No. _____

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

TEXAS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

Jason D. Hawkins
Federal Public Defender
Jeremy Schepers*
Supervisor, Capital Habeas Unit
jeremy_schepers@fd.org
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214-767-2746
214-767-2286 (fax)

Jennae R. Swiergula
Texas Defender Service
9390 Research Blvd
Kaleido II, Suite 210
Austin, TX 78759
512-320-8300
512-477-2153 (fax)
jswiergula@texasdefender.org

**Counsel of Record*

Attorneys for Petitioner

CAPITAL CASE
QUESTION PRESENTED

Did the state court run afoul of *Atkins v. Virginia*, 536 U.S. 304 (2002), when it ignored an applicant's full range of IQ scores in favor of a single part-score and deferred to an expert who did not conduct a complete adaptive behavior assessment?

PARTIES BELOW

All parties are listed on the cover page in the case caption. There are no corporate parties involved in this case.

LIST OF RELATED CASES

4th District Court of Rusk County, Texas

State of Texas v. Blaine Milam, No. CR-09-066

Texas Court of Criminal Appeals

Milam v. State, No. AP-76,379 (direct appeal)

Ex parte Milam, No. WR-79,322-01 (initial state post-conviction proceeding)

Ex parte Milam, No. WR-79,322-02 (second state post-conviction proceeding)

Ex parte Milam, No. WR-79,322-03 (original writ of mandamus)

Ex parte Milam, No. WR-79,322-04 (third state post-conviction proceeding)

United States District Court for the Eastern District of Texas

Milam v. Director, TDCJ-CID, No. 4:13-cv-545 (federal habeas proceeding)

Milam v. Director, TDCJ-CID, No. 6:20-cv-646 (second federal habeas proceeding)

United States Court of Appeals for the Fifth Circuit

Milam v. Davis, No. 17-70020 (federal habeas appeal)

In re Milam, No. 20-40663 (motion for authorization to file second or successive proceeding under 28 U.S.C. § 2244)

In re Milam, No. 20-40849 (appeal from order of transfer), consolidated with *Milam v. Lumpkin*, No. 20-70024

Supreme Court of the United States

Milam v. Davis, No. 18-5494 (certiorari from federal habeas)

Milam v. Davis, No. 20-6518 (certiorari from subsequent state habeas)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

Statutes

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Blaine Milam petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA").

OPINIONS BELOW

The November 1, 2023, Findings of Fact and Conclusions of Law signed by the 4th Judicial District Court of Rusk County are attached as Appendix A. The July 31, 2024, unpublished opinion of the TCCA is attached as Appendix B.

STATEMENT OF JURISDICTION

The TCCA entered its judgment on July 31, 2024. On October 15, 2024, Justice Alito extended the time for filing this petition to November 28, 2024. *See Milam v. Texas*, No. 24A347 (Oct. 15, 2024). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides in relevant part: "… nor [shall] cruel and unusual punishments [be] inflicted."

INTRODUCTION

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court observed that people who meet the clinical definition of intellectual disability exhibit characteristics which make them less morally culpable and more vulnerable to excessive sentences: "Because of their impairments, . . . by definition [people with intellectual disability] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning,

to control impulses, and to understand the reactions of others." *Id.* at 318. "[I]n group settings they are followers rather than leaders." *Id.* These impairments heighten the risk of disproportionate sentencing based on the "possibility of false confessions[.]" *Id.* at 320. In light of these characteristics, this Court reasoned that people with intellectual disability, while still criminally culpable, have "diminish[ed] . . . personal culpability." *Id.* at 318. Consequently, "death is not a suitable punishment" for the intellectually disabled. *Id.* at 321.

Atkins left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317. The Court noted, however, that of the states that had prohibited imposition of the death penalty on persons with intellectual disability, the state "statutory definitions of [intellectual disability] are not identical, but generally conform to the clinical definitions[.]" *Id.* at 317 n.22. Those clinical criteria—(A) deficits in intellectual functioning, (B) deficits in adaptive functioning, and (C) emergence of these deficits in the developmental period—formed the foundation of the Court's reasoning regarding why people with intellectual disability have reduced moral culpability. *See id.* at 318. Indeed, this Court later expressly recognized that "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall v. Florida*, 572 U.S. 701, 720 (2014). In other words, under *Atkins*, the clinical definition of intellectual disability and the Eighth Amendment legal standard are intertwined.

Consequently, since *Atkins*, courts have largely adjudicated intellectual disability claims with reference to the clinical definition.[1] That definition permits the judicial identification of persons who possess the impairments identified in *Atkins* as lessening their moral culpability and requiring exemption from the death penalty. Indeed, the three diagnostic criteria correspond to the three prongs of an *Atkins* claim.

Five experts have been asked to examine whether Petitioner meets that clinical definition. However, only four of them applied the diagnostic criteria. Each of those four experts concluded that Petitioner met the criteria for intellectual disability. The State's trial expert, Dr. Timothy Proctor, initially found at the time of Petitioner's trial that he was not intellectually disabled. However, asked to re-evaluate his opinion during post-conviction proceedings in 2020, Dr. Proctor found—in light of new information and changes in the relevant science—that Petitioner had deficits in intellectual functioning as established by full-scale IQ scores of 68 and 71, deficits in adaptive functioning as evidenced by lay witness information and neuropsychological testing, and that these deficits were present in the developmental period. Dr. Edward Gripon, also retained pre-trial by the State but not called to testify, signed an affidavit after trial opining that Petitioner was intellectually disabled. Finally, Dr. Mark Cunningham, Petitioner's expert at trial, and Dr. Jack Fletcher, retained by Petitioner in post-conviction, both concluded that Petitioner met the criteria for intellectual disability.

[1] Texas was, of course, a notable outlier. *See Moore v. Texas*, 581 U.S. 1, 18 (2017).

After Dr. Proctor concluded that Petitioner was intellectually disabled, the State jettisoned him and retained a different expert, Dr. Antoinette McGarrahan, in an attempt to obtain an opinion it liked better. She alone opined that Petitioner was not intellectually disabled. Dr. McGarrahan reached this conclusion based on: 1) a single part-score that does not measure intellectual functioning as defined by the diagnostic manuals; 2) her opinion that Petitioner does not have deficits in one of the domains of adaptive functioning—the conceptual domain—based on her impression of strengths in reading and writing; 3) and because of her conclusion that Petitioner does not have intellectual or adaptive functioning deficits, correspondingly he did not have deficits in the developmental period. The trial court's Findings of Fact and Conclusions of Law wholly credited and relied upon Dr. McGarrahan's opinion. *See* App'x A. The TCCA adopted the trial court's findings and denied *Atkins* relief. *See* App'x B. Dr. McGarrahan's opinion and the TCCA's adoption of the same does not comport with the Eighth Amendment requirements set out in *Atkins*.

STATEMENT OF THE CASE

I. Petitioner's impairments made him vulnerable to influence and were leveraged against him by the State to obtain a conviction and death sentence.

Petitioner was convicted of capital murder and sentenced to death in Rusk County, Texas, in 2010. At trial, the State alleged that Petitioner, along with his then-fiancée Jesseca Carson, killed Carson's thirteen-month-old daughter. Because the State could not prove Petitioner's direct culpability, it sought and obtained jury

instructions that allowed him to be held responsible for a murder committed by Carson.[2]

On the morning of December 2, 2008, Petitioner called 911 to report the death of Carson's daughter. Immediately, law enforcement's investigation zeroed in on Petitioner. The Texas Ranger who interviewed Petitioner told him "a whole lot of people think you did this." State's Ex. F1, 59 RR 166. When Petitioner asked why, the Ranger responded, "you're the only male in this house." *Id.*

At the time, Petitioner was a socially isolated eighteen-year-old boy described by the few who knew him as naïve, awkward, and "slow." 51 RR 14, 32. His grade-school teachers described a shy and socially inept boy who was a slow learner. *Id.*; 2021 Ex. 8 at 1, 2021 Ex. 9 at 1.[3] In the fourth grade, Petitioner was placed in Resource, or Special Education, and was pulled out of class for several hours each morning for one-on-one support. 2021 Ex. 9 at 1. He spoke with a stutter and struggled to handwrite. *Id.* He had few friends in school. 53 RR 220.

