IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-13,374-05

Ex parte BOBBY JAMES MOORE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE. NO. 314483-C IN THE 185TH JUDICIAL DISTRICT COURT FROM HARRIS COUNTY

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, YEARY, and KEEL, JJ., joined. ALCALA, J., filed a dissenting opinion in which RICHARDSON and WALKER, JJ., joined. NEWELL, J., did not participate.

In a punishment retrial that was held before the Supreme Court decided that intellectual disability exempted offenders from the death penalty,[1] Applicant claimed that he was not intellectually disabled and that any adaptive difficulties he had were due to the abusive environment in which he grew up, emotional issues resulting therefrom, and his lack of opportunities to learn. In this habeas proceeding, Applicant now seeks to be exempted from the death penalty on the ground that he is intellectually disabled. The habeas court agreed with Applicant, citing what it considered

[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting intellectually disabled persons from the death penalty).

to be the contemporary standards for an intellectual disability diagnosis. We disagreed with the habeas court for a variety of reasons falling within two overarching categories: (1) because the habeas court failed to follow standards set out in our caselaw,[2] and (2) because the habeas court failed to consider, or unreasonably disregarded, "a vast array of evidence in this lengthy record that cannot rationally be squared with a finding of intellectual disability."[3] The Supreme Court vacated our decision, concluding that some of the standards in our caselaw did not comport with the Eighth Amendment's requirements regarding an intellectual disability determination.[4]

Having received guidance from the Supreme Court on the appropriate framework for assessing claims of intellectual disability, we now adopt the framework set forth in the DSM-5.[5] Although the Supreme Court has vindicated some of the habeas court's analysis with respect to the proper framework to apply to intellectual disability claims, it remains true under our newly adopted framework that a vast array of evidence in this record is inconsistent with a finding of intellectual disability. Reviewing Applicant's claims under the DSM-5 framework, we conclude that he has failed to demonstrate adaptive deficits sufficient to support a diagnosis of intellectual disability. Consequently, we disagree with the habeas court's conclusion that Applicant has demonstrated

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[2] *Moore v. State*, 470 S.W.3d 481, 486-89 (Tex. Crim. App. 2015), *vacated by Moore v. Texas*, 137 S. Ct. 1039 (2017).

[3] *Id.* at 489.

[4] *See Moore v. Texas*, 137 S. Ct. 1039 (2017).

[5] American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF DISORDERS, 5th ed. (2013) ("DSM-5").

intellectual disability, and we deny relief.[6]

A. The Murder

On April 25, 1980, Applicant and his companions, Ricky Koonce and Everett Pradia, were driving around Houston, looking for a place to commit their third robbery in two weeks. They chose the Birdsall Super Market after seeing that it was manned by two elderly people and a pregnant woman. Jim McCarble and Edna Scott were working in the courtesy booth. Koonce entered the booth and told McCarble and Scott that they were being robbed and demanded money. Applicant stood outside the booth, pointing a shotgun through the courtesy booth window. When Scott shouted out that they were being robbed and dropped to the floor, Applicant pointed the shotgun at McCarble, looked down the barrel at him, and shot his head off.

B. Standard for Assessing Intellectual Disability

1. From *Atkins* to *Briseno*

In *Atkins v. Virginia*, the Supreme Court found that a national consensus had developed against the practice of executing mentally retarded offenders, with the only serious disagreement about the issue being determining which offenders were in fact retarded.[7] While holding that the Eighth Amendment prohibited the execution of mentally retarded offenders, the Court acknowledged that not all people claiming to be mentally retarded would "fall within the range of mentally retarded

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[6] Although it opposed granting relief on original submission, the State now contends that Applicant is entitled to relief in light of the Supreme Court's opinion. Because we conclude that Applicant has failed to show that he is intellectually disabled under the DSM-5 framework, we disagree with that assessment.

[7] 536 U.S. at 316, 317.

offenders about whom there is a national consensus."[8] The Court left to the States the task of developing appropriate ways to enforce this constitutional restriction.[9] In the absence of legislative direction, we set out what we considered to be interim guidelines in *Ex parte Briseno*.[10]

Briseno adopted the then-existing framework for determining mental retardation set out by the American Association on Mental Retardation (AAMR).[11] Under that framework, an individual was mentally retarded if a three-pronged test was satisfied: (1) significantly subaverage general intellectual functioning (an IQ of approximately 70 or below, which is approximately two standard deviations below the mean), (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurred prior to age 18.[12] To help courts assess adaptive functioning, and determine whether adaptive deficits were due to mental retardation or a personality disorder, we suggested a list of non-exclusive evidentiary factors:

> • Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
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> • Has the person formulated plans and carried them through or is his conduct impulsive?
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> • Does his conduct show leadership or does it show that he is led around by others?
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> • Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

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[8] *Id*. at 317.

[9] *Id*. *See also Moore*, 470 S.W.3d at 486.

[10] 135 S.W.3d 1, 4-5 (Tex. Crim. App. 2004). *See also Moore*, *supra*.

[11] *Briseno*, 135 S.W.3d at 7-8.

[12] *Id.* at 7 & nn.24-26.

> • Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
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> • Can the person hide facts or lie effectively in his own or others' interests?
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> • Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[13]

2. The Habeas Court's Approach

Changes have occurred since our decision in *Briseno*. What used to be referred to as "mental retardation" is now labeled "intellectual disability," and the AAMR has renamed itself the American Association on Intellectual and Developmental Disabilities (AAIDD).[14] The habeas court in this case reasoned that more has changed than names and labels and that, in assessing whether a person is intellectually disabled, courts should use the most current standards of psychological diagnosis.[15] The habeas court further concluded that, under the current standards, use of the *Briseno* factors was discretionary, and, because it perceived no evidence that Applicant had a personality disorder, unnecessary in this case.[16]

3. Our Prior Opinion

In our prior opinion reviewing the present habeas application, we adhered to the framework

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[13] *Briseno*, 135 S.W.3d at 8-9.

