No. 24-6058

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

STATE OF TEXAS

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Brief in Opposition, the State fails to address Petitioner's core arguments: In *Atkins*, this Court identified fundamental characteristics of people with intellectual disability that reduce their moral culpability and render them ineligible for execution. Those characteristics include "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 . . . [a tendency to] act on impulse rather than pursuant to a premeditated plan, and . . . in group settings [to be] followers rather than leaders." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). While *Atkins* gave states discretion in how to implement the Eighth Amendment prohibition on executing the intellectually disabled, that discretion was not unfettered. States must implement an enforcement mechanism that reliably identifies people with the class characteristics identified in *Atkins* and generally conforms to the medical community's understanding of intellectual disability. *Hall v. Florida*, 572 U.S. 701, 720 (2014) (noting that "[t]he clinical definitions of intellectual disability" were "a fundamental premise of *Atkins*").

But the state court below rejected Petitioner's intellectual disability claim for reasons untethered from the Eighth Amendment. In short, the state court rejected Petitioner's claim because his verbal abilities are an area of relative strength which, according to the State's expert, supposedly warranted rejection of Petitioner's qualifying full-scale IQ scores in favor of an optional partial measure of intelligence and evidence of his adaptive deficits. In doing so, the Texas courts once again flouted

this Court's precedent and ignored significant evidence of deficits in areas specifically identified as relevant to the Eighth Amendment in *Atkins*.

In its Brief in Opposition, the State encourages this Court to leave the TCCA's disregard for the Eighth Amendment standard unchecked and to likewise defer to the unreliable opinion of its expert, Dr. Antoinette McGarrahan.[1]

A. The State's Defense of Its Expert's Reliance on a Partial Score of Intelligence Ignores the Legal and Clinical Standards for Assessing Intellectual Disability.

The State defends the state court's reliance on the General Ability Index ("GAI") to measure Petitioner's intellectual functioning. Dr. McGarrahan, upon whom the state court relied, claimed that reliance on the GAI was warranted because the difference between Petitioner's scores on the verbal portion of the WAIS and his scores the working memory and processing speed portions was statistically significant. SHRR State's Ex. 4 at 6. The GAI is an optional part-score derived from a WAIS IQ test that omits working memory and processing speed measures—areas of intellectual functioning relevant to legal and clinical standards. The State asserts that "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." Br. in Opp. at 30. What it does not assert—because it cannot—is that use of the GAI is consistent with the established diagnostic and legal criteria for intellectual disability.

[1] The State asserts that Dr. McGarrahan was appointed by the state trial court to test Petitioner. Br. in Opp. at 2, 10. This is untrue. *See* 2 SHRR 7 (Dr. McGarrahan testifying on direct examination that she was retained by the State in this case.)

First, the State does not explain how Dr. McGarrahan's methodology comports with the American Association on Intellectual and Developmental Disabilities' ("AAIDD") diagnostic criteria for intellectual disability, which explicitly requires a full-scale IQ ("FSIQ") score to measure the intellectual functioning criterion. AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports, twelfth edition (AAIDD-12), 40 (2021). Indeed, the State neglects to mention the AAIDD's requirement of an FSIQ score at all.

Second, while ignoring the AAIDD's diagnostic criteria for intellectual functioning altogether, the State insists Dr. McGarrahan's reliance on the GAI is not prohibited by the Diagnostic and Statistical Manual of Mental Disorders ("DSM").[2] Br. in Opp. at 31. It may be true that the DSM-5-TR does not specify a particular IQ test to be used or mandate the use of a WAIS FSIQ score in particular, *id.*, but this argument establishes nothing. The DSM does define intellectual functioning for the purposes of an intellectual disability diagnosis. Use of a measure which does not comport with that definition is therefore unsupported. The State omits any mention of that definition, which explicitly includes working memory and processing speed—the very areas of intellectual functioning excluded from the GAI. *See* DSM-5-TR at 38. The State does not explain how use of the GAI for diagnosis is consistent with the DSM when it fails to measure aspects of intellectual functioning identified as "critical components" in the manual's definition. *Id.*

[2] The most current edition of the DSM is the 5th edition, text revision ("DSM-5-TR").

