No. _____

In the
Supreme Court of the United States

JAMES HARRIS, JR.,

Petitioner,

v.

STATE OF TEXAS

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner James Harris Jr. has an IQ in the bottom 5th percentile and has trouble with basic everyday tasks like reading, arithmetic, and living independently. Those facts should have prompted a robust investigation into intellectual disability in preparation for the mitigation phase of Mr. Harris's capital murder trial. Instead, Mr. Harris's lawyer never hired anyone to evaluate Mr. Harris for an intellectual disability and disclaimed any argument that Mr. Harris was intellectually disabled. The jury recommended that he be sentenced to death. When Mr. Harris was finally evaluated by a qualified doctor, he was diagnosed with an intellectual disability that renders him ineligible for the death penalty.

The state habeas trial court and the Texas Court of Criminal Appeals (TCCA) rejected Mr. Harris's intellectual disability claim based on an analysis that departs from the medically accepted standard. This Court has already twice corrected the same error. *See Moore v. Texas* ("*Moore I*"), 137 S. Ct. 1039 (2017); *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666 (2019). The TCCA also rejected the state habeas trial court's detailed factfindings and legal conclusions that Mr. Harris received ineffective assistance of counsel from a lawyer who inadequately pursued the possibility of Mr. Harris's intellectual disability.

The questions presented are:

1. Whether the TCCA contravened the Eighth and Fourteenth Amendments, and this Court's precedents, when it evaluated petitioner's intellectual disability

claim based on its own standard instead of medically accepted criteria.

2. Whether petitioner received ineffective assistance of counsel in violation of the Sixth Amendment when his counsel abandoned an investigation into his intellectual disability without having any medical professional evaluate the defendant for that condition.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii): *Ex Parte James Harris*, No. WR-84,064-01, (Tex. Crim. App. Jan. 10, 2023); *Ex Parte James Harris*, No. WR-84,064-01, 2022 WL 1567654, at *1 (Tex. Crim. App. May 18, 2022); *Ex Parte James Harris*, No. 67063-A, (149th D. Ct. Brazoria Cnty. Feb. 22, 2021); *Harris v. State*, No. AP-77,029, 2016 WL 922439 (Tex. Crim. App. Mar. 9, 2016).

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PETITION FOR WRIT OF CERTIORARI

James Harris Jr. respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals (TCCA).

The Eighth and Fourteenth Amendments "forbid the execution of persons with intellectual disability." *Hall v. Florida*, 572 U.S. 701, 704 (2014) (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). This Court has repeatedly held that in order to evaluate claims of intellectual disability, courts must be "informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721. This case arises from the TCCA's latest refusal to follow those clear precedents. This Court has corrected the TCCA's refusal to follow the medical community's diagnostic framework before. In *Moore v. Texas* ("*Moore I*"), 581 U.S. 1 (2017), this Court vacated a TCCA decision rejecting an intellectual-disability claim, holding that the TCCA's test was "an invention of the [T]CCA untied to any acknowledged source" and "[n]ot aligned with the medical community's information." *Id.* at 6. After the TCCA reinstated the very same death sentence, this Court granted certiorari again and summarily reversed. *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666 (2019). The Chief Justice concurred in the summary reversal after dissenting in *Moore I*. As he put it, the TCCA on remand "repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Moore II*, 139 S. Ct. 666, 672 (Roberts, C.J., concurring).

The decision below warrants the same fate. The state habeas trial court evaluated Mr. Harris's intellectual disability claim according to its own *four-*

part test that required that Mr. Harris's adaptive deficits be "directly related" to his intellectual deficits. The medical community uses a *three*-part test, repeated often by this Court, that looks only for deficits in intellectual functioning, adaptive deficits, and the onset of those deficits during the developmental stage. The state habeas trial court's error was unmistakable by the time the TCCA considered this case because a then-recent text update to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) made explicit that there is not and never was a "directly related" requirement. The TCCA nevertheless rubber-stamped the state habeas trial court's determination that Mr. Harris is not intellectually disabled and therefore constitutionally ineligible for the death penalty. It can only have reached that conclusion by repeating the trial court's error. It then rejected the state habeas trial court's determination that Mr. Harris received constitutionally deficient assistance of counsel. It reasoned that counsel adequately pursued an intellectual disability claim when building Mr. Harris's mitigation case, despite that counsel *never* retained anyone to actually evaluate whether Mr. Harris has an intellectual disability that would render his sentence unconstitutional.

The TCCA's failure to adhere to this Court's precedents may mean death for Mr. Harris. The Court should grant the petition and summarily reverse the TCCA's judgment. In the alternative, the Court should grant the petition, conduct plenary review, and reverse.

OPINIONS BELOW

The order of the Texas Court of Criminal Appeals concluding that Mr. Harris is not intellectually disabled and rejecting the state habeas trial court's conclusion that Mr. Harris received ineffective assistance of counsel is not published. It is available at 2022 WL 1567654 and reproduced at pages 1–10 of the Appendix to this petition ("App."). The TCCA's subsequent denial of Mr. Harris's suggestion for reconsideration is unreported and reproduced at App.11. The Findings of Fact and Conclusions of Law of the 149th Judicial District of Brazoria County, Texas, concluding that Mr. Harris received constitutionally deficient assistance of counsel, is unreported and reproduced at App.12–335.

JURISDICTION

The Texas Court of Criminal Appeals denied Mr. Harris's application for a writ of habeas corpus on May 18, 2022. It denied Mr. Harris's suggestion for reconsideration on January 10, 2023. An extension of time to file this petition was granted on March 15, 2023, in Application No. 22A812, extending the time to file to May 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, §1.

The relevant Article of the Texas Code of Criminal Procedure is reproduced at App.547–567.