[14] *See Ex parte Cathey*, 451 S.W.3d 1, 11 n.23 (Tex. Crim. App. 2014) (noting change from "mental retardation" to "intellectual disability"); *Ex parte Sosa*, 364 S.W.3d 889, 893 n.17 (Tex. Crim. App. 2012) (noting change from AAMR to AAIDD).

[15] Addendum Findings of Fact and Conclusions of Law on Claims 1-3 ("Findings"), paragraph 66 ("As our standards of decency evolve, so too do the standards of psychological diagnosis."). *See also Moore*, 470 S.W.3d at 486.

[16] Findings, paragraphs 93-94.

for determining intellectual disability that was set out in *Briseno*.[17] We said that, absent legislative action, the decision to modify the legal standard for intellectual disability "rests with this Court," and we believed that the legal test we established in *Briseno* remained adequately informed by the medical community's diagnostic framework.[18] We concluded that we should continue to adhere to the AAMR definition of intellectual disability that existed when *Briseno* was decided, even if the positions of the American Psychiatric Assocation (APA) and the AAIDD had changed since then.[19]

Regarding the subaverage-intellectual-functioning prong of the *Briseno* inquiry, we disagreed with Applicant's reliance upon all the various tests he had taken with scores ranging from 57 to 78.[20] We held that only two of the tests resulted in scores that were relevant and reliable enough to warrant consideration: a WISC test taken in 1973 at age 13 with a score of 78 and a WAIS-R test taken in 1989 at age 30 with score of 74.[21] Taking into account the standard error of measurement of five points for each test resulted in IQ score ranges of 73-83 and 69-79 respectively.[22]

We criticized the habeas court for subtracting points from IQ scores based on the so-called "Flynn Effect" (the concept that IQ tests become outmoded with the passage of time, causing purported IQ scores on the test to rise).[23] Rather, we held that the outmoded nature of the test is

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[17] *Moore*, 470 S.W.3d at 486-89, 514, 526-27 (citing and discussing *Briseno*, 135 S.W.3d at 7 & n.25, 8-9).

[18] *Id.* at 487.

[19] *Id.* at 486-87.

[20] *Id.* at 518-19.

[21] *Id.*

[22] *Id.* at 519.

[23] *Id.* at 487-88. *See* Findings, paragraphs 85-87.

simply something that might be considered in determining whether a person's actual IQ likely fell in the lower end of the standard error range for the test in question.[24] We also suggested that factors that tend to depress an IQ score—family violence, an impoverished background, drug use, and depression—would tend to place a person's actual IQ within the higher portion of the standard error range.[25] Considering these factors, we concluded that we had no reason to doubt that Applicant's IQ scores on both tests were accurate reflections of his actual IQ, and because both were above 70, that would place Applicant in the range of borderline intelligence rather than intellectual disability.[26] We concluded that Applicant had failed to prove significantly subaverage general intellectual functioning and therefore failed to meet the first prong of the three-pronged test.[27]

Nevertheless, we also assessed the second prong of the test, regarding adaptive deficits.[28] We criticized the habeas court for relying upon a definition of intellectual disability presently used by the AAIDD that omits a requirement that an individual's adaptive deficits be related to significantly subaverage intellectual functioning.[29] We also held that the *Briseno* evidentiary factors remained relevant to assessing adaptive deficits, and we held that we must look to all of the person's functional abilities, including those that show strength as well as those that show weakness.[30] We concluded

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[24] *Moore*, 470 S.W.3d at 519.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 513.

[28] *Id.* at 520.

[29] *Id.* at 486. *See* Findings, paragraph 67 (outlining current AAIDD framework). *But see id.*, paragraph 92 (referring to "relatedness" requirement).

[30] *Moore*, 470 S.W.3d at 489.

that the *Briseno* factors weighed heavily against a finding that any adaptive deficits were related to significantly subaverage intellectual functioning.[31] In rejecting Applicant's claim that he had shown sufficient adaptive deficits,[32] we made a number of other observations, but we will discuss those later in the application section of this opinion.

4. The Supreme Court's Response

The Supreme Court held that we were wrong to conclude that Applicant's IQ scores were, by themselves, a sufficient basis for rejecting his claim of intellectual disability.[33] The Court did not dispute our decision to rely upon scores from only two of the tests, so that we considered only the scores of 74 and 78, but the Court stated that, because of the standard error of measurement, a score of 74 was not high enough to rule out intellectual disability.[34] The Court criticized our reliance on various factors (family violence, an impoverished background, drug use, and depression) to disregard the lower end of the standard error of measurement range.[35] The Court admonished that, if any part of the range of scores yielded by the standard error of measurement was 70 or below, then an examination of adaptive functioning was required to resolve the issue of intellectual disability.[36]

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[31] *Id.* at 526-27.

[32] *Id.* at 520-26.

[33] *Moore*, 137 S. Ct. at 1049 ("The CCA's conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*[, 134 S.Ct. 1986 (2014)].").

[34] *Id.*

[35] *Id.* ("But the presence of other sources of imprecision in administering the test to a particular individual, cannot *narrow* the test-specific standard-error range.") (citation omitted, emphasis in original).

[36] *Id.* at 1049-50.

Because the five-point standard error of measurement applicable to the test with a score of 74 yielded a range of 69-79, an examination of adaptive functioning was required.[37]

The Court also criticized some of our analysis of adaptive functioning. The Court said that we were wrong to suggest that adaptive deficits in certain areas could be offset by strengths in unrelated areas.[38] The Court also concluded that we overemphasized Appellant's behavior in prison, and it cautioned against relying on adaptive strengths developed in a controlled setting, "as a prison surely is."[39] The Court further suggested that we erroneously viewed Appellant's record of academic failure and his childhood abuse as detracting from a finding of intellectual disability because the medical community counts traumatic experiences "as 'risk factors' *for* intellectual disability."[40] And the Court held that we departed from clinical practice by requiring Applicant to show that his adaptive deficits were not related to a personality disorder because personality disorders often co-occur with intellectual disability.[41]

Perhaps most importantly, the Supreme Court criticized our reliance on *Briseno*'s evidentiary factors for assessing adaptive functioning.[42] These factors, the Court found, merely advanced lay stereotypes of the intellectually disabled and were an outlier in comparison to other states' handling

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[37] *Id.*

[38] *Id.* at 1050 & n.8.

