No. 18–9262

IN THE
Supreme Court of the United States

DAVID LEONARD WOOD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

STATE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

David Leonard Wood was convicted and sentenced to death for murdering six young women in 1987. His direct, state habeas and federal habeas appeals were all denied. Shortly before his execution date in 2009, Wood filed a subsequent state habeas application arguing that he is intellectually disabled. The Texas Court of Criminal Appeals (CCA) stayed Wood's execution and remanded the case to the trial court for a hearing pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). At the hearing, Wood presented only three lay witnesses to support his claim and no expert testimony. The State, on the other hand, presented an expert who interviewed and extensively tested Wood and concluded that he is not intellectually disabled, as well as additional evidence and lay testimony supporting that conclusion. The trial court found that Wood is not intellectually disabled because he failed to show sub-average intellectual functioning or adaptive deficits with onset prior to age eighteen. The CCA adopted the trial court's findings.

On March 28, 2017, this Court held in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*) that the CCA could no longer rely on the factors enunciated in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) to determine intellectual disability because the factors are based on superseded medical standards. *Moore* also held that the CCA placed too much emphasis on additional evidence that deviated from prevailing clinical norms. Wood sought reconsideration from the CCA of his *Atkins* claim in light of *Moore I*. The CCA granted reconsideration but determined that *Moore I* would not change the outcome because, notwithstanding the *Briseno* factors, the evidence still clearly showed Wood is not intellectually disabled. Following *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), Wood sought certiorari review. This history gives rise to the following questions:

1. Is certiorari review warranted given that Wood presented neither evidence of sub-average intellectual functioning nor significant evidence of adaptive deficits?

2. Is certiorari review warranted where the CCA determined that the only reliable assessment of Wood's IQ showed that the standard error of measurement (SEM) of the IQ score fell above the cutoff of 70?

3. Do *Moore I* and *II* categorically preclude a reviewing court from considering evidence (1) of adaptive behavior in prison, (2) that a petitioner's behavior is due to a personality disorder, (3) that could even conceivably fall under a *Briseno* factor, (4) of the facts of the crime, and (5) of adaptive strengths in light of a lack of evidence of adaptive deficits?

LIST OF ALL PROCEEDINGS

State v. Wood, No. 58486–171 (171st Jud. Dist. Ct., El Paso County, Tex., Nov. 30, 1992)

State v. Wood, No. AP–71,594 (Tex. Crim. App. Dec. 13, 1995)

Ex parte Wood, No. WR–45,746–01 (Tex. Crim. App. Sept. 19, 2001)

Wood v. Dretke, No. 3:01–CV–2103–L (N.D. Tex. April 4, 2006)

Wood v. Quarterman, No. 06–70027 (5th Cir. Oct. 5, 2007)

Wood v. Quarterman, No. 07–8910 (U.S. April 14, 2008)

Ex parte Wood, No. WR–45,746–02 (Tex. Crim. App. Aug. 19, 2009)

Ex parte Wood, No. WR–45,746–02 (Tex. Crim. App. Nov. 11, 2014)

In re Wood, No. 14–11374 (5th Cir. May 12, 2016)

Ex parte Wood, No. WR–45,746–02 (Tex. Crim. App. Dec. 12, 2018)

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INTRODUCTION

David Leonard Wood is a serial killer convicted and sentenced to death for the 1987 murders of six young women whose decomposed bodies were found in the desert area just northeast of El Paso, Texas. The crime remained unsolved for several years until Wood—who was subsequently convicted and sentenced to fifty years imprisonment for sexual assault—bragged to a cell mate that he was the "desert killer."

Before his execution date in 2009, Wood filed a subsequent state habeas application arguing that he is intellectually disabled under *Atkins v. Virginia*. The CCA stayed Wood's execution and remanded the case to the trial court for an *Atkins* hearing. At the hearing, Wood presented only three lay witnesses—his sister, a childhood friend, and a school teacher—and no expert. The State presented an expert, numerous exhibits, and several lay witnesses. Following the hearing, the trial court found that Wood failed to demonstrate sub-average intellectual functioning or deficits in adaptive behavior. The CCA adopted the trial court's findings.

After this Court decided *Moore I*, Wood requested the CCA to reconsider his *Atkins* claim. The CCA granted reconsideration but concluded that Wood was not entitled to relief because even after excluding findings relying on the *Briseno* factors, he still could not show that he is intellectually disabled. In *Moore II*, which this Court decided after the CCA issued the opinion below, this Court held that the CCA made some of the same errors identified in *Moore I*. *Moore II*, 139 S. Ct. at 670–72.

Here, Wood claims that the CCA made a similar mistake as it did in *Moore II*—that it failed to apply *Moore I* and continued to rely on evidence considered improper in *Moore II.* But Wood's argument fails for several reasons.

First, unlike Moore, Wood never presented any reliable evidence of sub-average intellectual functioning. As stated, Wood presented no expert at the *Atkins* hearing, despite having the time and resources to do so. Instead, he relied on old IQ scores from tests performed by deceased experts. Thus, there was no underlying data or explanation for how they arrived at their scores or any indication that they performed effort testing. In contrast, there was significant evidence showing Wood is not intellectually disabled. The State presented testimony from Dr. Thomas Allen, who conducted extensive testing, an evaluation of Wood, and a review of the entire record, concluding that Wood is not intellectually disabled. Dr. Allen found Wood to have an overall IQ of 75, which was likely an artificially low score because effort testing revealed that Wood was malingering. *See* Section I, B, 1–2, *infra.*

Second, regarding his IQ scores, Wood argues that courts must account for variability in the SEM, even though the SEM itself accounts for variability of a "fixed" IQ score. In other words, he essentially argues a SEM should be applied to the SEM. But this Court has never announced such a requirement. *See* Section I, B, 3, *infra.*

Third, unlike Moore, Wood has never satisfied the adaptive-deficits prong. As stated, Wood presented only three lay witnesses at the hearing, none of whom provided any substantial evidence of adaptive deficits. On the other hand, Dr. Allen concluded that, in his professional judgment, Wood does not have adaptive deficits.

The State also presented additional substantial evidence showing Wood does not have adaptive deficits. *See* Section II, B–D, *infra.*

Fourth, Wood's argument is based on a misinterpretation of *Moore I* and *II.* For instance, this Court held that the CCA erred by emphasizing adaptive strengths over adaptive deficits, giving too much weight to adaptive improvements in prison without corroborative evidence, and relying on the *Briseno* factors. *Moore I*, 137 S. Ct. at 1049–53; *Moore II*, 139 S. Ct. at 670–72. Wood now claims that because the trial court and CCA considered his adaptive strengths, prison behavior, and any other evidence that could even conceivably fall under a *Briseno* factor, their decisions run afoul of *Moore I* and *II.* But this Court did not hold that consideration of this evidence was categorically improper, only that placing *undue emphasis* on such evidence in Moore's case was unconstitutional. Neither case can be read to categorically prevent consideration of this evidence. *See* Section II, C, *infra.*

Finally, the facts of Wood's serial murders belie any notion that he is intellectually disabled, and acknowledging this obvious fact is not barred by *Moore I* and *II.* *See* Section II, A, *infra.* For these reasons, the Court should deny the petition.

STATEMENT

I. Facts of the Crime

The federal district court summarized the relevant facts of the crime as follows:

> This case stems from the disappearances of six women from the El Paso, Texas area between May 13, 1987 and August 27, 1987. Between September 4, 1987 and March 14, 1988, the bodies of these women were found buried in shallow graves in the same desert area northeast of El Paso. Five of the bodies were located in the same one by one-half mile area; the sixth was three-quarters of a mile away. All of the bodies were approximately 30 to 40 yards from one of the dirt

roadways in the desert. Four of the bodies were in various states of undress, indicating that the killer had sexually abused them. Five of the victims were seen by witnesses on the day of their disappearance accepting a ride from a man with either a red Harley-Davidson motorcycle or a beige pickup truck, matching the two vehicles owned by [Wood]. [Wood's] girlfriend [Joanne Blaich] testified that he owned a burnt orange blanket and some shovels, all of which he kept in the back of his pickup truck. A forensic chemist later testified at trial that orange fibers found on the clothing of one of the victims matched orange fibers taken from a vacuum cleaner bag which [Wood] and his girlfriend had left in their old apartment.

