No. 24-5221

IN THE

Supreme Court of the United States

ARTHUR LEE BURTON,
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

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Deputy Chief, Criminal Appeals
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
tomee.heining@oag.texas.gov

This is a capital case.

QUESTION PRESENTED

Burton was convicted of capital murder in 1998 and resentenced to death in 2002. Burton's state and federal habeas corpus litigation was complete in 2014. Eight days before his scheduled execution, Burton filed his third subsequent application for state habeas relief, raising a claim of intellectual disability, based on *Atkins v. Virginia,* 536 U.S. 304 (2002), but arguing prior legal unavailability until *Moore v. Texas,* 581 U.S. 1 (2017). Burton relied upon evidence demonstrating he had a full-scale IQ of 84 obtained in 2000, and 77 obtained in July 2024. Did the Texas Court of Criminal Appeals err in dismissing Burton's third 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

Burton is **scheduled to be executed after 6:00 p.m. on August 7, 2024.** He was convicted and sentenced to death for the July 29, 1997 kidnapping, aggravated sexual assault, and strangulation of Nancy Adleman. Burton unsuccessfully appealed his conviction and sentence in state and federal court, with federal habeas litigation ending in June 2014. *See Burton v. Stephens,* 573 U.S. 909 (2014). More than ten years later and only eight days before his scheduled execution date, Burton filed a subsequent habeas corpus application in the state court, raising four claims for relief.[1] Relevant to this petition, he argued that the Eighth Amendment prohibits Texas from executing him because he is a person with intellectual disability. The Texas Court of Criminal Appeals (CCA) dismissed the subsequent application, without waiting for response from the State,[2] concluding "the application does not satisfy the requirements of [Texas Code of Criminal Procedure] Article

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[1] Burton raised the following claims: (1) the Eighth Amendment prohibits Texas from executing him because he is a person with intellectually disability; (2) previously unavailable scientific evidence establishes that he was at a very high risk for a coerced and false confession, and that the hair comparison testimony was scientifically invalid; (3) the State's use of scientifically invalid and misleading testimony violated his due process rights under the state and federal constitutions; and (4) his state and federal constitutional rights were violated as a result of the State's discriminatory pursuit of a death sentence based on Burton's race.

[2] The State was prepared to file a motion to dismiss the subsequent application that same day, complete with a report from a neuropsychologist, as well as other expert reports that would have thoroughly refuted Burton's claim.

11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ. *See* Art. 11.071, § 5(c)." *Ex parte Burton,* No. 64,360-03, Order at *3 (Tex. Crim. App. Aug. 1, 2024) (unpublished). The CCA also denied Burton's motion for stay of execution.

Burton now seeks certiorari review of only the CCA's dismissal of his intellectual disability claim. However, Burton is unable to present any special or important reason for certiorari review and he fails to 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 succinctly set forth the facts of the crime and evidence related to punishment in its opinion denying relief on direct appeal of the punishment phase retrial:

> Shortly after 7:00 p.m. on July 29, 1997, Nancy Adleman left home to go on a short jog along the bayou near [the Adlemans'] house. Around 7:20 p.m., Sharon Lalen was watching her children play by some heavy equipment near the bayou. When she turned around, she was startled by a dirty and angry-looking man on a bicycle standing very close to her. Lalen said, "Hello," but the man just gave her a mean look. Feeling threatened by the encounter, Lalen called her children and went home. As she was calling her children, Lalen saw Adleman jogging along the bayou. Lalen later identified the man on the bicycle as [Burton].
>
> The police discovered Adleman's body the next morning in a hole about three to four feet deep, located in the heavily wooded

> area off the jogging trail along the bayou. Her shorts and panties had been removed and discarded some distance away from the body, leading the police to believe that she had been sexually assaulted. Adleman had been strangled with her own shoelace, and her body looked as if she had been badly beaten.
>
> When initially approached by Deputy Sheriff Benjamin Beall, [Burton] denied that he ever rode his bicycle along the bayou, and he denied killing Adleman. Beall confronted [Burton] with inconsistencies in the evidence he had collected, and [Burton] eventually confessed to the crime. In his written statement, [Burton] admitted attacking a jogger, dragging her into the woods, and choking her until she was unconscious. He then removed her shorts and underwear and attempted to have sex with her. When she regained consciousness and began screaming, [Burton] again choked her into unconsciousness and dragged her into a hole. [Burton] began to leave, but when he saw another person walking nearby, he returned and strangled the jogger with her own shoelace.
>
> In addition to the facts of the crime, the state presented evidence that, in 1988, when [Burton] was eighteen, he had participated in thirty-nine burglaries of vehicles and outbuildings in a single month. [Burton] and his co-defendants had stolen guns, radios, fishing equipment, calculators, and other items. At times, the perpetrators would not take anything; they would just go through any papers in the car and then destroy the inside of the vehicle. Finally, [Burton's] brother testified that he knew that [Burton] used marijuana and sold cocaine when [Burton] lived in Arkansas.

