No. 21-466

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

REPLY BRIEF FOR PETITIONER

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The State tries mightily to demonstrate that the TCCA's "misapplication of this Court's precedent," BIO 4, is cabined to this case. But it is anything but. On each issue presented, the TCCA—which heard no live testimony—could reverse the trial court's findings only by discarding medically accepted frameworks in favor of *Atkins*-hostile reasoning this Court has repeatedly rejected. Moreover, the TCCA's summary reliance on its own pre-*Moore I*, pre-*Moore II* analysis is an affront to this Court's authority and, if left in place, would serve as a blueprint for state courts wishing to evade federal precedents they dislike. As in *Moore II*, the judgment should be summarily reversed.

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

A. The State Fails To Revive The TCCA's Self-Contradictory Analysis Of Intellectual Functioning.

The State concedes that the TCCA openly acknowledged the Flynn effect's validity, but then reversed the trial court for applying it. BIO 26-27. The TCCA's decision is thus a non-sequitur. And neither that court's reasoning nor the State's brief in opposition redeems it.

1. Because the decision below is largely devoid of analysis, the State relies extensively on the TCCA's pre-*Moore I*, pre-*Moore II* decision rejecting Cathey's claim. *See* BIO 26 n.13. But as the petition explains, that decision's reasoning is constitutionally invalid. Pet. 19-20. The TCCA's principal basis for rejecting application of the Flynn effect in 2014 was that it is duplicative of the standard error of measurement. App. 154a; *see also* Pet. 19. But this Court held in *Moore I* that the standard error of measurement is a *separate*, *independent* feature of IQ testing that must be recognized *in addition to* "other sources of imprecision." 137 S. Ct. at 1049; *see also* Pet. 19 (citing medical sources and habeas court's findings).

The 2014 decision's other rationale was that Cathey should have submitted to another, more recently curved test. *Cf.* App. 124a-125a. As the petition explains, any such suggestion is unsupportable as a matter of medical standards and instead depended solely on the 2014 TCCA's lay instinct. Pet. 19-20. The State scarcely disagrees, mentioning the issue only to vaguely hypothesize—without citation to any

medical source—that a new test would have been "reliable." BIO 28. The petition explains, with citations, why that is not so. Pet. 19-20. The State offers no response.

2. Unable to rely on either decision's actual reasoning, the State instead focuses on consequences, asserting that applying the Flynn effect would "prematurely declare a winner in an ongoing debate." BIO 30. As explained, however, the TCCA *itself* took the petitioner's side in the pertinent debate, declaring both in 2014 and in the decision below that the Flynn effect is a valid concept that factfinders "may consider." Pet. 11-12, 15 (citing App. 2a, 124a). Thus, the TCCA's error was not to *reject* the Flynn effect, but to reverse the habeas court without any cognizable reason. *See supra* at 2-3. This Court's intervention would thus have no bearing on any broader diagnostic questions. Instead, it would simply reinforce that, having acknowledged the Flynn effect's validity, the TCCA could not permissibly deny Cathey his federal constitutional rights without offering a constitutionally permissible basis. Indeed, even now, the State fails to propose any way a factfinder could "consider" the Flynn effect (as the TCCA said they may), *cf.* App. 2a, other than by applying it to an individual score.[1]

The State's arguments fail for that reason alone. But in addition, the State's contention that applying the effect to individual scores is controversial, *id.* at 27-28, reflects a fundamental misunderstanding of the effect itself. As the petition explains, every IQ-test score reflects not a raw number of correct answers, but

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[1] As noted, retesting individuals on death row is not a viable possibility. *See supra*; Pet. 19-20.

a grade against a curve. Pet. 8-9. To accept the Flynn effect—as the TCCA has twice said it does—is to accept that each score should be curved against the population at the time the test was *taken*, not against the population at the time the test was *created*. *See id.* Once that proposition is accepted (and, again, the TCCA openly accepted it), the final step is simply to apply that curve—a simple math problem not subject to dispute. Indeed, the reason Dr. Fletcher testified that he can "correct the score as a shortcut to correcting the norms" (*i.e.*, the curve), *cf.* BIO 19, is that the two corrections are based on the exact same principles and have the exact same effect.

