No. _____

IN THE

Supreme Court of the United States

ARTHUR BROWN JR.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

Mr. Brown was sentenced to death in 1993, prior to this Court's ruling in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits the execution of individuals with intellectual disability. Mr. Brown's first state habeas petition was filed March 29, 1998, and his subsequent (and last previous) petition was filed on October 29, 2014.

In 2017 this Court held that the *Briseno* factors adopted by Texas Court of Criminal Appeals (TCCA) for evaluating an *Atkins* claim are based on superseded medical standards that create an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment. *Moore v. Texas,* 581 U.S. 1 (2017) (*Moore I*). On remand, the TCCA determined that Moore was not a person with intellectual disability, a determination that this Court held was erroneous in *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*). The State of Texas seeks to execute Mr. Brown, who was determined to be Educable Mentally Retarded (EMR) in his childhood and had a full-scale IQ score assessed at 70, by applying without explanation a procedural bar that the State did not raise and is not supported either by the language of the applicable statute or by prior consistent state court interpretation of that statute.

Mr. Brown has never before raised an *Atkins* claim and only last sought relief in state courts in 2014. When the State sought an execution date, competent counsel was appointed in July of 2022 and filed this *Atkins* claim on March 1, 2023. Although

Mr. Brown argued to the Texas Court of Criminal Appeals that his execution is categorically prohibited by the Eighth Amendment and that his claim met the procedural requirements of Texas Criminal Code Article 11.071, Section 5(a)(1) based on the new legal bases of *Moore I* and *Moore II*, the state court did not address any of his arguments on the merits in its ruling. Instead, on March 7, 2023, the Texas Court of Criminal Appeals purported to apply its state-created procedural bar and failed to address any of Mr. Brown's arguments either as to the availability of a state remedy or as to their merits. The State of Texas now seeks to execute him although no court has ever considered the constitutional implications of his diagnosis and without explaining why his claims are procedurally barred.

In this petition and accompanying motion, Mr. Brown requests that his execution be stayed and certiorari be granted to address the following substantial questions:

1. Is Mr. Brown entitled to a merits review of his *Atkins* claim under federal law, *Moore I* and *Moore II*, and was the procedural bar asserted by the Texas Court of Criminal Appeals an independent and adequate state ground to preclude the assertion of an *Atkins* claim where the applicable statute provides that a court may consider the merits of a subsequent application when "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application"?

2. Can a state procedural rule overcome the Eighth Amendment prohibition against executing the intellectually disabled?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Statutes:

Other:

PARTIES TO THE PROCEEDINGS

Petitioner Arthur Brown, Jr., a person sentenced to death in the State of Texas, scheduled for execution on March 9, 2023, was the applicant in the Texas Court of Criminal Appeals. Respondent, the State of Texas, represented by the Harris County District Attorney's Office, was the opposing party in the underlying litigation.

DECISION BELOW

The decision of the Texas Court of Criminal Appeals is not published or reported and is reprinted in the Appendix (App.) at 1.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on March 7, 2023. App. at 1. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

[1] Petitioner requests that the Court expedite consideration of this petition in order to ensure that it is circulated together with the accompanying stay application.

STATEMENT OF THE CASE

I. Introduction

Arthur Brown Jr. is an innocent and intellectually disabled man incarcerated on Texas's death row as a result of sloppy police work, prosecutorial suppression of exculpatory evidence, corrupted eyewitness identifications, false forensic testimony. His intellectual disability (ID) – the subject of this cert petition – made him especially vulnerable to this unjust conviction and sentence. No court has ever heard the merits of this Eighth Amendment claim because the Texas Court of Criminal Appeals (TCCA) has applied a novel procedural bar to his ID claim, wholly inconsistent with its practice in numerous other cases filed in the wake of this Court's decisions in *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*) and *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*). His execution has been scheduled for March 9, 2023.

II. Background and Procedural History

A. Evidence of Mr. Brown's Significant Deficits in Intellectual Functioning Including Childhood Mental Retardation Determinations

Mr. Brown had several IQ measurements beginning in his childhood, as evidenced by his school records. These childhood scores evidence that Mr. Brown was low functioning, and he was diagnosed as "mentally retarded" as child. In the third grade, when Mr. Brown was 8 years old, he was given the Weschler's Intelligence Scale for Children – Revised (WISC-R), in addition to the Wide Range Achievement Test (WRAT). On the WISC-R, Mr. Brown had a full-scale score of 70, and was placed by the testing psychologist in the "Educable Mentally Retarded" (EMR) range. As Dr.

David Price – who diagnosed Mr. Brown as intellectually disabled in the proceeding below – noted, accounting for the Standard Error of Measurement (SEM), this places Mr. Brown's full scale IQ score between 65 and 75. App. at 354. Further, during the same examination when he was in the 3rd grade, the testing psychologist wrote that Mr. Brown's performance on the WRAT had "scores confirm[ing] academic retardation." App. at 114 (internal citation omitted).

Although two IQ tests performed in Mr. Brown's later school years yielded scores in the borderline range, the scored protocols for those tests are not available, making it impossible to check the accuracy of the scoring. Moreover, those scores were likely elevated due both to practice effects and the Flynn effect. Importantly, his achievement testing and actual academic performance remained very low throughout his schooling, and consistent with an intellectual disability.