Burton v. State, No. 73,204, 2004 WL 3093226, at *1 (Tex. Crim. App. May 19, 2004) (*Burton II*).

II. Conviction and Postconviction Proceedings

Burton was convicted of capital murder and sentenced to death in June 1998 for the kidnapping, aggravated sexual assault, and strangulation of

Nancy Adleman. CR[3] 3, 67, 85-87. The CCA reversed his sentence and remanded the case for a new trial on punishment.[4] *Burton I,* slip op. at 2.[5] Burton was again sentenced to death in September 2002. II SUPP.CR 388-90. On direct appeal of his resentencing, the CCA affirmed. *Burton II,* 2004 WL 3093226, at *1.

Burton filed his first application for postconviction writ of habeas corpus on July 20, 2000, prior to the CCA's granting a new sentencing hearing. *See* I SHCR-A[6] 2. The CCA adopted the trial court's proposed findings and denied relief. *Ex parte Burton,* No. 64,360-02, 2007 WL 3292685 (Tex. Crim. App. Nov. 7, 2007). However, on February 6, 2008, on its own motion, the CCA reconsidered its decision. After further review, the CCA again adopted the trial court's findings and denied relief. *Ex parte Burton,* No. 64,360-02, 2009 WL 1076776 (Tex. Crim. App. April 22, 2009).

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[3] "CR" refers to the Clerk's Record from Burton's first trial, while "SUPP.CR" refers to the Clerk's Record from the retrial of Burton's punishment phase.

[4] The court found deficient performance from trial counsel's failure to object to the prosecution's jury argument regarding potential parole-eligibility in less than forty years, and found a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different. *Burton v. State,* No. 73,204, slip op. at 10 (Tex. Crim. App. March 7, 2001) (*Burton I*).

[5] An opinion was originally delivered October 25, 2000, but was withdrawn and replaced with this opinion.

[6] "SHCR-A" refers to the Clerk's Record from the first state habeas writ, while "SHCR-B" refers to the second state habeas writ, filed August 29, 2003.

Regarding Burton's second application for postconviction writ of habeas corpus challenging the second punishment hearing, the CCA adopted the trial court's findings of fact on three of the four claims (Claims 1, 3, and 4), but ordered additional briefing and oral argument on the remaining claim, and then remanded to the trial court for further development of the claim. *Ex parte Burton,* No. 75,790, 2008 WL 2486459 (Tex. Crim. App. June 18, 2008); *see* SHCR-B at 123-34. After additional briefing, the trial court again adopted the State's proposed findings and conclusions. *See* SHCR-B at 185-200. The CCA ultimately denied relief, without explicitly adopting or rejecting the trial court's findings. *Ex parte Burton,* No. 75,790, 2009 WL 874202, at *1 (Tex. Crim. App. April 1, 2009).

On May 29, 2012, the federal district court also denied Burton's petition for writ of habeas corpus, dismissed the case with prejudice, and denied COA. *Burton v. Thaler,* 863 F.Supp.2d 639 (S.D. Tex. May 29, 2012). The Fifth Circuit denied Burton's application for COA on October 28, 2013. *Burton v. Stephens,* 543 F. App'x 451 (5th Cir. 2013), *cert. denied,* 573 U.S. 909 (2014).

On May 1, 2024—almost ten years after this Court denied certiorari review—the trial court signed the order setting Burton's execution for August 7, 2024. On July 25, the trial court granted Burton's motion to withdraw the execution date, but the CCA granted a writ of mandamus and ordered the trial court to rescind its order purporting to recall the execution order and warrant.