STATEMENT OF THE CASE

A. Mr. Harris's Charge and the Pre-Trial Proceedings.

On January 14, 2012, Petitioner James Harris Jr. was charged with capital murder. App.13. Six days later, a Texas state trial court in the 149th District Court of Brazoria County appointed Thomas J. Wooten to represent Mr. Harris. *Id.* at 568–570. It was Wooten's first ever capital case. *Id.* at 124. He actively worked the case alone for about five months before he joined the Regional Public Defender's Office of Capital Cases (RPDO), and that office assumed formal representation of Mr. Harris with a sparse team led by Mr. Wooten.

In preparing for trial, Mr. Wooten's small team learned that Mr. Harris struggled intellectually. He had an IQ score of 75, which placed him in the bottom 5th percentile (*i.e.*, below 95% of people). Mr. Harris also has trouble reading and following directions, difficulty performing basic arithmetic, living alone, managing money, and working through paperwork, and a family history of special needs. *Id.* at 57–59, 62–63, 68–70, 116–117, 134–138; 371–372, 374–375, 393–394, 398–399, 461–462. Mr. Harris has struggled with

these concepts throughout his life, including when he was in school and when he was a teenager. *Id.* at 371–372, 374, 376–377. Notwithstanding those indications that Mr. Harris might suffer from an intellectual disability that would make the death penalty unconstitutional, Mr. Wooten never engaged an expert who was "qualified by training and experience to conduct a thorough mitigation investigation" into Mr. Harris's intellectual disability. *Id.* at 198–200.

The mitigation specialists and fact investigators that Mr. Harris's counsel did hire worked in seriatim and their work suffered from a lack of any information-sharing system. Nevertheless, several of those specialists and investigators mentioned to Mr. Wooten that Mr. Harris "presents as a person of low intellect." *See, e.g.*, *id.* at 403–404, 455–458. Three separate mitigation specialists recommended that Mr. Wooten conduct a thorough investigation of Mr. Harris's intellectual disability with a focus on his inability to adapt to everyday life (*i.e.*, his adaptive deficits). *Id.* at 158–163; *see also id.* at 419–420, 445–450, 458–459. But Mr. Wooten failed to conduct any such investigation. Instead, as Mr. Wooten described it, trial counsel "did only a *preliminary* investigation into intellectual disability." *Id.* at 126–127 (emphasis added). That "preliminary investigation" consisted of a single inquiry to Mr. Harris's sister about Mr. Harris's adaptive deficits. *Id.* at 197–198. According to Mr. Wooten's observations as a layperson, Mr. Harris was not "mentally [challenged]," and so he did not procure a medical examination or otherwise continue any investigation into the matter. *See id.* at 461–463, 468–469.

Counsel retained two neuropsychologists to evaluate the impact of Mr. Harris's history with toxic substances. Neither expert evaluated Mr. Harris for an intellectual disability. *See id.* at 523; *see also id.* at 580–581. One neuropsychologist, Dr. Elizabeth Kasper, was hired to assess whether Mr. Harris's exposure to toxins and pathogens that can affect brain development caused particular "organic developmental brain dysfunctions" or a "traumatic or organic [developmental] brain injury." *Id.* at 116–118; 607–609. She concluded that Mr. Harris had a "mild cognitive impairment" that fell short of dementia. *Id.* at 571–573. The other neuropsychologist, Dr. Raymond Singer, concluded that Mr. Harris suffered from a "major neurocognitive disorder" as a result of "brain injury from exposure to numerous toxic substances, particularly from childhood." *Id.* at 576. Again, neither neuropsychologist was hired to evaluate Mr. Harris for intellectual disability.

A few months before trial, in July 2013, Mr. Harris's trial team met to discuss the case. At some point, the team called Dr. Kasper and purportedly asked her whether she believed Mr. Harris was intellectually disabled, despite not retaining Dr. Kasper to evaluate that possibility. *Id.* at 604. According to Mr. Wooten, Dr. Kasper responded in the negative. *Id.* at 605. Dr. Kasper disputes that account; she maintains that she was never asked whether Mr. Harris was intellectually disabled and that she never offered an opinion on the issue. *See id.* at 523. In any event, Mr. Wooten's apparent understanding of the call was that Mr. Harris's beta IQ test prohibited a finding of intellectual disability. *See id.* at 450–451. Other team members on the call

testified that they explained to Mr. Wooten the fault in his reasoning and again urged him to conduct a thorough investigation into Mr. Harris's intellectual disability based on the various red flags that had sprouted pre-trial. *Id.* at 450–455. The trial team took no further action to investigate Mr. Harris's intellectual disability. *Id.* at 119–121.

B. Mr. Harris's Trial and Death Sentence.

Trial began on November 11, 2013, and Mr. Harris pleaded guilty to capital murder. *Id.* at 13–14. During the punishment phase of the trial, defense counsel expressly disclaimed that Mr. Harris was intellectually disabled and therefore constitutionally ineligible for the death penalty. *See id.* at 579.

The jury recommended a sentence of death. The trial court imposed that sentence on December 11, 2013. *Id.* at 13. On direct appeal, the TCCA affirmed Mr. Harris's conviction and death sentence. *See Harris v. State*, No. AP-77,029, 2016 WL 922439 (Tex. Crim. App. Mar. 9, 2016).

C. The State Habeas Trial Court Conducted A Two-Week Evidentiary Hearing.

On March 15, 2016, Mr. Harris filed a timely petition for habeas corpus in Brazoria County, Texas. App.13–16. With the assistance of newly appointed post-conviction counsel (the Office of Capital and Forensic Writs (OCFW)), Mr. Harris contended that he was ineligible for the death penalty because of his intellectual disability and that his trial counsel provided ineffective assistance of counsel by failing to adequately investigate his intellectual disability. *Id.* After the State responded in opposition, the trial court

ordered an evidentiary hearing on those issues. *Id.* at 15–16.

