No. _____

IN THE

Supreme Court of the United States

ARTHUR LEE BURTON,

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

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Texas Court of Criminal Appeals ("TCCA")—in refusing to authorize plenary review of Mr. Burton's unrebutted prima facie case that his intellectual disability measured by current clinical diagnostic criteria rendered him ineligible for execution—so contravened the Court's decisions and directives in *Hall v. Florida*, *Moore I*, and *Moore II*, that this Court's intervention is required to eliminate "an unacceptable risk that persons with intellectual disability will be executed" in Texas.

2. Whether the TCCA's dismissal of Mr. Burton's intellectual disability claim under Article 11.071, Section 5 of the Texas Code of Criminal Procedure "is an adequate and independent state-law ground for the judgment," *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (Mem.), even though it was necessarily dependent on a substantive analysis of federal constitutional law as applied to Mr. Burton's factual allegations.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF RELATED CASES

State court

State v. Burton, No. 760321, Harris County District Court for the State of Texas. Judgment entered June 23, 1998.

Burton v. State, No. 73,204, Texas Court of Criminal Appeals. Judgment entered March 7, 2001.

State v. Burton, No. 0760321, Harris County District Court for the State of Texas. Judgment entered September 6, 2002.

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

Ex parte Burton, No. 760321-B, Harris County District Court for the State of Texas. Judgment entered August 2, 2007.

Ex parte Burton, No. WR-64-360-02, 2009 WL 1076776 (Tex. Crim. App. Apr. 22, 2009).

Ex parte Burton, No. WR-64,360-03, Texas Court of Criminal Appeals. Judgment entered August 1, 2024.

Federal Court

Burton v. Thaler, 863 F. Supp. 2d 639 (S.D. Tex. 2012). Judgment entered May 29, 2012.

Burton v. Stephens, 543 Fed. App'x 451 (5th Cir. 2013). Judgment entered October 28, 2013.

Burton v. Stephens, No. 13-9591, 573 U.S. 909 (June 9, 2014) (mem.).

In re Burton, No. 24-0340, Fifth Circuit Court of Appeals. Pending as of the time of filing.

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PETITION FOR A WRIT OF CERTIORARI

Arthur Lee Burton petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The Aug. 1, 2024, unpublished opinion of the Texas Court of Criminal Appeals ("TCCA") is attached as an appendix.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals entered its judgment on Aug 1, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides: "… nor [shall] cruel and unusual punishments [be] inflicted."

This case also involves Tex. Crim Proc. Code § 11.071 § 5(a), which states, in relevant parts, as follows:

> "If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) 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;
>
> * * * *

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues."

INTRODUCTION

In a subsequent application for post-conviction writ of habeas corpus to the Texas Court of Criminal Appeals ("TCCA"), Mr. Burton presented a prima facie case that he is a person with an intellectual disability pursuant to current clinical standards. Mr. Burton's prima facie case is based on an expert evaluation in which he was interviewed and administered both the most current available intelligence test and a standard measure of adaptive functioning. His claim was supported by lay witness declarations and documentary evidence. The neuropsychologist who evaluated Mr. Burton applied the current medical standards in the DSM-5, DSM-5-TR, and AAIDD-12, and concluded that Mr. Burton is intellectually disabled pursuant to those standards.

This Court has made clear that Texas may not disregard current medical standards. But rather than remanding Mr. Burton's case for a hearing on the merits, the TCCA summarily denied Mr. Burton's application as an abuse of the writ, denying Mr. Burton a hearing on the merits of his claim that he is categorically ineligible for the death penalty. This dismissal was not procedural, but rather on the merits: the TCCA has repeatedly recognized that this Court's precedent in *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*) constitutes a new legal basis for a subsequent habeas applications under Texas law in circumstances like Mr. Burton's; where it is indisputable that such a legal basis exists, the TCCA's denial is necessarily on the merits.

While the TCCA offered no explanation for this extraordinary abuse of its authority, Mr. Burton's case does not stand alone. From the outset, the TCCA treated this Court's decision to ban the execution of intellectually disabled people[1] to a chilly reception. *See, e.g.*, *Ex Parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (Keller, P.J., concurring and dissenting, with Meyers, Keasler, Hervey, JJ.) (urging the TCCA to consider ordering permanent confinement on death row for intellectually disabled prisoners because "*Atkins* forces us to intrude upon the will of the people of Texas, as expressed by our Legislature, and upon the will of the jury. If there is an option that more closely adheres to those intentions, we should at least consider it.").

The TCCA responded to *Atkins* by announcing extra-clinical criteria for screening *Atkins* claims. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), *overruled by Moore v. Texas*, 581 U.S. 1 (2017). This Court eventually held that Texas's unique and idiosyncratic test for intellectual disability claims was

> an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the [Texas's test] "creat[e] an unacceptable risk that persons with intellectual disability will be executed,". . . . Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled

Moore I, 581 U.S. at 6 (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)). This Court repeatedly admonished that the ban on executing intellectually disabled prisoners draws substance from current clinical standards for assessing intellectual disability. *Id*. at 13 ("Even if 'the views of medical experts' do not 'dictate' a court's intellectual-

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002).

disability determination, … we clarified, the determination must be 'informed by the medical community's diagnostic framework'") (quoting *Hall*, 572 U.S. at 721, *see also id.* ("We relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11."). This Court made plain that while "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide," "neither does our precedent license disregard of current medical standards." *Id.*

Moore I did not end the TCCA's resistance to *Atkins*. On remand the TCCA again denied *Atkins* relief. *Ex parte Moore*, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018), *judgment rev'd sub nom. Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*). This Court subsequently held that the TCCA's "opinion [on remand contained] too many instances in which, with small variations, it repeats the analysis we previously found wanting." *Moore II*, 586 U.S. at 139.

Moore I and *II* overruled a long line of TCCA precedent and thus became a newly available legal basis for an *Atkins* claim, *see infra*. Prior to this week, Mr. Burton's most recent state habeas application was filed in 2003; thus, pursuant to the TCCA's application of the Texas abuse-of-the-writ rule, *Moore I* supplied a newly available legal basis for a claim that his intellectual disability rendered him constitutionally ineligible for the death penalty.