In re State of Texas ex rel. Kim Ogg, ---S.W.3d---, 2024 WL 3588029, at *3 (Tex. Crim. App. July 30, 2024) (published). The trial court did so the same day. Burton then filed a subsequent application for writ of habeas corpus in the CCA on July 30, 2024, raising the instant *Atkins* claim, as well as a motion for stay of execution. The CCA concluded the application "does not satisfy the requirements of Article 11.071 Section 5" and dismissed it "as an abuse of the writ." *Ex parte Burton,* No. 64,360-03, Order (Tex. Crim. App. Aug. 1, 2024) (per curium) (unpublished). The CCA also denied a stay of execution.[7] Prior to the CCA's dismissal, on July 31, 2024, Burton filed in the Fifth Circuit a motion for authorization to file a second or subsequent application for writ of habeas corpus and a motion for stay of execution. On August 5, 2024, the court of appeals denied both motions. *In re Burton,* —F.4th —, No. 24-20340 (5th Cir. Aug. 5, 2024).

On August 3, 2024, Burton filed the instant petition and accompanying application for stay of execution appealing the CCA's decision. The State of Texas opposes both.

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[7] On July 30, Burton also filed in the CCA a Motion for Leave to File a Petition for Writ of Prohibition, and an emergency motion for stay, seeking to prohibit the Texas Department of Criminal Justice from executing him pursuant to the challenged warrant. The CCA denied leave to file and a stay of execution without written order. *Ex parte Burton*, No. 64,360-04 (Tex. Crim. App. Aug. 1, 2024). Burton filed a second Motion to Withdraw the Death Warrant in the trial court, this time seeking to withdraw the warrant in light of the then pending subsequent application for writ of habeas corpus in the CCA. The trial court denied this motion on August 2, 2024.

REASONS FOR DENYING THE WRIT

The question that Burton 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, Burton advances no compelling reason to review his case, and none exists.

Burton'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 Burton did not satisfy the requirements of Article 11.071, § 5, and dismissed his intellectual disability claim as an abuse of the writ. While this might impact this Court's jurisdiction to reach Burton's remaining claims, the CCA's determination that Burton's *Atkins* claim was an 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 retains 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, Burton's reliance on *Cruz v. Arizona*, 598 U.S. 17, 25–26 (2023), and *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (Mem.), to argue the procedural bar was not adequate to support the CCA's judgment is irrelevant to this Court's determination.

Burton has not furnished a single reason the lower court erred in rejecting his claim or for this Court to grant a writ of certiorari, let alone a compelling one. Burton fails to demonstrate even a prima facie showing that he is intellectually disabled and thus ineligible for the death penalty. Therefore, the petition is unworthy of the Court's exercise of certiorari review. It and Burton's 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.

Addressing Burton's second issue first, *see* Pet. at 27–34, the law is clear that, in reviewing *Atkins* claims in subsequent habeas applications, 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 meet 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 Burton failed to present sufficient specific facts demonstrating he is intellectually disabled. *See Ex parte Burton,* No. 64,360-03, Order at *3. Because the State agrees the CCA's decision is *not* independent of the federal law question, Burton's attempt to extend *Cruz* to this context is beside the point—*Cruz* assumed the decision was independent and confined its analysis to the issue of "adequacy" of the decision to support judgment. 598 U.S. at 25 ("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 26 (citing *Bouie v. City of Columbia,* 378

U.S. 347, 354 (1964)). The CCA's decision does not implicate such rarity. And because there is no question that the Court has jurisdiction to reach this claim, the Court also need not issue a stay pending the outcome of *Glossip.*

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 Burton "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*, 598 U.S. at 29. The CCA is not required to grant permission to file a subsequent application, simply because a petitioner cites *Moore I* to excuse his post-*Atkins* failure to raise a claim—especially where *Atkins* was available during his punishment-phase retrial and in the twenty-two years since, and *Moore I* has been available for at least seven. 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, Burton's IQ scores of 84 and 77 do not rise to level of "significant deficits" in intellectual functioning, and his evidence of deficits in adaptive functioning is insufficient.

The CCA's application of the procedural bar was not in error. Burton 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. Burton Failed to Make a Prima Facie Claim for Relief Under *Atkins.*

In *Atkins,* this Court held the execution of intellectually disabled persons to be unconstitutional. 536 U.S. at 317. 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 I*, 581 U.S. at 13–21, 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 Disability (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 most recent version of the DSM to this case, IDD is characterized by significant deficits in

(1) intellectual and (2) adaptive functioning (3) during the developmental time period. An individual must satisfy each of the three criterion in order to be classified as IDD. DSM-5-TR at 37–38; *Moore I*, 581 U.S. at 7. 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.