On January 23, 2019, the state habeas trial court began a two-week evidentiary hearing. Neither Dr. Kasper nor Dr. Singer (the neuropsychologists) testified. But the trial court heard testimony from other experts that had been retained by post-conviction counsel to evaluate Mr. Harris's intellectual disability. This slate of experts included Dr. George Woods, a neuropsychiatrist who specializes primarily in neurodevelopmental disorders and was thus qualified to offer a diagnosis of intellectual disability; Dr. James Patton, who specializes in special education with a focus on mild intellectual disability and assessed Mr. Harris's adaptive functioning; and Dr. Kathleen Fahey, a speech language pathologist. *Id.* at 41–42, 70–71, 86–87; 365–366.

Each of those experts conducted batteries of additional testing and analyses of Mr. Harris before the evidentiary hearing. Dr. Patton, for his part, conducted an adaptive functioning assessment, which included a review of Mr. Harris's academic and other contemporaneous records from Mr. Harris's life, review of witness statements from Mr. Harris's family, friends, and teachers, and interviews of Mr. Harris's family members and friends. *Id.* at 72–87; 365–386. Dr. Patton concluded that Mr. Harris has adaptive deficits in both the adaptive and practical domains. *Id.* at 375.

Dr. Fahey conducted a number of tests that assessed Mr. Harris's reading comprehension. *Id.* at 86–87. She reached a number of conclusions, including that Mr. Harris's writing was immature and

comparable to third- or fourth-grade level and that his oral language was comparable to that of a six- to seven-year-old child. *Id.* at 92–95. She also opined that his listening, speaking, reading and writing deficits began in the developmental years. *Id.* at 95–97; 385–386.

Finally, Dr. Woods conducted additional examinations of Mr. Harris, reviewed Mr. Harris's existing neuropsychological test results, and considered the evaluations of Dr. Patton and Dr. Fahey. *Id.* at 43–44, 46–47. Dr. Woods diagnosed Mr. Harris with intellectual disability within a reasonable degree of medical certainty. *E.g.*, *id.* at 43–44, 59–60; 349–352, 367, 377–378.

At the evidentiary hearing, the experts walked through the governing standard for diagnosing intellectual disability, which comes from the Fifth Edition of the DSM (DSM-5). The latest edition was published in 2013 (six years before the evidentiary hearing). *See, e.g.*, *id.* at 343–344, 367. The DSM-5 defines an intellectual disability according to three diagnostic criteria: (A) "Deficits in intellectual functions," (B) "Deficits in adaptive functioning," and (C) "Onset of these deficits during the developmental period." *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5") S2H1. Those are the same criteria this Court has used to evaluate intellectual disability claims since 2013. *E.g.*, *Hall*, 572 U.S. at 710 ("[T]he medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning . . . and onset of these deficits

during the developmental period."); *see also Moore I*, 581 U.S. at 7 (same). Those three criteria long predated Mr. Harris's intellectual disability claim here. A 2022 text revision of the DSM-5, the DSM-5-TR, retains those three primary elements of intellectual disability but removes the statement describing the required deficits in adaptive functioning as "directly related to" the intellectual impairments in Criterion A. *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* (5th ed. 2022) ("DSM-5-TR"), at 37.

Copious evidence presented at the 2019 evidentiary hearing about Mr. Harris's intellectual functioning and adaptive deficits supports a finding that Mr. Harris meets the criteria outlined by the DSM-5 and DSM-5-TR. Dr. Woods concluded that Mr. Harris's intellectual functioning is "significantly impaired," based on numerous data points, including a composite IQ score of 75 on the WAIS-IV. App.59–63. Mr. Harris also demonstrated difficulty with comprehension, mental flexibility, attention, memory, reading comprehension, and problem solving. *Id.* at 59–60.

In addition to his impairment in intellectual functioning, Mr. Harris also demonstrated significant adaptive deficits in the practical and conceptual domains. Dr. Patton presented evidence of the adaptive deficits that Mr. Harris demonstrated throughout his life. *Id.* at 70–74; 365–377. Mr. Harris struggled in school as a child, struggled with money management and other administrative tasks into his teenage years, and struggled to make it on his own as an adult. *Id.* Indeed, even the state's *own expert*, Dr.

Price, admitted that Mr. Harris demonstrated significant deficits in the practical domain. *Id.* at 202–203.

The hearing evidence also bore out Mr. Harris's claim of ineffective assistance of trial counsel. Indeed, Mr. Wooten himself testified that the investigation into Mr. Harris's intellectual disability defense "never got jump-started." *See id.* at 465–468. He also admitted that his trial preparation lacked a methodical approach to investigating Mr. Harris's adaptive deficits. *Id.* at 469–470. And at trial, he failed to ask any probing questions designed to elicit information about Mr. Harris's mental struggles. *Id.* at 470–471. In the end, Mr. Wooten agreed that despite the red flags present, "there was never any investigation specific to intellectual disability" prior to trial. *Id.* at 463. As a result, the jury never heard the evidence that caused Dr. Patton to reach his conclusions, nor did it hear that Dr. Woods concluded Mr. Harris was intellectually disabled. *Id.* at 202–203.

D. The State Habeas Trial Court Concluded That Habeas Corpus Relief Was Warranted.

On February 22, 2021, the state habeas trial court entered its findings of fact and conclusions of law, finding that Mr. Harris was not intellectually disabled. *See id.* at 165–190. The trial court based that conclusion on two findings. First, it determined that Mr. Harris failed to show that his adaptive deficits were "directly related to" his intellectual deficits. *Id.* at 77–78, 86–87, 97–99, 100–105. Second, it concluded that the onset of those deficits did not occur during the developmental period, which,

according to the trial court, ended at age 18. *Id.* at 168–170, 186–188.