Regarding Mr. Brown's performance on a WRAT given to him when he was older, a school psychologist noted that he scored in the 1% percentile for Reading Recognition, 0.8% percentile in Spelling, and only at the 14%tile in Arithmetic, and remarked: "These standard scores, mathematically analogous to IQ scores, immediately suggest academic achievement far below that expected from Arthur [Brown]'s present WISC-R I.Q." App. at 115 (internal citation omitted). Mr. Brown was determined to be "Educable Mentally Retarded" and suffering from "academic retardation" as a child by the Tuscaloosa school system, diagnoses that were corroborated by his failure to graduate, placement in special education, and flunking of the 9th grade. An expert retained by undersigned counsel, Dr. David Price, like the

school psychologist, observed that the WRAT scores achieved by Mr. Brown at 11 years of age are consistent with an intellectual disability, and considering the entire record, concluded that Mr. Brown met the first prong necessary for an intellectual disability diagnosis, significant deficits in intellectual functioning, under the prevailing standards in *Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition, Text Revision* (2022) (DSM-5-TR) and the Twelfth Edition of the *American Association on Intellectual and Developmental Disabilities' Intellectual Disability: Definition, Classification, and Systems of Supports* (2021) (AAIDD-12).

B. Evidence of Mr. Brown's Significant Deficits in Adaptive Functioning in All Three Domains

In the eight month period in which undersigned counsel represented Mr. Brown, they amassed evidence of significant deficits in all three major areas of adaptive functioning. Adaptive deficits "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." DSM-5-TR at 42; *see also* AAIDD-12 at 29 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."). The adaptive deficits prong of an intellectual disability diagnosis "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 across multiple environments, such as home, school, work, and community." DSM-5-TR at 42; *see also* AAIDD-12 at 31.

Importantly, this prong of intellectual disability is met by clinical judgment of deficits and is not negated by strengths. *See, e.g.*, AAIDD-12 (noting that "[w]ithin an individual, limitations often coexist with strengths."). Although a diagnosis of intellectual disability requires deficits in only one adaptive deficits domain, as Dr. Price concluded, Mr. Brown evidenced deficits in all three of these domains.

1. Mr. Brown's Deficits in Conceptual Skills

The conceptual domain includes skills such as academic skills, problem solving, thinking abstractly, difficulty communicating thoughts or ideas. AAIDD-12 at 30. For individuals 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 (i.e., reading, money management), are impaired." DSM-5-TR at 39. As Dr. Price summarized, Mr. Brown has significant deficits in the conceptual domain including impairments related to thinking skills, self-direction and planning, functional academics, and communication. App. at 117. Generally, Mr. Brown's intellectual limitations were known to his friends and family, although they did not label him as "mentally retarded" or "intellectual disabled." Individuals that knew Mr. Brown over the course of his life have described him consistently as "slow" *Id.*; *see also id.* (noting others reported Mr. Brown was "slower than other kids his age," "slow at things," and that "a lot about [Mr. Brown] [] makes [them] think [Mr. Brown] had problems thinking," and that he was "slow learning").

Mr. Brown's teacher also observed that Mr. Brown was limited. For example, one of his special education teachers recalled: "I remember Arthur. He was slow. He could do things, and he got along with other students when he had to, but he definitely had issues." App. at 117 (internal citation omitted). He was observed to have a limited vocabulary, and nearly illiterate until the age of 19 when he was patiently taught to read by the mother of his children. *Id*. Mr. Brown's teacher's memory of him is well-supported by Mr. Brown's school records. Impairment in "academic skills involving reading writing, arithmetic, time, or money" are indications of mild intellectual disability. DSM-5- TR at 39. Consistent with such a diagnosis, Mr. Brown struggled in school and was placed in special education by the time he was in the 3rd grade, and then in the Educable Mentally Retarded (EMR) classes in the 4th and 5th grade. Mr. Brown had to repeat the 9th grade, even though he was still classified as "Educable Mentally Retarded" and taking nearly all special education classes. In a Mastery Management Individual Student Status Report given to Mr. Brown on December 3, 1984, when he was 14 years old, he received an overall score of 59%, and could not master basic skills such as: math skills (fractions, decimals, graphs and area), use of clocks, use of calendars, as well as phone numbers and zip codes.

After repeating the 9th grade, Mr. Brown began to be labelled "Learning Disabled" rather than EMR. Mr. Brown's struggles only worsened: he began failing 103 school even more significantly, getting F grades in the 10th grade. Eventually, Mr. Brown formally withdrew from school on February 5, 1988, when he was in the 10th grade (though he was 17.5 years old). Mr. Brown's issues in school were a source

of embarrassment for him, as several of his friends and family members noted. App. at 117-18 (noting "[n]ot everyone knew [Mr. Brown] was in special education. It's not something he wanted people to know" and "[w]hen [Mr. Brown] found out that he would probably have to repeat the 9th grade, he was very upset. He felt like he failed. He would hit himself in the forehead and call himself stupid.").

As Dr. Price notes, Mr. Brown also "has had pronounced issues with communication over the course of his life." App. at 119. From a very early age, many individuals knew that Mr. Brown struggled to express or communicate his thoughts or to understand others. Family friend and babysitter, Anita Simpson, recalled that Mr. Brown "did not start talking until he was 3 or 4 years old" and that even when he did begin to speak, "his speech was not clear App. at 117. Mr. Brown struggled even more significantly to understand others. Mr. Brown "had a significantly limited ability to express himself." *Id*. Mr. Brown "had trouble keeping up with conversations," and had "a very hard time following the thread of a conversation" and "often misunderstood what people meant." *Id*. Those in Mr. Brown's community were careful how they worded things to him, or he wouldn't understand. *Id*. (noting "you couldn't say big words around him because he wouldn't know what they would mean, and he would always be asking what it meant.").

