No. 22-1114

In The
Supreme Court of the United States

JAMES HARRIS, JR.,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1) Did the Texas Court of Criminal Appeals (TCCA) err by considering: (A) if Harris's adaptive deficits were directly related to intellectual impairment and (B) whether these intellectual and adaptive deficits manifested during his developmental period—before the age of 18—given recent changes to clinical manuals removing these criteria?

2) Did the TCCA err by concluding Harris failed to prove his trial attorneys were ineffective and that he was prejudiced by their ineffectiveness because counsel did not adequately investigate mitigating evidence of his alleged intellectual disability, given that a defense expert opined that a diagnosis of intellectual disability was not supported and Harris does not meet the medical criteria for the diagnosis?

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INTRODUCTION

On January 14, 2012, Harris invaded the home of an elderly couple, Darla and Alton Wilcox, and demanded money. Harris collected a small amount of cash and stabbed Darla and Alton multiple times. Harris then bound the two victims and drove away in their vehicle. Darla was able to free one hand and call 9-1-1. Darla survived the attack, but Alton died from his wounds.

STATEMENT OF THE CASE

Following his guilty plea, Harris was convicted of capital murder for the stabbing death of Alton Wilcox in the course of committing or attempting to commit a burglary of a habitation or robbery. TEX. PENAL CODE § 19.03(a)(2). Based on the jury's findings, the trial court sentenced Harris to death on December 11, 2013. TEX. CODE CRIM. PROC. art. 37.071, § 2(g). The TCCA affirmed the conviction in *Harris v. State*, No. AP-77,029, 2016 WL 922439 (Tex. Crim. App. 2016) (not designated for publication).

Harris filed an application for a writ of habeas corpus under Texas Code of Criminal Procedure Article 11.071 raising 12 challenges to his conviction.[1]

[1] The Hon. Ed Denman presided over Harris's original trial and the post-conviction habeas corpus proceeding as judge of the 149th District Court for Brazoria County, Texas, and is referred to herein as "the trial court." The trial court's findings are included in Appendix to "C" to Harris's petition ("App.").

Relevant here are two grounds raised in his application for habeas relief in the TCCA: (1) whether he is intellectually disabled and, therefore, constitutionally ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and (2) whether Harris's trial counsel provided ineffective assistance in failing to investigate whether Harris is intellectually disabled and not raising the issue with the trial court.

After considering an extensive record developed over a two-week evidentiary hearing, the trial court issued its findings of fact and conclusions of law on February 22, 2021. Regarding Harris's intellectual disability, the trial court determined that the "two ultimate questions" it was required to decide were whether Harris satisfied his burden of proof to show that he has severe adaptive deficits that are directly related to intellectual functioning and, if so, whether any of these manifested themselves before Harris reached age 18. (App. 171).

The trial court found that Harris failed to sustain his burden of proof that his alleged adaptive deficits in the "practical" and "conceptual domains" were directly related to his intellectual functioning. (App. 175, 177). Harris also "failed to satisfy his burden of proof that the onset of any adaptive deficits occurred before age 18, or at any time in the developmental period, even if the developmental period is extended to age 22." (App. 188).

As to the ineffective assistance claim, the trial court found that Harris's attorneys failed to conduct a

proper mitigation investigation into Harris's possible intellectual disability. The court noted that this "failure to cause a thorough mitigation investigation, which at the very least have shown [Harris] had red flags indicating some adaptive deficits, was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel." (App. 200).

The trial court next considered "whether there was a reasonable probability that had [Harris's] trial's team properly investigated whether [Harris] suffered from an intellectual disability, the result of [Harris's] capital murder trial would have been different." (App. 200-01). Harris's expert, Dr. Kasper, told his trial team that Harris was lower functioning but not intellectually disabled. (App. 118-20). The trial court noted that under *Strickland v. Washington*, 466 U.S. 668 (1984), "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (App. 200).

Guided by the Fifth Circuit's opinion in *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (holding, " . . . with a more detailed and graphic description and a fuller understanding of Neal's pathetic life, a reasonable juror may have become convinced of Neal's reduced moral culpability"), the trial court concluded that counsel's failure to conduct a more thorough mitigation investigation violated Harris's right to effective assistance of counsel, and he was prejudiced by this failure. (App. 205).

The TCCA agreed with the trial court's finding that Harris failed to establish his intellectual disability; however, based on its independent review of the record, it overruled the trial court's finding that Harris's attorneys failed to conduct a sufficient investigation of mitigating factors.[2] *Ex parte Harris*, WR-84,064-01, 2022 WL 1567654, at *3 (Tex. Crim. App. May 18, 2022) (not designated for publication). The TCCA concluded, based on counsel's investigation and "the opinions of their mental health experts, that a diagnosis of intellectual disability was not supported." *Id*. The TCCA further noted that Harris's "cognitive impairment issues do not satisfy the criteria for a diagnosis of intellectual disability under the DSM–5." *Id*. Thus, Harris failed to meet his burden to prove both deficient performance and prejudice under *Strickland*.

