No. 22-6964

IN THE

Supreme Court of the United States

ARTHUR BROWN JR.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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

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I. The State Mischaracterizes the Texas Court of Criminal Appeals' Decision and Highlights Why Review is Necessary Here

The Texas Court of Criminal Appeals (TCCA) was clear that when it dismissed Mr. Brown's *Atkins v. Virginia,* 536 U.S. 304 (2002), claim: "[W]e dismiss the application as an abuse of the writ *without reviewing the merits of the claims raised*." App. at 2 (emphasis added). The Office of the Attorney General's (OAG) Brief in Opposition (BIO) attempts to re-characterize the TCCA's clear language to say that the TCCA *must* have conducted a merits review or a prima facie merits review – *see, e.g.*, BIO at 13 – but that is not what the TCCA's order says. To be clear, again, the State did not contest that Mr. Brown met Texas Code of Criminal Procedure Section 5(a)(1)'s "new legal basis" requirement for merits review of his *Atkins* claim before the TCCA. The crux of the OAG's argument now is that because *the State* contested the merits of the underlying claim, the TCCA therefore *must* have considered the merits of the claim. But the State does not speak for the TCCA, and its Motion to Dismiss in the underlying litigation – or consideration thereof – is not a substitution for a court's merits review.[1] The TCCA speaks for itself, and it said it dismissed Mr. Brown's *Atkins* claim "without reviewing the merits." App. at 2. This Court should take the TCCA at its word, and not the re-characterization offered by the OAG's office, intervening in litigation arising from state court for the first time to bar a person

[1] Indeed, there is good reason to wonder if it was considered at all. A "Motion to Dismiss" as the State filed in the underlying litigation to contest the merits of Mr. Brown's case is unauthorized by statute, as Mr. Brown pointed out in his reply (App. at 174 n. 1.), and no authority permitted its filing much less relying on it in the way the OAG suggests.

described as "mentally retarded" as a child from ever having the merits of his claim reviewed by a court.

The TCCA barred Mr. Brown's *Atkins'* claim – which was supported by the unimpeached opinion of an expert psychologist and more than a dozen declarations, *see infra* Section (II) – on procedural grounds alone. This Court has long held that whether a state procedural ruling is adequate is a question of federal law appropriate for review. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1965); *Beard v. Kindler*, 558 U.S. 53, 60 (2009). The question here, as in *Cruz v. Arizona*, 598 U.S. ____, 2023 WL 2144416 (Feb. 22, 2023), is whether the TCCA's Article 11.071 Section 5 determination "so novel and unfounded that it does not constitute an adequate state procedural ground." *Id*. Here, as in *Cruz*, straightforward application of the procedural rule – namely, that *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*) and *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*) constituted a new "legal basis" under Tex. Code Crim. Proc. art. 11.071 sec. 5(a)(1) not available to him at the time of his prior 2014 application – should have resulted in Mr. Brown's *Atkins* claim being authorized for review.

It should be beyond question that *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) had a catastrophic effect on the ability of individuals sentenced to death in Texas to obtain merits reviews of their *Atkins* claims, and that this Court had to correct the TCCA not once, but twice, before meaningful review began to take place. Just as in *Cruz*, *Moore I* and *Moore II* overruled binding legal precedent in Texas. If *Moore I* and *Moore II* are suddenly not a "new legal basis" for review of *Atkins* claims,

Texas will reenter an era of ignoring these Eighth Amendment claims for those few remaining individuals like Mr. Brown who have never had the merits of their intellectual disability presented to any court. *Cf. Ex parte Segundo*, ___ S.W.3d ____, 2022 WL 1663956 at *2 (Tex. Crim. App. May 25, 2022) (Newell, J., concurring, joined by Hervey and Keel, JJ.) (calling this Court's *Atkins* decision an "intellectual failure" and noting that "[w]hen we decide cases involving the United States Constitution, we are bound by United States Supreme Court case law interpreting it. If we disagree with the Court's holding, too bad. It is up to the United States Supreme Court to fix it, not us.").

The State of Texas still seeks to execute individuals using *Briseño*-like factors while paying lip service to the guidance of the medical community, and the OAG's BIO – mirroring the Harris County District Attorney's Office's Motion to Dismiss in the TCCA – repeats these points. This highlights the need for merits review of Mr. Brown's case notwithstanding the procedural ruling imposed by the TCCA, rather than cutting against it. For instance, in support of its (wrong) position that Mr. Brown's *Atkins* claim is meritless, the OAG cites portions of Mr. Brown's school records reflecting that later in school, he was moved from classes for the Educable Mentally Retarded (EMR) to classes for Learning Disabled children, that he was able, at times, to achieve average grades in special education classes, and that he was observed in the 6th grade to have "below average" "pencil control" and "very low self-confidence." BIO at 20-21. These are not reasons supported by the medical community to deny review of a serious Eighth Amendment claim. If anything, Mr. Brown's long

and convoluted history of special education and learning-disabled classes support sincere review of his claim and highlight the need to rely on the expert opinion in this case. *See infra* Section (II). This Court should not be persuaded by the State of Texas's all too familiar attempt to use facts supporting an *Atkins* claim to try to hastily execute a person who has had no opportunity to present his claim fairly. *Cf., Moore I*, 581 U.S. at 18 n. 9 (noting skepticism over the use of stereotypes in the *Briseno* factors that "placed undue emphasis on adaptive strengths, and regarded risk factors for intellectual disability as evidence of the absence of intellectual disability.") (internal citations omitted).