2. Mr. Brown's Deficits in Social Skills

Adults with mild intellectual disability are "immature in social interactions," and may have "difficultly in accurately perceiving peers' social cues." DSM-5-TR at 39. Such individuals may also have "difficulties regulating emotion and behavior in

age-appropriate fashion" and have "limited understanding of risk in social situations," which means they are "at risk of being manipulated by others (gullibility)." *Id*. As Dr. Price concluded, Mr. Brown has "significant deficits in the social domain" App. at 120. Mr. Brown manifested significantly impaired interpersonal skills and poor social judgment. Individuals who knew Mr. Brown in his childhood said that Mr. Brown "didn't have any friends" and "didn't know how to make friends," and that he played with children much younger than him "instead of kids his own age" because "he could relate to them." *Id*. As a young child, Mr. Brown was "awkward with other children" and "got along with [the family's] hunting dogs better than he did with other children" because the dogs "didn't ask much of him." App. at 120-21. His thinking in social situations was always overly concrete. As Nettie Mae Williams recalls, Mr. Brown "couldn't handle teasing like other kids because he couldn't understand" when someone was joking and "took everything you said at face value and thought it was serious." App. at 121.

3. Mr. Brown's Deficits in Practical Skills

Adults with mild intellectual disabilities "may function age-appropriately in personal care," but "need some support with complex daily living tasks in comparison to peers." DSM-5-TR at 39. These adults typically need help with "grocery shopping, transportation, home and child-care organization, nutritious food preparation, and banking and money management." *Id*. Additionally, these "[i]ndividuals generally need support to make health care decisions and legal decisions, and to learn to

perform a skilled vocation competently." *Id*. Mr. Brown has significant deficits in his practical skills and these deficits stem from his childhood.

As a child, Mr. Brown got "special treatment" compared with his siblings, in part because he "was not able to do things that other kids were able to do." App. at 122. His mother physically carried him around until he was "4 or 5 years old." *Id*. It was well-known that [Mr. Brown] needed help: "Everybody in the family did things for [Mr. Brown] so he wouldn't have to do them himself. [Mr. Brown] had a harder time doing things so he needed the help." *Id*. Even after Mr. Brown left his parental home, his practical skill issues continued. His longtime girlfriend and the mother of his two children, Onetha Gay Bolden, noted that Mr. Brown could not act as a parent to their children:

> AJ played with the children and could put them down to sleep. But as far as most parenting goes, AJ wasn't good at it. He was loving and playful, but he couldn't do things that needed to be done. I would not let AJ measure formula for the babies, for example. He could not understand the proper ratios for that, so I always had to do it.
>
> *Id*.

Moreover, it wasn't just parenting tasks that Mr. Brown could not do, he also was not trusted to use things like blenders or sharp knives. App. 123; *cf. id*. ("I tried to keep AJ from using knives in the kitchen because I was worried he would accidentally cut himself.").

4. Mr. Brown's Adaptive Deficits Would Not Have Been Enough Under the *Briseño* Factors, Before this Court Corrected Texas's Improper ID Framework in *Moore v. Texas* and Progeny

Thus, Mr. Brown has displayed significant practical domain deficits as well as significant deficits in social skills and in conceptual skills, any one of which would meet the second prong for a diagnosis of intellectual disability. However, the evidence establishing these deficits would not meet the criteria set forth in the TCCA's decision *Ex Parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), criteria since held by this Court in *Moore I* to create an unacceptable risk that a person with intellectual disability will be executed.

Briseno insisted that the evaluation of adaptive functioning deficits focus on seven questions:

> 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?
> Has the person formulated plans and carried them through or is his conduct impulsive?
> Does his conduct show leadership or does it show that he is led around by others?
> Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
> Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
> Can the person hide facts or lie effectively in his own or others' interests?
> Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9 (Tex. Crim. App. 2004), *abrogated by Moore v. Texas*, 581 U.S. 1, (2017) (*Moore I*), and *abrogated by Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim.

App. 2018). Mr. Brown's evidence arguably satisfies the first question, whether those who knew him in the developmental period thought he was mentally retarded, though even the answer to that questions is mixed, as the school system and his teachers did classify him in that way, though family members and friends responses did not think of him as "mentally retarded." However, his evidence fails to provide a qualifying answer to any of the other six questions.

C. Evidence of Mr. Brown's Intellectual Disability Onset During the Developmental Period

The third prong of an intellectual disability diagnosis requires the "[o]nset of intellectual and adaptive deficits during the developmental period," DSM-5-TR at 37, now defined as prior to the age of 22 years old, *see* AAIDD-12 at 33. This prong refers only to "recognition that intellectual and adaptive deficits are present during childhood or adolescence," DSM-5-TR at 42, but, importantly, does not require proof to proof of intellectual disability before the age of 22 years old, only evidence manifesting that disability prior to the age of 22.