REASONS TO DENY THE PETITION

First, Harris's petition is based on his allegations that the TCCA's factual findings were erroneous and that it misapplied a properly stated rule of law, which rarely justifies certiorari. Sup. Ct. R. 10. Because Harris fails to demonstrate a sufficient reason to warrant this Court's intervention, review should be denied.

Second, Harris failed to show he is intellectually disabled. The TCCA adopted this conclusion by the

[2] In Texas, the TCCA, not the trial court, is the ultimate fact-finder in habeas corpus proceedings. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

trial court according to the medical community's latest diagnostic framework, which Harris's experts accepted. But even with the recent changes to the clinical manuals published by the American Psychiatric Association (APA) and the American Association on Intellectual and Developmental Disabilities (AAIDD) altering how intellectual disability is diagnosed, Harris provides no reason for this Court to conclude that the TCCA's finding was contrary to its opinion in *Atkins*.

Unlike *Moore v. Texas*, 581 U.S. 1 (2017) ("*Moore I*") and *Moore v. Texas*, ___ U.S. ___, 139 S.Ct. 666 (2019), ("*Moore II*")—in which the TCCA rejected expert testimony based upon current medical standards and made its own findings predicated on outdated factors utilizing lay perceptions of intellectual disability—the trial court and TCCA, in this case, relied upon contemporary medical expert testimony, weighed the evidence, made credibility determinations, and concluded that Harris failed to establish he was intellectually disabled.

Third, the TCCA reasonably applied the *Strickland* standard in holding that Harris did not establish ineffective assistance of counsel or prejudice resulting from his attorneys' alleged failure to present a more cumulative body of mitigating evidence concerning Harris's alleged intellectual disability. His attorneys were faced with the formidable task of defending a client who committed a brutal and senseless crime against two elderly persons in their home. The State had conclusive proof of guilt and extensive evidence

demonstrating the cruelty of the murder. And an expert for the defense told Harris's attorneys that the evidence did not support a finding of intellectual disability.

While Harris's attorneys could not completely abdicate their responsibility to conduct a pre-trial mitigation investigation on intellectual disability simply by hiring an expert, his attorneys should have been able to rely on an expert to alert them to the need for additional information. Intellectual disability did not provide a sound mitigation strategy. Thus, counsel's decision not to pursue a claim unsupported by evidence was not objectively unreasonable. Harris cannot overcome the strong presumption that his attorney's representation fell within the range of reasonable professional assistance, nor can he show any resulting prejudice.

ARGUMENT

1) Determination of intellectual disability for defendants facing the death penalty should be informed by the medical community's diagnostic framework, but it should not be controlled by the nuances in professional clinical manuals.

In *Atkins*, the Court held that the Eighth Amendment bars the execution of intellectually disabled offenders. *See* 536 U.S. at 321. The Court noted, "[t]o the extent there is serious disagreement about the

execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Id*. at 317. The Court in *Atkins* left it to the States to determine which offenders fall within this restriction, although it observed that definitions of intellectual disability "require[d] not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id*. at 318.

In *Hall v. Florida*, 572 U.S. 701 (2014), the Court considered "how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." *Id*. at 710. The Court said that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id*. at 719. It held, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework." *Id*. at 722. Finding Florida's rule that restricted *Atkins* to defendants with an IQ of 70 or less to be unconstitutional, this Court stated its opinion was "informed by the views of medical experts. These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments." *Id*. (citing *Kansas v. Crane*, 534 U.S. 407, 413 (2002) ("[T]he science of psychiatry . . . informs but does not control ultimate legal determinations. . . .")).

The dissent in *Hall* argued that the majority's decision was improperly "based on the evolving standards of *professional societies*, most notably the American Psychiatric Association (APA)." *See* 527 U.S. at

725 (Alito, J., dissenting) (emphasis original). The dissenting justices noted that "although the *Atkins* Court perceived a 'professional consensus' about the best procedure to be used in identifying the intellectually disabled, the *Atkins* Court declined to import that view into the law." *Id*. Justice Alito wrote, "[T]he views of professional associations often change" and the "changes adopted by professional associations are sometimes rescinded." *Id*. at 732.

