Nos. 19-6875, 19A639

IN THE

Supreme Court of the United States

TRAVIS RUNNELS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 9th day of December, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari and Application for a Stay of Execution** was sent by electronic mail to: Mark Pickett, Center for Death Penalty Litigation, 123 W. Main St., Suite 700, Durham, Texas 27701, mpickett@cdpl.org. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

Counsel for Respondent

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

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jay.clendenin@oag.texas.gov

Counsel for Respondent

QUESTION PRESENTED

While serving a seventy-year sentence for aggravated robbery, Petitioner Travis Runnels murdered his supervisor in the Texas Department of Criminal Justice (TDCJ) Clements Unit boot factory. Runnels has unsuccessfully challenged his conviction and sentence in state and federal court. Prior to filing a subsequent state habeas application in 2019, Runnels had never raised a claim challenging a prosecution witness's testimony at his 2005 trial regarding prison classification. In his subsequent application, Runnels alleged the witness falsely testified that capital murderers are automatically assigned to general population in relatively unrestricted custody. The state court dismissed Runnels's claim without considering its merit. He now asks this Court to create a new, retroactive rule of constitutional law prohibiting the prosecution from unknowingly presenting false expert testimony regarding a capital defendant's future dangerousness.

These facts raise the following question:

> Should the Court grant certiorari to review Runnels's claim where the state court dismissed the claim on a non-merits procedural ground, the rule Runnels seeks is barred by principles of non-retroactivity, and evidence of Runnels's violence while housed in administrative segregation plainly renders any false or misleading testimony harmless?

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BRIEF IN OPPOSITION

Petitioner Travis Runnels was convicted and sentenced to death in 2005 for the murder of Stanley Wiley, Runnels's supervisor in the TDCJ Clements Unit boot factory. He is scheduled to be executed after **6:00 p.m. (Central Time) on Wednesday, December 11, 2019**. Runnels has challenged his conviction and death sentence in both state and federal court. His claims have been rejected in each instance. Runnels recently filed a subsequent state habeas application in which he claimed his right to due process was violated because the prosecution unknowingly presented false testimony regarding TDCJ's classification procedures. The Texas Court of Criminal Appeals (CCA) dismissed the application as an abuse of the writ without considering the merits of Runnels's claim. Order, *Ex parte Runnels*, 46,226-03 (Tex. Crim. App. Dec. 2, 2019).

Runnels now seeks review in this Court, just days before his scheduled execution, of the state court's dismissal of his subsequent state habeas application. *See generally* Pet. Cert. He asks this Court to create a new, retroactive rule of constitutional law that a criminal defendant's right to due process is violated where the prosecution unknowingly presents false expert testimony regarding a capital defendant's future dangerousness. Pet. Cert. at i. Runnels's claim does not warrant this Court's attention.

First, the state court's dismissal of Runnels's subsequent state habeas application rested on an adequate and independent procedural bar. Runnels's attempt to avoid the consequences of the procedural default of his claim is to no avail. Second, Runnels seeks the creation of a new, retroactive rule of constitutional law, which is plainly barred by *Teague v. Lane*, 489 U.S. 288, 310 (1989). Third, Runnels would not benefit from his proposed rule because it is clear he was not harmed by the complained-of testimony. Therefore, the Court should deny Runnels's petition for a writ of certiorari. For the same reasons, the Court should deny Runnels's application for a stay of execution.

STATEMENT OF JURISDICTION

The Court does not have jurisdiction because the state court's dismissal of Runnels's subsequent habeas application rested on an adequate and independent state procedural bar. *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The CCA summarized the facts of the capital murder as follows:

> [Runnels] did not enjoy working as a janitor at the prison boot factory. On the morning of the day of the murder, he expressed anger at the fact that he had not been transferred to being a barber as he had requested. He told fellow inmate Bud Williams that he was going to be "shipped one way or another" and that "he was

> going to kill someone." [Runnels] said that he would kill [Stanley] Wiley if Wiley said anything to him that morning. [Runnels] told another inmate, William Gilchrist, that he planned to hold the boot-factory plant manager hostage in the office after the other correctional officers had left. Finally, after [Runnels] had arrived at the boot factory, he told fellow inmate Phillip Yow that he was going to do something.
>
> During the first shift at the boot factory, [Runnels] approached Wiley, raised a knife, tilted Wiley's head back, and cut his throat. [Runnels] then wiped the knife with a white rag and walked back toward the trimming tables. When Yow later asked [Runnels] why he had attacked Wiley, [Runnels] said, "It could have been any offender or inmate, you know, as long as they was white." In response to Yow's explanation that [Runnels] could get the death penalty if Wiley died, [Runnels] responded, "[a] dead man can't talk."
>
> Wiley did die from the injury. It was later determined that the cut was a twenty-three centimeter long neck wound that transected the external carotid artery and the internal jugular vein and extended in depth to the spine. A medical examiner found that the force required to inflict the wound was "moderate to severe." [Runnels] was twenty-six years old when he committed the offense.