While considering Mr. Burton's application, a plurality of the TCCA published a four-judge concurrence to an unpublished order denying *Atkins* relief in another case, making plain that the current clinical standards for assessing intellectual

disability are not the touchstone for assessing which intellectually disabled death-sentenced prisoners are constitutionally exempt from execution in Texas. In *Ex parte Milam*, ___ S.W.3d ___, 2024 WL 3587974, at *1 (Tex. Crim. App. July 31, 2024) (Keller, P.J., concurring, joined by Year, Keel, Slaughter, JJ.), the plurality characterized the current medical standards for intellectual disability as a bridge too far that "threaten[] to invalidate a valid death sentence contrary to any national consensus about cruel and unusual punishment." *Id*. at *3. Contrary to this Court's admonition that "our precedent [does not] license disregard of current medical standards," *Moore I*, 581 U.S. at 13, the plurality announced that, "[a]t some point, remaining faithful to *Atkins* ***requires*** an acknowledgment that the clinical standards for intellectual disability do not line up with the national consensus about cruel and unusual punishment," *id*. (emphasis added).

The next day, after it issued its decision in *Ex parte Milam*, the TCCA summarily dismissed Mr. Burton's unrebutted *Atkins* claim as an "abuse of the writ" under Article 11.071, Section 5 of the Texas Code of Criminal Procedure—contrary to this Court's decisions in *Hall*, *Moore I*, and *Moore II*, which require an intellectual disability determination informed by the medical community's diagnostic framework. The *only* evidence before the TCCA was that Mr. Burton is intellectually disabled pursuant to current standards—the same standards this Court endorsed in *Moore I*. *See Moore*, 581 U.S. at 20. The action below may reflect the TCCA's doubt about "whether the current standard for intellectual disability is faithful to the constitutional standard for determining whether punishment is cruel and unusual."

Id. at *1. But the outcome below—in which Mr. Burton was summarily denied any opportunity to pursue a claim that he is a person with intellectual disability, despite having presented an unrebutted prima facie case—clearly demonstrates that a chasm is once again growing between the medical community's diagnostic framework for intellectual disability and the TCCA's idiosyncratic view about who should be deemed ineligible for execution. Mr. Burton has fallen into that chasm. Thus, once again, Texas has imposed a test that flouts this Court's precedents and "create[s] an unacceptable risk that persons with intellectual disability will be executed." *Moore I*, 581 U.S. at 6. This Court's intervention is necessary to compel Texas's compliance with *Hall*, *Moore I*, and *Moore II* and to avoid the unacceptable risk that Mr. Burton will be executed despite his intellectual disability.

STATEMENT OF THE CASE

A. Procedural history.

On October 31, 1997, a Harris County, Texas grand jury indicted Mr. Burton for capital murder. The indictment alleged that Mr. Burton killed Nancy Adelman in the course of committing or attempting to commit kidnapping and/or aggravated sexual assault.

On June 23, 1998, the jury answered Texas's special issues in a manner requiring imposition of a death sentence. The trial court entered judgment the same day. Id. The TCCA affirmed the conviction, but vacated the sentence and remanded for a retrial on punishment only. *Burton v. State*, No. 73,204 (Tex. Crim. App. Mar. 7, 2001) (not designated for publication).

Following the punishment retrial, on September 6, 2002, in accord with the jury's answers to the special issues, the trial court once again sentenced Mr. Burton to death. The judgment was affirmed on May 19, 2004. *Burton v. State*, No. 73,204, 2004 WL 3093226 (Tex. Crim. App. May 19, 2004) (not designated for publication).

On July 20, 2000, while direct appeal was pending on the first judgment, Mr. Burton filed an application for writ of habeas corpus in the trial court. The trial court rejected Mr. Burton's claims.

On December 1, 2003, Mr. Burton filed a second habeas application, challenging the validity of the penalty retrial. The TCCA denied relief as to both habeas applications on April 22, 2009. *Ex parte Burton*, No. WR-64-360-02, 2009 WL 1076776 (Tex. Crim. App. Apr. 22, 2009) (not designated for publication).

On May 29, 2012, the United States District Court for the Southern District of Texas denied federal habeas relief. *Burton v. Thaler*, 863 F. Supp. 2d 639 (S.D. Tex. 2012). The Fifth Circuit denied a Certificate of Appealability on October 28, 2013. *Burton v. Stephens*, 543 Fed. App'x 451 (5th Cir. 2013). Cert was denied on June 9, 2014. *Burton v. Stephens*, 573 U.S. 909 (2014) (mem.).

On July 30, 2024, following the setting of an execution date, Mr. Burton filed a subsequent application for writ of habeas corpus pursuant to Article 11.071, §5, of the Texas Code of Criminal Procedure. As relevant to this Petition, Mr. Burton asserted that the Eighth Amendment prohibits Texas from executing him because he is a person with intellectual disability.

On August 1, 2024, the TCCA dismissed the application, holding without elaboration, that "the application does not satisfy the requirements of Article 11.071, Section 5." App. 3.

B. Mr. Burton pled an unrebutted *Atkins* claim supported by an expert evaluation and corroborating evidence that Mr. Burton meets the current clinical criteria for an intellectual disability diagnosis.

The Eighth and Fourteenth Amendments place "'a substantive restriction on the State's power to take the life' of [an intellectually disabled] offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). While States have some discretion in implementing the categorical ban on the execution of intellectually disabled persons, that discretion is not unfettered. *Hall v. Florida*, 572 U.S. 701, 719 (2014). Rather, states' determination of intellectual disability must be "informed by the medical community's diagnostic framework." *Id.* at 721; *Moore v. Texas*, 581 U.S. 1, 13 (2017) (*Atkins* does not "license disregard of current medical standards.").

In his application, Mr. Burton pled a prima facie case that he meets the current clinical criteria for an intellectual disability diagnosis, a claim supported by two expert reports, school records, and numerous declarations. The opinion of Dr. Jonathan DeRight, a licensed clinical psychologist, that Mr. Burton meets the criteria for mild intellectual disability, is unrebutted.

1. Current medical diagnostic framework for intellectual disability

The diagnostic criteria for intellectual disability are established in the most current versions of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision ("DSM-5-TR") and the twelfth edition of the manual by the American Association on Intellectual and Developmental Disabilities ("AAIDD-12"). Under both the DSM-5-TR and the AAIDD-12, the diagnostic criteria are: (1) deficits in intellectual functioning ("Criterion A"); (2) deficits in adaptive functioning ("Criterion B"); and (3) onset of these deficits during the developmental period ("Criterion C"). DSM-5-TR at 37; AAIDD-12 at 13. The DSM-5-TR states that "[t]he diagnosis of intellectual developmental disorder should be made whenever Criteria A, B, and C are met." *Id.* at 45.

