constitutes mitigating evidence by holding that the Eighth and Fourteenth Amendments require that a jury not be precluded from considering mitigating evidence).

18  *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242.

19 Majority op. at —.

20  *Moore*, 137 S.Ct. at 1051-52 (rejecting  *Briseno’s* reliance upon lay perceptions of intellectual disability because the medical profession has endeavored to counter lay stereotypes of the intellectually disabled).

21 See  *Id.* at 1052 n.9.

1 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.

2  *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

3 Other testing placed applicant’s IQ at 111, 101, and 67.

4 Findings 62-66.

5 Findings 113-115.