

09400930101C / Court: 182

**IN THE 182ND JUDICIAL DISTRICT COURT  
OF HARRIS COUNTY, TEXAS**

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**EX PARTE  
TOMAS RAUL GALLO,**

**Applicant.**

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**Cause No. 09400930101-C**

**(Texas Court of Criminal Appeals  
Cause No. WR-77,940-03)**

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**AGREED PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER**

The applicant, Tomas Raul Gallo, files this subsequent habeas application. The Court of Criminal Appeals (“CCA”) found that two of the applicant’s claims satisfied the requirements of TEX. CODE CRIM. PROC. art. 11.071 § 5: that the applicant is ineligible for execution under *Atkins v. Virginia*, 563 U.S. 304 (2002) (Claim One); and that his sentence was obtained in violation of due process because it was based on the false and misleading expert testimony of Dr. George Denkowski (Claim Three). *Ex parte Gallo*, No. WR-77,940-03, 2017 WL 562724, at \*1 (Tex. Crim. App. Feb. 8, 2017). The CCA remanded these claims to this Court for resolution.

This Court, having considered: (1) the applicant’s subsequent application for a writ of habeas corpus and associated exhibits; (2) the trial and appellate record; and

(3) the expert reports of Dr. Joan Mayfield and Dr. Timothy J. Proctor, recommends that habeas corpus relief be granted as to both of the applicant's claims.

### **PROCEDURAL HISTORY**

1. A jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to TEX. CODE CRIM. PROC. art 37.071, and the trial court, accordingly, set punishment at death. The CCA affirmed the applicant's conviction and sentence on direct appeal. *Gallo v. State*, 239 S.W.3d 757 (Tex. Crim. App. 2007).

2. The applicant filed his initial application for a writ of habeas corpus. After reviewing the application, the CCA denied relief. *Ex parte Gallo*, No. WR-77,940-01 (Tex. Crim. App. January 9, 2013) (not designated for publication).

3. The same attorney appointed to represent the applicant in his initial habeas proceedings filed the applicant's first subsequent writ application. However, the attorney filed the application without the applicant's permission. Accordingly, the CCA dismissed the first subsequent writ application without prejudice to the applicant to later file a subsequent writ application "as if it were the applicant's *first* subsequent writ application." *Ex parte Gallo*, 448 S.W.3d 1, 6 (Tex. Crim. App. 2014).

4. The applicant filed a petition for writ of habeas corpus in the United States

District Court for the Southern District of Texas. In response to the applicant's motion to stay, the federal district court entered an order staying its proceedings to allow the applicant to return to state court and file a subsequent state writ application raising his unexhausted claim that he is "constitutionally ineligible to be executed" under *Atkins v. Virginia* because he is intellectually disabled. See *Tomas Raul Gallo v. Lorie Davis*, No. 4:13-cv-01897 (S.D. Tex.), Order of August 18, 2016.

5. The CCA received the applicant's instant habeas application and considered it under Article 11.071 § 5 as if it were applicant's first subsequent application. In this subsequent application, the applicant avers that he is intellectually disabled and ineligible for execution under *Atkins* and that his sentence was obtained in violation of due process because it was based on false and misleading expert testimony concerning the question of whether he is intellectually disabled. The CCA remanded these two claims to the trial court for resolution. *Ex parte Gallo*, No. WR-77,940-03, 2017 WL 562724 (Tex. Crim. App. Feb. 8, 2017) (order, not designated for publication).

**CLAIM ONE:**  
**THE APPLICANT IS INELIGIBLE TO BE EXECUTED**  
**UNDER *ATKINS V. VIRGINIA***

6. In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), the United States Supreme Court held the execution of intellectually disabled persons to be unconstitutional.

7. In *Hall v. Florida*, 572 U.S. 701, 712 (2014), the United States Supreme Court held that courts cannot disregard “established medical practice” in examining an *Atkins* claim; that while there is a distinction between a medical and a legal conclusion regarding an intellectual disability claim, a court’s determination must be “informed by the medical community’s diagnostic framework.”

8. In *Moore v. Texas*, 137 S. Ct. 1039, 1049-55 (2016) (“*Moore I*”) the United States Supreme Court held that the latest editions of the American Psychiatric Association (APA)’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the American Association on Intellectual and Developmental Disabilities (AAIDD)’s *Definition Manual* constitute “current medical standards” that supply “the best available description of how mental disorders are expressed and can be recognized by a trained clinician.”<sup>1</sup> In accord with *Moore I*, reviewing courts must examine *Atkins* claims through the lens of the intellectual and developmental disabilities (“IDD”) definitions and clinical standards set forth in the most recent DSM and AAIDD clinical manuals.

