Nos. 24-5658, 24A302

IN THE

Supreme Court of the United States

GARCIA GLENN WHITE,
Petitioner,

v.

STATE OF TEXAS
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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This is a capital case.

QUESTIONS PRESENTED

Garcia White was convicted of capital murder and sentence to death in 1996. His state and federal habeas corpus litigation was complete in 2014 after which he received a stay of execution in 2015 to litigate a subsequent state habeas application pursuant to Texas Code of Criminal Procedure Article 11.073, which permits the filing of a subsequent application that presents a claim based on previously unavailable scientific evidence that shows the applicant should not have been convicted. The state court dismissed that application in 2016.

Prior to his currently scheduled execution date, White filed his fifth subsequent application for state habeas relief, which challenged the state court's interpretation of Article 11.073, raised a claim of intellectual disability under *Atkins v. Virginia,* 536 U.S. 304 (2002), and asserted a right to reweigh the aggravating and mitigating evidence in his case. The state court dismissed White's application as an abuse of the writ.

1. Does this Court have jurisdiction to review an untimely challenge to the state court's interpretation of its postconviction relief statute?

2. Does this Court have jurisdiction to review the state court's dismissal of two of White's claims where the dismissal was based on an independent and adequate state law ground?

3. Did the Texas Court of Criminal Appeals err in dismissing White's fifth subsequent application as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, § 5?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

BRIEF IN OPPOSITION

Garcia White is **scheduled to be executed after 6:00 p.m. on October 1, 2024.** He was convicted and sentenced to death in 1996 for the 1989 murders of sixteen-year-old twins Annette and Bernette Edwards. He killed Annette and Bernette's mother, Bonita, in the same gruesome attack, and he killed Greta Williams and Hai Pham in separate offenses. *See White v. Thaler*, No. H-02-1805, 2011 WL 4625361, at *1–2 (S.D. Tex. Sept. 30, 2011). White unsuccessfully appealed his conviction and sentence in state and federal court with federal habeas litigation ending in June 2014. *White v. Stephens*, 571 U.S. 1133 (2014). White received a stay of a previously scheduled execution in 2015 to pursue claims under Texas Code of Criminal Procedure Article 11.073 in a subsequent habeas application. *Ex parte White*, No. WR-48,152-08, 485 S.W.3d 431, 432 (Tex. Crim. App. 2016); *Ex parte White*, No. WR-48,152-08, 2015 WL 375733, at *1 (Tex. Crim. App. Jan. 27, 2015). The Texas Court of Criminal Appeals (TCCA) later dismissed the subsequent application. *Ex parte White*, 506 S.W.3d 39, 52 (Tex. Crim. App. 2016).

Almost ten years after he received a stay, and only weeks before his second scheduled execution date, White filed another subsequent habeas corpus application in the state court raising several claims for relief. He argued (1) the TCCA erroneously interpreted state law to permit the filing of a

subsequent application under Texas Code of Criminal Procedure Article 11.073 only if it alleged innocence of the crime, (2) he is intellectually disabled and therefore ineligible under *Atkins v. Virginia,* 536 U.S. 304 (2002), to be executed, and (3) he is entitled to reweighing of the aggravating and mitigating evidence in his case. *See* Order 2–3, *Ex parte White*, No. WR-48,152-09 (Tex. Crim. App. Sept. 18, 2024). The TCCA dismissed the subsequent application and denied White's motion for a stay of execution, stating "the application does not satisfy the requirements of [Texas Code of Criminal Procedure] Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ." *Id*. at 3.

White now seeks certiorari review of the TCCA's dismissal of his latest subsequent application. However, White 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

In late November 1989, Annette, Bernette, and their mother Bonita Edwards were found inside their apartment, one just inside the front door, one

in the dining area, and one in a bedroom. 15 RR 60.[1] Annette was lying face down semi-nude with her head on a pillow and a blanket partially covering her. 15 RR 75–76. Her twin sister Bernette had a towel wrapped around her neck and shoved into her mouth. 15 RR 85. Bonita was clothed but had blood on her shirt. 15 RR 78, 83. The three women had sustained multiple stab wounds to the neck and chest and had been dead for several days. 15 RR 83–84, 146–47. Although there was no sign of a forced entry into the apartment, the telephone was off the receiver, and it appeared the bedroom door had been forced open. 15 RR 70, 73, 91, 151. It appeared that Annette, who was found in the bedroom, may have been sexually assaulted. 15 RR 153. Moreover, blood was found on the walls and on numerous items in the apartment, including the bathtub and kitchen sink. 15 RR 76–78, 83, 88–100, 109–10, 151.

