No. 22-6964

IN THE

Supreme Court of the United States

ARTHUR BROWN, JR.,
Petitioner,

v.

STATE OF TEXAS
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

Eight days before his scheduled execution, Brown filed his second subsequent application for state habeas relief, raising a claim of intellectual disability, based on *Atkins v. Virginia,* 536 U.S. 304 (2002), and relying on evidence introduced in the punishment phase of his 1993 trial that demonstrated he had a Full-Scale IQ of 87 in the ninth grade. Did the Texas Court of Criminal Appeals err in dismissing Brown's second subsequent application as an abuse of the writ, pursuant to Texas Code of Criminal Procedure Article 11.071, § 5?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Brown is **scheduled to be executed after 6:00 p.m. on March 9, 2023.** He was convicted and sentenced to death for the June 20, 1992 murders of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias during the same criminal transaction. Brown unsuccessfully appealed his conviction and sentence in state and federal court. On March 1, 2023, eight days before his scheduled execution date, Brown filed a subsequent habeas corpus application in the state court—his third state habeas application—alleging (1) that he is actually innocent; (2) an interrelated *Brady*[1] claim involving a videotaped interview with the Anthony Farias, the son of surviving victim Rachel Tovar as well as Tovar's medical records; (3) Brown is intellectually disabled; and (4) racial bias infected the jury deliberations. The Texas Court of Criminal Appeals (CCA) dismissed his subsequent application pursuant to Texas Code of Criminal Procedure Article 11.071 § 5 "as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Brown,* No. WR-26,178-04, Order (Tex. Crim. App. March 7, 2023) (per curium).

Brown now seeks certiorari review of only one claim—the CCA's dismissal of his intellectual disability claim. However, Brown is unable to present any special or important reason for certiorari review and he fails to

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1 *Brady v. Maryland,* 373 U.S. 83 (1963)

demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA accurately summarized the evidence from the guilt-innocence phase of trial as follows:

> On the evening of June 20, 1992, at the Houston home of Rachel Tovar, six people were shot, four of whom died. Rachel Tovar was one of the survivors of the assault. In the hospital immediately after the incident, Tovar gave a recorded oral statement in which she stated that "Squirt" was one of the perpetrators and described the van he and his friends were driving. She subsequently identified [Brown] in a photospread. At trial Tovar identified [Brown] as the man she had referred to as "Squirt." Others also testified that [Brown] was known as "Squirt." Tovar further testified that she and her husband had sold marijuana and cocaine to [Brown] on several occasions. Tovar testified that on the day of the offense [Brown] and his friends came to her house about 2:00 or 3:00 in the afternoon to discuss the purchase of some cocaine and that they were driving a beige minivan. They left and returned around 6:00 p.m., and then left again only to return to the house a couple of hours later, at which time the shootings took place. Tovar testified that [Brown] bound her and five others who were in the house with strips of bedsheets [Brown] cut with a knife. The bound individuals were then placed in various rooms throughout the house. She heard gunshots from the other rooms and then she was shot. Tovar testified that she did not know who shot her, although she saw each of the three perpetrators with a gun at various times during the assault.
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> The other survivor, Nicholas Cortez Anzures, testified that he had gone to visit the Tovars at about 10:00 p.m. on the evening of the murders. He stated that he drove to the Tovars' house with some friends who waited for him in the car outside. He knocked on the door and was forced inside by [Brown] who was pointing a gun at

the head of one of the victims. Cortez was taken to a back room by [Brown] and one of his cohorts, where he was bound and gagged. Cortez testified he heard a woman scream and shots from the front of the house. Then "the man with the chrome gun" and [Brown] came into the room and the man with the gun shot Cortez and another victim.

Candelario Hernandez testified that he drove with Cortez to the Tovars' house and waited in the car, expecting Cortez to return to the car quickly so that they could proceed to a party they planned to attend. Shortly after Cortez went inside Hernandez heard two sets of shots coming from the house and observed two black men exit the front door, get into a minivan, and drive away.

