No. 24-6058

IN THE

Supreme Court of the United States

BLAINE MILAM,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

TOMEE M. HEINING
Acting Chief, Criminal Appeals Div.
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
tomee.heining@oag.texas.gov

This is a capital case.

QUESTION PRESENTED

The jury at Petitioner's 2010 trial rejected his mitigation defense alleging he was intellectually disabled (ID) and ineligible for execution and sentenced him to death. The Texas Court of Criminal Appeals (CCA) stayed his first scheduled 2019 execution date, but ultimately determined that the jury's rejection of Petitioner's ID defense did not contravene *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*). The CCA stayed Petitioner's second 2021 execution date and remanded to the trial court for a merits review of his ID claim pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002), following discovery of a scoring error in one of his pre-trial IQ scores as well as recent changes in diagnostic criteria under the most-recent Diagnostic and Statistical Manual of Mental Disorders (DSM). After examination by the State's new expert, neuropsychologist Dr. Antoinette McGarrahan—resulting in substantially higher adjusted IQ scores than those Petitioner obtained prior to trial—and an evidentiary hearing that provided Petitioner the opportunity for presentation of unlimited relevant expert testimony, the trial court credited Dr. McGarrahan's testimony that Petitioner was not ID, and recommended denial of habeas relief, which the CCA adopted.

Does Petitioner justify this Court's attention where his petition is based on nothing more than his assertion that the state court's decision was based on erroneous factual findings and involved a misapplication of a properly stated rule of law?

Did the CCA err in adopting the trial court's recommendation and denying habeas relief where the State's expert—relying on her personal evaluation of Petitioner and professional judgment, professional diagnostic and interpretative manuals, her clinical judgment based on her twenty-two years of experience as a neuropsychologist, and "the entire picture" of Petitioner's intellectual history—concluded that Petitioner did not meet the criteria for intellectual disability?

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BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

Petitioner Blaine Keith Milam was convicted and sentenced to death for the brutal capital murder of his fiancée's thirteen-month-old daughter, Amora Bain Carson. Amora was severely beaten, strangled, sexually mutilated, and had twenty-four human bitemarks covering her entire body in what the medical examiner called the worst case of brutality he had ever seen. 41 RR[1] 235–36. Petitioner and Amora's mother, Jesseca Carson, initially denied culpability, but Petitioner eventually confessed to a jail nurse.

At his trial, Petitioner presented evidence that he was intellectually disabled (ID) and thus exempt from execution. His jury was instructed in accordance with *Atkins v. Virginia*, 536 U.S. 304 (2002), and the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).[2] However, the jury negatively answered the special issue, "Do you find, by a preponderance of the evidence, that the defendant, Blaine Keith Milam, is a person with [intellectual disability]?" 4 CR 985–88; 56 RR 167–69. Petitioner unsuccessfully appealed his conviction and sentence through the state and federal courts but did not challenge the jury's ID determination or raise an *Atkins* claim, even when this Court decided *Moore v. Texas,* 581 U.S. 1 (2017) (*Moore I*) while his federal habeas appeal was still pending.

Eight days before his January 15, 2019 execution date, Petitioner filed a subsequent habeas corpus application in the state court raising for the first time an *Atkins* claim, arguing that *Moore I* was a recent change in the law that provided a

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[1] "RR" refers to the Reporter's Record for Petitioner's 2010 trial, while "EHRR" refers to the Reporter's Record for the 2023 evidentiary hearing, preceded by volume number and followed by page number. "EHSX" refers to State's Exhibits from the hearing, while "EHDX" refers to Petitioner's Exhibits, followed by exhibit number and page number.

[2] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) is now utilized. *See Ex parte Mays*, 686 S.W.3d 745, 747 n.3 (Tex. Crim. App. 2024).

previously unavailable legal basis for his claim pursuant to Texas Code of Criminal Procedure Article 11.071 § 5(a)(1), and alternatively that he was innocent of the death penalty under Article 11.071 § 5(a)(3) because he was ID. The Texas Court of Criminal Appeals (CCA) stayed his execution and remanded only the § 5(a)(1) *Moore I* allegation to the trial court for merits review. *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. 2019). The trial court recommended denying relief, which the CCA adopted. *Ex parte Milam,* No. WR-79,322-02, 2020 WL 3635921, at *1 (Tex. Crim. App. July 1, 2020), *cert. denied Milam v. Texas,* 141 S. Ct. 1402 (2021). The trial court then set Petitioner's execution date for January 21, 2021.

On January 12, 2021, Petitioner filed a second subsequent application for habeas relief based upon a scoring error discovered in one of his higher IQ scores from trial, reducing the score from 80 to 78, and causing the State's trial expert to change his opinion. The CCA granted a stay and remanded to the trial court. *See Ex parte Milam,* No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021). The trial court appointed neuropsychologist Dr. Antoinette McGarrahan to test Petitioner under the most current diagnostic standards and applicable caselaw. Dr. McGarrahan's evaluation produced an IQ score substantially higher than those Petitioner obtained eleven years earlier. Following an evidentiary hearing limited to expert testimony, the trial court again recommended denial of habeas relief. The CCA adopted the trial court's findings of fact and conclusions of law and, on those findings and its own review, again denied habeas relief. *Ex parte Milam,* No. WR-79,322-04, 2024 WL 3595749m at *1 (Tex. Crim. App. July 31, 2024). Petitioner now seeks certiorari review of this decision. However, Petitioner is unable to present any special or important reason for such review, and he fails to demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit Court of Appeals opinion offered a concise summary of the facts of the crime as follows:

> [Petitioner] was charged with capital murder for the death of Amora Bain Carson. During the guilt phase of his jury trial, the State's evidence showed that Amora died from homicidal violence, due to multiple blunt-force injuries and possible strangulation. A search of [Petitioner's] trailer, the scene of the murder, revealed blood-spatter stains consistent with blunt-force trauma, blood-stained bedding and baby clothes, blood-stained baby diapers and wipes, a tube of Astroglide lubricant, and a pair of jeans with blood stains on the lap. DNA testing showed that the blood on these items was Amora's. [Petitioner's] sister visited [Petitioner] in jail a few days after the murder, and that night she told her aunt that she needed to get to [Petitioner's] trailer because [Petitioner] told her to get evidence out from underneath it. [Petitioner's] aunt called the police, who immediately obtained a search warrant and, in a search underneath the trailer, discovered a pipe wrench inside a clear plastic bag that had been shoved down a hole in the floor of the master bathroom. Forensic analysis revealed components of Astroglide on the pipe wrench, the diaper Amora had been wearing, and the diaper and wipes collected from the trailer. The State also proffered testimony from Shirley Broyles, a nurse at the Rusk County Jail, who testified that [Petitioner] told her, "I'm going to confess. I did it. But Ms. Shirley, the Blaine you know did not do this. My dad told me to be a man, and I've been reading my Bible. Please tell Jesseca [Amora's mother] that I love her." The jury convicted [Petitioner] of capital murder, in violation of Texas Penal Code section 19.03(a)(8).

Milam v. Davis, 733 F. App'x 781, 782 (5th Cir. 2018) (internal citation omitted).

II. Evidence Related to the Intellectual Disability Special Issue.

A. Evidence from Petitioner's trial.

1. Subaverage intellectual functioning.

The State's expert Dr. Timothy Proctor and defense expert Dr. Paul Andrews[3]

[3] Dr. Andrews evaluated Petitioner but did not testify, though his test results were relied upon at trial and on appeal. In asserting that "[f]ive experts have been asked to examine whether [Petitioner] meets the clinical definition," Petitioner omits any reference to

concluded that Petitioner's test scores failed to demonstrate subaverage intellectual functioning. 54 RR 143–50; 55 RR 135–36. Dr. Proctor relied on Dr. Andrews's administration of the WAIS-IV, on which Petitioner obtained a full-scale IQ score (FSIQ) of 71, and the Stanford-Binet Intelligence Scales, Fifth Edition (SB5), on which Petitioner scored 80; and Dr. Proctor administered the Reynolds Intellectual Assessment Scales (RIAS), on which Petitioner scored an 80, and a second WAIS-IV, on which Petitioner scored 68. 53 RR 200–02; 55 RR 135–37, 140–41, 149–55.

Dr. Proctor explained that the second WAIS-IV should have been higher, given the "practice effect," and attributed the lower score to distraction or background noise. 55 RR 151–53. Both Dr. Andrews and Dr. Proctor agreed that it was unusual for someone to score better on the SB5 than the WAIS-IV. 55 RR 155–56. Both doctors administered effort tests and Petitioner did well on some but not on others; both surmised that he put forth less-than-adequate effort and was likely distracted. 54 RR 146–50; 55 RR 156–59. Both agreed that a lack of education can affect IQ testing; Dr. Proctor also suggested anxiety, depression, emotional upset, and drug abuse could impact testing. 55 RR 165–66. Dr. Proctor found it significant that Petitioner's reading comprehension scores were in the eighth-grade range, when his education ended at fourth grade, and persons with mild ID can read at most a sixth-grade level. 55 RR 162–64. Dr. Proctor opined that, given the standard error of measurement (SEM), Petitioner had below average intellectual functioning, in the borderline range, but not significantly sub-average intellectual functioning. 55 RR 149–50, 160, 165.

In contrast, Dr. Cunningham testified that Petitioner satisfied the sub-average-intellectual-functioning factor because his IQ score of 70 or below, with an

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Dr. Andrews. Pet. at 3 (citing Drs. Proctor, Edward Gripon, Mark Cunningham, Jack Fletcher, and McGarrahan). However, only three experts actually evaluated Petitioner and administered tests (Drs. Andrews, Proctor, and McGarrahan), and none of the three concluded Petitioner was ID following evaluation. 1 EHRR 161–62; 2 EHRR 10.

SEM of five points, was in the zone of ID eligibility. 53 RR 197–200. Dr. Cunningham discounted the RIAS score of 80, calling it a "screening measure," and not a "multi-subtest, fully-developed IQ test." 53 RR 202–03, 257–58; 54 RR 139–42.