B. The State Fails To Justify The TCCA's Improper Focus On Adaptive Strengths.

The petition also explained that, as in *Moore I* and *Moore II*, the TCCA inappropriately focused on Cathey's supposed adaptive *strengths* rather than directing its attention to his adaptive *weaknesses*. Pet. 20-23. To the extent the brief in opposition addresses that issue at all, it largely repeats the error.

1. The State wrongly contends that "[n]owhere in its opinions did the TCCA find evidence of Cathey's adaptive deficits were * * * outweighed by his adaptive strengths." BIO 31. Even the State cannot stand by that claim. Just pages after making it, the State itself catalogues Cathey's supposed adaptive strengths, admits the TCCA relied on them to discount his weaknesses, and openly endorses that erroneous approach. *Id.* at 34-35. Moreover, the State appears to contend that regardless of how *experts* would diagnose intellectual disability, *the TCCA's judges* were permitted to employ their own "common-sense understanding" of how to do so. *Id.* (citation omitted). Because *Moore I* and *Moore II* say precisely

the opposite, *see* Pet. 20-23, the State's concession that the TCCA engaged in such an analysis amounts to a confession of error.

2. The State's only other response is to wrongly imply that the TCCA's decision rests on an adverse credibility determination regarding *the entirety* of Cathey's evidence of adaptive weaknesses. *Cf.* BIO 31-33. That implication is simply inaccurate. Setting aside for the moment the testimony of Cathey's sister (which is discussed *infra*, at 7-9), the TCCA had no basis to disbelieve—and did not even claim to disbelieve—the undisputed record evidence from additional sources that Cathey:

- had deficits in adaptive areas such as language, reading and writing;
- had additional deficits in conceptual areas such as money, time, and numbers;
- was gullible and naïve;
- possessed low self-esteem as a result of deficits he suffered as a child and his resulting inability to avoid being victimized by more develop-mentally advanced children;
- "was severely impaired in terms of inter-personal 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); and
- lacked practical skills relating to such areas as daily living, basic safety, and the ability to hold a job.

See Pet. 10 (providing sources). Instead, as the petition explains, the TCCA simply deemed that evidence non-probative in light of the State's evidence of supposed adaptive strengths. Pet. 20-23. That is the exact mode of analysis that *Moore I* and *Moore II* "found wanting," and the decision below simply "repeats" it, *Moore II*, 139 S. Ct. at 670, in a single, summary paragraph. Reversal is warranted for that reason alone.

C. The State Fails To Justify The TCCA's Categorical Rejection Of The Vineland-II.

The petition further explains that the TCCA's rejection of the Vineland-II was constitutionally impermissible, because the TCCA both (i) impermissibly presumed to reject the medically accepted practice of interviewing witnesses close to the subject, Pet. 24-25, and (ii) impermissibly relied on lay analysis to erroneously perceive supposed contradictions in Cathey's sister's testimony, Pet. 25-26. Each issue reflects yet more disregard of the *Moore* cases.

1. The State's response on the issue of Dr. Fletcher's selection of interviewees is facially inadequate. As elsewhere, the State focuses exclusively on supposed inconsistencies in Cathey's *sister*'s testimony. BIO 33-35. But even if the State's contentions were correct (and they are not, *see infra* at 7-9), they would not impeach Cathey's *ex-wife's* Vineland-II testimony, which the TCCA claimed to disbelieve solely because of her relation to Cathey. App. 3a.[2] The petition

[2] The State asserts in the plural that the "respondent*s were* not credible, given the contradictions between *their* answers and the trial testimony." BIO 31-32 (emphasis added). That is

explains that the TCCA's analysis amounts to a rejection of well-accepted diagnostic techniques, Pet. 24-25, and the State does not respond. Nor is the State's *ipse dixit* that the TCCA's analysis is limited to this case, BIO 33-34, at all persuasive. As the petition explains, reliance on those who are close to the subject is an inherent feature of the Vineland-II. By holding that such witnesses are inherently unreliable—to the point that the TCCA will reverse a habeas court for crediting them—the TCCA has effectively rejected, on the basis of its own lay analysis, the clinical gold-standard test for evaluating adaptive deficits. *See* Pet. 3-4.

The State also proposes an alternative ground for rejecting the Vineland-II, claiming that the technique cannot be applied retrospectively. BIO 33-34. But the habeas court expressly rejected the State's contention, App. 70a-73a, and the TCCA specifically declined to disturb that holding, App. 3a (refusing to opine on "whether or not the Vineland can be administered retrospectively"). The judgment cannot stand on reasoning it unambiguously declined to adopt.