Rachel Tovar's neighbor testified that he was sitting in his front yard the night of the offense. He observed a van parked outside the Tovars' house and saw a black man going back and forth between the van and the house and putting something in the van. He further testified he heard three "popping sounds" and then the van left.[2] Shortly thereafter Rachel Tovar emerged from the house injured and calling for help.

Still another person, Daniel Leija, testified to having been at the Tovars' house earlier in the evening and seeing [Brown] there. He also testified that he had seen a van parked in front of the house.

[Brown's] three sisters, Serisa Brown, Grace Brown and Carolyn Momoh, were all called as witnesses for the State. At the time of the offense, Serisa and her child and Carolyn and her two children were living with Grace at Grace's house in Houston. The sisters all testified that [Brown] and three of his friends, Marion Dudley, Tony Dunson, and Maliek Travis, came to Grace's house in the early morning hours of June 20th. [Brown] and his friends were driving a tan minivan with Alabama plates. They left and returned several times that day and evening. Sometime after midnight that night [Brown] asked Serisa and Carolyn to drive the van back to

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2 His statement given to police following the offense stated that the van pulled away and then he heard the popping sounds. At trial he stated that was not correct, that he had heard the pops before the van left. [FN in original].

> Tuscaloosa, Alabama for him the next morning.[3] He agreed to pay each of them $1,000 in return for driving the van.[4] Serisa and Carolyn took [Brown] to the airport the morning of June 21st and then the two women and their children left for Tuscaloosa in the van. Upon arrival in Tuscaloosa, Carolyn spoke with Grace by phone who informed Carolyn of a news report she had seen pertaining to the murder of several persons and stating that a van with Alabama plates was identified as having been at the scene. Carolyn and Serisa turned the van over to [Brown] and his friends in Tuscaloosa and collected their money. Carolyn and Serisa eventually gave statements to Alabama authorities, and all three of the sisters gave statements to the Houston police on June 26th.

Brown v. State, No. 71,817, slip op. at 31-33 (Tex. Crim. App. 1996) (emphasis and footnotes in original).

II. Evidence Relating to Punishment

The Fifth Circuit Court of Appeals summarized the evidence related to punishment as follows:

> At the punishment phase of Brown's trial, the State re-offered all of the evidence presented at the guilt-innocence phase. The State also presented evidence that Brown had committed an armed robbery in Tuscaloosa four years earlier; that he had extorted other prisoners while in the Harris County Jail awaiting trial; and that he had assaulted a deputy at the Harris County Jail. The defense presented Brown's school records, which reflected that he had a low IQ, suffered from learning disabilities, and performed poorly in special education classes.[5] The defense also presented the

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3 [Brown's] residence was in Tuscaloosa and his parents also lived there. [FN in original].

4 Serisa testified that the money was payment for delivering cocaine that was in the van. Carolyn testified that she had no knowledge of drugs in the van. [FN in original].

5 During deliberations at the punishment phase, the jury sent out a note asking to see Brown's school records. [FN in original].

> testimony of a law professor that convicted, incarcerated offenders become less violent as they age. The jury answered affirmatively the special punishment issues on future danger and whether Brown actually caused the deaths, intended to kill the victims, or anticipated that human life would be taken. It answered negatively the special punishment issue on mitigating circumstances. The trial court sentenced Brown to death.

Brown v. Thaler, 684 F.3d 482, 486 (5th Cir. 2012).

III. Appeal and Postconviction Proceedings.

Brown was convicted and sentenced to death for the murders of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias during the same criminal transaction. CR 7, 485, 520-22, 526-27.[6] The CCA affirmed Brown's conviction and sentence in an unpublished opinion, *Brown v. State*, No. 71,817 (Tex. Crim. App.), and this Court denied Brown certiorari review. *Brown v. Texas*, 522 U.S. 940 (1997).

On December 18, 1996, the CCA affirmed Brown's conviction and sentence in an unpublished opinion. *Brown v. State*, No. 71,817 (Tex. Crim. App. 1996). On June 18, 2008, the CCA denied state habeas relief. *Ex parte Brown*, No. 26,178-02 (Tex. Crim. App. 2008).[7]

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[6] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, followed by page number(s). "RR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas clerk's record of Brown's first state habeas proceeding, followed by page number(s).