Mr. Brown also need not prove the exact origin of his disability, be it in utero, due to progressive damage such as malnutrition, or due to acquired disease or injury (such as traumatic brain injury) to meet this prong of the diagnosis. Mr. Brown's intellectual and adaptive deficits plainly existed before he was 22 years old. Indeed, Mr. Brown was arrested when he was approximately 22 years and two months old, meaning that all but two months of his time prior to incarceration for this offense was in the developmental period, and all of the adaptive functioning evidence described above relates to that period.

Evidence of risk factors is not required for the diagnosis of intellectual disability. However, the medical community considers "risk factors" as "cause to explore the prospect of intellectual disability further." *Moore*, 137 S. Ct. at 1051, and therefore the presence of risk factors is persuasive evidence that an intellectual disability may exist or develop. *See Moore*, 137 S. Ct. at 1051 ("At least one or more of the risk factors described in the [DSM] will be found in every case of intellectual disability.") (internal brackets and quotation marks omitted) (quoting AAIDD-11, p. 60). Mr. Brown experienced at least four of the risk factors associated with intellectual disability are: fetal alcohol exposure,[2] traumatic brain injury,[3] extreme poverty, and physical abuse and extreme domestic violence. *See, e.g.*, DSM-5-TR at 44; AAIDD-11 Manual at 60; AAIDD-12 at 93 (embracing "a multiple-perspectives approach to risk factors associated with the biomedical, 109 psychoeducational, sociocultural, and justice perspectives on ID").

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[2] Mr. Brown's mother, Joe Mae Brown, recalled that she "drank every weekend" and "[s]ometimes [she] drank during the week" while pregnant with Mr. Brown. App. at 437. Joe Mae said she "drank at least 1 pint of either whiskey or Brandy" every Friday, Saturday and Sunday while she was pregnant, and noted that multiple members of her family saw her do this. Id. She drank so much that she nearly miscarried Mr. Brown when she was 4-5 months pregnant with him and was put on bed rest for the remainder of her pregnancy. Id.

[3] While playing football, Mr. Brown was hit in the head and became unresponsive. He was brought to the hospital by his football coach, where he was observed to be not responsive to pain and did not open his eyes. Based on his review of the hospital records, Dr. Price concludes that "there is no question that Mr. Brown had at the very least a Moderate TBI, but more likely had a Severe TBI, from that accident." App. 363.

However, at the time Mr. Brown filed his previous subsequent petition in 2014, the TCCA was still holding that the presence of risk factors cut against a finding of intellectual disability rather than supporting it. *See Ex parte Moore*, 470 S.W.3d at 526 ("Rather, the record overwhelmingly supports the conclusion that applicant's academic difficulties were caused by a variety of factors, including trauma from the emotionally and physically abusive atmosphere in which he was raised, undiagnosed learning disorders, changing elementary schools three times in three years, racially motivated harassment and violence at school, a history of academic failure, drug abuse, and absenteeism."); *see also Moore*, 581 U.S. at 16 (criticizing the TCCA for concluding that Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related, and noting that "[t]hose traumatic experiences, however, count in the medical community as "risk factors" *for* intellectual disability.").

D. Mr. Brown's Conviction and Death Sentence

Mr. Brown's capital conviction stems from the June 20, 1992, robbery and shooting of six individuals – two of whom survived – present at 4631 Brownstone Lane in Houston, Texas. Mr. Brown was prosecuted along with Mr. Marion Dudley[4] and Mr. Antonio Dunson, with Mr. Brown's capital trial proceeding first. He was sentenced to death on November 22, 1993. 40 RR 150-55.[5]

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[4] Mr. Dudley has already been executed.

[5] This citation refers to the original Reporter's Record in Mr. Brown's direct appeal proceedings, in the following format: [Volume] RR [Page].

No forensic evidence was presented at Mr. Brown's trial, apart from firearms analysis that was determined to be false in 2016. *See Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 18, 2017) (unpublished); *see also id*. (Alcala, J., dissenting) (published) ("At the habeas hearing, evidence was presented and the habeas court determined that no evidence supports these conclusions made by [firearms analyst] Anderson."). The State's conviction rested largely on two surviving eyewitnesses – Rachel Tovar and Nicolas Cortez – who identified Mr. Brown as one of the assailants, but that testimony was impeached at trial in part by an extreme difference between the description provided by Ms. Tovar of her assailant and Mr. Brown's appearance and in part by very suggestive police procedures. *Brady* disclosures only provided in the last two weeks revealed that both individuals suffered brain damage and/or facial recognition and other cognitive issues as a result of being shot in the head, which would have affected not only their memory of that night but their ability to identify Mr. Brown later. Additionally, in further disclosures also made in 2023, the prosecution revealed a videotaped statement of a witness who implicated another person in this crime – exactly the person who trial counsel attempted at trial to show was an alternative suspect in this case. Put simply, Mr. Brown's conviction and death sentence were obtained with scant evidence of guilt that was thoroughly impeached over the course of several postconviction proceedings, including the one underlying this litigation, but Mr. Brown, a person with indisputably impaired cognitive functioning, was procedurally barred from litigating these claims because they had not been presented earlier.

E. Mr. Brown's Prior Postconviction Proceedings

Mr. Brown filed his initial application for a writ of habeas corpus on March 26, 1998 under Texas Code of Criminal Procedure Article 11.071. Inexplicably, the Harris County District Attorney's Office did not file an answer until nearly four years later on April 24, 2002. This application raised several undeveloped grounds for relief and was denied by the 351st District Court on August 31, 2007, without an evidentiary hearing. The TCCA agreed with the district court's finding and denied relief on this application on June 18, 2008. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008).