[39] *Id.*

[40] *Id.* at 1051.

[41] *Id.*

[42] *Id.* at 1051-52.

of intellectual disability claims and even to Texas's own practices in other contexts.[43] Even the dissenting opinion, by Chief Justice Roberts, criticized our reliance on the *Briseno* factors.[44]

5. Our Response: Adopting the DSM-5 Approach

"The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."[45] In *Moore*, the Supreme Court indicated that the DSM-5 embodies "current medical diagnostic standards" for determining intellectual disability.[46] When observing that the *Briseno* factors were inconsistent with Texas's own practices in other contexts, the Court referred to Texas's reliance on "the latest edition of the DSM."[47] The Supreme Court also observed that the DSM-5 retains a requirement that adaptive deficits be related to intellectual functioning deficits[48]—a requirement no longer explicitly retained by the AAIDD manual.[49] Given Texas's reliance on the DSM-5 in other contexts, and the logic of requiring that adaptive deficits be related to deficient intellectual functioning, we conclude that the DSM-5 should control our approach to resolving the issue of intellectual disability.[50] Although we

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[43] *Id.* at 1051-53.

[44] *Id.* at 1053 (Roberts, C.J., dissenting) ("I agree with the Court today that those factors [seven 'evidentiary factors' from *Ex parte Briseno*] are an unacceptable method of enforcing the guarantee of *Atkins*, and that the CCA therefore erred in using them to analyze adaptive deficits.").

[45] *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).

[46] 137 S. Ct. at 1045 (Court's op.). *See also id.* at 1048, 1053.

[47] *Id.* at 1052 (citing 37 TEX. ADMIN. CODE §380.8751(e)(3) (2016)).

[48] *Id.* at 1046 n.5.

[49] *See id.* at 1055 (Roberts, C.J., dissenting).

[50] Although we specifically adopt the DSM-5, nothing in this opinion suggests that a court must reject an expert's testimony if the expert relies upon the AAIDD manual. The standards in the

retain a "relatedness" requirement in conformity with the DSM-5, we abandon reliance on the *Briseno* evidentiary factors in determining whether such a requirement is met.

The DSM-5 retains the three-pronged approach to intellectual disability but refines it. The three criteria for finding someone to be intellectually disabled are: (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.[51]

"Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding."[52] Components of these functions include "verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy."[53]

The typical method of assessing these functions is through "individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence."[54] A score is indicative of intellectual disability if it is "approximately two standard deviations or more below the population mean, including a margin for measurement error (generally

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DSM-5 and the AAIDD manual are largely the same, with the AAIDD manual exploring the issue of intellectual disability in greater detail. Nothing in this opinion should be construed to prevent a court from relying upon portions of the AAIDD manual to the extent that they amplify or clarify standards contained in the DSM-5. But if there is a conflict between the two publications, a court must decide which to adhere to, and our decision is that, in the event of a conflict, the DSM-5 controls.

[51] DSM-5 at 37.

[52] *Id.*

[53] *Id.*

[54] *Id.*

+5 points)."[55] When the standard deviation of the test is 15 and the mean is 100, a score that is two standard deviations below the mean will be "a score of 65-75 (70 ±5)."[56] Practice effects and the "Flynn effect" may affect test scores.[57] Invalid scores may result from brief screening tests or group administered tests or when there are highly discrepant individual subtest scores.[58] Tests must also be normed for the individual's sociocultural background and native language.[59]

Criterion B, deficits in adaptive functioning, refers to "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background."[60] This involves adaptive reasoning in three domains: "conceptual, social, and practical."[61] The conceptual domain is also referred to as "academic" and involves things like "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations."[62] The social domain involves things such as "awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities, and social judgment."[63] The practical domain involves

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[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

such things as "learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization."[64]

Adaptive functioning is assessed by both clinical evaluation and testing.[65] Testing should be culturally appropriate and psychometrically sound.[66] Such tests should use standardized measures with knowledgeable informants such as family members, teachers, counselors, and care providers, as well as the individual being assessed, if possible.[67] Other sources of information include "educational, developmental, medical, and mental health evaluations."[68] All of this information "must be interpreted using clinical judgment."[69] "Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."[70]

Criterion B is met "when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community."[71]

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[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 38.

[71] *Id.*

For school-age children and adults with mild intellectual disability, "there are difficulties in learning academic skills involving reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations."[72] In adults with mild intellectual disability, "abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility) and short-term memory, as well as functional use of academic skills (e.g. reading, money management), are impaired."[73] Individuals with mild intellectual disability may have difficulty perceiving peers' social cues, tend to use more concrete or immature language in communicating, and are at risk of being manipulated by others.[74] "To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A."[75]

Criterion C recognizes that the intellectual deficits must have been "present during childhood or adolescence."[76]

B. Application

1. Adaptive Deficits Inquiry Required

The two IQ tests that we accepted on original submission as having validity with respect to assessing Applicant's general intellectual functioning yielded scores of 74 and 78.[77] Because the

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[72] *Id.* at 34.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 38.

[76] *Id.*

[77] *Moore*, 470 S.W.3d at 519.

score of 74 is within the test's standard error of measurement for intellectual disability (being within five points of 70), we must assess adaptive functioning before arriving at a conclusion regarding whether Applicant is intellectually disabled.[78]

2. Dr. Compton's Opinion is Credible and Reliable

On original submission we found the State's expert—Dr. Compton—to be "far more credible and reliable" on the issue of adaptive functioning than the experts presented by the defense.[79] We pointed out that the record showed Dr. Compton's considerable experience in conducting forensic evaluations.[80] Dr. Compton "thoroughly and rigorously reviewed a great deal of material concerning applicant's intellectual functioning and adaptive behavior," administered comprehensive "gold-standard" IQ testing, and personally evaluated Applicant.[81] By contrast, we observed that the defense psychologists—Borda, Greenspan, and Anderson—reviewed relatively limited material.[82] Greenspan did not personally evaluate Applicant, Borda's personal evaluation of Applicant was brief, and Anderson's personal evaluation was for a purpose other than evaluating intellectual disability.[83] And we would add that Borda's current conclusion that Applicant is intellectually disabled differs from the conclusion he arrived at in 1993, when he talked to Applicant's attorneys

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[78] Dr. Compton testified that the IQ score of 78 on the WISC was the most reliable because it was the only full scale IQ test administered during Applicant's developmental period. *See id.* at 517.