The initial interviews of witnesses proved to be fruitless, and the crime remained unsolved for nearly six years. 15 RR 153–56. However, in July of 1995, the police finally received a break in the case. During an interview regarding an unrelated murder of a convenience store owner involving White, Tecumseh Manuel, a close friend of White's, told the police that White admitted

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[1] "RR" refers to the "Reporter's Record," the transcribed proceedings of White's trial, preceded by the volume number and followed by the page number(s) cited. "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SX" refers to the State's Exhibits admitted at White's trial. "SCHR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte White*, No. WR-48,152-01.

to killing the Edwards family. 16 RR 185–86, 189–90. Officer Todd Miller took a statement from Manuel on July 20, 1995, and arrested White the following day. 15 RR 190. Miller contacted Sergeant Rudolph because he had been involved in the original investigation of this case, and Rudolph questioned White for several hours during the early morning of July 22, 1995. 15 RR 157–59; 16 RR 193–94. White denied involvement in the murders during the interview and believed the police were lying to him about Manuel implicating him in the crime. 15 RR 161. Miller showed White a portion of the taped statement from Manuel. 15 RR 161; 16 RR 195. Afterwards, Miller asked White if he was ready to tell the truth, and White said he was. 16 RR 195–96.

White then gave a videotaped statement of his version of the murders. 15 RR 162; 16 RR 196. The gist of White's statement was that he and Terrence Moore went over to Bonita's apartment to do drugs and have sex with her. SX 55A. They both tried to have sex with Bonita and, after they failed, Bonita got mad because they would not share the drugs with her. *Id.* A fight ensued, and Moore ended up stabbing all of the women. *Id.* White acknowledged during the interview that Terrence Moore was no longer alive. *Id.*

The police investigated Moore's death and discovered Moore had been killed on July 25, 1989, four months before the Edwards were murdered. 16 RR 205–06, 224. Miller and Rudolph confronted White with this discrepancy, and then White gave another taped statement. *Id.* at 206–09. In this brief

statement, White admitted that he made up the story involving Moore, and he confessed to killing all three women himself. SX 56A. Further, serology and DNA testing revealed that semen found on a beige sheet in one of the bedrooms was consistent with White's DNA, and blood found on the same sheet was consistent with the DNA of either Annette or Bernette. 16 RR 240–41; 17 RR 381–384. DNA retesting conducted in 2006 further incriminated White. ROA.1124–25.

II. Evidence Pertaining to Punishment

A. Evidence presented by the State

During the punishment phase, the State proved White had committed two prior murders, including one capital murder. With regard to the capital murder, Hau Pham, a sixteen-year-old immigrant from Vietnam, testified that on July 13, 1995, two men came into his father's convenience store and robbed it. 19 RR 33–34. Around 3:00 p.m. that day, Hau heard a scream, and then one of the men grabbed him by the neck and told him to open the register. 19 RR 34–35. Hau recognized the men because they had been in the store earlier in the day. 19 RR 34. One man was "fat," and the other had a medium build. 19 RR 35–36. Hau saw his father, Hai Pham, lying on the floor with blood on him. 19 RR 37. The men took some cigarettes and walked out of the store. 19 RR 38. Hai died several days later from multiple blunt traumas to the head with skull fractures, brain contusions, and associated complications. 19 RR 47, 83–84.

Hau was shown photographs of possible suspects and identified White as the "fat" man. 19 RR 46–47, 62–64. Officer Miller then obtained a warrant for White's arrest, and White gave a videotaped statement admitting his involvement in the crime. *Id.* at 64–69. In the statement, White said he grabbed Hai Pham, threw him to the floor, hit him several times, and kicked him in the chest when he tried to get up. SX 98. White was charged with capital murder. 19 RR 65.

With regard to the second offense, several Houston police officers testified that, on November 1, 1989, they were dispatched to an abandoned house. 20 RR 114, 121–22. When officers arrived, White and Raymond Manuel were at the scene. 20 RR 121. Officer Philip Clark pulled away plywood from one of the windows and saw a body lying in a back room. 20 RR 116. When homicide officer Wayne Wendel arrived, he found the body of a black female, Greta Williams, beaten to death and covered in carpet. 20 RR 122–23, 134. Greta's body was in the early stages of decomposition, and there was evidence of head trauma. 20 RR 129. Broken teeth were by her neck, and blood spatter on the walls indicated that she sustained repeated blows. 20 RR 131–32. An autopsy revealed that Greta had been struck by a blunt object at least ten times and died from trauma to the head, face, chest, and abdomen. 20 RR 189–95.