2. Adaptive deficits[4]

The jury was encouraged to continue considering the evidence beyond intellectual functioning. Dr. Proctor testified, "It's not just about how you score on an IQ test; it's also about how you function in the world." 55 RR 167. Dr. Cunningham found concurrent deficits in adaptive behaviors in all eleven of the categories listed in the DSM-IV, including functional academics, home living, social interpersonal skills, self-direction, and health and safety. 53 RR 203–38, 259–62. Applying the American Association on Intellectual and Developmental Disabilities (AAIDD) manual, Dr. Cunningham found deficits in all three categories: conceptual, social, and practical. 53 RR 261–62. Dr. Cunningham relied heavily on Petitioner's mother's reporting in reaching his decision. 53 RR 153–54, 194, 262; 54 RR 153.

In contrast, Dr. Proctor reviewed the evidence and talked to several former employers, as well as Petitioner's mother and sister. 55 RR 167–69. First, Dr. Proctor disagreed with Dr. Cunningham's use of the Adaptive Behavior Scale, Residential and Community, to assess an incarcerated individual because the test rated Petitioner against a group of developmentally disabled individuals living within the

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[4] Petitioner portrays himself as "vulnerable to influence," relying on Jesseca Carson's December 2008 police statements, which were not admitted at trial. Pet. at 4–10. But Carson's hearsay statements are not favorable to him. The statements demonstrate that both Petitioner and Carson lied to cover up the crime and came up with the cover story together. *See* Appl. for Writ of Hab. Corp., *Ex parte Milam,* WR-79,322-02, Exh. 6, at 48, 78–79; 1 CR09-066 at 54. Further, Carson blamed Petitioner for the murder and described how Petitioner manipulated her into believing both he and Amora were possessed by a demon summoned from a Ouija board. Exh. 6 at 49–80; 1 CR09-066 at 46–48. It was Petitioner who suggested and performed a purported exorcism of Amora, while Carson slept. 1 CR09-066 at 48–50. The CCA dismissed as an abuse of the writ a claim alleging denial of due process from the exclusion of Carson's statements. *Ex parte Milam,* 2021 WL 197088, at *1.

community, while a formal adaptive behavior assessment should rate a person against a normal population; and the measure also relies upon family member assessment but it is difficult for a family member to accurately rate an incarcerated person, and a family member is likely to show bias. 55 RR 170–71, 259–60.

Second, Dr. Cunningham's results did not match Dr. Proctor's findings. Dr. Proctor believed Petitioner's mother, Shirley Milam, deliberately tried to portray her son as slow. 55 RR 172–73. She said Petitioner was slow in reaching developmental milestones such as walking and talking, but the ages she gave were normal. 55 RR 173–74. And when Dr. Proctor talked to Petitioner's sister, Teresa, in Shirley's presence, Teresa would say Petitioner could do something, like work on cars, but Shirley would interject that Petitioner was slow and someone helped him; Teresa then changed her answer. 55 RR 173–74. Shirley was also not forthcoming about Petitioner's drug problem. 55 RR 174–75. Dr. Proctor opined that he could not place much weight on the family's testimony. 55 RR 176.

Dr. Proctor thus disagreed with Dr. Cunningham's results suggesting Petitioner had the adaptive functioning of a three- or four-year-old. 55 RR 176. Relying on testimony of those who knew Petitioner's work history, Dr. Proctor specifically questioned Dr. Cunningham's opinion that Petitioner showed deficits in his work history or vocational ability. 55 RR 176–77, 255–57. Dr. Proctor opined that Petitioner had some adaptive deficits as well as strengths, but he did not show *significant* deficits to the level required to demonstrate deficits in adaptive functioning. 55 RR 177, 257. Dr. Proctor also considered whether Petitioner's adaptive deficits were caused by something other than ID such as drug use, lack of opportunity, deprived environment, or laziness. 55 RR 257–59.

Witness testimony supported Dr. Proctor's testimony and opinions regarding Petitioner's work history. *See* Pet. App'x A at 11, #42; 49 RR 72 (testimony from

Ranger Ray regarding Petitioner's work history, job knowledge); 55 RR 27–29, 37 (Community Health Core employee assessment: Petitioner seemed of average intelligence given vocabulary, ability to answer questions, and lack of lapses in speech and memory); 51 RR 270, 277 (first job at age 15, held for two years); 50 RR 22–37 (Bryan Perkins, supervisor at Big 5 Tire & Auto, testifying Petitioner's performance was excellent, he began training as salesman, had no trouble learning to use computer, was one of the best employees he had until he stopped coming to work); 51 RR 325–27 (Petitioner stopped going to work around time he started using methamphetamine again); 54 RR 263–71 (co-worker Gary Jenkins, testifying Petitioner could perform job tasks, operate machinery, did well in training, performed job duties without prompting).

Substantial testimony from teachers and educators also supported Dr. Proctor's trial opinions. *See* Pet. App'x A at 11, #43; 51 RR 9, 14, 26–27, 32–33, 35 (grade-school teachers Nelda Thornton and Carolyn McIlhenny: he was a slow student with low grades but frequently absent due to health issues and overprotective mother; he could have been better student if he attended school); 54 RR 294–97 (Melanie Dolive, special education teacher, testified from personal observation [she was not his teacher] that nothing in Petitioner's behavior led her to believe there was anything wrong with him); 54 RR 313–15 (Sherry Brown, retired teacher who regularly interacted with Petitioner: he could do assigned work, and she attributed his difficulties to repeated absences, she never felt need to refer for ID screening); 55 RR 78–85 (Melynda Keenon, Petitioner's cousin who homeschooled her children and served as a community advisor for homeschooling, met with Petitioner to determine his homeschool learning style and recommended online classes; Petitioner would do whatever work she put in front of him); 55 RR 89–100, 117–18, 121 (neighbor Sarah

Hodges, who homeschooled her children, gave Petitioner work below his grade level because he was behind, but he was at the same level as children the same age).

Petitioner's parents removed him from school in the fourth grade after he was paddled by the school principal but stopped homeschooling him after six months. 51 RR 237–40. Petitioner's school records reflect that he was never held back, he was routinely absent, and he was evaluated by the special education department and identified as having a speech impediment but no other disability. *See* 51 RR 7–8, 13–15, 30–31; 54 RR 163–66, 305–10; 54 RR 321–23 (Cindy Smith, Special Education Director for Rusk County Shared Services Arrangement, examined Petitioner's school records and testified his last full and independent evaluation, dated February 8, 2000, indicated speech impediment only); 55 RR 178–80 (Dr. Proctor); SX 298, 300.

While Petitioner's mother described him as slow, she admitted he was evaluated for special education but only treated for his speech problem. 51 RR 340–41. Petitioner began crawling, using words, and walking at normal stages. 51 RR 341–42. Also, Petitioner used the computer and met Jesseca on MySpace, cared for Amora by giving her bottles and putting her to bed, and cared for his ailing father, 51 RR 283, 286, 288–89, 344; 52 RR 117–18. Shirley admitted that Petitioner could take care of cars and hold a job, 51 RR 344, and that he voluntarily gave his paycheck to his father every week so he would not spend it, 51 RR 347–48.

3. Onset before age eighteen

Dr. Cunningham concluded Petitioner's deficits originated prior to the age of eighteen. 53 RR 240. However, Dr. Proctor found no evidence to support this, citing Petitioner's school records indicating a speech impediment only and no secondary impediment, and a letter from the school district indicating a full and individual evaluation in 2000 but noting no ID diagnosis. 55 RR 178–80.

B. Evidence relevant to Petitioner's second execution setting.

1. Dr. Proctor's changed opinion

Prior to Petitioner's second execution date, in late December 2020, Petitioner sought for the first time permission to speak with Dr. Proctor, which the State granted. Petitioner asked Dr. Proctor to review the materials that had been proffered to the CCA as part of Petitioner's first subsequent habeas application, including a scoring error in one of the higher IQ scores—the SB5 score of 80. *See* Proctor Addendum at 1 (Second Subsq. Appl. Ex. 1). After a cursory review of this evidence, and without reexamining Petitioner, Dr. Proctor indicated that he stood by the opinion given eleven years prior at trial under the then-prevailing standards:

> It continues to be my opinion that when considered in light of the diagnostic nomenclature, relevant research, and law in place at the time of my 2010 evaluation/testimony regarding [Petitioner], the available evidence did not support a diagnosis of [ID], but rather was consistent with borderline intellectual functioning.

Proctor Addendum at 2–3. However, "[w]hen considered in light of the current diagnostic nomenclature, relevant research, and law," Dr. Proctor's opinion now "differs" from that given at trial. *Id*. at 3.

First, he noted that he must set aside the RIAS score of 80 because of "concerns regarding the test overinflating scores of individuals with low intelligence." *Id*. at 3. Second, because of a two-point scoring error, as well as the application of "'Flynn Effect' (i.e., IQ score inflation resulting from outdated test norms)" and the SEM to reduce the SB5[5] Dr. Proctor now believes that significantly subaverage intellectual functioning is established. *Id*. at 3–4.

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[5] The two-point scoring error and SEM reduced the SB5 80 to a range of 73 to 83. According to the unsworn declaration of Dr. Dale Watson, the Flynn correction is 2.7 points, creating a range of 70.3 to 80.3. *See* Second Subsq. Appl. Ex. 3 at 7, ¶22. This Court has referred to the Flynn Effect as a "controversial theory." *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021) (per curiam).