2. Mr. Burton meets the requirements of the diagnostic framework for Criterion A: Deficits in Intellectual Functioning

a. Clinical Criteria

The first criterion that an individual must meet for an intellectual disability diagnosis is deficits in intellectual functioning. While the DSM-5-TR and the AAIDD-12 call for the use of full-scale IQ scores, both manuals recognize that further insight into a person's intellectual functioning can be gleaned from additional neuropsychological testing. DSM-5-TR at 35; AAIDD-12 at 29. Consequently, "[i]ndividual cognitive profiles based on neuropsychological testing as well as cross-battery intellectual assessment (using multiple IQ or other cognitive tests to create a

profile) are more useful for understanding intellectual abilities than a single IQ score." DSM-5-TR at 38.

Under current clinical criteria, there is no firm cut-off for a qualifying IQ score. While a full-scale IQ score in the approximate range of 65-75 typically qualifies, best practices require clinicians to take into account factors that "may affect test scores." DSM-5-TR at 38; AAIDD-12 at 29. These factors include the practice effect and the "'Flynn effect' (i.e. overly high scores due to out-of-date test norms)." *Id.* Moreover, clinical judgment is important in the interpretation of IQ scores because "a person with deficits in intellectual functioning whose IQ score is somewhat above 65–75 may nevertheless have such substantial adaptive behavior problems in social judgment or other areas of adaptive functioning that the person's actual functioning is clinically comparable to that of individuals with a lower IQ score." *Id.* at 42. Consequently, "[w]hen an individual has an IQ score above 70 but still within a range that may indicate deficits in intellectual functioning, the task then is to determine whether additional evidence of intellectual disability regarding adaptive deficits qualifies the individual for a diagnosis." *Id.* at 5.

b. Mr. Burton has deficits in intellectual functioning

Recent neuropsychological testing administered to Mr. Burton demonstrates significantly subaverage intellectual functioning consistent with a diagnosis of intellectual disability. In July 2024, Dr. Jonathan DeRight administered a full neuropsychological battery on Burton. This included the administration of the WAIS-

IV on which Burton obtained a full-scale IQ ("FSIQ") of 77.[2] Numerically adjusted for the Flynn Effect, that score becomes 71.5.[3]

However, even without relying on recalculation for Flynn Effect, in Dr. DeRight's clinical judgment based on several clinically relevant factors, Burton's FSIQ of 77 score meets the first diagnostic criterion for intellectual disability.[4], considering the outdated norms on the WAIS-IV more generally and information obtained from the other neuropsychological testing administered to Mr. Burton, in Dr. DeRight's clinical judgment, the FSIQ score of 77 is likely an overestimation of Burton's true IQ. In Dr. DeRight's opinion, "the lower-end of the range of Arthur's score on the WAIS-IV falls below 70."[5] A second licensed clinical psychologist, Dr. Sara Boyd, reviewed the results of Dr. DeRight's neuropsychological testing and concluded that "[t]hese findings clearly document the presence of significantly subaverage intellectual ability in Mr. Burton…."[6]

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[2] Forensic Neuropsychological Evaluation of Arthur Lee Burton by Dr. Jonathan DeRight ("DeRight Report") at 1. Dr. DeRight's report, along with the other materials cited herein, were attached to Mr. Burton's subsequent application for writ of habeas corpus.

[3] *Id.* at 22.

[4] *Id.* Dr. DeRight also considered the results of a WAIS-R IQ test administered in July 2000 by neuropsychologist Dr. Edward Friedman, on which Mr. Burton purportedly obtained a full-scale IQ score of 84. Dr. DeRight concluded that (1) Dr. Friedman's methodology was unsound for multiple reasons; and (2) Dr. Friedman erred in administering the WAIS-R in 2000, because the norms were extremely outdated and a more recent test, the WAIS-III, had been released in 1997, substantially undermining the results of Dr. Friedman's testing. *Id.* at 12. Dr. Boyd further opined that, taking into account the Flynn Effect and research that has criticized the WAIS-R for overinflating IQ scores for people at the lower end of the measurement range, Mr. Burton's true IQ score on the WAIS-R administered by Dr. Friedman was in the mid-70s before taking into account the standard error of measurement – i.e., consistent with a diagnosis of intellectual disability. Expert Report of Dr. Sara Boyd ("Boyd Report") at 5.

[4] DeRight Report at 24.

Additional neuropsychological testing consistent with the requisite deficits in intellectual functioning necessary for an intellectual disability diagnosis includes Mr. Burton's scores on the NAB Daily Living Module, the Test of Practical Judgment, and the Gudjonsson Suggestibility Scales ("GSS")—all of which were "exceptionally low" and "worse than over 98% of his peers."[7] These tests measure components of intellectual functioning including "problems with social problem solving/decision-making, problems with language comprehension, suggestibility, and a desire to please authority figures."[8] On the GSS, "Arthur's scores on measures of suggestibility were often significantly higher (worse) than the general population and highly consistent with the intellectual disabled population."[9] Based on the additional cognitive testing he administered, Dr. DeRight concluded that Mr. Burton "exhibited low scores on tests of learning, reasoning, comprehending complex ideas, problem solving, and suggestibility, all of which are examples of significant limitations in intellectual functioning in the AAIDD manual."[10] *See also* DSM-5-TR at 38 (cross-battery intellectual assessment more useful to understanding intellectual abilities than single IQ score).

Dr. DeRight's conclusion is also supported by Mr. Burton's significant academic struggles. *See* DSM-5-TR at 42 (IQ scores are approximation of conceptual functioning). As discussed in further detail below, *see* § A(3)(b)(1) *supra*, Mr. Burton repeated both the second and eighth grade; scored significantly below grade-level on

[7] DeRight Report at 16.
[8] *Id.*
[9] *Id.* at 18.
[10] *Id.* at 22.

standardized testing administered in the fourth grade; was in special education; and performed poorly in the majority of his special education classes.