On January 1, 2009, Mr. Brown sought relief in federal district court. Mr. Brown's federal habeas petition was denied on February 28, 2011. Memorandum and Order (ECF 31), *Brown v. Thaler*, No. H-09-74, 2011 WL 798391 (S.D. Tex. Feb. 28, 2011). The Fifth Circuit denied Mr. Brown's request for a Certificate of Appealability (COA) on June 12, 2012. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012).

On October 29, 2014, Mr. Brown filed his first successive application for Article 11.071 relief. *See* Subsequent Application for Writ of Habeas Corpus, Filed in Accordance with Article 11.071, Section 5, Texas Code of Criminal Procedure, *Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 29, 2014). In this application, Mr. Brown raised several claims, including that the state's firearms expert at trial, C.E. Anderson, provided false or misleading testimony about the bullets recovered from the autopsies "matching" two guns that the prosecution attributed to Mr. Brown and his co-defendants.

The Court of Criminal Appeals authorized and remanded Mr. Brown's first claim centered on the false testimony of the State's firearm expert, C.E. Anderson, to the 351st District Court. *See* Order, *Ex parte Brown*, WR-26,178-03 (Tex. Crim. App. Oct. 28, 2015). During an evidentiary hearing on October 11, 2016, Mr. Brown presented evidence from two firearms examiners, Edard Love, Jr. and Donna Eudaley, reflecting that the two weapons allegedly connected to Mr. Brown and his co-defendants, the .357 Smith & Wesson and the .38 Charter Arms, were excluded or inconclusive upon re-testing the ballistic evidence. On December 19, 2016, the trial court recommended that relief be granted on his false testimony claim. Order, *Ex parte Brown*, No. 636,535-B (351st Dist. Ct. – Harris County, Dec. 19, 2016).

The TCCA rejected the district court's recommendation of relief in a per curiam order on October 18, 2017. *See Ex parte Brown,* WR-26,178-03 (Tex. Crim. App. Oct. 18, 2017) (unpublished). Although the TCCA assumed, as the trial court had found, that the ballistics evidence was presented in Mr. Brown's trial was false, it denied relief on materiality grounds. On October 15, 2018, the United States Supreme Court denied certiorari. *Brown v. Texas*, No. 17-7929 (Oct. 15, 2018).

Between 2018 and 2022, Mr. Brown was without competent counsel. The Office of Capital and Forensic Writs, undersigned counsel, was appointed to represent him in July of 2022. Since then, Mr. Brown's intellectual disability was investigated for the first time and his counsel filed a subsequent writ of habeas corpus that included a claim that because of his intellectual disability, the Eighth Amendment precluded his execution.

III. Decision Below

Mr. Brown argued in his state subsequent writ of habeas corpus that he is intellectually disabled; that his intellectual disability is a *categorical* prohibition to his execution under the Eighth Amendment that could not be barred, and that his intellectual disability claim, because it is based upon new law, met the procedural hurdle imposed on subsequent applications. Texas Criminal Code of Procedure Article 11.071 Section 5(a)(1) provides that claims raised in a subsequent application cannot be considered unless "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or *legal basis* for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071(5)(a)(1) (emphasis added). The State in its response to the subsequent writ disputed the merits of Mr. Brown's intellectual disability claim at great length but did not dispute that it satisfied the procedural gateway established by virtue of being based upon "new law."

Nonetheless, the TCCA did not address Mr. Brown's substantive arguments in its order, and explicitly stated that it had not reviewed the merits of his claim. After listing the claims raised in application, the order states:

> "We have reviewed the application and find that Applicant has failed to show that he satisfies the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised." Art. 11.071 § 5(c).

App. at 2.

REASONS FOR GRANTING THE WRIT

I. The Procedural Bar to Consideration of the Merits of Petitioner's *Atkins* Claim is Not Based Upon an Adequate and Independent State Ground and Should Not Prevent a Merits Decision

This Court will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *see also Herb v. Pitcairn*, 324 U.S. 117 (1945) (stating that the prohibition on reviewing judgments of state courts that rest on "adequate and independent state grounds" is based in part on limitations on this Court's jurisdiction). Although this doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules." *Harris*, 489 U.S. at 260-61, the question of when and how defaults in compliance with state procedural rules can preclude this Court's consideration of a federal question is itself a federal question. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Henry v. Mississippi,* 379 U.S. 443, 447 (1965).

The TCCA's rejection of Mr. Brown's *Atkins* claim clearly rested on an "independent" state ground; the opinion explicitly states that the TCCA is dismissing the application "as an abuse of the writ without reviewing the merits of the claims raised." Art. 11.071 § 5(c)." App. at 2. The question is therefore, as it was in *Cruz v. Arizona*, 598 U.S. __ , 2023 WL 2144416 (Feb. 22, 2023), whether the cited state procedural ground is adequate, and whether the TCCA was obligated to apply federal

law in line with the Supremacy Clause. *See Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

A state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)); *Hathorn v. Lovorn,* 457 U.S. 255, 262–263 (1982). Ordinarily, violation of a state procedural rule that is "firmly established and regularly followed" constitutes a state ground "adequate" to foreclose merits review of a federal claim, but in "exceptional cases" a generally sound rule may be applied in a way that "renders the state ground inadequate to stop consideration of a federal question." *Cruz*, 2023 WL 2144416 at *5; *Lee v. Kemna*, 534 U.S. 362, 376 (2002). "Because "novelty in procedural requirements cannot be permitted to thwart review. . . by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457, (1958). *See also Cruz*, 2023 WL 2144416 at *6; *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.").

