No. 21-466

IN THE

Supreme Court of the United States

ERIC DEWAYNE CATHEY,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Eric Dewayne Cathey sought state habeas relief, alleging, for the first time on the eve of his scheduled execution in 2008, that he is intellectually disabled. The state court ordered evidentiary development of the claim, including development of evidence regarding the validity of the Flynn Effect. The Texas Court of Criminal Appeals (TCCA) ultimately denied relief, explicitly holding factfinders may consider the possible impact of the Flynn Effect on IQ scores. The court also found insufficient evidence that Cathey suffered significant limitations in adaptive behavior, noting that Cathey's expert relied on biased reports from Cathey's sister and ex-wife, some of which were contradicted by trial testimony. After this Court issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the TCCA reconsidered its prior opinion and again denied relief.

The TCCA's application of the Flynn Effect and its critical assessment of evidence of Cathey's adaptive behavior was consistent with this Court's precedent as well as current medical standards, and it was supported by evidence Cathey relied upon. Cathey's request for this Court to review the state court's decision is based solely on his disagreement with its factfinding and application of this Court's precedent.

These facts raise the following question: should the Court grant certiorari review in the absence of any compelling reason justifying review and where the lower court's decision was consistent with this Court's precedent and current medical standards?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

BRIEF IN OPPOSITION

Petitioner Eric Cathey was convicted and sentenced to death in 1997 for the murder of Christina Castillo. Cathey challenged his conviction and sentence in state and federal court, including by filing a federal habeas petition in 2004 after this Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). Cathey did not raise a claim in that petition alleging he was intellectually disabled. He did not do so until the eve of his scheduled execution in 2008 by way of a subsequent state habeas application. The claim was supported by an IQ score of 77, which Cathey obtained before his capital murder trial. Pet'r's App. 131a. The TCCA remanded the claim for an evidentiary hearing, specifically instructing the state trial court to receive evidence regarding, *inter alia*, the validity and reliability of the Flynn Effect (FE) and whether clinical practitioners apply it to IQ test results outside the forensic context. *Ex parte Cathey*, No. 55,161-02, 2008 WL 4927446, at *1 (Tex. Crim. App. Nov. 18, 2008).

An evidentiary hearing was held in 2010 in the state trial court after which the court recommended to the TCCA that it grant relief. Pet'r's App. 177a–284a. The TCCA rejected the recommendation as the trial court's findings were "so adversarial and slanted that they [were] hard to credit[,]" and many findings were not supported by the record. Pet'r's App. 134a. The TCCA determined the FE is scientifically valid but there exists "considerable debate" regarding the phenomenon. Pet'r's App. 140a. The TCCA also found there was insufficient evidence that clinical practitioners adjusted obtained IQ scores to account for the FE. Pet'r's App. 145a–155a. The TCCA concluded factfinders may consider the FE and its

possible impact on IQ scores generally but may not alter an IQ score. Pet'r's App. 152a–155a.

Regarding Cathey's adaptive behavior, the state trial court credited Cathey's expert's findings based on his administration of the Vineland Adaptive Behavior Scales (VABS) through questioning Cathey's sister and ex-wife over the telephone regarding their recollection of Cathey's behavior decades earlier. Pet'r's App. 157a. The TCCA faulted the trial court's "uncritical acceptance" of Cathey's expert's opinion based on retrospective answers given by respondents who were motivated to underestimate Cathey's abilities, particularly where some of those recollections were contradicted by trial testimony. Pet'r's App. 161a. The TCCA relied on the relatively "objective, unbiased" information contained in Cathey's school records, which did not support a finding that he was intellectually disabled. Pet'r's App. 164a. Noting that experts caution against relying too heavily on an individual's prison behavior or adaptive strengths in assessing their adaptive behavior, the TCCA determined "sound scientific principles" call for a factfinder to consider all possible data. Pet'r's App. 172a.

Considering "the entire body of evidence" from Cathey's trial and the evidentiary hearing, the TCCA determined Cathey failed to show he was intellectually disabled. Pet'r's App. 174a. Consequently, the TCCA denied Cathey's habeas application. Pet'r's App. 174a. This Court denied Cathey's petition for a writ of certiorari. *Cathey v. Texas*, 576 U.S. 1037 (2015).

About a year later, this Court granted review in Bobby Moore's case. *Moore v. Texas*, 578 U.S. 1022 (2016). In the meantime, Cathey sought to file a

successive federal habeas petition following the TCCA's denial of his subsequent application, and the Fifth Circuit ultimately granted him permission to do so after this Court issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*). *In re Cathey*, 857 F.3d 221, 241 (5th Cir. 2017). Cathey then sought and obtained a stay of proceedings in the federal district court to allow him to seek reconsideration in state court of the denial of his subsequent application in light of this Court's holding in *Moore I*. Order, *Cathey v. Davis*, No. 4:15-CV-2883 (S.D. Tex. July 28, 2017), ECF No. 40.

The TCCA then exercised its authority to reconsider Cathey's case on its own initiative and remanded it to the trial court "to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation . . . on the issue of intellectual disability." Pet'r's App. 118a. The state trial court held an evidentiary hearing during which an expert for Cathey and an expert for the State testified regarding the change since 2010 in the assessment of intellectual disability. *See* Pet'r's App. 10a. The trial court recommended relief be granted on Cathey's intellectual disability claim. Pet'r's App. 113a.

The TCCA rejected the recommendation, again declining to adjust Cathey's IQ score of 77 downward to account for the FE but reiterating that factfinders can consider the FE in assessing the validity of a score. Pet'r's App. 2a. As to Cathey's adaptive behavior, the TCCA explicitly disregarded the *Briseno*[1] factors and did not rely on evidence of Cathey's adaptive strengths and

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[1] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by Moore I*, 137 S. Ct. at 1051–53.

behavior in prison. Pet'r's App. 3a. The TCCA chose not to credit the results of the VABS because the respondents—Cathey's sister and ex-wife—"were highly motivated to misremember [Cathey's] adaptive abilities." Pet'r's App. 3a. Indeed, some answers to the VABS provided by Cathey's sister were contradicted by her trial testimony. Pet'r's App. 3a. The TCCA denied relief. Pet'r's App. 3a.