Substantial unrebutted evidence and the opinions of two qualified clinical psychologists establish that Mr. Burton has pled a prima facie case that he meets the diagnostic criteria for Criterion A.

3. Mr. Burton meets the requirements of the diagnostic framework for Criterion B: Deficits in Adaptive Functioning

a. Clinical Criteria

Adaptive functioning is "the collection of conceptual, social and practical skills that have been learned and are performed by people in their everyday lives." AAIDD-12 at 29. Adaptive deficits "result in the failure to meet developmental and sociocultural standards for personal independence and social responsibility." DSM-5-TR at 37. When evaluating for intellectual disability, examiners assess whether, in the absence of on-going support, an individual has deficits that "limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community." *Id.* Under both the DSM-5-TR and the AAIDD-12, "equal or more weight is placed on the individual's adaptive functioning [than] IQ score when considering impairment." *Id.* at 21. Both the DSM-5-TR and the AAIDD-12 identify three domains of adaptive functioning: conceptual, social, and practical. DSM-5-TR at 42; AAIDD-12 at 29. The presence of deficits in one domain meets the diagnostic criteria for deficits in adaptive functioning under the DSM-5-TR. DSM-5-TR at 42; AAIDD-12 at 31. Moreover, all people with intellectual disability have areas of strengths, and

thus the inquiry into adaptive functioning is singularly focused on the presence of adaptive deficits. AAIDD-12 at 40.

b. Mr. Burton has adaptive deficits in all three domains

Dr. DeRight evaluated Mr. Burton's adaptive functioning based upon Mr. Burton's social history as relayed by Mr. Burton and multiple declarants, school records, Mr. Burton's scores on neuropsychological testing, and a Vineland 3 Comprehensive Interview administered by Dr. DeRight to Mr. Burton's mother.[11] Dr. DeRight opined that Mr. Burton has "impairment in abstract thinking, short-term memory, poor social judgment, gullibility, and needing support for most complex daily living tests."[12] On the Vineland, Mr. Burton's "adaptive functioning composite score of 54 is worse than over 99% of his peers."[13] Based on multiple sources, Dr. DeRight identified deficits in all three domains.

(1) Conceptual Domain

The conceptual domain involves functional academics, such as reading, writing, and math, as well as executive functioning, abstract thinking, self-direction, working memory, and problem solving. DSM-5-TR at 42; AAIDD-12 at 30.

Within the conceptual domain, Mr. Burton's poor performance in school demonstrates the presence of deficits. He was held back in both the second and eighth grades and, even when he repeated eighth grade, he obtained mostly Ds, only

[11] DeRight Report at 19, 23.
[12] *Id.* at 23.
[13] *Id.* at 19.

performing well in remedial reading.[14] He did poorly in the majority of his classes throughout the remainder of his schooling,[15] despite the fact that the courses he took were not academically rigorous. Mr. Burton's 10th grade math teacher, Marcia Alexander, taught from a consumer math textbook that focused on teaching "simple addition, subtraction, multiplication and division," and how "to apply these functions to activities of daily living."[16] Ms. Alexander also taught basic biology, and recalled teaching students in her high school biology class from a fourth grade textbook and having the class complete projects like "count[ing] beans and then glu[ing] them to a paper plate."[17]

Mr. Burton's deficits in the conceptual domain also manifested in his daily life: for example, he was unable to follow a multi-step recipe,[18] was poor at giving directions,[19] and struggled to communicate effectively.[20] Mr. Burton's mother recalled that he preferred comic books to chapter books, and that "he enjoyed looking at the pictures for a long time before being able to actually read the content of the comic books."[21]

Dr. DeRight relied on clinical interviews, standardized testing, and detailed declarations from individuals who knew Burton during the developmental period to

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[14] Crossett School District Records at 1; Declaration of Scott Sasser ("Sasser Dec.") ¶ 4.
[15] Crossett School District Records.
[16] Declaration of Marcia Alexander ("Alexander Dec.") ¶¶ 3-4.
[17] *Id.* ¶ 5.
[18] 2024 Declaration of Fannie Burton ("2024 F. Burton Dec.") ¶ 15; 2024 Declaration of Michael Burton ("2024 M. Burton Dec.") ¶ 14,
[19] 2024 F. Burton Dec. ¶ 17.
[20] Declaration of Cheryl Douglas ("Douglas Dec") at ¶ 7.
[21] 2024 F. Burton Dec. ¶ 17.

support his conclusion that Burton has significant deficits within the conceptual domain.[22]

(2) Practical Domain

The practical domain involves learning and self-management across life settings, including personal care, money management, occupational skills, and school and work tasks. DSM-5-TR at 42; AAIDD-12 at 30.

Mr. Burton's deficits within the practical domain are apparent both from the accounts of people who knew Mr. Burton during the developmental period and the testing performed by Dr. DeRight. Mr. Burton never lived by himself.[23] He did not have a bank account,[24] and was not responsible household bills.[25] He could only cook very simple foods, and was eventually prohibited from using the stove or oven at his mother's house because he forgot to turn it off.[26] He did not independently perform household chores.[27]

If Mr. Burton was sick, he "did not know to take his own temperature or take a medication such as Tylenol."[28] He could not be trusted to wash his hands before touching food and "he would not think to rinse off produce before consuming it."[29] His mother stopped allowing him to put away dishes because he accidentally broke too

[22] DeRight Report at 23-24.
[23] 2024 F. Burton Dec. ¶ 19.
[24] 2024 F. Burton Dec. ¶ 16; 2024 M. Burton Dec. ¶ 19
[25] 2024 M. Burton Dec. ¶ 19-20.
[26] 2024 F. Burton Dec. ¶ 15; DeRight Report at 12.
[27] 2024 Fannie Dec. ¶14; 2024 M. Burton Dec at ¶31 (recalling that, when he lived with a girlfriend, Mr. Burton's "house was always dirty and looked like a hoarder's home" but Mr. Burton was not able to handle cleaning it up).
[28] DeRight Report at 12 (relaying interview with F. Burton).
[29] *Id.*

many.[30] On the NAB Daily Living Module, Mr. Burton scored "exceptionally low" on his ability to write a check to pay a bill and follow instructions by reading a map.[31]

Dr. DeRight relied on clinical interviews, standardized testing, and detailed declarations from individuals who knew Mr. Burton during the developmental period to support his conclusion that Mr. Burton has significant deficits within the practical domain.[32]

(3) Social Domain

The social domain involves: an impaired ability in social skills, social judgment, and interpersonal communication skills; increased vulnerability concerning who can be trusted, whom to follow, and what circumstances are safe; a strong desire to please authority figures based on a limited understanding of a situation; and the extent to which a person is naïve, gullible, easily tricked, or manipulated. DSM-5-TR at 42; AAIDD-12 at 30.