Petitioner's parents removed him from school around the fourth grade. 51 RR 39. One neighbor briefly invited him to join her home-schooled children in their lessons. 55 RR 84. His parents also attempted to home school him but a short time

---

[2] *See* Tex. Penal Code § 7.02(a)(2).

[3] Citations to exhibits appended to the Subsequent State Habeas Application filed in *Ex parte Milam*, No. WR-79,322-04 (Jan. 12, 2021) are cited as 2021 Ex. [number], and exhibits appended to the Application filed in 2019 in *Ex parte Milam*, No. WR-79,322-02 (Jan. 07, 2019) as 2019 Ex. [number]. Citations to the reporter's record at trial are cited as [volume] RR [page number], to the clerk's record at trial as [volume] CR [page number], and to the 2023 evidentiary hearing record as [volume] SHRR [page number].

after they started, Petitioner's father suffered a devastating heart attack that left him bedridden. 51 RR 241, 247. Petitioner stopped attending home schooling. 51 RR 258–59. Petitioner spent the intervening years staying home with his seriously ill father, while his mother worked at the Dollar Store to financially support the family. *Id.* at 259. He spent his days watching old Westerns with his father. 52 RR 94; 51 RR 264.

In January 2008, Petitioner met Carson—his first girlfriend—through the website MySpace. 51 RR 283. Unlike Petitioner, Carson graduated from high school and got good grades. 46 RR 31. Soon their online relationship developed in the real world. The couple eventually moved into their own apartment, a short drive from Petitioner's mother's trailer home. 50 RR 33; 51 RR 298. They were evicted after just a few months for failing to make rent and moved back into Petitioner's mother's trailer. 51 RR 310. In September 2008, Petitioner's father, who was his best friend, died. Petitioner was devastated. *Id.* at 305. In his grief, he began using methamphetamine again.[4] 53 RR 221.

Around the same time, Carson's friends noticed increasingly bizarre and erratic behavior from her. 46 RR 41; 51 RR 304. Whereas she had once been outgoing and friendly, she became withdrawn and disheveled. 46 RR 41. Carson and Petitioner bought a Ouija board after she became convinced she and Petitioner would be able to communicate with their deceased fathers through it. 2019 Ex. 6 at 80–81. Carson's

[4] Petitioner's older brother introduced him to methamphetamine when Petitioner was fifteen and his brother was twenty. 53 RR 129.

father had committed suicide when she was a child. But, as Carson shared with Petitioner, the Ouija board revealed to her that he had been murdered by Carson's mother and that the murder weapon was buried in Alabama. 2019 Ex. 6 at 90–91; 2019 Ex. 8 at 4–5. Carson began making harassing phone calls to her mother at all hours of the day and night. In an email, sent October 4, 2008, Carson accused her mother of killing her father and trying to poison her and her daughter. 2019 Ex. 7 at 1.

That October, Carson took Petitioner and her daughter on an investigative trip to Alabama. 46 RR 204. The young family stayed with a friend of Carson's. Carson recounted to her friend the Ouija board's revelations and that her mother had been putting rat poison in her and Petitioner's food and in her daughter's bottle. 2019 Ex. 8 at 4–5. Carson did not sleep the entire time they were in Alabama. 46 RR 206–07. Her friend did not know whether to believe these stories, but she brought Carson to a friend who was in law enforcement. 2019 Ex. 8 at 5; 46 RR 206. The officer told Carson there was nothing he could do without evidence. *Id.* Soon after, Carson returned to Texas with Petitioner and her daughter in tow.

In November 2008, Carson's mother filed a police report, complaining of her daughter's harassment. *See* 2019 Ex. 9 at 6–7. At times, Carson was calling eight to ten times a night, sometimes waiting until her mother picked up and immediately hanging up. *Id.* at 3–4. That same month, Carson again took Petitioner and her daughter to Alabama to stay with her friend. Carson told them they were planning to stay in Alabama to live but they returned to Texas after just three days. 46 RR

212. Friends who saw Carson became concerned that she appeared disinterested and disconnected from her daughter. 46 RR 210–11. The mother of one of Carson's friends would later recount that when she looked into Carson's eyes, she saw nothing: "It's like looking into a dark space." 46 RR 209.

At about 10:30 a.m. on December 2, 2008, emergency services received a call from Petitioner reporting that Carson's daughter was not breathing. 42 RR 105. Soon after arriving at the scene, law enforcement interviewed Petitioner and Carson separately. *See* 59 RR State's Ex. F-1. Carson told police that she and Petitioner had left earlier that morning to walk some land they were considering moving to. 2019 Ex. 6 at 69–70. They had been gone just a couple of hours and left her daughter in the trailer. *Id.* at 74. When they came back, they discovered her daughter's lifeless body. *Id.* at 74–75. Petitioner parroted the same story, which Carson later admitted to fabricating and instructing Petitioner to repeat. *See* 59 RR State's Ex. F-1 at 28–29; 2019 Ex. 6 at 110. Apparently struck by Petitioner's obvious limitations while interviewing him, the Texas Ranger questioning Petitioner asked him to spell the word Texas and count from 25 to 35, the latter of which Petitioner did not initially do successfully. 59 RR State's Ex. F-1 at 43. The Ranger also asked Petitioner if he could name the then-current president of the United States, which Petitioner exhibited confusion about. *Id.* at 40.

In a subsequent interview with Carson, law enforcement noticed that, when pushed for the true story, Carson's demeanor changed from that of a grieving mother to being coldly matter-of-fact. 40 RR 31. She proceeded to tell a bizarre story that she

and Petitioner had communicated with their dead fathers through a Ouija board and that both Petitioner and then her daughter became possessed with demons. 2019 Ex. 6 at 82–86. Carson told investigators that Petitioner attempted to perform an exorcism on her daughter. *Id.* at 90. Law enforcement noted several demonstrable fabrications in Carson's custodial statements. For example, in addition to Carson's admission that she concocted the story both she and Petitioner initially told to investigators, Carson was careful to tell investigators that the bedroom where Petitioner supposedly performed the exorcism locked from the inside, in order to paint herself as a passive participant who was unable to help her daughter. Def. Ex. 6, 60 RR 157. In fact, police discovered the door could only be locked from the outside. *State v. Carson*, No. CR2009-067, 12 RR 219.

Petitioner was also questioned several times by law enforcement after he was taken into custody. In one of those statements, Petitioner asked "what if I tell you it was me and I take the blame for somebody else, will I be in trouble?" State's Ex. E-2, 59 RR 58. The State sought the death penalty against Petitioner only.[5]

At his trial, Petitioner was prevented from presenting evidence about Carson's state of mind or introducing her custodial statements in front of the jury. Carson's admitted lie to law enforcement about her and Petitioner's whereabouts on the morning of the offense was misleadingly presented as Petitioner's own conniving. 39 RRR 59–61. The State also relied on discredited expert opinion testimony attributing

[5] During closing arguments at sentencing, the prosecutor assured Petitioner's jury that it was also going to seek a death sentence against Carson. 56 RR 130. It did not.

marks on the decedent's body to bitemarks made by Petitioner and on DNA evidence that the State's expert agreed established little more than the fact that Petitioner, Carson, and her daughter all lived in the same home together. *See, e.g.,* 45 RR 24, 27–28. The State presented extensive testimony about a pipe wrench discovered under the trailer but could not prove any connection either to Petitioner or to the offense. 48 RR 31. Finally, the State emphasized the testimony of a jail nurse to whom Petitioner purportedly told he was going to "be a man" and confess to authorities that he had done "it." 40 RR 166. The nurse's testimony echoed Petitioner's statements to law enforcement contemplating "tak[ing] the blame for somebody else." State's Ex. E-2, 59 RR 58. Petitioner's jury was instructed that they could hold Petitioner responsible as a party for a capital murder committed by Carson. 4 CR 933–34. The jury returned a guilty verdict.

At sentencing, the jury was presented evidence regarding intellectual disability. Specifically, the jury heard from State's expert Dr. Proctor that Petitioner did not meet the diagnostic criteria and defense expert Dr. Cunningham, who opined that Petitioner was intellectually disabled. *See, e.g.,* 53 RR 197–240, 243–62; 55 RR 135–80. The jury was asked to answer whether Petitioner was a person with intellectual disability and answered that special issue in the negative. Petitioner was sentenced to death.