9. In *Petetan v. State*, 622 S.W.3d 321, 332-33 (Tex. Crim. App. 2021), the CCA explained that while the APA and AAIDD clinical manuals are quite similar,

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<sup>1</sup> The APA and AAIDD manuals have both been updated since *Moore I*. Those changes are examined and discussed at length *infra*.

a legal determination of IDD should hew closer to the APA's DSM since its clinical purpose is more in keeping with the rationale underpinning *Atkins*.

10. The applicant must demonstrate that he is IDD by a preponderance of the evidence. *Ex parte Cathey*, 451 S.W. 3d 1, 4 (Tex. Crim. App. 2014).

11. A clinical diagnosis of intellectual disability does not imply that the individual with such a condition meets the legal criteria for the presence of a mental disorder or a specified legal standard. In fact, the APA recognizes that there is an "imperfect fit" between a clinical diagnosis and a legal conclusion. The DSM notes in a "Cautionary Statement for Forensic Use": "In most situations, the clinical diagnosis of a DSM-5 medical disorder such as intellectual disability (intellectual disability disorder)...does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specific legal standard (e.g., for competence criminal liability, or disability)." DSM-5-TR at 29.

**CLINICAL DEFINITION OF INTELLECTUAL DEVELOPMENTAL  
DISORDER  
(INTELLECTUAL DISABILITY)**

12. The APA and AAIDD agree that IDD is characterized by significant deficits in (1) intellectual and (2) adaptive functioning (3) during the developmental time period. An individual must satisfy each of the three criteria in order to be classified as IDD. DSM-5-TR at 37; AAIDD-12 at 16-20.

13. The APA and AAIDD published revisions to their clinical manuals during 2021. In accord with *Moore I*, and in an abundance of caution, this Court applies the most recent text to its analysis. 137 S. Ct. at 1049-55. *See Hall v. Florida*, 572 U.S. 701, 731-34 (2014) (Alito, Thomas, Scalia JJ and Roberts CJ dissenting) (*Atkins* jurisprudence “implicitly calls upon the Judiciary” to follow every change in thinking of the APA and AAIDD).

14. The AAIDD-12 raises the age of onset from before age eighteen to before age twenty-two. AAIDD-12 at 117.

15. The DSM-5-TR makes an important change from the DSM-5 regarding adaptive functioning. The DSM-5-TR eliminates the following language found in the DSM-5: that the deficits in adaptive functioning must be “directly related” to intellectual impairments described on Criterion A.” *Compare* DSM-5-TR at 42 with DSM-5 at 38. The elimination of the phrase “directly related” brings the AAIDD and APA into accord on this point. *See Moore I*, 581 U.S. at 24 (Roberts, CJ, dissenting); *Ex parte Moore*, 470 S.W.3d at 487 n.5.

16. Significant deficits in adaptive functioning are shown 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 across multiple environments, such as home, school work and community. DSM-5-

TR at 42.

17. Clinical judgment must be applied in the diagnosis of IDD. DSM-5-TR at 42. “Clinical judgment is a systematic process based on solid scientific knowledge and the reliable principles of science.” Randy G. Floyd, Ryan L. Farmer, W. Joel Schneider, & Kevin S. McGrew, Theories and Measurement of Intelligence, in *APA Handbook of Intellectual and Developmental Disabilities Vol. 1* 385, 410 (Laraine Masters Glidden Ed. 2021).

**THE APPLICANT DEMONSTRATES SIGNIFICANTLY SUB-AVERAGE INTELLECTUAL FUNCTIONING (CRITERION A)**

18. Intellectual functioning involves reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually measured and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence. DSM-5-TR at 38.

19. Individuals with IDD have IQ scores of approximately two standard deviations or more below the population mean including a margin for measurement error (normally +/- 5 points). For individuals diagnosed with mild IDD, this means

on IQ tests with a standard deviation of 15 and a mean of 100, a score of 65-75 (70 +/-5). IQ scores can be inflated due to out-of-date test norms. DSM-5-TR at 38.

20. In 1991 when the applicant was 15, his school administered the Wechsler Intelligence Scale for Children-Revised (WISC-R). The WISC-R is the juvenile analog to the WAIS for adults, and on that scale, the applicant's full scale IQ was measured as 74. (60 RR 131).