[Wood's] cell mate, Randy Wells, testified that [Wood] told him about the murders, describing his victims as topless dancers or prostitutes. [Wood] told him that he would lure each girl into his pickup truck with an offer of drugs, drive out to the desert, tie her to his truck, and dig a grave. Next, he would tie the victim to a tree and rape her. Another cell mate, James Carl Sweeney, Jr., testified at [Wood's] trial that Wood had shown him numerous clippings about the El Paso, Texas murders and had confessed to him that he was the one who had committed the murders.

The testimony of Judith Kelly ("Kelly") regarding an extraneous criminal offense committed by [Wood] played a crucial role at the guilt phase of the trial and in the opinion of the Court of Criminal Appeals. Kelly, a prostitute and heroin addict, testified that in July 1987 she had been walking outside of a convenience store in the northeast part of El Paso when a man identified as Wood, and matching his description, asked if she needed a ride. She accepted his offer but Wood did not take her home as directed. Instead, he stopped at an apartment complex and went inside. When he returned, a piece of rope was hanging from one of his pockets. [Wood] drove northeast of town toward the desert, and after driving around the area for a period of time, stopped the truck, got out, and ordered Kelly out as well. She saw him get a "brownish red" blanket and shovel from the back of his truck. After tying her to the front of his truck with the rope, [Wood] proceeded to dig a hole behind some bushes. Ten or fifteen minutes later he returned with the blanket and began ripping her clothes and forcing her to the ground. Upon hearing voices, [Wood] ordered Kelly to get back in the truck. Wood drove to a different location in the desert where he stopped his truck again, ordered Kelly out, spread the blanket on the ground, and forced the victim to remove her clothes. He gagged her, tied her to a bush, and raped her. Immediately afterwards, [Wood] stated that he heard voices, and hastily threw his belongings back into the truck and drove away, leaving Kelly

naked in the desert. His final words to her were, "[A]lways remember, I'm free."

Wood v. Dretke, No. 3:01–CV–2103–L (N.D. Tex.), Docket Entry (DE) 34 at 2–4.

II. Facts Pertaining to Punishment

A. State's case

During the punishment phase of trial, the State presented extensive evidence of Wood's future dangerousness. First, the State showed that Wood had been previously convicted of indecency with a child, rape of a child, and sexual assault. For those crimes, he received five, twenty, and fifty-year sentences, respectively. 71 RR 7593–98.[1]

Virginia Staples, who was a prostitute, testified that on September 19, 1987, Wood offered her money for sex while she was standing on a street corner. Eventually, she got into Wood's truck and told him to go to the Mesa Inn Motel. However, Wood did not drive to the motel; instead he pulled a knife on Staples and told her "I'm going to fuck you, stab you and throw you in the river." Wood was laughing at the time. When Wood drove by the river, Staples jumped out while the truck was still moving and injured herself. Staples also testified that, at one point, Wood hit her in her eye with the back of his hand. 71 RR 7601–07.

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[1] "RR" refers to the reporter's record of transcribed trial proceedings, preceded by volume number and followed by page number(s). "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, followed by page number(s). "1 SHCR" refers to the state habeas record, followed by page number(s). "2 SHCR" refers to the state habeas court's findings and conclusions, followed by page number(s). "R 81" refers to Dr. Thomas Allen's report—admitted as Exhibit 81 at the *Atkins* hearing—followed by page number(s). "SHRR" refers to the reporter's record of the state habeas *Atkins* hearing, preceded by volume number and followed by page number(s).

Christi LeClaire testified that she came into contact with Wood on March 10, 1980. At the time, LeClaire was only thirteen-years old. While walking home one day from a gymnastics class, she thought she saw a friend behind her. But the person grabbed her. LeClaire tried to get away from the man, but he said to stop fighting or he would beat her up. The man told her that someone had broken the windshield of his car, that it cost $110 to fix, and that he was going with LeClaire to her house so that her family could pay for his windshield. When they walked underneath a bridge, the man raped her. LeClaire identified Wood as the assailant. 71 RR 7612–29.

Joan Szymblowski Capps, testified that she came into contact with Wood on August 30, 1976, when she was twelve-years old. Capps was playing with a friend of hers when Wood approached her and asked her to help him find his dog. Wood eventually grabbed and brutally raped her. 71 RR 7632–37.

Dora Morales Padilla testified that in March or April 1987, Wood sexually assaulted her. Padilla was twenty-three-years of age and was working in the New Yorker Bar. She got a ride home with Blaich and Wood at 2:30 a.m. on the night in question. They drove to some apartments on Montana Street, and Blaich and Wood went inside. Wood came back to the truck alone and started driving. He offered Padilla drugs and verbally demeaned her. At one point, Wood pulled off to the side of the road and began attacking Padilla. She tried to get away, but he caught her and tied her up in the truck. Wood also had a pocketknife and threatened her with it. He then pulled off Padilla's clothes and raped her. He kept hitting her during the assault. Eventually, Padilla made it home by stopping a taxicab. 71 RR 7640–51.

Finally, Dr. Richard Coons, a psychiatrist, testified that given the facts of the crime and the evidence presented by the State, he believed Wood constituted a future danger to society. 72 RR 7758–63.

B. Defense's evidence

Wood's father, Leo Wood, testified that he had a rocky marriage with Wood's mother. Wood's mother was always sick; she was also under psychiatric care. She was not the motherly type and not a good wife. Wood's mother had shock treatments and was dependent on prescription drugs. She was also institutionalized a couple of times. The children lived from place to place and were sometimes in foster homes. Leo Wood claimed that Wood's sister Deborah was essentially the mother figure. He described Wood as hyperactive in grade school, but outside of school he was normal. Leo Wood testified that they tried to use medication on him, but stated he was probably over medicated. Wood had a learning disorder, but he was not "dumb" or "stupid." 72 RR 7764–77.

Debbie Galvan, Wood's sister, testified that she cared much of the time for her siblings because of her mother's illnesses and because their father was a workaholic. The children were forced to take care of their mother instead of vice versa. She recalled that Wood was on Ritalin to control his hyperactivity. He never made good grades, but she described Wood as being talented with his hands. Galvan recalled that he was placed in a foster home twice. She further described their father as being very strict and a perfectionist. Wood ran away from home one year when he was in the fourth grade because he got a bad report card and believed he was going to be

punished. But other than his hyperactivity and school problems, Galvan said Wood was no different than any other boy. 72 RR 7678–86.

Michael Maxwell testified that he once employed Wood. Wood worked for Maxwell for approximately six to eight months. Wood did yard work, cleaned the pool, hung ceiling fans, and generally performed light maintenance. Maxwell allowed Wood into his house, and Wood was constantly around his family. Maxwell trusted Wood around his family, and he was polite toward them. Maxwell described Wood as a slow learner and "not the smartest guy out there." He sometimes had to correct Wood's work. Nevertheless, Wood was mild and calm. 72 RR 7688–97.

Finally, Donald Lunde, a clinical professor of psychiatry at Stanford medical school—but now long deceased—testified. He examined Wood and found that Wood has a long history of organic brain deficiency and attention deficit disorder associated with minimal brain damage. Dr. Lunde testified that Wood has a somewhat below-average intelligence; his IQ runs on the average about 68. The fact that Wood had caseworkers or doctors back when he was a child indicated serious problems, and another problem was his lack of maternal support combined with a dysfunctional family. It was recommended at some point that Wood be hospitalized. Nevertheless, Dr. Lunde believed with a high degree of certainty that Wood would not present a threat of any kind to other persons such as inmates or guards. His rendered this opinion because Wood was not violent or aggressive when he was imprisoned before. 72 RR 7698–7731.

III. Trial, Direct Appeal, and Postconviction Proceedings

Wood was convicted and sentenced to death for the murders of Ivy Williams, Desiree Wheatley, Karen Baker, Angelica Frausto, Rosa Maria Casio, and Dawn Smith during different criminal transactions but pursuant to the same scheme or course of conduct. CR 3, 297–300; Tex. Penal Code § 19.03(a)(7)(B). Wood appealed his conviction and sentence to the CCA, which affirmed in an unpublished opinion. *Wood v. State*, No. 71,594 (Tex. Crim. App. 1995).

Wood then filed a state application for writ of habeas corpus in the trial court. 1 SHCR 17. The trial court entered findings of fact and conclusions of law recommending that Wood be denied relief. 2 SHCR 1–6. The CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Wood*, No. 45,746–01 (Tex. Crim. App. September 19, 2001) at cover and Order.