II. The State relied on Dr. Proctor's opinion to rebut Petitioner's intellectual disability claim—without ever verifying with him that it was still valid.

After appellate and collateral challenges were exhausted, the trial court set an execution date for Petitioner of January 15, 2019. Petitioner then filed a second

habeas corpus application in state court raising, *inter alia*, a claim that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. *See* 2019 State Habeas Application. The TCCA remanded the case to the convicting court for a determination on the merits of the intellectual disability claim. *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209, *1 (Tex. Crim. App. Jan. 14, 2019).

At the State's urging, the trial court declined to hold a hearing, adopted the State's Proposed Findings of Fact and Conclusions of Law, and recommended that relief be denied. The Findings of Fact and Conclusions of Law written by the State and adopted by the trial court relied on Dr. Proctor's opinion to conclude that Petitioner was not intellectually disabled. *See* Findings of Fact and Conclusions of Law, *Ex parte Milam,* CR 09-066 (4th Judicial Dist. Ct. of Rusk Cty. Oct. 16, 2019) ("2019 FFCL") (citing Dr. Proctor's name 59 times). They also included the finding that Dr. Proctor was "far more credible" than Petitioner's proffered expert, Dr. Fletcher. 2019 FFCL at ¶ 232. The State did not consult with Dr. Proctor to confirm the validity of his opinion at that time. *See* 2021 Ex. 1 at 1. The TCCA adopted the trial court's Findings of Fact and Conclusions of Law with limited exceptions not relevant here and denied relief. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921, *1 (Tex. Crim. App. July 1, 2020).

III. Dr. Proctor concludes that Petitioner was intellectually disabled.

The trial court scheduled a second execution date for Petitioner of January 21, 2021. With the State's permission, Petitioner's counsel contacted Dr. Proctor and asked him to reassess his opinion in light of this Court's abolition of Texas's aclinical

Briseno[6] factors. Dr. Proctor revised his opinion from trial and concluded that Petitioner was intellectually disabled. 2021 Ex. 1 at 6. Petitioner again filed a state habeas application raising, inter alia, an *Atkins* claim. The application emphasized that all of the experts who had opined on whether Petitioner met the three diagnostic criteria of intellectual disability, including both State's experts, concluded that he did.

In support of the *Atkins* claim, Petitioner set out the following allegations of deficits in intellectual and adaptive functioning and of their presence in the developmental period. First, Petitioner underwent pre-trial examinations by two psychologists who administered IQ tests. Petitioner was administered intellectual functioning testing by defense expert Dr. Paul Andrews in November 2009, when Petitioner was 19 years old. He obtained a full-scale IQ score ("FSIQ") of 71 on the WAIS-IV.[7] Four months later, when Petitioner was 20 years old, he was administered the WAIS-IV by the State's expert Dr. Proctor. Petitioner obtained a FSIQ of 68. Both scores are within the range of intellectual disability. *See Atkins*, 536 U.S. at 309 n.5.

Second, Petitioner relied on assessments of his adaptive behavior completed pre-trial by Dr. Cunningham, the pre-trial opinion of State's expert Dr. Gripon,[8] Dr.

---

[6] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

[7] Dr. Andrews also administered the Stanford Binet 5 ("SB-5") to Petitioner. According to Dr. Andrews, Petitioner received a FSIQ score of 80. Later review by Dr. Dale Watson established that Dr. Andrews mis-scored the SB-5 and that the correct score was a 78. 2021 Ex. 3 at 6–7. The State has not contested this scoring error.

[8] The State did not call Dr. Gripon to testify. In his notes, Dr. Gripon described Petitioner as "very naïve, extremely gullible, easily led." 2021 Ex. 6 at 13. His "basic impression" of Petitioner was that it was "glaringly obvious that he is quite

Fletcher's assessment in post-conviction, and Dr. Proctor's reassessment in 2020. *See* 53 RR 197–240; 2021 Exs. 6, 5, 1. Petitioner also relied on information from witnesses who knew him as a child and young adult. *See* 2021 Exs. 2, 8, 9, 10, 11, 12, 14. These evaluations and information revealed significant adaptive deficits in all three domains of adaptive behavior.

The conceptual domain includes language, reading, writing, arithmetic, planning, and time. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 39 (2022 text revised) ("DSM-5-TR"); AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports, 30 (2021) ("AAIDD-12"). Dr. Proctor noted that Petitioner suffers from deficits in functional academics, particularly in the areas of number concepts, money management, etc. 2021 Ex. 1 at 5. Likewise, Dr. Gripon observed Petitioner had "significant difficulty with mathematics as it applies to handling money, etc." 2021 Ex. 6 at 15. This opinion was confirmed by the impressions of lay witnesses who knew Petitioner in the developmental period. *See* 2021 Ex. 10 at 2 ("At the end of the day, when I told [Petitioner] how many hours he had worked and his pay per hour, he could not figure out how much I owed him."); *see also* 51 RR 276 (Petitioner never had his own bank account and would not be able to keep track of the money if he did, could not

---

simplistic." *Id*. Dr. Gripon concluded that he "does not have normal intellectual potential" and "clearly has intellectual limitations." *Id.* at 14. After observing Dr. Cunningham's testimony, Dr. Gripon informed the State that "it would be better if I did not testify because my testimony would not have been favorable to the State." 2021 Ex. 16 at 1. Dr. Gripon later opined in a 2014 affidavit that "[Petitioner] is intellectually disabled within the requirements of the DSM-5 and the holding of *Hall v. Florida*." *Id.* at 2.

accurately calculate change, and could not pay his own bills); 53 RR 224–25 (when Petitioner lived with Carson, she managed their bank account and he could not plan or budget his money). Petitioner's second and third grade teacher remembered that Petitioner's "intellectual functioning was the lowest of the class." 2021 Ex. 8 at 1. His teacher "had to modify instructions and adapt exercises to his academic limitations." *Id.*

Petitioner similarly needed instructions repeated to perform rudimentary tasks at work. According to a former employer, even when Petitioner was shown how to do simple tasks like raking leaves and hauling trash "he would not remember how to do it the next time, and I had to show him again." 2021 Ex. 10 at 1. Another employer who owned a marina where Petitioner washed boats remembered that Petitioner "could not complete a task independently and required a lot of supervision." 2019 Ex. 11 at 1. A former neighbor would ask Petitioner "to perform various simple tasks on [the neighbor's] property." 2021 Ex. 12 at 1. However, the neighbor "had to instruct him on how to perform these tasks and supervise him while he did them because he was not smart." *Id.* A work supervisor who oversaw Petitioner at Big 5 Tire, where he worked as a tire buster, testified at Petitioner's trial that when Petitioner first started, the supervisor had to show him what to do, not just tell him, even though Petitioner had been working on cars for years. 54 RR 285–86.

The social domain includes interpersonal skills, self-esteem, gullibility, naïveté, and social problem solving. AAIDD-12 at 30. State's expert Dr. Gripon observed that Petitioner "has very simplistic ideas, is very naïve, extremely gullible,

easily led . . . ." 2021 Ex. 6 at 13. Petitioner's neighbor remembered that Petitioner "was no leader, he was a follower." 2021 Ex. 12 at 1; *see id.* ("[Petitioner] did not think independently, and did whatever his father told him to."); *see also* 51 RR 28 (Petitioner was a follower). In the classroom, Petitioner was "bashful" and "shy," "didn't want to meet your eye too much," and "h[u]ng his head." 51 RR 28; 2021 Ex. 8 at 1 ("He did not make eye contact . . . . He was often alone in class."); 51 RR 19 (Petitioner had "one or two friends" in school.). Even as a young teenager, Petitioner watched Scooby Doo and played with cars for hours with his niece who is ten years younger. 51 RR 233. Coworkers described him as "more like a child." 2021 Ex. 15 at 8. At the age of 16, Petitioner seemed to be closer to the age of 10 emotionally. 52 RR 101.