[79] *Id.* at 524.

[80] *Id.*

[81] *Id.* at 524-25.

[82] *Id.* at 525.

[83] *Id.*

and testified in connection with an earlier habeas hearing.[84] Notes from Applicant's attorneys at that time show Borda saying that he did not consider Applicant to be intellectually disabled.[85]

Dr. Compton's methodology is consistent with the Supreme Court's dictates for evaluating intellectual disability. She explained that the major emphasis in an intellectual disability inquiry is "with adaptive deficits or adaptive functioning. That is primary. It supersedes the, you know, raw intelligence score." She further explained that "somebody could have an IQ of 75 but have exceedingly low adaptive functioning and qualify for a diagnosis of intellectual disability." She pointed to the three criteria for evaluating intellectual disability as well the three domains for evaluating adaptive deficits, and she referred to various adaptive areas that are cited in the DSM-5. She also talked about the various risk factors for intellectual disability and acknowledged that Applicant had some of those.

Dr. Compton rarely testified for the prosecution with respect to intellectual disability litigation in death penalty cases. Forty percent of the time she worked for the defense, and fifty percent of the time she worked directly for a court. She worked for the prosecution only ten percent of the time. She testified that she was not a fan of the death penalty and "took no joy" in giving her opinion in this case.

3. Dr. Compton's Opinion: Adaptive Functioning Does Not Support Intellectual Disability Diagnosis

As we explained on original submission, Dr. Compton testified that, even before he went to prison, the level of Applicant's adaptive functioning was too great to support an intellectual-

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[84] *Id.* at 506.

[85] *Id.*

disability diagnosis.[86] Specifically, Dr. Compton concluded:

> I think there is a greater probability than not that Mr. Moore suffers from borderline intellectual functioning. I do not believe – I do not have the data to support a diagnosis of mental retardation, simply because the adaptive functioning, I think, has been too great. Even before prison, I mean, there's indications of adaptive skills. So, I just – I do not have the adaptive deficits for a diagnosis.
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> * * *
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> I believe that I don't have enough information on his adaptive deficits or adaptive – I do not believe there's enough adaptive deficits to diagnose him with mental retardation. I do think he has below average intelligence but I do not believe there's enough in the record or from what I've seen to qualify for that diagnosis.

A substantial amount of evidence in the record substantiates Dr. Compton's conclusion and is contrary to various findings made by the habeas court. In the area of conceptual skills, the habeas court found that applicant had deficits in the area of communication, citing a speech impediment,[87] that he had deficits in reading and writing,[88] that he had difficulty with math,[89] and that he was in general a "slow learner."[90] As will be discussed below, a good deal of evidence contradicts these conclusions. The habeas court found Applicant lacking in the area of social skills based on his withdrawn behavior as a child and low conduct scores on his report card. As will be discussed below, the evidence relied upon by the habeas court is limited and does not account for the social skills that Applicant has shown as an adult. In the area of practical skills, the habeas court concluded that Applicant lacks many practical life skills, cannot maintain a safe environment, and cannot live

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[86] *Id.* at 526.

[87] Findings, paragraphs 141, 172(d).

[88] *Id.*, paragraph 142.

[89] *Id.*, paragraph 153.

[90] *Id.*, paragraph 158.

independently. As we shall see, some of the cited lack of skills are due to the lack of opportunity to learn while other conclusions about Applicant's practical skills conflict with the record.

4. Communication Skills

To begin with, a conclusion that Applicant had difficulty communicating is at odds with his ability to testify at trial and to advocate for himself after trial. Applicant testified both at a hearing on a motion to suppress his written statement and during the defense's case-in-chief at the guilt phase.[91] His testimony was coherent and sometimes lengthy.[92] Dr. Compton said that Applicant's responses to questions during his trial showed that he could "conceptualize what was being asked and form exculpatory statements or responses" and indicated "an ability to engage in abstract reasoning to some degree."[93]

When Applicant became dissatisfied with his appellate representation, he filed a *pro se*

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[91] *Moore*, 470 S.W.3d at 491.

[92] For example, at one point in the hearing on a motion to suppress his written statement, Applicant testified,

> They took me to a little room and told me that I may as well sign the statement since these dudes had identified me as being with them. I told them I wouldn't. The one; so he told me I was going to make it or else it would be up to him to make this statement on whatever it called for me to make a statement.

When asked what happened at that point, Applicant stated,

> Well, one officer, he told one officer to leave the room and go do something. I don't know what he went to do; but, he got to hitting me upside the jaw and everything; and I still refused to sign the statement and everything; so he took me to another room where there was some typewriters and everything and asked me would I sign. I told him, no, I wouldn't sign it.

[93] *See also Moore*, 470 S.W.3d at 522.

petition for a writ of mandamus, and a hearing was held on the matter.[94] At that hearing, Applicant advocated on his own behalf and presented five exhibits.[95] The exhibits included letters Applicant had written to his attorneys, several of which he read aloud at the hearing without any apparent difficulty.[96] When it became evident that Applicant was unaware that his attorney had filed a brief, the hearing was recessed to allow Applicant to review it.[97] Although Applicant did not understand all of the legal arguments in his attorney's brief, he responded rationally and coherently to questions regarding whether he understood and was satisfied with the issues his attorney had raised.[98] The trial

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[94] *Id.* at 492.

[95] *Id.* at 492, 522. Applicant did not have a lawyer to coach him for this hearing. *Id.* at 522.