Regarding adaptive deficits, while at the time of Petitioner's trial Dr. Proctor "did not view [Petitioner's] deficits in this area as rising to the significant level," he now believes there are "significant deficits in the conceptual domain" under "the current state of the diagnostic nomenclature, research, and law pertaining to [ID]." *Id*. at 5. Dr. Proctor concluded, "Based on the information currently available to me and the relevant diagnostic nomenclature and law at this time, it is my opinion that [Petitioner] meets [the] criteria for [ID]." *Id*. at 6.[6]

2. Petitioner's second subsequent state habeas application and remanded proceedings

Relying on Dr. Proctor's Addendum, Petitioner filed a second subsequent application for habeas relief on January 12, 2021, and a motion for stay of execution. The CCA again stayed his execution and remanded his second subsequent writ to the trial court for review of his ID claim on the merits. *Ex parte Milam,* 2021 WL 197088, at *1. The trial court granted the State's opposed motion to have Petitioner retested under the most current diagnostic standards and applicable caselaw, and appointed Dr. McGarrahan to perform the examination. *See* Order (filed July 7, 2021); Suppl. Order Authorizing Evaluation of July 7, 2021 (filed Aug. 17, 2021).

Dr. McGarrahan met with Petitioner at his prison unit and performed a clinical interview, mental status examination, and intellectual and neuropsychological assessment. EHRR SX4 (McGarrahan Report). Dr. McGarrahan concluded that Petitioner did not meet the criteria set out by the DSM-5 and the AAIDD manual for ID. *Id*. Dr. McGarrahan obtained an FSIQ of 80 on the WAIS-IV, and an adjusted Global Abilities Index (GAI) score of 91. *See* Pet. App'x A at 24–37. In her opinion, Petitioner's IQ scores do not satisfy the intellectual-deficits prong of the ID criteria,

[6] Dr. Proctor does not indicate that any additional materials submitted for review had any impact on his opinion. His changed opinion appears to rely solely on the scoring error, the Flynn Effect, and changes in the law and diagnostic practices.

EHRR SX4 at 8, and his deficits do not satisfy the adaptive-deficits prong because his "cognitive deficits are not seen as occurring in the context of adaptive deficits associated with intellectual functioning, and his academic achievement scores far exceed what could be attained by an individual with ID." EHRR SX4 at 9. Dr. McGarrahan concluded Petitioner does not satisfy the third prong, onset during the developmental period. *Id.*

3. Relevant testimony from the evidentiary hearing.

a. Criterion 1: deficits in intellectual functioning.

Dr. McGarrahan explained her decision to rely on the GAI. The WAIS-IV is comprised of four indexes: Verbal Comprehension Index (VCI) on which Petitioner scored 102, Perceptional Reasoning Index (PRI), on which Petitioner scored 81, Working Memory Index (WMI), on which he scored 77, and a Processing Speed Index (PSI), on which he scored 68. 2 EHRR 27. Dr. McGarrahan noted that many of the index scores she obtained were not substantially different from scores obtained by Drs. Andrews and Proctor. *Id*. But, on the VCI she observed a "massive—highly unlikely, very rare increase in his verbal skills from prior testing to [her] testing." 2 EHRR 27–28. Petitioner's VCI on her test was 102 as compared to 74 on Dr. Andrews's test, and 72 on Dr. Proctor's test. 2 EHRR 29. This was surprising because verbal skills "are fairly developed early in life and remain stable over the course of our lives." *Id*. Verbal comprehension scores are "innate," meaning they are "fairly fixed," and jumps in vocabulary ability are atypical. 2 EHRR 30–31. Unless there is damage to the left side of the brain, verbal scores "are what neuropsychologists rely upon in looking at premorbid intellectual functioning." 2 EHRR 30.

Dr. McGarrahan also administered the Wide Range Achievement Test (WRAT-5), on which Petitioner's scores corresponded with the WAIS-IV. 2 EHRR 32. On the WRAT-5, Petitioner obtained Standard Scores of 92 on word reading, 100 on reading

comprehension, and 100 on spelling. These scores correspond with 10th grade and college level grade equivalencies, whereas his math Standard Score was a 65—a 2nd grade equivalency. 2 EHRR 31–32; EHSX 4, at 6. Math score aside, Dr. McGarrahan stated that the scores Petitioner achieved on these two verbal tests are not typical of a person with ID because of the innate nature of verbal skills. 2 EHRR 32–33. Dr. McGarrahan has not diagnosed anyone as ID with this sort of verbal or academic skills and is unaware of any such diagnosis in professional literature. 2 EHRR 33.

Dr. McGarrahan attributed this huge jump in scores to Petitioner's prolonged use of methamphetamine prior to his arrest and the lingering effects of which likely depressed his pre-trial scores but had worn off after his incarceration. 2 EHRR 33–34. Indeed, Dr. Proctor and Dr. Andrews obtained "flat profiles" at the time of testing—meaning scores were fairly consistent across the various indexes without a lot of "peaks and valleys." *See* 1 EHRR 19–21; 2 EHRR 33–35. The only variance came from verbal results obtained by Dr. Andrews on the SB5 suggesting—consistent with the present scores—that his verbal skills were always in the average range. 2 EHRR 33–34; *see also* 55 RR 165 (Dr. Proctor agreeing with Dr. Andrews's testing notes indicating Petitioner "Reads well."). Petitioner's assertion to Dr. McGarrahan that it took some time for his head to clear from the drugs is thus consistent with the difference in his relatively flat scores in 2010 and his elevated scores now suggesting Petitioner always had the capacity to learn. 2 EHRR 34; EHSX 4, at 4.

Dr. McGarrahan also considered Petitioner's profound lack of education in connection with this elevation in some scores but not others. 2 EHRR 42. Specifically, Petitioner continued to score below average on math, which likely reflects his limited education and possible learning disability. 2 EHRR 31–32, 43–44. Dr. McGarrahan explained that math is not a skill an inmate typically utilizes in an incarcerated environment. 2 EHRR 42. Thus, an inmate's math skill is not likely to improve in a

prison setting, unlike reading and spelling, which Petitioner does rely upon, and upon which he showed substantial improvement in subsequent testing. 2 EHRR 42–43. Dr. Proctor also admitted Petitioner does like to read and write and now has the time to do it and, while Petitioner's prison cell contained lots of letters and books, there was no evidence he was working on math. 1 EHRR 107–08.

Because there were statistically significant differences between the index scores of the WAIS-IV, Dr. McGarrahan explained that she looked to the authoritative texts for guidance in interpreting the scores. 2 EHRR 35. Specifically, she looked to *The Essentials of WAIS-IV Assessment* (2nd ed.) (Essentials), *The WAIS-IV Technical and Interpretive Manual* (Technical Manual), *The WAIS-IV Administration and Scoring Manual* (Administration Manual), the DSM-5-TR, and *The WAIS-IV, WMS-IV and ACS Advanced Clinical Interpretation* (Advanced Manual). 2 EHRR 35, 144; EHSX 4, at 6. These texts indicated that the Petitioner's FSIQ of 80 was not reliable in determining broad intellectual abilities (often referred to as "g"[7]) because Petitioner has substantial processing speed deficits and working memory deficits. 2 EHRR 35–36. The texts advise removing interference from these deficits by referring to the GAI, on which Petitioner's score was a 91. 2 EHRR 36. In her expert opinion, under these conditions, the GAI is the more reliable indicator of intellectual functioning and did not meet prong one of the ID criteria. 2 EHRR 44–45; *see* EHSX 4, at 8 (factoring in SEM and Flynn Effect, GAI range at 81.8–91.8).

Dr. McGarrahan's reliance on the GAI over the FSIQ was thoroughly debated at the hearing but is supported. Dr. Proctor disagreed with using the GAI, arguing the DSM-5-TR requires an FSIQ score for a prong one diagnosis. And because the GAI omits the WMI and PSI in calculating overall intellectual ability, Dr. Proctor

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[7] The experts described "g" as "a term of art" meaning "the heart of someone's general intelligence," 1 EHRR 77–78; "broad intellectual abilities," 2 EHRR 35–36; and a "theoretical construct," and measure of general ability, 2 EHRR 188.

believes reliance on the GAI for diagnosis is inconsistent with current clinical guidance for diagnosis. *See* 1 EHRR 15–16, 37–39, 71–72. However, Dr. Proctor admitted that the DSM-5-TR does not specifically exclude the GAI, nor does it mandate the use of a particular IQ test, like the WAIS-IV, for diagnosis. 1 EHRR 71–72. He admits the WAIS-IV interpretative manuals provide context on when to consider GAI, and he agreed there are times when GAI is more appropriate. 1 EHRR 72. But, in Dr. Proctor's opinion, the GAI should not be used for diagnosis, or as the sole basis for assessing prong one, and it should not override an FSIQ. 1 EHRR 72–73. According to Dr. Proctor, use of the GAI violates the diagnostic criteria of the DSM-5-TR, but not the rules for administering the WAIS-IV. 1 EHRR 71–72, 75.

Dr. McGarrahan defended her reliance on the GAI, explaining that after observing "statistically significant differences" between Petitioner's index scores, she sought guidance from the authoritative texts in her field. 2 EHRR 35–36. Relying on her training as a neuropsychologist (which Dr. Proctor is not, *see* 1 EHRR 6–9), and the authoritative texts, she was able to look at factors that may intervene or reduce someone's IQ score and parcel out what comprises a particular IQ score. 2 EHRR 36–37. According to Dr. McGarrahan, the WAIS-IV, its accompanying manuals, the Essentials, and the DSM "are very clear about not relying on [one] score and excluding all other information that might be to the contrary." 2 EHRR 37.

Regarding the use of specific terminology like "FSIQ," Dr. McGarrahan explained that the DSM-5-TR and AAIDD do not refer to any specific IQ test or score—like an FSIQ from the WAIS-IV—but address obtaining a "broad intellectual score." 2 EHRR 39.[8] Regardless of terminology, "the goal is to try to figure out what the whole picture of a person's functioning is[.]" 2 EHRR 39.

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[8] The DSM-5-TR does not specifically mention "FSIQ," nor does it forbid use of the GAI. DSM-5-TR at 37–45. It requires "[d]eficits in intellectual functions [to be] confirmed by both clinical assessment and individualized, standardized intelligence testing." *Id.* at 37–38.