The practical domain captures activities of daily living, occupation skills, use of money, safety, health care, travel/transportation, and schedules/routines. AAIDD-12 at 30. Petitioner never lived independently and required significant support from family and peers in activities of daily living. Dr. Fletcher reported, "[a]t a younger age, [Petitioner's] self-care skills were under-developed and he needed many reminders to do simple tasks like brush his teeth." 2021 Ex. 5 at 8. Petitioner never had his own bank account and never managed his own finances. 53 RR 224–25. State's expert Dr. Gripon likewise noted that Petitioner could not manage his bank account independently, could not memorize the pin number to his debit card, and was unable to learn how to use his debit card to make purchases. 2021 Ex. 6 at 9 ("As an example, in an area where he would purchase gas, [Petitioner] would actually give

the people, whom he knew, his PIN number and they would actually operate the machine for him.").

Petitioner's employment involved repetitive, low-skilled tasks. 2021 Exs. 10, 11. At the boat marina where he did light janitorial work, his supervisor observed that Petitioner was unable to learn his duties and could not complete any task as instructed. 2021 Ex. 11 at 1. Petitioner was eventually employed as a lube tech at an oil change shop. His duties were primarily limited to changing oil and fuel filters. 2021 Ex. 15 at 7. His employer reported that he was unable to train Petitioner to handle money. *Id.* Finally, Petitioner was employed as a "tire buster" at Big 5 Tire to change oil and air filters and change and fix flat tires. He did not perform any mechanical or body work. 50 RR 20, 27. While Petitioner was able to learn "tasks that are repetitious and routine," he was "not able to progress beyond this point to more complex mechanical work." 2021 Ex. 5 at 6.

The third criterion of intellectual disability requires that deficits in intellectual and adaptive functioning be present in the developmental period. DSM-5-TR at 37. Petitioner was 18 at the time of his arrest in the present case. Consequently, all—or almost all—of the evidence of Petitioner's everyday functioning necessarily dates from the developmental period. Indeed, much of it comes from teachers, employers, and friends who knew him from early childhood through his mid-to-late teens. As State's expert Dr. Proctor concluded, available evidence "supports an onset of significant intellectual impairment and adaptive behavior/functioning during the developmental period." 2021 Ex. 1 at 5.

The TCCA stayed Petitioner's execution and remanded the case to the trial court. *Ex parte Milam*, No. WR-79,322-04, 2021 WL 197088, *1 (Tex. Crim. App. Jan. 15, 2021).

IV. The State takes a second bite at the apple.

Its retained expert having revised his opinion and concluded that Petitioner was intellectually disabled, the State sought a second bite at the apple. It retained Dr. Antoinette McGarrahan to administer the WAIS-IV—then fifteen years past its norming date[9]—to Petitioner, again. Petitioner obtained a FSIQ score of 80 on Dr. McGarrahan's administration in September 2021. 2023 SHRR State's Ex. 1 at 6. Dr. McGarrahan also interviewed Petitioner and administered various other neuropsychological instruments. She did not conduct a full assessment of Petitioner's adaptive functioning. In her report, Dr. McGarrahan concluded that Petitioner was not intellectually disabled based on the following: 1) a General Ability Index ("GAI")[10] score of 91; 2) a reading and writing score on a neuropsychological test that measures academic achievement which Dr. McGarrahan believed were "dramatically outside of parameters seen in individuals with ID"; and 3) in the absence of deficits in intellectual and adaptive functioning, there could have been no onset in the developmental period. *Id.* However, her report stated that she did "not dispute the scores or tests results from prior examinations[.]" *Id.*

---

[9] As an IQ test is administered further on from the year in which it was normed, it overinflates IQ by roughly .3 points for every year since the IQ test's norming date. 1 SHRR 22; 2 SHRR 59–60, 64.

[10] The GAI is a score derived from two of the four measures of intellectual functioning on the WAIS-IV. 2 SHRR 84–85.

The convicting court held a hearing on May 30 and 31, 2023. The court took judicial notice of all prior proceedings and filings. 1 SHRR 4–5. Petitioner called Dr. Proctor and Dr. Alan Kaufman, whose book *Essentials of WAIS-IV Assessment* Dr. McGarrahan relied upon to reject the FSIQ score she obtained in favor of the GAI. *See* 2023 SHRR State's Ex. 4. The State called Dr. McGarrahan.

A. Testimony about Criterion A.

Dr. Proctor testified that he had reviewed Dr. McGarrahan's report and consulted with her, and reasserted his opinion that Petitioner was intellectually disabled. 1 SHRR 50–51. He also expressed significant concerns with Dr. McGarrahan's methodology and conclusion, notably her reliance on the GAI, an optional part-score on the WAIS-IV. 1 SHRR 16–17, 138–39. He testified that he had been retained by the State to opine on intellectual disability in around 30 capital cases and had never previously seen the GAI relied upon to assess intellectual functioning in Texas. 1 SHRR 10, 17. In its cross-examination, the State elicited that Dr. Proctor remained the State's expert but that it would not compensate him for his time because of his conclusion that Petitioner met the criteria for an intellectual disability diagnosis. 1 SHRR 156. Dr. Kaufman testified that Dr. McGarrahan had misapplied his methodology and incorrectly relied on the GAI to form an opinion about Petitioner's intellectual functioning for the purpose of evaluating intellectual disability. 2 SHRR 184.

Dr. McGarrahan testified that all of Petitioner's FSIQ scores on the WAIS-IV, including the score on her most recent administration, were within the range for diagnosing intellectual functioning deficits. 2 SHRR 45, 63–66, 78. She nevertheless

concluded that he did not meet Criterion A of an intellectual disability diagnosis because the GAI score resulting from her administration of the WAIS-IV was outside the requisite range. 2 SHRR 36. The GAI is a part-score derived from two of the four areas of intellectual functioning measured by the WAIS-IV. 2 SHRR 84–85. It includes measures of perceptual reasoning and verbal comprehension but excludes measures of processing speed and working memory. *Id.* Dr. McGarrahan acknowledged that the GAI therefore does not account for two critical aspects of intellectual functioning as defined by the DSM-5-TR—and the two weakest areas of Petitioner's intellectual functioning.[11] *Id.* at 85–86

B. Testimony about Criterion B.

With regard to adaptive behavior, Dr. McGarrahan testified that pre-trial neuropsychological testing, as well as her administration of the same, reflected that Petitioner had "difficulties with planning and problem solving, nonverbal abstract reasoning, making decisions, these sorts of things" and "executive functioning or higher order functioning." 2 SHRR 48. She ruled out Criterion B, however, based on

[11] Authoritative texts on interpretation of the WAIS advise relying on the GAI and excluding the working memory and processing speed scores in certain circumstances where the validity of those scores is in doubt. *See* LAWRENCE G. WEISS ET AL., *Theoretical, Empirical, and Clinical Foundations of the WAIS-IV Index Scores*, *in* WAIS-IV CLINICAL USE AND INTERPRETATION: SCIENTIST-PRACTITIONER PERSPECTIVES 61, 80–81 (2010). For example, if a clinician has reason to believe that working memory or processing speed scores, which are most vulnerable to external interference, may be artificially deflated due psychomotor issues, sensory issues, distractibility, anxiety, etc, it may be advisable to exclude those artificially deflated scores. *Id.* Both Dr. McGarrahan's report and her testimony reflect that she had no such concerns about her administration of the WAIS to Petitioner and believe that the scores she obtained were valid. 2 SHRR 56–57.

Petitioner's reading and writing scores on her administration of the WRAT-5, a test of academic functioning.

Her report and her testimony on direct examination do not identify any of the domains of adaptive behavior—conceptual, social, and practical. While Petitioner's academic functioning may be relevant to the conceptual domain, clinical practice does not support relying only on academic functioning testing to assess the conceptual domain as it is not a reflection of a person's day-to-day functioning. 1 SHRR 35. Nor did Dr. McGarrahan's report and testimony explain how these academic functioning scores relate to Petitioner's ability to function day-to-day—particularly in the developmental period. *See* 2 SHRR 119 (Dr. McGarrahan testifying only that Petitioner's scores on academic achievement testing provide evidence of his day-to-day functioning "to some extent" but providing no explanation about how they do so).