[96] *Id.* at 492. For example, Applicant read into the record a handwritten letter to his attorney that was dated February 13, 1983:

> Dear sir: Through the forgoing letter, I respectfully request unto you, sir, to be notified as to whether or not have yet the Appellant's Brief was filed on February 9, 1983, or if you has requested another extension of time in which to file said brief in the above reference cause number 314483.
>
> However, Mr. Bonner, sir, please be advised that I have filed three different motion with the court to review the record on Appeal and Prose Supplemental Brief to be considered along with your brief and the State's brief when sames are orally argued in accordance with Art. 44.33 V.A.C.C.P. and the rules of procedure of the Court of Criminal Appeals. I do not attempt to bump heads with you in any kind of way. All I wish to do is have the opportunity to defend my own life.
>
> However, again, sir, in the above three motions that I have filed to the Court of said, I respectfully request you, sir, to enter into judge of said presence, George Walker. In the favor behalf of myself in you asking Judge of said to grant my motions. For you consideration in attending to this causing matter request will be grately appreciated as I enter your presence I enclosed three motions in this letter. I pray that you, sir, will get in touch with me as soon as possible.

(Passage as it appears in court reporter's record).

[97] *Id.* at 492-93.

[98] *Id.* at 493.

court ultimately granted Applicant the relief he sought in his *pro se* pleading and appointed a new appellate attorney.[99] And although this new attorney filed a brief, Applicant also filed his own supplemental *pro se* brief, which made cogent arguments based on applicable caselaw, including then-recent Supreme Court caselaw.[100]

Applicant's communication skills were also shown in various letters he wrote and in his ability to influence others, which we will discuss in detail later in connection with other adaptive traits. At the 1993 habeas hearing, Borda had testified that he saw nothing to indicate "really severe deficits in communication skills" and that Applicant was "able to communicate adequately."[101]

5. Language Skills (Reading and Writing)

Regarding Applicant's ability to read and write, the evidence showed that, in prison, he progressed from being illiterate to being able to write at a seventh-grade level. Compton testified that seventh-grade level writing was demonstrated by Applicant's personal handwritten correspondence.[102] The *pro se* motions and pleadings that Applicant filed—some of which were handwritten—evidenced an even greater level of writing ability. And according to Dr. Compton, even if it were assumed that someone else composed those documents, Applicant's ability to copy such documents by hand would indicate an understanding and ability to write that would be within

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[99] *Id.*

[100] *See also id.*

[101] *Id.* at 495.

[102] *Id.* at 522.

the realm of only a few intellectually disabled people.[103]

Cloteal Morris, Applicant's mother's cousin, testified at Applicant's 2001 punishment retrial that Applicant had written her beautiful letters from prison about church and religion.[104] Alice Moore, Applicant's maternal aunt, said that Applicant wrote letters to her from prison and described them as "just normal letters."[105] Jo Ann Cross began corresponding with Applicant in 1993. She testified that Applicant's writing style, spelling, grammar, and use of language improved during their period of correspondence.[106] Cross arranged for Applicant to receive newspapers and articles, which they discussed during the correspondence, and Applicant exhibited "a greater deal of understanding of all sort of issues, be it culture issues [or] politics" than he had at the beginning of their correspondence.[107] When Cross's mother died in 1996, Applicant wrote Cross "a very moving letter" about her death.[108] At the 2014 habeas hearing, Colleen McNeese, one of applicant's sisters, testified that Applicant's reading and writing ability had greatly improved since his imprisonment.[109]

Dee Dee Halpin, an educational diagnostician called by the defense at the 2001 retrial, stated that a letter Applicant had recently written, though containing some errors, was "certainly coherent,"

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[103] *Id.* at 522-23. In addition, Applicant testified that a typewritten *pro se* brief was familiar to him as a document someone had helped him prepare and that he had a part in researching it. *Id.* at 497.

[104] *Id.* at 501.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 510.

"fairly complex," and "adult like."

When Dr. Compton went to evaluate Applicant, there were books (including a copy of the Qu'ran), a newspaper, and newspaper articles in Applicant's prison cell.[110] One of the newspaper articles was about winning an appeal, and many of the books and newspaper articles contained underlining.[111] Dr. Compton stated that underlining was often an indication that the person read and understood the text.[112] But, she said, even if the underlining was taken as a sign that the person did not fully understand the text and wished to review it later, doing so would still involve processing and conceptualizing and would imply understanding of the surrounding text.[113] Applicant's cell also contained a composition notebook, in the same handwriting throughout, that contained some material that could have been copied and some material that could have been a product of Applicant's independent thought.[114] The notebook also contained a handwritten table matching the Wechsler Scales's normal distribution of IQ scores, which indicated to Dr. Compton that Applicant was investigating IQ scores from his cell.[115]

6. Math and Money Skills

Although Applicant had poor grades in elementary school and struggled with both language and math on testing in the early elementary years, his math score in fifth grade on the Iowa Test of

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[110] *Id.* at 524.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

Basic Skills was within the average range.[116] Colleen McNeese testified that, in second and third grade, Applicant could not tell a $1 bill from a $5 or $10 bill.[117] However, she acknowledged that after Applicant learned to read, he was able to distinguish the denominations on bills.[118] She further acknowledged that, in prison, his ability to count had greatly improved.[119]

The prison commissary records indicated that Applicant's math skills were fairly well-developed. Jerry LeBlanc had worked at the commissary unit for fourteen years and had interacted with Applicant numerous times. LeBlanc did not help Applicant complete commissary forms, and to his knowledge, no one else did.[120] Although there was a cell adjacent to Applicant's on death row, the unit moved death row inmates frequently, so Applicant did not have the same neighbor for significant periods.[121] According to LeBlanc, there were recent examples of Applicant composing orders that came within the $85 spending limit.[122]

The habeas court found that the commissary slips contained "numerous mathematical and spelling errors," that the goods requested for Applicant often were well in excess of the spending limit, that Applicant was only within the $85 spend limit on two occasions, and that Applicant

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[116] *Id.* at 502.

[117] *Id.* at 509-10.

[118] *Id.* at 510.

[119] *Id.*

[120] *Id.* at 513.