Wood filed a federal habeas petition on May 6, 2002, and subsequently filed an amended petition on October 2, 2002. DE 10 & 16. A magistrate issued findings and a recommendation that Wood's petition be denied. DE 26. The district court adopted the magistrate's findings and denied Wood federal habeas relief. DE 34 & 35. Wood then filed an application for a certificate of appealability (COA) in the Fifth Circuit, but the appellate court denied the application in a published opinion. *Wood v. Quarterman*, 503 F.3d 408 (5th Cir. 2007). This Court denied Wood certiorari review. *Wood v. Quarterman*, 128 S. Ct. 1874 (2008).

Two days before his scheduled execution, Wood filed a subsequent state habeas application and motion for stay of execution in the CCA, contending that he is

intellectually disabled and that his execution would violate the Eighth Amendment. The CCA determined that Wood's application satisfied the requirements of Texas Code of Criminal Procedure, article 11.071 section 5(a), stayed Wood's execution, and remanded the case to the trial court for an *Atkins* hearing. *Ex parte Wood*, No. 45,746–02, 2009 WL 10690712 (Tex. Crim. App. 2009).

After a lengthy delay, the state trial court held the hearing on October 11–14, 2011, and December 6–7, 2011, before Judge Bert Richardson. *See* Trial Court's Findings and Conclusions, hereafter "Petition, Appendix C" at 7. On October 1, 2013, Judge Richardson submitted findings of fact and conclusions of law that Wood is not intellectually disabled and that habeas relief should be denied. *Id.* at 96. On November 26, 2014, the CCA adopted the trial court's findings and denied Wood habeas relief. *Ex parte Wood*, No. 45,746–02, 2014 WL 6765490 (Tex. Crim. App. 2014); Petition, Appendix B. Wood then moved for authorization from the Fifth Circuit to file a successive petition to litigate his *Atkins* claim in federal court. The Fifth Circuit denied Wood's motion. *In re Wood*, 648 F. App'x 388 (5th Cir. 2016).

Following this Court's decision in *Moore I*, Wood filed a suggestion for reconsideration of his *Atkins* claim in the CCA. The CCA granted Wood's request but concluded that *Moore I* would not change the disposition of Wood's claim and denied relief.[2] Specifically, the CCA held:

> Striking [the *Briseno*] findings 280 through 322 would bring the habeas court's findings in compliance with the *Moore* decisions, and given the extensive nature of the fact finding contained in findings 1 through 279,

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[2] Wood has also filed several motions for DNA testing and other unrelated motions currently pending before the trial court. *Wood v. State*, No. 58486–171 (171st Dist. Ct., El Paso County, TX.).

> there is no reasonable likelihood that the habeas court's recommendation to deny relief would change, nor would there be any support for such a change in light of those findings.

Ex parte Wood, No. WR–45,746–02, 568 S.W.3d 678, 682 (Tex. Crim. App. December 12, 2018), hereafter "Petition, Appendix A" at 3.

REASONS FOR DENYING THE PETITION

This case 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 jurisdictional discretion, and will be granted only for "compelling reasons." Wood advances no such special or important reason in this case, and none exists. Wood strives to present this case as *Moore* redux, but there are substantial factual differences between this case and *Moore*. Here, the CCA correctly applied *Moore I* to the facts of this case. Petition, Appendix A at 1–3. Wood has simply failed to demonstrate he has sub-average intellectual functioning or adaptive deficits with onset prior to age eighteen, even in light of *Moore I* and *II*.

Wood claims that the CCA merely excised the *Briseno* factors from the trial court's findings while leaving intact the other findings, which he argues still run afoul of *Moore I* and *II*. He contends that the CCA made the same mistakes this Court found in *Moore II*; in other words, that the CCA continued to rely on evidence—or give weight to evidence—it should not have.

But Wood's petition is premised on an incorrect interpretation of *Moore I* and *II*. For instance, Wood claims that because *Hall*[3] and *Moore I* held intellectual

[3] *Hall v. Florida*, 572 U.S. 701 (2014).

functioning cannot be premised on a "fixed" score, *Hall*, 572 U.S. at 712–14; *Moore I*, 137 S. Ct. at 1049, the CCA erred in relying on the IQ score obtained by Dr. Allen because he found the SEM to be 71 to 80, which is only one point above the cutoff of 70. This boils down to an argument that the SEM cannot be fixed either, Petition at 24–30, but neither *Moore I* nor *Moore II* supports that argument.

Regarding adaptive deficits, Wood argues that *Moore I* and *II* stand for the following: (1) because courts cannot overemphasize perceived adaptive strengths over adaptive deficits, *Moore I*, 137 S. Ct. at 1050, any emphasis on adaptive strengths is forbidden; (2) because clinicians guard against relying on improved adaptive strengths in prison, *id.*, any discussion of adaptive behavior in prison is not permitted; (3) because the CCA improperly *required* Moore to show his adaptive deficits were not related to a personality disorder, *id.* at 1051, any explanation of behavior as resulting from such a disorder is erroneous; (4) because the CCA cannot rely on the *Briseno* factors, which are based in part on lay stereotypes of intellectual disability, *id.* at 1051–52, any assessment of lay testimony regarding intellectual functioning is impermissible; and (5) because the seventh *Briseno* factor is whether the crime involved a level of forethought and planning, *Moore II*, 139 S. Ct. at 671, any discussion of the facts of the criminal offense is not allowed. Petition at 10–24.

Wood is mistaken. At no point did this Court state in *Moore I* and *II* that the above factors cannot, as a categorical matter, ever be considered. Rather—as discussed below—this Court held that the *Briseno* questions were impermissible and that courts should not place *undue emphasis* on the other evidence. Moreover, *Atkins*

itself refutes the argument that a court cannot assess the facts of the crime in analyzing intellectual disability.

Ultimately, what distinguishes this case from *Moore I* and *II* is that Moore presented substantial evidence of sub-average intellectual functioning and adaptive deficits, according to the trial court. The CCA rejected that finding based on the errors discussed in *Moore I* and *II*. Here, Wood presented only three lay witnesses at his *Atkins* hearing and never established, according to both the trial court and CCA, that he is intellectually disabled. Given Wood's lack of evidence and misinterpretation of *Moore I* and *II*, the CCA's rejection of his claim is proper, and he has failed to demonstrate any grounds for granting certiorari review.

I. Wood's IQ Scores Do Not Reveal Sub-Average Intellectual Functioning.

A. Intellectual-Disability Standard

"[T]he Constitution places a substantive restriction on the State's power to take the life of a[n] [intellectually disabled] offender." *Atkins,* 536 U.S. at 321. Recognizing that not all offenders who claim intellectual disability "will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus," this Court charged the states to develop "appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317. As stated in *Atkins*:

> The [AAMR] defines [intellectual disability] as follows: "[*Intellectual disability*] refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care,

> home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. [Intellectual disability] manifests before age 18."

Id. at 309 n.3 (internal citations omitted).

The CCA has likewise adopted the three-pronged criteria in the Diagnostic and Statistical Manual, 5th edition (DSM–5) for finding intellectual disability: (A) deficits in general mental abilities, (B) impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally-matched peers, and (C) onset during the developmental period. *Ex parte Moore,* 548 S.W.3d 552, 560 (Tex. Crim. App. 2018). This Court reiterated that it considers this to be the appropriate test for intellectual disability. *Moore II*, 139 S. Ct. at 668.

With regard to IQ scores, overall scores cannot operate as a strict cutoff. Rather, the score must be considered along with the SEM for the test. *Hall*, 572 U.S. at 711–12. If the low end of the SEM is at 70 or below, then an assessment of adaptive functioning must be considered. *Id.* at 723; *Moore I*, 137 S. Ct. at 1049.

Wood's claim also hinges on *Moore I* and *II*. *Moore I* faulted the CCA for refusing to consider all evidence suggesting sub-average intellectual functioning. This Court reversed the CCA's rejection of Moore's *Atkins* claim raised on postconviction review, finding the CCA (1) refused to account for the SEM when considering borderline IQ scores, in violation of *Hall*; (2) overemphasized adaptive strengths over deficits; (3) required Moore to demonstrate that his adaptive deficits were not related to a risk factor or a personality disorder; and (4) used the seven

Briseno factors to evaluate Moore's adaptive functioning, which depart from "current medical standards." *See Moore I,* 137 S. Ct. at 1049–52.

