No. 21-____

IN THE

Supreme Court of the United States

ERIC DEWAYNE CATHEY,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

This petition, like those in *Moore* v. *Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), and *Moore* v. *Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"), arises from a decision of the Texas Court of Criminal Appeals ("TCCA") rejecting a trial court's conclusion that an individual is intellectually disabled and therefore may not be put to death by the state. In *Moore I*, this Court vacated the TCCA's decision, concluding that the TCCA's framework for assessing intellectual disability impermissibly disregarded medical criteria in favor of lay analysis. On remand, the TCCA—employing essentially the same reasoning *Moore I* rejected—reinstated the sentence this Court had vacated, prompting the Court to summarily reverse. *Moore II*, 139 S. Ct. at 672. As the Chief Justice (who dissented in *Moore I* but then concurred in *Moore II*) explained, the TCCA's opinion on remand simply "repeated the same errors" *Moore I* had already "condemned." *Id.* (Roberts, C.J., concurring).

In this case, as in both *Moore* cases, the TCCA again rejected the detailed factfindings and legal conclusions of a state habeas trial court, disregarded medically accepted standards, and determined based on lay analysis that the petitioner is not intellectually disabled. This time, the TCCA did so in less than two pages, citing no medical authority and instead relying overwhelmingly on its own, pre-*Moore I* opinion rejecting petitioner's claim. The question presented is whether, in so doing, the TCCA yet again contravened the Eighth and Fourteenth Amendments and this Court's precedents.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Ex Parte Eric DeWayne Cathey*, No. WR-55, 161-02, Court of Criminal Appeals of Texas. Judgment entered April 28, 2021.
- *Ex Parte Eric DeWayne Cathey*, No. 713189-B, 176th Judicial District Court of Harris County, Texas. Judgment entered June 15, 2020.
- *Eric DeWayne Cathey* v. *Lorie Davis*, No. H-15-2883, U.S. District Court for the Southern District of Texas. Stayed and administratively closed July 28, 2017.
- *In re: Eric DeWayne Cathey*, No. 16-20312 (consolidated with No. 16-70015), U.S. Court of Appeals for the Fifth Circuit. Judgment entered May 11, 2017.
- *In re: Eric DeWayne Cathey*, No. 15-20420, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 21, 2015.
- *Eric DeWayne* v. *Texas*, No. 14-8305, Supreme Court of the United States. Judgment entered June 22, 2015.
- *Eric DeWayne Cathey* v. *Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, No. 05-70003, U.S. Court of Appeals for the Fifth Circuit. Judgment entered April 7, 2006.
- *Eric DeWayne Cathey* v. *Doug Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, No. H-04-1306,

U.S. District Court for the Southern District of Texas. Judgment entered December 23, 2004.

- *Ex Parte Eric DeWayne Cathey*, No. WR-55, 161-01, Court of Criminal Appeals of Texas. Judgment entered April 2, 2003.
- *Eric Dwayne Cathey* v. *Texas*, No. 99-6206, Supreme Court of the United States. Judgment entered January 10, 2000.
- *Eric DeWayne Cathey* v. *The State of Texas*, No. 72772, Court of Criminal Appeals of Texas. Judgment entered April 21, 1999.

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"[T]he Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability." *Hall* v. *Florida*, 572 U.S. 701, 704 (2014) (quoting *Atkins* v. *Florida*, 536 U.S. 304, 321 (2002)). Interpreting those provisions, this Court has repeatedly held that in the context of assessing a claim of intellectual disability, a court's determinations must be "informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721.

This petition asks that this Court once again instruct the Texas Court of Criminal Appeals ("TCCA") that adherence to these precedents is mandatory, not optional. This is not the first time the Court has had to do so. In *Moore* v. *Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), the Court vacated a TCCA decision rejecting an intellectual-disability claim, holding that the analytical framework the TCCA had long employed to assess such claims was "an invention of the [T]CCA untied to any acknowledged source," "[n]ot aligned with the medical community's information," and unacceptably prone toward the unconstitutional execution of the disabled. *Id.* at 1044. Two years later, after the TCCA reinstated the very capital sentence *Moore I* had vacated, the Court granted certiorari and summarily reversed, observing that "with small variations," the TCCA's opinion on remand simply "repeat[ed] the analysis" *Moore I* had "found wanting." *Moore* v. *Texas*, 139 S. Ct. 666, 670 (2019) (per curiam) ("*Moore II*"). Indeed, despite having dissented from *Moore I*, the Chief Justice joined *Moore II*'s majority for *stare decisis* reasons, writing separately to explain that the TCCA's decision on remand simply "repeated

the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Id.* at 672.

The decision below confirms that the TCCA still has not gotten the message. The petitioner, Eric DeWayne Cathey, challenged his death sentence on the ground that he is intellectually disabled and his execution would therefore violate the Constitution. Two state habeas trial courts agreed, issuing detailed fact-findings of over seventy-five pages each under the relevant clinical frameworks endorsed by the American Association of Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA"), along with extensive legal reasoning to support their shared conclusion that Cathey is intellectually disabled.

Specifically, those trial courts found:

- that Cathey's intellectual functioning, as measured primarily by an IQ test administered to Cathey, before his capital murder trial, is consistent with intellectual disability;
- that, based on sworn testimony from individuals who knew Cathey in his youth and psychologists who evaluated him, as well as the results of a neuropsychologist-administered Vineland-II Adaptive Behavior Scales ("Vineland-II") test,[1]

[1] The Vineland-II is a standardized, universally accepted instrument used to assess adaptive behavior. *See* J. Gregory Olley, "Adaptive Behavior Instruments" in E. A. Polloway (ed.), *The Death Penalty and Intellectual Disability* 187, 189-193 (2015) (identifying the Vineland-II as one of the four preferred instruments available for the assessment of adaptive behavior and noting that "[t]he Vineland-II has the advantage of containing items that reflect more current community functioning" than the three identified competing scales); *id.* at 192 (Vineland-II "allows

Cathey suffers from adaptive deficits such as, *inter alia*, linguistic limitations and difficulties expressing himself, an inability to understand numerical concepts such as time and money, limited functioning in reading and writing, gullibility, naivety, and a lack of basic skills required for daily living; and

- that those intellectual and adaptive deficits appeared when Cathey was a minor.