21. In 2002, Dr. George Denkowski conducted a pretrial evaluation of the applicant's intellectual functioning using the WAIS-III and obtained a full scale IQ score of 68. (60 RR 136). Dr. Denkowski did not find evidence of malingering. Supplemental Exhibit 23. (Confidential Forensic Psychological Evaluation of Tomas Gallo, Dec. 19, 20, 2002, by Dr. George Denkowski).

22. Dr. Richard Garnett interviewed the applicant in 2002 after Dr. Denkowski's testing, and after reviewing the two available scores, concluded that the applicant had an IQ score of 70. (60 RR 148).

23. In 2015, Dr. Joan Mayfield administered the WAIS IV, and measured Mr. Gallo's full scale IQ as 71. Dr. Mayfield administered instruments designed to detect malingering, and from the results of those tests, concluded that Mr. Gallo's WAIS IV scores were valid. Supplemental Exhibit 1. (Neuropsychological Evaluation of Tomas Gallo, Mar. 26, 27, 2015, by Dr. Joan Mayfield).



24. In 2022, Dr. Timothy Proctor was asked to review the applicant's case by Harris County Assistant District Attorney Joshua Reiss and to offer his clinical opinion as to whether or not, upon a review of available materials, a diagnosis of IDD is accurate for the applicant. Dr. Proctor concluded that the applicant's 74 on the WISC-R and 71 on the WAIS-IV likely overestimated the applicant's true abilities due to out-of-date test norms. State's Exhibit 1 (Evaluation of Tomas Gallo by Dr. Timothy J. Proctor, letter to Assist. District Attorney Joshua Reiss, June 23, 2022).

25. The Court finds that the applicant's WISC-R, WAIS-III, and WAIS IV scores all fall within the clinically recognized range of IDD. See *Moore I*, 137 S. Ct. at 1045 (average score of 70.66 satisfies Criterion A). Additionally, there is no evidence presented that the applicant malingered on any of the IQ tests. See DSM-5-TR at 38 (clinical training and judgment required to interpret an IQ score).

26. Accordingly, the Court finds that the applicant demonstrates significantly sub-average intellectual functioning by a preponderance of the evidence. *Moore I*, 137 S. Ct. at 1045.

**THE APPLICANT DEMONSTRATES SIGNIFICANT DEFICITS  
IN ADAPTIVE BEHAVIOR (CRITERION B)**

27. Deficits in adaptive functioning refer to how well a person meets

community standards of personal independence and social responsibility.in comparison to others of similar age and sociocultural background. Adaptive functioning involves adaptive reasoning in three domains: conceptual (academic), social, and practical. Criterion B is met when at least one domain of adaptive functioning is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across multiple environments. DSM-5-TR at 42.

28. The Court finds that the applicant demonstrates significantly sub-average adaptive functioning by a preponderance of the evidence. *Moore I*, 137 S. Ct. at 1045. *Infra* Findings of Fact 29- 42.

### **CONCEPTUAL (ACADEMIC) DOMAIN**

29. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. DSM-5-TR at 42.

30. The Court finds that evidence of the applicant’s significantly sub-average functioning in the conceptual area, most of which comes from reliable school records, is substantial and alone satisfies the requirements of the DSM-5-TR.

- The Iowa Basic Skills test, given to the applicant in 1984 when he was eight, showed he was at the fifth percentile. (60 RR 125). Supplemental Exhibits 2-5. (Palo Verde School Records of Tomas Gallo, Parts 1-4).
- The next year, at the age nine, the applicant was still at a very low level and

“many [results] were at the first and second percentile.” (60 RR 126). Supplemental Exhibit 2 at 5. (Palo Verde School Records of Tomas Gallo, Part 1).

- At 12, additional basic skills testing revealed “peaks and valleys that ranged from the first percentile to the 22nd percentile, but 11 of those 15 sub-scales were still at or below the six percentile.” (60 RR 127). Supplemental Exhibit 2 at 3 (Palo Verde School Records of Tomas Gallo, Part 1).
- At 13, the applicant was placed in special education classes. (60 RR 127-28).
- In the 11th grade, the applicant’s reading was at the fifth grade level, his math at the third grade and nine months level, and his spelling at the fifth year and four months level. (60 RR 129); Supplemental Exhibit 2 at 6 (Palo Verde School Records of Tomas Gallo, Part 1); Supplemental Exhibit 17 (Palo Verde School District 1991 testing of Tomas Gallo). On the Adolescent Behavior Inventory, commonly known as the adaptive behavior test, he had a full scale score of 71(60 RR 132), and on the Personality Inventory for Children, he scored a 60 on the “intellectual screening” scale and 61 on the “cognitive development” scale. (60 RR 134).
- When the applicant was tested at the age of 17 *all* of his scores were at or below the fifth grade level. (60 RR 134-35). On a reading test, the Woodcock Johnson, every one of the seven sub-scores were at the sixth grade level or below. (60 RR 135). At this time, he was still eligible for special education classes, but he had Fs in all subjects, Supplemental Exhibit 2 at 8 (Palo Verde School Records of Tomas Gallo, Part 1), and he stopped attending school without graduating. (60 RR 136).