[121] *Id.*

[122] *Id.*

"orders almost the same thing every time."[123] This was based on the habeas court's examination of what it characterized as "the 24 commissary order slips in evidence," which included examples ranging from 2012 to 2013.[124] We conclude that these findings, though in accord with the record in some respects, are also at odds with the record in some respects.

To begin with, the habeas court appears to have reviewed only the commissary slips in State's Exhibit 23, which contained twenty-four commissary slips ranging from 2012 to 2013. But State's Exhibit 26 was also admitted into evidence, and it contained twenty-two commissary slips ranging from 2010 to 2011. Further, the habeas court's conclusion that Applicant ordered almost the same thing every time does not to us seem consistent with a review of the slips in evidence. There are many items that recur from time to time, and some of the prices are the same, but nearly every slip seems to have a unique combination of items and prices. LeBlanc testified that the commissary price list changed frequently.[125]

To what extent Applicant's commissary slips met the $85 spend limit is a more complicated question than we appreciated on original submission, but it is also more complicated than was appreciated by the habeas court. Most of the slips contain some items that are marked through with a line. LeBlanc testified that the commissary staff would mark a line through an item if the item was out of stock. Many of the slips also show quantity reductions in various items. Some of the slips also contain a dollar sign ("$") on items marked through, which suggests a recognition by

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[123] Findings, paragraph 169.

[124] *Id.*

[125] *Moore*, 470 S.W.3d at 513. On cross-examination, defense counsel had asked, "So, your price list does not change all that much, does it?" LeBlanc responded, "Oh, yes, sir, it does. Quite often."

someone—Applicant or the commissary staff—that items were being struck out due to exceeding the spend limit. To what extent items were marked through by Applicant versus by the commissary staff is unknown. If one counts only the items that are not marked through in calculating the "spend total," and accounts for any quantity reductions, Applicant was more often than not within the spend total for commissary slips contained in State's Exhibit 23 and nearly always within the spend total for commissary slips contained within State's Exhibit 26. If items that were marked through are counted (and quantity reductions ignored), then most commissary slips exceeded the spend total.[126]

Even if we concluded that all of the mark-throughs and quantity reductions were made by commissary staff, that does not necessarily show that any failure to abide by the spending limit was due to adaptive deficits on Applicant's part. Applicant might have purposefully requested excess items to account for the possibility that some of his items would turn out to be out of stock. Inmates were allowed to specify substitute items, which seems to be a recognition that an item might not currently be in stock even if it was on the list. In addition, LeBlanc testified that certain types of property items (such as a hot pot) required special approval. Once the item was approved, then it would appear on the commissary request. It is unclear from the testimony whether these specially approved items are supposed to be part of the spend total. And there may be other reasons for Applicant to make requests in excess of the spend limit that do not indicate a lack of understanding on Applicant's part.

What we can say about the commissary slips is that they required Applicant to add or

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[126] The habeas court may have overlooked a commissary slip from 2/03/2013 that would appear to be within the spend total, regardless of whether marked-out items are included. Also, the 12/19/2012 commissary slip that the habeas court calculated as requesting $196.50 worth goods appears, by our calculations, to request only $100.50 worth of goods, if all marked-through items are included.

multiply when he ordered multiple quantities of a particular item. For each line item, there is a box for the quantity, a box for the unit price, and a box for the total price. The vast majority of the time, Applicant's calculations of the total price from the quantity and the unit price are correct. Many of his commissary slips contain no math errors at all. And at least some of the calculations would in practical terms require multiplying a two-digit number by another two-digit number.[127]

A few of the commissary slips contain what appear to be up to three possible errors, but many of these may not be errors at all. Sometimes a line item specifies a quantity that may actually be a pack or two packs of an item. For example, Applicant would specify twelve Ibuprofen tablets, but the unit price and the total price would be the same—suggesting that what is being ordered was a twelve-pack.[128] Or Applicant would order ten bars of soap, and the total price would be twice the unit price, which appears to mean that the soap came in packs of five.[129] Also, Applicant would often specify substitute items on the same line, and they were not necessarily in the same quantities, which could complicate an attempt at a straightforward calculation of the final price from the quantity and the unit price. Some ostensible errors may also be writing legibility issues rather than actual errors in calculation.

A few entries appear to be errors but would not be if Applicant had ordered a different

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[127] Examples of correct calculations include: 25 x 0.25 = 6.25, 14 x 0.80 = 11.20, 20 x 0.19 = 3.80, 15 x 1.70 = 25.50, 15 x 0.22 = 3.30.

[128] Our conjecture is supported by the cost of the Ibuprofin. Several receipts show a request for 12 of this item, a unit price of $1.20 and a total price of $1.20. It seems to us more likely that a single Ibuprofin pill would cost ten cents than $1.20. It also seems unlikely that an inmate would order twelve pills at a time if they really cost $1.20 each.

[129] There is at least one commissary slip in which soap was ordered when the quantity of two is marked out in favor of a quantity of ten, and the total price ($4.00) is twice the unit price ($2.00). Other slips simply order ten bars of soap where the total price is twice the unit price.

quantity of the item—suggesting the likelihood that Applicant changed his mind about how many of an item he wanted and did not recalculate the price.[130] A few entries are clearly calculation errors. But these relatively few errors are not consistent with the habeas court's conclusion that the mathematical errors were "numerous." Overall, the commissary slips support the conclusion that Applicant has well-developed math skills.

Moreover, LeBlanc testified that Applicant had occasionally brought mistakes made by the commissary to his attention, when Applicant had been charged for more items than he received.[131] LeBlanc never had the impression that Applicant did not understand "what's going on with his commissary."

Further support for the conclusion that Applicant had well-developed math skills can be found in Dr. Compton's testing. One of the tests she conducted, the WRAT-4, was a test of academic abilities.[132] Applicant was able to perform relatively complex math calculations on one portion of that test but failed to correctly perform simpler math calculations elsewhere on the test.[133] These inconsistent results led Dr. Compton to conclude that there was an increased probability that

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[130] In at least some of these cases, the relative complexity of the calculation suggests that the error was not caused by a simple failure to know times-tables. For example, on the September 17, 2013 slip, Applicant specified a quantity of two peanut butter items with a unit price of $2.25 and a total price of $6.75. The correct total price was $4.50, but the price of $6.75 would be correct if Applicant had ordered three items.