Cathey now seeks review in this Court of the TCCA's decision. He does not, however, identify any reason, e.g., a split among the state courts, amplifying the need for this Court's review. *See* Sup. Ct. R. 10, 14.1(h). Instead, he only seeks correction of what he believes were erroneous fact findings and a misapplication by the state court of this Court's precedent. This is patently insufficient to warrant this Court's review. Sup. Ct. R. 10. In any event, Cathey does not identify any error by the TCCA. Unable to demonstrate any error in his case, Cathey asks this Court to send the TCCA a message warning it to apply its holdings in a way he would prefer. But this is also an insufficient reason for this Court to grant review, particularly in light of the TCCA's record of appropriately applying *Moore I* and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*). This Court should deny Cathey's petition.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a) to review the state court's denial of Cathey's claim.

STATEMENT OF THE CASE

I. The Facts of the Capital Murder

> [Cathey] was charged with capital murder for fatally shooting twenty-year-old Cristina Castillo while kidnapping her on September 12, 1995. The evidence at trial showed that [Cathey], along with five other men, planned to rob Cristina and her boyfriend, Hector Alicia, because they thought the two had drugs and money in their apartment. According to one of the conspirators, [Cathey] was the only person armed. He had a 9 mm pistol and grabbed Cristina as she was getting out of her car at the apartment complex. [Cathey] held Cristina at gunpoint and forced her into a red car occupied by several of the conspirators, who then tied her up with duct tape. [Cathey] called the other conspirators, who were in a white car, and told them to meet at his mother's house on Palmer Street.
>
> Once at the Palmer Street house, all six men questioned Cristina in an attempt to find the drugs and money. Even though they began to beat her, Cristina continued to deny any knowledge of drugs or money and told them that she was pregnant. [Cathey] and two others continued kicking and beating Cristina for about fifteen minutes. Finally, they took her to a remote location to abandon her. As one set of

> conspirators drove off, leaving Cristina with [Cathey], they heard a gunshot. [Cathey] later told his cohorts that he had shot her. Cristina's decomposed body was found almost two weeks later in a field. She had been shot three times in the head, and three 9[ ]mm Luger casings were recovered from underneath her body. Police were able to match the shell casings to a 9 mm pistol that Mark Young had snatched from [Cathey] over a month after the murder.

Pet'r's App. 127a–128a.

II. The Punishment Phase

> At the punishment phase, evidence of [Cathey's] prior acts of violence was admitted, including evidence of the kidnapping of Mark Young and two little girls at a Chevron station. . . .
>
> In a different incident, Frank Condley testified that he was walking from his apartment near the Sherwood Forest Apartments to a convenience store when he saw some men with cocked guns in a nearby parked van. Mr. Condley turned away, but [Cathey] came after him, armed with a .38 or 9 mm gun in each hand. [Cathey] ordered Mr. Condley to lie down and then shot the prostrate man four times as he begged for his life. . . .
>
> Antonio Glenn testified that he lived across the street from [Cathey] during 1995

and sold cocaine to him in the Sherwood Forest Apartments. [Cathey] would then cut it and resell it for a 50% profit. One time [Cathey] came to Glenn's apartment with a sawed-off shotgun, forced Glenn to undress, tied him up, and held his shotgun to Glenn's head, demanding drugs. When Glenn said that he didn't have any drugs right then, [Cathey] beat him up with the stock of the shotgun.

. . .

[Cathey's] sister, Charlotte, testified that he went to Blackshear Elementary School, Brian Middle School, and Yates High School. He was "average" and played a little football and a little baseball while growing up. According to Charlotte, he was a "nerd" because he "read a lot of books, stayed to himself a lot, [and] did a lot of drawing." [Cathey] and his brother were kind of "spoiled," and "they never went without." [Cathey] was shy but "he opened up more to older people." As far as she knew, [Cathey] did well in school, but he dropped out when he was seventeen to marry Noaella. They had two children, but later divorced. While he was married, [Cathey] sometimes worked for Charlotte's former husband, Luke Ezeh, at Dynamic Battery Exchange.

Mr. Ezeh testified that [Cathey] worked for him "off and on" between 1991

and 1993, when [Cathey] was twenty to twenty-three-years old. Mr. Ezeh said that [Cathey] was a technician and a good, trustworthy worker who could also watch the shop when Mr. Ezeh made deliveries. [Cathey] was twenty-four when he committed this capital murder.

[Cathey's] school records showed that he was home schooled during most of third grade because he had tuberculosis, but he kept up with his class work. [Cathey's] former middle-school teacher, Anne Smith, testified that she taught him Texas history and she remembered him as "such a very well behaved, very nice, very sweet young man." He was shy, but well-liked by both boys and girls. . . . She stated that Cathey, like most of his schoolmates, "was functioning slightly below grade level." His high school records showed that he functioned at about the 30th/40th percentile in math; "[h]e passed all three sections of the math, the reading, and writing of the TEAMS Test, but he was still seriously below grade level." Ms. Smith noted that when grades drop in the 9th or 10th grades, it is frequently because of the child's poor adjustment from middle school to high school. [Cathey's] grades dropped dramatically in 9th grade, and he quit school the following year to get married.

. . .

> Before trial, Dr. Robert Yohman, a clinical neuropsychologist, interviewed [Cathey] for six hours in the Harris County Jail to evaluate his cognitive and emotional functioning. He was careful to ensure that [Cathey] was not malingering or faking, so he gave him about two dozen tests. [Cathey] scored a 77 IQ on the WAIS-R, which was "borderline intellectual functioning." In other achievement tests, [Cathey] functioned in the borderline to mildly deficient range—about the 8th percentile. He did not have a specific learning disorder, but he was mildly deficient in most academic areas, and in the memory test, dealing with the ability to recall a short story, he was "low average to average." On the word association test, [Cathey] scored in the high average range of the 81st percentile. That is, 81% of the population would score lower than [Cathey]. On the "Trails B" test, [Cathey] scored in the 75th percentile.
>
> Dr. Yohman gave [Cathey] several personality tests, including the MMPI, which indicated that [Cathey] was within normal limits for anxiety and depression, but was a "fairly naive individual, psychologically naive, unsophisticated." [Cathey] "wanted to look good . . . wants to be well thought of, be liked." Dr. Yohman did not, however, find anything in his testing that indicated "any impulse

disorder, explosive disorder, anything of that nature." Although [Cathey] had had a couple of "blows to the head as a youngster," nothing suggested any focal or localized brain damage. Dr. Yohman noted that [Cathey] had a behavioral change after his wife left him. Overall, [Cathey] fit in the borderline intelligence function, a category that covers about 8% of the population.