When White was initially questioned about the incident, he gave a statement in which he admitted seeing Greta walking down the street but

denied having anything to do with her murder. 20 RR 178–79. White was charged with the murder, and the case was presented to a grand jury on November 29, 1989. 20 RR 141–42. At that time, however, White was "no billed" because there was insufficient evidence for the grand jury to present the indictment. 20 RR 142. But when the police questioned Tecumseh Manuel about his knowledge of the Hai Pham murder, Manuel told the police that White told him about his involvement in both the instant case and Greta Williams's murder. 19 RR 67.

The police confronted White with this new information, and White agreed to give another statement regarding his involvement in Greta's death. 20 RR 207–08. White stated that he approached Greta and offered to pay her for sex. SX 116A. They went to the abandoned house and had sex. *Id.* Afterward, White believed that Greta had taken some of his money. *Id*. When he started to walk away, Greta pulled his shirt and started hitting him. *Id.* White hit her hard about three times, and Greta fell to the ground. *Id.* White then rolled Greta up in carpet and left. *Id.* White further stated that he and Manuel came back to the house two weeks later and noticed a foul odor coming from the house. *Id.* Although White knew it was Greta's body that was causing the smell, he told Manuel that it was probably a dead dog, and they ended up calling the dog pound. *Id.* According to White, the health department contacted the police when they found Greta's body inside. *Id.*

B. Evidence presented by the defense

White's first two witnesses were his mother and sister, who testified regarding White's childhood, character, family, problems related to injuries and work, and drug use. 21 RR 230–78. White's mother, Lizzie White, testified that White was a poor student in school but had good conduct records, was only disciplined once, and got along well with his siblings. 21 RR 230–37. White was a starter on the Wheatley High football team, wanted to play college and pro football, and got accepted to Lubbock Christian College to play football. 21 RR 237–39. However, White injured his knee during his first semester, which terminated his football career, and he dropped out of school. 21 RR 239–40. White came back home and, after working several jobs, he got a job with Clean America sandblasting buildings. 21 RR 240–44. Eventually, he was promoted to crew leader. 21 RR 244. However, in March of 1988, he sustained a serious fall on the job and was hospitalized. 21 RR 245–46. The injury resulted in pain and drug use, and White started hanging around drug abusers. 21 RR 246–49. Although White's medical records were not available, records were produced showing White had been admitted and discharged from the hospital around that time. 21 RR 283. Further, although White had three children whom he loved and was separated from his common-law wife, he was a poor provider and was behind on his child support payments due to his drug use. 21 RR 249–53. Lizzie asked the jury to spare her son's life. 21 RR 254.

Monica Garrett, White's sister, testified to similar effect as her mother. She stated White was a nice brother who got along well with his siblings. 21 RR 271. White had difficulty in school. 21 RR 271. She tried to help White with his grades but to little avail. 21 RR 271–72. Monica and her siblings considered White to be a football hero. 21 RR 272–73.

White then presented two expert witnesses. Robert Yohman, a clinical neuropsychologist, testified that he conducted a battery of tests on White and reviewed records provided by White's attorneys. 21 RR 308–13. Yohman's examination showed, among other things, that White had an IQ of 76, which was in the borderline range of intellectual functioning but not in the range of intellectual disability. 21 RR 315–16. Dennis Nelson, a psychologist, testified that he examined White and conducted various tests on White's intellectual and emotional functioning, as well as his personality. 21 RR 387, 390. According to screening tests, White had an estimated IQ of 85 or 87. 21 RR 391.

On rebuttal, the State presented a probation officer, John Thomas, who stated that on March 20, 1995, White received a probated three-year sentence for theft. 21 RR 451–52. As part of his alcohol and drug evaluation, he was referred to a program but did not follow through. 21 RR 454–55. Further, although White admitted to using drugs on his personal data sheet, he denied being a drug abuser. 21 RR 453–54.

III. Procedural History

White was convicted and sentenced to death for the murder of Annette and Bernette Edwards. CR 5, 222, 233–36, 242–43. The TCCA upheld White's conviction and death sentence on direct appeal. Op., *White v. State*, No. AP-72,580 (Tex. Crim. App. June 17, 1998).

White then filed a state application for a writ of habeas corpus in the trial court. SHCR-01 at 2–109. The trial court entered findings of fact and conclusions of law recommending that White be denied relief. *Id.* at 259–290. The TCCA adopted the trial court's findings and conclusions and denied relief. Order, *Ex parte White,* No. WR-48,152-01 (Tex. Crim. App. Feb. 21, 2001). White also filed a second state habeas application, which the TCCA dismissed as an abuse of the writ. Order, *Ex parte White,* No. WR-48,152-02 (Tex. Crim. App. Apr. 24, 2002).