Third, the State also neglects to address how the GAI comports with the legal standard for adjudicating intellectual disability claims. It does not explain how the GAI is consistent with the Eighth Amendment when the aspects of intelligence excluded from the GAI correspond to, for example, the ability to understand and process information and to learn from mistakes—characteristics identified by this Court in *Atkins* as reducing moral culpability. *See* Pet. for Cert. at 28. While it is true that "*Atkins* does not dictate the standard to be used" by the states in adjudicating intellectual disability claims, Br. in Opp. at 32, the Court did identify the characteristics of the intellectually disabled that make them less morally culpable. 536 U.S. at 318. Those characteristics define the parameters of subsequent state-developed tests. The determination of who fits within the category of intellectually disabled for purposes of the Eighth Amendment must reflect those characteristics. Contrary to the State's contention, Petitioner's position is not that "*Atkins* jurisprudence mandate[s] that a court consider particular subtests of an individual's functioning in working memory and processing speed . . . ." Br. in Opp. at 32. Petitioner's argument is not that specific subtests are required for their own sake. It is that the evaluation of who is intellectually disabled must reflect the societal conception of who is less morally culpable as defined by this Court's opinions. The measure used by Dr. McGarrahan to rule out the first criterion of intellectual disability does not meet that requirement.

Thus, the State's argument that "Petitioner would have this Court require acceptance of FSIQ as the only permissible measure of an individual's functioning

irrespective of whether current standards require it[,]" Br. in Opp. at 33 (emphasis added), misses the mark. Current standards—both clinical and legal—do require it, at least when intellectual functioning is measured using WAIS tests because, on the WAIS, the FSIQ is the only measure that captures the key components of intellectual functioning identified in the legal standard and the clinical definition in the DSM. And an FSIQ is always required by the AAIDD.

The manuals relied on by the State to attempt to establish that Dr. McGarrahan's assessment is consistent with current diagnostic standards are not manuals that define intellectual disability and provide diagnostic criteria for that disorder. They are manuals on how to interpret WAIS IQ tests generally for all the purposes those tests are used for. 2 SHRR 101, 172. Dr. McGarrahan herself acknowledged this. 2 SHRR 80 (WAIS Technical Manual is "not designed specifically for diagnosing"). Consequently, the State's attempts to paint Dr. McGarrahan's reliance on these manuals as evidence she adhered to diagnostic criteria is misleading. *See Moore v. Texas*, 581 U.S. 1, 7 (2017) (identifying the AAIDD manual and the DSM as the two texts that contain the diagnostic criteria for intellectual disability).

Finally, the State suggests that this Court should not review the TCCA's decision below because the TCCA properly adopted the opinion of Dr. McGarrahan, an expert in the field. Specifically, the State argues that "the CCA's reliance on [Dr. McGarrahan's] 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.'" Br. in Opp. at 32–33 (emphasis added) (quoting *Hall*, 572 U.S. at 721). While it may be true that this Court's jurisprudence mandates that the legal framework for intellectual disability reflect prevailing clinical diagnostic standards, it does not mandate deference to a witness's opinion or methodology simply because they are a credentialed professional. *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 State's Assertion that Petitioner's Qualifying IQ Scores Were Given Proper Consideration by the State Court Is Belied by the Record.