[7] Brown's first postconviction filing was a petition for writ of mandamus. *Ex parte Brown*, No. 26,178-01.

On February 28, 2011, the United States District Court for the Southern District of Texas, Houston Division, denied a federal petition for writ of habeas corpus, and a certificate of appealability. *Brown v. Thaler,* No. 4:09-CV-00074, 2011 WL 798391 (S.D. Tex.). On June 12, 2012, the Fifth Circuit Court of Appeals also denied Brown a certificate of appealability. *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012), *cert. denied,* 568 U.S. 1164 (2013).

On July 2, 2013, the convicting court entered an order scheduling Brown's execution for October 29, 2013. By agreement of the parties, the convicting court withdrew Brown's execution date to allow for the retesting of ballistics evidence.

Brown then filed a subsequent habeas application alleging multiple grounds of prosecutorial misconduct and ineffective assistance of counsel. The CCA determined that only one of Brown's claims satisfied the requirements of Texas Code of Criminal Procedure, Article 11.071, § 5(a), and remanded the case to the trial court for consideration of the following allegation: whether the State's ballistics expert Anderson "testified falsely or in a materially misleading manner when he expressed his unequivocal opinion that the evidence bullets were fired from the two guns that the State recovered in Alabama and tied to [Brown]." *Ex parte Brown*, No. WR-26,178-03, 2015 WL 6522854 (Tex. Crim. App. October 28, 2015) (order).

Following a hearing, the state trial court recommended that Brown be granted habeas relief on the above claim. *Ex parte Brown*, No. 636535-B (351st Dist. Ct., Harris County, Texas). However, on October 18, 2017, the CCA declined to adopt the trial court's recommendation and denied habeas relief. *Ex parte Brown*, No. 26,178-03, 2017 WL 4675396 (Tex. Crim. App. 2017). This Court denied certiorari review. *Brown v. Texas,* 139 S. Ct. 373 (Oct. 15, 2018).

After the State filed a motion for leave to file and a petition for writ of mandamus, seeking to compel the trial court to set an execution date*, see In re State ex rel. Ogg,* No. WR-93,812-01, 2022 WL 1670500 (Tex. Crim. App. May 25, 2022), and the CCA ordered additional briefing, *see id.* 2022 WL 2344100 (Tex. Crim. App. June 29, 2022), the trial court signed an order setting Brown's execution date for March 9, 2023. The CCA dismissed the pending proceeding as moot. *Id.* 2023 WL 1425683 (Tex. Crim. App. Feb. 1, 2023).

On January 8, 2022, Brown filed a motion to intervene in an Original Verified Petition and Application for Temporary Injunction, Declaratory Relief, and Permanent Injunction in Travis County District Court, filed on December 16, 2022, by Dallas County death row inmate Wesley Ruiz and Potter County death row inmate John Balentine, and later joined by Harris County death row inmate Robert Fratta and then Brown. The death row inmates, all scheduled for execution in the upcoming months, sought to enjoin TDCJ from using allegedly expired pentobarbital in their scheduled executions. However, on

January 4, 2023, the CCA granted Texas Attorney General Ken Paxton leave to file an application for writ of prohibition and ordered the district court judge "to refrain from issuing any order purporting to stay the January and February executions of Harris County death row inmate [Fratta], Dallas County death row inmate [Ruiz], or Potter County death row inmate [Balentine]." Mem. Opinion at 2-3, *In re State of Texas ex rel. Ken Paxton,* No. WR-94,432-01 (Tex. Crim. App. Jan. 4, 2023).[8] And when the district court judge nevertheless granted a motion for temporary injunction ordering TDCJ officials to refrain from using expired pentobarbital to execute the four death row inmates until the case reached final judgment following a trial set for March 20, 2023, the CCA granted Attorney General Paxton's application for writ of mandamus and vacated the temporary injunction order, and again ordered the judge "'to refrain from issuing any order purporting to stay the' executions of the various inmates." *In re State of Texas Ex. Rel. Ken Paxton,* No. 94,432-02 (Jan. 10, 2023).[9]

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[8] This order was entered before Brown joined the litigation.