After remand, the CCA once again determined that Moore was not intellectually disabled. This Court reversed finding "too many instances in which, with small variations, it repeats the analysis we previously found wanting." *Moore II*, 139 S. Ct. at 670. In particular, the Supreme Court criticized the CCA for (1) "[relying] less upon the adaptive *deficits* to which the trial court had referred than upon Moore's apparent adaptive *strengths*"; (2) "[*relying*] heavily upon adaptive improvements made in prison"; (3) concluding that Moore failed to show the cause of his "deficient social behavior" was related to mental deficits rather than emotional problems; and, in particular, (4) for continuing to use the *Briseno* factors in reaching its conclusion. *Id.* at 670–72 (emphases in original).

Here, Wood is claiming the same: that upon reconsideration, the CCA made similar errors when it re-evaluated his *Atkins* claim. There are, however, dispositive differences between these cases.

B. The CCA's decision does not conflict with *Moore I.*

In *Moore I*, this Court reiterated that, per *Hall*, "where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits," adaptive deficits must then be considered. 137 S. Ct. at 1049–50. Here, the CCA addressed the IQ portion of the analysis as follows:

> In findings 1 through 73, the habeas court discussed [Wood's] IQ tests. His IQ scores ranged from 64 to 111. However, the only test that the habeas court could conclude was comprehensive and conducted properly was the one conducted by Dr. Thomas Allen in 2011. This test yielded a

> full scale IQ score of 75, with a measurement error range of 71 to 80 (-4, +5). Because the low end of the error range is above 70, [Wood's] score does not meet the first prong of the DSM–5 test for intellectual disability (deficits in general mental abilities).

Petition, Appendix A at 2. The CCA also noted that, per Dr. Allen, the SEM is not automatically plus or minus five; rather it is calculated for practitioners in the manual and depends on statistics. *Id.* at 2 n.9. Wood complains that the CCA's decision is irreconcilable with *Hall* and *Moore I* because the CCA disregarded other scores that were lower and focused on a "fixed" IQ score.

1. Wood's IQ scores do not indicate he is intellectually disabled.

In this case, Wood has six documented IQ scores, ranging from 64 to 111, none occurring before age eighteen. Petition, Appendix C at 9–10. The earliest score was obtained by TDCJ in 1977 when Wood was nineteen years old, and that score was his highest: 111. *Id.* The lowest score was obtained approximately three years later, in 1980, by Dr. Dale Johnson, who administered the first version of the Wechsler Adult Intelligence Scale (WAIS) to Wood pursuant to a court-ordered evaluation for competency to stand trial on two counts of sexual assault. *Id.* Wood obtained a verbal IQ of 67, performance IQ of 64, and full scale IQ of 64. *Id.* However, Dr. Johnson also concluded that Wood had a potential maximum IQ of 80. *Id.* at 12 (FF 9). Less than a month later, Dr. Richard Walker performed a short-form WAIS on Wood and obtained a verbal IQ of 75, performance IQ of 69, and full scale IQ of 71. *Id.* at 9–10. When Wood entered TDCJ, in August of 1980, his IQ was listed as 101, although the record contains no information about the kind of intelligence test performed. *Id.*

When Wood entered prison for a third time in 1988, TDCJ listed his IQ as 67, but again there is no information about the type of IQ test performed. *Id.* at 14 (FF 16).

The state court determined that Dr. Johnson's report and obtained IQ score of 64 were not credible. *Id.* at 12–13 (FF 11–13). Dr. Johnson concluded that Wood's score placed him in the high-end range of intellectual disability and indicated that Wood was incompetent to stand trial. *Id.* at 12 (FF 10). But Dr. Johnson's assertion is contradictory because "if [Wood] is capable of achieving an IQ score of 80, then he cannot possibly be [intellectually disabled], regardless of his obtained IQ scores." *Id.* (FF 11). The court also found that (1) Wood failed to supply the court with the tests, subtests, or raw data forming the bases of Dr. Johnson's conclusions; (2) there is no indication Dr. Johnson conducted any effort testing to determine if Wood was malingering; (3) Dr. Johnson is no longer living and, thus, was not able to testify about the specific testing conducted; (4) Dr. Johnson's statement that Wood was capable of a maximum score of 80 indicates that Wood was not giving his best effort; and (5) the obtained IQ score conflicts with others in the record demonstrating Wood's IQ is not in the intellectually-disabled range. *Id.* at 12–13 (FF 6 & 11).

The court found the other IQ scores, with one exception, to be normal, including the score of 111 to be "bright normal." *Id.* at 13–14 (FF 15 & 16). Although information is lacking about the TDCJ scores and they might have a greater range of error, they do not indicate sub-average intellectual functioning. Further, any "wobble" in error measurement could not be so large that a person's IQ could range from "mild retardation" to "bright normal" because even a screening device taps forms

of intelligence. *Id.* at 14 (FF 17 & 18). Importantly, the court found a significant problem with Wood's claim, addressed via Dr. Allen's testimony: although it is quite possible for a person to obtain a low IQ score due to lack of effort, a person who suffers from intellectual disability cannot "fake" a high IQ score. *Id.* (FF 16).

Regarding Dr. Walker's testing, the prorated IQ was 71, but Dr. Walker determined that the score was more consistent with the estimated potential IQ of 80. *Id.* at 15 (FF 21). Dr. Walker twice noted that Wood's "motivation was less than optimal." *Id.* (FF 23). The court also found Dr. Walker's IQ testing and score to be suspect due to practice effects, no effort testing, sub-optimal effort, and lack of consistency with TDCJ scores. *Id.* (FF 25). "Nonetheless, the testing does not indicate that [Wood] has significantly sub-average intellectual functioning." *Id.*

Dr. Allen was the only expert to testify at the hearing, and the court found him to be "credible, unbiased, and professional." *Id.* at 15–16 (FF 26–29). Dr. Allen performed testing on Wood in order to assess his intelligence, achievement in school, and malingering. *Id.* (FF 30). The court found as follows:

> The Court finds that on the [WAIS, 4th ed. (WAIS–4)], [Wood] obtained a verbal comprehension score of 80, a perceptual reasoning score of 86, and a full scale score of 75. There was substantial scatter in the subtest scores. The full scale score is relevant to *Atkins*, and the range of error was 71 to 80. These scores place [Wood] in the 5th percentile of intellectual functioning and likely reflect poor effort. The full scale score of 75 does not meet the first prong of the diagnostic criteria for [intellectual disability]. . . .
>
> The Court finds that [Wood's] verbal comprehension scores of 80 and 86 are more closely tied to [Wood's] working IQ. These scores are well above the second percentile, which is necessary for a diagnosis of [intellectual disability].

Id. at 17 (FF 35 & 36). As stated, Wood presented no expert at the hearing; instead he chose to rely on the old WAIS scores while attempting to impeach Dr. Allen, who "agreed with very little, if any of [Wood's] assertions." *Id.* at 11–13 (FF 5, 14).

The court then found that Wood "has failed to meet his burden of demonstrating significantly sub-average intellectual functioning." *Id.* at 18 (FF 39). Likewise, the CCA—which discounted all other scores as invalid—found Wood failed to meet the first prong for intellectual disability based on Dr. Allen's testing. Petition, Appendix A at 2.

2. There is substantial evidence that Wood's lower scores were due to malingering.

Dr. Allen conducted two tests on Wood to assess his effort: the Green's Word Memory Test (WMT) and the Test of Memory Malingering (TOMM). Effort testing is necessary "because (1) capital defendants have an external incentive to perform poorly on IQ tests; (2) it is not difficult to malinger on an IQ test; (3) as effort declines, so do IQ scores; and (4) clinical judgment is not accurate in assessing effort because many factors can influence judgment." Petition, Appendix C at 18 (FF 40). The WMT revealed that Wood demonstrated poor effort and that his poor effort was not due to genuine memory problems. *Id.* at 19–20 (FF 47–49). For instance, the court found that Wood's effort scores were worse than those in numerous comparison groups, such as elderly patients with advanced dementia, children with developmental disorders, and children with autism and IQs of 63. *Id.* at 20 (FF 50). Wood's scores most closely matched, but were even lower than, comparison groups specifically asked to *fake* impairment. *Id.* (FF 51). A mathematical calculation called the "easy/hard mean

difference" determined that Wood's scores reflected poor effort and were not due to memory problems or cognitive impairments. *Id.* at 20–21 (FF 52). The WMT results "strongly suggest" that Wood was malingering on the WAIS–4 and that his IQ score of 75 is lower than his true intelligence. *Id.* at 21 (FF 53). Wood's scores on the TOMM also indicated poor effort, as he scored worse than persons with mild intellectual disability. *Id.* at 21–22 (FF 57 & 59). Dr. Allen also testified about additional evidence in the record indicating that Wood "has attempted to be deceitful about his intellectual capacity." *Id.* at 22–24 (FF 61–64, 66–67).