Regarding the "statistically significant differences" between Petitioner's index scores, 2 EHRR 35, Dr. McGarrahan explained that the split in index scores, as seen in Petitioner's case, is a very rare occurrence—seen in one percent of the population; it's extremely rare in even a clinical population of individuals with ID. 2 EHRR 37–38. For this reason, both the WAIS Manuals and the Essentials offer multistep processes to guide clinicians in these rare instances where statistically significant differences in index scores are obtained. 2 EHRR 35–38.

Relying on these texts, Dr. McGarrahan determined that Petitioner's FSIQ was unreliable as a measure of his broad intellectual abilities, or "g," because Petitioner currently has substantial PSI and WMI deficits. Dr. McGarrahan explained that the PSI and WMI are most sensitive to cognitive or psychomotor issues—issues that could be seen in someone who is severely depressed, abusing drugs, or suffering from motor difficulties, but do not necessarily involve intelligence. 2 EHRR 39–41. In contrast, VCI is the most innate and solid of the indexes, and less likely to change over time. 2 EHRR 29–30, 40–41. When this kind of divergence exists between the indexes, removing PSI and WMI prevents those most-sensitive indexes from pulling down the other indexes, and gives a purer sense of intellect. 2 EHRR 41.

With guidance from the texts, Dr. McGarrahan removed this interference from Petitioner's attention, concentration, and psychomotor speed difficulties in order to look at his broad cognitive functioning—the GAI. 2 EHRR 35–36. The manuals gave Dr. McGarrahan guidelines for making these determinations, but also her training and twenty-two years of experience allow her to exercise her clinical judgment in following the manuals' rules. 2 EHRR 41. Dr. McGarrahan explained, she is looking at the entire picture to get the most global and accurate result—she would not just rely on one score or look at a small window of a person's life; rather, she must look at the entire picture through clinical judgment. 2 EHRR 45, 65. In Petitioner's case, the

GAI was 91, which was average, and not close to the cutoff for finding ID under prong one, while his FSIQ of 80 was low average, but approaches the ID cutoff after applying the Flynn Effect and SEM. 2 EHRR 44–45.

On cross-examination, Petitioner attacked Dr. McGarrahan's credibility by parsing language from the various authorities, but ultimately failed to demonstrate that she was foreclosed from relying on the GAI. 2 EHRR 78–102, 123–29, 154–63. Rather, on redirect, Dr. McGarrahan explained that the "bits and pieces of different documents" shown by Petitioner's counsel did not present the entire picture presented by those authorities. 2 EHRR 135–36. She then thoroughly explained all the authorities she relied upon and the steps she followed before arriving at her IQ diagnosis, explaining that "it was a conglomeration of all these things that were fairly consistent." 2 EHRR 136.

First, from the DSM-5-TR, to diagnose ID, "clinical training and judgment are required to interpret test results and assess intellectual performance. Individual cognitive profiles based on neuropsychological testing as well as cross-battery intellectual assessment are more useful for understanding intellectual abilities than a single IQ score." 2 EHRR 136 (citing DSM-5-TR at 38). She further explained this section of the DSM-5-TR, in combination with the other texts, indicates that she does not "rely upon one score in a vacuum." 2 EHRR 136. Also, the DSM-5-TR indicates that "[h]ighly discrepant test scores may make an overall IQ score invalid." 2 EHRR 136–37 (citing DSM-5-TR at 38). This is what she found in Petitioner's case so, to get a better picture, she had to look at something else. 2 EHRR 137.

Next, Dr. McGarrahan turned to the WAIS-IV Technical Manual, explaining that its Appendix C addresses the multiple steps involved in determining whether the GAI or the FSIQ is the "more valid and reliable measure of global intellectual functioning." 2 EHRR 137–38; *see also* EHDX 2 (Sealed by Court). "The steps are to

determine whether the index discrepancies are statistically significant, and if they are, that's when you make the step then to look at the discrepancies and determine whether the [FSIQ] is less valid as a measure than the [GAI] which would best capture [global intelligence] by removing those scores that are pulling down his [FSIQ] score." 2 EHRR 138–40. Step one requires determination of whether the discrepancy is statistically significant—Dr. McGarrahan determined that it was—before moving on to step two to determine the more appropriate score. 2 EHRR 138.

The Technical Manual works hand in hand with the Administration Manual, referring to tables in the Administration Manual to initially determine whether the discrepancy is rare or statistically significant. 2 EHRR 70, 139–40, 155, 172. The Administration Manual provides scoring instructions, calculations, and statistical analysis about the frequency of index score discrepancies. *Id.* Dr. McGarrahan relied upon this guide to determine whether to go to the next step in determining the appropriateness of relying on an FSIQ or GAI. 2 EHRR 140–41.[9]

The fourth book Dr. McGarrahan relied upon was the Essentials. 2 EHRR 141–42. Specifically, she relied on Step 2 which reads, in part:

> Two composites are available for the WAIS-IV: The traditional FSIQ and the [GAI] composed only of the subtests that constitute for the VCI and PRI. The GAI which excludes subtests associated with a person's working memory and processing speed has also been used as an alternate measure of global intelligence for the . . . WAIS-IV. The three VCI and three PRI subtests that compose the WAIS-IV GAI are usually the best measures of g, whereas working memory and processing speed subtests are often among the worst measures. Because the GAI is composed of strong measures of general ability, it is especially useful for

[9] Dr. McGarrahan disagreed that she "ignored [Petitioner's] two greatest areas of relative cognitive weakness." 2 EHRR 86. When challenged with a quote from the Technical Manual indicating a practitioner "may wish to consider using the GAI where significant unusual discrepancies exist between index scores," but "the GAI does not replace the [FSIQ] but it should be reported and interpreted along with the [FSIQ,]" Dr. McGarrahan agreed, and her report demonstrates she reported both. 2 EHRR 87–89. The Technical Manual "gives the clinician the ability to use their judgment;" and she did not discount FSIQ but relied on the GAI "as a more reliable indicator of his overall intellectual functioning." 2 EHRR 89–91.

> estimating general ability for individuals whose scores on memory and speed tests deviate significantly from their scores on measures of verbal and nonverbal tasks.

2 EHRR 142–43 (citing Essentials at 156–60). She proceeded to Steps 2A and 2B, "in step-wise progression that told [her] the GAI may be calculated and interpreted as reliable while the [FSIQ] could not." 2 EHRR 143.

Step 2A provides: "Consider the person's four WAIS-IV indexes. Subtract the lowest index from the highest index. Answer this question: Is the size of the standard score difference less than 1.5 standard deviations (less than 23 points.)" 1 EHRR 79; 2 EHRR 190. Applying Step 2A to Petitioner's case, Dr. McGarrahan subtracted the PSI (68) from the VCI (102) for a score of 34. 1 EHRR 80; EHSX 4, at 6. If the answer had been "yes," then FISQ would have been "a reliable and valid estimate of a person's Global Intellectual Ability." 1 EHRR 80; 2 EHRR 190-91. But, because the answer was "no," in this case, "the variation in the indexes that compose the [FSIQ] is too great. . . . For the purpose of summarizing Global Intellectual Ability in a single score, i.e., the FSIQ, proceed to Step 2B." 1 EHRR 81; 2 EHRR 191.

Step 2B reads: "When FSIQ is not interpretable, determine whether the [GAI] may be used to describe overall intellectual ability." 2 EHRR 192. Step 2B asks, "Is the size of the standard score difference between the VCI and PRI less than. . . 23 points?" 1 EHRR 81; 2 EHRR 192. In Petitioner's case, the VCI (102) less the PRI (81) resulted in a score of 21, which is less than 23. *See* EHSX 4, at 6. Step 2B then reads:

> If yes, then the GAI may be calculated and interpreted as a reliable and valid estimate of a person's general intellectual ability. To calculate the GAI and obtain its 90 percent or 95 percent competence intervals, simply sum the scaled scores on the six subtests that compose the GAI (similarities, vocabulary, information, block design, matrix reasoning, individual puzzles) and enter this sum into the appropriate table. *See* Appendix C of the WAIS-IV Technical and Interpretive Manual.

1 EHRR 82; 2 EHRR 192. Thus, by the terms of Steps 2A and 2B, Dr. McGarrahan

determined that "the GAI may be calculated and interpreted as reliable while the [FSIQ] could not." 2 EHRR 143.

Finally, Dr. McGarrahan relied upon the Advanced Manual to support her decision to use the GAI in lieu of the FSIQ. 2 EHRR 144. Specifically, the Advanced Manual supports the theory that the VCI and PRI "are thought to contain the most highly ['g'] loaded subtests within the WAIS-IV" and should be used when there is too much discrepancy in the index scores. 2 EHRR 144. The manual discourages dropping WMI and PSI simply because they are too low, 2 EHRR 91–94, which Dr. McGarrahan did not do, 2 EHRR 144–45. Rather, she dropped them because of the discrepancy in scores: "[T]he differences were so statistically significant that they could not have occurred by chance and, following those steps, [she] then relied upon the GAI as the more reliable overall IQ score for him." 2 EHRR 145.

Dr. McGarrahan explained that in arriving at the GAI, she "relied upon the texts that are authoritative in our field and the steps that it suggests that you do." 2 EHRR 141. While usually the FSIQ is the preferred score, these were not usual results. 2 EHRR 146. As a clinical neuropsychologist, her opinion was not just about a number, it involved clinical judgment. 2 EHRR 146–47. Her opinion was not just about one strength—the VCI—but about all the information she had. 2 EHRR 150.

In rebuttal, Petitioner called Dr. Alan Kaufman, one of the co-authors of the Essentials, 2 EHRR 174–76, who accused Dr. McGarrahan of misapplying his methodology in two ways. First, he contended she ignored the Caution Box entitled "Exception to the Rule Regarding Interpretation of [FSIQ] and GAI." 2 EHRR 182 (citing Essentials at 162), 184–85. Second, by relying on the GAI in this case, she "ignore[ed] one of the basic principles of the whole intelligent testing approach that I have advocated for a half century: Don't use test scores to hurt somebody." 2 EHRR 185. However, on cross-examination, the State demonstrated that, not only did Dr.