The facts of this case track those that grounded reversal in *Cruz*. This case, like *Cruz*, challenges "an unforeseeable and unsupported state-court decision on a question of state procedure." *Cruz*, 2023 WL 2144416 at *2. Like Cruz, Mr. Brown asks for the enforcement of clear federal law in *Atkins*, *Moore I*, and *Moore II*, under the Supremacy Clause and due process. Both cases involve a state statute that

permits successive petitions where the claim raised is based in new law. The Arizona rule at stake in *Cruz* permitted a defendant to bring a successive petition if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." *Cruz*, 2023 WL 2144416 at *2. The applicable Texas statute provides that a court may consider the merits of a subsequent application when "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071 §5(a)(1).

Both this case and *Cruz* involve a decision of this Court overturning a decision of the very same state court that then boldly declares that no new law was created by this Court's decision. After the Arizona Supreme Court repeatedly held that Arizona's sentencing and parole scheme did not trigger application of *Simmons v. South Carolina,* 512 U.S. 154 (1994), this Court summarily reversed that state court in *Lynch v. Arizona*, 578 U.S. 613 (2016) (*per curiam*), holding that that it was fundamental error to conclude that *Simmons* "did not apply" in Arizona. 578 U.S. at 615. Likewise, after the Texas Court of Criminal Appeals repeatedly applied its "*Briseño* factors" instead of clinical consensus on the definition of intellectual disability, this Court overturned the TCCA's deviations from clinical consensus in *Moore I* – and again in *Moore II*. And finally, the Arizona Supreme Court denied merits review of Cruz's claim after holding that *Lynch* was "not a significant change

in the law," *Cruz,* 2023 WL 2144416 at *5 and the TCCA denied relief stating that Mr. Brown had failed to "satisfy[y] the requirements of Article 11.071 § 5," App. at 2, *i.e.,* that the legal basis for the claim was unavailable on the date the applicant filed the previous application. In both cases, contrary to the state court's reasoning, "[i]t is hard to imagine a clearer break from the past." *Cruz,* 2023 WL 2144416 at *6.

True, this Court also criticized the Arizona Court's reasoning as to why the overturned case did not create new law, and such criticism is not possible here – but only because the TCCA offered no explanation at all. Moreover, none can be gleaned or cobbled together from the State's pleading because the State did not even *contest* Mr. Brown's assertion that the claim was authorized under Tex. Code Crim. Proc. art. 11.071(5)(a)(1), though it did at substantial length contested the merits of his claim.[6]

Moreover, the TCCA's previous exposition on the meaning of 5(a)(1) provides no explanation for its decision to ignore the language of the provision but supplies additional reason to conclude that *Moore I* and *II* satisfy 5(a)(1), at least in instances where the evidence proffered would not satisfy the *Briseno* test. The CCA has explained that the § 5(a)(1) exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the CCA's law at the time of the previous application. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007) (authorizing a claim under § 5(a)(1) when a "subsequent writ is based on binding and

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[6] Although it disputed all of Mr. Brown's other claims on procedural grounds, the State did not dispute that Mr. Brown's *Atkins*' claim meets the requirements of Section 5 at all and disputed only the merits of Mr. Brown's claim. Indeed, of its 24-page reply and Mr. Brown's four claims to respond to, the State spent a third of its reply (pages 7-15) contesting the merits of Mr. Brown's ID claim.

directly relevant United States Supreme Court precedent decided after applicant had exhausted [his] claim at trial and on direct appeal and after applicant had filed his first state habeas application"); *see also Ex parte Hood*, 304 S.W.3d 397, 405 n.40–41 (Tex. Crim. App. 2010) (*Hood II*) (collecting sources largely relying on *Martinez*).

Most telling of all, however, are the TCCA's previous decisions that *Moore I* represents a new legal basis under Texas Code of Criminal Procedure Article 11.071 section 5(a). *See, e.g., Ex parte Butler*, WR-41,121-03, 2019 WL 4464270 at *2 (Tex. Crim. App. Sept. 18, 2019) ("Applicant filed the instant habeas application in the trial court on August 29, 2018 . . . We find that, in light of *Moore I* and *Moore II*, Applicant has satisfied the requirements of Article 11.071, § 5(a)(1)."); *Ex parte Gutierrez*, WR-70,152-03, 2019 WL 4318678, at *1 (Tex. Crim. App. Sept. 11, 2019) ("Applicant alleges in this subsequent application that the Supreme Court's *Moore [I]* decision constitutes a new legal basis for relief that was not available when he originally raised his Atkins claim. We find that, in light of *Moore [I]*, Applicant has satisfied the requirements of Article 11.071, § 5(a)(1)."); *Ex parte Milam,* WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019) ("Because of recent changes . . . changes in the law pertaining to the issue of intellectual disability, we find that applicant has met the dictates of Article 11.071 § 5(a)(1) with regard to his first two allegations. We therefore stay his execution and remand these claims to the trial court for a review of the merits of these claims."); *Ex parte Guevara*, WR-63,926-03, 2018 WL 2717041, at *1 (Tex. Crim. App. June 6, 2018) ("[Guevara] alleges in this subsequent application that the Supreme Court's [*Moore I*] decision constitutes a new legal basis