The decision now on review comprises two pages, is bereft of any citation to medical authority, and relies almost exclusively on analysis from the TCCA's previous, pre-*Moore I* decision denying the petitioner's claim. In it, the TCCA threw out the habeas courts' factfindings and rejected their considered judgments. Specifically, the TCCA (1) disregarded uncontroverted expert evidence establishing that Cathey exhibits significantly subaverage intellectual functioning, instead finding—contrary to accepted diagnostic frameworks and this Court's decision in *Hall*—that a greater-than-70 IQ score conclusively demonstrates the opposite; (2) declined to credit undisputed evidence regarding Cathey's adaptive deficits because certain other evidence allegedly suggests that he might possess limited adaptive strengths, even though, as this Court held in *Moore I* and *Moore II*, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," not adaptive strengths, *see*, *e.g.*, *Moore II*, 139 S. Ct. at 668 (citing *Moore I*, 137 S. Ct. at 1050); and (3) rejected the results of the clinical gold-standard test for evaluating adaptive deficits—the Vineland-II—because it relies

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an opportunity to explore adaptive functioning in greater depth" than the three identified competing scales).

on testimony from individuals close to the subject, even though that is undisputedly what established diagnostic procedure requires.

The TCCA's continuing failure to adhere to this Court's precedents may mean death for an individual whom two separate state habeas courts, relying on extensive expert testimony and accepted medical frameworks, have concluded is intellectually disabled. Neither that result nor the TCCA's continued recalcitrance regarding *Atkins* and *Hall* can be squared with this Court's "suprem[acy]." *See* U.S. Const. art. III. As in *Moore II*, the Court should grant the petition and summarily reverse the TCCA's judgment. Alternatively, the Court should grant the petition, conduct plenary review, and reverse.

OPINIONS BELOW

The 2021 opinion of the Texas Court of Criminal Appeals, reversing the state habeas court's conclusion that Cathey is intellectually disabled for the second time, is not published. It is available at 2021 WL 1653233 and reproduced at page App. 1a of the Appendix to this petition ("App.").

The 2020 Findings of Fact and Conclusions of Law of the 176th Judicial District Court of Harris County, Texas, concluding that Cathey is a person with intellectual disability who cannot be executed, is unreported and reproduced at App. 4a.

The 2018 order of the Texas Court of Criminal Appeals, remanding Cathey's state habeas proceedings to the trial court for a new set of findings and conclusions on Cathey's *Atkins* claim, is not published. It is available at 2018 WL 5817199 and reproduced at App. 116a.

The 2014 opinion of the Texas Court of Criminal Appeals, reversing the first state habeas court to evaluate Cathey's *Atkins* claim, is available at *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014) and reproduced at App. 120a. The partial concurring opinion of TCCA Judge Price to the TCCA's 2014 opinion is reproduced at App. 175a.

The 2012 Findings of Fact and Conclusions of Law of the 176th Judicial District Court of Harris County, Texas, concluding that Cathey is a person with intellectual disability who cannot be executed, is unreported and reproduced at App. 177a.

JURISDICTION

The Texas Court of Criminal Appeals issued its final judgment on April 28, 2021. On March 19, 2020, this Court issued a standing order extending the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment. The effect of that order was to extend the deadline for filing this petition to September 24, 2021. 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 punishment 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. Pre-*Moore I* Proceedings.

1. Proceedings In The Trial Court.

In 1997, Cathey was convicted of capital murder and sentenced to death. In 2008, Cathey sought state habeas relief based on this Court's subsequent holding in *Atkins*, *supra*, that the Eighth and Fourteenth Amendments forbid execution of the intellectually disabled.

In 2010, at the TCCA's behest, a state habeas trial court held a five-day evidentiary hearing to determine whether Cathey is intellectually disabled. The court heard live and written testimony from experts and family members regarding Cathey's intellectual and adaptive functioning. App. 184a-186a ¶¶ 8-11. The evidence revealed that Cathey scarcely spoke as a child, rarely initiated conversation, and was bullied by other children due to his poor communication skills. App. 244a-245a ¶¶ 130-131, 257a-258a ¶¶ 157-158. Family members reported that Cathey "didn't catch onto things quickly" and did not "unders[tand] lots of the things that people said to him," such that they routinely had to repeat themselves when addressing him. App. 241a-242a ¶ 124, 245a ¶ 132. Cathey's school records reinforced the point, demonstrating that he "performed poorly" in academic settings, including receiving multiple "D" grades and scores below 70%. App. 246a-247a ¶¶ 135. Cathey's ninth-grade standardized test scores showed that he underperformed by approximately 2-4 grade levels in all measured subjects before dropping out of school that year. App. 247a-248a ¶¶ 136-138. These issues continued throughout Cathey's adolescence: His former spouse, who moved in with him during his late teens, had to

teach him how to clean the house, wash his clothes, flip a hamburger, and use a microwave. App. 261a-262a ¶¶ 166-167. She also left "post-it notes all over the place telling [Cathey] what to do and when to do it," leaving the walls "completely yellow with post-it notes." App. 261a-262a ¶¶ 167. And even as an adult, Cathey was unable to manage his personal finances: He never had a bank account, relied on his former spouse to manage his money, and, once he arrived in prison, depended on fellow inmates to help him manage his commissary account. App. 245a-246a ¶¶ 133-134.