White then filed a federal habeas petition, but the district court granted White an administrative stay pending the outcome of DNA retesting. White later filed two additional state habeas applications, which the TCCA dismissed pursuant to Art. 11.071, § 5(a) of the Texas Code of Criminal Procedure. Order, *Ex parte White*, Nos. WR-48,152-03, -04 (Tex. Crim. App. May 6, 2009). Following DNA retesting and the state court's dismissal of those applications, the district court lifted the stay. The district court then granted the Director's motion for summary judgment, denied White's petition, and denied White a

certificate of appealability (COA). *White v. Thaler*, 2011 WL 4625361, at *15. Next, White filed an application for a COA, which the Fifth Circuit denied. *White v. Thaler*, 522 F. App'x 226, 236 (5th Cir. 2013), *cert. denied*, 571 U.S. 1133 (2014).

Thereafter, the convicting court scheduled White's execution for January 28, 2015. On January 8, 2015, White filed in the TCCA a Motion for Leave to file an Original Petition for a Writ of Habeas Corpus, a Motion for Leave to file a Petition for a Writ of Prohibition, and a Motion for a Stay of Execution. SHCR-05, -06. The TCCA denied White's motions on January 15, 2015. *Id*. White then filed in this Court a Motion for Authorization to File a Successive Federal Habeas Petition, which was denied. *In re White*, 602 F. App'x 954, 958 (5th Cir. 2015).

Subsequently, White filed in state court, on January 19 and January 20, 2015, respectively, a Motion for Leave to File a Petition for Writ of Prohibition and his fourth subsequent state habeas application. SHCR-07, -08. The CCA denied the Motion for Leave to File a Petition for a Writ of Prohibition on January 21, 2015. SHCR-07. This Court ultimately denied certiorari review. *White v. Texas,* 135 S. Ct. 1510 (2015). The TCCA issued an order staying White's execution based on the subsequent habeas application. *Ex parte White*, 2015 WL 375733, at *1. The TCCA ultimately dismissed the application pursuant to Article 11.071, § 5. *Ex parte White,* 506 S.W.3d at 52.

The state trial court then scheduled White's execution for October 1, 2024. White filed a subsequent application for a writ of habeas corpus and a motion to withdraw the trial court's execution order. On September 3, 2024, the state trial court denied White's motion to withdraw the execution order. The TCCA dismissed White's state habeas application and denied his motion for a stay of execution on September 18, 2024. Order, *Ex parte White*, No. WR-48,152-09 (Tex. Crim. App. Sept. 18, 2024). On September 27, 2024, White filed in this Court a petition for a writ of certiorari and an application for a stay of execution. The instant opposition follows.

On September 18, 2024, White filed in the TCCA a motion for leave to file a petition for a writ of prohibition. The motion for leave and White's request for a stay of execution were denied without written order on September 25, 2024. *In re Garcia White*, Nos. WR-48,152-10, -11 (Tex. Crim. App. Sept. 25, 2024).

On September 13, 2024, outside counsel filed a motion in White's concluded federal habeas proceedings for substitution of counsel and a stay of execution. The district court denied both motions. Order, *White v. Lumpkin*, No. 4:02-CV-1805 (S.D. Tex. Sept. 23, 2024), ECF No. 121. Outside counsel appealed that ruling. The appeal remains pending. *White v. Lumpkin*, No. 24-70005 (5th Cir.).

On September 23, 2024, White filed in the federal district court motions for relief from judgment and for a stay of execution. ROA.2005–13. On September 27, 2024, the district court transferred the motion for relief from judgment to the Fifth Circuit and denied White's motion for a stay of execution. Order, *White v. Lumpkin*, No. 4:02-CV-1805 (S.D. Tex. Sept. 27, 2024), ECF No. 129.

On September 24, 2024, White filed a motion in the Fifth Circuit for authorization to file a successive federal habeas petition. Mot., *In re White*, No. 24-20428 (5th Cir. Sept. 24, 2024), ECF No. 2. The motion is pending.

On September 25, 2025, White filed a civil rights complaint in federal district court followed by a motion for a stay of execution on September 27, 2024. Comp., *White v. Abbott, et al.*, No. 1:24-CV-1136 (W.D. Tex. Sept. 25, 2024), ECF No. 1. The district court denied the motion for a stay. Order on Mot. to Stay Execution, *White v. Abbott, et al.*, No. 1:24-CV-1136 (W.D. Tex. Sept. 27, 2024), ECF No. 13.

REASONS FOR DENYING THE WRIT

The questions White presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on a 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, White advances no compelling reason to review his case, and none exists.