In sum, the court found that Wood was malingering during the WAIS–4 testing; that his IQ score of 75 was likely not valid; that his true IQ is probably closer to scores in the 100 range; and that Wood could not have obtained a score of 111 on a TDCJ screening device if his IQ is actually 64 because, although some variation will occur, a 47-point disparity is too great. *Id.* at 24 (FF 71 & 72). The trial court agreed with Dr. Allen's conclusion that Wood's IQ score does not meet the criteria for intellectual disability due to his poor effort, inconsistencies in the scores as a whole, and lack of adaptive deficits. *Id.* at 25 (FF 73). The CCA also agreed that the "strong evidence of malingering" supported the finding that Wood cannot meet the first prong for intellectual disability. Petition, Appendix A at 2.

3. Wood's arguments about the IQ scores are unavailing.

Wood ignores most of these factors in discussing IQ. Instead, as shown, he claims that the CCA's acceptance of Dr. Allen's score "cannot be reconciled with *Hall* and *Moore I*," and he presented to the state court an affidavit from another expert,

Dr. Marc Tasse, who reviewed the old WAIS scores and determined they likely indicated significant deficits in intellectual functioning. Petition at 28–29. But *Hall* and *Moore I* were concerned with IQ scores where the low end of the SEM places an individual at or below 70. *Hall*, 572 U.S. at 711–12; *Moore I*, 137 S. Ct. at 1049. Dr. Allen's score did not. Moreover, in *Moore I*, this Court criticized the CCA for improperly "narrowing" the SEM based on Moore's academic failures and depressed mood when taking the test. 137 S. Ct. at 1047, 1049. The same did not transpire in this case; neither Dr. Allen, the trial court, nor the CCA "narrowed" the SEM. And while Dr. Allen and the trial court found Wood's effort to be a substantial factor in his score, neither *Hall* nor *Moore I* discounted the significance of malingering that was clearly in play with Wood.

Wood points to the supposed reliability of the earlier WAIS scores by Drs. Johnson and Walker, while discounting the TDCJ tests, stating: "It is inappropriate to give such inscrutable test scores any diagnostic weight, especially in the context of determining a person's eligibility for execution." Petition at 24–27. But the same can be said of the WAIS tests because there is no data about how those results were obtained, and there is no indication either doctor performed effort testing. Petition, Appendix A at 5 ("The habeas court's observations in this regard seem to place weight on the score of 75 not because of factors "unique" to the test-taker, but because the methodology for that test was the most scientifically reliable.") (Newell, J., concurring). Dr. Allen, moreover, did not simply opine that Wood was malingering; he administered standardized tests that statistically demonstrated poor

effort on Wood's part. Wood fails to address the effort testing, and he likewise fails to mention that both Drs. Johnson and Walker believed Wood was capable of achieving an IQ score of 80, indicating that their obtained scores were also the product of poor effort.[4] Essentially, Wood asks this Court to accept his WAIS scores at face value despite the lack of underlying data and sub-optimal effort.

Wood also points to Judge Alcala's dissent in the lower court, in which the judge argued that the majority "inappropriate[ly]. . . decide[d] that someone is not intellectually disabled by using a strict cutoff score taken from a cherry picked IQ test." Petition, Appendix A at 6 (Alcala, J., dissenting); Petition at 27–28. But the majority did not "cherry pick" a score—it did not discount the lower WAIS scores while accepting the validity of the highest TDCJ scores. Rather, the court specifically held that Dr. Allen's test was "the only test with any validity" because it was the only one the trial court could conclude was "comprehensive and conducted properly." Petition, Appendix A at 2. The CCA focused solely on Dr. Allen's score because he was the lone expert who provided underlying data, a thorough explanation for how he arrived at the scores, and effort testing. Implicitly, Judge Alcala uncritically assumes the validity of the lower WAIS scores despite the absence of facts or data establishing how those scores were obtained.

[4] Wood claims the WAIS scores are reliable in part because they predate *Atkins* and, thus, any incentive by Wood to perform poorly was lacking. Petition at 28. But Wood clearly had some incentive other than *Atkins* to perform poorly because (1) both doctors found his effort less than optimal, and (2) they assessed his competence to stand trial, which can work to a defendant's benefit depending on the conclusion reached.

Wood points to Judge Alcala's discomfort that the low end of the SEM here is one point above cutoff. But Wood mischaracterizes this as a "strict cutoff score" or "fixed" when it is not. Petition at 26, 29. The SEM in this case hardly runs afoul of *Hall* or *Moore I*—even if it is one point above 70—because neither case held that the SEM cannot be a strict range. Rather, the SEM is "a statistical fact, a reflection of the inherent imprecision of the test itself" and "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Hall*, 572 U.S. at 713. Thus, *a fixed IQ score itself* cannot be determinative of intellectual functioning without incorporating the SEM. Wood now seems to be saying the SEM cannot be fixed either; in other words, a SEM must be applied to the SEM, at least in this case. But neither *Hall* nor *Moore I* can be interpreted in that fashion without rendering the SEM meaningless. There must be a cutoff point, and this Court has defined it as the range provided by the SEM, not a range within a range. *Cf. Roper v. Simmons*, 543 U.S. 551, 574 (2005) (regarding age and the eligibility for capital punishment, 18 marks the cutoff because "a line must be drawn" even though "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18" and "some under 18 have already attained a level of maturity some adults will never reach").

Ultimately, Wood's argument falters because he had the chance to rebut Dr. Allen's findings with his own expert and he chose not to present one. Instead, he decided to rely on dated scores lacking any underlying data or explanation, while

unsuccessfully attempting to impeach Dr. Allen. Given the absence of evidence, Wood has failed to demonstrate sub-average intellectual functioning.[5]

II. Wood Has Failed to Demonstrate Deficits in Adaptive Functioning.

Woods's complaint about the CCA's decision regarding adaptive deficits is the same as that in *Moore II*: that the CCA and trial court overemphasized adaptive strengths over adaptive deficits, and the *Briseno* factors continued to "infect" the state court's decision even though it removed them. He also complains that the CCA left intact evidence of Wood's adaptive improvements in prison and explained away his school difficulties as stemming from emotional problems. Petition at 10–24. These arguments are flawed for the reasons addressed below. But ultimately they fail because Wood presented almost no evidence of adaptive deficits. As the concurring opinion below noted, "[W]e cannot rely solely upon the testimony of a fourth grade teacher, a childhood friend, and [Wood's] sister to determine adaptive deficits because that approach is built upon lay stereotypes of the intellectually disabled." Petition, Appendix A at 5 (Newell, J., concurring). A review of the facts of the crime and criteria listed in the DSM–4—the version of the DSM in use at the time of the hearing—demonstrates that Wood's claim lacks merit.

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[5] An additional flaw with Wood's claim is that, as shown, both *Hall* and *Moore I* hold that where the low end of the SEM is 70 or below, an assessment of adaptive deficits must occur. *Hall*, 572 U.S. at 723; *Moore I*, 137 S. Ct. at 1049. Because both the trial court and CCA extensively reviewed the adaptive deficits prong despite Dr. Allen's IQ testing, there can be no violation of *Hall* and *Moore I*.

A. The facts of the offenses show Wood does not suffer from adaptive deficits, and this evidence is not categorically barred from consideration by *Moore I* or *II*.

In his petition, Wood claims that the CCA, and specifically the concurring opinion, improperly relied on the facts of the crimes, which he argues is precluded as the seventh *Briseno* factor. Petition at 30. Wood calls the concurrence "stunning" for relying "solely on the last and most prejudicial of the *Briseno* factors: '. . . did the commission of that offense require forethought, planning, and complex execution of purpose?'" *Id.* (quoting *Briseno*, 135 S.W.3d at 8–9).