McGarrahan follow his methodology as it was written but the Essentials contained a critical research error that has gone uncorrected for more than ten years. Furthermore, Dr. Kaufman's philosophy to not "hurt somebody" essentially advocates for use of the least harmful IQ score, not the most reliable.

On his first point, Dr. Kaufman testified that "research" and "literature" on the subject indicate that "scatter" or variability among the indexes has little effect on validity or reliability of the FSIQ score. 2 EHRR 179. Thus, the research does not support the notion that index variability makes the FSIQ uninterpretable for ID diagnosis. 2 EHRR 179. And because the GAI excludes aspects of intelligence that are included in FSIQ, in Dr. Kaufman's opinion, the GAI is not a comprehensive test as required by the DSM and AAIDD, which thus renders it inappropriate for ID diagnosis, regardless of his methodology. 2 EHRR 180–84.

On cross-examination, the State walked Dr. Kaufman through the steps of his book, establishing first that, under Step 2, "two composites are available for the WAIS-IV: the traditional FSIQ and [GAI]." 2 EHRR 187 (Essentials, at 156). His book indicates, "the GAI has also been used as an alternate measure of global intelligence[,]" and "[t]he three VCI and three PRI subtests that compose the WAIS-IV and GAI are usually the best measures of ['g'] whereas the working memory and processing speed subtests are often among the worst measures." 2 EHRR 187–88 (Essentials, at 158). When confronted with this statement from the Essentials—"Because the GAI is composed of strong measures of general ability, it is especially useful for estimating general ability for individuals whose scores on memory and speed subtests deviates significantly from their scores on measures of overall verbal and nonverbal tasks"—Dr. Kaufman focused on the word "estimating" as the most important word, as in estimating FSIQ, although "FSIQ" is not specifically mentioned. 2 EHRR 188–89.

Dr. Kaufman agreed that Step 2A—subtracting the lowest index from the highest—amounted to "empirical criteria," which he described as "between scores, looking at that difference, and seeing if it is large enough to be meaningful," but distinguishing "meaningful" from "statistically significant." 2 EHRR 189–90; *see* 2 EHRR 138–40 (discussion of "statistically significant" in Technical Manual). But he confirmed that if the answer to Step 2A is "no," as it is in this case, "then the variation in the indexes is too great . . . for the purpose of summarizing global intellectual ability in a single score, i.e., the FSIQ, proceed to Step 2B." 2 EHRR 190–91.

The State then focused on the terminology of Step 2B—which, if following Dr. Kaufman's methodology, one only reaches if it is determined that variation in the indexes is too great. 2 EHRR 190–91. The State asked Dr. Kaufman to reconcile the first sentence of Step 2B—reading, in part, "when FSIQ is not interpretable"—with his current testimony suggesting FSIQ is *never* uninterpretable. 2 EHRR 179, 191. Dr. Kaufman admitted "it was a poor choice of words," but maintained the Caution Box should have made it clear when *not* to follow his rules. 2 EHRR 191. He suggested "nonintepretable" should have been—but was not—in quotes and again directed the State to the Caution Box which addresses the issue of interpretation. 2 EHRR 192.

The State confirmed Step 2B provides that "the GAI may be calculated and interpreted as a reliable and valid estimate of a person's general intellectual ability" when FISQ is not interpretable, and the difference between the VCI and PRI is less than 23 points—as in this case. 2 EHRR 192. Thus, by the language of the Essentials Step 2B, Petitioner's GAI "may be calculated as a reliable and valid estimate" of general intellectual ability. *Id.* Nevertheless, Dr. Kaufman insisted Dr. McGarrahan erred because the text does not permit the use of the score for *diagnosis*, 2 EHRR 192–93, a distinction not made anywhere in this step. Dr. Kaufman admitted these statistical rules must be interpreted by a carefully trained examiner who does not

rely specifically on numbers—a "clinician's decision," as suggested by the State, which Dr. Kaufman is not. 2 EHRR 193–94.

The State turned to the Caution Box, which reads:

> Always interpret a person's overall score on the WAIS-IV whenever a global score is essential for diagnosis [e.g., of ID] or placement [e.g., in a gifted and talented program]. Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria, select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process. Use clinical judgment to make this decision. For example, if the examinee was impulsive or distractible when administering the working memory and/or the processing speed subtests, then select the GAI which excludes the WMI and the PSI.

2 EHRR 194-97; *see also* 1 EHRR 84-85 (Essentials at 162). Dr. Kaufman explained the box should not be read to just pick a score, but to "use the score that is needed to make a diagnosis in whatever circumstance you are in." 2 EHRR 195. And where "scatter doesn't matter" there is no justification for choosing the GAI over the FSIQ. 2 EHRR 195. The State posed, in a case like this where the GAI "*was* interpretable based upon empirical criteria" the rest of the box does not apply—an examiner can use the one based upon empirical criteria, and if an examiner follows the numerical empirical results, one would never reach this point. 2 EHRR 196–98 (emphasis added). Dr. Kaufman disagreed, insisting the GAI is never appropriate for diagnostic decisions, and his methodology has not been followed in this case. 2 EHRR 196–97.

The State disagreed, repeating the words of the Caution Box: "Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria, select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process." 2 EHRR 195–96. The State posited, there would be no point to the steps outlined in the Essentials if they must be disregarded at the Caution Box. 2 EHRR 197–98. Dr. Kaufman ultimately stated, "You can focus on the word empirical if you want, but the focus there is the most sensible and in capital

punishment cases, in diagnostics of intellectual disability, nationwide, the most sensible score is the [FSIQ] and that is the process. That is the score." 2 EHRR 198.

The State then questioned Dr. Kaufman on the "literature" he relied upon to downplay the discrepancy in the indexes, i.e., "research" suggesting "scatter" or variability in indexes has little effect on the reliability of scores. *See* 2 EHRR 179. Specifically, Dr. Kaufman cited an article by Mark Daniel, published in 2007. 2 EHRR 200–01; EHDX 4, at 6–7. Dr. Kaufman admitted he was not aware of this 2007 research when he published the Essentials in 2013, and his book did not contain this information. Rather, he changed his methodology in 2016 when he published *Intelligent Testing with the WISC-V Children and Adolescents*, and admitted he was wrong. 2 EHRR 202. He did *not,* however, file a new edition of Essentials updating his methodology, and continues to sell copies of his 2013 book. 2 EHRR 203.

Despite professional endorsement by the AAIDD (and Dr. Kaufman's adoption of such) as "arguably the most prominent scholar on intelligence testing and interpretation of the various Wechsler IQ tests," EHDX 4, at 3, Dr. Kaufman nevertheless faulted Dr. McGarrahan for relying on his professional reputation, and for not discerning the error in his 2013 book on her own. 2 EHRR 202–04. He suggested she should have been aware of his 2016 book regarding administration of testing to children and adolescents, despite the fact that her practice does not involve examining children. 2 EHRR 203–04; *see also* EHSX 2 (McGarrahan's CV). Dr. Kaufman further chastised Dr. McGarrahan for not considering "the datedness of his book and look[ing] to see has anything changed," even though he himself has not updated the book in response to his discovery of the 2007 article. 2 EHRR 202–04. Notably, Dr. Kaufman has published nothing—apart from a manual on the testing of children—in the past ten years as notice to the community of "thousands and

thousands of licensed psychologists" who have "relied on [his books] internationally," of the potential errors in his published methodology. 2 EHRR 194.

Regardless, Dr. McGarrahan did not rely solely on Dr. Kaufman's book. 2 EHRR 204; *see* 2 EHRR 143. Indeed, as noted above, Dr. McGarrahan relied upon no less than five different sources to support her opinion. No other author of any of these texts was called to rebut Dr. McGarrahan's reliance on their work.

Finally, Dr. Kaufman made clear his opinion that test scores should not be used to hurt someone: he stated that, "*in capital punishment cases,* in diagnostics of intellectual disability, nationwide, the most sensible score is the [FSIQ.]" 2 EHRR 198 (emphasis added). Dr. Kaufman accused Dr. McGarrahan of:

> ignoring one of the basic principles of the whole intelligent testing approach that I have advocated for a half century: Don't use test scores to hurt somebody. . . . [I]n this case, life and death, it's violating the basic intent of my entire testing philosophy and of Dr. Wechsler's entire testing philosophy.

2 EHRR 185. He made this point again on cross examination. 2 EHRR 204–05.

b. Criterion 2: deficits in adaptive functioning.

Dr. McGarrahan also concluded that Petitioner did not meet prong two of the ID diagnosis—adaptive deficits. 2 EHRR 49. Dr. McGarrahan opined that, when tested prior to trial, Petitioner's depressed cognitive functioning was the result of his drug usage and custodial status. *Id*. However, his adaptive abilities were reflected in the neurocognitive testing she did with respect to his academic skills, verbal skills, and memory skills. *Id*. He does have deficits in processing speed and executive functioning. 2 EHRR 50. But it would be extremely rare for someone with ID to show the improvements Petitioner made in the other indexes. *Id*. And while Dr. Proctor found conceptual domain deficits because of Petitioner's math deficits, 1 EHRR 46–48; Proctor Addendum, at 4–5, Dr. McGarrahan explained that math skills fall within the same domain as the verbal comprehension skills upon which he showed such

improvements, 2 EHRR 50–51. For this reason, Dr. McGarrahan concluded that his deficits in math skills alone where not sufficient to sustain a finding that he showed deficits in the conceptual domain, in satisfaction of prong two. 2 EHRR 51.

Petitioner challenged Dr. McGarrahan's opinion on grounds that she improperly considered strengths over weaknesses and did not give deference to possible "risk factors" for ID diagnosis—his profound lack of education and history of methamphetamine abuse. *See* 1 EHRR 47–53, 117–20, 160–61. According to Dr. Proctor, under the current diagnostic and interpretive manuals, Petitioner's lack of education and history of methamphetamine abuse are no longer reasons to exclude ID, but ways to understand it. 1 EHRR 46–47. They are risk factors that could contribute to someone becoming ID. 1 EHRR 107.