The trial court next concluded that Mr. Harris received constitutionally ineffective assistance of counsel in violation of the Sixth Amendment. The court found that trial counsel failed to conduct "a thorough mitigation investigation," into Mr. Harris's intellectual disabilities, and that such a failure "was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel." *Id.* at 198–200. It also found a reasonable probability that the result of Mr. Harris's trial would have been different if the "trial team[] properly investigated whether [Mr. Harris] suffered from an intellectual disability." *Id.* at 198–202, 204–205. Because Mr. Harris's Sixth Amendment right to counsel was infringed, the trial court concluded that Mr. Harris was entitled to habeas relief.

E. The TCCA Denied Relief.

On May 18, 2022, the TCCA denied all of Mr. Harris's claims. The TCCA disposed of Mr. Harris's intellectual disability claim in one unreasoned sentence. *Id.* at 2–3.

On the ineffective assistance of counsel claim, the TCCA disagreed with the trial court. *Id.* at 3. The TCCA reasoned that trial counsel explored the possibility of possible cognitive impairment by retaining Dr. Kasper and Dr. Singer, both neuropsychologists. *Id.* at 4–6. Those experts concluded that Mr. Harris suffers from "mild cognitive impairment," and trial counsel adequately presented evidence of such an impairment. *Id* at 6. The TCCA did not grapple with the fact that neither Dr. Kasper

nor Dr. Singer evaluated whether Mr. Harris suffers from an intellectual disability as defined in the DSM-5. *Id.*

Mr. Harris filed a timely suggestion to reconsider, in which he argued that the TCCA failed to adhere to this Court's decisions in *Moore I* and *II* because it relied on an outdated and improper intellectual disability analysis. *See* App.511–515. He further argued that the TCCA failed to faithfully apply this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. App.515–520. The TCCA denied reconsideration without written order. *Id.* at 11. This Petition followed.

REASONS FOR GRANTING THE PETITION

The TCCA's unreasoned and unexplained conclusion that Mr. Harris is not intellectually disabled cannot be based on a faithful application of the widely accepted medical standard. The TCCA rubber-stamped the state habeas trial court's decision, which clearly contravenes *Atkins*, *Hall*, and the two *Moore* cases by (1) adding a fourth criterion to the DSM-5 framework for analyzing intellectual disability; and (2) artificially constraining the "developmental period" to age 18, despite the medical consensus that the relevant period extends into the early 20s. Those errors are repeats of those corrected in *Hall* and the two *Moore* cases. The TCCA further erred in its evaluation of Mr. Harris's ineffective assistance of counsel claim. As the state habeas trial court correctly found, trial counsel performed below an objectively reasonable standard when it never engaged a qualified individual to evaluate whether Mr. Harris is intellectually disabled, despite

numerous red flags indicating that he is. That deficient performance prejudiced Mr. Harris. Even if a sufficient mitigation investigation did not prove intellectual disability, there is a reasonable likelihood that it would have affected the jury's impression of Mr. Harris's moral culpability.

The TCCA's inability to hew to this Court's precedents undermines the rule of law and disregards this Court's supremacy. The Court should grant certiorari and summarily reverse. In the alternative, the Court should grant certiorari and conduct plenary review.

I. The TCCA's Decision Clearly Contravenes Established Law.

The TCCA's judgment violates this Court's repeated holdings that a court evaluating a claim of intellectual disability must "be informed by the medical community's diagnostic framework," *Moore I*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 721), and cannot instead substitute its lay analysis for the medically accepted approach.

The Eighth Amendment prohibits the execution of persons who are intellectually disabled according to current medical standards. *See Atkins*, 536 U.S. at 321. As this Court has repeatedly held, a court's adjudication of a defendant's intellectual disability must be based on sound medical principles. *See Moore II*, 139 S. Ct. at 669; *Moore I*, 581 U.S. at 20–21; *Hall*, 572 U.S. at 710; *Atkins*, 536 U.S. at 318. Courts cannot devise their own tests; they must use the same criteria that the medical community does. The uncontroversial, widely accepted test for intellectual disability includes three elements: "significantly

subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall*, 572 U.S. at 710; *Moore II*, 139 S. Ct. at 668; *Moore I*, 581 U.S. at 7; *see also* DSM-5 at S2H1.

Here, the TCCA offered no explanation whatsoever for its conclusion that Mr. Harris is not intellectually disabled. *See* App.2–3. The only way it could have reached that conclusion is by applying its own intellectual disability test in favor of the medically accepted one. That is what the state habeas trial court did. It required Mr. Harris to show that his adaptive deficits are "directly related" to his intellectual deficits. *Id.* at 166-168. It further placed undue emphasis on whether those deficits manifested before Mr. Harris turned 18, despite the medical consensus that the relevant developmental period extends into the early twenties. Measured by the proper standard, Mr. Harris is intellectually disabled and ineligible for the death penalty.

A. The Courts Below Erroneously Required That Mr. Harris's Adaptive Deficits Be "Directly Related" to His Intellectual Functioning.

The TCCA rubber-stamped the state habeas trial court's intellectual disability analysis. In doing so, it repeated the trial court's error of evaluating Mr. Harris's intellectual disability claim according to a standard of the court's own making rather than the medically accepted test.