Based on these findings and others, and in express reliance on the governing diagnostic frameworks,[2] the habeas court concluded that Cathey is intellectually disabled according to what this Court has described as "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Hall*, 572 U.S. at 708-10; App. 187a ¶ 13, 279a-280a ¶¶ 206-210. That definition "identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—*i.e.*, a score of roughly 70—adjusted for the standard error of measurement); (2) adaptive deficits (the inability to learn basic skills and adjust behavior to changing circumstances), and (3) the onset of these deficits while still a minor." *See*, *e.g.*, *Moore I*, 137 S.

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[2] Specifically, these are the frameworks set forth in the 11th edition of the AAIDD clinical manual, *see* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ("AAIDD-11"), and the 4th edition of the *Diagnostic and Statistical Manual of Mental Disorders* published by the APA.

Ct. at 1043 (quoting, *inter alia*, *Hall*, 572 U.S. at 711; AAIDD-11 at 27).

Regarding Cathey's intellectual functioning, the habeas court relied principally on Cathey's IQ score, viewed in conjunction with other evidence and analyzed as it would have been by an expert in the field. That score resulted from a Wechsler Adult Intelligent Scale-Revised ("WAIS-R") test administered to Cathey in December 1996, before his capital murder trial. App. 229a ¶ 95

Although Cathey's scaled score on that test was a 77, the habeas court took into account two recognized diagnostic criteria when evaluating it. First, in reliance on widespread medical agreement, the habeas court acknowledged the "standard of error of measurement," which recognizes (as this Court later would in *Hall*) that because "[a]n individual's IQ score on any given exam may fluctuate for a variety of reasons," IQ test "scores should be read not as a single fixed number but as a range" that includes roughly five points on either side of the score obtained. *See* App. 188a-189a ¶¶ 15, 15 n.4 (quoting AAIDD-11 at 39-40). Thus, rather than viewing Cathey's score as 77, the habeas court viewed it as a ten-point range. App. 229a-230a ¶¶ 96-99.

Second, the habeas court interpreted the score in light of the "Flynn effect"—another clinically accepted lens through which to view the numerical result of a given test. The authoritative diagnostic materials explain the Flynn effect as follows. IQ tests are graded on a curve, which is developed by administering the test to a sample population. *See* AAIDD*, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports* 23 (2012) ("AAIDD-11 User's

Guide"). The "average" performance within that population becomes a 100 on the test. *Id*. However, experts have observed that as each particular test ages, the average score increases by approximately three tenths of a point per year. *Id*. That observed phenomenon is referred to as the Flynn effect, and its result is that (for example) achieving a score of 100 on a ten-year-old test reflects a sub-average IQ, not an average one. *Id*.

When the TCCA ordered the habeas court to hold a hearing on Cathey's claim, it specifically instructed that court to receive and evaluate evidence concerning the Flynn effect's validity, reliability, and applicability. *See Ex parte Cathey*, 2008 WL 4927446 (Tex. Crim. App. Nov. 18, 2008) (per curiam). After hearing and weighing that evidence, the habeas court concluded that an expert viewing Cathey's WAIS-R score would take the Flynn effect into account. App. 228a ¶ 93. The test was administered to Cathey in 1996—18 years after it was curved. App. 229a ¶ 96. As noted, Cathey's score range was between 72 and 82, which would have placed him slightly within two standard deviations of "average" intellectual functioning if the test had been taken in 1978. However, the habeas court found, based on the diagnostic manuals and expert testimony regarding the Flynn effect, that a medical expert would have viewed Cathey's range as encompassing scores that are more than two standard deviations from the mean. For that reason, and on the basis of other evidence reinforcing the conclusion that Cathey's IQ was within the range qualifying him as intellectually disabled, the habeas court found that Cathey suffers from deficits in intellectual functioning. App. 229a-233a ¶¶ 96-107.

The habeas court also found that Cathey suffered adaptive deficits. It based that conclusion largely on undisputed record evidence in the form of affidavits, school records, and fact and expert testimony. *See* App. 244a-266a ¶¶ 129-174. Specifically, the court concluded that the record established that Cathey had deficits in adaptive areas such as language, reading and writing, and conceptual areas such as money, time, and numbers, App. 245a-247a ¶¶ 133-135; that he was gullible and naïve, App. 254a-256a ¶¶ 151-152; that he possessed low self-esteem as a result of adaptive deficits he suffered as a child and his resulting inability to avoid being victimized by more developmentally advanced children, App. 256a-258a ¶¶ 155-158; that he "was severely impaired in terms of interpersonal relationships," never had friends of his own, and interacted abnormally even with his wife (such as by "jump[ing] out at [her] when it was dark and when [she] was in the house and thought [she] was alone," despite her repeated disapproval of such behavior), App. 258a-259a ¶¶ 159-161; and that he lacked practical skills relating to such areas as daily living, basic safety, and the ability to hold a job, App. 261a-266a ¶¶ 166-174.

The habeas court's conclusion regarding adaptive deficits found further support in a Vineland-II adaptive-behavior examination administered by Dr. Jack Fletcher.[3] Consistent with professional best practices,

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[3] Dr. Fletcher is the University Chair in Psychology at the University of Houston and a clinical neuropsychologist with specific expertise in classification and measurement issues pertaining to the diagnosis of people with intellectual disabilities. App. 197a-198a ¶ 33. For additional background regarding the Vineland-II, see *supra* at 2-3 n.1.