Dr. Walter Quijano, a clinical psychologist, also interviewed [Cathey] for an hour and a half in the jail. He gave him the MCMI 2, a personality test, and determined that he was excessively dependent and compulsive. Dr. Quijano said that [Cathey] did not meet the definition of "a full-blown antisocial personality," but he exhibited some antisocial features. Dr. Quijano originally thought that [Cathey] was "psychologically functioning okay," but he had not known about the robberies, shootings, and murder that [Cathey] had committed. If [Cathey] had a history of those offenses, then Dr. Quijano believed that he would fit the "antisocial personality disorder" category.

No one at trial intimated that [Cathey] was . . . intellectually disabled. No one suggested that he was mentally "slow" or had any adaptive deficiencies. His elementary school grades were entirely normal, even though he spent much of his

> 3rd grade being home-schooled because he had TB. His middle-school history teacher never suggested any intellectual disabilities; she attributed his plummeting grades to the difficulties of making the transition from middle school to high school. Still, [Cathey] passed all three sections of the TEAMS Test in high school. Both [Cathey's] mother and sister thought he was entirely normal, if a bit "nerdy," as a child. [Cathey] worked as a technician in a battery-replacement shop, and his ex-brother-in-law left him in charge while he made deliveries.
>
> Neither [Cathey] nor any mental health professional identified [Cathey] as [intellectually disabled] until ten years after he was sentenced to death for capital murder and six years after the *Atkins* decision exempted from execution those who are found to be [intellectually disabled].

Pet'r's App. 128a–133a (footnotes omitted).

III. Evidence Presented at the State Habeas Court's First Evidentiary Hearing

The state trial court held a hearing in 2010 on Cathey's intellectual disability claim. Cathey presented the testimony of retired professor James Flynn and psychologists Jack Fletcher and Alan Kaufman. The State presented the testimony of forensic psychologist Tim Proctor and clinical and forensic psychologist Leigh Hagan.

A. Cathey's evidence

Professor Flynn testified at Cathey's state habeas hearing regarding the eponymous FE. 4 SHRR 29–135.[2] The FE refers to the observation that IQ scores have generally increased over time due to norm obsolescence. *Id*. at 31. His research has shown that IQ tests become obsolete at approximately .3 points per year.[3] *Id*. at 41.

Professor Flynn testified it is generally accepted scientific procedure to apply the FE to individual IQ test results by reducing an individual's score by .3 points for every year that has passed since the test was normed.[4] *Id*. at 51. The American Association on Intellectual and Developmental Disability (AAIDD) manual states that

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[2] "SHRR" refers to the Reporter's Record of the first state habeas evidentiary hearing, with the preceding number referring to the volume number of the hearing record and the following number(s) referring to the page(s) being cited. *See generally Ex parte Cathey*, No. 55,161-02. The Reporter's Record of the second state habeas evidentiary hearing will be cited in the same manner as "SHRR (2019)". "PX" will refer to Cathey's exhibits submitted at the 2019 evidentiary hearing, which consisted of scholarly articles. The page of the exhibit cited will refer to the page of the article. The state habeas court's Clerk's Record will be cited to as "SHCR," preceded by the volume number and followed by the page number being cited. "RR" will refer to the Reporter's Record from Cathey's trial and will be preceded by the volume and followed by the page number(s) cited.

[3] Professor Flynn had a doctorate in political science; he was not a clinical psychologist. 4 SHRR 38.

[4] Professor Flynn acknowledged on cross-examination that Lawrence G. Weiss, a senior psychometrician of the Wechsler Group that developed the WAIS series of IQ tests, disagreed that a correct response to the Flynn Effect is to adjust downward an individual IQ score. 4 SHRR at 82–84; Pet'r's App. 148a–150a.

"best practice requires recognition of a potential Flynn Effect when older norms are used in the assessment or interpretation of an IQ score." *Id*. at 73. Professor Flynn testified that he advocates for the subtraction of points from a score on an outdated IQ test when the consequence of not doing so "might kill somebody" but does not otherwise advocate adjustment of IQ scores because, for example, the decision of whether a child needs tutoring will not be affected by such an adjustment. *Id*. at 93–94. Professor Flynn also testified there would be "no competent clinical psychologist today, if they inherited a score from a school psychologist that was ten years obsolete, any competent one would throw that out and regive a test. That I will say flatly." *Id*. at 101.

Dr. Fletcher reviewed affidavits of Cathey's family members and the testimony given during the punishment phase of Cathey's capital murder trial.[5] 5 SHRR at 15–20. Dr. Fletcher also reviewed the Wechsler Adult Intelligence Scale-Revised (WAIS-R) test that was administered to Cathey in 1996 on which Cathey scored a 77. *Id*. at 20. Because the WAIS-R had been normed eighteen years prior to its administration to Cathey, Dr. Fletcher testified that Cathey's score was inflated by 5.4 points (i.e., .3 multiplied by eighteen).[6] *Id*. at 43.

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[5] Dr. Fletcher did not examine Cathey or administer an IQ test to him. 5 SHRR at 83, 96, 123. Dr. Fletcher did not review the offense report from Cathey's capital murder, the guilt-innocence testimony from Cathey's capital murder trial, or Cathey's prison records and correspondence, and he did not interview Cathey's school teachers. *Id*. at 96–98.

[6] Dr. Fletcher acknowledged that not all psychologists advocate the adjustment of IQ scores for the Flynn Effect. 5 SHRR

Therefore, Dr. Fletcher testified, Cathey's IQ score is 71.6 with a standard error of measurement (SEM) of five points. *Id*. at 49. His "best estimate" of Cathey's IQ was 72. *Id*. at 148.

To assess Cathey's adaptive behavior, Dr. Fletcher administered the VABS. *Id*. at 54. The VABS is a semi-structured interview including questions regarding the subject's behavior. *Id*. at 54. He chose Cathey's sister and ex-wife as respondents. *Id*. at 53. Based on his review, Dr. Fletcher concluded Cathey had limitations in intellectual functioning and adaptive behavior that were consistent with intellectual disability. *Id*. at 71–72.

Dr. Kaufman testified regarding the FE. 6 SHRR at 7–74. He testified the FE is scientifically reliable and valid. *Id*. at 17. When asked whether clinical practitioners who are called upon to diagnose intellectual disability outside the criminal justice system apply the FE, Dr. Kaufman answered that clinicians apply the Flynn Effect when administering IQ tests whether they know it or not because test publishers publish updated tests to avoid norm obsolescence.[7] *Id*. at 38–39. Dr. Kaufman testified that, in making a diagnosis of intellectual disability, a

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146. Dr. Fletcher also testified that it was necessary to follow a test manual in administering the test and that he was not aware of any test manual for standardized intelligence tests that instructs the administrator to adjust an obtained IQ score for the FE. *Id*. at 144.