The state habeas trial court improperly based its adjudication of Mr. Harris's intellectual disability on

a phantom fourth criterion that adaptive deficits must be directly related to intellectual deficits. *See id.* at 47–49, 74–78, 166–171, 174–175, 177–178, 180–181. The court acknowledged that Mr. Harris "satisfied his burden of proof on Prong 2 concerning deficits in the practical domain," as even the State's expert agreed. *Id.* at 170–171. But then it departed from the three-part test by asking "if Applicant has satisfied his burden to prove that these deficits in the practical domain are directly related to Prong 1" (*i.e.*, significantly subaverage intellectual functioning). *Id.* The DSM-5 contains no such requirement. That error pervaded the rest of the court's analysis. *E.g.*, *id.* at 166–175. The trial court concluded that although Mr. Harris "does have some deficits in the practical domain," they are not "directly related to intellectual functioning," speculating that his adaptive deficits might be related to "years of abusing his body and his brain," referring to drug and alcohol use. *Id.* at 174–178.

The fact that the TCCA rubber-stamped that analysis, which turned on an invented fourth criterion absent from the DSM-5, may turn the state habeas trial court's error into a matter of life and death in this case. By the time of the TCCA's decision, there was no doubt that the trial court's requirement that an individual's adaptive deficits be "directly related" to their intellectual deficits was unmoored from the medically accepted standard. In March 2022—two months before the TCCA's decision—the APA released a textual revision to the DSM-5 (known as the DSM-5-TR). The revision maintained the three criteria for defining intellectual disability contained in the DSM-5, which this Court has repeatedly cited. *Moore II*, 139

S. Ct. at 668; *Moore I*, 581 U.S. at 7; *Hall*, 572 U.S. at 710. It also removed one sentence that referred to adaptive deficits being "directly related to" intellectual impairments. DSM-5 S2H1. The APA explained that the deletion of the "directly related to" language was intended to correct any false impression that the diagnostic criteria for intellectual disability included a "fourth criterion" of direct relatedness. That phrase "appear[ed] to inadvertently" add "a fourth criterion" where there are, and have always been, only three requirements. DSM-5-TR, Text Updates, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/IDD-Text-Update.pdf. The APA's removal of that phrase and explanation for doing so clarifies that there was never a "fourth criterion" that adaptive deficits must be "directly related to" a person's intellectual impairments to meet the definition of intellectual disability.

The APA's 2022 textual revision to the DSM-5 thus made plain that the state habeas trial court was wrong at the time it denied Mr. Harris's intellectual disability claim on the basis that his adaptive deficits were insufficiently related to his intellectual deficits. *See id.*; App.165–190. By the time that the TCCA rubber-stamped that conclusion in an unreasoned single sentence, that error was glaring.

The TCCA's error is of a kind with *Moore I*. There, the TCCA departed from prevailing clinical standards. by, among other errors, "requiring Moore to show that his adaptive deficits were not related to 'a personality disorder.'" 581 U.S. at 17. This Court concluded that the TCCA's reliance on "nonclinical" factors and "fail[ure] adequately to inform itself of the 'medical

community's diagnostic framework'" ran afoul of the Constitution. *Id.* at 20–21 (quoting *Hall*, 572 U.S. at 721. The same description fits this case. The trial court faulted Mr. Harris for a failure to show that his adaptive deficits are "directly related" to his intellectual deficits and speculated that Mr. Harris's adaptive deficits are related to drug and alcohol use, not intellectual disability. But just as in *Moore I*, that requirement is "nonclinical." As the 2022 text update made plain, reading the DSM-5 to include a "fourth criterion" of direct relatedness was a misreading. *See* DSM-5-TR, Text Updates, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/IDD-Text-Update.pdf.

This Court has repeatedly emphasized the importance of relying on up-to-date clinical practices for evaluating intellectual disability claims. Current medical manuals reflect "improved understanding over time," and "offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore I*, 581 U.S. at 20 (quotation omitted). The TCCA's failure to analyze Mr. Harris's claim pursuant to the accepted clinical practice is yet another refusal to follow this Court's admonishments and warrants summary reversal.

B. The Courts Below Erroneously Limited The "Developmental Period" to Age 18.

The courts below again flouted *Moore I* when they redefined the diagnostic criteria to make age 18 the cutoff for the relevant onset of intellectual and adaptive deficits, rather than evaluating whether onset occurred during the "developmental period," which extends through at least age 22. *Coonce v.*

United States, 142 S. Ct. 25, 28 (2021) (Mem.) (Sotomayor, J., dissenting from the denial of certiorari). Without any basis in the relevant medical standards, the trial court determined "that onset must occur before reaching age 18" and framed its entire analysis around whether "any of these [deficiencies] manifest[ed] themselves before [Mr. Harris] reached age 18." App.166–171, 180–181, 185–186. The TCCA rubber-stamped that decision without analysis. *Id.* at 2–3. But neither this Court's precedents nor the prevailing medical standards impose that arbitrary fixed-age cutoff for assessing the onset criterion. The trial court's analysis thus contravenes *Moore I* by again "deviat[ing] from prevailing clinical standards." 581 U.S. at 15.

The DSM-5, as even the trial court acknowledged, does not place any age-specific requirement on the definition of intellectual disability. *See* App.77–78. It refers instead to the onset of symptoms "during the developmental period." *Id.* at 48. That broad definition was unchanged by the revisions in the DSM-5-TR. According to expert testimony presented at the evidentiary hearing, medical consensus has coalesced around an understanding that the developmental period referenced in the DSM-5 and DSM-5-TR reaches into the early twenties. *See id.* at 590–593. The American Association on Intellectual and Developmental Disabilities—the key medical group offering a detailed definition of the developmental period—agrees. The current version of its Manual on Intellectual Disability (the "AAIDD Manual"), which was released between the evidentiary hearing and the time the trial court issued its findings, expressly defines the developmental period as continuing to age

22. *See* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnoses, Classification, and Systems of Supports* (12th ed. 2021); *see also Coonce*, 142 S.Ct. at 27–28 (Sotomayor, J., dissenting from the denial of certiorari) (recognizing same). Put simply, by the time the trial court issued its findings, there was no support in the prevailing medical standards for limiting the developmental period to age 18. That error should have been obvious to the TCCA, especially considering Mr. Harris explicitly brought it to the TCCA's attention in his suggestion for reconsideration. App.514–18. Just like the text update to the DSM-5 made pellucid that the trial court's "directly related" requirement was not part of the medically accepted test for intellectual disability, the updated AAIDD Manual explicitly contradicted the trial court's imposition of an age-18 cutoff.