As a result, the majority's opinion in *Hall* "implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change." *Id*. By elevating the APA's current views as presented in the latest clinical practice manual "to constitutional significance" the majority "throws into question the basic approach that *Atkins* approved and that most of the States have followed." *Id*.

Three years later, in *Moore I*, this Court explained that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." 581 U.S. at 13. The Court concluded, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Id*. at 20. The Court ultimately held, "By rejecting the habeas court's application of medical guidance . . . the [T]CCA failed adequately to inform itself of the 'medical community's diagnostic framework.'" *Id*. at 20-21 (quoting *Hall*).

In *Moore I*, the Court faulted the TCCA for concluding the defendant's IQ scores, some of which were at or below 70, established that he was not intellectually disabled. *Moore*, 581 U.S. at 15. The Court concluded that the TCCA improperly evaluated the defendant's adaptive functioning. The Court held that the TCCA erred by "overemphasiz[ing] [the defendant's] perceived adaptive strengths," despite the medical community's focus on "adaptive deficits." *Id*. at 15. It found the TCCA erred by "stress[ing] [the petitioner's] improved behavior in prison," even though the medical community "caution[ed] against reliance on adaptive strengths developed in a controlled setting, as a prison surely is." *Id*. at 15 (internal quotation marks omitted).

The dissent in *Moore I* argued that the majority had "craft[ed] a constitutional holding based solely on what it deems to be medical consensus about intellectual disability" and that "clinicians, not judges, should determine clinical standards." *Id*. at 22 (Roberts, J., dissenting). The dissent explained:

> Today's decision departs from this Court's precedents, followed in *Atkins* and *Hall*, establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice. . . . The clinical guides on which the Court relies today are 'designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning.' DSM–5, at 25. They do not seek to dictate or describe who is

> morally culpable—indeed, the DSM–5 cautions its readers about 'the imperfect fit between the questions of ultimate concern to the law and the information contained' within its pages.

Id. at 28-29. "'Psychiatry is not . . . an exact science.'" *Id*. at 32 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)). And "'because there often is no single, accurate psychiatric conclusion,' [the Court has] emphasized the importance of allowing the 'primary factfinder[]' to 'resolve differences in opinion . . . *on the basis of the evidence offered by each party*.'" *Id*. (emphasis added).

After remand by this Court in *Moore I*, the TCCA again found that the defendant was not intellectually disabled and was, therefore, eligible for the death penalty. *Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018) (adopting contemporary clinical standards in the DSM–5 for assessing intellectual disability). This Court then summarily reversed the TCCA's decision again in *Moore II*, finding that the TCCA, while purporting to apply the latest medical diagnostic standards, had, "with small variations," simply "repeat[ed] the analysis [this Court] previously found wanting." 139 S.Ct. at 670. After reviewing the trial record, this Court concluded the defendant was intellectually disabled. *Id*. at 672.[3]

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[3] In *Moore II*, the Harris County District Attorney's Office agreed that the defendant was intellectually disabled; however, the Texas Attorney General opposed the petition for a writ of certiorari and attempted to intervene as respondent.

The dissent in *Moore II* argued that "each of the errors that the majority ascribes to the state court's decision is traceable to [*Moore I's*] failure to provide a clear rule." *Id*. at 673. He was concerned that the majority had taken "it upon itself to correct [the TCCA's] factual findings and reverse the judgment." *Id*. Justice Alito wrote, "This is not our role. 'We do not grant a certiorari to review evidence and discuss specific facts.'" *Id*. (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925) and *Salazar-Limon v. Houston*, 581 U.S. ___, 137 S.Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case").

Here, the TCCA adopted the trial court's finding that Harris was not intellectually disabled based on medical standards and practices that both the State and Harris accepted. Accordingly, in this case, there was "professional consensus" about the procedures and diagnostic references to be used in identifying whether Harris is intellectually disabled. The conclusions reached by the medical experts involved in this case differed; but as the ultimate finder of fact, the TCCA weighed the evidence, made credibility determinations, resolved conflicts in the evidence, and reached a conclusion guided by the medical community's diagnostic framework that Harris is not intellectually disabled.

2) Harris failed to prove he is intellectually disabled.

In determining whether a capital defendant is intellectually disabled, the TCCA adopted the standard reflected in the American Psychiatric Association's DSM–5. *Thomas v. State*, No. AP-77,047, 2018 WL 6332526 (Tex. Crim. App. Dec. 5, 2018) (not designated for publication) (cited by the trial court in this case); *see also Petetan v. State*, 622 S.W.3d 321 (Tex. Crim. App. 2021). In *Petetan*, the TCCA explained:

> To the extent that the clinical diagnosis of intellectual developmental disorder can be harmonized with a reviewing court's legal inquiry under *Atkins* and its progeny, the approach taken by the DSM–5 hews closer to the original justification set out by the Supreme Court than the AAIDD–11.[4] And that is the approach we take.
>
> . . . Nothing in this opinion should be construed as prohibiting consideration of or reliance upon the AAIDD-11. We only recognize that there must be a showing that adaptive deficits are related to subaverage intellectual functioning to satisfy the *Atkins* exception to the imposition of the death penalty.