Burton does not provide prima facie evidence to support a legal conclusion that he has IDD. First, Burton proffered two full-scale IQ scores in support of his subsequent application: 1) an IQ score of 84 obtained in 2000 through administration of the WAIS-R by Dr. Edward Friedman; and 2) an IQ score of 77 on the more-recently normed WAIS-IV, administered in July 2024 by Dr. Jonathan DeRight. *See* Pet. at 10–13. Neither score supports a prima facie claim for IDD. Burton nevertheless discounts the 84, in a footnote, arguing the tester's methodology was unsound, the test was outdated, and, taking into account the Flynn Effect and standard error or measurement (SEM), his true score was likely in the "mid-70s." Pet. at 11 n.4. In the lower courts, Burton acknowledged that his IQ score of 77 exceeds the cut off for IDD, but once again seeks to adjust his score through application of the Flynn Effect, thereby reducing it to 71.5. *See* Pet. at 10–11.

Burton fails to show the CCA unreasonably determined he did not make a prima facie claim for relief. According to the DSM-5-TR, individuals with IDD have scores approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +/- 5 points), or a score of 65–75. DSM-5-TR at 42. Applying the SEM to Burton's lowest IQ score of 77 produces a range of 72–82. Based on the Supreme Court's decision in *Moore I*, the low end of the SEM does not fall within the range of intellectual disability sufficient to trigger an analysis of adaptive deficits. *See Moore I*, 581 U.S. at 14 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning.") (citing *Hall*).

The Fifth Circuit has held that the CCA reasonably determined that a petitioner could not demonstrate subaverage intellectual functioning when the lowest IQ score he provided was a 74 on the WAIS-IV (yielding a range from 70–79), which the test's administrator described as "Borderline." *Busby*, 925 F.3d at 716–20. The Fifth Circuit reached a similar conclusion in another case, where the petitioner's score, considered with SEM, did not fall below at or below 70. *Green v. Lumpkin*, 860 F. App'x 930, 940 (5th Cir. 2021) (per curiam), *cert. denied*, 142 S. Ct. 1234 (2022) (holding that where lowest IQ score submitted was 78, the state court was not unreasonable for determining the petitioner was not intellectually disabled because petitioner could not satisfy

the first *Atkins* prong). The Fifth Circuit stated that reason alone was enough to foreclose relief on the *Atkins* claim. *Id.*

Burton thus seeks to apply the Flynn Effect to reduce his score to an acceptable range. The Flynn Effect posits that over time, the IQ scores of a population rise without corresponding increases in intelligence and, thus, the test must be re-normalized. *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007). The Flynn Effect "may affect" a test score. DSM-5-TR at 38; *see Ex parte Cathey*, 451 S.W.3d 12–14 (Tex. Crim. App. 2015). The Flynn Effect is calculated by adjusting a score .3 downward per year from when the test was normed. *See* AAIDD-11 at 23.3.

However, this Court has recently observed that the Flynn Effect is a "controversial theory." *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021) (per curiam). Moreover, such application, while permissible, is not required.[8] Importantly, the DSM-5-TR does not require adjusting a score downward for the Flynn Effect. DSM-5-TR at 38. And controlling Texas law requires that an IQ score "may not be changed" to adjust for the Flynn Effect. *Cathey*, 451

[8] Indeed, Burton's own expert acknowledges it is not standard practice to adjust IQ scores, but in cases "with a high stakes decision (such as a capital case…) it is recommended for IQ scores to be considered in the context of the Flynn effect." *See* Supp. Appl. App'x Ex. 2at 22. If nothing else, this admission evidences the expert's bias and lack of credibility in capital cases.

S.W.3d at 18.[9] Finally, "the Fifth Circuit has not recognized the Flynn effect." *Brumfield v. Cain*, 808 F.3d 1041, 1060 n. 27 (5th Cir. 2015).[10]

Without this adjustment, Burton cannot make a prima facie showing on the first criteria for IDD—that he suffers from deficits in intellectual functioning. Both IQ scores place him clearly outside the range of IDD. Even adjusted for Flynn Effect his, lowest score is still 71.5, while his higher score, adjusted for both Flynn Effect and SEM, is still in the "mid-70s." Pet. at 10–11. These scores do not satisfy the first criterion.