Additionally, Dr. McGarrahan's report and testimony offered no analysis of the social and practical domains—whether as to the presence or absence of deficits in these domains. 2 SHRR 110. She agreed, however that deficits in either domain would be sufficient to support a diagnosis of intellectual disability. 2 SHRR 103. In her testimony, she agreed that her report included no discussion of the social domain. Likewise, she could provide no further information about the practical domain other than to testify that her report did not reference the practical domain "by title." 2 SHRR 111. Dr. McGarrahan did not provide any basis upon which a court could rely to reject deficits in either the social or practical domains.

By failing to account for the practical and social domains, Dr. McGarrahan's opinion lacked necessary components of an adaptive behavior assessment. Dr. McGarrahan also did not interview any lay persons who knew Petitioner in the developmental period or review declarations by such persons. 2 SHRR 104–05. Notably, the trial court's finding that Dr. McGarrahan "found no deficiency in any domain" is without citation to the record. App'x A at ¶ 42.

C. Testimony about Criterion C and risk factors.

Dr. McGarrahan also rejected the relevance of two risk factors in Petitioner's developmental history: lack of formal education and substance abuse. Instead, she characterized those as better, alternative explanations for Petitioner's deficits. 2 SHRR 52. In her testimony at the hearing, Dr. McGarrahan also speculated for the first time that Petitioner may have been in a methamphetamine-induced brain "fog" at the time of the pre-trial testing due to his drug use one year prior to that testing. 2 SHRR 21, 33–34. She further speculated that this "fog" could explain why his prior FSIQ scores fell within the range for intellectual disability. She did not include this opinion in her report. 2 SHRR 131, 134; *see also* 2 SHRR 215. She also did not explain why Petitioner's FSIQ on her administration of the WAIS-IV—years after this "fog"—would nevertheless still fall within the range for intellectual disability. 2 SHRR 63–65 (McGarrahan testifying that score of 80 was consistent with prior qualifying scores when accounting for the standard error of measurement and norm obsolescence). Dr. Proctor, who had examined Petitioner pre-trial during the time period Dr. McGarrahan speculated about, had no concern that Petitioner's prior drug use over a year prior to his testing affected the reliability of his test results. 1 SHRR 89, 135.

Dr. McGarrahan also did not inquire with Dr. Proctor on this issue despite consulting with him. 2 SHRR 215. Finally, Dr. McGarrahan testified that she "believe[d] that many of [Petitioner's] deficits came on after the developmental period" and Criterion C was therefore not met. 2 SHRR 51–52.

V. The TCCA adopts the State's Findings of Fact and Conclusions of Law *verbatim*.

The trial court signed the State's Findings of Fact and Conclusions of Law ("FFCL") verbatim.[12] Those FFCL concluded that Petitioner "fail[ed] to meet the three prongs necessary to establish he is intellectually disabled." App'x A at ¶ 164. After previously crediting Dr. Proctor's opinion, the TCCA concluded that Dr. Proctor was less credible than Dr. McGarrahan. *See, e.g., id.* at ¶¶ 143, 166(b).

In the court's conclusions of law, it determined that "Dr. McGarrahan's decision to rely on the WAIS-IV GAI instead of the FSIQ, in this specific case, is supported by the professional literature, and is the more reliable indicator of Applicant's intellectual functioning than the FSIQ." App'x A at ¶ 165(a). The court cited no legal basis for reliance on a part score for assessing the first criterion of an intellectual disability claim. *See id.* at ¶ 165. Nor did the court's legal conclusions so much as reference Petitioner's pretrial FSIQ scores of 68 and 71 on the WAIS-IV. *See id.* at ¶ 165 (a)–(g). Finally, the court's legal conclusions made no reference to the unanimous opinion of every expert, including Dr. McGarrahan, that Petitioner's full-

[12] As set out in Petitioner's Objections in the CCA, numerous findings were unsupported by, or mischaracterized, the record below. Applicant's Objections, *Ex parte Milam*, No. WR-79,322-04, at 16–24 (Tex. Crim. App. Feb. 5, 2024).

scale IQ scores on all three administrations of the WAIS-IV were consistent with deficits in intellectual functioning for purposes of an intellectual disability diagnosis. *Id.*

Regarding adaptive functioning, the court relied on Dr. McGarrahan's opinion that Petitioner "did not meet the criteria for adaptive deficits." App'x A at ¶ 166(a). The court relied on Petitioner's perceived adaptive strengths in the conceptual domain to discount the deficits also present in that domain. *Id.* at ¶ 165(b). The court also relied on Dr. McGarrahan's opinion to conclude that Petitioner had not met his burden on Criterion B of an intellectual disability diagnosis, notwithstanding that Dr. McGarrahan's report and testimony did not offer a basis for finding that Petitioner did not have deficits in the practical or social domains. Finally, the court concluded that "because [Petitioner] fails to demonstrate the first two prongs—deficits in intellectual functioning or adaptive skills—[Petitioner] necessarily fails to demonstrate the onset of any intellectual and adaptive deficits which occurred during childhood or adolescence, or the developmental period." *Id.* at ¶ 168.

The TCCA adopted the trial court's findings and conclusions in full and denied relief. *Ex parte Milam*, WR-79,322-04, 2024 WL 3595749 (Tex. Crim. App. July 31, 2024).

REASONS FOR GRANTING THE WRIT

In this case the TCCA decided an important federal question—the determination of who is intellectually disabled under the Eighth Amendment—in a way that significantly departs from this Court's mandate in *Atkins* and its progeny, and in a way that significantly departs from how other state and federal courts

resolve *Atkins* claims. Certiorari is warranted to realign Texas with the rest of the nation.

I. Certiorari should be granted because the TCCA departed from objective indicia of society's standards for ascertaining who is intellectually disabled within the meaning of the Eighth Amendment.

The TCCA rejected Petitioner's intellectual disability claim based on an expert opinion that does not comport with the legal standard for intellectual disability under *Atkins*. In *Atkins*, this Court noted that the clinical definition of intellectual disability "require[s] 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." *Atkins*, 536 U.S. at 318. In the Court's analysis, the impairments that define the disability are inextricably intertwined with the characteristics that reduce the moral culpability of people with intellectual disability and make them less deserving of the death penalty. *Id.* (noting that the impairments of people with intellectual disability "by definition" mean that they have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

As noted in *Atkins*, of the states that enacted legislation that prohibited the execution of people with intellectual disability prior to the Court's decision, the legal standards adopted in those statutes "generally conformed" with the clinical definition.[13] 536 U.S. at 317 n.22. Most of the current death penalty states that had

[13] The current death penalty states cited in *Atkins* as having passed legislation prohibiting the execution of intellectually disabled people were Arizona, Arkansas,

not yet exempted people with intellectual disability from the death penalty prior to *Atkins* adopted the clinical definition as the legal standard under the Eighth Amendment following this Court's decision.[14] Texas was an outlier and twice required

---

Florida, Georgia, Indiana, Kansas, Kentucky, Missouri, Nebraska, North Carolina, South Dakota, and Tennessee. Of those 12 states, the legal standards of 9 adhered—and still adhere—to clinical standards. *See* Ariz. Rev. Stat. § 13-753(K)(3) ("Intellectual disability means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen."); Ark. Code Ann. § 5-4-618(a)(1)(A)-(B) (prohibiting "sentencing of a mentally retarded defendant to death" and defining "mental retardation" as including "[s]ignificantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period" and "deficits in adaptive behavior.") (1993) (amended in 2019 to require "significantly below average" general intellectual functioning); Fla. Stat. § 921.137 (defining mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18"); Ga. Code Ann. 17-7-131(a) (defining mental retardation as "significantly subaverage intellectual functioning resulting in or associated with impairments in adaptive behavior which manifests during the developmental period"); Ky. Rev. Stat. § 532.130-140 (defining mental retardation as "significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period"); Neb. Rev. Stat. § 28-105.01 (defining mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior"); N.C. Gen. Stat. § 15-A-2005 (2) (defining mentally retarded as "[s]ignificantly subaverage intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18"); S.D. Codified Laws § 23A-27A-26.2 (defining "mental retardation" as "significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas"); Tenn. Code Ann. § 39-13-203(a)-(c) (defining "mental retardation" as 1) significantly subaverage general intellectual functioning; (2) deficits in adaptive behavior; (3) the mental retardation must have been manifested during the developmental period or by age 18).