31. The applicant’s school records are augmented by the testimony of one of his teachers, Melinda Bates. Bates explained that the school records did not label Mr. Gallo as “mentally retarded” because they use euphemisms such as “cognitively delayed” or “limited cognitive functioning,” labels that mean the same thing. (65 RR 27-28, 32); *Gallo*, 239 S.W.3d at 772 (“Bates explained that the school system used the term ‘limited cognitive functioning’ instead of ‘mentally retarded.’”).

32. Bates testified that she first met the applicant in 1990 when he was a little boy in the “Special Day Class,” a Special Education program “for students that are categorized as cognitively delayed or significantly below average in cognitive skills.” (65 RR 12, 30). Students in these classes “have cognitive delays.” (65 RR 12). The applicant could not do his A, B, Cs, and only learned them when he was in the fifth or sixth grade, and even then, did not learn them very well. (65 RR 51-52). Ms. Bates also taught the applicant when he was in a high school Resource Class for children with cognitive or learning disabilities. (65 RR 16). He “was below average in all areas” and “was reading at about third-grade level when I got him in tenth grade.” (65 RR 17-19). “He struggled with school and with the academy mix even though our classes were adapted specifically for students who have low skills.” (65 RR 18, 25). She reported that the students in those classes were graded on effort and “a tenth grade English class in the mainstream would be totally different than a tenth grade class in Special Education.” (65 RR 19). The fact that the applicant sometimes made high grades or the honor roll did not mean he was academically gifted. In particular, she stated that a student with a low IQ could get good grades in a “Restaurant Class” because “the skills they use in there are trades skills.” (65 RR 20-21).

## **PRACTICAL DOMAIN**

33. The Court finds that evidence of the applicant's significantly sub-average functioning in the practical domain is substantial.

34. The practical domain involves 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, among others. DSM-5-TR at 42.

35. The applicant's mother testified to facts that established that even as a child, his practical functioning was substantially impaired. The applicant had problems tying his shoes and finding his way around the neighborhood; could not go to the grocery store and didn't join in discussions; could not use a map or a globe and could not find streets or read a clock or fix things around the house; had to do orally pass his written driving test, because "[h]e couldn't read it"; that as a result of his limitations, he frequently was fired from jobs. (65 RR 52-55).

36. In terms of communication skills, applicant's mother also testified that when he was growing up, he had to have things repeated to him more than once before he would understand (65 RR 50) and sometimes, he would pretend to understand when he really didn't. (65 RR 50). Similarly, Dr. Garnett opined that Gallo was difficult to follow at times. (60 RR 188).

37. Noelia Rivera, the applicant's former wife, explained that even though he "was a hard worker and frequently took 'ready labor' jobs, which could last a day or much longer. . . . I managed and paid the bills [because t]hat was just not something [the applicant] was capable of doing." (Supplemental Exhibit 8, Declaration of Noelia Rivera).

38. Ricardo Gallo, applicant's younger brother, states that "Tomas took resource classes once his grades dropped. No matter how much he tried, Tomas could not do math." (Supplemental Exhibit 10, Declaration of Ricardo Gallo at 5). Regarding applicants' alleged cooking skills, Ricardo says that "Tomas is not much of a cook...Tomas was not one to learn by being shown how to do something, even after several times. He can only cook basic items for himself, like eggs or a hamburger. He's not able to make meatloaf. Tomas is someone who needs to be taught many times in order to learn." *Id.*

39. Marian Kay Leonard, applicant's friend and correspondent, states that he repeats himself in letters, "does not hold intellectual or complex conversations like some of the other inmates I visit, but communicates on a simpler level." (Supplemental Exhibit 20, Declaration of Marian Kay Leonard).

## SOCIAL DOMAIN

40. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment among others. DSM-5-TR at 42.

41. In third grade in Salinas, California, it was noted that applicant was a follower and "will go along with pranks as long as it's someone else's idea." (School Records, Supplemental Exhibit 2, at p.4). In the sixth grade, it was also noted that applicant was a follower. (*Id.*)

42. The applicant's mother testified that when he was growing up, he had to have things repeated to him more than once before he would understand and would pretend to understand when he really did not. (65 RR 50).