[7] Dr. Kaufman acknowledged there is disagreement among researchers regarding how to apply the FE and whether subtracting points from an obtained IQ score is a valid response to it. 6 SHRR at 45, 50–51, 53.

clinician should use the most recently normed test available but should adjust for the FE if there is a reason, such as a pending *Atkins* claim, not to use a more recent test. *Id*. at 40.

B. The State's evidence

Dr. Proctor intended to administer an IQ test to Cathey prior to the state habeas court's hearing, *id*. at 84, but Cathey objected to such testing and the trial court sustained the objection. *Id*. at 85–87, 103. Dr. Proctor testified that IQ scores have increased in recent decades, but he does not agree that individual IQ scores should be adjusted to account for the FE. *Id*. at 160–61. Dr. Proctor also testified that IQ test manuals do not instruct test administrators to subtract points from an individual IQ score to account for the FE and that it is not proper scientific method to adjust data to fit theory. *Id*. at 103, 161–62. Further, a psychologist must rely on standards for psychological testing, ethical guidelines for psychologists, specialty guidelines for forensic psychology, and the procedures of the testing instruments used. *Id*. at 162. None of those standards or guidelines recommended subtracting points from an IQ score. *Id*. at 161–62. Dr. Proctor testified that academic literature he reviewed stated there is no agreed-upon method for how the FE should influence diagnostic conclusions, and adjustment of IQ scores is not good practice. *Id*. at 163–65. He also had never "seen . . . a report outside of an *Atkins* situation that mentioned" the FE. *Id*. at 162.

Regarding Cathey's intellectual functioning, Dr. Proctor testified Cathey's school records did not include any diagnosis of intellectual disability and showed that

Cathey was placed in regular classes. *Id.* at 105. Cathey's IQ score of 77 did not fall into the range of intellectual disability. *Id.* at 89, 98. Dr. Proctor concluded there was insufficient evidence that Cathey suffered from significant limitations in intellectual functioning. *Id.* at 109.

Dr. Proctor also testified regarding Cathey's adaptive behavior. Dr. Proctor testified that he disagreed with Dr. Fletcher's procedure of administering the VABS to Cathey's sister and ex-wife to obtain their potentially biased recollection of Cathey's behavior twenty-six years earlier. *Id.* at 111–13. Dr. Proctor also found those respondents to be less credible due to contradictions between their VABS answers and the trial testimony.[8] *Id.* at 188–90, 207. Dr. Proctor reviewed Cathey's prison correspondence and testified it demonstrated, *inter alia*, an awareness of his *Atkins* claim, an ability to plan, an understanding of current events, an ability to manage money, and an ability to think abstractly.[9] *Id.* at 114–50. Dr. Proctor concluded there was insufficient evidence that Cathey suffered from significant deficits in adaptive behavior. *Id.* at 157. He also concluded Cathey did not have "onset" of intellectual disability during the developmental period. *Id.* at 157–58.

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[8] Dr. Proctor testified that academic literature indicates concerns using the VABS in the manner Dr. Fletcher administered the test, i.e., retrospectively. 7 SHRR at 88–90.

[9] Dr. Proctor testified that an inmate's prison behaviors are relevant in assessing the inmate for intellectual disability. 6 SHRR at 232–242.

Dr. Hagan testified that the FE is a genuine statistical observation, but it is not generally accepted scientific procedure to apply the FE by adjusting individual IQ scores. 7 SHRR at 117–18. Dr. Hagan testified that, along with two other psychologists, he undertook to study whether and how practitioners apply the FE. *Id*. at 119. The study showed (1) adjusting obtained IQ scores based on the FE is not the "convention and custom" in psychology, (2) recalculating an individual's data "likely violates standardization procedures and departs from training practices, prevailing canons, guidelines, most treatises, and test instruction manuals," and (3) test administrators should describe in the report anything that might compromise his or her findings, including norm obsolescence. *Id*. at 121–22.

Further, Dr. Hagan testified that a research study of 5,000 special education IQ reports found only six that referenced the FE and none that adjusted an individual's IQ score. *Id*. at 129. The prevailing recommendation for responding to the FE is for IQ test publishers to update the test's norms because test administrators are obliged to use the most current and appropriate test measure. *Id*. at 136.

C. The state courts' findings and conclusions

The trial judge adopted Cathey's proposed findings and conclusions of law. The trial court found the FE "should be applied to intellectual functioning test scores in death penalty cases" and that Cathey had demonstrated he suffers from intellectual disability. Pet'r's App. 182a. The TCCA rejected the trial court's

findings, concluding the FE is generally considered valid but clinical practitioners outside the criminal justice system do not normally adjust individual IQ scores. Pet'r's App. 145a–155a. The TCCA concluded the trial court also erred in finding the VABS test answers given by Cathey's sister and ex-wife were scientifically valid and that Cathey is intellectually disabled. Pet'r's App. 122a–124a.

IV. Evidence Presented at the State Habeas Court's Second Evidentiary Hearing

Following the TCCA's second remand, the state trial court held a one-day evidentiary hearing in December 2019. Cathey presented testimony from Dr. Fletcher. Dr. Fletcher testified that, since 2010, the FE had become more widely recognized and more established in practice. SHRR (2019) at 17–20. Dr. Fletcher testified the AAIDD recommends correcting IQ scores to account for the FE. *Id*. at 22. Dr. Fletcher also testified the general consensus is that a retrospective assessment of adaptive behavior is essential in "high-stakes" decisions. *Id*. at 24. Dr. Fletcher's opinion that Cathey is intellectually disabled did not change following the 2010 evidentiary hearing. *Id*. at 26.

On cross-examination, Dr. Fletcher acknowledged Dr. Weiss described adjusting scores obtained on obsolete tests for high-stakes evaluations as controversial, although Dr. Fletcher stated it is less controversial now than it was in 2010. *Id*. at 47–48, 58. Dr. Fletcher also acknowledged that literature provided by Cathey in support of his intellectual disability claim indicated that, in a high stakes forensic context, the FE should be "considered" when assessing a defendant's IQ,

but the literature did not state that downward adjustment of an IQ score is required. *Id*. at 48–50; PX 8. Similarly, Dr. Fletcher acknowledged the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) does not require downward adjustment of individual IQ scores to account for the FE but rather calls for experts to use clinical judgment in interpreting IQ scores.[10] SHRR (2019) at 50. Dr. Fletcher testified that he adjusts IQ scores to "correct the score as a shortcut to correcting the norms." *Id*. at 60.