Dr. Fletcher conducted his assessment by interviewing respondents deeply familiar with Cathey in his youth: one of his older sisters and his former spouse. App. 238a-239a ¶ 118, 240a-241a ¶¶ 122-123. Dr. Fletcher learned from these interviews that, as a child, Cathey was easily distracted and would believe anything he was told, had difficulty expressing himself, and was able to participate only in the simplest games. App. 241a-242a ¶ 124. As an adult, Cathey continued to have difficulty communicating, and he was so developmentally challenged that his spouse at the time did not trust him to watch their children by himself. App. 242a-243a ¶ 125. Based on these facts and others, Dr. Fletcher's examination placed Cathey's adaptive behavior at or below the first percentile, App. 241a-243a ¶¶ 124-125, and Dr. Fletcher testified to the habeas court that in his expert opinion, Cathey has deficits in adaptive functioning consistent with intellectual disability, App. 243a ¶¶ 126-127. The habeas court credited that testimony. App. 243a ¶ 128.

Based on those findings, the court found that Cathey suffered intellectual-functioning deficits and adaptive deficits that appeared while he was still a minor. App. 269a ¶¶ 181-182, 279a ¶ 208. On that basis, it concluded that the evidence showed that Cathey is intellectually disabled and, accordingly, that his death sentence violates the Eighth and Fourteenth Amendments. App. 280a ¶ 210.

2. The TCCA's Decision.

In 2014, the TCCA rejected the habeas court's findings and conclusions. First, despite asserting that factfinders "may 'consider' the concept of the 'Flynn Effect' in assessing the validity of a WAIS or WAIS–R IQ test score," App. 124a, the TCCA refused to apply

the Flynn effect to Cathey's score. App. 154a. Thus, while the TCCA conceded that "the fact that applicant took an outmoded version of the WAIS-R in 1996 might tend to place his actual IQ in a somewhat lower portion of th[e] 72-82 range [resulting from application of the standard error of measurement, *see supra* at 8]," it reasoned that "the fact that he took the test under adverse circumstances, while in jail and awaiting trial in a capital murder case, might tend to place his actual IQ in a somewhat higher portion of that 72-82 range." App. 154a. Based on that balancing, it held that "there is no reason to think that applicant's obtained IQ score of 77 is inaccurate." App. 154a.

Second, the TCCA analyzed adaptive deficits, relying principally on a series of non-clinical, lay considerations that it had first identified in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), and that this Court would later invalidate in *Moore I*.[4] As relevant here, the TCCA analyzed whether family members, teachers, and employers thought Cathey was intellectually disabled during his developmental period, and identified trial testimony it believed proved they did not. This included trial testimony from: (i) Cathey's older sister that she thought Cathey was "average" or a "nerd" growing up because he "read a lot of books, stayed to himself a lot, [and] did a lot of drawing," App. 129a; (ii) Cathey's former teacher that Cathey functioned "'slightly' below grade level" and was well-liked by classmates, App. 164a; and (iii) Cathey's former brother-in-law—who employed Cathey "off and on" between the ages of 20 and 23 at

[4] Reliance on the *Briseno* factors was one of "at least five errors" the TCCA committed in the decision this Court reviewed in *Moore I*. *See Moore II*, 139 S. Ct. at 668-69.

an auto battery-replacement shop—that he left Cathey in charge of the shop when making deliveries. App. 129a-130a. The TCCA further concluded, based on its own analysis, that Cathey's school records did not paint "the academic portrait of an intellectually disabled person." App. 164a.

Third, regarding the Vineland-II, the TCCA declined to credit Dr. Fletcher's results because, in the TCCA's opinion: (i) the Vineland-II test was not designed to be administered "retrospectively" (*i.e.*, it was not appropriate for Dr. Fletcher to ask the respondents to recall Cathey's behavior in his youth); (ii) the Vineland-II respondents—Cathey's older sister and former spouse—were "motivated to misremember" Cathey's adaptive abilities; and (iii) Cathey's sister's responses during her Vineland-II interview were, in the TCCA's view, "contradicted by her trial testimony" that Cathey was "'average,' 'nerdy,' and read books all the time." App. 157a.

Judge Price concurred in the result, yet declined to join the part of the CCA's opinion addressing adaptive deficits. He noted that he "continue[d] to disagree with the [TCCA]'s decidedly non-diagnostic approach to evaluating the adaptive-deficits prong of the standard for determining intellectual disability," and that because of this Court's reaffirmance in *Hall*, *supra*, that analysis of intellectual-disability claims must be informed by clinical standards, "the writing [was] on the wall for the future viability" of the TCCA's framework. App. 175a-176a.[5]

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[5] Judge Price was no longer on the TCCA at the time the decision on review here was issued.

B. Proceedings On Review.

In 2017, this Court decided *Moore I*, holding—as Judge Price had predicted it would—that the TCCA's framework for determining intellectual disability was constitutionally invalid. *See* 137 S. Ct. at 1044. In light of that holding, Cathey asked the TCCA to reconsider its rejection of his claim, and the TCCA remanded Cathey's case to a second state habeas court to analyze his intellectual disability claim anew. App. 116a-119a.[6]

1. Proceedings In The Trial Court.

Pursuant to the TCCA's instruction, a second state habeas trial court conducted a hearing, receiving additional expert testimony and other scientific evidence regarding both Cathey's specific circumstances and the medical community's accepted diagnostic practices. This additional evidence included guidance from the updated AAIDD and APA manuals, additional medical literature published since the first hearing discussing topics like the Flynn effect, and retrospective adaptive behavior assessments, and additional testimony from Cathey's expert, Dr. Fletcher, and the State's expert, Dr. Proctor, on whether they had changed their opinions on Cathey's intellectually

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[6] As a result of the TCCA's remand order, Cathey's ongoing federal habeas challenge was stayed. Prior to the stay, in evaluating whether Cathey had made a prima facie showing of a meritorious *Atkins* claim sufficient to warrant a successive habeas petition, the Fifth Circuit wrote that the risk of executing a person with an intellectual disability "lurks here," and that the "variety of evidence" that Cathey put forth "warrant[s] a fuller exploration by the district court." *In re Cathey*, 857 F.3d 221, 236-40 (5th Cir. 2017).

disability since 2010. *See, e.g.*, App. 42a-46a ¶ 76, 110a-112a ¶¶ 214-222.