[9] This proceeding remains pending, although TDCJ has filed a plea challenging the district court's jurisdiction to hear the case. A hearing was held on this still-pending motion March 8, 2023, but no ruling has issued. Fratta, Ruiz, and Balentine were executed as scheduled.

On March 1, 2023, Brown filed in the 351st District Court of Harris County, Texas, a Chapter 64 motion for postconviction DNA testing, and a motion to withdraw his execution date. That court held a hearing on March 7, 2023, and denied his motions from the bench.

Also on March 1, 2023, Brown filed in the Fifth Circuit Court of Appeals, a motion for authorization to file a successive writ in the federal district court—seeking authorization to file only his *Brady* claim but not the instant *Atkins* claim—and a motion for stay of his execution date. The Fifth Circuit denied his motion for authorization and motion for stay on March 7, 2023. *In re Arthur Brown,* No. 23-20080, Unpublished Order (5th Cir. March 7, 2023).

Finally, on March 1, 2023, Brown filed his second subsequent application for state habeas relief in the CCA—his third state writ—and a motion for stay. On March7, 2023, the CCA dismissed this application as an abuse of the writ and denied his motion for stay of execution. *Ex parte Brown,* No. WR-26,178-04, Order at *2. The instant petition for writ of certiorari was filed on March 8, 2023.

REASONS FOR DENYING THE WRIT

The question that Brown presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a

properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Brown advances no compelling reason to review his case, and none exists.

Brown's present issue stems from the lower court's application of Texas Code of Criminal Procedure Article 11.071, § 5(a). The CCA determined that Brown did not satisfy the requirements of Article 11.071, § 5 on any claim, and dismissed his four claims—including the intellectual disability claim—without reaching the merits. While this might impact this Court's jurisdiction to reach Brown's other three claims that are not presently before this Court, the CCA's determination that Brown's *Atkins* claim was abuse of the writ necessarily requires a prima facie review of the merits of the underlying claim before the court could make that determination. Therefore, the CCA's *Atkins* ruling was not independent of federal law and this Court does indeed have jurisdiction to review the CCA's determination on the merits. *See Busby v. Davis,* 925 F.3d 699, 709 (5th Cir. 2019) (holding CCA conclusion that evidence did not satisfy § 5 threshold "was not a denial of relief on purely state-law procedural grounds, independent of federal law, because in addressing the *Atkins* claim, the TCCA necessarily considered federal law in assessing the sufficiency of the facts supporting the claim."); *Blue v. Thaler,* 665 F.3d 647, 653-54 (5th Cir. 2011) (recognizing State's acceptance of § 5 dismissal of *Atkins* claim as a merits decision). Thus, Brown's reliance on *Cruz v. Arizona,* No. 21-846, 2023 WL

2144416 (Feb. 22, 2023), to argue the procedural bar was not adequate to support the CCA's judgment is irrelevant to this Court's determination.

Assuming this Court's jurisdiction, Brown has not furnished a single reason to grant a writ of certiorari, let alone a compelling one. Brown merely raises a claim based on evidence that was available, and indeed was presented as an exhibit at his trial. Further, this evidence fails to demonstrate even a prima facie showing that he is intellectually disabled and thus ineligible for the death penalty. Therefore, the CCA correctly dismissed the claim, which is unworthy of the Court's exercise of certiorari review. Brown's petition and concurrently filed application for stay of execution should be denied.

ARGUMENT

I. The CCA's Dismissal of an *Atkins* Claim in a Subsequent Writ Pursuant to 11.071, § 5 is a Determination on the Merits.

The CCA has strictly and regularly applied 11.071 § 5(a), and dismissal of a successive habeas application upon such grounds constitutes an adequate and independent state procedural bar. *See, e.g., Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting) ("There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *see also Balentine v. Thaler,* 626 F.3d 842, 856-57 (5th Cir. 2010) ("We have previously held that the [CCA] regularly enforces the Section 5(a) requirements.").