43. Dr. Garnett testified that applicant was deficient with social and interpersonal skills. (60 RR 191). He was also deficient on the ability to direct himself, to make decisions, and read the environment. (60 RR 195).

44. Bertha Pinon, who was employed at Mr. Gallo's high school, testified that Mr. Gallo's girlfriend Noelia Cavazos (Rivera) was in charge of the relationship and would answer all questions. (65 RR 100).

45. Noelia Rivera, Gallo's former wife explains that even though he could hold down a job, he could not function adequately: "Tomas was a hard worker and

frequently took ‘ready labor’ jobs, which could last a day or much longer.... When Tomas and I lived together, I managed and paid the bills. That was just not something Tomas was capable of doing. Tomas could work and make money; however, he could not budget and properly spend it.” (Supplemental Exhibit 8, Declaration of Noelia Rivera). In terms of his leisure activities, applicant had trouble with toy models. (65 RR 51). He seemed excessively interested in children’s activities even up to the time of the victim’s death, obsessively preoccupied with Play Station. (54 RR 115-117).

46. These lay observations of substantially impaired social skills were corroborated by Dr. Garnett. He found communication deficits, observing that Mr. Gallo was difficult to follow at times. (60 RR 188). He also assessed Mr. Gallo’s social and interpersonal skills, which he found deficient. (60 RR 191). Mr. Gallo was also displayed deficits in his ability to direct himself, to make decisions, and to read the environment. (60 RR 195).

### **ADAPTIVE BEHAVIOR INSTRUMENTS**

47. The DSM-5-TR requires that the diagnosis of IDD include “standardized tests of adaptive functioning.” DSM-5-TR at 38.

48. The applicant was administered an Adaptive Behavior Inventory (ABI) in 1991. The applicant received an overall score of 74. When the measurement error is considered (+/- 5 points), this score falls within the range consistent with Criterion



B. The applicant was also administered an Adaptive Behavior Assessment System (ABAS) instrument and scored a 71. According to the State's expert Dr. Timothy Proctor, the results of these instruments are in the range of an individual with IDD. State's Exhibit 1, (Evaluation of Tomas Gallo by Dr. Timothy J. Proctor, letter to Assist. District Attorney Josh Reiss, June 23, 2022).

49. Accordingly, the Court finds that the applicant presents the required standardized tests of adaptive functioning with results supporting a diagnosis of IDD.

**THE APPLICANT DEMONSTRATES  
ONSET DURING THE DEVELOPMENTAL PERIOD (CRITERION C)**

50. Onset during the developmental period refers to the recognition that intellectual and adaptive deficits are present during childhood or adolescence, i.e., prior to age twenty-two. DSM-5-TR at 42.

51. The Court finds that the applicant demonstrates significantly sub-average intellectual and adaptive functioning during the developmental period by a preponderance of the evidence. Moreover, there has been no evidence of any significant event after the developmental period to which the applicant's deficits might be attributed. *Moore I*, 137 S. Ct. at 1045. *Supra* Findings of Fact 19 - 49.

**EXPERT OPINION REGARDING  
THE APPLICANT'S INTELLECTUAL DISABILITY DISORDER**

52. Although it is not dispositive as to this Court's legal conclusion, the Court

finds it important to recognize that three clinicians with expertise in IDD -- Dr. Joan Mayfield, Dr. Richard Garnett, and Dr. Timothy Proctor -- all conclude that an IDD diagnosis for the applicant is accurate. *Gallo*, 239 S.W.3d at 770-72; (State's Exhibit 1, Evaluation of Tomas Gallo by Dr. Timothy J. Proctor, letter to Assist. District Attorney Josh Reiss, June 23, 2022, at 3). By contrast, the only expert find otherwise is Dr. George Denkowski, whose work has since been discredited. *Infra*. Accordingly, the Court accords no weight to Dr. Denkowski's ultimate clinical opinion.

**CLAIM THREE:**  
**THE APPLICANT'S SENTENCE WAS OBTAINED BASED ON THE**  
**FALSE TESTIMONY OF DR. GEORGE DENKOWSKI**

**PERTINENT LAW**

53. The knowing and unknowing use of false testimony is a cognizable claim in habeas corpus. *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009). To satisfy this claim, the applicant must demonstrate by a preponderance of the evidence that the testimony at issue was (1) false and (2) material. *Ex parte Chavez*, 371 S.W.3d 200, 207-9 (Tex. Crim. App. 2012). See also *Ex parte Hunter*, No. WR-69,291-01, 2016 WL 47931652 (Tex. Crim. App. March 9, 2016) (per curiam) (not designated for publication) (habeas relief granted based on false testimony of Dr.