On June 15, 2020, the second habeas court issued an 81-page order setting forth factual findings and conclusions of law, again recommending relief. The court made clear, as had the first trial court, that its analysis of Cathey's *Atkins* claim was grounded in the AAIDD's and APA's diagnostic methodologies. App. 13a-14a ¶ 21, 102a-104a ¶¶ 192-199. And it concluded, as had the first court, that Cathey is a person with intellectual disability who cannot constitutionally be executed by the state. App. 112a-113a ¶¶ 1-5.

2. The TCCA's Decision.

In 2021, the TCCA again reversed, this time in an unpublished, *per curiam* opinion totaling fewer than 500 words. Regarding intellectual functioning, the TCCA again purported to acknowledge "that factfinders may consider the concept of the 'Flynn Effect' in assessing the validity of a WAIS-R IQ test score," *see also supra* at 11-12, but nevertheless—without any explanation apart from a lone citation to a single page in its earlier opinion—"decline[d] to subtract points from [Cathey]'s obtained IQ score." App. 2a. Instead, it applied only the standard error of measurement, determined that Cathey's IQ score range "is between 72 and 82," and, solely on that basis, held that Cathey had "failed to show the requisite deficits in intellectual functioning." App. 2a.

The TCCA then turned to Cathey's adaptive behavior. Assuming *arguendo* that its prior decision had erred by "improperly rel[ying] on the *Briseno* factors and focus[ing] on [petitioner's] 'perceived adaptive strengths' and 'behavior while incarcerated,'" it nevertheless reaffirmed that decision. First, and without

more specific detail, it "conclude[d] based on school records and trial testimony that [Cathey] has failed to prove adaptive deficits." App. 2a-3a. And second, it again refused to "credit the results of the Vineland Adaptive Behavior Scales administered by Dr. Fletcher." App. 3a. Directly citing its earlier opinion, the TCCA repeated its prior beliefs that "the Vineland reporters"—Cathey's older sister and former spouse—"were highly motivated to misremember [his] adaptive abilities" and "[t]he adaptive behavior [Cathey]'s sister reported to Fletcher as part of the Vineland test was * * * contradicted by her trial testimony." App. 3a (citing earlier opinion).

Based solely on that cursory analysis, the TCCA held that "[u]nder the circumstances presented in this case," Cathey "has not established that he is intellectually disabled according to the standards articulated by the United States Supreme Court in *Moore I* and *Moore II*." App. 3a. This petition followed.

REASONS FOR GRANTING THE PETITION

As was the case in *Moore I* and *Moore II*, the TCCA's decision cites this Court's precedents but does not come close to faithfully applying them. The decision clearly contravenes *Atkins*, *Hall*, and the two *Moore* cases by (1) treating Cathey's "IQ score as final and conclusive evidence of [his] intellectual capacity," even though *Hall* held that "experts in the field" would both recognize that test's "imprecision" and "consider other evidence," *see* 572 U.S. at 712-13; (2) rejecting the trial court's finding of adaptive *deficits* by focusing instead on adaptive *strengths*, even though *Moore I* and *Moore II* unambiguously rejected such an approach, *see* 139 S. Ct. 668-69; and (3) dismissing the trial court's reliance on the Vineland-II *precisely because* it was performed in the manner

sound clinical guidance demands, even though this Court's precedents require courts to be guided by "the medical community's diagnostic framework," *see, e.g.*, *Moore I*, 137 S. Ct. at 1053.

The TCCA's continuing inability to faithfully apply *Atkins* and *Hall* threatens this Court's supremacy and undermines the rule of law. It therefore demands this Court's attention. The Court should grant certiorari and summarily reverse. Alternatively, the Court should grant certiorari and conduct plenary review.

I. THE TCCA'S JUDGMENT CLEARLY CONTRAVENES THIS COURT'S REPEATED HOLDINGS.

The decision below rests on three independent errors, each of which is independently sufficient to warrant certiorari and reversal. Viewed together, the errors "leave[] too little" in the TCCA's opinion "that might warrant reaching a different conclusion than did the trial court." *Moore II*, 139 S. Ct. at 672. The Court should therefore summarily reverse.

A. The TCCA Contravened *Hall* By Substituting Its Own Intellectual-Functioning Analysis For Accepted Clinical Frameworks.

The TCCA's analysis clearly violates this Court's holding in *Hall*, 572 U.S. at 723, that states cannot "take[] an IQ score as final and conclusive evidence of a defendant's intellectual capacity," and must instead view IQ scores with "the same studied skepticism that those who design and use the tests do."

1. The first respect in which the TCCA's judgment contravenes *Hall* is by treating a score range of 72 to 82 as conclusive evidence of non-deficient intellectual

functioning. As this Court made clear in *Hall*, "[i]ntellectual disability is a condition, not a number." *See Hall*, 572 U.S. at 723.[7] Yet *the only fact* the TCCA examined in concluding that Cathey "failed to show the requisite deficits in intellectual functioning" was his IQ-score range, with no further efforts to interpret the score range in line with clinical guidance. App. 2a. The judgment should be reversed for that reason alone.

2. The TCCA also erred by adopting an irrational and unsupportable approach to the Flynn effect. The habeas court found, based on extensive evidence, that medical experts would understand Cathey's WAIS-R score range to be inflated due to the Flynn effect and would interpret it accordingly. App. 19a-62a ¶¶ 31-111. Reviewing that finding, the TCCA *openly acknowledged* that the Flynn effect is a valid concept that factfinders may take into consideration. App. 2a. Yet in the same breath, the TCCA inexplicably—and unexplainedly—rejected the habeas court's decision to consider it. App. 2a. Even assuming *arguendo* that a state *can* refuse to view IQ tests in light of the Flynn effect despite its near-universal acceptance in the medical literature, the decision below fails to point to "a single medical professional," *Hall*, 572 U.S. at 722, who would "agree" that the Flynn effect is valid (as the TCCA did, App. 2a), yet prohibit factfinders to apply it.