White's petition stems from the lower court's application of Texas Code of Criminal Procedure Article 11.071, § 5(a). The TCCA determined White did not satisfy the requirements of Article 11.071, § 5 and dismissed his application as an abuse of the writ. While this might impact the Court's jurisdiction to reach White's claims regarding Article 11.073 and his "weighing" claim, the TCCA's determination that White's *Atkins* claim was an abuse of the writ necessarily required a prima facie review of the merits of the underlying claim before the state court could make that determination. Therefore, the TCCA's *Atkins* ruling was not independent of federal law, and this Court retains jurisdiction to review the TCCA's determination on the merits. *See Busby v. Davis,* 925 F.3d 699, 709 (5th Cir. 2019) (holding TCCA conclusion that evidence did not satisfy § 5 threshold "was not a denial of relief on purely state-law procedural grounds"); *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). But the TCCA's dismissal of his other claims involved nothing but the court's application of state law, and his petition fails to invoke this Court's jurisdiction to review the dismissal of those claims.

White has not furnished a single reason the lower court erred in rejecting his *Atkins* claim or any reason, let alone a compelling one, for this Court to

grant a writ of certiorari. White failed to demonstrate even a prima facie showing that he is intellectually disabled and thus ineligible for the death penalty. His claim regarding Article 11.073 is untimely and meritless, and his "weighing" claim fails even to state a claim for relief. Therefore, the petition is unworthy of the Court's attention. The petition and White's application for a stay of execution should be denied.

ARGUMENT

I. White's Challenge to the State Court's Interpretation of Article 11.073 Is Unworthy of this Court's Attention.

The first claim White raises in his petition alleges the TCCA's interpretation of Texas Code of Criminal Procedure Article 11.073 is unconstitutional because it permits only the filing of subsequent applications that raise claims challenging an applicant's conviction but not his punishment. Pet. Cert. 14–17. The claim is unworthy of this Court's attention.

First, White's petition seeks this Court's review of the TCCA's dismissal of his subsequent application he filed this year pursuant to Article 11.071, not the Article 11.073 application he filed in 2015. But White's first claim essentially challenges the TCCA's dismissal of his Article 11.073 application. His petition is untimely to the extent it challenges the TCCA's interpretation of Article 11.073 because the TCCA dismissed White's Article 11.073 application in 2016, *Ex parte White,* 506 S.W.3d at 52. *See* Sup. Ct. R. 13(1) (a

petition for a writ of certiorari is timely if it is filed within ninety days after entry of judgment). Indeed, White filed a petition for a writ of certiorari challenging the TCCA's dismissal of his Article 11.073 application, and this Court denied the petition. *White v. Texas*, 583 U.S. 850 (2017). The first claim in White's petition is, therefore, untimely.

Second, White's first claim fails to invoke this Court's jurisdiction to the extent it challenges the TCCA's application of Article 11.071 § 5(a)(3). The TCCA dismissed White's subsequent Article 11.071 application as an abuse of the writ pursuant to § 5. Order 3, *Ex parte White,* No. WR-48,152-09. As this Court has explained, it "lacks jurisdiction to entertain a federal claim on review of a state court judgment '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.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *see Sochor v. Florida,* 504 U.S. 527, 533 (1992); *Michigan v. Long,* 463 U.S. 1032, 1042 (1983). This Court lacks jurisdiction to consider White's first claim.

Ultimately, the abuse-of-the-writ bar—a state law ground clearly and unambiguously applied by the TCCA—prohibits this Court from exercising jurisdiction over White's first claim. *See Kunkle v. Texas*, 125 S. Ct. 2898, 2898 (2004) (Stevens, J., concurring) ("I am now satisfied that the Texas court's determination was independently based on a determination of state law, *see*

Tex. Code Crim. Proc. art. 11.071 § 5 [ ], and therefore that we cannot grant petitioner his requested relief."). White did not argue in the court below or in his certiorari petition that this claim satisfied any exception to Article 11.071 § 5, and he does not argue the TCCA's dismissal of his subsequent application was not independent of the merits of this claim or that the state law ground was an inadequate basis for dismissal.[2] Therefore, this Court is without jurisdiction to review White's first claim.

Third, White's assertion that the TCCA's interpretation of Article 11.073 violates due process is meritless, just as it was when White presented that argument to this Court in his 2017 certiorari petition. Pet. Cert. 12–19, *White v. Texas*, No. 16-9453 (Apr. 3, 2017). White fails to show he has a liberty interest in seeking collateral review in state court to allege new scientific evidence shows he is innocent of the death penalty. *See Murray v. Giarratano,* 492 U.S. 1, 7–8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (States have no obligation to provide collateral review).