Mr. Burton's "social history reveals evidence of deficits in the social domain, including gullibility and being easily lead."[33] His classmate Cassandra Green remembered that Mr. Burton was "quiet and not very talkative. He wasn't a loud person who drew attention to himself. He was just there. He was often around but didn't try to stand out."[34]

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[30] *Id.*
[31] *Id.* at 16.
[32] *Id.* at 23-24.
[33] *Id.* at 10.
[34] Declaration of Cassandra Green ("Green Dec.") ¶ 4; *see also* DeRight Report at 11 (("Arthur's former classmate, Cassandra Green, recalled that Arthur was quiet, withdrawn, and often did not have facial expressions that matched his actions. She provided an example of him cracking a joke but still having a sad expression on his face.").

His mother remembered that "[i]f his brothers would try to pick a fight with him, he would leave the room or avoid fighting with them."[35] This passivity was accompanied by poor problem-solving skills.[36] *See* AAIDD-12 at 30 (social deficits include "inadequate social responding" and difficulty with problem solving). Both Mr. Burton's mother and brother described Mr. Burton's father as manipulative; however, "[a]ll the children knew better except Arthur."[37] The record reflects numerous other examples of deficits within the social domain.

Dr. DeRight relied on clinical interviews and detailed declarations from individuals who knew Burton during the developmental period to support his conclusion that Burton has significant deficits within the social domain.[38]

Although deficits in only one domain are required for diagnosis, substantial unrebutted evidence and the opinion of a qualified clinical psychologist establishes that Mr. Burton has pled a prima facie case that he meets the diagnostic criteria for Criterion B with respect to all three adaptive domains.

4. Mr. Burton meets the requirements of the diagnostic framework for Criterion C: Onset of Deficits in the Developmental Period

Under both the DSM-5-TR and the AAIDD-12, the onset of deficits in intellectual and adaptive functioning must occur in the developmental period. DSM-5-TR at 42; AAIDD-12 at 32. The DSM-5-TR does not specify a precise age for the

[35] 2000 Affidavit of Fannie Burton ("2000 F. Burton Aff.") ¶ 4.
[36] Douglas Dec. ¶ 8; ("Instead of dealing directly with hard things, he would shut down and keep it to himself."); 2024 M. Burton Dec. ¶ 8 ("He was timid and would get so upset he would just start crying, even as an adult.").
[37] 2024 F. Burton Dec. ¶ 23.
[38] DeRight Report at 23-24.

developmental period but instead defines it as "childhood and adolescence." DSM-5-TR at 42. The DSM-5-TR does not require an individual to have been diagnosed or identified as intellectually disabled in the developmental period. *See* DSM-5-TR at 42.

Information from multiple sources, including Mr. Burton's school records and individuals who knew him from the developmental period, "indicate that Arthur's intellectual and adaptive deficits have been longstanding and present throughout his life."[39] Indeed, Mr. Burton failed both the second and eighth grade and was in special education throughout all four high school years.[40]. Reports from multiple individuals who knew Burton well during his childhood evidence deficits in all three domains of adaptive behavior during the developmental period. Furthermore, "[t]here is no identifiable condition that would be expected to have led to otherwise explained Arthur's history and test scores."[41] Based on the entirety of the information available to him, Dr. DeRight concluded that Mr. Burton's "intellectual and adaptive functioning deficits are known to have begun during the developmental period and persisted throughout his life."[42]

C. The TCCA treats *Moore I* as a new legal basis for subsequent habeas applications when any prior habeas proceedings predated *Moore I*, and allows consideration of *Atkins* claims pursuant to Texas's innocence-of-the-death penalty exception to the abuse of the writ rule, yet it summarily dismissed Mr. Burton's *Atkins* claim without permitting plenary consideration.

[39] DeRight Report at 24.
[40] Sasser Dec. ¶ 3; Crosset School District Records.
[41] DeRight Report at 24.
[42] *Id.*

Texas's abuse-of-the-writ rule contains several exceptions; Mr. Burton pled that he satisfied two of them by showing that: (1) his *Atkins* claim was not "and could not have been presented previously in a timely initial application or in a previously considered application … because the … legal basis for the claim was unavailable on the date the applicant filed the previous application"; or, (2) "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071 § 5(a)(1); § 5(a)(3).

The TCCA has explained that the § 5(a)(1) exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the TCCA'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 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, 409 (Tex. Crim. App. 2010) ("we have already held, in numerous subsequent habeas applications since 2007, that *Tennard*, *Smith, et al.* did announce new law and that those death-row inmates were entitled to have the merits of their *Penry* claims addressed.").

The TCCA has explicitly recognized that *Moore I* constitutes "a new legal basis" for a claim under Article 11.071 § 5(a)(1), including in cases in which the court

previously rejected an *Atkins* claim in the *Briseno* era.[43] Mr. Burton's most recent application predated not only *Moore I*, but also *Hall*. Thus, Mr. Burton's *Atkins* claim satisfied the newly-available-legal-basis gateway under 11.071 § 5(a)(1), because the "legal basis for the claim was unavailable on the date" Mr. Burton filed his most recent previous application.