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[7] *See also*, *e.g.*, AAIDD-11 at 35, 40 ("It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable. * * * The term *approximately* [two standard deviations below the mean] also addresses statistical error and uncertainty inherent in any assessment of human behavior.").

Nor can the TCCA's categorical refusal to apply the Flynn effect be justified by the TCCA's application of the standard error of measurement, which is an entirely different concept. *Cf.* App. 154a (hypothesizing that "the fact that applicant took an outmoded version of the WAIS-R in 1996 might tend to place his actual IQ in a somewhat lower portion of th[e]" standard-error-of-measurement range). Indeed, the 2014 TCCA's suggestion that the Flynn effect merely indicates that Cathey's IQ is in the low end of the standard-error-of-measurement range directly conflicts with *Moore I* and the medical literature. As this Court held in *Moore I*, the standard error of measurement is an inherent feature of IQ testing that must be recognized *in addition to* "other sources of imprecision." 137 S. Ct. at 1049. The habeas court noted the same, finding based on the record that the Flynn effect is "separate [from] an adjustment for the standard error of measurement." App. 49a-51a ¶¶ 79-83; *see also* AAIDD-11 at 35-37 (recognizing separateness); AAIDD-11 User's Guide at 22-23 (same). Thus, to the extent the decision below sought to resuscitate the TCCA's previous view that the Flynn effect is *part of* (rather than additive to) the standard error of measurement, that was clear error.

To the extent the TCCA instead intended to reprise its previously stated view that Cathey should submit to another, more recently curved IQ test rather than applying the Flynn effect, *cf.* App. 124a-125a, that view is unsupportable also. As the habeas court expressly found, IQ test curves "are not * * * applicable" to long-incarcerated individuals, because "makers of IQ tests do not include incarcerated individuals in their sampling for determining [the score curve]." App. 64a ¶ 115. Accordingly—and as the habeas court

further explained—medical experts would view Cathey's 1996 WAIS-R test as a far more reliable means of assessing Cathey's IQ than retesting him after over 20 years on death row. App. 64a ¶¶ 114-115 (describing uncontroverted testimony of Yale Professor Alan Kaufman that medical best practice is to rely on a valid IQ score obtained before an inmate was on death row). Nothing in the TCCA's decision is to the contrary. The TCCA's insistence that Cathey should have gotten a new test rather than invoking the Flynn effect is not supported by any medical evidence or literature; instead, it is simply the TCCA's lay instinct. Rejecting an *Atkins* claim by disregarding medical consensus in favor of such instincts plainly violates this Court's holdings. *See*, *e.g.*, *Moore II*, 139 S. Ct. at 669 ("[A] court's intellectual disability determination 'must be informed by the medical community's diagnostic framework.'") (quoting *Moore I*, 137 S. Ct. at 1047).

B. As In *Moore I* And *Moore II*, The TCCA Erroneously Focused On Adaptive Strengths.

The TCCA also erred in analyzing Cathey's adaptive deficits. Two state habeas trial courts have concluded that Cathey suffers from significant deficits in this regard, finding based on extensive evidentiary records that, *inter alia*, Cathey demonstrated linguistic limitations and had "difficulties expressing himself," was unable to understand numerical concepts such as time and money, had "limited functioning in reading and writing" (including testing as a fifth or sixth grader during his ninth-grade year), was gullible, naïve, and suffered interpersonal difficulties, and lacked the practical skills necessary to keep himself safe or manage his home, work, and marriage. App. 65a-102a ¶¶ 119-189.

The TCCA categorically rejected those courts' conclusions in a single sentence, instead determining based on unspecified "school records and trial testimony that [Cathey] has failed to prove adaptive deficits." App. 3a. That is the precise error the TCCA committed in *Moore I* and *Moore II*. In those cases, as here, a state habeas court made detailed factfindings highlighting the *Atkins* claimant's adaptive deficits. Like the habeas courts here, the habeas court in *Moore* "consulted current medical diagnostic standards" and identified materials from the claimant's academic record, testimony about the claimant's upbringing, and other evidence before it to conclude that the claimant demonstrated adaptive deficits. *Moore I*, 137 S. Ct. at 1045. In reviewing those findings, the TCCA instead chose to focus on evidence of perceived adaptive *strengths*—for example, testimony that the claimant was able to "mow lawns" and "play[] pool for money," and school records that showed the claimant remained in regular classrooms throughout his time in school. *Moore I*, 137 S. Ct. at 1050-52 (citing *Ex parte Moore*, 470 S.W.3d 481, 522-24, 526-27 (2015)). That led to this Court explicitly correcting the TCCA for "deviat[ing] from prevailing clinical standards" by "overemphasiz[ing] [the claimant's] perceived adaptive strengths." *Moore I*, 137 S. Ct. at 1050. On remand, the TCCA committed the same error, failing even to "discuss the evidence relied upon by the trial court" to conclude that the claimant possessed adaptive *deficits*, and instead focusing solely on evidence pertaining to the claimant's supposed adaptive *strengths*. *See Moore II*, 139 S. Ct. 670.

That is no different from what the TCCA did here. In its pre-*Moore I* decision, the TCCA set forth its conclusion that Cathey's supposed adaptive strengths

rendered irrelevant the extensive evidence of adaptive deficits on which the trial court based its detailed findings. This Court expressly repudiated that mode of analysis in both *Moore* decisions. Yet in relying on "school records and trial testimony" in the decision now on review, App. 3a, the TCCA incorporated by reference its pre-*Moore I* error.