for relief that was not available when he originally raised his *Atkins* claim. *See* Art. 11.071 § 5(a)(1). He contends that he is entitled to a review of his *Atkins* claim on the merits and a grant of relief. We find that, in light of [*Moore I*], applicant has satisfied the requirements of Article 11.071 § 5(a)(1) with regard to his first allegation in the instant subsequent writ application."). *Ex parte Williams*, WR–71,296–03, 2018 WL 2717039, *1 (Tex. Crim. App. June 5, 2018) ("On March 28, 2017, the United States Supreme Court issued its decision *in Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017). In light of the *Moore* decision and the facts presented in applicant's application, we find that applicant has satisfied the requirements of Article 11.071 § 5."); *see also Ex parte Davis*, WR-40,339-09, 2020 WL 1557291, at *3 (Tex. Crim. App. Apr. 1, 2020) (finding that although Davis failed to meet the requirements of Section 5, the CCA has "previously found *Moore I* to constitute a new legal basis under Article 11.071, § 5."). No basis for treating Mr. Brown's claim differently is apparent, and none has been articulated.

Under all these circumstances, the procedural bar cited by the TCCA, like that cited by the Arizona Supreme Court in *Cruz*, must be deemed an inadequate state ground for denying federal review of Mr. Brown's *Atkins* claim. It is so "without fair support [and] so unfounded as to be essentially arbitrary," that it poses the questions whether it is "merely a device to prevent a review of the other [federal] ground of the judgment." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 165, (1917)..Given the TCCA's prior recalcitrance with respect to this Court's *Atkins* rulings, the question of adequacy is particularly important – to Mr. Brown, but also

important to other litigants with *Atkins* claims. Moreover, the disregard of this Court's decision in *Cruz* also needs correcting lest the TCCA think that carelessness in complying with this Court's mandates will be tolerated. Given how close this case hews to Cruz, summary reversal coupled with a remand to determine intellectual disability is appropriate.

II. The Eighth Amendment Categorical Prohibition on the Execution of the Intellectually Disabled Should Not be Forestalled by State-Created Procedural Rules

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court explained its Eighth Amendment jurisprudence, which includes categorical exclusions from the death penalty, noting:

> The Court's cases addressing the [Eighth Amendment] proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.
>
> In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.
>
> * * *
>
> The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, *Roper v. Simmons*, 543 U.S. 551 [] (2005), or whose intellectual functioning is in a low range, *Atkins v. Virginia*, 536 U.S. 304 [] (2002).

Graham, 560 U.S. at 59-61. The categorical prohibition against the execution of the intellectually disabled emanates from the Eighth Amendment because, as this Court

has explained, to execute the intellectual disabled "violates his or her inherent dignity as a human being." *Hall v. Florida*, 572 U.S. 701, 708 (2014).

Unlike the majority of Eighth Amendment restrictions, categorical prohibitions focus only on the characteristics of the offender, regardless of the nature of the crime of conviction, guilt or innocence, or culpability. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 568 (2005), ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."). The focus in these inquiries is one specific trait of the offender that makes him or her ineligible for execution for any crime. Even claims of factual innocence arguably require proof of an error at trial of factual innocent, *cf. Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) ("[I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial *unless the court is also satisfied that the trial was free of nonharmless constitutional error*, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.") (emphasis added), but individuals who have a trait that makes them constitutionally immune from execution need not prove that there was any error at all in their trial or sentencing proceedings. This Court has held that such a categorical prohibition concerning the offender exists on rare occasion and includes only the execution of juveniles (*Roper v. Simmons*), the execution of the insane (*Ford v. Wainwright*, 477 U.S. 399 (1986)), and the execution of the intellectually disabled (*Atkins v. Virginia*).

The question presented here is not whether this categorical bar exists—because *Atkins* and its progeny are dispositive on that issue—but what the *effect* of this categorical prohibition is, and whether or not a state-created procedural rule can supersede even the review necessary to determine whether the categorical exemption exists. This Court's Eighth Amendment analysis in cases establishing that categorical prohibitions on executing certain kinds of offenders does not support such a possible reading, and further, this Court's specific jurisprudence in *Atkins* cases does not suggest that possibility. This Court has the opportunity to speak clearly on what categorical prohibition means, and in a case where the life of an intellectually disabled man of questionable guilt lies in the balance, this Court should grant certiorari to do so.

A. A State Procedural Rule Superseding a Categorical Prohibition on Executing a Certain Kind of Offender Cannot be Squared with This Court's Eighth Amendment Jurisprudence

The Eighth Amendment analysis of the decisions creating categorical prohibitions on the execution of certain kinds of offenders—*Ford*, *Atkins*, and *Roper*—cannot be squared with a state-created procedural rule superseding even a merits review of whether a litigant can prove their inclusion in a category that would render them constitutionally immune from execution.