Id. at 332.

When Texas seeks the death penalty, a criminal defendant wanting to raise this issue must prove, by a preponderance of the evidence, that he is intellectually

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[4] Referring to the 11th edition of the AAIDD Manual, infra.

disabled. *Petetan*, 622 S.W.3d at 325. He "must prove that he has subaverage intellectual functioning, and significant limitations in adaptive skills such as communication, self-care, and self-direction—both manifest before age eighteen." *Id*. (citing *Hall*, 572 U.S. at 710).

The trial court observed, according to the DSM–5, three criteria must be met for a person to be considered intellectually disabled. "Criterion A, or Prong 1, is a deficit in intellectual functions confirmed by clinical assessments and individualized in standard intelligence testing. Criterion B, or Prong 2, is a deficit in one of three adaptive functioning areas. The adaptive areas are conceptual domain, social domain, and practical domain." (App. 47). As part of Criterion B, the trial court observed:

> To meet diagnostic criteria related to intellectual disability, the deficits in adaptive functioning *must be directly related to the intellectual impairments described in Criteria A*.

(App. 48) (emphasis added by the trial court) (quoting Def's Writ Ex. 240:38). The trial court also noted:

> Criterion C, or Prong 3, onset during the developmental period, *refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence*.

(App. 48) (quoting Def's Writ Ex. 240:33, 37-38, which is DSM–5) (emphasis added). The DSM–5 does not specify an age for the developmental period. But in

Moore II, supra, this Court, citing its prior opinion in *Moore I*, supra, agreed that the defects must have occurred while the defendant *was still a minor*. (App. 167-68) (emphasis added).

In its analysis of Harris's adaptive defects in the practical and conceptual domains (adopted by the TCCA) the trial court noted that the State's expert, Dr. Randall Price, characterized Harris's "alleged deficits in the practical domain, not as deficits, but rather as choices he made that enabled [Harris] to spend his time and money on things that provided him instant gratification." (App. 174). Dr. Price agreed with Harris's expert, Dr. James Patton, that Harris "does have significant deficits in the practical domain, but those are not related to his intellectual functioning," rather, they are related to lifestyle choices that Harris made. (App. 103).

Dr. Price's opinions are similar to the findings of Dr. Walter Farrell, Harris's social expert at trial, who concluded Harris's life was "' . . . careening out of- off the path from normalcy. And this was—after high school, mid-20's, late 30's, you can see the crack use escalated with alcohol which put him on a negative glide path.'" (App. 82-83). Based on the evidence, the trial court ultimately concluded that although Harris "does have some deficits in the practical domain, they are not so severe that [he] is intellectually disabled." (App. 175).

As to Harris's deficits in the conceptual domain, the trial court noted that, by the time all of the experts

examined Harris, "he had abused alcohol, marijuana for more than 32 years, and crack for 23 years and had been addicted to crack for years." (App. 176). Harris was dependent on friends, family, and coworkers, worked day-to-day jobs, and lived in motels for several years. (App. 176). But the trial court also stated:

> It is clear that [Harris] was able to assist in his defense as on one occasion he requested that a peremptory challenge be used even though the trial team did not object for cause. [Harris] also had the perception to recognize that one member of the trial team was not performing satisfactorily, and after his complaint to [the] RPDO [Regional Public Defender's Office for Capital Cases] that person was removed from voir dire.

(App. 167).

The trial court was not surprised that "due to his life choices" Harris "had difficulties in executive functioning" and problem-solving, and had low self-esteem. (App. 176-77). It also made sense that "a person addicted to drugs and alcohol would not be responsible in his management of money and his personal affairs." (App. 177). Considering all the evidence presented by Harris and the State, the trial court found that Harris "failed to sustain his burden of proof that any of [his] alleged deficits in the conceptual domain were directly related to intellectual functioning." (App. 177).

3) The updated DSM–5–TR does not show the TCCA rejected current medical guidance by relying on the prior edition.

During the hearing on Harris's post-conviction habeas application, the DSM–5 was treated as a "foundational text" supporting the experts' testimony and "a reliable and authoritative source within the field of neuropsychology." (App. 97). Guided by the DSM–5, the trial court made its findings on February 22, 2021, recommending that relief be denied as to Harris's intellectual disability claim, but granted as to his ineffective assistance of counsel claim. Based on detailed factual findings from the trial court, as informed by the medical standards reflected in the DSM–5, TCCA entered its order denying all relief on May 18, 2022.