However, Dr. Proctor admitted that one can talk about strengths in the context of adaptive deficits, it's just not appropriate to say, "if a person can do X, then they can't be [ID]." 1 EHRR 26–27. And "[c]ertainly there are some levels of things you would not expect to ultimately see in someone who is [ID.]" 1 EHRR 27. The diagnosis must focus on whether there are significantly subaverage deficits[10] in one of the three areas. *Id*. According to Dr. Proctor, Petitioner has a mix of strengths and weaknesses in the conceptual domain—his math ability continues to be extremely low, while his verbal abilities were average at the time of trial and, along with writing, have now improved. 1 EHRR 48. But considering his lack of education as a risk factor, Dr. Proctor found conceptual domain deficits. *Id*.

Dr. McGarrahan did consider risk factors in her analysis: the evidence from trial demonstrated that Petitioner's parents removed him from school in fourth grade

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[10] When asked by the court to define "significant," Dr. Proctor said it was similar to an IQ test, with two standard deviations below the mean, or 70 plus or minus five. 1 EHRR 27–28. The WRAT-5—a test administered by Dr. McGarrahan—is one test for measuring these deficits, particularly relevant to the conceptual domain. 1 EHRR 34–35, 48–49.

because he was paddled by the school principal, but stopped homeschooling him after six months, 51 RR 237–40; 53 RR 12; *see also* 2 EHRR 15. Dr. McGarrahan testified that, in her twenty-two years of practice, she could not recall anyone with so profound a lack of education as Petitioner. 2 EHRR 17. Dr. Proctor agreed. 1 EHRR 47. While Dr. McGarrahan agreed lack of education was a risk factor for ID, she explained that it must be considered when looking at his performance and test scores. 2 EHRR 17. Dr. McGarrahan stated that for a thorough interpretation of cognitive testing, she must know the individual's level of education, because the expectations for cognitive test results will differ depending on level of education. 2 EHRR 16. Test results must be normed with peers of the same general age and education, although most of the norms only go down to seventh or eighth grade. 2 EHRR 17–18.

Dr. McGarrahan also considered Petitioner's history of substance abuse. While acknowledging that drug usage is a risk factor for ID, as a neuropsychologist, she must consider the effects of drug usage on the brain to determine the severity and extent of damage to the brain, looking at patterns of cognitive performance to help determine what is contributing to the scores she is seeing. 2 EHRR 21–22. Petitioner said he began drinking and using drugs at age 12, and drank substantially until age 15, when he started using methamphetamine intravenously on a regular and heavy basis until he was arrested. 2 EHRR 20. Petitioner reported that "he continued even after his arrest to suffer the consequences and the intoxicating effects from methamphetamine for quite some time while he was in custody." 2 EHRR 21. Dr. McGarrahan found it significant that Petitioner reported "his thinking was so much clearer" when she examined him years later, and "that it took a substantial amount of time, up to a couple of years, which is consistent with what the research shows about methamphetamine use, in order for his brain to . . . clear the fog, to clear the effects of the methamphetamine and that he felt so much clearer-headed and able to

focus and concentrate" when she saw him. 2 EHRR 21. As a neuropsychologist, this informed her opinions and diagnosis. 2 EHRR 21–22. In contrast, despite the fact that Petitioner's drug usage was noted by Dr. Proctor at trial, *see* 55 RR 165–66, 257–59, and thoroughly documented as part of his defense, *see* 52 RR 23–25 (toxicology reports from blood screen at time of arrest showed levels of methamphetamine almost ten times higher than a clinical dose); 53 RR 53–79 (Pharmacologist explaining effects of methamphetamine on the brain), at the hearing Dr. Proctor did not consider drug-induced brain fog to be a significant factor in his analysis because he had no other point of reference when he evaluated Petitioner in 2010. 1 EHRR 89.

Petitioner challenged Dr. McGarrahan's opinion on adaptive deficits because her report addressed the conceptual domain but did not mention the social or practical domains. *See* 2 EHRR 106–11. When questioned, Dr. McGarrahan said she did not reference the practical or social domains "by title" in her report, 2 EHRR 111, suggesting she did intend for her report—concluding Petitioner did not meet the second prong—to be read as rejecting deficiency in all three domains. Regardless, Dr. Proctor found *only* deficits in the conceptual domain, specifically in the area of mathematics. *See* Proctor Addendum, at 5; *see also* 1 EHRR 33–35, 48–50, 52–53, 118, 150–54. Moreover, because Petitioner's "verbal abilities are clearly not deficient," Dr. Proctor found that "prong two is too close to call." 1 EHRR 163.

c. Criterion 3: Onset during the developmental period.

Finally, regarding prong three, onset during the developmental period, Dr. McGarrahan acknowledged that it would be difficult to evaluate, testifying that Petitioner's cognitive testing indicates that he had the capacity prior to her evaluation such that it would have existed in the developmental period and would be inconsistent with ID. 2 EHRR 51–52.

III. The State-Court and Federal Appellate Proceedings.

The CCA affirmed Petitioner's conviction and sentence on direct appeal. *Milam v. State,* No. AP-76,379, 2012 WL 1868458, at *21 (Tex. Crim. App. May 23, 2012). He did not seek certiorari review. The CCA denied state habeas relief. *Ex parte Milam,* No. WR-79,322-01 (Tex. Crim. App. Sept. 11, 2013). The district court denied federal habeas relief and a certificate of appealability (COA). *Milam v. Director, TDCJ-CID,* No. 4:13-cv-545, 2017 WL 3537272, at *51 (E.D. Tex. Aug. 16, 2017). The Fifth Circuit also denied a COA. *Milam v. Davis,* 733 F. App'x 781 (5th Cir. 2018), *cert. denied,* 139 S. Ct. 335 (2018).

The CCA stayed his January 15, 2019 execution date, and remanded to the trial court for a review of two claims on the merits. *Ex parte Milam,* 2019 WL 190209, at *1. The CCA adopted the trial court's recommended denial of relief on July 1, 2020. *Ex parte Milam*, 2020 WL 3635921, at *1, *cert. denied, Milam v. Texas*, 141 S. Ct. 1402 (2021). Federal appeal was unsuccessful. *See In re Blaine Milam,* 838 F. App'x 795, 798–800 (5th Cir. 2020) (unpublished); *In re Milam,* No. 20-40849 c/w No. 20-70024, 832 F. App'x 918 (5th Cir. 2021), *cert. denied, Milam v. Lumpkin,* 142 S. Ct. 172 (2021). The trial court reset Petitioner's execution date for January 21, 2021.

The CCA stayed this execution date on January 15, 2021, and remanded Petitioner's second subsequent writ to the trial court for merits review of his ID claim. *Ex parte Milam,* 2021 WL 197088, at *1. Following an evidentiary hearing, the CCA adopted the trial court's recommendation and denied relief. *Ex parte Milam,* 2024 WL 3595749, at *1. Petitioner filed the instant petition on November 26, 2024.

REASONS FOR DENYING THE WRIT

I. Petitioner Presents no Important Question of Law to Justify Certiorari Review.

The question that Petitioner presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a

matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Petitioner advances no compelling reason to review his case, and none exists. The question raised is facially inadequate under Rule 10, because it asks this Court to correct what he views as erroneous factual findings and the state court's misapplication of a properly stated rule of law, Pet. at i. *See* Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 5–45 (11th ed. 2019) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari"); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Nevertheless, Petitioner fails to demonstrate that the state court applied the wrong legal standard. Petitioner, therefore, presents no important questions of law to justify the exercise of certiorari jurisdiction.

II. The CCA Correctly Determined that Petitioner Was Not ID and Thus Exempt from Execution Under the Eighth Amendment.

Petitioner alleges that the CCA rejected his ID claim based upon expert opinion that did not comport with the legal standard for ID under *Atkins*. Pet. at 24. But *Atkins* does not dictate the legal standard to be applied by any state. 536 U.S. at 317. Indeed, in *Atkins,* this Court recognized a national consensus against execution of ID offenders, but also recognized there was "serious disagreement" regarding which offenders are actually ID. *Id*. The Court thus left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentence," *id.* (citing *Ford v. Wainwright,* 477 U.S. 399, 405 (1986)), with the "medical community's current standards" supplying "one constraint on States' leeway in this area." *Moore I,* 581 U.S. at 20. While this Court has twice intervened in a single Texas case because the CCA analyzed that case under standards that did not adhere to

views of medical experts and "diminish[ed] the force of the medical community's consensus," *id.* at 5–6; *Moore v. Texas,* 586 U.S. 133, 140–41 (2019) (*Moore II*), the CCA has already determined that *Moore* error did not occur in this case, *see Ex parte Milam,* 2020 WL 3635921, at *1, *cert. denied Milam v. Texas,* 141 S. Ct. 1402.

The issue before the Court now is whether the CCA's current decision complies with the Eighth Amendment and the standards identified by this Court's legal precedent. It does. The CCA adheres to the standards set forth under the DSM-5-TR, and to the guidance of this Court in *Atkins, Moore, Moore I,* and *Hall v. Florida,* 572 U.S. 701 (2014). *See Petetan v. State,* 622 S.W.3d 321, 327–33 (Tex. Crim. App. 2021); *see also* Pet. App'x A at 61–62, 66, 68 (citing applicable legal standard). Further, this Court mandates that "a court's [ID] determination 'must be 'informed by the medical community's diagnostic framework.'" *Moore II,* 586 U.S. at 137–38 (citing *Moore I,* 581 U.S. at 12–13; and *Hall,* 572 U.S. at 721). The CCA's determination, relying on credible expert opinion, complies with the Court's precedent and violates no constitutional right.

A. The CCA did not violate this Court's Eighth Amendment jurisprudence in concluding Petitioner does not have significantly subaverage intellectual functioning.

