No. 22-1114

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The TCCA's dismissal of Mr. Harris's application for a writ of habeas corpus cannot be reconciled with this Court's binding precedents. In *Hall v. Florida*, 572 U.S. 701 (2014), this Court made clear that courts must consider current diagnostic criteria for determining intellectual disability. And in both *Moore v. Texas* ("*Moore I*"), 581 U.S. 1 (2017), and *Moore v. Texas* ("*Moore II*"), 139 S. Ct. 666 (2019), this Court re-emphasized that principle in correcting TCCA decisions that declined to follow it. This case presents the TCCA's latest attempt to flout this Court's clear direction and apply its own disability criteria to evaluate claims like Mr. Harris's. Summary reversal is appropriate for that reason alone.

Respondent denies the cert-worthiness of this case, but only after asking this Court to reinterpret its well-settled precedent in support of the TCCA's wrongful determinations below. Indeed, Respondent asks this Court to deny Mr. Harris's petition based on commentary from various dissents in *Hall*, *Moore I*, and *Moore II*. But "dissenting opinion[s] [are] generally not the best source of legal advice on how to comply with [a] majority opinion." *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023). Respondent's other disability-centric arguments cherry-pick from parts of the record and ignore others; they are thus insufficient to support denial of certiorari.

Equally unavailing is Respondent's attempt to distract this Court from the ineffectiveness of Mr. Harris's trial counsel. *Strickland v. Washington*, 466

U.S. 668 (1984), and its progeny demand that trial counsel conduct a thorough investigation into mitigating evidence (especially in capital cases) and that habeas courts conduct probing and fact-specific analyses to make sure counsel was effective. Here, however, the TCCA endorsed counsel's cursory investigation into Mr. Harris's intellectual disability to reverse the state habeas trial court's detailed and reasoned findings that Mr. Harris received ineffective assistance of counsel. Respondent's primary defense is that Mr. Harris's counsel should not be held to the reasonable, longstanding standards set forth by the ABA and the State Bar of Texas, even though courts (including this one) routinely consider those standards in evaluating the assistance of counsel. *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). That defense, along with the other misplaced and misleading arguments Respondent calls upon, is baseless. The Court should grant Mr. Harris's petition for certiorari and summarily reverse.

ARGUMENT

I. The TCCA's Dismissal of Mr. Harris's Intellectual Disability Claim Cannot Be Reconciled with this Court's Precedents.

The reasons for granting certiorari in this case are straightforward. The TCCA violated this Court's instruction in *Hall*, *Moore I*, and *Moore II*, to evaluate Mr. Harris's claim of intellectual disability in a manner that was "informed by the medical community's diagnostic framework." *Moore I*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 721). Most notably, the TCCA failed to correct its erroneous imposition of a "relatedness" requirement in light of

the DSM-5-TR, which clarified the diagnostic criteria for intellectual disability. This Court should grant certiorari to correct the TCCA's clear error.

In its opposition to certiorari, Respondent's primary argument is that *Hall*, *Moore I*, and *Moore II* were wrongly decided or should be controlled by their dissents. Respondent's remaining arguments that Mr. Harris is not intellectually disabled rely on faulty authority and misstate the relevant facts.

A. The TCCA's decision conflicts with this Court's repeated holding that *Atkins* claims must be evaluated by current medical standards.

Adjudication of a defendant's intellectual disability for purposes of an *Atkins* claim must be based on current medical standards. *See Moore II*, 139 S. Ct. at 669; *Moore I*, 581 U.S. at 20–21; *Hall*, 572 U.S. at 710. Those standards include three elements: (1) "significantly subaverage intellectual functioning," (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)," and (3) "onset of these deficits during the developmental period." *Hall*, 572 U.S. at 710. Contrary to Respondent's assertions and the TCCA's holding below, that test does not contain a fourth element that adaptive deficits must be "directly related to" intellectual deficiencies. *See* App.47–49, 74–78, 166–171, 174–175, 177–178, 180–181. Indeed, the textual revision to the DSM-5—a resource that was available to the TCCA in advance of its decision in this case—made crystal clear that the TCCA's adoption or application of that criterion was error.