[14] There are 15 current death penalty states that were not cited in *Atkins* as having already barred the execution of intellectually disabled people. Those states are: Alabama, California, Idaho, Louisiana, Mississippi, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, and Wyoming. Of those 15, 10 explicitly adopted the clinical definition as the legal standard before this

Court clarified in *Hall*, that legal determinations of intellectual disability should be "informed by the medical community's diagnostic framework." 572 U.S. at 721. *See Smith v. State*, 213 So.3d 239, 248 (Ala. 2007) ("The mental retardation definition set forth in *Ex parte Perkins* is in accordance with the definitions set forth in the statutes of other states and with recognized clinical definitions, including those found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed.1994)." (*citing Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002)); *In re Hawthorne*, 105 P.3d 552, 556–57 (Cal. 2005) (stating California's standard is derived from "the two clinical definitions referenced by the high court in *Atkins*," and that adaptive behavior deficits must be demonstrated according to the "skill areas" set forth in the AAMR and DSM); Idaho Code § 19-2515A(1),(3) (2003) (barring imposition of death penalty on intellectually disabled persons and adopting definition of "mentally retarded" derived from the AAMR and DSM IV-TR); *Pizzuto v. State*, 484 P.3d 823, 829–30 (Idaho 2021) (stating the statute was passed "[i]n response to *Atkins*" and its definitions "generally conform to the clinical standards in place at the time *Atkins*"); La. C.Cr.P. art. 905.5.1(H)(1) (2003) (adopting a statutory definition of "mental retardation" identical to the definition of mental retardation in the 2002 AAMR); *Russel v. State*, 849 So.2d 95, 148 (Miss. 2003) (holding that "the standard or definition of mental retardation" applied in death penalty cases "shall be that enunciated by the Supreme Court in *Atkins*, especially the American Psychiatric Association's definition of mental retardation."); *Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004) (holding that to be "adjudged mentally retarded" there must be an expert opinion that "[t]he defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or The American Psychiatric Association"); *Ybarra v. State*, 247 P.3d 269, 273–74 (Nev. 2011) ("[Nevada's] statutory definition conforms to the clinical definitions espoused by two professional associations that are concerned with mental retardation—the American Association on Mental Retardation (AAMR) and the American Psychiatric association (APA). . . . Given the similarities between the statutory definition and the clinical definitions of mental retardation, the AAMR and APA provide useful guidance in applying the definition set forth in NRS 174.098."); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (guiding lower courts that "[c]linical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation."); Okla. Stat. tit. 21, § 701.10b(A)(2) (2006) (adopting definition of intellectual disability closely paralleling APA and AAMR definitions including three prongs and word-for-word adoption of detailed adaptive functioning deficit requirement); *Franklin v. Maynard*, 588 S.E.2d 604, 605 (S.C. 2003) ("We find it inappropriate to create a definition of mental retardation different from the one already established by the legislature . . . Section 16-3-20(C)(b)(1) defines mental retardation as: 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'"). Pennsylvania "permitted" the use of the clinical standards. *Commonwealth v. Miller*, 888 A.2d 624, 629–31 (Pa. 2005) (defining intellectual

this Court's intervention. *See Moore v. Texas*, 581 U.S. 1, 9 (2017) (noting that the seven *Briseno* factors that the TCCA previously used to adjudicate intellectual disability claims in Texas were created with "[n]o citation to any authority, medical or judicial[.]"); *Moore v. Texas*, 586 U.S. 133, 142 (2019) ("We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper."). In Petitioner's case, Texas once again has failed to comply with *Atkins*.

A. The TCCA's reliance on a single part-score to the exclusion of a range of FSIQ scores obtained over time does not comport with the Eighth Amendment.

With regard to Criterion A of an intellectual disability diagnosis—deficits in intellectual functioning—the TCCA rejected Petitioner's claim based on one GAI score, despite full-scale IQ scores of 68, 71, and 80, which both State's experts below agreed were qualifying. *See* 1 SHRR 53, 150; 2 SHRR 63–65, 78; App'x A at ¶165(d).

---

disability according to the two clinical definitions set forth in *Atkins*, and holding that "proper procedure for resolution of an *Atkins* claim on collateral review" permits petitioners to establish their claims "under either of the two classification systems of the American Association of Mental Retardation or the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders."). Oregon did not address the question of the proper Eighth Amendment legal standard for intellectual disability claims until after *Hall* but subsequently adopted the clinical standard. *State v. Agee*, 364 P.3d 971, 982 (Or. 2015) ("[S]ince the Supreme Court decided *Atkins*, the Oregon legislature has not adopted any procedure for determining whether a person accused of aggravated murder has an intellectual disability . . . . Nor has the issue been addressed by the Oregon appellate courts before today."); *id.* at 990 ("We therefore remand for a new *Atkins* hearing, in which the trial court shall consider the evidence presented in light of the standards set out in the DSM–5 and discussed in *Hall*."). Montana and Wyoming appear to have not addressed the issue at all.

The GAI is an optional, part-score derived from two of the four indexes on the WAIS-IV. It only measures perceptual reasoning and verbal comprehension. 2 SHRR 84–85. It does not include measures of processing speed and working memory and therefore does not reflect a person's intellectual functioning in those areas. On the WAIS-IV, the FSIQ is the only measure which accounts for all four indexes and provides a complete representation of a person's intellectual functioning. 1 SHRR at 19; 2 SHRR at 62–63.

The GAI does not measure aspects of intellectual functioning that underpinned the Court's rationale in *Atkins*: that people with intellectual disability have "diminished capacities to understand and process information . . . ." *Atkins*, 536 U.S. at 318. They struggle "to abstract from mistakes and learn from experience" and "to engage in logical reasoning . . . ." *Id.* By failing to account for an individual's working memory and processing speed—which, for example, implicate understanding and processing information and learning from experience—the GAI does not reflect a person's functioning in areas expressly identified as relevant to evaluating a person's moral culpability and the appropriate punishment. On the WAIS-IV, only the FSIQ provides a complete picture of a person's intellectual functioning, including in those areas expressly identified by the Court as underpinning *Atkins*. And regardless of the IQ test administered, the FSIQ score is the measure generally relied upon by courts to evaluate intellectual disability as it relates to culpability and punishment.

By contrast, the GAI is not a measure relied on by courts to adjudicate intellectual functioning in *Atkins* claims. Until Petitioner's case, the Texas Court of

Criminal Appeals had never relied upon the GAI to adjudicate the first prong of an intellectual disability claim. Nor is Petitioner aware of any court opinion in which a GAI score alone was used to adjudicate the first prong of an intellectual disability claim. There is no evidence that reliance on the GAI reflects societal standards as described in *Atkins*. Reliance on the GAI to adjudicate whether a person is eligible for execution is therefore incompatible with *Atkins*. *Cf. Moore*, 581 U.S. at 33 (Roberts, C.J., dissenting) (*Briseno* factors are incompatible with the Eighth Amendment because no state legislature has approved these or similar factors).[15]

Similar to its inconsistency with the legal standard, the GAI also does not reflect intellectual functioning as defined in clinical criteria. Notably, the DSM-5-TR identifies certain "critical components" of intellectual functioning, including working memory and processing speed. 1 SHRR 15; 2 SHRR 61. By omitting those measures, the GAI does not represent intellectual functioning, for purposes of intellectual disability, as it is understood by clinicians. Reliance on the GAI is excluded by the DSM-5-TR's definition of intellectual functioning and is expressly rejected by the AAIDD-12. *See* AAIDD-12 at 29 ("For a diagnosis of ID, the 'significant limitations in intellectual functioning' criterion is a full-scale IQ score[.]"). Notably, none of the authorities relied upon by Dr. McGarrahan to support her substitution of the GAI for Petitioner's FSIQ scores and its use as the measure of intellectual functioning to rule

[15] The Social Security Administration has also rejected the use of the GAI to assess intellectual functioning for the purpose of determining eligibility for social security benefits on the basis of intellectual disability. *See* 81 Fed. Reg. at 66151–52 ("We do not agree with the recommendation to encourage adjudicators to use the GAI rather than the full scale IQ score as a summary measure of intelligence for listing 12.05.").

in or out Criterion A of intellectual disability, actually endorse using the GAI in the manner Dr. McGarrahan did. 2 SHRR 56–58, 81, 88, 89, 95–96, 160–61, 184.