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[2] The Fifth Circuit has held that, since 1994, "the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an . . . adequate state ground for the purpose of imposing a [federal] procedural bar." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *cf. Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (noting that this Court generally defers to a court of appeals's interpretation of their respective states' laws); *De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 520 U.S. 806, 810 n.5 (1997) (noting "settled practice of according respect to the courts of appeals' greater familiarity with issues of state law").

Fourth, White cites no support for the assertion that Article 11.071 § 5(a)(3) does not permit the filing of a subsequent application raising a claim challenging a death sentence. Indeed, the assertion is wrong because (1) § 5(a)(3) on its face permits such claims, (2) the TCCA has not limited § 5(a)(3) in the way White suggests, and (3) the TCCA has granted merits review of claims raised in subsequent Article 11.071 applications alleging ineligibility for the death penalty, *see, e.g., Ex parte Milam*, No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021) (per curiam); *Ex parte Weathers*, No. WR-64,302-02, 2012 WL 1378105, at *1 (Tex. Crim. App. Apr. 18, 2012) (per curiam); *see also Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010) (stating that § 5(a)(3) incorporates the definition of actual innocence of the death penalty in *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992)).

For support, White refers to a declaratory judgment entered by a district court in a civil rights action in *Gutierrez v. Saenz*, 565 F. Supp. 3d 892 (S.D. Tex. 2021), involving a procedural due process challenge to Texas's postconviction DNA testing statute, Chapter 64 of the Texas Code of Criminal Procedure. Pet. Cert. 16. But that judgment has been vacated. *Gutierrez v. Saenz*, 93 F.4th 267, 275 (5th Cir. 2024). Moreover, the district court's judgment was based on its finding that Chapter 64 was irreconcilable with

Article 11.071 § 5(a)(3) and rendered § 5(a)(3) illusory,[3] but White's subsequent state habeas application raised no such claim, and he neither alleges he has been improperly denied postconviction DNA testing nor that Chapter 64 is constitutionally infirm. White also cites to this Court's stay of Ruben Gutierrez's execution as support for his assertion that this Court sees merit to Gutierrez's due process claim. But Gutierrez's certiorari petition challenged only the Fifth Circuit's holding regarding standing. Pet. Cert. ii, *Gutierrez v. Saenz*, No. 23-7809 (June 25, 2024). Moreover, this Court recently *vacated a stay* in a case involving a substantially similar claim as Gutierrez's. *Murphy v. Nasser*, 84 F.4th 288, 290 (5th Cir. 2023) (declining to rule on defendant's motion to vacate stay of execution) ("Murphy challenges the limitation of testing to evidence affecting guilt."), 144 S. Ct. 324 (2023) (granting application to vacate district court's stay of execution).

Fifth, the evidence shows unequivocally that White's DNA was found in the victims' apartment, *White v. Thaler*, 2011 WL 4625361, at *5, and there was testimony at trial that evidence of another DNA donor was found at the scene, *id*. (citing 17 RR 388). White has also raised his claim regarding his purported cocaine-induced psychosis, but it has been rejected. *Ex parte White*,

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[3] The district court's declaratory judgment was *based on* the fact that § 5(a)(3) permits the filing of a subsequent application that raises a claim alleging ineligibility of the death penalty. This is contrary to White's claim that the TCCA has interpreted § 5(a)(3) as applying only to claims alleging innocence of the crime.

506 S.W.3d at 49 n.59; *White v. Thaler*, 522 F. App'x at 232–33; *White v. Thaler*, 2011 WL 4625361, at *4–5. White's first claim presents no compelling reason for this Court to grant review, and his petition should be denied.

II. The TCCA Properly Dismissed White's *Atkins* Claim.

White's second claim asserts the TCCA erred in rejecting his *Atkins* claim. Pet. Cert. 17–20. As discussed below, White's claim is unworthy of this Court's attention.

A. The TCCA's dismissal of White's *Atkins* claim was an adjudication on the merits.

In reviewing *Atkins* claims in subsequent habeas applications, the TCCA necessarily considers the merits of the federal constitutional claim. *See Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007); *Busby,* 925 F.3d at 709. Here the TCCA concluded White failed to present sufficient specific facts demonstrating he is intellectually disabled. *See* Order 3, *Ex parte White,* No. WR-48,152-09. Indeed, the TCCA was required by its precedent to conduct a prima facie review of the merits, *see Ex parte Blue,* 230 S.W.3d at 163, and clearly found them lacking. This was correct, as discussed below. The TCCA was not required to grant permission to file a subsequent application simply because White cited to *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), and *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*), to excuse his post-*Atkins* failure to raise an *Atkins* claim. This is especially true where *Atkins* was available when

White filed earlier subsequent state habeas applications, and *Moore I* has been available for seven years. Further, the TCCA committed no error in its application of *Atkins* and *Moore I* in its threshold determination of the merits under § 5(a)(3). Indeed, as will be discussed, White's IQ score of 78 did not rise to the level of evidence of significant deficits in intellectual functioning, and his evidence of deficits in adaptive functioning was insufficient.