That error, which has kept Mr. Harris on death row, merits swift correction.

As their primary retort, Respondent asserts that intellectual disability determinations should not be "controlled by the nuances in professional clinical manuals." BIO.6. Respondent is mistaken. To be sure, *Moore I* states that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide," and courts necessarily retain some discretion in applying medical standards. 581 U.S. at 13. But *Moore I* clarifies that this Court's precedents do not provide a "license" for courts to "disregard . . . current medical standards." *Id.* By failing to even consider the latest medical standards, the TCCA's decision clearly violated *Hall*, *Moore I*, and *Moore II*.

Unsurprisingly, like the TCCA, Respondent disagrees with this Court on the role of medical expertise. Its opposition to certiorari includes lengthy quotations from dissents that express concern about overreliance on medical consensus. *See* BIO.7–12. But "dissenting opinion[s] [are] generally not the best source of legal advice on how to comply with [a] majority opinion." *Students for Fair Admissions*, 143 S. Ct. at 2176. Respondent's primary contention in opposing certiorari, then, is not that the TCCA properly applied this Court's precedents, but rather that this Court's established decisions on intellectual disability are wrong. Its reliance on dissents to defend the TCCA's decision only emphasizes the TCCA's error.

Respondent defends the lower courts' imposition of the specious fourth criterion based primarily on the

TCCA's decision in *Petetan v. State*, which erroneously imposed the same "relational requirement" as an element of the DSM-5's diagnostic criteria. 622 S.W.3d 321, 333–334 (Tex. Crim. App. 2021). The TCCA's error in *Petetan* was made clear when the DSM-5-TR clarified that no such criterion was ever required by the DSM-5. Here, its error was even less justifiable because the TCCA had access to the DSM-5-TR, which explicitly rejected any "relational requirement." By invoking *Petetan*, Respondent therefore attempts to use a mistaken decision in an earlier state case to justify the TCCA's erroneous decision here, despite *Petetan's* clear inconsistency with current medical standards. In that sense, it mirrors the TCCA's misplaced reliance on *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), that required this Court's correction in *Moore I*. *See Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). As in *Moore I*, this Court should correct the TCCA's error.

B. The courts below erred in limiting the developmental period to age 18.

The TCCA had access to multiple authoritative sources indicating a medical consensus that the "developmental period" extends into a person's early twenties. *See* Pet.19–20. The record also included expert testimony consistent with the medical consensus that the developmental period extends "into the 20's, with 22 kind of being the target age." App.76. Despite this guidance, the state habeas trial court and the TCCA erred by limiting the "developmental period" to age 18.

The lower courts' erroneous ruling is not, as Respondent suggests, justified by this Court's passing use of the term "minor" in *Moore I* and *Moore II*. BIO.18. There, an early age of onset was undisputed, so onset as a minor was only sufficient, not necessary, for onset during the developmental period. *See Moore II*, 139 S. Ct. at 668 ("[W]e found general agreement that any onset took place when Moore was a minor."). The more precise version of the relevant standard was set forth in *Hall*, where this Court described the DSM criterion as "onset of these deficits during the developmental period." 572 U.S. at 710. *Moore I* does not change that standard; rather, it cites it approvingly. *See* 581 U.S. at 7.

Additionally, Respondent's discussion of *Coonce*, BIO.19–21, is immaterial. *Coonce* is relevant only because it shows that members of this Court have already recognized the current medical consensus that the "developmental period" extends into a person's early twenties. *See Coonce v. United States*, 142 S. Ct. 25, 28 (2021) (mem.) (Sotomayor, J., dissenting from the denial of certiorari). Here, the TCCA should have taken stock of that consensus view. *See* Pet.19–20. Its failure to do so contravenes the pronouncements in *Hall*, *Moore I*, and *Moore II* that courts' intellectual disability determinations should be guided by current medical standards.