Nevertheless, Burton also fails to make a prima facie showing of deficiency in adaptive behaviors. This second criterion 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,

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[9] The CCA has noted that practice effects and the Flynn Effect "may affect test scores," *Petetan*, 622 S.W.3d at 338 (citing DSM-5 at 37), and courts "may consider the Flynn Effect and its possible impact on IQ scores generally" *only* "[w]hen it is impossible to retest using the most current IQ test available." *Ex parte Cathey*, 451 S.W.3d at 5, 18. And even then, courts "may consider that effect only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, and so forth." *Id*. Thus, *Ex parte Cathey* precludes such adjustment, and it should be discounted here.

[10] *See also In re Cathey*, 857 F.3d 221, 236–37 (5th Cir. 2017) (declining to resolve whether the Flynn Effect is valid); *but see In re Johnson*, 935 F.3d 284, 292 (5th Cir. 2019) (stating that "courts recognized as viable a theory called the Flynn Effect"). Neither *Cathey* nor *Johnson* contradict *Brumfield* because they do not resolve the issue.

and community." DSM-5-TR at 42. The DSM-5-TR requires "[t]he 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." DSM-5-TR at 38. But Burton provides insufficient testing of his adaptive behavior to satisfy contemporary professional norms.

The requirements of the DSM-5-TR are clear: an IDD diagnosis under the DSM-5-TR is based on "standardized *tests*" of adaptive functioning. DSM-5-TR at 38 (emphasis added).[11] Burton provides only a single test to demonstrate deficits in all three adaptive behavior domains—the Vineland Adaptive Behavior Scale—Third Edition (VABS-3), administered to Burton's mother, after the execution date was set. *See* Supp. Appl. App'x Ex. 2, at 19–21, 23–24. Ms. Burton was asked to recall Burton's everyday adaptive behavior from 34-years prior. Dr. DeRight then supplements this single VABS-3 with the review of six unsworn declarations also all collected after the applicant's

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[11] *Atkins* jurisprudence does not tolerate deviations from current medical standards as expressed in the DSM-5-TR. *See Moore I,* 581 U.S. at 15–21. The DSM-5-TR contains revisions to the assessment of the adaptive deficits criterion. Of significance here, the DSM-5-TR now requires: "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*." DSM-5-TR at 38 (emphasis added); *compare* DSM-5 at 37 ("The diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized *testing* of intellectual and adaptive functions." DSM-5 at 37 (emphasis added).

execution date was set. *See* Sub. Appl. App'x at 25–26 ("Arthur exhibited poor social reasoning/practical judgment on a cognitive test in this area, and this was consistent with scores on the Vineland-3 and reports from several of his friends and family."); *see also* Supp. Appl. App'x Ex. 2 at 2 (Review of Records); Supp. Appl. App'x Ex. 3–11 (Declarations and Affidavits). In short, Dr. DeRight's clinical judgment to only administer one VABS-3 violates the requirements of the DSM-5-TR, and his reliance on multiple unsworn statements (all collected in the last four weeks) creates a scenario fraught with imprecision due to faded memories and the bias of interested parties. *See Cathey*, 451 S.W.3d at 20 (recognizing that the VABS-3 is not designed to be administered retrospectively and is susceptible to reporters being "highly motivated to misremember"); *see also* Resp. App'x at 7–8 (Letter of Dr. Guilmette concluding that the VABS-3 in the instant case are "invalid and uninterpretable"). In sum, this is not *prima facie* evidence of significant adaptive deficits.

Because Dr. DeRight did not follow the most recent version of the DSM-5-TR, his evidence of adaptive deficits falls short of demonstrating a prima facie diagnosis of IDD. These deviations, coupled with the questionable affidavits and declarations considered by Dr. DeRight, and his admitted bias in capital cases, necessitate that the instant claim was correctly dismissed by the CCA for lack of merit.

In concluding that Burton had failed to show IDD with IQ scores that clearly fall outside the acceptable range, even accounting for the SEM, as well as evidence of adaptive deficits based upon unreliable testing data, Burton fails to demonstrate that the CCA refused to adhere to this Court's precedent. To bolster his argument, Burton cites a recent concurring opinion from the CCA which he argues shows the CCA's "hostility" towards *Atkins* and open refusal to adhere to changes in intellectual disability diagnostic criteria. *See* Pet. at 26; *see also* Pet. at 4–5 (citing *Ex parte Milam,* —S.W.3d—, No. 79,322-04, 2024 WL 3587974 (Tex. Crim. App. July 31, 2024) (Keller, P.J., concurring, joined by Yeary, Keel, and Slaughter, JJ.)). However, the *Milam* denial of relief and resulting concurrence involves a factual scenario entirely distinct from Burton's.