In *Ford*, *Atkins*, and *Roper*, this Court held that categorical exemptions to the death penalty existed based on the Eighth Amendment's proscription: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," which is applicable to the States through the Fourteenth

Amendment. *See Ford*, 477 U.S. at 410-11; *Atkins*, 536 U.S. at 311-12; *Roper*, 543 U.S. at 560-61. In each of these cases, this Court found that the execution of individuals in relevant categories would constitute a disproportional and excessive sanction in violation of the Constitution due to the unique vulnerabilities and characteristics of the offenders. The *Ford* Court found the execution of the "insane" tainted with a "natural abhorrence" because it would mean "killing one who has no capacity to come to grips with his own conscience or deity." *Ford*, 477 U.S. at 409. The *Atkins* Court found that the execution of the intellectually disabled offended the Eighth Amendment in part because intellectually disabled individuals have "diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," and "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders," thus reducing their "personal culpability." *Atkins*, 536 U.S. at 318. These characteristics of intellectually disabled offenders thus contribute to reducing the efficacy any of the alleged goals of capital punishment, including retribution or deterrence. *Id*. at 319-20. The *Roper* Court found that the execution of juveniles was disproportional in part due to their "lack of maturity and [] underdeveloped sense of responsibility," "impetuous and ill-considered actions and decisions," their vulnerability to "negative influences and outside pressures," and their lack of well-formed character." *Roper*, 543 U.S. at 569-70. Like the *Atkins* Court, the *Roper* Court noted that these characteristics of

juveniles undermined the penological justifications for imposing the death penalty on them, diminishing any deterrent or retributive function. *Id*. at 571-72.

These individual characteristics of the insane, intellectually disabled, and juveniles, underscore the barbarism of capital punishment on them both to the individual and society, making it disproportional to them as a result of their immutable characteristics. The constitutional prohibition thus "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Roper*, 543 U.S. at 560 (quoting *Atkins*, 536 U.S. at 311) (internal quotation omitted).

Because the proportionality concerns of the Eighth Amendment in these categorical-prohibition-on-execution analyses are so intimately tied to the characteristics of the category of offender—which are present regardless of the crime committed, the culpability for that crime, or any legal process (or lack thereof) flowing from those events—this Court's underlying reasoning in these cases does not permit the conclusion that there could be procedural mechanisms that undermine this constitutional protection. A judicially or legislatively created rule that bars all consideration of the evidence from death-sentenced individuals that they are included in the category of offenders who may not be executed—that they, too, have the characteristics that make their execution abhorrent to society and disproportionately cruel and unusual—cannot be squared with the goals of this jurisprudence. The execution of these individuals is abhorrent because of who these individuals are, regardless of rules of timeliness or procedure when they raise these facts in the court.

Thus, the Eighth Amendment's categorical prohibition on executing intellectually disabled individuals must not yield to a state procedural rule—rather, the procedure must yield to the constitutional prohibition.

B. This Court's Intellectual Disability Jurisprudence Has Never Suggested that an Intellectual Disability Claim Can be Procedurally Barred, and This Court Should Take this Opportunity to Make Explicit That It Cannot

This Court emphasized in *Atkins* that it was announcing "a *categorical rule* making such [intellectually disabled] offenders ineligible for the death penalty." *Atkins,* 536 U.S. at 320 (emphasis added). Although the *Atkins* Court noted, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," it did not expressly address whether states could create rules that denied individuals meaningful—or in this case, any—consideration of their diagnosis. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 405).

However, this Court's post-*Atkins* jurisprudence reflects that the categorical prohibition on the execution of the intellectually disabled is not subject to such state-created frustration. This Court's decisions in intellectual disability cases following *Atkins* is replete with analogies (and citations) to its proper corollary: the execution of juveniles, as prohibited in *Roper v. Simmons*. For example, in *Hall v. Florida*, this Court stated:

> The Eighth Amendment prohibits certain punishments as a categorical matter. No natural-born citizen may be denaturalized. *Ibid*. No person may be sentenced to death for a crime committed as a juvenile. *Roper*, *supra*, at 572, [] And, as relevant for this case, persons with intellectual disability may not be executed. *Atkins*, 536 U.S., at 321[].

Hall, 572 U.S. at 708. Likewise, in 2017 in *Moore v. Texas* this Court again clearly stated: "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 137 S. Ct. at 1051 (quoting *Roper*, 543 U.S. at 553-564) (emphasis in original).

This Court's repeated comparison of the prohibition against execution of the intellectually disabled to that against the execution of juveniles is not accidental. Just as it would be illegal to execute a person who was convicted of committing a murder as a fifteen-year-old and who failed to raise an Eighth Amendment challenge at the appropriate time, *see Roper*, 543 U.S. at 568-69, so too should it is illegal to execute an intellectually disabled person who failed to raise his claim at the appropriate procedural time. To hold that a procedural rule of timeliness can overcome the Eighth Amendment prohibition on executing the intellectually disabled is akin to holding that an individual who was a juvenile at the time of their crime may be executed because he could not timely provide proof of his age for lack of access to proper identification papers or birth records – or for lack of a lawyer diligent enough to produce such documentation. A rational constitutional categorical prohibition cannot countenance such absurd and abhorrent results, whether in *Atkins* claims or in *Roper* claims.

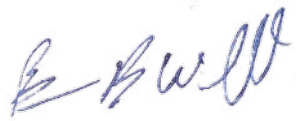
This Court now has the opportunity, in the case of an individual with an imminent execution, to clearly vindicate the Constitution's Eighth Amendment protections, and should grant certiorari to do so.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below, vacate and remand it for consideration of Mr. Brown's intellectual disability claim on the merits.

Respectfully submitted,

MARCH 8, 2023



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