Wood is incorrect. The facts of the crime are not off limits because, as the concurrence pointed out, that notion is flatly rejected by this Court's decision in *Atkins*. Petition, Appendix A at 4 (Newell, J., concurring). In *Atkins*, this Court explained that the theory of deterrence was not furthered by executing the intellectually disabled because "deterrence" is served only where "'murder is the result of premeditation and deliberation.'" 536 U.S. at 319–20 (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982)). This Court then stated: "Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision' of other potential murderers. *Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders*. *Id.* (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). An interpretation of *Moore I* and *II* that precludes any and all consideration of the facts of the crime, particularly those cold and calculated, cannot be reconciled with *Atkins*.

Recognizing this distinction, the concurrence stated: "[T]he methodical way in which [Wood], by himself, carried out his crimes paints the exact opposite picture." The concurrence then summarized the facts of the crimes, which mirrors the summary in the Facts of the Crime, *supra*. Petition, Appendix A at 4 (Newell, J., concurring). Judge Newell also aptly noted the following:

> If we completely ignore the existence of evidence demonstrating adaptive strengths, then this aspect of the inquiry becomes nothing more than a legal choice to credit only mitigation evidence that provides "a basis for a sentence less than death" regardless of the strength of evidence demonstrating a defendant's moral blameworthiness. It would seem to contradict the Supreme Court's requirement that the definition of intellectual disability be calibrated to only include those whose degree of intellectual disability falls within a national consensus regarding moral blameworthiness.

Id. at 5 (citing *Atkins*, 536 U.S. at 317; *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). Thus, the lower court could not disregard the facts of Wood's crimes—six murders he nearly got away with but for his admission to a fellow inmate—given the extent they speak to his lack of adaptive deficits. Simply put, "[Wood] is not intellectually disabled. He is a serial killer." *Id.* (Newell, J., concurring).[6]

B. Summary of the DSM–4 factors addressed by the trial court

The trial court examined extensive evidence related to the DSM–4 factors and Wood's adaptive functioning. These are summarized below.

1. Functional academics

- Wood's difficulties in school were not due to intellectual disability, but rather emotional problems, hyperactivity, and an unstable home

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[6] In his petition, Wood makes a lengthy argument that the facts of his offense should not be considered because it is possible he is actually innocent. Petition at 31–39. The State will not address this argument because it is not an issue before the Court.

life. Petition, Appendix C at 48–49 (FF 154).

- Testimony from Mrs. DeArman, Wood's school teacher, and school records reveal that Wood had learning and conduct disabilities, not intellectual disability. *Id.* at 49 (FF 155–56).

- Insightful letters Wood wrote to the trial judge in the Christi LeClaire case and to the parole board in 1986 are inconsistent with the functional academics of someone who is intellectually disabled. *Id.* (FF 157). *See Moore II*, 139 S. Ct. at 671 (finding pro se court papers to be relevant but criticizing the CCA for relying on them due to lack of evidence Moore wrote them on his own).

- The court also found the following to be inconsistent with deficits in functional academics: the quantity and types of books Wood has checked out of the prison library (e.g., Tom Clancy novels); letters Wood has written addressing topics such as global warming and the BP oil spill; evidence that Wood is sufficient in arithmetic and works out puzzles; the fact that Wood understands the concept of identity theft; Wood took the GED in prison and passed all but one section; his vocabulary and spelling "clearly exceed the functional academic skills of someone with mild intellectual disability"; Wood's ability to conceptually understand, operate, and repair complex tools while working in the bus barn; and the fact that Wood's scores on the Wide Range Achievement Test, 4th edition (WRAT-4) place him well above the second percentile and most were at high school level. *Id.* at 50–51 (FF 159–67).

2. Communication

- Dr. Allen testified that, during his interview of Wood, Wood understood his instructions and conversed throughout. He has the capacity to concentrate when someone is speaking to him, has good vocabulary, uses words in the proper context, and speaks in full sentences. Petition, Appendix C at 51–52 (FF 169).

- Wood has written many letters to friends and family while in prison, and they all demonstrate that he has sufficient ability to communicate. *Id.* at 52–55 (FF 170 a–i) (excerpts from Wood's letters). In one letter, Wood stated: "My new attorney is wanting to raise the *Atkins* issue, which is the retardation issue. Well, we all know that that is not going to work, but he wants the time to raise other issues." *Id.* at 52 (FF 170 a).

- The trial court found that these letters “reflect normal ability to conceptualize, understand, think, plan and anticipate the future.” Wood can sufficiently communicate with attorneys; is aware of concepts like DNA testing and *Atkins*; “can advise others on personal issues”; “has the capacity to put together coherent points in an argument in an effort to persuade someone”; and “clearly understands how the system works and how it can be manipulated.” *Id.* at 55 (FF 171).

- The state court also found: Wood utilizes TDCJ grievance procedures by communicating in writing his objections to mail room actions and disciplinaries; prior to his capital murder trial, Wood drafted several handwritten motions requesting that his current attorney(s) be dismissed and new counsel appointed, one of which the trial court granted; TDCJ employee Herbert Wilbanks supervised Wood in the mechanical department of the bus barn and never had any difficulty conversing with him; and Wood’s former parole officer, John Mulaney, testified that Wood was easy to supervise and that he never had to “dumb down” conversations so that Wood could understand him. *Id.* at 55–58 (FF 172–87).

3. Self-care

- The state court found that Dr. Allen did not see any deficits in self-care because Wood can handle daily activities and maintains good personal hygiene. Petition, Appendix C at 58 (FF 190).

- The court found that the following evidence demonstrates that Wood does not have a deficit in self-care: he filed grievances claiming that he submitted four sick call requests to see a doctor for an infected foot but was turned down and, consequently, was being refused proper medical attention; his commissary records reflect that he is consistently buying deodorant, shower shoes, soap, and other self-care items; and in a letter to a friend, he stated that he was worn out from playing basketball, was getting in bad shape, and needed to start exercising more. *Id.* at 59 (FF 191).

4. Home living and money management

- The state court found that Dr. Allen reported that Wood acknowledged his ability to prepare food and take care of himself as an adult and child. Wood also maintains his cell in a clean and orderly fashion. Petition, Appendix C at 59 (FF 196–97).

- The court found that Wood knows how to count money; make change; complete a money order and instruct people how to get one; use a thermometer and thermostat; use a checking account; shop for groceries; use measuring devices; purchase vehicles and furniture; own or rent a home; tell time; order from menus; apply for a job; and calculate the cost of commissary purchases. Wood did not need a caregiver during his life in the free world. *Id.* at 60 (FF 198).

- According to Dr. Allen, several letters Wood wrote indicate he can engage in con games to receive money. Wood once defrauded an insurance company of money by filing a complaint that his motorcycle had been stolen. A subsequent police report showed that this was not a true theft and the circumstances suspicious. Wood recovered the motorcycle the day after his insurance company paid him off. Wood also used to con his sister out of money. *Id.* at 60–61 (FF 199–201).

- Wood has filed complaints with the Better Business Bureau against magazine publishers; he has asked pen pals for money; he handled home and daily activities properly when he lived with Joanne Blaich; and he has been married several times. *Id.* at 61 (FF 202–05).

5. Social and interpersonal skills

- The state court found that, according to Dr. Allen, Wood has antisocial personality disorder, which impairs his ability to get along with others and maintain relationships. But he does not have significant deficits in social skills, and he can certainly socialize with others via mail. Petition, Appendix C at 62–63 (FF 208–11).

- The court found that Dr. Allen's opinion is supported by the trial evidence, specifically that Wood does not lack the ability to socialize with others, regardless of whether the interactions are positive or negative. The state court summarized the trial evidence revealing how Wood lured the women he eventually murdered into his vehicles, and how he socialized with others at parties, bars, or other gatherings. *Id.* at 63–65 (FF 212 a–i).

- In an article in the El Paso Times, Erika Dismukes—the mother of a girl who also disappeared in 1987—said of Wood: "Girls loved him and he loved girls. . . .He was good-looking and women were attracted to him." *Id.* at 65 (FF 213).