[131] *See also id.* at 513.

[132] *Id.* at 522.

[133] *Id.* Applicant demonstrated math ability included being able to add three-digit or four-digit numbers together.

Applicant was not exerting full effort on the test.[134]

Dr. Compton also noted that Applicant's practice of playing pool for money and mowing lawns before he went to prison shows "some ability to understand money concepts and work."[135] And after he went to prison, Applicant played dominoes, a game that requires counting.[136]

7. Learning Ability

Dr. Compton testified that IQ tends to remain constant over time and that it is unlikely that a person who is intellectually disabled at one point in his life will reach a point at which he is no longer intellectually disabled. As we have observed above, the DSM-5 indicates that even people with "mild" intellectual disability have difficulty learning to read, write, do math, and handle money.[137] We take into account the warning from the Supreme Court, as well as the DSM-5, that we should be cautious about relying upon adaptive strengths developed in a controlled setting such as prison. Nevertheless, even taking into account the controlled nature of the setting, the amount and pace of Applicant's improvement in reading and writing is simply inconsistent with the habeas court's description of Applicant as a "slow learner."

Even as early as 1971, Applicant was evaluated (in response to IQ testing) as possibly being "a child who has not been taught, but who can learn."[138] Halpin testified at Applicant's 2001 retrial

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[134] *Id.*

[135] *See also id.*

[136] *Id.* at 524. In a disciplinary report, an offender who was questioned after being found in Applicant's cell stated that he was there to play dominoes. Applicant also told the defense team in May 2000 that he played dominoes with another inmate. *See id.* at 508, 523 & n.55.

[137] *See supra* at n.72 and accompanying text.

[138] *Moore*, 470 S.W.3d at 494. This evaluation was done by Marcelle Tucker, M.Ed. *Id.*

that Applicant "definitely had some ability to learn that wasn't tapped early in his school years."[139] Bettina Wright, a clinical social worker called by the defense at the 2001 retrial, testified at that time that Applicant was "nowhere near retarded" and that his ability to learn was "very intact."[140] Dr. Compton found that both Halpin and Wright attributed Applicant's withdrawn behavior to emotional problems that were not recognized or dealt with appropriately in childhood and that the progression of Applicant's abilities in prison indicated "a strong ability to learn."

In fact, defense counsel argued in closing at the 2001 retrial that "we learned later from the experts and other people who looked at [applicant's school records] that he wasn't really [intellectually disabled] at all, he was capable of learning."[141] Defense counsel further asserted that it was not until Applicant went to prison, away from his abusive family environment, that he was "safe enough to be able to learn and grow and become the kind of person that he could have become had he come from a safe environment."[142]

8. Social Skills

The habeas court's discussion of Applicant's social skills is brief, spanning little more than a page in the findings. The habeas court found Applicant to be deficient in the area of "interpersonal relations" on the basis of three brief and isolated statements: (1) a statement in a kindergarten evaluation that Applicant was "very withdrawn—maybe retarded but most likely emotional problems" and a recommendation that he be referred for psychological testing and to a counselor,

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[139] *Id.* at 503.

[140] *Id.*

[141] *Id.* at 504 (brackets in the opinion)

[142] *Id.*

(2) a statement in a psychological evaluation report conducted approximately seven years later that the reason for the referral was that Applicant was "below grade level; withdrawn; takes no part in class unless called on," and (3) a statement by Applicant that "it always seemed like people disliked me" and that a teacher singled him out for special treatment by placing his desk alongside hers to stop other children from teasing him.[143] The habeas court found that Applicant was deficient in the area of "following rules" because he had a general conduct grade of "Unsatisfactory" on an elementary school report card that was based on below-average scores in the categories of "Disciplines Himself," "Is Courteous," "Respects Property Rights," "Is Attentive," "Follows Directions," "Participates Well in Class Activities," and "Does Neat and Orderly Work."[144]

The evidence upon which the habeas court relied is a minimal basis upon which to conclude that Applicant lacks social skills. And even this evidence fails to suggest that the cause of Applicant's deficient social behavior was related to any deficits in general mental abilities, suggesting instead that the cause was "most likely emotional problems."

Evidence from Applicant's adult life indicates that he has progressed beyond being withdrawn and is able to have significant social interactions. He had a girlfriend, Shirley Carmen, and he played pool, dice, and dominoes with peers.[145] The manager of a restaurant wrote in a disciplinary report that Applicant was "capable of influencing others to dissent, likes confrontation."[146] Although Dr. Compton addressed the idea of influencing people as a conceptual

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[143] Findings, paragraph 161(a)-(c).

[144] *Id.*, paragraph 162.

[145] *Moore*, 470 S.W.3d at 490, 497, 508.

[146] *See id.* at 523.

skill, it also shows social skill in interacting with people. Applicant also displayed a social ability to interact with and stand up to authority when he refused to mop up some spilled oatmeal, saying that he was not a hall porter and mopping was not his job.[147] And while in prison, Applicant had two pen pals, Cross and her mother. Dr. Compton noted that Applicant had responded in an emotionally appropriate way in letters to Cross and "had grown immensely as a person."

Some of the habeas court's statements about Applicant's practical skills might also be relevant to his social skills. The habeas court cited testimony from family and friends that Applicant was "always a follower," "always allowed those around him to make decisions for him," was "impressionable," and was "easily led."[148] But this evidence cannot be squared with the testimony of more objective witnesses that Applicant influences others and stands up to authority. In addition to the mopping incident, there were a number of incidents in prison in which Applicant refused to follow orders.[149] Although adaptive behavior may in general be expected to be higher in the controlled setting of the prison environment than in the "free world," standing up to authority is one trait that the prison environment would be expected to suppress. Applicant's willingness to stand up to authority in prison (and at times give reasoned explanations for doing so) is at odds with the claim that he is an impressionable, easily-led follower.