In the alternative, Mr. Burton argued that his claim should be authorized for plenary review under 11.071 § 5(a)(3). Pursuant to § 5(a)(3), an applicant "may proceed with an *Atkins* claim" in successive habeas proceedings, though it was legally available in a previous habeas proceeding, "if he is able to demonstrate … that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally

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[43] *See, e.g., Ex parte Bridgers*, No. WR-45,179-05, 2021 WL 2346539 (Tex. Crim. App. June 9, 2021) (unpub.) ("in light of *Moore*, Applicant has satisfied the requirements of Article 11.071, § 5(a)(1)"); *Ex parte Guevara*, No. WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. Jun. 6, 2018) (unpub.) (agreeing with applicant that *Moore I* "constitutes a new legal basis for relief that was not available when he originally raised his *Atkins* claim" in prior habeas application, and authorizing further proceedings in light of *Moore I* when claim was re-asserted in subsequent habeas application); *Ex parte Davis*, No. WR-40,339-09, 2020 WL 1557291 (Tex. Crim. App. Apr. 1, 2020) (unpub.), at *3 ("We have previously found *Moore I* to constitute a new legal basis under Article 11.071, § 5."); *Ex parte Gutierrez*, No. WR-70,152-03, 2019 WL 4318678 (Tex. Crim. App. Sept. 11, 2019) (unpub.) (authorizing subsequent application under Article 11.071, § 5(a)(1) where "[Gutierrez] allege[d] that the Supreme Court's *Moore* decision constitutes a new legal basis for relief that was not available when he originally raised his *Atkins* claim"); *Ex parte Williams*, No. WR-71,296-03, 2018 WL 2717039 (Tex. Crim. App. Jun. 5, 2018) (unpub.) (finding intellectual disability claim asserted in second subsequent habeas application satisfied art., 1.071, § 5 on basis of *Moore I*, where claim was originally raised at trial and on direct appeal); *Ex parte Escobedo*, No. WR-56,818-03, 2020 WL 3469044 (Tex. Crim. App. Jun. 24, 2020) (unpub.); *Ex parte Butler*, No. WR-41,121-03, 2019 WL 4464270 (Tex. Crim. App. Sept. 18, 2019) (unpub.); *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019) (unpub.); *Ex parte Long*, No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. Jun. 27, 2018) (unpub.); *Ex parte Segundo*, 2018 WL 4856580 (Tex. Crim. App. Oct. 5, 2018) (unpub.).

retarded."[44] *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007). The TCCA "construe[s] Article 11.071, Section 5(a)(3) to require a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation." *Id*. at 163.

The TCCA, however, "conclude[d] that the application does not satisfy the requirements of Article 11.071, Section 5" and "dismiss[ed] the application as an abuse of the writ." App. 1 at 3. In so doing, the TCCA did *not* state that its dismissal of Mr. Burton's claims was "without considering the merits," its standard language for procedural dismissals, thus indicating that the court assessed the merits of the federal constitutional claim. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court has already expended considerable time and resources correcting the TCCA's recalcitrant approach to *Atkins* claims, including clear guidance on the centrality of current clinical diagnostic standards. Yet, the TCCA continues to flout this explicit guidance, and is reverting instead to the same non-clinical approach this Court specifically rejected in *Moore I*. It is critically important that this Court review the TCCA's decision for two interrelated reasons.

First, at a minimum, the Court should prevent a lower court from repeatedly ignoring its explicit direction regarding the proper application of this Court's precedents. Second, this Court should grant review to vindicate its objectives in *Hall*,

[44] Although the currently-accepted terminology is "intellectually disabled," Mr. Burton uses "mentally retarded" where it appears directly in the quoted materials.

Moore I, and *Moore II*: to ensure that *Atkins* retains meaning and a reasonable degree of uniformity by tethering intellectual disability determinations to accepted medical criteria. The TCCA's recent decisions, including the one below, unfortunately reflect that despite the Court's painstakingly clear and thorough guidance, the TCCA is unwilling to accept as a prima facie *Atkins* claim an unrebutted diagnosis of intellectual disability pursuant to the DSM-5-TR and allow such a claim to proceed for further factual development and hearing.

This case provides an effective vehicle for enforcing the Court's decisions because the record contains an unrebutted diagnosis of intellectual disability pursuant to current clinical standards.

A. The TCCA's disregard for *Hall* and *Moore I*—by refusing to authorize plenary review of an *Atkins* claim supported by an intellectual disability diagnosis pursuant to current diagnostic criteria–requires this Court's intervention.

Under current diagnostic criteria Mr. Burton is intellectually disabled. As described *supra*, he presented a report in which a neuropsychologist—based on testing, an in-person clinical interview, documentary evidence, and input from those who have known Mr. Burton throughout his life—applied his clinical judgment and diagnosed him with intellectual disability pursuant to the DSM-5-TR and AAIDD-12. The expert noted that "the lower-end of the range of Arthur's score on the WAIS-IV falls below 70,"[45], which is corroborated by his performance on other neuropsychological testing. Combined with his constant academic struggles—

[45] DeRight Report at 24.

including repeating two grades and placement in special education classes—this uniform evidence confirms that Burton's "deficits are consistent with those described in the AAIDD and DSM-5-TR criteria."[46] The expert found that Mr. Burton has "clinically significant adaptive deficits" in all three areas—practical, social, and conceptual—though a deficit in just one domain is sufficient for an intellectual disability diagnosis.[47] And third, "Arthur's intellectual and adaptive functioning deficits are known to have begun during the developmental period and persisted throughout his life."[48] The State of Texas did not submit any contravening evidence. Thus, the TCCA's assessment was predicated solely on Mr. Burton's threshold showing of an intellectual disability. Based on this record, the TCCA's summary dismissal was in direct contravention of this Court's precedent in at least two respects.

First, after reviewing Mr. Burton's prima facie showing of intellectual disability, the TCCA unreasonably deprived Mr. Burton of the ability to be heard and to present additional evidence of intellectual disability in a hearing on the merits. Even before *Moore I*, *Hall* cast doubt on Texas's deviation from the clinical standards governing intellectual disability. *Hall* made clear that while states may craft their own *procedures* governing the intellectual disability determination, states do not enjoy "unfettered discretion to define the full scope of the constitutional protection." *Hall v. Florida*, 572 U.S. at 719 (emphasis added).

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[46] *Id.* at 23.
[47] *Id.* at 24.
[48] *Id.*

Hall had "scores between 71 and 80." [49] *Id.* at 707. The Court invalidated a Florida rule declaring that a person with an IQ test score above 70 "does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Id.* at 711–12. The Court emphasized that "clinical definitions of intellectual disability … were a fundamental premise of *Atkins*," *id.* at 720, and therefore a state court's intellectual-disability determination must be "informed by the medical community's diagnostic framework." *Id.* at 721. But "Florida's rule disregard[ed] established medical practice in two interrelated ways," and was thus unconstitutional. *Id.* at 712.

First, the Florida rule was unconstitutional because it departed from established clinical practice by using a single IQ score as a "cut-off" even though experts in the field would consider the standard error of measurement and other evidence. 572 U.S. at 722.