As for adaptive behavior, Dr. Fletcher acknowledged the DSM-5 calls for an assessment using both clinical evaluation and use of appropriate measures, but he did not perform a clinical evaluation of Cathey. *Id*. at 51. Dr. Fletcher also acknowledged the DSM-5 does not prohibit the use of evidence of an individual's adaptive behavior in prison but instead suggests obtaining corroborative information reflecting his or her behavior outside the prison setting. *Id*. at 54–55.

Dr. Proctor testified the DSM-5 supports his conclusion that there was insufficient evidence that Cathey is intellectually disabled. *Id*. at 62. Dr. Proctor agreed with Dr. Fletcher that the FE exists but stated the issue of whether to adjust IQ scores is controversial.

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[10] The DSM-5 contains a "Cautionary Statement for Forensic Use of DSM-5," which states that in most situations, a diagnosis of a mental disorder such as intellectual disability "does not imply that an individual with such a condition meets legal criteria for the presence of a . . . specific legal standard such as competence, criminal responsibility, or disability." SHRR (2019) at 56–57.

Id. at 64, 77. Dr. Proctor emphasized that an assessment of an individual's intellectual functioning is ultimately a matter of clinical judgment. *Id*. at 68. Dr. Proctor explained that he considered evidence of Cathey's adaptive behavior in prison, which is appropriate under the DSM-5.[11] *Id*. at 66–67. Nonetheless, evidence of Cathey's prison behavior did not comprise a significant portion of his opinion. *Id*. at 73. Dr. Proctor testified that his opinion about Cathey's adaptive behavior is not "weaker" after this Court's opinion in *Moore I* and the publication of the DSM-5. *Id*. at 75.

V. Procedural History

Cathey was convicted and sentenced to death for the murder of Christina Castillo. *Cathey v. State*, 992 S.W.2d 460, 461–62 (Tex. Crim. App. 1999). The TCCA upheld Cathey's conviction and death sentence on direct appeal. *Id*. at 466, *cert. denied*, 528 U.S. 1082 (2000).

Cathey filed his initial state habeas corpus application on March 15, 1999. SHCR-01. The TCCA denied relief in 2003. Order, *Ex parte Cathey*, No. 55,161-01 (Tex. Crim. App. Apr. 2, 2003).

Cathey then filed his initial federal habeas petition on April 2, 2004. Pet., *Cathey v. Dretke*, No. 4:04-CV-1306 (S.D. Tex.), ECF No. 3. The district court denied the petition on December 23, 2004. Mem. & Order, *id*., ECF No. 8. Cathey then filed an application for a certificate of appealability (COA), which was

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[11] Dr. Proctor testified that, in 2010, he answered questions about the *Briseno* factors but did not base his assessment of Cathey's adaptive behavior on them. *Id*. at 68.

denied. *Cathey v. Dretke*, 174 F. App'x 841, 846–47 (5th Cir. 2006).

Thereafter, the convicting court set Cathey's execution date for November 18, 2008. On November 17, 2008, Cathey filed a subsequent state habeas application claiming he was ineligible for execution because he was intellectually disabled. SHCR-02 at 2–78. The TCCA stayed Cathey's execution and remanded the case to the trial court for further proceedings on Cathey's claim. *Ex parte Cathey*, 2008 WL 4927446, at *1. After holding an evidentiary hearing, the trial court adopted Cathey's proposed findings of fact and conclusions of law recommending that relief be granted. Pet'r's App. 177a–284a. The TCCA issued an opinion denying relief. Pet'r's App. 120a–174a. This Court denied Cathey's petition for a writ of certiorari. *Cathey v. Texas*, 576 U.S. at 1037.

Cathey then sought to file a successive federal habeas petition following the TCCA's denial of his subsequent application, and the Fifth Circuit ultimately granted him permission to do so after this Court issued its opinion in *Moore I*. *In re Cathey*, 857 F.3d at 241. Cathey then sought and obtained a stay of proceedings in the federal district court to allow him to seek reconsideration in state court of the denial of his subsequent application. Order, *Cathey v. Davis*, No. 4:15-CV-2883 (S.D. Tex. July 28, 2017), ECF No. 40.

The TCCA exercised its authority to reconsider Cathey's case on its own initiative and remanded it to the trial court "to consider all of the evidence in light of the *Moore v. Texas* opinion and make a new recommendation . . . on the issue of intellectual

disability." Pet'r's App. 118a. The state trial court held an evidentiary hearing after which it recommended relief be granted on Cathey's intellectual disability claim. Pet'r's App. 113a. The TCCA rejected the recommendation and denied relief. Pet'r's App. 3a.

Cathey then filed a Petition for a Writ of Certiorari. The instant Brief in Opposition follows.

REASONS TO DENY THE PETITION

I. Cathey Fails to Identify Any Compelling Reason Justifying this Court's Attention.

Cathey's petition is based entirely on his allegations that the TCCA's factual findings were erroneous and that it misapplied a properly stated rule of law. This is plainly insufficient to warrant this Court's intervention, and review should be denied for that reason alone. Sup. Ct. R. 10.

Unable to identify any compelling reason in his case that warrants review, Cathey broadly argues the TCCA should be reprimanded for failing to strictly apply this Court's holdings in *Moore I* and *II*. Pet. Cert. at 1–2, 27–29 (citing *Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018)). It goes without saying, however, that in the absence of a compelling reason to review the TCCA's judgment in this case, Cathey cannot justify this Court's intervention to correct what he sees as a misapplication of this Court's precedent by the TCCA in another case.

This is even more plainly evident given that this Court *denied review* in *Ex parte Wood*, the one case Cathey cites to demonstrate a purported pattern of the TCCA's refusal to follow this Court's precedent. *Wood v.*