2. All that remains is the TCCA's rejection of the habeas court's findings regarding Cathey's sister's testimony. But the TCCA's supposed "credibility assessment," BIO 32, made without access to any live testimony, cannot support the judgment either. To begin, despite the State's repeated invocation of the sister's testimony, *cf.* BIO 4, 16, 31-32, that testimony has little or nothing to do with most of the issues the petition raises. Her testimony was irrelevant to the TCCA's erroneous analysis of Cathey's intellectual

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sleight of hand. No one contends that the ex-wife's testimony was the least bit contradictory.

functioning, *supra* at 2-4; had no material bearing on the TCCA's erroneous focus on supposed strengths at the expense of deficits, *supra* at 4-6, and, as explained, cannot justify doubting the independent testimony of Cathey's ex-wife, *supra* at 6-7. Thus, even if the rejection of Cathey's sister's testimony had been warranted, it would not save the judgment.

In any event, the TCCA rejected the testimony only by resorting to the very same lay stereotypes *Moore I* and *Moore II* prohibit. In making its determination, the TCCA incorporated by reference its 2014 explanation—issued before *Moore I* and *Moore II*, and under the now-prohibited *Briseno* framework—that "the adaptive behavior applicant's sister reported * * * was contradicted by her trial testimony * * * that applicant was 'average,' 'nerdy,' and read books all the time." App. 157a. Although the decision below purports to be independent of *Briseno*, the TCCA's analysis was in substance *an application* of the *Briseno* framework, which asked (*inter alia*) whether "those who knew the person best during the development stage * * * th[ought] he was mentally retarded at that time." *Moore I*, 137 S. Ct. at 1051-52. This Court rejected such an inquiry in *Moore I*, explaining that such reliance on lay perceptions is directly contrary to accepted diagnostic frameworks, which affirmatively "endeavor[] to *counter* lay stereotypes of the intellectually disabled." *Moore I*, 137 S. Ct. at 1052 (emphasis added).

Indeed, even the State now concedes—in a nod to *Moore I*—that the sister's trial testimony is not "evidence to contradict a finding of intellectual disability." BIO 32. That concession should be the end of the matter. But instead, the State seeks to walk a tightrope, asserting without citation that the

testimony is still "a reason to discount her recollection." *Id.* But the State cannot explain why. As the petition sets forth, Cathey's sister's testimony not only fails to contradict the bottom-line conclusion that Cathey is intellectually disabled, but also does not cast doubt on her specific factual 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. Pet. 25-26. There is no evidence that Cathey's sister associated such behavior with intellectual disability, so it is no surprise—much less a contradiction—that she deemed Cathey "average," particularly given that she did so when discussing him in a generalized context not specific to the issue of his intellectual or adaptive capabilities. [3] Particularly in light of her later elaboration on her testimony, which the TCCA similarly offered no reason to doubt, the TCCA could find a contradiction only by presuming that no sister of an intellectually disabled brother would describe that brother as "nerdy" or "average." Pet. 25-26. And that is precisely the sort of presumption that *Moore I* and *Moore II* reject.

[3] The State's effort to mine Cathey's sister's testimony for additional supposed contradictions, BIO 32 n.17, is unwarranted. Each instance the State identifies involves different witnesses testifying in general terms about their own experiences with Cathey, so differences in their recollections are only natural. Nor is it material whether Cathey's sister's "comic book" testimony was given at trial or in the context of the Vineland-II; either way, there is nothing contradictory about it.

II. THE TCCA'S DEMONSTRATED HOSTILITY TO THIS COURT'S PRECEDENTS REQUIRES INTERVENTION.

Certiorari is warranted here for the exact same reason as in *Moore II*: the TCCA continues to fail to faithfully apply this Court's *Atkins* jurisprudence. Indeed, the reasons for granting certiorari are even stronger here, both because of the TCCA's open hostility to this Court's decisions, *see* Pet. 27-28 (discussing *Ex Parte Wood*, 568 S.W. 3d 678 (Tex. Crim. App. 2018)), and because the two-page decision below is even more clearly inadequate than the TCCA decisions this Court invalidated in the *Moore* cases.