Runnels v. State, No. 75,318, slip op. at 1 (Tex. Crim. App. Sept. 12, 2007).

B. The prosecution's punishment case

The CCA summarized on direct appeal the State's case for future dangerousness:

> In addition to the crime before [the court], the record shows that [Runnels] has been convicted of three other felonies. In 1993, he was convicted of the second-degree felony of burglary of a building. He was placed on probation for that felony, but later that year he committed another burglary of a building. As a result, he received a second conviction and his probation on the first conviction was revoked. In 1997, [Runnels] was convicted of aggravated robbery,

> a first-degree felony. That conviction carried a deadly weapon finding, specifying the deadly weapon as a "firearm."
>
> [Runnels] also committed several acts of misconduct in prison. On January[ ] 19, 1999, he hit a guard in the jaw. On May 3, 2003, he threw urine at a guard. On November 18, 2003, he threw a light bulb at a guard. And on June 25, 2004, he threw feces at a guard.

Id. at 2.

C. The defense's case

The defense developed testimony showing that, prior to the murder, Runnels felt that Mr. Wiley had harassed him. William Gilchrist testified that Wiley had a confrontation with Runnels the day prior to the murder. 15 RR 115.[1] Jimmy Jordan testified to the same effect. 15 RR 145. Jordan and Bud Williams, Jr., testified that Mr. Wiley had scolded Runnels for not working and Runnels said that he was tired of Mr. Wiley "messing with him." 15 RR 67, 146.

Witnesses who had known Runnels for a significant period of time in prison testified that they had not seen Runnels exhibit any violent behavior. 15 RR 78, 80, 113–14. Williams had known Runnels for eight years. 15 RR 53. He testified that he had never seen Runnels fight and that Runnels had walked away from trouble. 15 RR 78, 81–82. Gilchrist testified that Runnels never engaged in violence or threatened others. 15 RR 114. Jimmy Jordan and Phillip

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[1] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). The transcript of the punishment phase of Runnels's trial is contained within Respondent's Appendix.

Yow also testified they had not seen Runnels involved in any fights. 15 RR 157, 243.

Gilchrist testified that he had not seen Runnels threaten anyone or exhibit violence during the nine or ten months he had known Runnels. 15 RR 114. William Elkins testified that Runnels was good-natured. 15 RR 183. The defense also showed that Runnels did not attempt escape or resist arrest when officers responded to the scene of the attack. 15 RR 213, 229–30.

II. Procedural History

Runnels pleaded guilty to, and was convicted and sentenced to death for, the murder of Stanley Wiley. CR 20, 334, 342–45, 390–94;[2] 21 RR 3; 15 RR 8; 17 RR 41. The CCA upheld Runnels's conviction and death sentence on direct appeal. Op., *Runnels v. State*, No. 75,318 (Tex. Crim. App. Sept. 12, 2007). Following a remand to the trial court and an evidentiary hearing regarding Runnels's ineffective-assistance-of-trial-counsel claim, the CCA denied Runnels's state habeas application based on the trial court's findings of fact and conclusions of law and based on its own review. Order, *Ex parte Runnels*,

[2] "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). "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Runnels*, No. 46,226-02. "Supp. SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court following the CCA's remand to the trial court.

No. 46,226-02 (Tex. Crim. App. March 7, 2012); SHCR-02 at 298–306; Supp. SHCR-02 at 7–14.

Runnels then filed a federal habeas petition. The district court denied habeas corpus relief and denied a COA. *Runnels v. Stephens*, 2016 WL 1275654, at *1–2 (N.D. Tex. March 31, 2016) (order adopting Report and Recommendation); *Runnels v. Stephens*, 2016 WL 1274132, at *1–28 (N.D. Tex. March 15, 2016) (magistrate judge's Report and Recommendation). Runnels then filed an application for a certificate of appealability (COA), which the Fifth Circuit denied. *Runnels v. Davis*, 664 F. App'x 371, 372–78 (5th Cir. 2016). Runnels filed petitions for rehearing and for rehearing en banc following the Fifth Circuit's denial of a COA. The Fifth Circuit denied each petition. Order, *Runnels v. Davis*, No. 16-70012 (5th Cir. Dec. 11, 2017). Runnels then filed a petition for a writ of certiorari, which this Court denied. *Runnels v. Davis*, 138 S. Ct. 2653 (2018).