Dr. McGarrahan's opinion—relied on by the TCCA to reject Petitioner's claim—requires departure from the well-established legal and clinical framework. The state court relied heavily on McGarrahan's purported "clinical judgment" to justify such stark departure. *See, e.g.,* App'x A at ¶ 98 (finding that Dr. McGarrahan could exercise her clinical judgment in reading the manuals to permit the use of the GAI instead of the FSIQ); *id.* at ¶ 99 (finding that Dr. McGarrahan "must look at the entire picture through clinical judgment"); *id.* at ¶ 101 (finding that Dr. McGarrahan's opinion that the GAI should be used instead of the FSIQ "involves clinical judgment"). But courts cannot abdicate their role in applying the proper legal standard and wholesale adopt an expert opinion that does not comply with that standard. *See Moore*, 581 U.S. at 22 (Roberts, C.J., dissenting) ("[C]linicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment.").

B. The TCCA failed to consider the range of FSIQ scores and ignored that all experts agreed that Petitioner's FSIQ scores are within the range for intellectual disability.

This is not a case in which a finding that prong one of an *Atkins* claim is met requires a court to pick and choose scores to conclude that an individual has established deficits in intellectual functioning. On the contrary, consensus expert testimony—*including* from Dr. McGarrahan—establish that all of Petitioner's FSIQ scores across three administrations of the WAIS-IV meet Criterion A. 1 SHRR 51–53; 2 SHRR 45, 63–65, 78.

The TCCA, however, adopted findings and conclusions that omit any discussion of these scores. Instead, it based its conclusion that Criterion A was not met based on a single part-score. There is no support for this approach in *Atkins*, *Hall*, or *Moore I* and *II*. *Cf. Moore I*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) (describing *Moore*'s emphasis on one score as "dicta [that] cannot be read to call into question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores"). *See also Smith v. Commissioner, Alabama Dep't of Corr.*, No. 21-14519, 2024 WL 4793028, at *1 (11th Cir. Nov. 14, 2024) (making a prong one determination based on a "'holistic approach to multiple IQ scores'" and rejecting that a court may determine prong one based "solely" on a single score) (quoting *Hamm v. Smith*, No. 23-167, 2024 WL 4654458, at *1) (Nov. 4, 2024)). Here, the TCCA used no such holistic approach. Instead, the Court relied on a single, incomplete measure that appears to have never been relied on in the adjudication of an *Atkins* claim to the exclusion of several qualifying full-scale IQ scores.

C. The TCCA's reliance on a partial assessment of adaptive behavior does not comport with the Eighth Amendment.

Under *Atkins*, aspects of adaptive behavior specifically identified by the Court as important to the Eighth Amendment analysis include impairments in one's ability "to control impulses" and "to understand the reactions of others[,]" as well as the tendency to be a follower rather than a leader. *Atkins*, 536 U.S. at 318. As such, the legal standard for determining whether a petitioner has deficits in adaptive functioning likewise mirrors the clinical definition. A person's adaptive functioning

is reflected in their various strengths and weaknesses across three domains of behavior: the conceptual, the practical, and the social. A diagnosis of intellectual disability requires deficits in one of these three domains. *See* DSM-5-TR at 42. Like with intellectual functioning, most states implementing *Atkins* have adopted the clinical definition of adaptive deficits in their application of the legal standard.[16]

The TCCA did not adhere to this legal standard. Instead, it relied on an expert opinion that analyzed only on area of adaptive functioning to conclude that Criterion B was not met. Dr. McGarrahan's opinion provided no analysis or reasoning for her partial assessment and apparent rejection of deficits in the social and practical domains. *See generally* SHRR State's Ex. 1, 2 SHRR 4–166. Her report contains no

[16] Of the 24 current death penalty states that articulated standards for adjudicating intellectual disability prior to *Hall*, at least half had expressly adopted the clinical definition of adaptive deficits. *See Morris v. State*, 60 So.3d 326, 339 (Ala. Crim. App. 2010) (adopting clinical definition of criteria for adaptive deficits for legal adjudication of intellectual disability claim); *In re Hawthorne*, 105 P.3d at 556–57 (same); *Phillips v. State*, 984 So.2d 503, 511 (Fla. 2008) (same); *Pizzuto*, 202 P.3d at 728 (same); *Russell v. State*, 849 So.2d 95, 148 (Miss. 2003) (same); *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. 2010) (same); *State v. Locklear*, 681 S.E.2d 293, 311 (N.C. 2009) (same); *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (same), *overruled on other grounds by State v. Ford*, 140 N.E.3d 616, 655–66 (Ohio 2019) (also noting update in clinical definition since *Lott*); Okla. Stat. tit. 21, sec. 701.10b(A)(2) (2006) (same); *Miller*, 888 A.2d at 625, 632 (same); *Coleman v. State*, 341 S.W.3d 221, 238 (Tenn. 2011) (same); *see also Ledford v. Head*, 2014 WL 793466, at *12-13 (N.D. Ga. Feb. 27, 2014) (under Georgia statute clinical definition of adaptive behavior governs adjudication of prong two of intellectual disability claim); *Young v. State*, 860 S.E.2d 746, 771 (Ga. 2021) ("On [the definition of intellectual disability], we emphasize that Georgia, by statute and through case law, has always applied such prevailing clinical standards.); *Hill v. Humphrey*, 662 F.3d 1335, 1352 (11th Cir. 2011) ("It is undisputed that Georgia's statutory definition of mental retardation is consistent with the clinical definitions cited in *Atkins*."). And, as noted above, several states have more generally adopted the clinical definitions as their legal standard. *See supra* nn. 13 and 14.

mention of either the social or practical domain, and she provided no basis or explanation on which she determined Petitioner did not have deficits in those domains. The trial court's findings likewise provide no analysis of either of these domains, other than to conclude Petitioner did not meet his burden. *See* App'x A at ¶ 166(a)-(d). Indeed, the trial court's finding of fact regarding Dr. McGarrahan's opinion on the social or practical domain notes that "Dr. McGarrahan did not reference the practical or social domains 'by title.'" App'x A at ¶ 118. Nonetheless, the court then determined that Dr. McGarrahan "found no deficiency in any domain" without any citation to the record. *Id.* By relying on an expert opinion that does not evaluate two of the three domains of adaptive behavior, the state court did not comport with the prevailing legal standard under *Atkins*. *See supra* n.16.

Moreover, Dr. McGarrahan's analysis of the conceptual domain did not comport with the legal standard announced in *Atkins*. Dr. McGarrahan's opinion, adopted by the court below, determined that Petitioner did not have deficits in the conceptual domain because the neurocognitive testing she administered reflected strengths in that one area of adaptive behavior. App'x A at ¶ 166(b). Specifically, it concluded that Petitioner had shown improvements in academic, verbal, and memory skills on academic achievement testing that "would be extremely rare for someone with ID." *Id.*