Texas, 140 S. Ct. 213 (2019). Indeed, Cathey fails to cite any of the several cases in which the TCCA has granted relief, reconsideration, or requests to file subsequent habeas applications following *Moore I* and *II*. *Petetan v. State*, 622 S.W.3d 321, 360–61 (Tex. Crim. App. 2021) (applying *Moore I* and *II* and granting a new punishment trial); *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021) (remanding intellectual disability claim raised in subsequent application); *Ex parte Williams*, No. WR-71,296-03, 2020 WL 7234532, at *1 (Tex. Crim. App. Dec. 9, 2020) (granting relief on intellectual disability claim and reforming sentence to life); *Ex parte Gutierrez*, No. WR-70,152-03, 2020 WL 6930823, at *1 (Tex. Crim. App. Nov. 25, 2020) (granting relief on subsequent application and reforming sentence to life after remanding intellectual disability claim to the trial court in light of *Moore*); *Ex parte Guevara*, No. WR-63,926-03, 2020 WL 5649445, at *3 (Tex. Crim. App. Sept. 23, 2020) (same); *Ex parte Lizcano*, No. WR-68,348-03, 2020 WL 5540165, at *1 (Tex. Crim. App. Sept. 16, 2020) (same); *Ex parte Lewis*, No. WR-86,572-01, 2020 WL 5540550, at *1 (Tex. Crim. App. Sept. 16, 2020); *Ex parte Escobedo*, No. WR-56,818-03, 2020 WL 3469044, at *1 (Tex. Crim. App. June 24, 2020) (remanding intellectual disability claim raised in a subsequent application for review on the merits); *Ex parte Henderson*, No. WR-37,658-03, 2020 WL 1870477, at *1 (Tex. Crim. App. Apr. 15, 2020) (granting relief after reconsidering case in light of *Moore I* and reforming sentence to life); *Brownlow v. State*, No. AP-77,068, 2020 WL 718026, at *23 (Tex. Crim. App. Feb. 12, 2020) (granting a new punishment trial in light of *Moore I* and *II*); *Ex parte Butler*, No. WR-41,121-03,

2019 WL 4464270, at *2 (Tex. Crim. App. Sept. 18, 2019) (remanding intellectual disability claim raised in a subsequent application to trial court to consider the evidence in light of *Moore I* and *II*); *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019) (remanding subsequent application for merits review of, *inter alia*, applicant's claim of intellectual disability due to "recent changes in the law pertaining to the issue of intellectual disability"); *Thomas v. State*, No. AP-77,047, 2018 WL 6332526, at *19 (Tex. Crim. App. Dec. 5, 2018) (granting a new punishment trial following *Moore I* and *II*);[12] *Ex parte Sosa*, 2017 WL 2131776, at *1 (Tex. Crim. App. May 3, 2017) (granting relief on intellectual disability claim after *Moore I*). Cathey's hyperbolic argument about the TCCA's supposed recalcitrance, Pet. Cert. at 26–29, flies in the face of the several cases in which the TCCA has granted various forms of relief following *Moore I* and *II*.

Even if Cathey's complaint about the state court's application in this case of this Court's precedent could warrant review, he fails to justify it. As discussed below, the TCCA properly applied this Court's precedent and rejected Cathey's claim.

II. The TCCA Properly Rejected Cathey's Intellectual Disability Claim.

The TCCA has adopted the criteria in the DSM-5 for intellectual disability: (1) deficits in general mental abilities; (2) impairment in everyday adaptive functioning; and (3) onset during the developmental

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[12] The TCCA noted in *Thomas* that it had by that time remanded "at least six" habeas applications for further factfinding since *Moore I* was decided. 2018 WL 6332526, at *19 n.59.

period. *See Petetan*, 622 S.W.3d at 330; *see also Moore I*, 137 S. Ct. at 1045, 1048. The TCCA applied the appropriate standards as articulated in the DSM-5 and by this Court in *Moore I* and *II*. The TCCA properly rejected Cathey's intellectual disability claim, finding he failed to show either deficits in intellectual or adaptive functioning. Pet'r's App. 2a–3a. Cathey fails to identify any error in the lower court's judgment.

A. The TCCA properly found Cathey failed to show he suffers from significantly subaverage intellectual functioning.

Cathey argues the TCCA erred by treating his IQ score of 77 (with a range of 72–82) as conclusive evidence that he does not suffer from significantly subaverage intellectual functioning. Pet. Cert. at 16–20. He asserts the TCCA's opinion contravenes this Court's holdings in *Hall v. Florida*, 572 U.S. 701 (2014), *Moore I*, and *Moore II*. Pet. Cert. at 16. Cathey also takes issue with the TCCA's findings regarding the FE. Pet. Cert. at 18. He fails to identify any error let alone a compelling reason for this Court to grant review.

First, Cathey's assertion that the TCCA treated evidence of his intellectual functioning in a way that contravenes this Court's precedent is based on a misapprehension of the TCCA's holding and this Court's precedent. At issue in *Hall* was Florida's "strict cutoff" whereby an individual would be precluded from presenting additional evidence of intellectual disability if he or she did not present evidence of having obtained an IQ score of 70 or below. *Hall*, 572 U.S. at 712. This Court held the strict cutoff violated the Eighth

Amendment because it ignored the medical community's practice recognizing the SEM inherent in IQ testing and recognizing that an individual with an IQ score above 70 may nonetheless be diagnosed with intellectual disability if he or she suffers from significant limitations in adaptive behavior. *Id.* at 712–14. The TCCA applied no such cutoff in this case. It explicitly considered the SEM as applied to Cathey's IQ score. Pet'r's App. 2a ("Taking the [SEM] into account, [Cathey's] IQ score range is between 72 and 82."); 136a ("As we explained, mental health professionals are flexible in their assessment of intellectual disability; sometimes a person whose IQ has tested above 70 may be diagnosed as intellectually disabled while a person whose IQ tests below 70 may not be disabled.").[13] Nor did the TCCA ignore the lower end of the SEM or otherwise "narrow" it. *Moore I*, 137 S. Ct. at 1049; *see* Pet'r's App. 2a. Moreover, the TCCA explicitly held that a factfinder may consider the FE in interpreting an IQ score. Pet'r's

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[13] In reconsidering this case and denying Cathey's claim a second time, the TCCA considered all the evidence presented to the state trial court and relied in part on its reasoning from its first opinion. Pet'r's App. 2a–3a. The TCCA did not withdraw or vacate its 2014 opinion when it granted reconsideration. Pet'r's App. 118a–119a. Consequently, the TCCA's first opinion denying Cathey's claim is relevant to his complaints regarding the court's rejection of his claim. *Compare* Pet'r's App. 118a (order reconsidering case and remanding for consideration of all the evidence in light of *Moore I*), *with Ex parte Gibson*, No. WR-73,299-01, 2010 WL 2332144, at *1 (Tex. Crim. App. June 9, 2010) (reconsidering case, explicitly withdrawing previous denial of application, and remanding to the trial court for factual development); *see Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008) (describing the state court's reconsideration of a prior denial of an application for a writ of habeas corpus as "revisit[ing]" its earlier judgment).

App. 2a. That the TCCA did not treat Cathey's IQ score of 77 as dispositive is also patently clear because Cathey was "able to present"—and the TCCA considered—"additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 572 U.S. at 723; *see Moore I*, 137 S. Ct. at 1049; Pet'r's App. 2a–3a, 155a–174a. This, even though the SEM (as low as 72) here did not place Cathey in the "range for intellectual-functioning deficits." *Moore I*, 137 S. Ct. at 1049–50 ("Because the lower end of Moore's score range falls at or below 70, the [T]CCA had to move on to consider Moore's adaptive functioning.").