The State's argument to the contrary simply ignores the grants in those cases, which involved similar (if less egregious) circumstances. And the State also misunderstands the petition's discussion of *Wood*. As that case demonstrates, far from being case-specific, the errors in the decision below are symptoms of a repeated, purposeful, and open challenge to this Court's authority as the final arbiter of the Constitution's meaning. The question is therefore not whether granting certiorari here would "correct" the decision in *Wood*, *cf.* BIO 22, but instead whether certiorari is warranted to address and put a stop to the TCCA's demonstrated intransigence. As the petition demonstrates, although lower courts do not often presume to disregard this Court's decisions, this Court does not hesitate to intervene when they do. Pet. 26-27.

The State contests whether such intransigence has occurred, but the decisions it cites do not support its argument. *Cf.* BIO 22-24. Although the State does not mention it, at least eight of those fourteen cases

involved a concession by prosecutors that the defendant was intellectually disabled.[4] In five more, the TCCA merely remanded for reconsideration or additional factfinding, just as it did in this case before issuing the erroneous decision below.[5] As that decision demonstrates, those non-final, procedural orders say little about the TCCA's ultimate disposition.

The State's page-long stringcite thus boils down to a single case, *Ex parte Sosa*, 2017 WL 2131776 (Tex. Crim. App. May 3, 2017), in which the TCCA actually afforded *Atkins* relief and the available record does not make clear that the relief was unopposed. And even that case undermines the State's point. *Sosa*

[4] *See Ex parte Williams*, 2020 WL 7234532, at *1 n.1 (Tex. Crim. App. Dec. 9, 2020); *Ex parte Gutierrez*, 2020 WL 6930823, at *1 (Tex. Crim. App. Nov. 25, 2020); *Ex parte Guevara*, 2020 WL 5649445, at *2 (Tex. Crim. App. Sept. 23, 2020); *Ex parte Lizcano*, Trial Ct.'s Finding of Fact and Conclusions of Law 1 (Dist. Ct. Dall. Cnty. Mar. 29, 2019); *Ex parte Henderson*, 2020 WL 1870477, at *1 (Tex. Crim. App. Apr. 15, 2020); *Brownlow* v. *State*, J. of Conviction by Jury 2 (Dist. Ct. Kaufman Cnty. Aug. 23, 2021); *Ex parte Butler*, Agreed Proposed Finding of Fact, Conclusions of Law, and Order 2 (Dist. Ct. Harris Cnty. Sept. 14, 2021); *Thomas* v. *State*, 2021 WL 4988320, at *1 (Tex. App.—Dall. Oct. 27, 2021).

[5] *Petetan* v. *State*, 622 S.W.3d 321 (Tex. Crim. App. 2021); *Ex parte Busby*, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021); *Ex parte Lewis*, 2020 WL 5540550, at *1 (Tex. Crim. App. Sept. 16, 2020); *Ex parte Escobedo*, 2020 WL 3469044 (Tex. Crim. App. June 24, 2020); *Ex parte Milam*, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019). In one of the cases, Presiding Judge Keller, joined by Judges Yeary, Keel, and Slaughter, vigorously dissented on grounds reminiscent of the TCCA's decision here, such as that the evidence of intellectual disability came from family members, whom the dissenters deemed inherently "biased and unreliable." *Petetan*, 622 S.W.3d at 371 (Keller, P.J., dissenting).

involved an applicant with IQ-test scores as low as 39, whose *Atkins* claim the TCCA nevertheless initially *denied* based solely on its belief that his offense of conviction was "inconsistent with" "mental retardation." *See Ex parte Sosa,* 364 S.W.3d 889, 892, 896 (Tex. Crim. App. 2012). After thus consigning him to an unconstitutional execution, the TCCA reconsidered only after this Court decided *Moore I*, in which it vacated an analogous ruling in part for relying on how the petitioner "committ[ed] the crime." *See Moore I*, 137 S. Ct. at 1047; *Sosa*, 2017 WL 2131776, at *1 (reconsidering in light of *Moore I*). Thus, to the extent it is relevant at all, *Sosa* only emphasizes the continuing need for close scrutiny of the TCCA's *Atkins* decisions, which, as the *amici* supporting the petition note, remain well outside the bounds of national norms.

CONCLUSION

The Court should grant certiorari and reverse, either summarily or after plenary review.

Respectfully submitted,

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