- The court found: Wood was a member of the Aryan Brotherhood; Wood has written hundreds of letters to pen pals and expresses his affection for them; parole files show that Wood's father described him as "not shy, very outgoing" and had "lots of friends"; in a letter to his sister, Wood described how he saved money to buy a car just so a girl would out with him; and Mulaney testified that Wood once requested permission to travel from El Paso to Houston to visit his aunt and uncle, and he described Wood as one of his better parolees. *Id.* at 65–67 (FF 214–24).

6. Use of community resources

- The state court found that, during his developmental years, Wood was able to get around El Paso without difficulty, obtained a driver's license and used public transit, and could read street signs and purchase items at stores. He also frequently uses TDCJ library sources. Neither Dr. Allen nor the court found that Wood had any significant deficits in this area. Petition, Appendix C at 67 (FF 227–29).

7. Self-direction

- Wood reported to Dr. Allen that he was able to obtain employment both in and out of prison; he can drive a car and motorcycles; he has had valid driver's licenses; and he has never needed a caretaker. Petition, Appendix C at 67–68 (FF 230).

- The state court also rejected Wood's argument that he was gullible. "To the contrary, [Wood] was self-motivated, manipulative, and refused to take the advice of others including his attorney. The fact that he volunteered to be questioned by the police is indicative of his arrogance, narcissism, and antisocial personality, not his gullibility or alleged [intellectual disability]." *Id.* at 68 (FF 231).

- Dr. Allen also read into the record an affidavit from Ronnie Callahan, Wood's welding instructor in prison, in which Callahan spoke of Wood in glowing terms. Callahan instructed Wood "in both the academic knowledge and skills of various metal welding methods, and for ensuring that he worked and practiced safely." Wood learned these skills with only general monitoring and little supervision, was assigned grades of "A" and "B" reflecting his competence and comprehension, and was assigned to be a welder at the unit. Callahan did not suspect that Wood had any mental disability. *Id.* at 68–69 (FF 233).

- The court found that Wood directed his family to send him trial transcripts so that TDCJ could not check them, defrauded his insurance company of money, as stated above, and was not considered gullible by TDCJ guards who believed that Wood was confident and did not let others bully him. *Id.* at 70 (FF 237–41).

8. Work

- Despite Wood's limited work history due to frequent incarcerations, the court found that he has sufficient job skills and has held jobs in both the free world and prison. Wood's parole file revealed that he worked as a mechanic at Auto Parts Limited for eight months and was described as a dependable worker eligible for rehire. His father also stated that Wood worked at Earl Scheib Paint Shop for six months in 1975. Petition, Appendix C at 70–71 (FF 243–45).

- Herbert Wilbanks testified about Wood's work abilities in the bus barn at TDCJ. Wood's duties included servicing and repairing complex hydraulic and pneumatic tools. Wilbanks never recalled any of the tools Wood repaired to fail afterwards, which is quite possible if the repair is not performed correctly because the pneumatic wrench runs on air pressure. The more skilled inmates work in the school bus barn because the safety of children is a priority. Moreover, it is a regular eight-hour job, and Wood would not have kept the job had he performed poorly. In fact, Wilbanks has worked with over 6000 inmates but has written letters to the parole board on behalf of less than twenty, one being Wood. *Id.* at 71–72 (FF 246–56).

- The state court also found that Wood received very positive reviews from five other supervisors while he worked at the bus barn. In one review from William Walker, Industrial Supervisor, Walker described Wood as an excellent worker who had "a fine grasp of the details and methods" to "stay one step ahead" of the constantly changing situations in the Bus Repair Facility and who was "largely responsible for the continued operation of many of the air and power tools we have here." *Id.* at 74 (FF 257 f).

- At Wood's trial, Michael Maxwell testified that he hired Wood to work at his mobile home business. He characterized Wood as a "slow learner" and "not very smart." But he also said Wood's job performance was "good" and that he would consider rehiring Wood. The state court found Maxwell's characterization of Wood as "slow" to lack credibility in light of the above reviews and complexity of the work at the bus barn. *Id.* at 75 (FF 261) ("The above performance

reports showed that [Wood] was performing challenging work that required skill and intellect."). Wood had also worked as a painter, sewing machine operator, and at a furniture store. *Id.* at 74–75 (FF 259–63).

9. Leisure

- The state court found that Wood has engaged in numerous leisure activities over the years, including reading, artwork, mechanical work on cars and motorcycles, and interacting with friends at parties and bars. Petition, Appendix C at 75–77 (FF 265–71).

- Wood is an avid reader whose "interests include books by Tom Clancy and Dean Koontz, the Twilight series, Bob Ross's The Joy of Painting, Smithsonian, Maxim, Reminisce, Vanity Fair, Prison Legal News, National Geographic, and Car & Driver, among others." *Id.* at 76 (FF 270).

- Dr. Allen also found significant Wood's unique methods for creating paint brushes. *Id.* at 76 (FF 267) ("I do use crushed-up-colored pencils mixed with water, and, yes, I use my hair that I wrap in a piece of thread and stick it into the end of the pen . . . we have to make due with what we have, because they don't allow us to have paint brushes that are real.").

10. Health and safety

- The state court found that Wood can communicate with health care providers; report symptoms; handle his own medical emergencies; consume prescribed medications; and complete his own medical requests without assistance. Petition, Appendix C at 77 (FF 273).

- The court also found that Wood worked without injury in the relatively dangerous setting of the bus barn; informed TDCJ that he is allergic to penicillin and had to have surgery on his knee due to an on-the-job injury; has addressed health-related issues like swine flu and epilepsy in letters to family and friends; requested materials on sensory deprivation in order to cope on death row; and has filed grievances against TDCJ for not receiving proper medical care. *Id.* at 77–78 (FF 274–79).

As shown, these factors demonstrate that Wood does not have adaptive deficits. To the contrary, they reveal Wood possesses skills and abilities that are not indicative of an intellectually-disabled capital petitioner.

C. Wood's adaptive-deficits arguments are meritless.

1. *Briseno* factors

Wood argues that the CCA continued to rely "heavily" on the *Briseno* factors even after this Court's decision in *Moore I*. He contends that even though the CCA "excised" the findings of the trial court pertaining to the *Briseno* factors, the remaining findings still rely on the *Briseno* factors "in all but name." He then provides examples that he believes show the findings left intact rely on *Briseno*, for instance lay perceptions of the intellectually disabled. Petition at 12–17. Ironically, some of the examples Wood cites are statements *his own witnesses*—his sister, a childhood friend, and his elementary school teacher—made to the trial court about their beliefs that he was not intellectually disabled. *Id.* at 13. Again, Wood presented only those three witnesses; he offered no expert to support his claim.

Regardless, Wood's argument falters for several reasons. First, in neither *Moore I* nor *II* did this Court hold that evidence that could conceivably fall under a *Briseno* factor can never be considered as a categorical matter. For instance, regarding communication skills, Wood claims that the court is prohibited from considering statements by others, including his own witnesses, about his ability to communicate with them. Petition at 13. But in *Moore II*, this Court criticized the CCA for *discounting* evidence relied on by the trial court that Moore lacked the

ability "to understand and answer family members, even a failure on occasion to respond to his own name." 139 S. Ct. at 670. Further, "the trial court heard, among other things, evidence that in school Moore was made to draw pictures when other children were reading, and that by sixth grade Moore struggled to read at a second-grade level." *Id.* at 670–71. Clearly this is evidence pertaining to what lay witnesses observed. If such evidence is off limits, per Wood's argument, then the trial court in *Moore* could not have relied on it as well. *Moore II* states otherwise.

Second, Wood argues that the trial court erred because Dr. Allen also relied on evidence pertaining to the *Briseno* factors. Petition at 16–17. As shown above, Dr. Allen relied on much more in rendering his decision that Wood is not intellectually disabled. Nonetheless, in *Moore II*, this Court recognized that clinicians "also ask questions" that are relevant to the *Briseno* factors. 139 S. Ct. at 672 (citing American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010) (AAIDD–11), at 44 ("noting that how a person 'follows rules' and 'obeys laws' can bear on assessment of her social skills")). Thus, while the *Briseno* factors themselves may be unconstitutional as a stand-alone test, *Moore II* implicitly permits clinicians the discretion to address evidence that might arguably fall under them, and that evidence is not categorically impermissible for courts to consider.

Third, as discussed above, the trial court relied on evidence clearly relevant to the DSM–4 factors that any court would have to consider, for instance Wood's achievement on the WRAT–4; handwritten motions Wood drafted to the court prior

to trial; his ability to socialize with others and lure women into his vehicles; the fact that he owned and rented homes; his success in defrauding an insurance company of money; his ability to work as a mechanic and to handle complex machinery; and that he handled home and daily activities properly when he lived with Joanne Blaich.