During the proceedings in the Fifth Circuit, Runnels obtained a stay to file in the district court a motion for relief from judgment. Order, *Runnels v. Davis*, No. 16-70012 (5th Cir. June 5, 2017). Runnels then filed a motion for relief from judgment, which the district court dismissed as a successive petition and denied in the alternative.[3] *Runnels v. Davis*, 2017 WL 5028243, at *5 (N.D.

[3] Runnels did not file in the Fifth Circuit a motion for authorization to file a successive habeas petition. Therefore, the Fifth Circuit dismissed such an action for

Tex. Oct. 31, 2017) (order adopting Report and Recommendation); *Runnels v. Davis*, 2017 WL 5004843, at *7 (N.D. Tex. Sept. 29, 2017) (magistrate judge's Report and Recommendation). The Fifth Circuit denied a COA as to the district court's rejection of his motion for relief from judgment. *Runnels v. Davis*, 746 F. App'x 308, 317 (5th Cir. 2018). The Fifth Circuit also denied Runnels's petition for rehearing. Order, *Runnels v. Davis*, No. 17-70031 (5th Cir. Sept. 18, 2018). Runnels then filed a petition for a writ of certiorari, which this Court denied. *Runnels v. Davis*, 139 S. Ct. 2747 (June 24, 2019).

The state trial court scheduled Runnels's execution for December 11, 2019. Runnels then filed in state court a subsequent application for a writ of habeas corpus and a motion for a stay of execution. The CCA dismissed the application and denied Runnels's motion for a stay. Order, *Ex parte Runnels*, No. 46,226-03 (Tex. Crim. App. Dec. 2, 2019).

On December 6, 2019, Runnels filed in this Court a petition for a writ of certiorari and an application for a stay of execution. *Runnels v. Texas*, Nos. 19-6875, 19A639. The instant brief in opposition follows.

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failure to comply with the court's scheduling order. Order, *In re Runnels*, 17-11294 (5th Cir. Dec. 5, 2017).

ARGUMENT

I. Certiorari Review Is Foreclosed Because Runnels's Claim Is Procedurally Defaulted.

Runnels seeks certiorari review of the CCA's dismissal of his due process claim. Pet. Cert. at 18. His claim alleged the prosecution unknowingly presented false testimony from A.P. Merillat that an inmate sentenced to life for capital murder would "automatically" be classified in general population in "G-3" custody and enjoy relatively unrestricted custody. Pet. Cert. at 28. The CCA dismissed the claim as an abuse of the writ without considering its merit. Order, *Ex parte Runnels*, No. 46,226-03 (Tex. Crim. App. Dec. 2, 2019).

Runnels's petition implicates nothing more than the state court's proper application of state procedural rules for collateral review of death sentences. The state court's dismissal of Runnels's claim, which relied upon an adequate and independent state procedural ground, forecloses certiorari review. *Walker v. Martin*, 562 U.S. 307, 315–16 (2011); *Long*, 463 U.S. at 1041–42; *see Rocha v. Thaler*, 626 F.3d 815, 838 (5th Cir. 2010); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). Specifically, when Runnels filed a subsequent state habeas application raising the claim presented in the instant petition, he was cited for abuse of the writ. Order, *Ex parte Runnels*, No. 46,226-03 (Tex. Crim. App. Dec. 2, 2019) (citing Tex. Code Crim. Proc. art. 11.071, § 5). The CCA dismissed the subsequent state habeas application "without reviewing the

merits of the claim raised." *Id*. Despite the state court's plain statement, Runnels argues that the state court's dismissal of his subsequent application should be disregarded. Pet. Cert. at 29–32. He is mistaken.

A. Runnels's claim was available at the time he filed his initial state habeas application.

Runnels argues that the CCA's dismissal of his subsequent application should not bar this Court's review of his claim because the CCA did not apply the statutory abuse-of-the-writ bar to his claim in the way it has applied it in other cases—i.e., by finding that his claim was unavailable to him at the time he filed his initial state habeas application. Pet. Cert. at 30 (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982)). Specifically, he argues that he could not have raised his claim alleging the prosecution unknowingly presented false testimony from Merillat when he filed his initial state habeas application in 2007 because the legal basis of the claim did not exist until the CCA issued its opinion in *Ex parte Chabot*[4] in 2009 explicitly recognizing such a claim. Subsequent Appl., *Ex parte Runnels*, No. 46,226-03 at 38–40 (citing Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1)).[5] But Runnels fails to show that his claim was

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[4] 300 S.W.3d 768 (Tex. Crim. App. 2009).