This Court has explained that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal[.]" *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997); *see also Sochor v. Florida,* 504 U.S. 527, 533-34 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The "independent" and "adequate" requirements are satisfied where the court "clearly and expressly" indicates that its dismissal rests upon state grounds that bar relief, and that bar is strictly or regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)); *see also Johnson v. Mississippi,* 486 U.S. 578, 587 (1981).

However, in reviewing *Atkins* claims in subsequent habeas applications, precedent is clear that the CCA necessarily considers the merits of the federal constitutional claim. *See Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) ("For the post-*Atkins* applicant who bypassed the opportunity to raise mental retardation at trial or in an initial writ, Section 5(a)(3) mandates that his subsequent application 'contain[ ] sufficient specific facts' that, if true, would establish 'by clear and convincing evidence' that no rational fact finder

would fail to find him mentally retarded."); *Busby,* 925 F.3d at 709 (citing *Blue,* held CCA conclusion that evidence did not subsection 5(a)(3) threshold "was not a denial of relief on purely state-law procedural grounds, independent of federal law, because in addressing the *Atkins* claim, the TCCA necessarily considered federal law in assessing the sufficiency of the facts supporting the claim.")

Here the CCA concluded that Brown failed to satisfy the requirements of Texas Code of Criminal Procedure Article 11.071, §5, for filing a subsequent application for state habeas relief. *Ex parte Brown,* No. WR-26,178-04, Order at *2. The court did not explain which provision of subsection 5 Brown failed to satisfy. And while the court stated it was dismissing "the application as an abuse of the writ without reviewing the merits of the claims raised," *id.,* the decision—as it pertains to the *Atkins* claim—was not independent of federal law. Rather, as noted, CCA precedent demonstrates that the decision necessarily involved a prima facie determination of the merits of Brown's *Atkins* claim. *See Ex parte Woods,* 296 S.W.3d 587, 605-606, 613 (Tex. Crim. App. 2009) (Applicant does not demonstrate evidence is "new" under subsection 5(a)(1) thus court addressed whether it may consider merits of successive application under 5(a)(3), ultimately concluding additional evidence did not satisfy statute); *Ex parte Blue,* 230 S.W.3d at 163; *Ex parte Campbell,* 226 S.W.3d 418, 422 (Tex. Crim. App. 2007) (Showing unavailability is only the

first hurdle, must also demonstrate prima facie showing of entitlement to relief). An applicant filing a subsequent writ pursuant to 11.071 § 5(a)(1) and (a)(3), due to the prior unavailability of *Atkins*, necessarily must make a prima facie showing of intellectual disability to be granted leave to file the writ. *Blue,* 230 S.W.3d at 162.

That this was a prima facie merits determination is further supported by the fact that State did not contest legal unavailability in its motion to dismiss. *See* Petition at 16 (arguing the State did not dispute that his ID claim "satisfied the procedural gateway established by virtue of being based upon 'new law.'"). Rather, the State argued, assuming Brown could satisfy the factual or legal unavailability hurdles, he could not demonstrate the additional hurdle—he "fails to allege sufficient facts that would entitle him to relief." State's Motion to Dismiss at 7-15. And for this reason, the State argued, his application should be dismissed as an abuse of the writ. *Id.* at 15. The prima facie determination is not a full merits review. *Blue,* 230 S.W.3d at 162 ("We do not construe Section 5(a)(3), however, to require that the subsequent applicant must necessarily convince this Court by clear and convincing evidence, *at the threshold,* that no rational factfinder would fail to find he is mentally retarded.") But it is sufficient to remove the question of whether the court applied an independent state procedural ground. It did not. This Court thus has jurisdiction to review the decision.