Petitioner first argues that the CCA violated the Eighth Amendment by relying on a single part-score—the GAI of 91—rather than a range of FSIQ scores obtained over time, in determining Petitioner failed to satisfy Criterion A for proof of ID. Pet. at 27–30. Petitioner complains that use of the GAI does not reflect societal or clinical standards. Pet. at 28–29. But Dr. McGarrahan's reliance on the GAI, in this specific case, is supported by the professional literature and the evidence, and is the more reliable indicator of Petitioner's intellectual functioning than the FSIQ. *See* Pet. App'x A at 62; 2 EHRR 35–45.

As set forth in the Statement of the Case, Section II(B)(3)(a), Dr. McGarrahan supported her reliance on GAI through her training as a neuropsychologist and clinical judgment, and with diagnostic and interpretative manuals, which recognize and support use of the GAI when a substantial discrepancy in indexes exists. *See* 2 EHRR 137–41, 142–43, 191–92, 144–45. All hearing experts acknowledged this, but Drs. Proctor and Kaufman nevertheless maintained that the DSM-5-TR and AAIDD forbid reliance on the GAI over the FSIQ for diagnoses. *See* 1 EHRR 70–87; 2 EHRR 192–93. But the DSM-5-TR does not specifically forbid reliance on the GAI, and the Essentials recognizes that the GAI may be the most "reliable and valid" estimate of a person's "general" or "true intelligence." *See* 1 EHRR 77–78, 81–82; 2 EHRR 192. Regardless, the manuals provide for the exercise of clinical judgment. *See* 1 EHRR 85–86 ("Even if both the FSIQ and GAI are noninterpretable based on our empirical criteria, select the one that provides the most sensible overview of the examinee's intelligence for use in the diagnostic or placement process. Use clinical judgment to make this decision."); 2 EHRR 137–37 (DSM-5-TR at 37–38). Only Dr. McGarrahan relied upon a personal evaluation, the steps contained within the diagnostic and technical manuals, her clinical judgment as a neuropsychologist, and "the entire picture" of Petitioner's intellectual history to arrive at the most accurate reflection of his broad intellectual ability. 2 EHRR 45, 65.

Furthermore, the DSM-5-TR does not specify the IQ test that must be used for diagnosis, nor does it mandate the WAIS-IV FSIQ. *See* 1 EHRR 71–72 (Dr. Proctor's admission that DSM-5-TR does not specifically exclude GAI, nor does it mandate a particular IQ test, like WAIS-IV, for diagnosis.); 2 EHRR 39 (Dr. McGarrahan explaining DSM-5-TR and AAIDD are not referring to a specific IQ test or score but address obtaining a "broad intellectual score.") And, contrary to Petitioner's argument, *see* Pet. at 29 (asserting reliance on GAI is excluded by DSM-5-TR), the

DSM-5-TR does not specifically mention "FSIQ," nor does it forbid use of the GAI. *See* DSM-5-TR at 37–45. Rather, it requires "[d]eficits in intellectual functions [to be] confirmed by both clinical assessment and individualized, standardized intelligence testing." *Id.* at 37. "Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence." *Id.* at 38. Further, "[c]linical training and judgment are required to interpret test results and assess intellectual performance." *Id.* Regardless of what terminology you use, "the goal is to try to figure out what the whole picture of a person's functioning is[.]" 2 EHRR 39.

Petitioner argues that reliance on the GAI is incompatible with *Atkins* because neither the CCA nor any other court has ever relied upon it to adjudicate the first prong of an ID claim. Pet. at 28–29. But, as noted, *Atkins* does not dictate the standard to be used, nor does this Court's *Atkins* jurisprudence mandate that a court consider particular subtests of an individual's functioning in working memory and processing speed, as Petitioner suggests. Pet. at 28. That the GAI has purportedly never been used in another case does not mean it was not the appropriate tool to use in the unique factual scenario presented by this case. Dr. McGarrahan explained that the split in index scores, as seen in Petitioner's case, is a very rare occurrence—seen in one percent of the population; it's extremely rare in even a clinical population of individuals with ID. 2 EHRR 37–38. Such rarity could explain why Dr. Proctor has never seen the GAI applied to diagnose ID, 2 EHRR 38; *see also* 1 EHRR 16–17, and why no caselaw exists citing its usage. But, as discussed by Dr. McGarrahan, use of the GAI is approved by current professional manuals, and the CCA's reliance on her expert opinion that the GAI was the more reliable indicator of Petitioner's intellectual functioning is not contrary to Eighth Amendment jurisprudence mandating such deference to the views of experts and the "medical community's diagnostic

framework." *Hall,* 572 U.S. at 721; *see also Moore II,* 586 U.S. at 137–38; *Moore I,* 581 U.S. at 12–13. Petitioner would have this Court require acceptance of FSIQ as the only permissible measure of an individual's intellectual functioning irrespective of whether current standards require it. *See* Pet. at 27–30. This Court's *Atkins* jurisprudence does not countenance such an approach.

B. The CCA considered the full range of IQ scores and expert testimony.

Petitioner next argues that the CCA failed to consider or even discuss the range of FSIQ scores and ignored expert agreement that his FSIQ scores fell within the range for ID. Pet. at 30–31. Petitioner misrepresents the extent of review given to the evidence in this case.

Petitioner accuses the CCA of adopting findings and conclusions that omit discussion of the range of scores. Pet. at 31. But the trial court and the CCA specifically acknowledged the IQ scores obtained at trial, *see* Pet. App'x A at 9–10, and the reasons Dr. Proctor later changed his opinion—including the scoring error, application of Flynn Effect and SEM to the SB5 score of 80, and the now-unreliability of the RIAS score of 80. *Id.* at 13–16. The courts acknowledged Dr. McGarrahan's test results, including both the FSIQ of 80, and GAI of 91, and how she arrived at her conclusion that the GAI more accurately reflected Petitioner's broad intellectual ability. *Id.* at 24–37. The courts acknowledged Dr. Proctor's and Dr. Kaufman's disagreement with use of the GAI. *Id.* at 16–18, 44–51. The courts made credibility determinations regarding the three experts, *id.* at 51–60, before concluding Petitioner failed to demonstrate subaverage intellectual functioning, let alone that he met all three criteria of an ID claim. *See id.* at 60–70. The courts' examination was thorough.

Petitioner cites *Hamm v. Smith,* 604 U.S. 1 (2024), and *Smith v. Commissioner, Alabama Dep't of Corr.,* No. 21-14519, 2024 WL 4793028, at *1 (11th Cir. Nov. 14, 2024), to suggest the CCA failed to utilize a "holistic approach" to Petitioner's

evidence, relying instead on a single score. Pet. at 31. In fact, a "holistic approach" is precisely the approach taken by Dr. McGarrahan and adopted by the CCA. It is Petitioner who seeks per se reliance on the lowest score without consideration of the "relevant evidence," or "any relevant expert testimony." *Hamm,* 604 U.S. at 2.

In *Smith,* this Court reviewed an Eleventh Circuit case where the district court vacated the petitioner's death sentence on grounds that, after applying the SEM to five IQ scores ranging from 72–78, the petitioner's score could be as low as 69, thus satisfying the first prong of an ID claim. 604 U.S. at 1. This Court acknowledged that, after *Hall,* each test score must be assessed considering the SEM, that "analysis of multiple IQ scores jointly is a complicated endeavor," and the Court "has not specified how courts should evaluate multiple IQ scores." *Id.* at 2 (citing *Hall,* 572 U.S. at 714). Because the Eleventh Circuit opinion affirming the grant of relief could be read as either (1) a per se rule that the lower end of the SEM range for the lowest scores is dispositive, or (2) "a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony," the Court remanded for further clarification. *Id.*

On remand, the Eleventh Circuit explained that it had in fact applied the "holistic approach." *Smith,* 2024 WL 4793028, at *1. The court's conclusion was "based on the complete record, including any relevant expert testimony," and rendered a determination on all three prongs. *Id.* The court "unambiguously reject[ed] any suggestion that a court may ever conclude that a capital defendant suffers from significantly subaverage intellectual functioning based solely on the fact that the lower end of the standard-error range for his lowest of multiple IQ scores is 69." *Id.* In rationalizing its decision, the Eleventh Circuit acknowledged that IQ test scores represent "a range rather than a fixed number," qualitative factors are important, and clinicians should not limit themselves to IQ tests alone. *Id.* at *2

(citing *Hall,* 572 U.S. at 723). The court thus recognized the interplay between IQ scores and the existence of limitations in adaptive functioning. *Id.*

While Petitioner suggests the trial court and the CCA did not apply the "holistic approach" but relied on just one score, as discussed, the record belies this assertion. And the accusation oversimplifies the unique journey this case has taken through the courts. Indeed, as cited above, the jury considered and rejected Petitioner's broad range of IQ scores (68, 71, 80, and 80), as well as significant evidence both in support of and against a finding of ID. On subsequent review, the CCA found no *Moore* error in the jury's consideration of the evidence. The trial court and the CCA reexamined the issue again, considering evidence from the trial and first subsequent appeal, as well as an evidentiary hearing, and rejected Petitioner's claim. To suggest that the courts failed to evaluate the entire "body of evidence," *see Smith,* 2024 WL 4793028, at *3, including Petitioner's IQ scores, distorts the courts' actual findings and conclusions, and ignores the evaluation of the evidence that has taken place over the past fourteen years.

Dr. McGarrahan herself testified at the hearing that her desire is to seek the most accurate reflection of one's intelligence, and that she reaches her conclusion "by look[ing] at the entire picture rather than just a number or two numbers or three numbers or five numbers." 2 EHRR 147–50; *see also* 2 EHRR 45. Dr. McGarrahan does her testing in a "standardized" manner—her process for administration, scoring, interpretation, and diagnosis is the same regardless of the severity of the situation or end-result. 2 EHRR 47–49. 49.