[5] Texas Code of Criminal Procedure article 11.071 § 5(a)(1) provides that a court may not consider the merits of a claim presented in a subsequent habeas application unless the claim has not and could not have been presented previously because the factual or legal basis for the claim was unavailable when the applicant filed the previous application.

previously unavailable. His failure to meet the standard provided an additional adequate and independent state-law basis on which the CCA dismissed his subsequent application. *See Rocha*, 626 F.3d at 835–37.

The CCA's holding in *Ex parte Chabot* that the prosecution's unknowing presentation of false testimony may violate due process was based on its previous holding in 2006 in *Ex parte Carmona*, 185 S.W.3d 492, 497 (Tex. Crim. App. 2006). *Ex parte Chabot*, 300 S.W.3d at 770–71. And the facts, i.e., Merillat's testimony at Runnels's 2005 trial and TDCJ's classification procedures that were in place at that time, underlying Runnels's claim were plainly available to him when he filed his initial state habeas application in 2007. *Cf. Sparks v. Davis*, 2018 WL 1509205, at *13 (N.D. Tex. March 27, 2018) (rejecting complaint that the prosecution withheld evidence of Merillat's false testimony because the petitioner failed to show TDCJ's classification policy was not available to him).

As the CCA has explained, the purpose of Texas's abuse-of-the-writ bar "is to prevent" abuse of the writ "by prohibiting courts from addressing the merits of subsequent-writ applications that raise claims that . . . could have been rationally fashioned from certain jurisprudence even if the legal basis had not yet been recognized." *Ex parte Navarro*, 538 S.W.3d 608, 615 (Tex. Crim.

App. 2018) (citing Tex. Code Crim. Proc. art. 11.07 § 4(a)(1));[6] Tex. Code Crim. Proc. art. 11.071 §5(d) ("For purposes of Subsection (a)(1), a legal basis of a claim is unavailable . . . if the legal basis . . . could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.");[7] *see Ex parte Milam*, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019) (Yeary, J., dissenting). Runnels's claim "could have been rationally fashioned" from the CCA's and circuit-court jurisprudence in 2007 "even if the legal basis had not yet been recognized." *Ex parte Navarro*, 538 S.W.3d at 615. Consequently, Runnels's claim was subject to dismissal as having been previously available. Runnels's claim is, therefore barred by an adequate and independent state bar and certiorari review should be denied. *See Rocha*, 626 F.3d at 835–37.

Runnels argues that the CCA held in *Ex parte Chavez* that a claim alleging the prosecution's unknowing presentation of false testimony did not

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[6] Texas Code of Criminal Procedure article 11.07 § 4(a)(1) applies to noncapital cases. The "unavailability" provisions of article 11.07 § 4(a)(1) and 11.071 § 5(a)(1) are essentially identical.

[7] Notably, some circuit courts held—before Runnels filed his initial state habeas application—that a defendant may be entitled to a new trial when the prosecution unknowingly presents false testimony. *See Ortega v. Duncan*, 333 F.3d 102, 108 (2d Cir. 2003); *Killian v. Poole*, 282 F.3d 1204, 1208–10 (9th Cir. 2002); *United States v. Huddleston*, 194 F.3d 214, 221 (1st Cir. 1999); *United States v. Tierney*, 947 F.2d 854, 861 (8th Cir. 1991).

become available until the court issued *Ex parte Chabot*. Pet. Cert. at 31 (citing *Ex parte Chavez*, 371 S.W.3d 200, 204 (Tex. Crim. App. 2012)). However, it appears the applicant in *Ex parte Chavez* filed his initial application prior to the CCA's opinion in 2006 in *Ex parte Carmona*, which, as noted above, was the basis of the court's holding in *Ex parte Chabot*. *See Ex parte Chavez*, No. 62-349-01 (Tex. Crim. App. 2005). Consequently, the applicant likely could not have formulated a claim alleging the unknowing presentation of false testimony at the time he filed his initial application. Moreover, the CCA had addressed Chavez's due process claim in his initial state habeas application but did so under a materiality standard that was, after *Ex parte Chabot*, no longer appropriate. *Ex parte Chavez*, 371 S.W.3d at 206–07. Here, the facts underlying Runnels's claim—Merillat's trial testimony and TDCJ's classification procedures—were available to him when he filed his initial application in 2007 and he could have formulated a claim alleging the unknowing presentation of false testimony as the applicant in *Ex parte Chabot* did.