The trial court's error was prejudicial. Significant record evidence demonstrates that Mr. Harris exhibited deficits by his early twenties and thus within the properly measured developmental period. Mr. Harris married when he was 22, and his wife learned that she had married a man already unable to handle the daily tasks of life. She had to identify by herself a place for them to rent; handle all rental paperwork because it confused him; and manage their finances because the simple math aspects of money were conceptually difficult for him. App.593–596; 597–599; 543–544. His wife observed that, upon moving in together, Mr. Harris could not understand paperwork and "needed someone to take care of him because he could not take care of himself." *Id.* at 543–544. He could not balance his checkbook and required

her assistance to cash his paychecks. *Id.* at 543–544. The trial court did not appear to credit any of that to the developmental period, noting that Mr. Harris "did not meet Rose Lewis until 1982 and did not marry her until Applicant was almost 23." *Id.* at 78–79. Indeed, the court did not credit the above information as evidence of deficits in the developmental period. *Id.* at 186–188.

It also failed to appreciate that through his late teen years and into his early twenties, Mr. Harris exhibited heavy dependence on his family and wife in doing basic home tasks, such as cooking, cleaning, fixing things, and doing laundry. *Id.* at 594–595; 543–544. He continued to live with his mother into his early twenties due to his inability to live independently. *Id.* at 595–596; 597–598. In major social relationships, he was effectively unable to provide reciprocation. *Id.* at 598–599. Even as a child Mr. Harris required more help than other students to perform in school, especially in math. *Id.* at 600–602. That deficiency again emerged as he entered early adulthood when he was unable to translate math skills into everyday math abilities outside of school. *Id.* If the court had properly considered that evidence, it likely would have reached a different conclusion about Mr. Harris's intellectual disability.

C. Mr. Harris Is Intellectually Disabled.

Mr. Harris meets the medical definition of intellectual disability, as set forth in the DSM-5 and demonstrated at the evidentiary hearing. He meets each of the prongs set forth in the DSM-5: his intellectual functioning is impaired, as demonstrated by an IQ score within the range normally considered

for intellectual developmental disorder and poor performance on testing of intellectual functioning, *see id.* at 353–354; he struggled with adaptive deficits throughout his life, to the point that the state's own expert agreed that Mr. Harris has adaptive deficits in the practical domain, *see id.* at 202–203, and his deficits took hold in the developmental period, as established by testimony from his family members and contemporaneous school records, in addition to his performance on functional academic testing and reading comprehension tests, *see id.* at 360–361, 497–499.

Both pre-conviction and post-conviction testing conducted by numerous experts supported the neuropsychiatrist's ultimate diagnosis that Mr. Harris is intellectually disabled.

II. The TCCA Improperly Applied *Strickland*'s Ineffective Assistance of Counsel Standard.

The TCCA also failed to follow this Court's precedents when it came to Mr. Harris's ineffective assistance of counsel claim. As the state habeas trial court correctly found, the trial team's approach to developing a mitigation case was haphazard. The trial team never included a mitigation specialist "qualified by training and experience to conduct a thorough mitigation investigation." *Id.* at 198–200. The mitigation investigation was "fragmented," and never included a meaningful investigation into intellectual disability and adaptive deficits. *Id.* The state habeas trial court also concluded that, but for trial counsel's objectively unreasonable failure to pursue an intellectual disability claim, there was a sufficient probability that the jury would have judged Mr.

Harris's moral culpability differently (even if they did not conclude that he was constitutionally ineligible for the death penalty as a result of an intellectual disability). *Id.* at 198–207.

The TCCA disagreed, reasoning that the trial team adequately pursued an intellectual disability claim by hiring two neuropsychologists, neither of whom evaluated Mr. Harris for an intellectual disability. That was error. A faithful application of this Court's precedents in *Strickland v. Washington* and its progeny leads only to the conclusion that trial counsel's mitigation investigation was objectively unreasonable and prejudiced Mr. Harris. This Court should summarily reverse.

A. Trial counsel's cursory intellectual disability investigation was objectively unreasonable and prejudicial.

Ineffective assistance of counsel claims are governed by the familiar standard set forth in *Strickland*: A criminal defendant is denied his constitutional right to counsel when counsel's representation falls "below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694. An inadequate mitigation investigation at the penalty stage can be constitutionally deficient, even if counsel presents *some* mitigation evidence. *Sears v. Upton*, 561 U.S. 945, 945, 951–52, 954 (2010) (per curiam). Counsel must "conduct a thorough investigation of the defendant's background." *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (citing *Porter v. McCollum*, 558 U.S. 30, 39 (2009)). In death penalty

cases, counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691). In evaluating counsel's assistance, a court must consider both the "quantum of evidence already known to counsel" and "whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Habeas courts reviewing ineffective assistance claims must conduct a "probing and fact-specific analysis." *Sears*, 561 U.S. at 955.

