

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

ARTHUR BROWN JR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

APPLICATION FOR STAY OF EXECUTION

***THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, MARCH 9, 2023, AT 6:00 P.M.***

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

The State of Texas has scheduled the execution of Petitioner Arthur Brown for **March 9, 2023, at 6:00 p.m.** Mr. Brown requests a stay of execution pending the consideration and disposition of the petition for a writ of certiorari that he is filing simultaneously with this application.¹

¹ Petitioner requests expedited consideration of the petition. *See* Petition at 1 n.1.

I. The Accompanying Petition for a Writ of Certiorari Presents Issues Sufficiently Meritorious for the Grant of Review

A. Mr. Brown is Intellectually Disabled

Petitioner Arthur Brown is an intellectually disabled man who is scheduled to be executed by the State of Texas on March 9, 2023, at 6:00 p.m. If the Texas Court of Appeals' decision below stands, Mr. Brown will be executed without any court having considered the strong evidence that he is intellectually disabled, despite his efforts to present that evidence to the state court for the first time in 2023.

Beginning in 2022, and up until his final subsequent writ of habeas corpus was filed on March 1, 2023, Mr. Brown developed and proffered evidence of his intellectual disability. Regarding significantly subaverage intellectual functioning, Mr. Brown provided evidence of his childhood WISC-R full-scale score of 70, the determination of a mental health professional, Dr. David Price, that he was intellectually disabled, and numerous affidavits and declarations supporting the same. Mr. Brown also proffered sworn statements from more than a dozen individuals establishing that Mr. Brown had risk factors for intellectual disability and has pervasive, life-long adaptive deficits that spanned multiple domains.

B. The TCCA Applied an Inadequate Rule in This Case to Bar a Merits Determination on Whether Mr. Brown is an Intellectually Disabled Individual that Can Not Be Executed

Mr. Brown was sentenced to death in 1993, prior to this Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), recognizing the Eighth Amendment's prohibition of executing individuals with intellectual disabilities. At the time that *Atkins* was decided, this Court "left 'to the States the task of developing appropriate

ways to enforce the constitutional restriction.” *Hall v. Florida*, 572 U.S. 701, 719 (2014) (quoting *Atkins*, 536 U.S. at 317)).

Because *Atkins* left to the states how to implement the constitutional restriction, and thus what could constitute a successful intellectual disability claim as a matter of state law, Texas litigants were constrained by the court-created rules in intellectual disability claims laid out in *Ex Parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), which has twice been struck down by this Court. Under Texas’s incorrect framework for deciding intellectual disability claims, Mr. Brown did not have a viable claim before *Moore I* and *Moore II*.

This Court’s intervention is urgently needed to prevent the imminent execution of Mr. Brown, who the evidence strongly suggests is intellectually disabled and therefore categorically exempt from the death penalty, despite the TCCA’s application of a novel procedural bar that it has not applied in other similarly situated cases. Because the TCCA refuses to consider the evidence of Mr. Brown’s intellectual disability, or even address Mr. Brown’s federal arguments, this Court should grant a stay of execution, grant a writ of certiorari, and remand to the state courts for a hearing on Mr. Brown’s evidence and merits determination of whether he is in fact intellectually disabled. Without intervention, Mr. Brown will be executed, notwithstanding his intellectual disability and his constitutional ineligibility for the death penalty, due to the TCCA’s novel and inconsistent application of a procedural bar notwithstanding this Court’s guidance in *Moore I* and *Moore II*.

III. Conclusion

The Court should stay Mr. Brown's execution, grant his petition for a writ of certiorari, and remand this case for the TCCA to address the merits of his Eighth Amendment intellectual disability claim.

Respectfully submitted,

/s/ BENJAMIN WOLFF

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