Second, assessing an individual's intellectual and adaptive functioning involves "conjunctive and interrelated" inquiries that cannot be reduced to the "single factor" of an IQ score—especially when the medical community, which "design[s] and use[s] the tests," recognizes "that the IQ test is imprecise." *Id.* at 723. Therefore, the Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant *must be able to present additional evidence of intellectual disability*, including testimony regarding adaptive deficits."

[49] Hall presented other scores below 70 but they were excluded for evidentiary reasons. *Hall*, 572 U.S. at 707.

Id. (emphasis added). The TCCA's summary rejection of Mr. Burton's application defied *Hall*'s clear command. *See also Brumfield v. Cain*, 576 U.S. 305, 315–17 (2015) (holding that a state court's refusal to allow fact development of an *Atkins* claim was unreasonable when "Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability" and "record before the state court contained sufficient evidence to raise a question as to whether Brumfield met" the adaptive deficits criteria).

Second, because the only evidence before the TCCA demonstrated that Mr. Burton meets current clinical criterial for an intellectual disability diagnosis, the TCCA's summary rejection of his claim necessarily rejects the medical community's diagnostic framework, including the DSM-5-TR and the AAIDD-12. As noted *supra*, the TCCA has already signaled its view that the DSM-5-TR is a *departure* from *Atkins* rather than criteria relevant to applying it. *Ex parte Milam*, supra. at *3. But the *only* evidence before the TCCA satisfied a prima facie claim pursuant to current medical criteria. Given the comprehensiveness of Mr. Burton's *threshold* showing with respect to each element of an intellectual disability diagnosis, the TCCA's dismissal was necessarily based on the Texas court's hostility to *Atkins* and, more specifically, its open refusal to adhere to this Court's direction to consider changes to the intellectual disability diagnostic criteria.

This Court's directions could not be more explicit: "criteria [n]ot aligned with the medical community's information, and drawing no strength from our precedent … may not be used." *Moore I*, 581 U.S. at 6. *See also id.* at 13 ("our precedent [does

not] license disregard of current medical standards."). The TCCA's refusal to accept and apply current medical standards represents a substantial departure from adherence to this Court's precedents. This Court should grant *certiorari*, vacate the lower Court's decision, and direct the TCCA to adhere to this Court's precedents.

B. The TCCA's § 5(a) holding was not predicated on an adequate and independent state court rule; it was a determination of the merits of Mr. Burton's *prima facie* showing of intellectual disability.

Mr. Burton anticipates that the State of Texas will argue that the decision below is unreviewable because the TCCA couched its order as a dismissal pursuant to Texas's abuse-of-the-writ rule rather than a denial on the merits. 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 of 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 application of Texas's procedural rule here was not, however, independent of federal law; rather, it was necessarily predicated on an assessment of

Mr. Burton's prima facie case for *Atkins* relief. And, even if the extent the decision below were to be construed as procedural, the application of the procedural rule would be "novel … [in] the way in which it disregards the effect of [*Moore I*] on the law in [Texas]" and thus inadequate to bar review. *Cruz v. Arizona*, 598 U.S. 17, 28 (2023). Should this Court doubt that the TCCA's decision was merits-based, Mr. Burton respectfully suggests that the Court hold his case pending the resolution of *Glossip v. Oklahoma*, 144 S. Ct. 691, 692 (2024).

1. The TCCA's 11.071 § 5(a)(1) dismissal was not independent of federal law.

Texas's unavailability exception to the abuse-of-the-writ rule requires a two-part showing: "1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Thus, in addition to demonstrating the factual or legal unavailability of the claim, the "[a]pplicant also must jump over the rest of the section 5(a)(1) bar" by "alleg[ing] sufficient specific facts that, if proven, establish a federal constitutional violation sufficiently serious as to likely require relief from his conviction or sentence." *Id.* at 422.For two reasons, it is plain here that the TCCA's dismissal was on the merits.

First, as described *supra*, the TCCA has repeatedly held that *Moore I* supplies a new legal basis for an *Atkins* claim for petitioners, like Mr. Burton, whose previous habeas application pre-dated it. When the legal basis for an *Atkins* claim was

indisputably unavailable at the time of the applicant's previous filing, then a TCCA dismissal is a merits ruling. *See, e.g., Rivera v. Quarterman*, 505 F.3d 349, 355 (5th Cir. 2007) ("In granting Rivera's motion to file a successive petition after the CCA denied his second petition, this court explained that 'characterizing the failure to meet the threshold requirement as an abuse of the writ does not foot the ruling on an independent state ground.'"); *see also Busby v. Davis*, 925 F.3d 699, 709 (5th Cir. 2019) ("Accordingly, even had the TCCA resolved Busby's Atkins claim under section 5(a)(1), our court has concluded that the denial of an *Atkins* claim under section 5(a)(1) meant that the merits of the claim were considered by the TCCA, and the claim was not procedurally defaulted.").

Second, when the TCCA dismisses a claim without reaching the second, merits-based prong of the § 5(a)(1) showing, it says so:

> Thus, a Texas court may dismiss a claim on the first ground—that the claim's "factual or legal basis" was not "unavailable"—without ever reaching the constitutional issue…. That is exactly what the CCA did in this case when it "dismiss[ed] the subsequent application as an abuse of the writ *without considering the claims' merits*." *Ex parte Carl Wayne Buntion*, 2022 WL 946264, at *1 (emphasis added).

Buntion v. Lumpkin, 31 F.4th 952, 962–63 (5th Cir. 2022). Indeed, the TCCA frequently dismisses claims under § 5(a)(1) with an explicit notation that it has not considered the merits.[50] The TCCA omitted this language from the order dismissing

[50] *Ex parte Mays*, 686 S.W.3d 745, 748 (Tex. Crim. App. 2024) ("…Applicant has failed to satisfy the requirements of Article 11.071, Section 5. Accordingly, we dismiss these claims as an abuse of the writ *without reviewing the merits*.") (emphasis added); *Ex parte Storey*, 584 S.W.3d 437, 439–40 (Tex. Crim. App. 2019) ("Applicant has also failed to satisfy the requirements of Article 11.071, § 5. Accordingly, we dismiss all of Applicant's claims as an abuse of the writ *without reviewing the merits*.") (emphasis added); *Ex parte Preyor*, 537 S.W.3d 1 (Tex. Crim. App. 2017) ("After reviewing applicant's writ application, we find that

Mr. Burton's case: "we conclude that the application does not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ. *See* Art. 11.071, § 5(c)." App. at 3. If the dismissal was based on the unavailability prong of the § 5(a)(1) test, the TCCA would have adhered to its routine practice of noting it was "without considering the merits."