However, *Atkins* emphasized the focus should be on deficits in adaptive functioning: it is "cognitive and behavioral *impairments* that make these defendants less morally culpable[.]" *Atkins,* 536 U.S. at 320 (emphasis added). And indeed, with

the exception of Kansas, every current death penalty state noted in *Atkins*, 536 U.S. at 314–15, as having codified the standard for adjudicating intellectual disability pre-*Atkins* already defined Criterion B as requiring a showing of "deficits," "limitations," or "impairments" in adaptive functioning. Ariz. Rev. Stat. § 13-703.02 (2001); Ark. Code Ann. § 5-4-618(a)(1) (1993); Fla. Stat. § 921.137(1) (2001); Ga. Code Ann. § 17-7-131(a)(2) (1988); Ind. Code § 35-36-9-2 Sec. 2(2) (1994); Ky. Rev. Stat. § 532.130 (2) (1990); Mo. Rev. Stat. § 565.030(6) (2000); Neb. Rev. Stat. § 28-105.01(3) (1998); N.C. Gen. Stat. § 15A-2005(a)(1)(b) (2001); S.D. Codified Laws § 23A-27A-26.1 (2000); Tenn. Code Ann. § 39-13-203(a)(2) (1990). Further, the majority of current death penalty states that have enacted statutory prohibitions on the execution of the intellectually disabled since *Atkins* likewise defined Criterion B. *See* Cal. Penal Code § 1376(a) (2003); Idaho Code Ann. § 19-2515A(1)(a) (2003); La. Code Crim. Proc. Ann. art. 905.5.1(H)(1) (2003) (Louisiana amended the definition of adaptive functioning in 2014 but the statute's focus on deficits has not changed); Nev. Rev. Stat. §174.098(7) (2003); Okla. Stat. tit. 21, § 701.10b(A)(1) (2006). As reflected in the statutory schemes of most current death penalty states, the focus in an intellectual disability adjudication is on adaptive deficits. The focus on deficits is consistent with the Court's reasoning in *Atkins* because an individual's relative strengths in certain areas do not negate the deficits which, as recognized in *Atkins*, make him more vulnerable, less culpable, and therefore ineligible for the death penalty. *Moore II*, 586 U.S. at 136.

Like the legal standard, clinical criteria reflect the emphasis on deficits by defining Criterion B as one or more deficits in one or more domains of adaptive functioning. *See* DSM-5-TR at 42. This Court emphasized the medical community's rejection of the relevance of strengths when assessing a person's adaptive functioning as it relates to diagnosing intellectual disability. *Moore I*, 581 U.S. at 15 (noting that the focus of the "adaptive-functioning inquiry" is on "adaptive *deficits*" and criticizing the TCCA for "overemphasiz[ing] Moore's perceived adaptive strengths"). Reliance on areas of strength—here, Dr. McGarrahan's impression that Petitioner's reading and writing skills were greater than that she would expect in a person with intellectual disability—is therefore incompatible with the legal standard and the clinical criteria. Notably, Dr. McGarrahan pointed to no authority to support this impression.

The TCCA likewise re-adopted the conclusion from the first subsequent state habeas proceedings that this Court's precedent does not prohibit a clinician from concluding that risk factors associated with intellectual disability "did not demonstrate intellectual disability." App'x A at ¶ 167(a). That conclusion, however, was based on the State's reaffirmation of Dr. Proctor's opinion at trial, which he has since revised. Dr. Proctor was clear in his hearing testimony that Petitioner's low education and substance abuse are risk factors for intellectual disability and are not to be relied upon to negate an intellectual disability diagnosis. 1 SHRR 107. Moreover, reliance upon risk factors to exclude, or as an alternative to, a diagnosis of intellectual disability has been expressly rejected by this Court. *Moore*, 538 U.S. at 16.

Like with its analysis of intellectual functioning, the TCCA relied on the opinion of an expert whose evaluation did not address the elements of the legal standard. While the legal standard for an intellectual disability claim mirrors the clinical definition, that does not give courts leeway to simply adopt the opinion of an expert without addressing whether that opinion comports with the Eighth Amendment legal standard. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596–97 (1993) ("[T]here are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.").

D. The TCCA ignored clinical evidence of adaptive functioning deficits.

By adopting Dr. McGarrahan's opinion that only addressed Petitioner's adaptive behavior in the conceptual domain, the TCCA ignored significant other evidence of adaptive deficits in the record. Indeed, there was testimony at trial from Dr. Cunningham that Petitioner had "substantial deficits" in all three domains. 53 RR 262. With regard to the social domain, Dr. Gripon—an expert for the State at trial who the State elected not to call to testify—observed "[i]n visiting with Petitioner for almost four hours, it becomes glaringly obvious that he is quite simplistic." 53 RR 211. Dr. Gripon further described Petitioner as "very naïve, extremely gullible, [and] easily led" and noted that he had "very simplistic ideas." 53 RR 211; *see also* 2 SHRR 109 (Dr. McGarrahan testifying that she was not provided with Dr. Gripon's report). Dr. Cunningham likewise testified that Petitioner was "gullible and easily exploited."

53 RR 218. He was socially isolated and did not have close friendships. 53 RR 220. A family member recalled that he was immature for his age. 53 RR 220. An employer who Petitioner worked for in his late teens described him as "slow" and "childlike." 55 RR 251.

Regarding the practical domain, there was evidence that Petitioner did not independently manage basic self-care tasks. For example, he had to be reminded to make medical appointments, about basic personal hygiene, and even after he moved out of his mother's house, had to be reminded to take important medications. 53 RR 222–23. Petitioner did not have the ability to plan or budget and was never able to have an independent bank account. 53 RR 224–25. The jobs he held involved simple repetitive tasks. 53 RR 228. However, even at those jobs, he had difficulty learning new things and tasks had to be demonstrated to him, rather than verbally explained. 53 RR 228; 55 RR 251. By adopting Dr. McGarrahan's opinion, in which she offered no explicit conclusion about either of the social or practical domains, let alone any basis for her opinion, the TCCA ignored substantial evidence of adaptive deficits.

Finally, regarding the conceptual domain, which Dr. McGarrahan did opine on, the TCCA likewise overlooked significant evidence in the record. Dr. Proctor testified that, based on Petitioner's scores on academic achievement testing and accounts from informants who knew Petitioner in the developmental period, Petitioner had deficits in academic functioning, particularly as to math, money management, and number concepts. 1 SHRR 49–50. At the time of trial, Dr. Proctor attributed these deficits to Petitioner's low level of education. In his 2021 Addendum

and later testimony, Dr. Proctor revised his opinion. 1 SHRR 46–50. As Dr. Proctor explained, Petitioner's very low level of education is understood by the medical community's current diagnostic framework as increasing the risk of intellectual disability. 1 SHRR 48–47. In other words, Petitioner's lack of education might help explain why he has adaptive behavior deficits, but it does not preclude the recognition of them as such. *Id*. Based on this current understanding of risk factors, Dr. Proctor opined that Petitioner's low math scores and real-world difficulties with number concepts as relayed to him during his evaluation by credible informants established adaptive functioning deficits in the conceptual domain. 1 SHRR at 48. This comports with other evidence in the record, including Dr. Gripon's observation—as testified to by Dr. Cunningham—that Petitioner "has some significant difficulty in mathematics as it applies to handling money–as he is out in the real world and is having to make sense of math skills in making purchases, getting change, that kind of thing." 53 RR 208.

Additionally, Dr. McGarrahan likewise found that Petitioner had moderate to severe executive functioning deficits. 2 SHRR 48; 2023 SHRR State. Ex. 4 at 6. His scores on neurocognitive testing placed Petitioner's executive functioning in less than the first percentile. 2023 SHRR State. Ex. 4 at 6. These deficits would impact Petitioner's planning and problem solving, non-verbal abstract reasoning, and decision-making abilities. 2 SHRR 48.

The TCCA relied on Dr. McGarrahan's opinion to the exclusion of significant other evidence in the record. It did so despite her failure to analyze Petitioner's

adaptive functioning across all domains, as required by the relevant legal standard and despite evidence of adaptive deficits in the conceptual domain that are particularly germane to the Court's reasoning in *Atkins*. 536 U.S. at 306.

CONCLUSION

As set out above, the straightforward application of the three criteria of intellectual disability as they are understood in law and by clinicians for establishing intellectual disability yield the conclusion that Petitioner was intellectually disabled: (A) all FSIQ scores within the range for establishing deficits in intellectual functioning; (B) deficits in adaptive functioning reflected in neuropsychological testing and interviews of lay informants; and (C) the presence of these deficits in the developmental period.

The Court should grant *certiorari* and summarily reverse. Alternatively, the Court should grant the petition and conduct plenary review.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

/s/Jeremy Schepers
Jeremy Schepers
Supervisor, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746
214-767-2286 (fax)
jeremy_schepers@fd.org

Jennae R. Swiergula
Texas Defender Service
9390 Research Blvd
Kaleido II, Suite 210
Austin, TX 78759
512-320-8300 (phone)
512-477-2153 (fax)
jswiergula@texasdefender.org