Despite the State's acknowledgement that the TCCA relied on Dr. McGarrahan's use of the GAI only, Br. in Opp. at 32, and its defense of her use of the GAI, Br. in Opp. at 30–33, the State insists that the TCCA considered the full range of Petitioner's FSIQ scores. Br. in Opp. 34 ("In fact, a 'holistic approach' is precisely the approach taken by Dr. McGarrahan and adopted by the CCA."). This assertion is belied by the trial court's legal conclusions, which contain no discussion or reference to Petitioner's qualifying pretrial FSIQ scores. App'x A at ¶165. Those legal conclusions were adopted in whole by the TCCA. App'x B at 3. Thus, there is no reason to believe that the TCCA's legal analysis contemplated Petitioner's qualifying IQ scores.

Moreover, the State's assertion that "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" as support for the CCA's findings, Br. in Opp. at 35, is misleading. It ignores the factual changes that have occurred since Petitioner's trial. Most significantly, Dr. Proctor, the only expert the State presented at trial and whose opinion the jury presumably accepted, has since changed his opinion and determined that Petitioner's IQ scores are qualifying for an ID diagnosis. The jury never heard about that changed opinion or the facts that formed the basis for that change. First, one of Petitioner's scores that appeared to be out of range for an ID diagnosis—a FSIQ score of 80 on the Stanford-Binet 5—contained a scoring error. 1 SHRR 44. The correct score on that test is 78. *Id.* That score is within qualifying range when the standard error of measurement and norm obsolescence are accounted for—two standard practices used by all experts in the case. *See* 1 SHRR 44, 51 (Proctor); 2 SHRR 64–65 (McGarrahan). Second, Petitioner's other score of 80 was on the Reynolds Intellectual Assessment Scale, which—while not understood at the time of trial—is now known to overinflate the scores of individuals with low intelligence. 1 SHRR 62–64. The State has not contested either of these facts. The State's continued insistence that the jury verdict is valid when these facts, which were significant enough to change the opinion of its own expert, were not before the jury blinks reality.[3]

[3] Further undermining the legitimacy of the jury's verdict is the fact that the State encouraged the jury to reject Petitioner's evidence of intellectual disability at trial based on lay stereotypes that are irrelevant under the proper legal and clinical standards. *See, e.g.*, 56 RR 135–36 (State's closing argument encouraging jury to find Petitioner not intellectually disabled because he could "lie to protect himself;" "carry on a conversation;" "use[] a cell phone;" and talk about "what music he liked[.]" *See Moore*, 561 U.S. at 18 (noting "the medical profession has endeavored to counter lay

The State's continued reliance on the TCCA's prior adjudication of Petitioner's intellectual disability claim in his 2019 habeas application, Br. in Opp. at 35, suffers from the same defects. The TCCA relied heavily on Dr. Proctor's opinion in rejecting Petitioner's claim. *See, e.g., Ex parte Milam*, Findings of Fact and Conclusions of Law, No. 09-066, at 77–78 (4th Jud. Dist. Ct. of Rusk Cty. Oct. 16, 2019) (finding of fact, adopted by the CCA, that Dr. Proctor was "far more credible" than Petitioner's experts). The State's suggestion that the TCCA's prior adjudication should assure this Court that the TCCA's current adjudication is sound, without acknowledging the changed factual landscape from that time, is specious.[4]

Finally, the State asserts that, "[w]hile advocating for a 'holistic approach,' Petitioner actually seeks a per se rule that the lower end of the SEM range for the lowest score is dispositive." Br. in Opp. at 35. This is patently untrue. Petitioner's position is that a court's refusal to consider the totality of the evidence of an individual's intellectual functioning—including working memory and processing

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stereotypes of the intellectually disabled" and rejecting Texas's then-legal standard because it relied on such stereotypes).