Denkowski).<sup>2</sup>

54. Evidence is false if it is demonstrated to be “flatly incorrect.” *Weinstein*, 421 S.W.3d at 666. False evidence is material “only if there is reasonable likelihood that the false evidence affected the judgment of the jury.” *Id.* at 665.

### **DR. GEORGE DENKOWSKI’S SANCTIONS**

55. After the applicant’s conviction, Dr. George Denkowski was sanctioned by the Texas State Board of Psychologists. The Court finds that this sanction calls into doubt Denkowski’s credibility regarding his clinical judgment in the applicant’s case.

56. In *Ex parte Plata*, No. AP-75820, 2008 WL151296, the CCA adopted the findings of the state habeas trial court that there were “fatal errors in Denkowski’s administration and scoring of Plata’s IQ and adaptive deficit tests.” Following the issuance of the *Plata* opinion, the Texas State Board of Examiners of Psychologists (“TSBEP”) filed a complaint against Dr. Denkowski with the State Office of Administrative Hearings (“SOAH”), attaching the state habeas trial opinion to the complaint and seeking to sanction him for intentionally misapplying psychiatric testing methods in that case. *See* SOAH Docket No. 520-09-2882. After being the subject of eight different complaints by other psychologists and defense attorneys to the TSBEP, TSBEP Complaints No. 07-213-3967, 08-029-3967, 09-054-3697, 09-

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<sup>2</sup> The parties acknowledge that *Hunter* is persuasive authority and not binding.

065-3967, 09-072-3967, 09-077-3967, 09-111-3967, 09-195-3967, Dr. Denkowski was found to have “violated Board Rule 465.18(a)(4) pertaining to forensic services.”<sup>3</sup> In addition to having his license reprimanded, Settlement Agreement, *Texas State Board of Examiners of Psychologists v. George C. Denkowski*, Ph.D, SOAH Docket No. 520-09-2882, Apr. 3, 2011, Dr. Denkowski was assessed administrative penalties, Settlement Agreement, *Texas State Board of Examiners of Psychologists v. George C. Denkowski*, Ph.D, SOAH Docket No. 520-09-2882, Apr. 3, 2011; TSBEP Newsletter Vol 24, No 2 Fall 2011, <http://docplayer.net/6305560-Tsbep-newsletter-vol-24-no-2-fall-2011.html>, and was barred from accepting “any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings.” Settlement Agreement, *Texas State Board of Examiners of Psychologists v. George C. Denkowski*, Ph.D, SOAH Docket No. 520-09-2882, Apr. 3, 2011.

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<sup>3</sup> Settlement Agreement, *Texas State Board of Examiners of Psychologists v. George C. Denkowski*, Ph.D, SOAH Docket No. 520-09-2882, Apr. 3, 2011. The complaint also alleged that Dr. Denkowski violated various State Board Rules, including rules that limit the employment of “new techniques only after first undertaking appropriate study and training” (Rule 465.9(a)-(e), (h)-(j)); and rules requiring that “licensees rely on scientifically and professionally derived knowledge when making professional judgments” (Rule 465.10); rules requiring that licensees use assessment techniques or tests “only if they are familiar with the reliability, validation and related standardization or outcome studies of, and proper applications of, the[se]techniques” (Rule 465.16(b)(1), (2)); and rules requiring licensees to base all assessments and recommendations upon “information and techniques sufficient to provide appropriate substantiation for each finding” and decline to render opinion in areas “about which the licensee does not have the appropriate knowledge and competency”(Rule 465.18(a)(2)(4), (b)(1), (2)).

## **DR. GEORGE DENKOWSKI'S FALSE TESTIMONY**

### **INTELLECTUAL FUNCTIONING**

57. Dr. Denkowski administered a WAIS III to the applicant, on which he scored a 68. (61 RR 28, 72). That score, even without considering the standard error of measurement or the Flynn effect, was clearly within the intellectually disabled range. (61 RR 66-68). Nonetheless, Dr. Denkowski concluded the applicant's IQ failed to meet Criterion One. (61 RR 28, 40, 49).

58. Dr. Denkowski testified that the applicant's score of 68 established a IQ range "somewhere between 65 and 73." (61 RR 28, 72). This was not an accurate statement, given the standard error of measurement of  $\pm 5$  points, which would be 63 to 73. Dr. Denkowski could not explain why he would go up five points but only down three points, other than to claim "[t]hat's what it says in the test manual." (61 RR 73).