Ignoring the State's position as well as established precedent, and taking the CCA at face value, Brown speciously argues that his *Atkins* claim was dismissed on an "independent" state ground and that the CCA was "obligated to apply federal law in line with the Supremacy Clause," and that the court's refusal to grant authorization, pursuant to subsection 5(a)(1), to file his subsequent writ after *Moore I* amounted to a violation of the due process and the Supremacy Clause. Petition at 17-22. Pursuant to *Cruz v. Arizona,* No. 21-846, 2023 WL 2144416 (Feb. 22, 2023), Brown argues that the CCA's application of the procedural bar must be deemed an inadequate ground for denying federal habeas relief. Petition at 22.

But, as the State agrees, because the CCA's decision is *not* independent of the federal law question, Brown's attempt to extend *Cruz* to this context is irrelevant—*Cruz* assumed the decision was independent and confined its analysis to the issue of "adequacy" of the decision to support judgment. 2023 WL 2144416, at *5 ("Here the Court focuses on the second of these requirements: adequacy.") Further, the Court narrowly confined its decision as one implicating a rule "reserved for the rarest of situations, that 'an 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.'" *Id.* at *6 (citing *Bouie v. City of Columbia,* 378 U.S. 347, 354 (1964)). The CCA's decision does not implicate such rarity.

The CCA was required by precedent to conduct a prima facie review of the merits and clearly found them lacking. This was correct, as shown in the next section. The CCA's determination that Brown "fails to show that he satisfies the requirements of Article 11.071 § 5," did not amount to a "departure" from pre-existing law, as anticipated in *Cruz*, 2023 WL 2144416, at *7. The CCA is not required to grant authorization to file a subsequent application, simply because a petitioner cites *Moore I* to excuse his post-*Atkins* failure to raise a claim—especially where the pertinent evidence has been a part of the trial court record for more than thirty years, and *Atkins* has been available for at least twelve. Furthermore, the CCA committed no error in its application of *Atkins* and *Moore I* in its threshold determination of the merits under subsection 5(a)(3)—indeed, as will be discussed, Brown's IQ scores do not rise to level of "significant deficits" in intellectual functioning.

The CCA's application of the procedural bar was not in error. Brown simply failed to demonstrate a prima facie claim for relief under *Atkins*. Therefore, his claim was properly dismissed as an abuse of the writ.

II. Brown Failed to Make a Prima Facie Claim for Relief Under *Atkins*.

In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), this Court held the execution of intellectually disabled persons to be unconstitutional. In *Hall v. Florida*, 572 U.S. 701, 712 (2014), the Court clarified that courts cannot

disregard "established medical practice" in examining an *Atkins* claim; that while there is a distinction between a medical and legal conclusion regarding an intellectual disability claim, a court's determination must be "informed by the medical community's diagnostic framework." In *Moore v. Texas*, 137 S. Ct. 1039, 1049-55 (2016), this Court held that the latest editions of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the American Association on Intellectual and Developmental Disabilities (AAIDD) *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."

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, a legal determination of Intellectual Developmental Disorder (IDD) should hew close to the APA's DSM since its clinical purpose is more in keeping with the rationale underpinning *Atkins*. Applying the DSM-5-TR to this case, Intellectual Developmental Disorder 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 criterion in order to be classified as IDD. DSM-5-TR at 37. Of importance to the instant writ is the DSM-5-TR requirement that "the diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of

intellectual functions, standardized neuropsychological tests, and standardized tests of adaptive functioning. *Id*. at 38.

Brown does not provide prima facie evidence to support a legal conclusion that he has IDD. First, his school records—which were presented as an exhibit in the punishment phase of trial, Mtn. to Diss. Ex. 3;[10] 44 RR DX 132, 133—are extensive and reflect that Brown is an individual with below average to average intelligence and a learning disability, not IDD.