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

B. White failed to make a prima facie claim for relief under *Atkins*.

At the outset, it should be noted that White's petition does not identify a basis for certiorari review. Indeed, with respect to his *Atkins* claim, his petition asserts, at most, that the TCCA made erroneous factual findings or misapplied this Court's precedent. Such requests for error correction do not warrant review. Sup. Ct. R. 10. Nonetheless, as discussed below, the TCCA properly rejected White's *Atkins* claim because it is meritless.

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; 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*, 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." 581 U.S. at 13–21.

In *Petetan v. State*, 622 S.W.3d 321, 332–33 (Tex. Crim. App. 2021), the TCCA explained that while the APA and AAIDD clinical manuals are quite similar, a legal determination of Intellectual Developmental Disorder (IDD) should hew closely to the APA's DSM since its clinical purpose is more in keeping with the rationale underlying *Atkins*. The DSM states that IDD is characterized by significant deficits in intellectual and adaptive functioning with onset during the developmental period.[4] An individual must satisfy each of the three criteria to be classified as intellectually disabled. DSM-5-TR at 37–38; *Moore I*, 581 U.S. at 7. The DSM-5-TR requires that the diagnosis of IDD

[4] According to the DSM-5-TR, individuals with IDD have IQ 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.

be based on clinical assessment and standardized testing of intellectual functions, standardized neuropsychological tests, and standardized tests of adaptive functioning. *Id*. at 38.

White did not provide prima facie evidence to support a legal conclusion that he intellectually disabled. He relied on a score of 78 that was obtained by Dr. Patricia Averill in 2008. App. D at 4.[5] Applying the standard error of measurement to that score produced a range of 74–83. App. D at 4. According to Dr. Greg Hupp, who provided a recent report, the range would be 71–85 if applying a seven-point error of measurement.[6] App. C at 5. Based on this Court's decision in *Moore I*, even the low end of the larger range of error of White's score 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."). Therefore, White's evidence of deficits in intellectual functioning was insufficient to make out a prima facie claim, and the TCCA properly rejected White's claim.

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[5] White's appendix to his certiorari petition includes the habeas application he filed in the court below. The application is accompanied by its own appendix. White's expert reports are included in the state application's appendix. The reports will be cited as they appear in that appendix.

[6] It is at least questionable why Dr. Hupp suggested such a larger range of error should apply than Dr. Averill—who conducted the assessment that produced the score of 78—reported in 2008.

As a comparison, the Fifth Circuit has held the TCCA 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 result the test's administrator described as indicating "Borderline" intellectual functioning. *Busby*, 925 F.3d at 716–20. The Fifth Circuit reached a similar conclusion in another case, where the petitioner's score, considered with the range or error, 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.*

White has asserted that adjusting his score of 78 to account for the Flynn Effect produces a score of 75 and, with application of the larger seven-point range of error, his IQ score is "possibly" as low as 68. App. C at 5. Nonetheless, White fails to show the TCCA unreasonably determined he did not make a prima facie claim for relief.

The Flynn Effect posits that over time, the IQ scores of a population rise without corresponding increases in intelligence and, thus, IQ tests must be occasionally re-normed. *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 1, 12–14 (Tex. Crim. App. 2015). It is applied by adjusting a score approximately .3 points 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, application of the Flynn Effect, while permissible, is not required. The DSM-5-TR, for example, does not require adjusting a score downward to account 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 S.W.3d at 18.[7] Notably, "the Fifth Circuit has not recognized the Flynn effect." *Brumfield v. Cain*, 808 F.3d 1041, 1060 n. 27 (5th Cir. 2015).[8] Without this adjustment, White cannot make a prima facie showing on the first criteria for IDD. His evidence of intellectual functioning places him clearly outside the range of IDD.

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[7] The TCCA 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.*

[8] *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.

White also fails to make a prima facie showing of significant deficits in adaptive behavior. 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, and community." DSM-5-TR at 42. As noted above, the DSM-5-TR states "[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. White provided insufficient testing of his adaptive behavior to satisfy contemporary professional norms.