In March 2022, approximately two months before the TCCA issued its order, the APA updated the definition of intellectual disability in the DSM–5–TR by removing the bracketed and italicized language below:

> Criterion B is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. [*To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A.*] Criterion C, onset during the

> developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed., text rev. 2022) [herein, DSM–5–TR].

The Court's opinions in *Atkins*, *Hall*, *Moore I*, and *Moore II*, should not be read to support Harris's conclusion that the TCCA's finding that he does not have an intellectual disability contravenes the Eighth Amendment merely because a professional organization altered its definition of intellectual disability in a clinical manual published while the case was pending. Although the medical community's "current standards" provide some constraint on a court's leeway in determining intellectual disability under *Atkins*, the APA's adjustment to its diagnostic criteria for intellectual disability does not mean the TCCA's finding was ill-informed, or its analysis flawed, when its conclusions were reached through expert testimony based on standards accepted by the witnesses for the defense and the State.

Harris complains the trial court "improperly based its adjudication of [his] intellectual disability on a phantom fourth criterion that adaptive defects must be directly related to intellectual deficits." (Harris Pet. 16). Harris faults the court for its conclusion that his alleged "deficits in the practical domain" were not "directly related to intellectual functioning," and "speculating that his adaptive defects might be related to

'years of abusing his body and his brain,' referring to drug and alcohol use." (Harris Pet. 16). This argument ignores the fact that Harris's expert, Dr. Woods, who testified in the trial court and whose opinions feature prominently in the petition to this Court, "acknowledged that alcohol abuse can affect brain function." (App. 177). Dr. Farrell also attributed Harris's issues "to his lifestyle and drug and alcohol addictions." (App. 177).

There was no "speculation" by the trial court concerning the impact of Harris's decades-long use of crack cocaine and alcohol concerning his alleged intellectual deficits. Ample evidence of it is available in the record. Even though the "directly related" requirement is no longer a part of the APA's or AAIDD's diagnostic criteria of intellectual disability for purposes of a clinical assessment or treatment planning, a trial court should be able to consider whether a defendant's adaptive deficits are related to factors other than his subaverage intellectual functioning to make the legal determination of whether the Eighth Amendment forbids his execution.

Harris also argues the trial court and the TCCA erroneously limited the "developmental period" to age 18. The trial court relied on this Court's use of the term "minor" in reference to the time of onset in *Moore I* and *Moore II*. (App. 181). Harris points out that the revised edition of the AAIDD Manual, released between Harris's evidentiary hearing and the time the trial court issued its findings, defines the developmental period as continuing to age 22. (Harris Pet. 19-20)

(internal citation omitted). He also cites the dissent to the Court's denial of certiorari in *Coonce v. United States*, ___ U.S. ___,142 S.Ct. 25, 28 (2021) (Mem.) (Sotomayor, J., dissenting) (" . . . the change in the AAIDD's definition provides compelling evidence of a shift in consensus in Coonce's favor with respect to the age of onset requirement.").

In *Coonce*, the dissent argued that "the AAIDD (relied upon in *Hall*) now has replaced its prior age-18 onset requirement with an age-22 onset requirement, evincing a clear shift." *Coonce*, 142 S.Ct. at 28 (internal citation omitted). "Similarly, the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM) used to require an impairment to onset 'before age 18 years' to meet the definition of an intellectual disability." *Id*. (citing *Atkins*, 536 U.S. at 308, n. 3 (quoting DSM–4, p. 41 (4th ed. 2000)). "However, in 2013, the manual's fifth edition (DSM–5) changed course, providing only that an impairment must onset 'during the developmental period.'" *Id*. (citing *Hall*, 572 U.S. at 721 (citing DSM–5, at 33)).

The lower court in *Coonce* relied on a definition of intellectual disability in the AAIDD Manual, which "required that an impairment manifest before age 18." *Coonce*, 142 S.Ct. at 25-26. "Coonce's impairments fully manifested at age 20." *Id*. at 26. After he petitioned for certiorari, "the AAIDD changed its definition to include impairments that, like Coonce's, manifested before age 22." *Id*. The government also asked the Court to grant certiorari, "conceding that it is reasonably probable that the Eighth Circuit would reach a different result

on reconsideration given the significant shift in the definition that formed the basis of its opinion." *Id*. Nevertheless, certiorari was denied.