[4] This adjudication also occurred based only on the pleadings without affording Petitioner any opportunity to present evidence or prove his claim. Had the state court held evidentiary proceedings on Petitioner's intellectual disability claim in 2019, Dr. Proctor's changed opinion would have undoubtedly been discovered at that time, changing the State and state court's representations about his opinion in the 2019 Findings of Fact and Conclusions of Law. However, instead of verifying with its expert that his opinions from nearly a decade prior were accurate, the State simply represented that his opinions from trial were still valid. Indeed, the State continued to rely on Dr. Proctor's pretrial opinion in this Court, even after it knew Dr. Proctor had concluded Petitioner was intellectually disabled under current standards. *See Milam v. Texas*, Respondent's Brief in Opposition, No. 20-6518 (Dec. 21, 2021).

speed—as relevant to an intellectual disability diagnosis violates *Atkins*. Further, Petitioner's argument is that all the experts agree that his FSIQ scores are qualifying and that there is no basis consistent with the controlling law upon which a court could find that he has failed to establish deficits in intellectual functioning.[5] *See* Pet. for Cert. at 27.

[5] In a footnote in its Statement of the Case, the State accuses Petitioner of omitting reference to Dr. Paul Andrews, who was retained by the defense at trial and who administered the pre-trial IQ testing to Petitioner that was relied upon by Petitioner's testifying expert at trial, Dr. Mark Cunningham. Br. in Opp. at 3 n.3. Petitioner did not refer to Dr. Andrews because Petitioner's contention was that four of the five experts who have done a comprehensive evaluation of intellectual disability (i.e. who were asked to evaluate all three criterion) returned a diagnosis. Dr. Andrews was not asked to form an opinion about whether Petitioner is intellectually disabled. Consistent with what he was retained by defense counsel to do, his report reflects that he reached no conclusion about whether Petitioner met the criteria for intellectual disability. In his "Diagnostic Impressions" in his report, under Axis II where an intellectual disability diagnosis would be documented, Dr. Andrews wrote "Deferred." *Ex parte Milam*, Subsequent Application for Post-Conviction Writ of Habeas Corpus, No. 79,322-04, Ex. 4, Report of Dr. Paul Andrews at 7 (Tex. Crim. App. Jan. 12, 2021). Under the DSM-IV-TR, the version of the DSM in effect at the time of Andrews' evaluation, "Diagnosis Deferred on Axis II" indicates "Information inadequate to make any diagnostic judgment about an Axis II diagnosis." DSM-IV-TR at 5. Because Andrews was not asked to make a diagnostic decision—and correspondingly was not provided the requisite information to do so—Petitioner has not included him in the count of experts asked to make a diagnosis.

The State also asserts that neither Dr. Proctor nor the State's other expert, Dr. Edward Gripon, diagnosed Petitioner as intellectually disabled prior to his trial. Br. in Opp. at 3–4 n.3. Petitioner has never made assertions to the contrary. He has relied on the fact that both Dr. Proctor and Dr. Gripon made diagnoses *after* Petitioner's trial. 1 SHRR 43; *Ex parte Milam*, No. 79,322-04, Subsequent Application for Post-Conviction Writ of Habeas Corpus, Ex. 16, Affidavit of Dr. Edward Gripon at 2 (Tex. Crim. App. Jan. 12, 2021).

C. The State's Brief Fails to Demonstrate that the TCCA Adjudicated Petitioner's Adaptive Functioning Consistently with this Court's Precedent.

The State also asserts that Dr. McGarrahan's opinion regarding Petitioner's adaptive functioning was "constitutionally sound." Br. in Opp. at 36. But the State can point to no evidence in the record demonstrating that Dr. McGarrahan evaluated Petitioner's adaptive functioning in a manner consistent with diagnostic criteria or in light of the enumerated traits of the intellectually disabled described in *Atkins*, 536 U.S. at 318. Indeed, regarding Petitioner's arguments that Dr. McGarrahan's assessment omitted any reasoning for her apparent rejection of deficits in the social and practical domains of adaptive functioning—two undisputed components of an intellectual disability evaluation—the State's only response is that "Dr. McGarrahan said she did not reference the practical or social domains 'by title' in her report, . . . suggesting she did intend to reject deficiency in all three domains." Br. in Opp. at 36 (emphasis added).