II. The State's Arguments Opposing a Stay of Mr. Brown's Execution are Incorrect and Unsupported

The OAG argues that this Court should not grant a stay of execution because it asserts that Mr. Brown has failed to demonstrate the likelihood of success of the merits, irreparable injury, the lack of injury to third parties, and that public interest favors a stay. *See, e.g., Nken v. Holder*, 556 U.S. 418, 434 (2009). Their argument fails on all counts.

Contrary to the OAG's arguments, Mr. Brown is likely to succeed on the merits. First, this is not a case where expert opinion differs on the question of intellectual disability or where there is a "battle of the experts" to disentangle on the issue of intellectual disability. As this Court made clear in *Hall v. Florida*, adjudications of intellectual disability should be "informed by the views of medical experts." 572 U.S. 701, 721 (2014). The record contains unimpeached, uncontradicted expert opinion that Mr. Brown is, in fact, intellectual disabled. This expert opinion was supported

by multiple witness affidavits, review of school records, and etiological corroboration, including the fact that Mr. Brown's mother drank liquor heavily during her pregnancy with Mr. Brown. Without the succor of contrary expert opinion, the OAG is left to rely on lay stereotypes such as Mr. Brown having low self-esteem and an outlier IQ score in the school records on a test for which there is no raw data. Just as this Court rejected the State of Texas's obstinate reliance on unscientific methods of evaluating intellectual disability contrary to medical expert opinion in *Moore I* and *Moore II*, it should not countenance or credit the State's arguments here, unmoored as they are from expert opinion while also deeply reflective of lay stereotypes. The record here is clear: the only considered, medical expert opinion supports Mr. Brown's intellectual disability.

Permitting Mr. Brown to be executed, notwithstanding his intellectual disability would be deeply and irreparably injurious both to Mr. Brown and the criminal justice system. As this Court has made clear, the execution of the intellectually disabled is unconstitutional and reflects the national consensus against the practice, due to the "widespread judgment about the relative culpability of [intellectually disabled] offenders, and the relationship between [intellectual disability] and the penological purposes served by the death penalty." *Atkins*, 536 U.S. at 317.

The TCCA opinion in this case reflects a flagrant disregard not only for this Court's Eighth Amendment jurisprudence over the last 21 years, but also for that court's own precedent finding *Moore v. Texas* to be a new legal basis for relief. The

interests of the rule of law would be poorly served by permitting Mr. Brown's execution despite the fact that the *only* medical expert testimony on the issue supports his intellectual disability and the TCCA's imposition of a procedural bar implicit finding that *Moore v. Texas* was not a new legal basis for relief is entirely novel and unsupported by the caselaw of that court.

Moreover, the State's arguments about dilatoriness are misplaced. Unquestionably, this Court's 2017 decision *Moore v. Texas* provides a new legal basis for relief that did not exist at the time of Mr. Brown's previous writ application in 2014. *See* Tex. Code Crim. Proc. art. 11.071 sec. 5(a)(1). On May 25, 2022, the convicting court appointed Mr. Brown's present counsel after his prior lawyer admitted to that court two things of note: (1) despite prenatal exposure to alcohol, special education classes, and an IQ score in the intellectually disabled range, no one, including himself, had ever investigated whether Mr. Brown is intellectually disabled; and (2) he was unable to provide minimally competent representation. A little over nine months later, Mr. Brown's present counsel filed the underlying successive writ containing the claim regarding Mr. Brown's intellectual disability. The State's alacrity with respect to the litigation, on the other hand, is newly embraced. In fact, the history of this case suggests that the State has acted with something less than diligence. For example, notwithstanding the state statute that requires the State of Texas to answer a writ application no later than 180 days after it is filed, *see* Tex. Code Crim. Proc. art. 11.071 sec. 7(a), here the State waited four

years to answer.[2] Likewise, the record reflects that this Court denied certiorari in the last round of post-conviction in October 2018, yet the State did not seek an execution date for Mr. Brown for over three years.

Public interest favors a stay. This Court's intervention is urgently needed to prevent the imminent execution of Mr. Brown, who the evidence strongly suggests is intellectually disabled and therefore categorically exempt from the death penalty. Without intervention, Mr. Brown will be executed, notwithstanding his intellectual disability and his constitutional ineligibility for the death penalty, due to the TCCA's novel and inconsistent application of a procedural bar notwithstanding this Court's guidance in *Moore I* and *Moore II*.

III. Conclusion

The Court should grant Mr. Brown's application for a stay of execution and grant a writ of certiorari to review the decision below.

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[2] The state court writ record reflects that Mr. Brown's first state habeas counsel filed an application for writ of habeas corpus on March 26, 1998, and the State did not file an Answer until April 24, 2002.

Respectfully submitted,

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