The circumstances of Harris's case are significantly different from the facts highlighted by the dissent to the denial of Coonce's petition. Unlike Paul Coonce, Jr., whose "childhood was marked by emotional, physical, and sexual abuse," who "cycled through child psychiatric institutions beginning at age four" and whose IQ "plummeted from average into the range of intellectual disability" after a traumatic brain injury at age 20, *see Coonce*, 142 S.Ct. at 26, nothing suggests that Harris's alleged deficits manifested during his formative years. And unlike Bobby Moore, there was no evidence that Harris "was ever called slow or stupid," he never failed a grade, and there was no testimony, or evidence in his school records indicating that Harris "was considered retarded." (App. 181-82).

The investigation supporting Harris's post-conviction writ application produced "very little evidence concerning adaptive deficits that manifested themselves before Applicant reached age 18, or even before age 22, if the developmental period is extended to that age as proposed by Dr. Patton in his testimony." (App. 181). All of the factors that Dr. Patton concluded were relevant to deficits during Harris's developmental period "were either explained or contradicted by other witnesses" or "clearly occurred outside any possible developmental period, except that a relative helped him obtain his first job, and as a teenager [Harris] would spend the money he had." (App. 81-82). Regardless of

whether the "developmental period" ends at 18 or 22, the evidence, in this case, does not support a finding that the circumstances of Harris's childhood, adolescence or early adulthood show that he is intellectually disabled.

4) The TCCA reasonably concluded Harris failed to show his trial attorneys were ineffective or that he was prejudiced by their alleged ineffectiveness.

The trial court appointed Thomas J. "Jay" Wooten to represent Harris. (App. 13). On March 19, 2012, the RPDO was appointed to represent Harris. Mr. Wooten was by that time an employee of RPDO, and he, along with Philip Wischkaemper, were the attorneys assigned to the case. (App. 13). The RPDO "functions on a 'team' concept in that all of their offices receive copies of all information that the trial team compiles, and all major decisions are made collectively by RPDO." (App. 195). The trial court noted the RPDO was responsible to ensure that the duties assigned to defense counsel in both the American Bar Association Guidelines and the Texas State Guidelines for capital defendants were followed. (App. 195). It found that the "RPDO's failure to cause a thorough mitigation investigation, which at the very least have shown [Harris] had red flags indicating some adaptive deficits, was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel." (App. 200).

The trial court believed the RPDO failed to comply with both "the letter and the spirit" of the American Bar Association and Texas State Bar guidelines for the investigation of mitigating factors in the defense of capital defendants. (App. 126-27, 197). The court also thought that the RPDO's mitigation investigation was fragmented and failed to pursue the type of investigation that, even if it could not support a finding of intellectual disability, would have uncovered more information that could have been mitigating. (App. 200).

The purpose of the Sixth Amendment right to effective assistance of counsel is "not to improve the quality of legal representation"—it is "'simply to ensure criminal defendants receive a fair trial.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). This Court has stressed that the "benchmark" for a determination of ineffectiveness is "'whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Id*. (emphasis original) (quoting *Strickland*, 466 U.S. at 686). Under *Strickland*, Harris's trial attorneys should be "'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 690). This presumption may be overcome if Harris can establish his trial attorneys "'failed to act 'reasonabl[y] considering

all the circumstances.'" *Id*. (quoting *Strickland*, 466 U.S. at 688).

In this case, trial counsel was required to make a reasonable investigation into potential mitigating evidence or a reasonable decision that an additional investigation was unnecessary. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 691). The TCCA reasonably concluded Harris's trial team was not deficient when they chose to abandon an intellectual disability theory that was not supported by the evidence. This Court "has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009); *see Wiggins*, 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant . . . [or even] to present mitigating evidence at sentencing in every case.").

Harris must also prove prejudice arising from his attorney's alleged ineffectiveness. *Cullen*, 563 U.S. at 189; *Strickland*, 466 U.S. at 691-92. In this case, "prejudice" means there is a "reasonable probability" that, but for the RPDO's unprofessional errors, Harris would not have been sentenced to death. *Cullen*, 563 U.S. at 189; *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. This "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id*. (quoting *Harrington v. Richter*, 562 U.S. 86, 110 (2011)).

The probability that Harris would have received a different sentence is speculative at best. Even after an extensive post-conviction investigation and a two-week evidentiary hearing, the trial court noted that writ counsel produced "very little direct mitigating evidence." (App. 202). The TCCA reasonably overruled the trial court's conclusion that a more organized and detailed inquiry into Harris's potential intellectual disability would have produced "something" to alter the outcome. *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) ("*Strickland* asks whether it is 'reasonably likely' the result would have been different" and this "likelihood of a different result must be substantial, not just conceivable.").