Brown's intellectual functioning was repeatedly tested and documented from third through ninth grade. Of particular importance are the results of his WISC-R IQ tests. The WISC-R tests were administered in three-year intervals (third, sixth, and ninth grade) so the practice effect is not at issue. Dale G. Watson, *Intelligence Testing*, in The Death Penalty and Intellectual Disability, 113, 123 (Edward A. Polloway Ed. 2015). Those tests demonstrate in November 1978, when Brown was in third grade, he obtained a Verbal IQ of 70, a Performance IQ of 75, and a Full Scale IQ of 70. Mtn. to Diss. Ex. 3 at 2149-50. In December 1981, when Brown was in the sixth grade, he obtained a Verbal IQ score of 84, a Performance IQ of 95, and Full Scale IQ of 88. Mtn. to Diss. Ex. 3 at 2142-45. And in October 1985, when Brown was in the ninth

[10] Motion to Dismiss Exhibit 3 and 4 are Bates stamped, beginning with 2093 (last four digits). Citations to this exhibit will be "Mtn. to Diss. Exh. __ at __."

grade, he obtained a Verbal IQ of 81, Performance IQ of 96, and Full Scale IQ of 87. Mtn. to Diss. Ex. 3 at 2119.

The sixth and ninth grade scores are virtually identical, while the third-grade score is an outlier. The school psychologist's report for the third-grade test administration indicates Brown lacked motivation: "Inter and intra test variability probably reflect cultural differences and motivational shifts." Mtn. to Diss. Ex. 4 at 2149-50 (November 1978 Psychological Report). By contrast, there is no such suggestion of lack of motivation for his other test administrations. Viewed cumulatively, and in association with the reports of school psychologists who administered the tests, the WISC-R scores do not reflect "*significant* deficits" in intellectual functioning.

The identification of Brown's learning disability is thoroughly documented in his grades and reports of school psychologists. Based in good measure on his 1978 WISC-R score, Brown was placed in special education classes in third grade, and was designated as "educable mentally retarded." Mtn. to Diss. Ex. 4 at 2149-50. With the extra assistance Brown's grades steadily improved and by the end of 5th grade Brown was a solid B student. Mtn. to Diss. Ex. 3 at 2097 (Report Card).

In 6th grade Brown's exceptionality was changed from "educable mentally retarded" to "learning disabled." The school psychologist's report is

insightful and underscores why Brown does not demonstrate a prima facie case that he is IDD. The report indicates:

> • "Pencil control below average for age. Handwriting especially poor. (Reversals and rotations)."[11]
> • "These [WISC-R] scores fall near the border between Low Average and Average ranges of intellectual functioning. . . These scores are judged to be a reasonably accurate estimate of Arthur's present level of functioning. On most subtests he did show inconsistency, succeeding on a number of relatively difficult items after failing easier ones. *Potential may be somewhat higher than present level of functioning*."
> • "Arthur tended to show very low self-confidence and either gave up or became disorganized when he felt he was failing. However, with success and positive feedback he gained in ability to attend, persist, and concentrate. His expectations of himself seem to be paramount importance in his level of functioning."
> • "The 11 point discrepancy between verbal and performance sections of the WISC-R is consistent with Learning Disability functioning."
> • "It is recommended that he be transferred from EMR to LD class on a resource basis. . . *It will be important to help Arthur understand the concept of learning disability*, so that he can develop a more accurate self-concept, i.e., *a person of normal intelligence with a special problem in specific areas of functioning*."

Mtn. to Diss. Ex. 4 at 2142-45 (6th Grade Psychological Report)(emphasis added).

Brown continued to perform well in special education classes that took his learning disability into account. He was promoted every year in middle school and in eighth grade was a B student in core academic subjects. Mtn. to Diss. Ex. 3 at 2098. Also in eighth grade, at age 13, his national percentage on

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[11] This suggests something akin to dyslexia.

the Short Form Test of Academic Achievement is 24th percentile with a 91 index and 4th stanine.

In ninth grade Brown was again assessed with a WISC-R and received an 87 FSIQ. He was also administered a battery of additional tests: Wepman Auditory Discrimination Test, Wide Range Achievement Test-Revised (WRAT-R), Bender Visual-Motor Gestalt Test; Mykleburst and Boshes Behavior Scale and personal observation of the school psychologist. The results indicated a reading problem consistent with a learning disability. Of note, Brown did well in auditory matters and his ability to discern phonics was solid. On the Wepman Auditory Discrimination Test Brown demonstrated "good auditory discrimination ability." It was again determined that Brown was to "receive specially designed instruction in classes for students identified as having Specific Learning Disabilities." Mtn. to Diss. Ex. 4 at 2109-12 (October 1985 Psychological Report).