While advocating for a "holistic approach," Petitioner actually seeks a per se rule that the lower end of the SEM range for the lowest scores is dispositive.[11] But

[11] Indeed, Petitioner's own expert repeatedly advocated against the GAI because test scores should not be used to hurt someone, 2 EHRR 185, 204–05, suggesting his true motivation was not accuracy of scores but advocacy against the death penalty.

the Eleventh Circuit "unambiguously reject[ed]" this approach. *Smith,* 2024 WL 4793028, at *1. In this case, Dr. McGarrahan, the trial court, and the CCA applied the holistic approach to conclude that he was not ID. The CCA's determination is consistent with the Court's *Atkins* jurisprudence.

C. The CCA properly concluded Petitioner did not demonstrate adaptive deficits.

Petitioner next argues that the CCA's reliance on a partial assessment of adaptive behavior does not comport with the Eighth Amendment. Pet. at 31–36. He complains that the CCA did not adhere to the clinical definition of adaptive deficits, as outlined in the DSM-5-TR—the legal standard adopted by most states implementing *Atkins*. Pet. at 32. Once again, it does not have to, *see Atkins,* 536 U.S. at 317, but the CCA did not contradict this Court's precedent by adopting Dr. McGarrahan's findings.

Dr. McGarrahan's expert opinion is constitutionally sound. Petitioner complains that Dr. McGarrahan focused on only one area of adaptive functioning in concluding that Criterion B was not met, specifically that her report addresses the conceptual domain without mentioning the social or practical domains. *See* Pet. at 32–33; 2 EHRR 106–11. Dr. McGarrahan's opinion is not deficient. When questioned at the hearing, Dr. McGarrahan said she did not reference the practical or social domains "by title" in her report, 2 EHRR 111, suggesting she did intend to reject deficiency in all three domains. Her ultimate conclusion that Petitioner did not meet Criterion B demonstrates rejection of all three domains.

Regardless, Petitioner—who bore the burden before the CCA[12]—proffers no new expert opinion finding adaptive deficits in any domain *other than* conceptual. Dr.

[12] Petitioner bore the burden of proving ID by "clear and convincing" evidence, s*ee* Article 11.071 § 5(a)(3); *Ex parte Woods,* 296 S.W.3d 587, 606 (Tex. Crim. App. 2009), but his

Proctor found *only* deficits in the conceptual domain, namely in mathematics. *See* Proctor Addendum, at 5; 1 EHRR 33–35, 48–50, 52–53, 118, 150–54. Petitioner suggests deficits in social and practical domains are shown by Dr. Gripon's pretrial report. *See* Pet. at 36–37; 2 EHRR 107–09. But Dr. Gripon also found only conceptual domain deficits in writing and mathematics. *See Ex parte Milam,* No. 79,322-03, Sub. App. for Post-Conviction Writ of Habeas Corpus, Exhibit 6, at 14. Further, Dr. Gripon did not testify at trial or the evidentiary hearing, despite the State's non-opposition to him being called at the hearing, *see* State's Amend. Ans. to Sub. App. For Post-Conviction Writ of Habeas Corpus, at 73, thus his non-conclusory and unchallenged pretrial report bears little credibility, as found by the CCA. *See* Pet. App'x A at 60, ##159–59. Dr. McGarrahan's report expounding on only the conceptual domain was likely a response to Dr. Proctor's opinion that Petitioner met only that domain.

Petitioner further argues that Dr. McGarrahan's analysis did not comport with the legal standard announced in *Atkins* because her neurocognitive testing relied on Petitioner's strengths in the conceptual domain that would be rare for someone with ID. Pet. at 33. Petitioner contends that *Atkins, Moore I,* and *Moore II* mandate that she focus on deficits, limitations, or impairments in adaptive functioning instead of strengths. Pet. at 33–35. But Dr. McGarrahan, as the expert, was allowed to consider all the evidence. In *Moore I,* the Court chastised *the CCA* for overemphasizing strengths in the face of the medical community's reliance on deficits, but did not suggest an expert could not themselves consider all the evidence. *See* 581 U.S. at 15 (criticizing the CCA for "overemphasiz[ing] Moore's perceived adaptive strengths" while noting the "medical community focuses the adaptive-functioning inquiry on adaptive *deficits*"). As noted, the Eleventh Circuit supports a "holistic approach . . .

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evidence fell well short. His own expert admitted that Petitioner's "verbal abilities are clearly not deficient," and thus found that "prong two is too close to call." 1 EHRR 163.

that considers the relevant evidence, including as appropriate any relevant expert testimony," and reliance on a "full record." *Smith,* 2024 WL 4793028, at *4.

Dr. McGarrahan disagreed with the presumption that, because risk factors exist, she *must* find Petitioner ID. And *Moore I* does not so hold. In Petitioner's case, the CCA has twice concluded:

> While the Supreme Court noted that "[c]linicians rely on such [risk] factors as cause to explore the prospect of [ID] further," . . . the Court did not suggest that a clinician cannot himself conclude those "risk factors" did not demonstrate [ID]. Rather, the Court faulted the CCA for dismissing evidence of academic failures as possibly attributed to these risk factors rather than [ID].

Pet. App'x A at 65–66 (citing *Moore I,* 581 U.S. at 16–17). The CCA further concluded that "the existence of these factors does not mandate an ID diagnosis, and *Moore I* does not rule out the exercise of clinical judgment in consideration of these risk factors; indeed, the Supreme Court demands adherence to clinical standards and practice." Pet. App'x at 66; *see Moore I,* 581 U.S. at 5 ("adjudications of [ID] should be 'informed by the views of medical experts.'" (quoting *Hall*, 572 U.S. at 721)). These findings are supported by the Court's cited precedent, as well as the DSM which provides for the exercise of clinical judgment. DSM-5-TR at 38 ("Clinical training and judgment are required to interpret test results and assess intellectual performance."); *id.* at 42 ("[C]linical judgment is important in interpreting the results of IQ tests[.]"); *id.* ("Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. . . . Scores from standardized measures and interview sources must be interpreted using clinical judgment.").

Further, Petitioner's drug usage, while a risk factor to be considered, also explains the drastic change in Petitioner's test scores between trial and the evidentiary hearing. Petitioner's drug usage and possible effects was a thoroughly

documented part of his defense at trial. *See* 52 RR 23–25; 53 RR 53–79; 55 RR 165–66, 257–59. While acknowledging that drug usage is a risk factor for ID, as a neuropsychologist, Dr. McGarrahan said she must consider the effects of drug usage on the brain and look at patterns of cognitive performance to determine what contributed to the scores obtained. 2 EHRR 21–22. Dr. McGarrahan testified that Petitioner's original IQ scores may have been suppressed by his drug usage, 2 EHRR 21–22, 131–34, noting Petitioner's drug history and his comments to her about the lingering effects, *see* EHSX 4, at 3–4. Dr. McGarrahan found, and the CCA agreed, that "[a] lack of education and drug usage offer an explanation for divergency in results and must be considered in totality." Pet. App'x A at 41, #117; 2 EHRR 52. And Dr. McGarrahan utilized this information in reaching her expert opinion that Petitioner was not ID. *See* Pet. App'x A at 65–68, ##167–68.

In short, Petitioner failed to demonstrate significant deficits in adaptive functioning. Dr. McGarrahan's thorough consideration of the evidence—from trial and now—following her recent evaluation, and exercise of her clinical expertise did not contravene any diagnostic or legal authority. Her opinion that Petitioner's "current cognitive deficits are not seen as occurring in the context of adaptive deficits associated with intellectual functioning" because his "academic achievement scores far exceed what could be attained by an individual with ID" is credible. Pet. App'x A at 23–24, #73; EHSX 4, at 9.

D. The CCA considered all evidence.

Finally, Petitioner argues that, by adopting Dr. McGarrahan's opinion that only addressed adaptive behavior in the conceptual domain, the CCA ignored clinical evidence of adaptive functioning deficits. Pet. at 36–39. The trial court did not ignore evidence. Once again, Petitioner ignores numerous specific findings of fact regarding adaptive deficits, adopted by the CCA. *See* Pet. App'x A, at 10–13, ##40–46; 15–16,

##49(c)–(e); 18–21, ##60–65; 37–42, ##104–18; 64–67, ##166–67; *see also id.* at 7, #29 ("incorporate[ing] by reference" relevant and uncontested factual findings adopted by the CCA in connection with Petitioner's first subsequent writ proceeding).

Regarding the trial testimony of Dr. Cunningham that relied upon the pretrial reports of Dr. Gripon, *see* 53 RR 207–08, 211, 215, 217, 219, 233, 244; 54 RR 224; 55 RR 207, 235, the jury already rejected such evidence as proof of adaptive deficits. The CCA upheld this credibility determination against Dr. Cunningham and Dr. Gripon in Petitioner's first subsequent writ application—a finding cited with approval by the CCA in rejecting the second subsequent application. *See* Pet. App'x A at 60, #158. And the CCA specifically found the opinions of Drs. Cunningham and Gripon not credible in comparison to Dr. McGarrahan. *See* Pet. App'x A at 58–60, ##156–59. Dr. McGarrahan also did not find Dr. Gripon's 2013 affidavit, or Dr. Cunningham's trial testimony compelling, and she did not change her opinion after hearing portions of Dr. Gripon's report at the hearing. 2 EHRR 105–09; EHSX 4, at 1, 3.

As noted in Section II(C), no expert, other than Dr. Cunningham, found deficits in the social or practical domains. Petitioner failed to meet his burden of demonstrating clear and convincing evidence of substantial adaptive deficits sufficient to satisfy Criterion B. The CCA considered all evidence and correctly concluded Petitioner failed to meet his burden of proof. This decision did not violate this Court's Eighth Amendment jurisprudence and is unworthy of certiorari review.

CONCLUSION

The CCA correctly denied and dismissed Petitioner's second successive state habeas application. For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

TOMEE HEINING
Acting Chief, Criminal Appeals Division

*TOMEE M. HEINING

*Attorney in charge

Texas Bar No. 24007052
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

tomee.heining@oag.texas.gov

Telephone: (512) 936-1600
Telecopier: (512) 320-8132