Mr. Harris's trial counsel performed a completely inadequate mitigation investigation. In particular, the trial team failed to pursue an intellectual disability claim despite numerous red flags that should have prompted further investigation into Mr. Harris's intellectual disability. For example, Mr. Harris scored in the bottom 5th percentile on his IQ test (a score of 75). App. 62–63, 68–70, 116–118, 137–138. He also has significant difficulty with everyday tasks (*i.e.*, adaptive deficits in the practical domain): he reads at between a fourth and seventh grade level and has trouble performing basic arithmetic; he could not name the medicines he took or treatments he received; he was almost totally dependent on family members for day-to-day tasks; and had difficulty judging social relationships, solving problems, and dealing with abstraction. *Id.* at 54–60, 70–71, 170–171. That is not all: Mr. Harris also has family with special needs. *See, e.g.*, *id.* at 110–111, 136–137 (niece was in special needs classes and participated in Special Olympics); *id.* at 588–589 (noting that family history of intellectual disability increases the need for

investigation). And he had difficulty managing money while in jail—a common issue for those who are intellectually disabled. *Id.* at 136–137. Finally, before trial, Danalynn Recer, an experienced capital defense attorney and mitigation specialist consulted by the trial team, recommended that trial counsel more thoroughly investigate Mr. Harris's adaptive deficits because of his IQ score and other red flags. *Id.* at 158–163.

Despite all of those indications that Mr. Harris might be intellectually disabled and therefore constitutionally ineligible for the death penalty, Mr. Harris's trial team failed to do the bare minimum to explore the possibility of an intellectual disability claim. They never hired any medical expert to evaluate Mr. Harris for intellectual disabilities. That point bears repeating: the trial team never hired an expert to determine whether Mr. Harris might be constitutionally ineligible for the death penalty. *Id.* at 461–463, 468–469; 126–127, 197–200. They engaged two neuropsychologists, Dr. Kasper and Dr. Singer, to evaluate whether Mr. Harris's history of drug abuse led to a cognitive impairment. *Id.* at 116–118; 576. That is not equivalent to evaluating an individual for an intellectual disability as described in the DSM-5. As Mr. Harris's lead trial counsel Thomas Wooten admitted, the defense team "did only a preliminary investigation into intellectual disability." *Id.* at 126–127; 465–468 (Mr. Harris's intellectual disability defense "never got jump-started").

Defense counsel's mere "preliminary investigation into intellectual disability" fell below an objective standard of reasonableness. In capital cases,

the ABA sets standards to guide courts in "determining what is reasonable." *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). According to those ABA standards (as well as similar guidelines promulgated by the state of Texas), when a person's life is at stake, defense counsel must assemble a well-rounded, five-member team comprising two attorneys, an investigator, a mitigation specialist, and a "member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." American Bar Association, *Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases*, 4.1(A), 10.4(C) (2003) ("ABA *Guidelines*"); *see also* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 3.1(A), 10.1 (2006). That team is necessary because "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." ABA *Guidelines* at 10 cmt. (quoting Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion, at 35 (Jan./Feb. 1999)).

Mr. Harris's trial team fell short of those standards in several ways. For at least five months, lead counsel Mr. Wooten was the *only* attorney actively working on the case. *Id.* at 197–198. Making matters worse, Mr. Wooten had never tried a capital case. *Id.* at 124. He also failed to bring on mitigation specialists who "were qualified by training and experience to conduct a thorough mitigation investigation." *Id.* at 198–200. Meanwhile, the trial team suffered significant turnover. The team included four successive mitigation specialists and three successive fact investigators, and yet Mr. Wooten

failed to implement any effective system to transfer work product from one specialist or investigator to the next. *Id.* at 122–123, 198–200.

Perhaps unsurprisingly given that turnover and lack of information sharing, no one ever developed a multi-generational biopsychosocial history of Mr. Harris. *Id.* at 197–198; *see also id.* at 148–149 (noting that investigation into biopsychosocial family history is a primary role of the mitigation specialist). Carol Camp, one of Mr. Harris's mitigation specialists, never conducted any investigation into adaptive deficits and did not advise her successor of the need for further investigation into Mr. Harris's adaptive deficits. *Id.* at 146–148, 197–198. That failure was particularly egregious given that even the State's expert agreed that Mr. Harris suffers adaptive deficits. *Id.* at 375. Such an investigation would have been crucial to establishing Mr. Harris's intellectual disability.

At the eleventh hour, the defense team tried and failed to salvage its investigative shortcomings. More than eighteen months after Mr. Wooten was appointed as lead counsel, and just two months before trial, the trial team called Dr. Kasper to discuss several issues related to Mr. Harris's case. *Id.* at 13, 118–119; 583–584. One of those issues was the possibility of Mr. Harris being intellectually disabled. *Id.* at 118–119. The defense team did *not* hire Dr. Kasper to evaluate Mr. Harris for an intellectual disability, and she conducted no such evaluation. *Id.* at 116–121, 204–205; 579. Nevertheless, the trial team asked Dr. Kasper whether she believed Mr. Harris was intellectually disabled, and apparently understood her to answer in the negative. *Id.* at 118–119; 523; 585–

588; *see also id.* at 450–451. Ms. Kathryn Kase, an attorney experienced in trying capital cases, met with the trial team about their case on a few occasions. *Id.* at 162–166. Ms. Kase recalled that Dr. Kasper had not been provided with sufficient information to rule out intellectual disability. *Id.* at 165–166. Even assuming Dr. Kasper did say that Mr. Harris was not intellectually disabled, the defense team acted unreasonably if and when it accepted that less-than-informed assertion without further inquiry and abandoned the intellectual disability investigation because Dr. Kasper had not been retained to evaluate Mr. Harris for an intellectual disability and in fact did not conduct such an evaluation. *Id.*

In sum, the defense team's limited investigation into intellectual disability fell below an objective standard of reasonableness. As this Court has recognized, trial counsel's failure to "fulfill their obligation to conduct a thorough investigation of the defendant's background" is constitutionally ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Despite numerous red flags and recommendations from mitigation specialists, the trial team never hired anyone to evaluate Mr. Harris for an intellectual disability and conducted only a preliminary investigation into intellectual disability for eighteen months. Counsel then scrapped that investigation based on the opinion of a neuropsychologist who never evaluated Mr. Harris for an intellectual disability. That fell short of the "thorough investigation" that the Sixth Amendment requires, *Andrus*, 140 S. Ct. at 1881 (citing *Porter*, 558 U.S. at 39), and therefore constitutes ineffective assistance of counsel.