The TCCA's discussion of Cathey's adaptive functioning therefore falls far short of what *Moore I* and *Moore II* require. To begin with, as in *Moore II*, the TCCA reached its conclusion that Cathey possesses adaptive strengths while failing even to "discuss the evidence relied upon by the trial court" in concluding that Cathey suffers adaptive weaknesses. *Cf. Moore II*, 139 S. Ct. at 670. The TCCA's repetition of that error alone warrants summary reversal.

The similarities with the *Moore* cases do not end there. For instance, where *Moore I* faulted the TCCA for determining that the claimant's "education in normal classrooms during his school career" defeated a showing of adaptive deficits, 137 S. Ct. at 1052, the TCCA reached the same conclusion here based on essentially the same evidence, observing that Cathey "was always placed in regular classes and generally received passing grades." App. 164a. And even though *Moore I* deemed it error for the TCCA to rely on the claimant's "sister's perceptions of [his] intellectual abilities," noting that "the medical profession has endeavored to counter lay stereotypes of the intellectually disabled," 137 S. Ct. at 1052, the TCCA essentially repeated that error here, relying heavily on lay opinions, such as testimony that Cathey's "sister thought he was entirely normal, if a bit nerdy, as

a child." App. 133a (internal quotation marks omitted).[8]

In short, the TCCA failed, just as it did in *Moore I*, *Moore II*, and its pre-*Moore I* opinion in this case, to appropriately direct its attention to the habeas court's findings regarding adaptive *weaknesses*. And just as in *Moore I* and *Moore II*, that was constitutional error. 137 S. Ct. at 1050; 139 S. Ct. at 670. The judgment should be summarily reversed for that additional reason.

C. The TCCA's Rejection Of The Vineland-II Adaptive Behavior Scales Has No Medical Basis.

The TCCA also erred in refusing to accept Dr. Fletcher's Vineland-II assessment. That refusal was based on two rationales, each of which is irreconcilable with accepted diagnostic practice and this Court's precedents. First, the TCCA believed that the witnesses Dr. Fletcher interviewed were impermissible—even though they are the precise individuals the diagnostic frameworks favored—because they might have been "motivated to misremember [Cathey's] adaptive abilities." App. 3a. And second, the TCCA believed that "[t]he adaptive behavior [Cathey]'s sister reported to [Dr.] Fletcher as part of the Vineland test," which suggested that Cathey suffers from intellectual disability, was "contradicted by her trial

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[8] *See also, e.g.*, *id.* ("No one at trial intimated that applicant was mentally retarded or intellectually disabled. No one suggested that he was mentally 'slow' or had any adaptive deficiencies."); App. 158a ("No one who testified at trial suggested that [Cathey] was intellectually disabled or suffered from adaptive deficiencies.").

testimony," which reflected her own, non-expert belief that he was "average." App. 3a.

1. In choosing to reject Dr. Fletcher's selection of interviewees in favor of its own views regarding effective diagnostic practices, the TCCA reflected the same failure to adhere to clinical standards that resulted in the decisions in *Moore I* and *Moore II*. 137 S. Ct. 1051. As the habeas court found, Dr. Fletcher's methodology was entirely consistent with sound clinical practice. Diagnostic manuals explain that "individuals who act as respondents" for adaptive-deficits examinations "should be very familiar with the person [being examined] and have known him/her for some time and have had the opportunity to observe the person function across community settings and times." AAIDD-11 at 47. Such individuals will therefore "[v]ery often" be "parents, older siblings, other family members, teachers, employers, and friends." *Id.*; *see also, e.g.*, J. Gregory Olley, "Adaptive Behavior Instruments" in E. A. Polloway (ed.), *The Death Penalty and Intellectual Disability* 187, 193 (2015) ("Among the most common and potentially most valuable sources are interviews with family members and others who have known the individual well in varied community settings.").

Thus, as the habeas court explained, Dr. Fletcher's decision to conduct the Vineland-II by using interviews with Cathey's older sister and former spouse—*i.e.*, those "who knew Mr. Cathey best during his developmental period and prior to incarceration"—is exactly what the relevant diagnostic frameworks require. *See* App. 66a-67a ¶ 121, 69a-74a ¶¶ 127-132. Indeed, *even the State's own expert* testified that Dr. Fletcher's "adaptive behavior assessment used the best possible information." App. 74a ¶ 133. The

TCCA's rejection of Dr. Fletcher's methodology finds no support in the medical literature, falls short of the TCCA's obligation to apply a framework "informed by the medical community's diagnostic [practices]," *Hall*, 572 U.S. at 721, and reflects the same erroneous, lay-attitude-driven analysis that the TCCA displayed in the *Moore* cases. It should be rejected here just as it was there.

2. The TCCA's perception that Cathey's older sister's "trial testimony" contradicted her Vineland-II interview responses is equally flawed. No such contradiction exists, and to the extent the TCCA perceived one, it was by erroneously resorting yet again to "lay perceptions of intellectual disability." *Moore I*, 137 S. Ct. 1051-52. Specifically, although the decision below does not specify which testimony the TCCA thought contradicted the Vineland-II interview, the TCCA was likely referring (as it had in its prior opinion) to the testimony, also discussed above, that Cathey was "average" or "nerdy" and routinely read books. *See* App. 157a ("[T]he adaptive behavior applicant's sister reported to the expert as part of the Vineland test was contradicted by her trial testimony (before *Atkins* had been decided and any issue of mental retardation had arisen) that applicant was 'average,' 'nerdy,' and read books all the time."). As explained, that testimony simply does not demonstrate that Cathey was not intellectually disabled. *See Moore I*, 137 S. Ct. at 1051-52 (rejecting *Briseno* factor asking whether "those who knew the person best during the development stage * * * th[ought] he was mentally retarded at that time"). Nor does it cast doubt on Cathey's sister's more specific reports that Cathey would believe anything he was told, could not be left alone to do

anything, could play only simple games, and did not talk much, particularly given that there is no evidence that Cathey's sister associated such behavior with intellectual disability. Indeed, although the TCCA failed to mention it, Cathey's sister explained at trial that the books she observed Cathey reading were comics such as Spiderman, and that when she referred to him as "nerdy," she meant only that he did not routinely get sent to detention. App. 81a ¶ 148. There was no contradiction between her trial testimony and her reports to Dr. Fletcher. The TCCA concluded otherwise only by ignoring this Court's repeated teachings.