59. Dr. Denkowski also reviewed the applicant's one prior IQ score, which was a 74, and claimed that since "74 lies closer to 73 than it does the 65," the applicant's "true IQ score is above 70." (61 RR 28). There is no authority for this assessment. All of applicant's scores are within the IDD range taking into account the standard error of measurement. *Hall* makes clear that if the score is 75 or less, IDD cannot be ruled out only on the basis of Criterion A. *Hall*, 572 U.S. at 712-13.

60. The Court finds that Dr. Denkowski’s testimony on the range of the SEM and the applicant’s score within that range is plainly incorrect, i.e., false. *Weinstein*, 421 S.W.3d at 666.

61. Dr. Denkowski might just as easily have said that the score of 74 should be read as 69 because it would be more consistent with the score of 68 he had just obtained. Neither inference is more reasonable than the other – nor is either supported by the DSM-5-TR. Rather, a score of 74 has a confidence interval of 69 to 79 and a score of 68 has a confidence interval of 63 to 73. Both scores are consistent with intellectual disability. DSM-5-TR at 38.

62. Dr. Denkowski justified his clinical judgment of the applicant’s IQ on an invalid ground: that the applicant was “seriously depressed” and “moderately anxious” reasoning that anxiety and depression can depress an IQ score by eight points. (61 RR 29-30). There was no scientific basis for such an adjustment. DSM-5-TR at 38. As the Supreme Court noted in *Moore I*, the “existence of a personality disorder or mental-health issue . . . is ‘not evidence that a person does not also have intellectual disability.’” 137 S. Ct. at 1051. If the applicant’s performance on the WAIS-III was discrepant with indicators of his intellectual ability obtained when he was not anxious or depressed, describing the possible influence of depression might be appropriate, but as discussed *supra*, numerous academic achievement tests

and grades, taken at various ages are all consistent with the WAIS-III score.

63. Dr. Denkowski's grounded his clinical conclusion that the applicant's IQ score suffered from anxiety and depression based on the applicant's responses to two tests: the Beck Depression Inventory and the Beck Anxiety Inventory. (61 RR 88-90). However, both are only recommended only for use in research and clinical settings. Beck AT, Epstein N, Brown G, Steer RA (1988), "An inventory for measuring clinical anxiety: Psychometric properties," *Journal of Consulting and Clinical Psychology* 56: 893-897. An inmate awaiting a capital murder trial in jail is not such a setting. See Dr. Denkowski's Confidential Forensic Psychological Evaluation; Supplemental Exhibit 23 at 1. Indeed, it is one where elevated markers of depression and anxiety relative to the general population are to be expected. Consequently, what those elevated markers might imply for IQ test results is completely unknown.

### **ADAPTIVE FUNCTIONING**

64. The Court finds that Dr. Denkowski provided multiple instances of false testimony regarding the applicant's adaptive functioning. *Weinstein*, 421 S.W.3d at 666 ("the proper question in a false-testimony claim is whether the particular testimony gives the jury a false impression."). This finding of falsity is grounded in Dr. Denkowski's idiosyncratic practices detailed below. Taken as a whole, his

testimony gave the jury a false impression that his practices and clinical judgment were in accord with the DSM and prevailing professional norms.

65. Dr. Denkowski testified that he formulated about 250 questions specifically for the applicant then “took [his] adaptive behavior assessment, I wrote up the whole process, how I was going to approach it, and I submitted it for peer review to a psychologist who is also an attorney and a professor of a law school who does a lot of evaluations for the courts. I asked him to review it.” (61 RR 60-61). Rather than credit the applicant’s answers to his idiosyncratic questions, Dr. Denkowski then speculated about what he thought the applicant was capable of doing, and substituted his speculation for the information he had gathered: “[T]here were some things that I believed he would do if he had the opportunity, if he were motivated to do so because he had the underlying skills to do it. In those very, very few areas he didn’t do it, so therefore I used professional judgment to indicate that yes, indeed he could do that.” (61 RR 84). Simply put, Dr. Denkowski’s approach does not satisfy the APA’s requirement of utilizing standardized, psychometrically sound measures, and gave the jury a false impression that his practices were scientifically valid. DSM-5-TR at 42; *Weinstein*, 421 S.W.3d at 666.