The State posits that "Dr. McGarrahan's report expounding on only the conceptual domain of adaptive functioning was likely a response to Dr. Proctor's opinion that Petitioner met only that domain." Br. in Opp. at 37 (emphasis added). By the State's own admission, it can only speculate as to why its own expert failed to include any assessment or discussion of two of three domains of adaptive functioning. Moreover, Dr. Proctor was not the only expert to evaluate and opine on Petitioner's adaptive functioning prior to Dr. McGarrahan's evaluation. Dr. Cunningham testified at trial that Petitioner had deficits in all three domains. 53 RR 262. There was

evidence of social deficits in Dr. Gripon's pretrial report.[6] *See, e.g.*, 53 RR 211. Petitioner also proffered evidence from Dr. Jack Fletcher that he had significant deficits in all three domains. *Ex parte Milam*, Subsequent Application for Post-Conviction Writ of Habeas Corpus, No. 79,322-04, Ex. 5, Declaration of Dr. Jack Fletcher at 7–9 (Tex. Crim. App. Jan. 12, 2021). Thus, Dr. Proctor's opinion was just one of several expert assessments of adaptive functioning and does not explain Dr. McGarrahan's failure to assess all three domains in her report.

Dr. McGarrahan offered no contradiction of the evidence of deficits in the social and practical domains in the record. Indeed, she provided no reasoning at all, in either her report or her testimony, for her apparent rejection of adaptive deficits in any domain but the conceptual. Moreover, despite the State's insistence that the TCCA considered all the evidence in the record, Br. in. Opp. at 39–40, the legal conclusions adopted by the TCCA contain only a cursory conclusion that Petitioner did not meet his burden with regard to the social and practical domains. App'x A. at ¶166(d). The state court's legal analysis makes no mention of the other evidence of deficits in the record—including those that correspond closely to the legal standard. App'x A at ¶166. For example, Dr. Gripon found Petitioner to be "very naïve, extremely gullible, [and] easily lead." *See Atkins*, 536 U.S. at 318 (people with intellectual disability are "followers rather than leaders"). The State has never rebutted Dr. Gripon's observations. Similarly, Dr. McGarrahan agreed that her testing revealed that

[6] This report was not provided to Dr. McGarrahan by the State for use in her evaluation. 2 SHRR 107–08. This report was provided to Dr. McGarrahan for the first time by Petitioner's counsel during cross-examination at the evidentiary hearing. 2 SHRR 108–09.

Petitioner has significant executive functioning deficits and deficits in processing information. 2 SHR 48–50, 85, 121. *See Atkins*, 536 U.S. at 318 (people with intellectual disability "often act on impulse rather than pursuant to a premeditated plan" and "have diminished capacities to understand and process information").

Instead, the state court's legal conclusions focused primarily on Petitioner's strength in one area: his language abilities. The state courts' rejection of Petitioner's intellectual disability claim is based almost exclusively on Dr. McGarrahan's contention that Petitioner's verbal abilities show "improvements that would be extremely rare for someone with ID." App'x A at ¶166(b).[7] This is also the position the State urges this Court to endorse. Br. in Opp. at 37 (arguing that this Court should disregard Petitioner's criticism of state court reliance on "Petitioner's strengths in the conceptual domain that would be rare for someone with ID"). Texas's position can be reduced to: Petitioner cannot be exempt from execution because his verbal skills are rarely seen in someone with intellectual disability. That is, the State

[7] The trial court's findings also cite to purported improvements in memory and improvements in academic skills generally. App'x A at ¶166(b). It is unclear what improvements the court is specifically referring to. Dr. McGarrahan likewise did not expound on these purported improvements in her report or her testimony. *See* 2 SHRR at 49. Dr. McGarrahan found that Petitioner had substantial working memory *deficits*, 2 SHRR 36, as well as significant impairment in non-verbal memory. SHRR State Ex. 4 at 9. Likewise, regarding his academic skills, his mathematics skills were significantly deficient. *Id.* The only other academic skills tested related to his verbal or language abilities. *See id.* (noting "language based academic achievement gains"); *id.* at 6 (academic assessment included evaluation of word reading, reading comprehension, spelling, and mathematics). Similarly, testing scores of his *verbal* memory were average to low average. *Id.* at 7. In other words, the only areas of reported improvement, or scores that did not reveal deficits, in academics or memory pertained to one area: language.