Trial counsel's failure to adequately investigate Mr. Harris's intellectual disability was also prejudicial. As the state habeas trial court found, there is a "reasonable probability" that the jury would have declined to recommend the death penalty if it had been able to consider evidence related to intellectual disability. *Strickland*, 466 U.S. at 688, 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* A reasonable probability need not be more likely than not. *Williams*, 529 U.S. at 406. A defendant may be prejudiced even when defense counsel produces more than a little mitigation evidence and produces a "superficially reasonable mitigation" case. *Sears*, 561 U.S. at 954. Furthermore, Texas law requires a unanimous jury recommendation in order to impose the death penalty. Tex. Code Crim. Proc. Ann., Art. 37.071. Consequently, counsel's ineffective assistance is prejudicial here if there is a reasonable probability that even one juror would not have recommended the death penalty if counsel's assistance had been acceptable. *Andrus*, 140 S. Ct. at 1886.

The state habeas trial court correctly identified four ways that ineffective assistance of counsel prejudiced Mr. Harris. *First*, the jury did not hear any of the evidence that caused Dr. Woods, one of the defense experts at the habeas evidentiary hearing, to conclude "within a reasonable degree of medical certainty" that Mr. Harris was intellectual disabled. App.43–44, 202–203. *Second*, the jury did not hear mitigating evidence about the red flag factors that might have suggested an intellectual disability. *Id.* at 200–202. *Third*, the jury did not hear evidence about the circumstances of Mr. Harris's troubled childhood,

which could have implied diminished culpability. *Id. Fourth*, the jury did not hear that people with an intellectual disability may "create an unwarranted impression of lack of remorse for their crimes." *Id.*; s*ee also Atkins*, 536 U.S. at 321. In addition to those reasons identified by the trial court, Mr. Harris might have been able to prove that he was constitutionally ineligible for the death penalty because of his intellectual disability. For all those reasons, Mr. Harris received objectively unreasonable assistance of counsel and that ineffective assistance prejudiced him.

B. The TCCA failed to conduct the required "probing and fact-specific analysis" of Mr. Harris's ineffective assistance of counsel claim.

Unlike the state habeas trial court, the TCCA eschewed the "probing and fact-specific analysis" that *Strickland* requires. The TCCA focused on a few cherry-picked facts. *See Hill v. Shoop*, 142 S. Ct. 2579, 2579 (2022) (Sotomayor, J., dissenting from the denial of certiorari) (agreeing with the Sixth Circuit that state habeas court "engaged in 'cafeteria-style selection of some evidence' over other evidence"). The TCCA illogically relied entirely on the testimony of the two neuropsychologists, Dr. Kasper and Dr. Singer. App.4-6. But again, neither expert was retained to evaluate Mr. Harris for an intellectual disability. Neither expert evaluated Mr. Harris for an intellectual disability. And neither expert rendered a medical opinion about whether he had an intellectual disability. *E.g. id.* at 116–118, 126–127, 197–200; 607–609; 571–573; 576; 461–463, 468–469. Nevertheless, the TCCA condoned trial counsel's

mitigation investigation and failure to pursue an intellectual disability claim on the basis that neither Dr. Kasper nor Dr. Singer concluded that Mr. Harris is intellectually disabled. *Id.* at 4–6. That makes a mockery of what the Sixth Amendment requires in a capital case—neither Dr. Kasper nor Dr. Singer evaluated whether Mr. Harris is intellectually disabled.

The trial court, by contrast, properly considered and weighed the relevant evidence. It considered conflicting testimony about whether Dr. Kasper ever told the trial team that this was not an intellectual disability case. Even assuming that she made that statement, it did not absolve the trial team of its responsibility to develop a thorough case for mitigation. The statement was made, if at all, on a short phone call just two months before trial, and without Dr. Kasper having examined Mr. Harris for an intellectual disability. *Id.* at 116–121, 204–205. The TCCA ignored all of those facts and made no mention of the red flags that should have prompted the trial team to at a minimum retain an expert to evaluate Mr. Harris for an intellectual disability.

The TCCA also unreasonably relied on Dr. Singer's conclusion that Mr. Harris suffers a major neurocognitive disorder. The fact that Mr. Harris has a major neurocognitive disorder does not have any bearing on whether he is intellectually disabled. The relevant question is whether trial counsel sufficiently pursued an intellectual disability claim. Dr. Singer's evaluation and opinion are simply beside the point. Indeed, Dr. Singer did not perform *any* of the analyses required to diagnose someone with an intellectual

disability, including an IQ test or an investigation of collateral sources to evaluate adaptive functioning. *See id.* at 575. Dr. Singer "didn't know how [IQ] tests were administered," *id.* at 581, and was not qualified to opine on Mr. Harris's IQ score, *id.* at 576–579. Dr. Singer testified only about whether toxic substances caused Mr. Harris to suffer from a separate and unrelated neurocognitive disorder. That was irrelevant to the question whether trial counsel should have pursued an intellectual disability claim. The TCCA's misplaced focus skewed the *Strickland* analysis and should not stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and summarily reverse.

Respectfully submitted,

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