The requirements of the DSM-5-TR are clear: an IDD diagnosis is based on "standardized tests" of adaptive functioning. DSM-5-TR at 38. But as Dr. Hupp acknowledged, App. C at 4, "White has never been administer[ed] nor evaluated on a standardized measure of adaptive functioning."[9] DSM-5-TR at 38. White's *Atkins* claim was, therefore, facially inadequate. His conclusory assertion that the TCCA's rejection of his claim is evidence that the court

[9] Even then, reliance on affidavits of White's friends and family regarding decades-old recollections of White's behavior *more than forty years ago* when he was a minor would be problematic even in the context of an "objective" measurement of White's adaptive behavior. *See Ex parte Cathey*, 451 S.W.3d at 20 (recognizing that a measurement of adaptive behavior was not designed to be administered retrospectively and was susceptible to reporters being "highly motivated to misremember").

refuses to apply either the appropriate medical or legal standard to *Atkins* claims, Pet. Cert. 20, fails to show that is true, particularly where his claim was facially inadequate.

The TCCA's dismissal of White's meritless *Atkins* claim does not present a compelling reason that warrants this Court's attention. White's petition for a writ of certiorari should be denied.

III. White's Weighing Claim Is Unworthy of this Court's Attention.

White argues the TCCA in *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021), departed from its earlier precedent and began to apply a weighing scheme. Pet. Cert. 21–22. Presumably White means that the TCCA now applies such a scheme when analyzing claims of ineffective assistance of trial counsel (IATC). White's argument does not warrant this Court's attention.

First, neither White's state habeas application nor his petition for a writ of certiorari identify any underlying claim under which any evidence should be reweighed. White also fails to point to any specific evidence any court failed to consider. Consequently, White's argument regarding how the TCCA evaluates IATC claims after *Andrus* simply has no application in his case.

Second, White asks this Court to examine the TCCA's holding in *Andrus*. But this Court did, and it denied Terence Andrus's petition for a writ of certiorari. *Andrus v. Texas*, 142 S. Ct. 1866 (2022). It goes without saying that White's case is not the appropriate vehicle for this Court to review the TCCA's

holding in another case, particularly where White's subsequent habeas application gave the TCCA no occasion on which to apply the holding.

Third, White argues the TCCA's opinion in *Andrus* contradicted its earlier opinions adjudicating ineffectiveness claims, Pet. Cert. 21, but he does not assert its opinion contradicted any of this Court's precedent. Therefore, he fails to justify this Court's attention. *See* Sup. Ct. R. 10(b)–(c).

Fourth, White asserts the TCCA's opinion in *Andrus* created a new mode of analyzing prejudice, but that is not accurate. The TCCA has, consistent with *Strickland v. Washington*, 466 U.S. 668 (1984), long considered whether newly proffered mitigating evidence would have changed the result of an applicant's trial in light of the mitigating and aggravating evidence that was admitted at trial. *See, e.g. Ex parte Martinez*, 195 S.W.3d 713, 731 (Tex. Crim. App. 2006); *Ex parte Gonzales*, 204 S.W.3d 391, 399 (Tex. Crim. App. 2006). White's argument is simply inaccurate. Therefore, he presents no compelling reason justifying this Court's attention. His petition for a writ of certiorari should be denied. *See* Sup. Ct. R. 10(b)–(c).

IV. White's Application for a Stay of Execution Should Be Denied.

This Court should also deny White's request for a stay of execution. A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547

U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A court must consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation." *Nelson*, 541 U.S. at 649–50 (citing *Gomez v. U.S. Dist. Court for Northern Dist of California,* 503 U.S. 653, 654 (1992)).

As demonstrated above, White's petition is unworthy of this Court's attention, and he fails to demonstrate a likelihood of success on the underlying claims. Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. White killed the Edwards sisters and their mother in 1989, and he was convicted and sentenced to death in 1996. He exhaustively appealed his conviction and sentence through both state and federal court, obtaining a stay of execution in 2015. His case sat dormant until another execution date was set almost ten

years later. White's last-minute attempt to raise new, meritless claims that could and should have been raised long ago is plainly a dilatory effort to delay his sentence. Such tactics underscore why the court should deny this application for a stay. *See, e.g.*, *Bucklew v. Precythe*, 587 U.S. 119, 149–51 (2019). White presents no reason to delay his execution date any longer. The Edwards family—and the victims of White's other murders, Greta Williams and Hai Pham—deserve justice for his decades-old crimes.

Lastly, White cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution. For the same reason, White fails to show that he would suffer irreparable harm if denied a stay of execution. *Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008) (explaining that "the merits of [the movant's] case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue"). For the reasons above, this Court should deny White's application for a stay of execution.

CONCLUSION

For the reasons set forth above, White's petition for a writ of certiorari and his application for a stay of execution should be denied.

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