Second, as noted above, the TCCA explicitly found the FE exists but found insufficient support for Cathey's assertion that IQ scores are routinely adjusted to account for it. Pet'r's App. 144a–154a. Cathey's argument in this regard is a non sequitur, Pet. Cert. at 18, because the TCCA did not *prohibit* factfinders from considering the FE—it explicitly held that factfinders can. Pet'r's App. 2a. Indeed, the TCCA's finding was supported by scientific evidence, including Dr. Proctor's testimony that he *considers* the FE but does not adjust an IQ score to account for it, such adjustments are controversial, and adjusting data to fit theory is not an appropriate scientific method. SHRR (2019) at 64, 68; 6 SHRR at 103, 161–62; *see* Pet'r's App. 149a, 153a. Cathey's assertion that the TCCA failed to identify any medical professional who does not adjust IQ scores to account for the FE, Pet. Cert. at 18, ignores Dr. Proctor's testimony. Pet'r's App. 151a–153a. Indeed, Cathey's expert, Dr. Fletcher, acknowledged the DSM-5 does not require deduction of points from an IQ score to account for the FE but rather states that clinical judgment is

needed to interpret the score.[14] SHRR (2019) 50. Dr. Proctor's testimony and the TCCA's decision not to require factfinders to adjust IQ scores to account for the FE are also consistent with this Court's recent observation that the FE is a "controversial theory." *Dunn v. Reeves*, 141 S. Ct. 2405, 2408–09 (2021) (per curiam); *see Ledford*, 818 F.3d at 638 ("Far from mandating numerically specific [FE] reductions to all IQ scores, the DSM-[5] does little more than acknowledge the possibility that the FE is a 'factor' that 'may' impact an individual's IQ score.");[15] Pet'r's App. 148a–149a (collecting cases). Similarly, the TCCA's finding that retesting of Cathey's intellectual functioning would have provided reliable evidence was also supported by the evidence. Pet'r's App. 124a–126a.

The TCCA's rejection of Cathey's arguments that a factfinder *must adjust* an IQ score to account for the FE and that re-testing would have been inappropriate

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[14] Dr. Fletcher cited an article in which Dr. Kevin McGrew stated, "[t]he use of a [FE] correction in clinical settings is less of an issue given that psychologists in such settings typically have more leeway to interpret scores" but that in "high stakes settings" like an *Atkins* case "may have strict point-specific cut-scores" such that the court does "not allow for such clinical interpretation." PX 12 at 5. As the Eleventh Circuit has recognized, Dr. McGrew's observation carries little weight because (1) there is no medical consensus "at all" as to application of the FE in a clinical setting and (2) the observation is irrelevant if there is no point-specific cutoff. *Ledford v. Warden, Ga. Diagnostic and Classification Prison*, 818 F.3d 600, 638 (11th Cir. 2016).

[15] *Wright v. Secretary, Dept. of Corr.*, No. 20-13966, 2021 WL 5293405, at *6 (11th Cir. Nov. 15, 2021) (stating the court was "not persuaded the medical consensus" regarding the FE had changed since its opinion in *Ledford*).

here was supported even by the evidence Cathey relied upon at the most recent evidentiary hearing.[16] *E.g.,* PX 3 at 491–92 (Dr. Weiss's statement that "[a]djustment of scores on obsolete tests for high-stakes evaluations is controversial. The primary area of disagreement concerns the appropriateness of adjusting individual scores based on group data. . . . Adjustments for routine clinical practice are not recommended."); PX 8 at 1 (describing the FE as a "highly debated" trend and recommending more research of it given "the high stakes involved"), 9 (noting "[s]ome scholars argue that correcting IQ scores for the FE is unscientific due to the FE's variability, and that it violates standardization and test guidelines" but stating the consensus is that, "*given the high stakes involved*, the FE should be *considered* when assessing defendants' IQs") (emphasis added), 13 ("Most importantly, practitioners need to ensure that the most current editions of IQ tests (i.e., correctly normed versions) are used."); PX 9 at 137 ("Obtaining information from multiple sources and employing a convergence-of-data approach is a key element to conducting a retrospective evaluation. . . . Conducting an assessment of the individual's present intellectual functioning does not generally pose a problem, *even for an individual who is currently incarcerated*.") (emphasis added); *see* 6 SHRR 85 (Dr. Proctor's testimony that retesting of Cathey would have been best practice).

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[16] As discussed extensively in the prior proceedings in this Court, the evidence presented to the state court plainly contradicted Cathey's argument that there exists a consensus in the scientific community that an IQ score *must* be adjusted to account for the FE. Br. in Opp'n, 27–32, *Cathey v. Texas*, No. 14-8305 (May 15, 2015); *see* Pet'r's App. 139a–155a.

Cathey's own evidence belies his argument that the TCCA's opinion represents a disregard of medical consensus in favor of lay instinct, Pet. Cert. at 20. And Cathey's preference for a cribbed view of the evidence—limited to only that which supports a finding of intellectual disability—flies in the face of the medical community's emphasis on seeking convergent validity. *See* PX 7 at 105 ("When multiple reliable and valid IQ test scores are available, the goal is not to identify which single score is the 'best' estimate of an individual's general intelligence. Assessment professionals should integrate the multiple scores and provide a scientific and professionally accepted estimate, using reliable and valid principles and methods, of the person's general level of intellectual functioning. When the multiple scores are reasonably consistent (i.e., a convergence of indicators) and any significant differences are explainable, assessment professionals can have greater confidence in their diagnostic conclusion."); PX 9 at 137; DX 10 at 196.

Rather than simply relying on an existing scientific consensus, Cathey seeks to prematurely declare a winner in an ongoing debate regarding the FE. *See Ledford*, 818 F.3d at 635–40. This Court's precedent does not countenance such an adversarial application of science. The TCCA's conclusion that Cathey failed to show he suffers from significant deficits in intellectual functioning was based on current medical standards and was consistent with this Court's precedent. Cathey fails to show any error in the TCCA's judgment, and his petition should be denied.

B. The TCCA properly found Cathey failed to show he suffers from significant deficits in adaptive functioning.

Cathey also argues the TCCA erred in finding he failed to prove he suffered from significant deficits in adaptive behavior. Pet. Cert. at 16, 21–26. He asserts the TCCA contravened this Court's *Moore* opinions by relying too heavily on evidence of his strengths and by rejecting his expert's testimony based on his administration of the VABS. Cathey's disagreement with the TCCA's factual findings fail to identify any error let alone a compelling reason for review.