Runnels also claims the CCA treated his claim differently than it treated a claim based on *Ex parte Chabot* in *Ex parte Castillo*, 2017 WL 5783355, at *1 (Tex. Crim. App. Nov. 28, 2017). In that case, the CCA found that the applicant's claim in his subsequent application satisfied § 5(a)(1) because it relied on *Ex parte Chabot*, which was unavailable when he filed his first

application. *Id*. The applicant's claim was based on a recanting declaration, executed in 2013, from a witness who testified for the prosecution. *Ex parte Castillo*, 2018 WL 739254, at *2 (Tex. Crim. App. Feb. 7, 2018). Therefore, the applicant did not have the facts to support a claim under *Ex parte Chabot* until after his initial state habeas application was denied.

Similarly, the applicant in *Ex parte Murphy* raised a claim in a subsequent application based on *Ex parte Chabot* and was permitted to pursue that claim. *Ex parte Murphy*, 2016 WL 4987251, at *1 (Tex. Crim. App. June 15, 2016). Like the applicant in *Ex parte Castillo*, Murphy relied on affidavits obtained from prosecution witnesses years after *Ex parte Chabot* was issued. *See In re Murphy*, 2019 WL 5406288, at *2 (5th Cir. Oct. 22, 2019). But unlike the applicants in *Ex parte Castillo* and *Ex parte Murphy*, Runnels does not rely on a recanting witness's new affidavit. He relies on TDCJ's policies that existed at the time of his trial.

The CCA's dismissal of Runnels's petition simply represents the court's application of the abuse-of-the-writ bar to the circumstances of Runnels's case. It does not indicate that the CCA does not regularly and consistently apply the bar. *See Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (concluding that state court "faithfully applied" its procedural rule to "vast majority" of cases raising the same type of constitutional claim). The CCA's adjudication of the merits of some claims based on *Ex parte Chabot* does not serve to defeat Texas's long-

standing abuse-of-the-writ bar,[8] especially because, in most instances,[9] the CCA did so where the applicant relied on evidence obtained after *Ex parte Chabot* was issued. *See Johnson v. Lee*, 136 S. Ct. 1802, 1805–07 (2016); *Dugger*, 489 U.S. at 410 n.6 ("Moreover, the few cases that respondent and the dissent cite as ignoring procedural defaults do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently.").[10] Therefore, this Court lacks jurisdiction to consider Runnels's claim and certiorari review is foreclosed. His petition should be denied.

B. The CCA's dismissal of Runnels's subsequent state habeas application relied upon an adequate and independent state procedural bar.

While Runnels does not argue in his petition that his claim satisfied § 5(a)(3), he made such an argument to the state court. It is worth noting that Runnels's claim in his subsequent application plainly could not show that, "but for a violation of the United States Constitution no rational juror would have answered in the state's favor" either the future dangerousness or mitigation

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[8] *Kunkle v. Dretke*, 352 F.3d 980, 989 (5th Cir. 2003) ("The abuse of the writ doctrine has been consistently applied as a procedural bar since 1994, long before its codification in Tex. Code Crim. Proc. art. 11.071 § 5.")

[9] *E.g., Ex parte Castillo*, 2017 WL 5783355, at *1; *Ex parte Murphy*, 2016 WL 4987251, at *1

[10] In *Hathorn*, on which Runnels relies, this Court found the purported state procedural bar preventing the state court from considering petitions for rehearing inadequate where the state court "regularly" granted such petitions. 457 U.S. at 263.

special issue. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). This Court has never held that a defendant's right to due process may be violated where the prosecution unknowingly presents false testimony. *See Cash v. Maxwell*, 132 S. Ct. 611, 614 (2012) (Scalia, J., dissenting to refusal to grant certiorari); *Pierre v. Vannoy*, 891 F.3d 224, 228 (5th Cir. 2018). Consequently, Runnels was completely unable to demonstrate the merit of his underlying claim to the extent it asserted a federal constitutional violation. Runnels's claim also did not assert he was *ineligible* for capital punishment. *See Sawyer v. Whitley*, 505 U.S. 333, 350 (1992). Nor could Runnels avoid the default of his claim by asserting actual innocence of the crime—he pleaded guilty to murdering Mr. Wiley. *See Schlup v. Delo*, 513 U.S. 298, 329 (1995). Therefore, Runnels's claim is foreclosed by an adequate and independent state procedural bar and certiorari review should be denied.