C. Mr. Harris is intellectually disabled.

Mr. Harris meets each of the prongs recognized by this Court and the DSM-5 for intellectual disability: His intellectual functioning is impaired, as demonstrated by an IQ score within the range normally considered for intellectual developmental

disorder, as well as by poor performance on testing of intellectual functioning. App.353–354. The State's own expert acknowledged that Mr. Harris struggled with adaptive deficits throughout his life, leading the state habeas trial court to conclude that he had "satisfied his burden of proof" on the matter. *Id.* at 170–171, 202–203. Those deficits arose during 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. The state habeas trial court acknowledged Mr. Harris's deficits, but it improperly concluded that these deficits were not sufficiently "related." *See id.* at 166–168. That "relatedness" requirement, as discussed above, *supra* pp. 3–5, should never have been imposed.

It is not correct, as Respondent contends, that "a trial court should be able to consider whether a defendant's adaptive deficits are related to factors other than his subaverage intellectual functioning." BIO.18. To permit courts to deny a claim on that basis would be to sanction the "relatedness" requirement explicitly rejected by the relevant medical authorities. As this Court has repeatedly held, lower courts may not substitute their own judgment in place of established medical standards. *See Moore I*, 581 U.S. at 20 ("The medical community's current standards supply one constraint on States' leeway in this area.").

More implausible still is Respondent's assertion that the lower courts' decisions can be justified based on their proposed alternative explanations for Mr. Harris's adaptive deficits. *See* BIO.14–15, 17–18.

Those alternative explanations are not relevant; they rely on the same flawed inference this Court forbade in *Moore I*, where the TCCA improperly reasoned that deficits related to some other factor are not "directly related to" intellectual functioning. *Moore I*, 581 U.S. at 17.

But even if such alternative causes were relevant, Respondent cites only the state habeas trial court's discussion of Mr. Harris's drug and alcohol use, with particular emphasis on crack cocaine. BIO.14–15, 17–18. Yet the record does not indicate that Mr. Harris used crack cocaine *at all* during his formative years, nor does it indicate pervasive alcohol use during that period. *E.g.,* App.85. The woman Mr. Harris married at age 22 confirmed several of his then-present intellectual and adaptive deficits, and she stated that she "never knew [Mr. Harris] to use hard drugs." *Id.* at 545. Even if Mr. Harris's drug use were a proper consideration, therefore, Mr. Harris's "use of crack cocaine and alcohol," BIO.18, does not explain the deficits that Mr. Harris exhibited during his formative years.

Under the standards recognized by this Court, therefore, Mr. Harris has proven conditions meeting the definition of intellectual disability and the TCCA's contrary determination merits reversal.

II. Trial Counsel's Premature Abandonment of an Intellectual Disability Investigation Constituted Ineffective Assistance of Counsel.

The state habeas trial court correctly concluded that Mr. Harris's counsel was ineffective. Mr. Harris displayed numerous intellectual disability red flags

that should have prompted further investigation by counsel. However, after conducting only a cursory investigation into Mr. Harris's intellectual disability, counsel prematurely eschewed further exploration despite never retaining an expert to evaluate Mr. Harris for an intellectual disability. The TCCA's approval of that cursory investigation also lacked the fulsome analysis that this Court's precedents require. Respondent barely engages with those realities and fails specifically to dispute that the TCCA's analysis ignored much of the record. Instead, Respondent resorts to arguments that are immaterial and misleading. A proper review of the record demonstrates that the state habeas trial court engaged with all the facts and correctly concluded that counsel failed to conduct "a thorough mitigation investigation" related to Mr. Harris's intellectual disabilities and that such failure "was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel." Pet.12. The TCCA's rejection of those findings was error, and this Court should reverse.

Mr. Harris exhibited several glaring intellectual disability red flags that should have prompted further investigation, but counsel ignored them. For example, Mr. Harris has an IQ in the bottom 5th percentile, has the oral language skills of a six- or seven-year-old child, reads at between a fourth and seventh grade level, has trouble with basic arithmetic, and has significant difficulty with everyday tasks. *Id.* at 9, 24–25. Despite those red flags, counsel never retained an expert to evaluate Mr. Harris for an intellectual disability, and Mr. Wooten admitted that "there was never any investigation specific to intellectual

disability" before trial. *Id.* at 11, 25. Moreover, counsel abandoned the possibility of an intellectual disability-specific investigation after a brief phone call shortly before trial with a neuropsychologist who never evaluated Mr. Harris for an intellectual disability. *Id.* at 27–28.