66. Dr. Denkowski characterized the applicant’s Hispanic background as “a low socioeconomic antisocial lifestyle” which required upward adjustment of “scores



obtained with any mainstream adaptive behavior instrument.” (61 RR 79). He also stated that “numerous behaviors that are adaptive in [the applicant’s] subculture” including “selling drugs, inducing others to provide room and board, intimidating detractors.” Dr. Denkowski’s Evaluation, Supplemental Exhibit 23, at 4. He further described the applicant’s subculture as a “sociopathic.” *Id.* Dr. Denkowski defended his methods as incorporation of “cultural relevance.” (61 RR 110). Assuming *arguendo* that this is, in fact, a subculture, Dr. Denkowski’s was required to use a “culturally and linguistically appropriate assessment instrument” that was reliable and valid for people of that subculture. Richard Ruth, in *The Death Penalty and Intellectual Disability*, 235, 241 (Edward A. Polloway Ed. 2015). He did not. Accordingly, his testimony gave the false impression that his practices were clinically sound.

67. Dr. Denkowski provided speculative testimony that because the applicant sold narcotics in a commercial transaction (practical domain) he could mediate gang conflicts (social domain), despite the fact there was no evidence that he did or could mediate gang conflicts. (61 RR 51). Dr. Denkowski also testified that the applicant’s employment at Hyrdoblast meant that he had the ability to follow instructions and perform a complicated job, despite the fact that Dr. Denkowski reported no knowledge of the requirements of the Hydroblast job. (61 RR 69). Dr. Denkowski

speculative testimony left the false impression that perceived adaptive strengths in one domain can balance out adaptive deficits in another. *Moore I*, 137 S. Ct. at 1050.

### **MATERIALITY**

68. The Court finds there was a reasonable likelihood that Dr. Denkowski's false testimony affected the judgment of the jury. Dr. Denkowski's multiple instances of misleading testimony created a false sense that his clinical judgment was based on solid scientific knowledge and the reliable principles of science. *See Theories and Measurement of Intelligence*, in *APA Handbook of Intellectual and Developmental Disabilities Vol. 1* at 410. The Court materiality finding is grounded in the CCA's assessment of the importance of Dr. Denkowski testimony. The CCA concluded that "this case involves dueling experts" and "[t]he jury was ultimately in the best determination to make credibility determinations." *Gallo*, 239 S.W.3d at 774. Dr. Denkowski's credibility would have been shattered had the jury known how far he deviated from professional and scientific norms.

## CONCLUSIONS OF LAW

1. The Court concludes that the applicant demonstrates by a preponderance of the evidence that he is intellectually disabled and ineligible to be sentenced to death. *Moore v. Texas*, 139 S. Ct. 666, 671-72 (2019) (per curiam) (“*Moore II*”).

2. The Court concludes that the applicant demonstrates by a preponderance of the evidence that his due process rights were violated by Dr. George Denkowski’s material, false testimony. *Ex parte Chaney*, 563 S.W.3d 239, 264-65 (Tex. Crim. App. 2018).

Respectfully submitted,

s/s Joshua A. Reiss

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**Cause No. 09400930101-C**

**EX PARTE** § **182nd DISTRICT COURT**  
§ **OF**  
**TOMAS RAUL GALLO,** § **HARRIS COUNTY, TEXAS**  
**Applicant**

**ORDER**

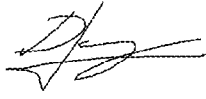
In accord with TEX. CRIM. PROC. CODE Art. 11.071 Sec. 9(f), the Harris County District Clerk is ORDERED to transmit to the Court of Criminal Appeals: (1) the findings of fact and conclusions of law entered by the Court; (2) the *Agreed Proposed Findings of Fact and Conclusions of Law*; (3) the writ application; including all exhibits filed by the parties, and (4) all answers and motions filed in the instant habeas proceeding.

The Harris County District Clerk is ORDERED to send an electronic copy of the Court's signed Findings of Fact and Conclusions of Law to the following attorneys for the parties: A. Richard Ellis for the applicant: a.r.ellis@att.net; Joshua Reiss for the respondent: reiss\_josh@dao.hctx.net.

By its signature below, the Court enters the above order, adopts the *Agreed Proposed Findings of Fact and Conclusions of Law*, and recommends that habeas corpus relief should be granted.

Dated: \_\_\_\_\_

Signed:  
4/5/2023

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a flourish.

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Presiding Judge, 182<sup>nd</sup> Judicial District Court

### Automated Certificate of eService

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Bar No. 24053738  
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#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Richard Ellis		a.r.ellis@att.net	4/4/2023 4:55:11 PM	SENT