Brown's school records indicate that he starts the first semester of ninth grade well. He earned an overall B average, including a B in reading and a C in English. Mtn. to Diss. Ex. 3 at 2095 (Report Card). Additionally, his homeroom teacher evaluated Brown in twenty-four areas of behavioral characteristics, auditory comprehension, spoken language, orientation, and behavior. Brown's scores average in all areas and above average in "social acceptance" and "completion of assignments". In areas pertaining to adaptive

behavior he is found to be cooperative, pays attention, has an ability to organize, can cope with new situations, accepts responsibility, is tactful, and displays appropriate levels of social acceptance. Mtn. to Diss. Ex. 4 at 2127 (Mykleburst and Boshes Score Sheet*)*.

However, Brown stopped attending school in the second semester of ninth grade, and only intermittently attended school for two more years until he dropped out. A December 1985 note from the school nurse states: "This student is an habitual truant—only been in school a few days since the beginning of the year. He hasn't been there in the last few months." Mtn. to Diss. Ex. 4 at 2171 (School Nurse Note). A counselor's notes in a 1986 Review of Educational Program indicated that Brown "will not attend school" and "With his record of attendance, no one could pass." The truancy records are important because they indicate that Brown's lack of motivation, rather than significant deficits in intellectual functioning, was the cause of his repeating ninth grade.

Brown's expert evidence also does not satisfy the requirements of the DSM-5-TR. Brown advances his *Atkins* claim through the report of psychologist Dr. David Price, PhD who diagnoses Brown as IDD. *See* CCA Application Ex. at 356-96. However, Dr. Price's diagnosis violates the requirements of the DSM-5-TR and undercuts Brown's prima facie claim.

Dr. Price acknowledges that the DSM-5-TR is the current authoritative work for diagnosing mental disorders, including IDD. *Id*. at 353. According to the DSM-5-TR, Dr. Price's diagnosis needed to be based on: (1) a clinical assessment of intellectual functions; (2) standardized testing of intellectual functions; (3) standardized neuropsychological tests, and (4) standardized tests of adaptive functioning. DSM-5-TR at 38.

Dr. Price's report makes clear that he did not follow the requirements of the "current authoritative work." Since he never interviewed Brown, there was no clinical assessment. Additionally, Brown offers no standardized neuropsychological tests for Dr. Price to review. Finally, there are also no standardized tests of adaptive functioning administered to individuals who knew Brown during the developmental period. Instead, Dr. Price relies on ten retrospective, non-notarized "declarations" of Brown's family and friends, whom he did not interview, all of which were signed after an execution date had been set. CCA Application Ex. at 397-432. Dr. Price does not acknowledge the potential for malingering by proxy from this diagnostic approach. Chafetz MD, Biondolillo A. *Validity issues in Atkins death cases*. Clin Neuropsychol. 2012;26(8):1358-76. doi: 10.1080/13854046.2012.730674. Epub 2012 Oct 4. PMID: 23035759. Dr. Price also ignores the contemporary assessment of Brown's ninth grade teacher reflecting that Brown was cooperative, pays attention, has an ability to organize, can cope with new situations, accepts

responsibility, is tactful, and displays appropriate levels of social acceptance. CCA Application Ex. at 356-96.

Atkins jurisprudence does not tolerate deviations from current medical standards as expressed in the DSM-5-TR. *Moore*, 137 S. Ct. at 1049-55. Because Dr. Price did so Brown cannot demonstrate a prima facie diagnosis of IDD. These deviations, coupled with the realities of Brown's school records, necessitate that the instant claim was correctly dismissed by the lower court for lack of merit. *Storey*, 584 S.W.3d at 439.

CONCLUSION

The CCA correctly dismissed Brown's subsequent state habeas application. For the reasons set forth above, this petition for a writ of certiorari should also be denied.

Respectfully submitted,

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