First, unlike Burton, Milam presented a robust IDD defense at his 2010 trial—a defense that consisted of at least two IQ scores that were within IDD range, 68 and 71, and evidence of adaptive deficits while still a minor, *see In re Milam,* 838 F. App'x 796, 799 (5th Cir. 2020)—which the jury rejected. Milam failed to raise any *Atkins*-related claim throughout state or federal court. Nevertheless, the CCA stayed his first execution date to allow the state court to consider the application of *Moore I*, which was unavailable when he filed his first state writ, to the jury's rejection of his IDD defense. *See Ex parte Milam,* No. 79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019); *see also Ex*

parte Milam, No. 79,322-04, 2024 WL 3595749 (Tex. Crim. App. July 31, 2024) (Noting denial of successive habeas relief on allegation that jury was not given the proper framework to consider the substantive question of whether he was intellectually disabled.) His second execution date was stayed only after the State's expert changed his opinion based in part upon changes in the DSM diagnostic criteria. *See Ex parte Milam,* No. 79,322-04, 2021 WL 197088 (Tex. Crim. App. Jan. 15, 2021).

The trial court then held an evidentiary hearing, where current neuropsychological testing revealed IQ scores "substantially higher—above the intellectual disability range, even accounting for possible measurement error." *Ex parte Milam,* 2024 WL 3587974, at *1. Expert testimony attributed this discrepancy with the lower scores obtained prior to trial to the lingering long-term effects of chronic methamphetamine abuse, which had diminished as a result of abstinence over Milam's years in prison. *See Ex parte Milam,* 2024 WL 3587974, at *1–2. The CCA again denied relief.

The *Milam* concurrence asked three questions: 1) How would a person of ordinary intelligence score on an IQ test if he were intoxicated? (2) What would adaptive behavior look like? And (3) "relatedly, when each new version of the diagnostic manual changes and liberalizes the meaning of intellectual disability, is there a point at which we must recognize that the diagnostic community for intellectual disability and the national consensus on the death

penalty are traveling on divergent evolutionary paths?" *Id.* at *1. The first two questions address an aspect of what is required to meet the current standard for IDD, and the CCA questioned how to interpret such test results in Milam's case when the current IDD standard assumes a person's natural mental abilities, unimpaired by intoxication. *Id.* at *1-2. The CCA noted that, if long-term intoxication can now make someone IDD under current standards, then the courts should recognize that the standards for IDD and cruel and unusual punishment "are traveling divergent evolutionary paths" because no national consensus permits a person to escape the death penalty due to long-term intoxication. *Id.* at *2. The concurrence opined, "[i]t is possible that changing standards could also be the result of bias against the death penalty on the part of those who dictate the standards for intellectual disability," and questioned whether "clinical standards accurately reflect societal standards." *Id.* at *3. The concurrence nevertheless concludes by specifically noting, "I think [Milam's] death sentence is sound *under current standards*," *id.* at 3 (emphasis added), thus dispelling any notion that the CCA refused to adhere to current diagnostic criteria in disposing of his case.

This concurring opinion bears no relevance to the CCA's dismissal of Burton's subsequent writ. The cases are not comparable. Unlike Milam, Burton presented no compelling evidence, at trial or any time since, to support his IDD defense. A discussion of the "changing standards," as they applied to

the unique factual scenario involved in Milam case, i.e., whether IQ scores artificially diminished by voluntary intoxication can amount to an IDD diagnosis, has no relation to Burton's IQ scores, both of which fell outside the range of IDD. For these reasons, the timing of the release of the *Milam* decision should be seen as nothing more than a coincidence. The *Milam* court concluded that his death sentence was sound under "current standards" and Burton fails to demonstrate that the CCA refused to apply the same standards to his case. Indeed, Burton cites to a concurrence by only four judges, not even a majority, whereas the CCA rejected Burton's claim in a unanimous per curium opinion with no dissent.

CONCLUSION

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

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL

Chief, Criminal Appeals Division

Tomee Heining

*TOMEE M. HEINING

*Attorney in charge

Deputy Chief, Criminal Appeals Division
Texas Bar No. 24007052
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

tomee.heining@oag.texas.gov

Telephone: (512) 936-1600
Telecopier: (512) 320-8132