Mr. Harris's counsel failed to provide constitutionally adequate assistance at least in part because the understaffed and disjointed defense team fell far short of objective professional standards. The applicable ABA and State Bar of Texas standards require a 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." *Id.* at 26. But Mr. Wooten was the only lawyer for at least five months, and the team also lacked a qualified mitigation specialist. *Id.*

Respondent argues unpersuasively that defense counsel should not be held to those standards. Respondent invokes this Court's reminder that ABA and similar guidelines are "only guides" of reasonableness and not binding definitions. BIO.27 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009)). However, Respondent does not argue that the ABA and Texas guidelines here were inappropriate or imposed an unreasonable standard on defense counsel. Nor does Respondent explain why those guides, routinely consulted by courts to evaluate counsel's performance, *e.g., Wiggins*, 539 U.S. at 524, would lead the Court astray here. Finally, Respondent does not propose any alternative standard

by which counsel's performance should be judged. And no plausible standard would justify trial counsel's abandonment of an intellectual disability defense here without his ever having an expert evaluate Mr. Harris for an intellectual disability.

Like the TCCA, Respondent attempts to justify counsel's performance as constitutionally adequate primarily by pointing to Dr. Kasper's statement that Mr. Harris was not intellectually disabled. BIO.24–26. But Dr. Kasper was not asked to and did not evaluate Mr. Harris for an intellectual disability. Pet.27. Respondent, like the TCCA, is forced to ignore this crucial fact because it vitiates its assertion that counsel's choice to abandon an investigation into intellectual disability that "would certainly have uncovered more information that could have been mitigating," App.200, was objectively reasonable. Counsel's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–691. Dr. Kasper could not have offered a reasonably informed opinion about whether Mr. Harris was intellectually disabled, so counsel could not have reasonably cut short its limited investigation based on her statement.

Respondent's only other argument that counsel's assistance was constitutionally adequate is equally feeble. Respondent notes that, in interviews, Mr. Harris's family did not raise red flags about his ability to live independently and explained his trouble dealing with money as the result of his problems with alcohol, drugs, and prostitution. BIO.25. But failing

to uncover red flags from one of many potential sources does not excuse ignoring red flags elsewhere.

Respondent does not seriously attempt to dispute that counsel's ineffective assistance was prejudicial. Respondent emphasizes that the jury was presented with highly prejudicial evidence of Mr. Harris's apparent lack of remorse. *Id.* at 30–31. That fact supports the conclusion that Mr. Harris was prejudiced by his counsel's failures. Further investigation into intellectual disability would have allowed counsel to present the jury with evidence that could have explained how that reaction was not the result of a lack of remorse. The demeanor of intellectually disabled defendants "may create an unwarranted impression of lack of remorse for their crimes." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). If presented with evidence of Mr. Harris's intellectual disability, there is at least a reasonable probability that one or more jurors would have voted against imposing the death penalty.

Respondent's remaining prejudice arguments merely repeat their earlier misleading arguments about Mr. Harris's intellectual disability and the deficiency of counsel's performance. Of note, Respondent speculates that "[a]rguably . . . decades of drug and alcohol abuse can have the same effects" as an intellectual disability on one's ability to perform basic tasks. BIO.30. Respondent fails to cite any authority for that conclusory assertion, and even if it were true, Mr. Harris already was unable to perform basic tasks at age 22 when he married his first wife, long before he could have felt any effects of decades of drug and alcohol abuse. Pet.20. Moreover, that

suggested alternative cause is irrelevant because the phantom fourth criterion of direct relatedness has never been part of the current diagnostic criteria for intellectual disability. *See supra* pp. 3–5.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse.

Respectfully submitted,

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