A) Harris fails to overcome the presumption that his trial attorneys exercised reasonable professional judgment.

Harris's trial attorneys investigated potentially mitigating evidence of his intellectual disability. Counsel hired Dr. Elizabeth Kasper, a neuropsychologist, to evaluate Harris. After spending approximately 50 hours interviewing him and reaching her diagnosis, Dr. Kasper ultimately concluded this was not an intellectual disability case and that Harris's lower IQ test scores of 75 and 83 were due to "early-stage dementia, drug use, and risky behaviors during his life." (App. 121, 133, 194). She also testified at trial that Harris suffered from cognitive impairment—a precursor of vascular dementia that was not significant enough to

diagnose as vascular dementia—and this became part of the trial team's mitigation theory. (App. 67, 69).

Harris's attorneys interviewed family members even though, generally, they were not cooperative with investigators or the RPDO staff attorneys. (App. 122). The results of their investigation offered no reason to believe that Harris had any trouble living independently, and any difficulties he had in managing money "was caused by his use of drugs, alcohol, and prostitution." (App. 122). None of Harris's family members told trial counsel that Harris was slow, could not function in life, or needed special care. (App. 122, 125).

Harris faults his attorneys for conducting only a "preliminary investigation into intellectual disability for eighteen months." (Harris Pet. 28). Citing this Court's decision in *Andrus v. Texas*, ___ U.S. ___, 140 S.Ct. 1875, 1881 (2020), he complains that counsel's decision to "scrap" the intellectual disability claim based on the opinion of a neuropsychologist, Dr. Kasper, fell short of the thorough investigation that the Sixth Amendment requires. (Harris Pet. 28). But the circumstances of the attorney's deficient performance in *Andrus* are not present here.

In *Andrus*, the defense counsel did not simply fail to investigate—he overlooked "vast tranches of mitigating evidence" that were readily apparent to him, *id*. at 1881, and "would [have] le[d] a reasonable attorney to investigate further." *Id*. at 1883 (alterations in original) (internal quotation mark omitted) (quoting *Wiggins*, 539 U.S. at 527). When questioned at the

post-conviction proceeding, Andrus's counsel "never offered, and no evidence support[ed], any tactical rationale for the pervasive oversights and lapses. . . ." *Id*. at 1883. "Instead, the overwhelming weight of the record show[ed] that counsel's 'failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.'" *Id*. (quoting *Wiggins*, 539 U.S. at 526).

In contrast, counsel's decision to shift its mitigation strategy away from Harris's alleged intellectual disability was objectively reasonable given their interviews with his family and acquaintances and consultation with Dr. Kasper, who opined that Harris was not intellectually disabled. *See*, *e.g.*, *Bell v. Thomson*, 545 U.S. 794, 810 (2005) ("Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion."); *Segundo v. Davis*, 831 F.3d 345 (5th Cir. 2016) ("Given trial counsel's investigation and reliance on reasonable expert evaluations Segundo cannot overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance.").[5]

The trial court placed a heavy emphasis on the death penalty litigation standards published by the American Bar Association and the State Bar of Texas.

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[5] *See also Turner v. Epps*, 412 Fed. Appx. 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information. . . .").

(App. 126-27, 192-93). This Court has maintained, however, that the "'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009) (citing *Strickland*, 466 U.S. at 688) (holding performance not deficient when counsel gathered a substantial amount of information and then made a reasonable decision not to pursue additional sources).

This Court has explained, "What we have said of state requirements is a fortiori true of standards set by private organizations: '[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Van Hook*, 558 U.S. at 9 (citing *Roe v. Flores–Ortega*, 528 U.S. 470, 479 (2000)); *cf. Wiggins*, 539 U.S. at 524 (counsel acknowledged a standard practice for capital cases in Maryland that was inconsistent with what he had done).

The Sixth Amendment required Harris's attorneys to make reasonable choices in preparing his defense. Shifting the mitigation strategy away from intellectual disability (a claim not supported by the evidence) was reasonable. Counsel did not fail to act "while potentially powerful mitigating evidence stared them in the face." *E.g.*, *Van Hook*, 558 U.S. at 11 (citing *Wiggins*, 539 U.S. at 525). Rather, their decision to forgo further investigation of his alleged intellectual disability fell well within the range of professionally

reasonable judgment. *Id*. at 11-12 (citing *Strickland*, 466 U.S. at 699).

B) Harris cannot show prejudice.