First, the TCCA did not rely too heavily on evidence of Cathey's strengths. Cathey asserts the TCCA found his strengths rendered his deficits irrelevant. Pet. Cert. at 21–22. Not so. Nowhere in its opinions did the TCCA find evidence of Cathey's adaptive deficits were rendered irrelevant or otherwise outweighed by his adaptive strengths. Instead, the TCCA assessed the credibility of the evidence in light of the obvious fact that the VABS respondents—Cathey's sister and ex-wife—would be motivated to exaggerate their recollections of Cathey's adaptive deficits decades earlier. Pet'r's App. 3a. The TCCA's opinion in this regard was supported by Dr. Proctor's testimony that he would give little weight to the VABS results. Pet'r's App. 160a–161a.

The TCCA demonstrated why the respondents were not credible, given the contradictions between their answers and the trial testimony. Most telling is Cathey's sister's trial testimony that everyone called Cathey a

"nerd" when he was young and that he read books all the time. Pet'r's App. 157a. In the same way, the TCCA's discussion of Cathey's sister's trial testimony is not an example of the court relying on lay stereotypes, Pet. Cert. at 22, but rather the court conducting a credibility assessment—what should be an uncontroversial endeavor. *See* Tex. R. Evid. 613. Standing on its own, Cathey's sister's description of him as a "nerd" might not be evidence to contradict a finding of intellectual disability, *Moore I*, 137 S. Ct. at 1052, but it is undoubtedly a reason to discount her recollection decades later of the extent of his adaptive deficits.[17] And again, the TCCA's opinion discounting her new recollection is not an example of it emphasizing Cathey's

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[17] Cathey asserts the TCCA's finding that Cathey's sister's trial testimony contradicted her later recollections of Cathey's adaptive deficits was erroneous. Pet. Cert. at 26. Importantly, Cathey's complaint does not justify this Court's review. Sup. Ct. R. 10. Nonetheless, Cathey's contention that his sister testified *at trial* that the books she observed him reading were comic books is not accurate. Pet. Cert. at 26. Rather, Cathey's characterization is based on his sister's decades-late *recharacterization* of her trial testimony. Pet'r's App. 81a. Indeed, Cathey's sister testified at trial that "[e]veryone called him a nerd" and that he was a "real nerd" who "read a lot of books." 22 RR 198. Additionally, Cathey's sister's recollection that he could not be left alone to do anything, *see* Pet. Cert. at 25–26, was contradicted by trial testimony of Cathey's brother-in-law that he left Cathey in charge of his battery repair shop while he made deliveries. Pet'r's App. 159a. And her recollection that Cathey was bullied and had no friends was contradicted by his middle school teacher's trial testimony that he was well-liked by his classmates. Pet'r's App. 159a. Cathey's sister's belated and clearly biased recharacterization of her trial testimony does not demonstrate the TCCA erred in finding a contradiction between the trial testimony and her much later reports of Cathey's adaptive deficits.

adaptive strengths but rather assessing the reliability of the evidence.

Second, Cathey fails to show any error in the TCCA's decision to discount the results of the VABS. Pet. Cert. at 23–26. Indeed, the TCCA's skepticism of the VABS results is supported even by evidence Cathey presented at the most recent evidentiary hearing. PX 9 at 138–40 (urging "caution" when conducting a retrospective adaptive behavior assessment because such an assessment is a "departure from standardization," noting "no research is available to inform us as to the possible error rate of adaptive behavior assessments obtained retrospectively," and recommending clinicians "closely examine[ ] for any possible bias" because of the possibility "the respondent's specific memory regarding the individual's adaptive behavior may be fallible"); PX 10 at 193–96 (explaining that clinical judgment is especially important in *Atkins* cases "because the various sources" of adaptive behavior evidence "are subject to many kinds of bias[,]" and providing list of acceptable sources of evidence, including evidence of performance on standardized tests, school performance, placement in special education classes, and prior statements of lay witnesses from prior court proceedings); PX 11 at 268 (stating that teachers and other school officials "are among the most important interviews when trying to make an accurate retrospective diagnosis"). Consistent with the scientific literature, the TCCA did not categorically preclude reliance on an inmate's family members' recollections but rather found *in this case* the trial court's "uncritical" acceptance of Dr. Fletcher's

opinion was not supported by the record.[18] Pet'r's App. 160a–161a. The TCCA is not an outlier in seeking to ensure the retrospective evidence of an inmate's adaptive behavior is reliable. Pet'r's App. 160a–161a.

As it did with the evidence of Cathey's intellectual functioning, the TCCA sought a broad set of data, which included the relatively objective evidence from Cathey's school records. Pet'r's App. 163a–164a. Those records showed Cathey achieving largely normal grades and passing all sections on a standardized test, which was consistent with the trial testimony of Anne Smith who taught Cathey from the sixth grade through eighth grade. Pet'r's App. 164a. The TCCA did not, as it did in *Moore*, 137 S. Ct. at 1052, improperly rely on the fact that Cathey was not placed in special education classes due to intellectual deficits. Rather, the TCCA evaluated the records of Cathey's achievement to determine whether it evidenced intellectual disability. Pet'r's App. 164a. This is far from relying on lay stereotypes, as Cathey alleges. Pet. Cert. at 22. Nothing in this Court's jurisprudence requires a factfinder to uncritically accept a habeas petitioner's expert's opinion merely because it comes from an expert. As the TCCA did here, courts in this context serve as factfinders and are permitted to determine whether evidence is reliable. *Parker v. Matthews*, 567 U.S. 37, 44 (2012) ("[E]xpert testimony does not trigger a conclusive presumption of correctness, and it was not unreasonable to conclude that *the jurors* were entitled to consider the tension between [the

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[18] Importantly, Cathey's sister and ex-wife had not had significant personal contact with Cathey in "recent decades[.]" Pet'r's App. 157a.

experts] and their own common-sense understanding of emotional disturbance.") (emphasis in original). This is not only a fundamental function of a factfinder, but also consistent with scientific principles, as discussed above. *See, e.g.,* PX 9 at 138–40; PX 10; Pet'r's App. 160a–161a.

This Court denied Cathey's petition for a writ of certiorari following the TCCA's 2014 denial of relief. This Court should likewise deny his current petition, as the TCCA's denial of relief is entirely consistent with current medical standards and this Court's opinions in *Moore I* and *II*.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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