C. There is no relevant circuit split because the CCA rejected Runnels's claim on procedural grounds.

Runnels argues that the Court should grant his petition to resolve a circuit split regarding whether a petitioner must prove the prosecution knew false evidence was presented at trial to establish a due process violation. Pet. Cert. at 4–5, 22–26. But as discussed above, the CCA dismissed Runnels's subsequent application based on a state procedural ground. The CCA did not address the merits of Runnels's due process claim. Order, *Ex parte Runnels*,

No. 46,226-03 (Tex. Crim. App. Dec. 2, 2019). Consequently, the CCA did not decide "an important federal question in a way that conflicts with the decision of . . . a United States court of appeals" or "an important question of federal law" that should be settled by this Court. Sup. Ct. R. 10(b), (c). Moreover, Texas has already adopted the rule Runnels proposes. *Ex parte Chabot*, 300 S.W.3d at 772. And as discussed below, his claim is patently meritless even under the more generous rule he asks this Court to recognize. Therefore, Runnels does not present a compelling reason justifying this Court's review, and his petition should be denied.

II. Runnels's Claim Is Barred by Principles of Non-Retroactivity.

Runnels argues that the Court should hold for the first time that the prosecution's unknowing presentation of false testimony may violate due process. Pet. Cert. at i. Runnels's petition does not present a compelling reason justifying the Court's exercise of certiorari review because, in addition to being procedurally barred, his claim is barred by principles of non-retroactivity, as *Teague* prohibits the retroactive application of such rules. 489 U.S. at 310. Therefore, the Court should decline certiorari review.

The *Teague* inquiry includes three steps. First, the date on which the petitioner's conviction became final must be determined. *O'Dell v. Netherland*, 521 U.S. 151, 156–57 (1997). Second, the court determines whether a state court addressing the petitioner's claim at the time the conviction became final

would have felt compelled to conclude the rule he sought was constitutionally required. *Id*. If not, the rule is new. *Id*. If the rule is new, the court must determine whether it falls within one of two exceptions: (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense; or (2) watershed rules of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding. *Id*.

Runnels's conviction became final in 2007 when his time for filing a petition for certiorari on direct appeal expired. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). And Runnels undoubtedly seeks a new constitutional rule. When Runnels's conviction became final, this Court had not—and still has not—held that due process prohibits the unknowing presentation of false testimony. *See Maxwell*, 132 S. Ct. at 614 (Scalia, J., dissenting to refusal to grant certiorari); *cf. Kinsel v. Cain*, 647 F.3d 265, 271–72 (5th Cir. 2011) (recognizing that no clearly established law from this Court establishes that due process prohibits the unknowing use of false testimony); *Schaff v. Snyder*, 190 F.3d 513, 530 (7th Cir. 1999) (same). Further, the new rule Runnels seeks does not prohibit the imposition of capital punishment on a class of persons.

Nor does Runnels seek the creation of a watershed rule of criminal procedure. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (to qualify as a watershed rule of criminal procedure, the rule must be necessary to prevent

an impermissibly large risk of an inaccurate conviction and "alter our understanding of the bedrock elements essential to the fairness of a proceeding"). He seeks to create a new rule that applies specifically to expert testimony regarding a defendant's future dangerousness. Pet. Cert. at 24–25. But testimony regarding prison classification like Merillat's is readily verifiable through the prison system's policies. Such testimony is also rebuttable through a defendant's own expert on prison classification. Testimony regarding prison classification is simply not so extraordinary as to warrant a new rule of constitutional law.[11] *See Graham v. Collins*, 506 U.S. 461, 478 (1993) ("We do not believe that denying Graham special jury instructions concerning his mitigating evidence of youth, family background, and positive character traits seriously diminished the likelihood of obtaining an accurate determination in the sentencing proceeding.") (cleaned up);

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[11] The Second Circuit in *Sanders v. Sullivan* held that the *Teague* bar did not apply where a petitioner raised a due process claim based on a trial witness's recantation of his or her testimony and alleging the prosecution unknowingly presented false testimony. 900 F.2d 601, 606 (2d Cir. 1990). As noted above, Runnels's case does not involve recantation of trial testimony that could not have been discovered before or at trial. For that reason, the Second Circuit's alternative holding that *Teague*'s exception for new "watershed rules of criminal procedure" permitted the retroactive application of a rule precluding the unknowing presentation of false testimony is inapplicable here.

The Ninth Circuit in *Jackson v. Brown* rejected the argument that the petitioner's due process claim was barred by *Teague*. 513 F.3d 1057, 1075 (9th Cir. 2008). It reached that conclusion because representatives of the prosecution knew trial testimony was false and the prosecutors should also have known of its falsity. *Id*.

Teague, 489 U.S. at 313 ("Because we operate from the premise that [procedures without which the likelihood of an accurate conviction is seriously diminished] would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.").