The TCCA reasonably overruled the trial court's speculative conclusion that a more thorough inquiry into Harris's adaptive deficits would have produced "something" to alter the outcome. Putting aside the inconsistencies in the supplemental testimony and other writ evidence noted by the trial court (App. 40-41), much of the additional evidence highlighted in his petition to this Court is cumulative of material already in the record. (App. 194, 205). *See*, *e.g.*, *United States v. Bernard*, 762 F.3d 467, 476 (5th Cir. 2014) (citing *Strickland*, 466 U.S. at 687) ("A plea for 'more of the same' does not, in the circumstances of this case," show that counsel "were not functioning as counsel guaranteed . . . by the Sixth Amendment."); *Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020) ("Cumulative testimony generally cannot be the basis" of an ineffective assistance claim.).

Moreover, the additional evidence that Harris claims his trial attorneys should have investigated and presented falls significantly short of the magnitude of the undeveloped material shown in the cases he cites for support. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516-17, 525 (describing Wiggins's "bleak life history" and his troubled childhood); *Andrus*, 140 S.Ct. at 1879 (observing that a "tidal wave" of evidence "revealed a childhood marked by extreme neglect and privation, a family

environment filled with violence and abuse" (internal quotation mark omitted)); *Sears v. Upton*, 561 U.S. 945, 948-51 (2010) (holding that an inadequate mitigation investigation failed to uncover that Sears suffered from "significant frontal lobe brain damage," had a history of head trauma and suffered physical, emotional, and sexual abuse); *Porter v. McCollum*, 558 U.S. 30, 33 (2009) ("[N]ew evidence described [Porter's] abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity."); *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000) (finding that further investigation would have uncovered "extensive records graphically describing Williams's nightmarish childhood," the fact that he was "borderline mentally retarded," and did not advance beyond the sixth grade).

Harris points to his "difficulty performing basic arithmetic, living alone, managing money, and working through paperwork, and a family history of special needs,"[6] which he claims should have prompted a further inquiry into his intellectual disability. (Harris Pet. 4). He offers expert testimony finding him "significantly impaired" based on an IQ score of 75 and a "demonstrated difficulty with comprehension, mental flexibility, attention, memory, reading comprehension, and problem-solving." (Harris Pet. 10).

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[6] Harris's niece participated in Special Olympics. (Harris Pet. 25).

He calls this Court's attention to Dr. Patton's testimony that Harris's "adaptive deficits" are evident because he "struggled in school as a child" (Harris Pet. 10). Although trial counsel could not locate Harris's teachers, they collected his school records that showed modest grades and almost perfect attendance. (App. 99, 167). The trial court concluded that while Harris "did not have honor roll grades," there was "no basis for the statement that he was struggling with nearly every subject or barely getting by." (App. 24-25).

Harris highlights his "struggle[s] with money management and other administrative tasks" and "struggled to make it on his own as an adult." (Harris Pet. 10). His first wife testified that she married a man "unable to handle the daily tasks of life" and he "needed someone to take care of him because he could not take care of himself." (Harris Pet. 20-21). He also "exhibited heavy dependence on his family and wife in doing basic home tasks, such as cooking, cleaning, fixing things, and doing laundry." (Harris Pet. 21). Arguably, however, decades of drug and alcohol abuse can have the same effects.

Additionally, Harris complains the jury did not hear testimony that people with an intellectual disability might "create an unwarranted impression of lack of remorse for their crimes." (Harris Pet. 29-30). Of course, the jury would have to weigh any testimony about any "unwarranted impression" of his lack of remorse against evidence that, immediately after butchering Darla and Alton Wilcox, Harris was arrested when investigators found the Wilcox's stolen car

parked outside the "De Biz Bar" located next to the Economy Motel where Harris was living and had just paid his rent using cash with the victim's blood on it. (App. 299, 301).

In light of the entire record, Harris offers nothing to show a reasonable probability that, but for counsel's failure to investigate his alleged intellectual disability or his "adaptive deficits" in a more in-depth and organized fashion, there is a substantial probability he would not have been sentenced to death. The trial court's conclusion that such a finding is supported by the record is merely theoretical, and the TCCA reasonably overruled that finding.

CONCLUSION

Harris asks the Court to reweigh the testimony and evidence and summarily reverse the TCCA's factual findings, which has never been the role of this Court. Given the very fact-specific inquiry in this case, review is not warranted.

Neither the trial court nor the TCCA erred by considering whether Harris's adaptive deficits were related to his intellectual functioning, or whether those deficits manifested during Harris's formative years (up to age 22), even if the APA and AAIDD no longer believe these factors are necessary for a medical diagnosis.

Finally, Harris failed to prove his trial attorneys were ineffective when they shifted the mitigation strategy away from his intellectual disability on learning the claim had no merit. He also failed to show prejudice from this decision, which is evident by his post-conviction investigation's failure to produce any additional material evidence supporting this theory.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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