contends that Petitioner is not intellectually disabled because of a single area of relative strength, one which even it does not contend definitively rules out intellectual disability under the diagnostic criteria.[8] *See id.* (Petitioner's strengths are "rare" for someone with intellectual disability)*; see also* Br. in Opp. at 15 (noting that the difference between Petitioner's score on verbal skills on his IQ test and his scores in the other areas of intellectual functioning measured by the test are "extremely rare" in the clinical population of individuals with intellectual disability). Nonetheless, it urges this Court to decline review of the state court's rejection of Petitioner's intellectual disability claim on this basis. The State takes this position despite the evidence of deficits that directly correspond to the characteristics of intellectual disability that lower moral culpability. This position is contrary to both legal and diagnostic criteria. *See* Pet. for Cert. at 33–35.

The State defends this position by trying to distinguish this case from *Moore*. *See* Br. in Opp. at 37. ("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 that an expert could not themselves consider all of the evidence."). But Dr. McGarrahan's opinion is important here because her conclusions were adopted by the court and form the sole basis for its conclusion that Petitioner is not intellectually

[8] The State does not allege that Petitioner's verbal skills definitively rule out a diagnosis of intellectual disability because it cannot. Its expert, Dr. McGarrahan, acknowledged that that the DSM-5-TR's definition of intellectual disability does not include an upper limit on isolated areas of strength and that a relative strength in one aspect of an adaptive domain does not exclude an intellectual disability diagnosis. 2 SHRR 123. This is because the diagnostic focus is on deficits in functioning, not strengths. *Id.* at 124.

disabled. Indeed, the legal conclusion adopted by the CCA mirror Dr. McGarrahan's opinion: "Given these improvements shown in Applicant's verbal comprehension skills (VCI index), his math deficits—which coexist within the same conceptual domain—are not sufficient to meet the standards for demonstrating the second prong of the ID requirements." App'x A at ¶166(b).

Finally, the State alleges that "Dr. McGarrahan disagreed with the presumption that, because risk factors exist, she must find Petitioner ID." Br. in Opp. at 38. This was also a legal conclusion adopted by the CCA. App'x A at ¶167(b) ("[T]he existence of [risk] factors does not mandate [an] ID diagnosis."). This is not a position ever taken by Petitioner. Petitioner has consistently argued that Dr. McGarrahan—and then the court—improperly relied on risk factors as alternative explanations for his deficits and reasons to reject a diagnosis. *See* Pet. for Cert. at 35.

Like with Dr. McGarrahan's use of the GAI, the State insists that this Court should defer to her analysis of adaptive functioning, despite the fact it fails to comply the legal and clinical standards this Court has recognized, because Dr. McGarrahan should have the discretion to exercise clinical judgment. App'x A at ¶167(b) ("*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."); Br. in Opp. at 38. This rationale conflates two concepts. Clinical judgment is not the same as clinical standards. And, as articulated above, courts cannot blindly defer to an expert opinion in the name of clinical judgment. Instead, they must

evaluate the expert's opinion under the prevailing legal standard. *See Moore*, 581 U.S. at 22 (Roberts, C.J., dissenting).

CONCLUSION

The State's Brief in Opposition fails to adequately address Petitioner's arguments about how the Texas courts again flouted this Court's precedent in adjudicating Petitioner's intellectual disability claim. For the foregoing reasons, the Court should either summarily reverse the TCCA's judgment or grant certiorari to decide the questions presented.

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