

No. _____

In The
Supreme Court of the United States

DAVID LEONARD WOOD,

Applicant,

v.

THE STATE OF TEXAS,

Respondent.

THIS IS A DEATH PENALTY CASE.

**UNOPPOSED APPLICATION
FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS**

GREGORY W. WIERCIOCH
Counsel of Record
FRANK J. REMINGTON CENTER
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 BASCOM MALL
MADISON, WISCONSIN 53706
(608) 263-1388
GREGORY.WIERCIOCH@WISC.EDU

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.5, Applicant David Leonard Wood asks for an additional 60 days to file a petition for writ of certiorari to review the December 12, 2018 decision of the Texas Court of Criminal Appeals (attached as Appendix). Mr. Wood's petition for writ of certiorari is currently due on March 12, 2019. Granting his request would extend the deadline to May 13, 2019. Mr. Wood makes this request more than 10 days in advance of his current filing deadline. The State is not opposed to this extension. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROCEDURAL HISTORY

After his 1992 conviction and death sentence, and the denial of state and federal postconviction review, Mr. Wood filed a subsequent application for writ of habeas corpus raising a claim that *Atkins v. Virginia*, 536 U.S. 304 (2002), prohibited his execution because he is intellectually disabled. In 2009, the Texas Court of Criminal Appeals (TCCA) stayed his scheduled execution and remanded the *Atkins* claim to the trial court for further proceedings.

In 2011, the trial court heard evidence and argument over the course of six days. In 2013, the trial court issued 322 findings of fact and recommended the denial of the *Atkins* claim. In 2014, the TCCA adopted all of the trial court's findings and

conclusions, and denied relief. *Ex parte Wood*, WR-45,746-02 (Tex. Crim. App. Nov. 26, 2014) (unpublished) (“*Wood I*”).

In 2017, after this Court handed down its decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (“*Moore I*”), Mr. Wood sought rehearing of his *Atkins* claim in the TCCA. On December 12, 2018, the TCCA denied rehearing in a 6–2 decision. *Ex parte Wood*, __ S.W.3d __, 2018 WL 6521581 (Tex. Crim. App. Dec. 12, 2018) (“*Wood II*”).¹

REASONS FOR SEEKING AN EXTENSION

After this Court reversed and remanded in *Moore I*, the TCCA issued a new decision. *See Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018) (“*Moore II*”). With three judges dissenting, the TCCA reached the same conclusion—that Moore had “failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability.” *Id.* at 573. After Moore filed a petition for writ of certiorari, this Court issued a summary reversal. *Moore v. Texas*, No.18-443, 2019 WL 659798 (Feb. 19, 2019) (“*Moore III*”).

In *Moore III*, this Court held that the TCCA’s re-examination of the evidence was “inconsistent” with *Moore I*: “We have found too many instances in which, with small variations, [the TCCA] repeats the analysis we previously found wanting, and these same parts are critical to its ultimate conclusion.” *Id.* at *3. In particular, this Court faulted the TCCA for: (1) downplaying Moore’s adaptive deficits while overemphasizing his adaptive strengths; (2) relying heavily upon adaptive

¹ Judge Richardson of the TCCA recused himself. He presided over the *Atkins* hearing in the trial court and issued the findings, conclusions, and recommendation. He was later elected to the TCCA and began serving his six-year term in January 2015.

improvements Moore made in prison; (3) requiring Moore to show that his adaptive deficits were not related to a personality disorder or mental health issue; and (4) continuing to rely on lay stereotypes of intellectual disability by using the *Briseno* factors in all but name. *Id.* at *3–*5.

The TCCA granted Mr. Wood rehearing after *Moore I* but summarily denied the *Atkins* claim. *Wood II*, 2018 WL 6521581, at *3. Unlike every other case where it previously granted rehearing in light of *Moore I*, the TCCA did not order the trial court to re-examine its findings, make a new recommendation on intellectual disability, or hear new evidence from mental health experts and any witnesses. *See, e.g., Ex parte Cathey*, WR-55-161-02, 2018 WL 5817199, (Tex. Crim. App. Nov. 7, 2018) (unpublished); *Ex parte Henderson*, WR-37,658-03, 2018 WL 4762755 (Tex. Crim. App. Oct. 3, 2018) (unpublished); *Ex parte Lizcano*, WR-68,348-03, 2018 WL 2717035 (Tex. Crim. App. June 6, 2018) (unpublished). Instead, the TCCA simply excised 43 findings of fact in which the trial court applied the now-discredited *Briseno* factors and discussed possible alternative causes of any adaptive deficits. It left the rest of the findings intact. *Wood II*, 2018 WL 6521581, at *1, *2–*3. The TCCA held that the remaining 279 findings were untainted by *Moore I* and provided ample support for the denial of relief. *Id.* at *2–*3. Under these circumstances, according to the TCCA, no further record development or fact findings were necessary. *Id.* at *3.

The TCCA did not repair its earlier *Atkins* determination by extricating from the decision only those findings that explicitly applied the *Briseno* factors. As the *Wood II* dissent pointed out, some of the findings that the TCCA majority left intact

“improperly focus[ed] on applicant’s adaptive strengths and his abilities in a controlled prison setting.” *Id.* at *7 (Alcala, J., dissenting). In addition, the dissent noted that the TCCA did not reject findings that concluded that “applicant’s troubles in school could be due to factors other than intellectual disability, such as dyslexia or trouble reading, a poor home life, or being held back a grade.” *Id.* (citing Findings 62–66) (internal quotation marks omitted). As the dissent emphasized (and this Court noted in *Moore I* and reiterated in *Moore III*), “other mental or physical impairments are common comorbidities in intellectually disabled persons and are ‘not evidence that a person does not have intellectual disability.’” *Id.* (citing Findings 113–15) (quoting *Moore I*, 137 S. Ct. at 1051); see *Moore III*, 2019 WL 659798 at *4. Mr. Wood asks for an extension so that his Counsel of Record has sufficient time to review the 96-page recommendation of the state trial court in the light of *Moore III*.

Counsel of Record, Gregory W. Wiercioch, is a full-time clinical professor at the University of Wisconsin Law School. He has substantial duties providing supervision to a number of law students in two clinical programs who directly represent indigent prisoners. Because of these professional duties, he will not be able to devote sufficient time to the petition for writ of certiorari in the short time remaining before his current deadline of March 12, 2019 expires.

An extension of time will neither prejudice the State (which does not oppose the extension) nor result in any meaningful delay in this Court’s consideration of the petition.

CONCLUSION

The Court should find that good cause exists for granting Mr. Wood's request and order that the time for filing his petition for writ of certiorari be extended to May 13, 2019.

Respectfully Submitted,

s/ Gregory W. Wiercioch

Gregory W. Wiercioch

Counsel of Record

University of Wisconsin Law School

975 Bascom Mall

Madison, Wisconsin 53706

(608) 263-1388

gregory.wiercioch@wisc.edu

February 27, 2019

Attorney for Applicant