In *Sawyer v. Smith*, this Court held that the retroactive application of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was barred by *Teague*. *Sawyer v. Smith*, 497 U.S. 227, 244 (1990). "The *Caldwell* rule was designed as an enhancement of the accuracy of capital sentencing." *Id.* "But given that it was added to an existing guarantee of due process protection against fundamental unfairness," the Court could not "say this systemic rule enhancing reliability [was] an absolute prerequisite to fundamental fairness of the type that may come within *Teague*'s second exception." *Id.* (cleaned up).

Here, Runnels's new rule would be "added to" the existing due process protection prohibiting the prosecution from knowingly presenting false testimony, and the new rule is not an "absolute prerequisite to fundamental fairness." *Id.* Again, the purportedly false or misleading testimony from Merillat regarding prison classification could have been discovered at Runnels's trial. Indeed, Merillat's testimony was challenged on cross-examination and through rebuttal testimony in several cases. *See, e.g., Devoe v. Davis*, 717 F. App'x 419, 427 (5th Cir. 2018) ("[T]rial counsel hired Larry

Fitzgerald, as an expert witness, because he had significant experience testifying in direct rebuttal to Merillat's testimony, in particular."); *Sparks v. Davis*, 756 F. App'x 397, 401 (5th Cir. 2018) ("Spark's defense attorney focused on correcting Merillat's testimony during his cross examination."). Runnels simply does not present an extraordinary circumstance in which the defendant could not have, through the exercise of reasonable diligence, attempted to counter purportedly false or misleading testimony regarding future dangerousness. Consequently, a new rule of constitutional law is unwarranted, and Runnels's claim is *Teague*-barred. His petition should be denied.

III. Runnels's Claim Is Patently Meritless.

Runnels claims the prosecution unknowingly presented false testimony from Merillat regarding the Texas prison system's classification process. He alleges Merillat falsely testified an inmate convicted of capital murder would automatically be classified as "G-3," a classification that would allow the inmate to move through a prison unescorted. Pet. Cert. at 12–17, 26–28. He also alleges Merillat falsely testified that such an inmate would be eligible for housing with inmates convicted of non-violent crimes. Pet. Cert. at 26. Runnels argues that inmates are not automatically classified and that the facts of his offense (i.e., killing a prison staff member) would have led the prison to house

him only in the more strictly controlled administrative segregation. Pet. Cert. at 26. Runnels fails to show that he was harmed by Merillat's testimony.[12]

Merillat was asked by the prosecution to explain the Texas prison system's classification process. 16 RR 104. He described the different levels of classification to which inmates are assigned. 16 RR 106. Merillat testified that inmates are placed in S (State Approved Trusty) or G classifications. 16 RR 105. There are five levels (G-1 thru G-5) within the G classification. 16 RR 106. An inmate assigned to a G-1 classification "is a minimal-custody inmate." 16 RR 106. An inmate assigned to a G-2 classification is also in minimum custody but may have committed disciplinary infractions. 16 RR 106. An inmate assigned to a G-3 classification is in "minimum/medium custody" due to "certain characteristics of violence in his history or certain disciplinary problems." 16 RR 106. Inmates in a G-4, G-5, and administrative segregation classification are subject to stricter custody. 16 RR 107–110. Merillat testified that an inmate in a G-3 classification who is serving a sentence for an aggravated offense (e.g., capital murder) will be classified at least as G-3 for a minimum of ten years. 16 RR 107. Merillat testified that G-3 is an "automatic classification" for inmates serving such sentences. 16 RR 107.

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[12] Runnels disclaims an effort to show the prosecution knew Merillat's testimony was false. Pet. Cert. at 31. Consequently, under this Court's controlling precedent, Runnels's claim is necessarily meritless. *See Giglio v. United States*, 405 U.S. 150, 153 (1972).

Merillat also testified that a G-3 inmate is housed in general population with a cell mate who could potentially be in a G-1 or G-2 classification. 16 RR 108, 110. He testified that inmates with a G classification are "free to come and go from their cells" and are not handcuffed when leaving their cells. 16 RR 108. He also stated that a capital murderer classified as G-3 would not be isolated. 16 RR 109. Merillat also described the restrictions placed on inmates in administrative segregation. 16 RR 110–12. He testified that incidents of violence, including murders, have occurred even among inmates in administrative segregation and "high security." 16 RR 118, 125–26.

On cross-examination, Merillat agreed that "there are provisions" in the classification system "for people who are considered risks to be more than 3s," including a G-4 classification and administrative segregation, which also has increasing levels of custody. 16 RR 124. Merillat testified that the prison system also has units that house extremely violent inmates. 16 RR 124.