9. Practical Skills

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[147] *See id.* at 498-99.

[148] Findings, paragraph 167(a)-(d).

[149] At least twice, Applicant refused an order to shave, once saying that he had a "shaving pass" and the other time citing a medical condition. *Moore*, 470 S.W.3d at 498. One time, Applicant refused to get a haircut. *Id.* Another time, Applicant refused to sit down with a group of inmates in the day room. *Id.*

The habeas court found that there was no evidence that Applicant was able to live independently of his family.[150] But the record shows that, at age fourteen, Applicant lived in the back of a pool hall for a while and stole food from stores.[151] Dr. Compton cited this as an indication of adaptive behavior.[152] Even the habeas court cited the fact that Applicant "'lived on the streets' for most of his teenage years" or slept "on neighborhood porches or in cars" without asking for family help.[153] Dr. Compton testified that "in order to survive on the streets, obviously he had to engage in some adaptive behavior." In addition, Applicant had enough independence to possess his own guns: he was the one who supplied the weapons—a shotgun and a .32 caliber pistol—for the robbery that led to the capital murder in this case.[154]

The habeas court also found that Applicant had "never held a real job,"[155] but the record shows that he worked at the Two-K restaurant.[156] And even if the record did support the habeas court's finding, there is nothing to suggest that any failure by Applicant to get a job would be related to intellectual deficits rather than to the fact that he did not need a job because he was making his living by robbing people. The habeas court faulted Applicant for getting ptomaine poisoning twice from eating out of the neighbors' trash cans when he was a child because he should have learned

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[150] Findings, paragraph 167(f).

[151] *Moore*, 470 S.W.3d at 497.

[152] *Id.* at 522.

[153] Findings, paragraph 172(b).

[154] *See Moore*, 470 S.W.3d at 490.

[155] Findings, paragraph 165.

[156] *See Moore*, 470 S.W.3d at 523.

from the first time.[157] But the testimony showed that he was hungry, and a hungry child of normal or slightly below normal intelligence could also ignore the risk of getting sick because of the immediate need for food. The habeas court found that Applicant did not have a driver's license and had never learned to drive.[158] That is a factor to consider, but is by no means dispositive, especially given his family's poverty and his relative youth (twenty years old) prior to incarceration. The habeas court also referred to Applicant being easily led, but as we explained above, those conclusions, from interested witnesses, are at odds with more objective evidence showing Applicant's ability to stand up for himself and to influence others.[159]

Some of the trial court's findings suggest that Applicant had defects in executive functioning (planning, strategizing, priority setting, and cognitive flexibility).[160] But Dr. Compton testified that the instant crime displayed Applicant's ability to plan—"[w]earing a wig, covering up the gun and going to Louisiana all indicate a level of planning and forethought and ability to appreciate the need to do something not to be apprehended."[161]

Dr. Compton testified that some of the skills that her testing showed that Applicant lacked

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[157] Findings, paragraph 166.

[158] *Id.*, paragraph 164.

[159] *See supra* at part B.8 (social skills).

[160] Findings, paragraphs 132 (low score on test that included evaluating "one's ability to plan ahead"—score of "1"—the lowest Borda had ever recorded), 169(h) (concluding that Applicant lived so well in prison because it "leaves little room for independent decision-making" and that practical food, shelter, job, and bill-paying activities "would in all likelihood perplex him.").

[161] *See also Moore*, 470 S.W.3d at 522.

were things that he simply had not had the opportunity to learn.[162] She had to assign zeroes to questions asking about areas for which Applicant had no exposure, such as writing a check or using a microwave oven.[163] As we explained above, Applicant displayed considerable skill with writing and math, employed in practical uses such as reading books and newspaper articles—some of which related to the claims being made in his legal proceeding—writing letters, composing or at least copying legal motions, filling out commissary slips (which required both math and writing), and playing dominoes.

We also conclude that Applicant's low scores on adaptive skills testing, in the practical area or otherwise, lack reliability, not only because of the skewing effect of Applicant's lack of exposure to certain skills, but also due to lack of effort or malingering on Applicant's part in taking the tests. We view with extreme skepticism one test resulting in the lowest score the examiner has ever recorded.[164] Applicant made exceedingly low scores on some IQ tests, such as a score of 57, that are inconsistent with scores on other tests that are in the 70s or even higher,[165] and he made inconsistent scores in the mathematical portions of one of the recent tests he had taken.[166] Dr. Compton noted

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[162] *Id.* at 470 S.W.3d at 521-22.

[163] *Id. See also id.* at 509 (testimony that Applicant's family did not have kitchen appliances such as a microwave oven, and meals were cooked on a hot plate).

[164] *See supra* at n.160.

[165] *See Moore*, 470 S.W.3d at 503, 514 (*e.g.*, score on Slosson test was 57, score on WAIS-IV was 59, overall score on WISC was 78, with a performance score of 83).

[166] *See supra* at nn.132-34.

that various testing she conducted suggested that Applicant was exerting suboptimal effort.[167] On an information subtest that asks general knowledge questions, Applicant stated that he did not know what a "thermometer" was, but he was able to describe what a thermometer was on a test he took in 1989.[168] Dr. Compton testified that memory of the meaning of such a word is "crystallized knowledge" and that it is "rare to just forget it and not know what it is."[169] Dr. Compton explained that that response caused her concern: "I found that disturbing. I'll be honest with you, I did."

C. Conclusion

After reviewing the case under the standards set forth in the DSM-5, we conclude that Applicant has failed to show adaptive deficits sufficient to support a diagnosis of intellectual disability.[170] Consequently, we deny relief.

Delivered: June 6, 2018
Publish

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[167] *See Moore*, 470 S.W.3d at 518 (suboptimal effort on WAIS-IV and Test of Memory Malingering).

[168] *See id.*

[169] *See also id.* at 518.

[170] The dissent contends that our present opinion continues to employ *Briseno*-type factors and focuses on adaptive strengths rather than adaptive weaknesses. We disagree. We go into detail about Applicant's adaptive abilities to explain why the trial court's findings of fact are not supported by the record.