Last, as previously stated, the more fundamental problem is that Wood presented virtually no evidence to support his *Atkins* claim at the hearing, and even his own lay witnesses undermined his assertion. In *Moore*, the petitioner clearly did present evidence of intellectual disability because the trial court found Moore to be intellectually disabled.

2. Emphasis on adaptive strengths rather than deficits

Wood complains that the CCA and trial court emphasized his adaptive strengths over his adaptive deficits, in contravention of *Moore I* and *II*. Petition at 17–18. But the trial court cannot emphasize that which, for the most part, does not exist. Again, Wood presented virtually *no* evidence of adaptive deficits. In fact, he addresses his supposed adaptive deficits in only two pages of the instant petition, noting his poor academic history, an alleged learning disability, and that he was teased and bullied as a kid. *Id.* at 7, 21.[7] On the other hand, the evidence of Wood's adaptive strengths was abundant. As the CCA stated below:

> [Wood] had plenty of incentive during the proceedings associated with his second habeas application to present all available witnesses to support his intellectual-disability claim. As the habeas court pointed out, [Wood's] defense team was given funds to hire an expert witness

[7] Wood also claims he could not read a clock as a teenager, but the trial court found otherwise. Petition, Appendix C at 60 (FF 198).

> but failed to offer expert testimony at the habeas hearing. Even now, in his suggestion that the Court grant rehearing on its own initiative, [Wood] does not contend that he should be given the opportunity to submit new evidence.

Petition, Appendix A at 2–3. For example, at trial, Dr. Lunde painted a picture of Wood that would have arguably supported his claim. Yet Wood failed to present an expert to merely give some credence to Dr. Lunde's testimony. By contrast, Moore presented not only evidence of adaptive deficits but testimony from several mental-health experts about those deficits. *Moore I*, 137 S. Ct. at 1045–46. In short, given the disparity between the evidence of adaptive strengths versus deficits, this is not a case where the state courts "overemphasized" the former. *Moore I*, 137 S. Ct. at 1050.

3. Adaptive "improvements" in prison

Next, Wood complains that the CCA and trial court improperly relied on his adaptive behavior in prison, which runs afoul of *Moore I* and *II*. Petition at 18–20. In *Moore I*, this Court criticized the CCA for stressing Moore's "*improved*" behavior in prison because clinicians caution against relying on adaptive strengths "*developed*" in a controlled setting like prison and should rely on corroborative information reflecting functioning outside that setting. 137 S. Ct. at 1050 (emphases added) (citing DSM–5, at 38); *see also Moore II*, 139 S. Ct. at 671. But Neither *Moore I* nor *II* held that prison behavior could not be discussed, only that the CCA "relied heavily" on that evidence. *Moore II*, 139 S. Ct. at 671. Here, the state courts relied on evidence of Wood's prison behavior, but the courts assessed plenty of corroborative evidence of Wood's functioning in the outside world.

Moreover, there is nothing to suggest that Wood's behavior in prison amounted to an "improvement" or "developments" over that in the outside world, as was the case in *Moore*. *Moore I*, 137 S. Ct. at 1047 ("Moore's *significant improvement* in prison, in the CCA's view, confirmed that his academic and social difficulties were not related to intellectual-functioning deficits.") (emphasis added). No evidence was presented that Wood had problems adjusting to prison but gradually improved over time, or that his prison behavior differed significantly from that in the outside world. For example, neither Herbert Wilbanks not Ronnie Callahan, who supervised Wood's work while in prison, stated that Wood started off slow but improved thereafter. According to them, Wood was a fine worker from the get-go, or at least showed "fast advancement." *See* Petition, Appendix C at 69 (FF 234). This evidence reveals Wood entered prison with adaptive strengths, not that he acquired them while confined.

Finally, as Wood concedes, he has spent much of his adult life in prison. Petition at 19. It would make little sense to disregard all of his activities while confined, as Wood suggests. And neither *Moore I* nor *II* stand for this proposition. Indeed, Dr. Allen also found the prison evidence significant, which is a separate matter recognized in *Moore II*. 139 S. Ct. at 672.

4. Explaining alleged adaptive deficits as the product of factors other than intellectual disability

Wood complains that the CCA left intact trial court findings that explained supposed adaptive deficits as being the product of factors other than intellectual disability. Petition at 20–23. For instance, the trial court found that Wood's problems in school were due to learning disabilities and conduct issues, rather than intellectual

disability. *See* Petition, Appendix C at 49 (FF 155–56), 18 (FF 38). Wood also complains that the state court explained his behavior as being the product of antisocial personality disorder rather than intellectual disability. Petition at 23; Petition, Appendix C at 62 (FF 208–10), 67 (FF 225–26), 68 (FF 231).

There are several flaws with Wood's argument. First, in *Moore I* and *II*, this Court criticized the CCA for "*requiring* Moore to show that his adaptive deficits were not related to 'a personality disorder.'" *Moore I*, 137 S. Ct. at 1051 (emphasis in original); *Moore II*, 139 S. Ct. at 671. Here, on the other hand, Wood never presented any evidence that his difficulties were due to intellectual problems. And although the state trial court found Wood's school difficulties were due to other factors, the CCA did not *require* Wood to show that they were not related to these other factors.

Second, Wood ignores crucial evidence: Dr. Allen specifically found that Wood's poor academic record also reflected poor effort, as evidenced by his WRAT–4 and malingering scores. R 81 at 6–7; Petition, Appendix C at 18 (FF 38). *Moore I* recognized that effort, or lack thereof, can play a role in impacting an intellectual-disability analysis. 137 S. Ct. at 1055; *id.* at 1061 n.3 (Roberts, C.J., dissenting). Wood never countered the significant evidence of his poor effort.

Third, Wood has antisocial personality disorder; Dr. Allen made this clear in his report and testimony. R 81 at 8, 11; 4 SHRR 173–74. In fact, antisocial personality disorder was the primary diagnosis Dr. Allen gave Wood. R 81 at 11. Dr. Allen stated: "[Wood's] social and interpersonal skills are impaired by his

personality disorder and aggression." *Id.* at 8. The trial court found that according to Dr. Allen,

> [Wood] has antisocial personality disorder. People with antisocial personality disorder can have good social skills. They lack a conscience and empathy, but they develop a knack for communication that can be initially endearing. However, they do not keep friends for long because others eventually become dissatisfied with the repeated manipulation and aggressive behavior.

Petition, Appendix C at 62 (FF 210). In *Moore I*, this Court never stated that Moore was diagnosed with this particular personality disorder, "which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Roper*, 543 U.S. at 573. The notion that this disorder would not play a substantial role in Wood's behavior does not withstand scrutiny. Wood, moreover, simply complains that the CCA left this finding intact while discounting "poverty, childhood trauma, and learning disabilities." Petition at 23. But again, other than a few school records and three lay witnesses, Wood—unlike Moore—never presented evidence that any difficulties were the product of an intellectual disability.

D. There are additional reasons why the petition should not be granted.

Additional facts about this case distinguish it from *Moore* and show there is no need for this Court's involvement. In *Moore I*, this Court said the following about adaptive deficits:

> [R]elying on testimony from several mental-health experts, the habeas court found significant adaptive deficits. In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social,

> and practical). *See* AAIDD–11, at 43. Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories.

137 S. Ct. at 1046 (emphasis in original). As stated, Wood presented no mental-health experts at the hearing, let alone evidence of significant adaptive deficits. But importantly, in his petition, Wood makes little to no effort demonstrating, or even arguing, that he has shown adaptive performance two or more standard deviations below the mean in any adaptive skill set. The bulk of Wood's petition merely complains about what the state courts held, not what he has shown. The evidence in *Moore* was quite the opposite. *Id.* at 1045–46.

Finally, *Moore* is distinguishable for two additional reasons: (1) the state trial court found Moore to be intellectually disabled, and (2) ultimately, the Harris County District Attorney agreed and determined that Moore should not be executed. *Id.*; *Moore II*, 139 S. Ct. at 670. Neither of those factors are present here. In short, Wood has *never* shown that he is intellectually disabled, and the decisions of both the trial court and CCA are correct and do not conflict with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

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