Given that (1) *Moore I* was not available in 2003—when Mr. Burton filed his previous application; that (2) the TCCA has repeatedly held that *Moore I* (a clear overruling of Texas's *Atkins* screening test) is a new legal basis for § 5(a)(1); and that (3) the TCCA omitted the frequently-invoked phrase "without reviewing the merits" from dismissal, the order below can only be understood as a determination that Mr. Burton's prima facie case, even if proven, did not entitle him to *Atkins* relief.

2. The TCCA's 11.071 § 5(a)(3) dismissal was not independent of federal law.

Likewise, the TCCA's dismissal under 11.071 § 5(a)(3) is inextricably linked with the merits of Mr. Burton's constitutional claim. The TCCA has expressly recognized that in assessing whether an *Atkins* claim satisfies § 5(a)(3), it must necessarily determine whether the applicant has made "a *threshold* showing of

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he has failed to satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss his writ application *without reviewing the merits* of his claims….") (emphasis added); *Ex Parte Medina*, No. WR-41,274-05, 2017 WL 690960, at *1 (Tex. Crim. App. Jan. 25, 2017) ("We have reviewed this subsequent application and find that the allegations fail to satisfy the requirements of Article 11.071, § 5(a). Therefore, we dismiss this application as an abuse of the writ *without considering the merits of the claims*. Art. 11.071, § 5(c).") (emphasis added).

evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation." *Ex parte Blue*, 230 S.W.3d at 163. As the Fifth Circuit has explained:

> The TCCA's seminal decision in *Ex parte Blue* makes clear that when a defendant who was convicted post-*Atkins* raises an *Atkins* claim for the first time in a successive habeas application, the Texas court must determine whether the defendant has asserted facts, which if true, would sufficiently state an *Atkins* claim to permit consideration of the successive petition. *That determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations.*

Busby v. Davis, 925 F.3d 699, 707 (5th Cir. 2019) (emphasis added).

That the TCCA's dismissal under § 5(a)(3) rested on an assessment of the *merits* of Mr. Burton's claim is clear from its order, which indicates that the court reviewed both the application and supporting exhibits, before concluding "the application does not satisfy the requirements of Article 11.071, Section 5." App. 1 at 3. The court's review thus "necessarily entailed an assessment of the facts presented in support of the *Atkins* claim." *Busby*, at 706-707. Furthermore, as previously noted, the order omits standard language that the dismissal was "without considering the merits." Accordingly, the TCCA order "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." *Id.*, at 709.

3. Alternatively, if the TCCA's 11.071 § 5(a)(1) dismissal was based on a finding that Mr. Burton's claim was available before *Hall* and *Moore I*, then the state ground is not adequate to preclude review.

Even if the TCCA's dismissal under § 5(a)(1) could be construed as independent from federal law, it surely is not adequate, because it squarely contradicts the court's treatment of cases that are materially indistinguishable from Mr. Burton's case, in which it found *Moore I* constituted a new legal basis for relief.

"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, 262-63 (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 v. Arizona*, 598 U.S. 17, 25–26 (2023); *Lee v. Kemna*, 534 U.S. 362, 376 (2002). This is 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). Thus, to be "adequate," the application of a procedural rule may not be "novel" and "unforeseeable." *Cruz*, 598 U.S. at 31. Rather, it must be "strictly or regularly applied *evenhandedly to the vast majority of similar claims*." *Amos v. Scott*, 61 F.3d 333, 339 (5th Cir. 1995) (emphasis in original).

The TCCA found *Moore I* constituted a new legal basis for an *Atkins* claim under § 5(a)(1) in at least ten cases that are materially indistinguishable from Mr. Burton's case. *See supra*, at footnote 2 (listing cases in which the TCCA authorized post-*Moore Atkins* claims under § 5(a)(1)). Just like those cases, *Moore I* was not available to Mr. Burton when he filed his previous application in 2003. If the TCCA's dismissal could be construed as a procedural bar under § 5(a)(1) to Mr. Burton's case, then it would be"entirely new and in conflict with prior [Texas] case law." *Cruz*, 598 U.S. 27. As such, it is so novel, unforeseeable, and unsupported, that it is inadequate to preclude federal review. *Id*.

4. Alternatively, this Court should stay resolution of Mr. Burton's case pending a decision in *Glossip v. Oklahoma*.

Mr. Burton believes that the TCCA's resolution of his claim does not rest on an independent and adequate state-law ground. However, should this Court harbor any doubt about its ability to review the TCCA order, it should stay Mr. Burton's execution and hold a decision in his case pending *Glossip v. Oklahoma*, No. 22-7466. In *Glossip*, this Court directed the parties to brief "[w]hether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment." *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (Mem.). In his brief, Glossip argued that the Oklahoma Court of Criminal Appeals' ("OCCA") resolution of his *Brady*[51] and *Napue*[52] claims "depended entirely" on the application of relevant

[51] *Brady v. Maryland*, 373 U.S. 83 (1963).
[52] *Napue v. Illinois*, 360 U.S. 264 (1959).

federal constitutional rulings. *Glossip v. Oklahoma*, No. 22-7466, Brief for Petitioner at 41–43. He further argued that the OCCA's application of a state procedural bar to his claims was "novel and unforeseeable," because it contravened the TCCA's own precedents. *Id.* at 46.

Similar to Glossip, Mr. Burton argues that the TCCA's dismissal under Article 11.071 §§ 5(a)(1) and 5(a)(3) is not independent of federal law because, in accordance with its own caselaw, the TCCA necessarily assessed the merits of Mr. Burton's federal constitutional claim. And to the extent the TCCA's resolution could be construed as independent from federal law (despite contrary caselaw), the application of any state procedural bar was novel and unforeseeable, and thus inadequate to preclude this Court's review. As such, should there be any uncertainty as to whether this Court has jurisdiction to reach Mr. Burton's claims, it should stay the execution and hold this case for resolution of the similar issue in *Glossip*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

Dated: August 3, 2024

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