II. THE TCCA'S REPEATED FAILURE TO FAITHFULLY APPLY THIS COURT'S PRECEDENTS ONCE AGAIN REQUIRES THE COURT'S INTERVENTION.

Decisions of this Court "constitute[] * * * binding precedents for the federal and state courts, and for this Court, unless and until * * * this Court" overrules them. *See*, *e.g.*, *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring in part); *see also*, *e.g.*, *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 220-21 (1931) ("The determination by this court of [a federal] question is binding upon the state courts, and must be followed[.]"); *Elmendorf* v. *Taylor*, 23 U.S. 152, 153 (1825) ("[T]he State Courts are bound by decisions of this Court in construing the constitution, laws, and treaties of the Union."). Indeed, "[a]s Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, 'the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in

any two states. The public mischiefs that would attend such a state of things would be truly deplorable.'" *James* v. *City of Boise*, 577 U.S. 306, 307 (2016) (quoting *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 348 (1816)).

The TCCA has repeatedly failed to heed this Court's Eighth Amendment jurisprudence. Summary reversal is therefore warranted, just as it was in *Moore II*.

1. Of the TCCA's nine judges, four have openly resisted *Atkins* and its progeny. In *Ex Parte Wood*, 568 S.W. 3d 678 (Tex. Crim. App. 2018), which arose after *Moore I* but before *Moore II*, those four judges joined two others to refuse to reconsider the TCCA's pre-*Moore I* rejection of an intellectual disability claim. The grounds for that refusal clearly violated this Court's precedents. First, despite *Hall*'s holding that "an IQ score" is not "final and conclusive evidence" of intellectual capacity, particularly when it is close to 70, *see* 572 U.S. at 701-02, the TCCA held that *by itself*, an IQ score range encompassing a 71 categorically precluded a finding of deficits in intellectual functioning. *But see Hall*, 572 U.S. at 723 ("Intellectual disability is a condition, not a number."). And second, as one dissenting judge explained, the TCCA violated *Moore I* by analyzing adaptive deficits with an "improper[] focus[]" on the "applicant's adaptive strengths and his abilities in a controlled prison setting," such as the ability to write coherent sentences, even though "clinical experts have counseled against considering adaptive strengths arising in controlled settings like a prison." *Wood*, 568 S.W. 3d at 687-88 (Alcala, J., dissenting).[9]

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[9] Judge Alcala, who also dissented from the judgment vacated in *Moore I* and would later dissent from the judgment reversed

Judge Newell, joined by Presiding Judge Keller and Judges Hervey and Keel—all of whom joined the decision below in this case—concurred to further emphasize their disagreement with this Court's jurisprudence. Specifically, they wrote that this Court was incorrect in *Hall* and *Moore I* to hold that "a clinical diagnosis" bears on "moral culpability," and that, in reflecting that view, this Court's jurisprudence has "become untethered" from the Eighth Amendment. *Id.* at 682, 686 (Newell, J., concurring). And, despite *Moore I*'s rejection of TCCA precedent holding that the means of commission of a crime can be a reason to reject an intellectual disability claim, those judges wrote: "Applicant is not intellectually disabled. He is a serial killer." *Id.* at 686.

2. *Ex Parte Wood* is not an anomaly. As both *Moore I* and *Moore II* demonstrate, the TCCA has repeatedly failed to faithfully apply this Court's *Atkins* precedents. Indeed, as the Chief Justice noted in *Moore II*, the TCCA's decision there reflected "the same errors" *Moore I* had already "condemned." *Moore II*, 139 S. Ct. at 672 (Roberts, C.J., concurring). And for years before *Moore I*, the TCCA's majority ignored colleagues who warned that its approach to *Atkins* claims was "unfaithful to" and "d[id] not even generally conform with" this Court's precedents. *See Lizcano* v. *State*, 2010 WL 1817772, at *40 (Tex. Crim. App. May 5, 2010) (Price, J., joined by Johnson and

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in *Moore II*, was no longer on the TCCA at the time the decision on review here was issued.

Holcomb, JJ., concurring and dissenting); *see also supra* at 13 (noting Judge Price concurrence).[10] The decision below, which relies extensively on the 2014 decision rejecting Cathey's *Atkins* claim over just such a warning, makes clear that the TCCA continues to see nothing wrong with the decisions it issued in that pre-*Moore* era.

3. This Court has "not shied away from summarily" reversing where "lower courts have egregiously misapplied settled law," *see, e.g.*, *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (compiling sources), particularly where the Court's own authority is threatened, *see, e.g.*, *Moore I*, *supra*; *James*, 577 U.S. at 307 (2016) (summarily reversing where state court failed to recognize it was "bound by this Court's" decisions). In this case, the TCCA presumed to resurrect its pre-*Moore I* rejection of Cathey's intellectual disability claim, clearly flouting *Atkins*, *Hall*, and both *Moore* decisions and engaging in what amounts to a refusal to faithfully apply those of this Court's precedents the TCCA's members dislike. That extraordinary circumstance warrants summary reversal. In the alternative, the Court should grant plenary review and reverse.

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[10] Like Judges Price and Alcala, *see supra* at 13 n.5, 27-28 n.9, Judges Johnson and Holcomb were no longer on the TCCA at the time the decision on review here was issued.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and summarily reverse or, in the alternative, reverse after conducting plenary review.

Respectfully submitted,

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