Runnels argues that Merillat's testimony that capital murderers are "automatically" classified as G-3 was false. Pet. Cert. at 28. He relies on an affidavit of Frank Aubuchon who asserts that the prison system classifies inmates based on several factors that include the inmate's offense, criminal history, and age. Pet'r's App. C at 131, 161. Aubuchon asserts that an inmate, like Runnels, who killed a prison staff employee would not even be eligible for classification in general population if he was sentenced to life. Pet'r's App. C at

161–62. However, Aubuchon acknowledges that an inmate convicted of killing a correctional officer would be assigned to administrative segregation and "remain in that status for many years."[13] Aubuchon's affidavit, then, does not show that Runnels would *never* be "eligible" for classification in general population. Pet'r's App. C at 161–62. Nonetheless, Aubuchon asserts that inmates who constitute a threat to the safety of other offenders or staff are assigned to administrative segregation. Pet'r's App. C at 162. Aubuchon asserts that, in his opinion, Runnels would have, if sentenced to life for Mr. Wiley's murder, been assigned to administrative segregation due to his killing a prison staff member. Pet'r's App. C at 162–63.

Merillat testified generally regarding the classification system. Merillat was not specifically asked whether an inmate, like Runnels, who was serving a prison sentence when he killed a prison staff employee and was placed in administrative segregation after the murder could not continue to be housed in administrative segregation after his capital murder conviction. He was

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[13] Aubuchon states that Runnels was convicted of killing a correctional officer. Pet'r's App. C at 161. Stanley Wiley was a civilian prison employee when Runnels killed him. 15 RR 87. Runnels also asserts that, if sentenced to life, he would have been given a "security precaution designator" due to "staff assault" and, as a result, "would never have been eligible for G-3 status." Pet. Cert. at 14. However, TDCJ's Classification Plan stated that a designation for staff assault "*must be removed* if the incident which caused the placement of the designator occurred more than ten (10) years ago" unless the Security Precaution Designator Review Committee approved the designation "to remain due to extraordinary circumstances." Pet'r's App. C at 137, 170 (emphasis added).

asked on cross-examination whether a capital murderer's classification as G-3 is done "without regard to any other history," to which Merillat responded "[n]o," but trial counsel interjected before Merillat completed his response. 16 RR 122. Trial counsel then asked Merillat whether an individual who has served prior sentences in prison and commits a murder in "the free world" would be classified as G-3. 16 RR 122–23. Merillat stated that such an inmate would be classified as G-3.[14] 16 RR 123.

Merillat's testimony also did not lead the jury to believe, as Aubuchon asserts, that Runnels could not be "confined to a secure environment if he was not sentenced to death." Pet'r's App. C at 161. Indeed, Merillat explained that inmates who are considered risks can be classified in a more restrictive custody such as G-4 or in administrative segregation. 16 RR 123-24.

Moreover, the Classification Plan Aubuchon relied upon shows that the classification committee was "required" to follow the computer system's

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[14] Merillat stated,

> If he had prior convictions—if I understand you correctly, say he came in for burglary, paroled, got out into the free world, got convicted for manslaughter, came back in, paroled, went back out, came back in for a capital murder, yes, he's going to come back in as a G-3.
>
> The prison is not going to look at those previous convictions. They're going to start him with his capital case as a G-3, and then his behavior will determine what happens after that situation.

16 RR 123.

"custody assignment recommendations unless it [was] determined that an override [was] necessary due to unusual or peculiar circumstances relative to individual classification considerations." Pet'r's App. C at 132, 149; *see* Pet'r's App. C at 167. And the Classification Plan provided that an inmate with a sentence of fifty years or more for, *inter alia*, capital murder, who had not yet served ten years would be classified as G-3. Pet'r's App. C at 137–38. An inmate with a "security precaution designator" would not be assigned a G-3 classification. Pet'r's App. C at 137.

However, the Classification Plan also stated that an initial classification decision was based on "factors such as prior criminal record" and "current offense of record." Pet'r's App. C at 131. The Classification Plan also stated that "[a] newly-received offender, upon transfer to his initial unit of assignment, may be assigned to [G-4] custody by the [Unit Classification Committee] if the offender's current offense of record is for a violent crime. . . or if the offender has committed an assault on staff or offenders in an adult correctional institution within the past twenty-four" months. Pet'r's App. C at 138–39. This conflicts with Merillat's testimony that the prison system would not "look at [an incoming inmate's] previous convictions." 16 RR 123. Even assuming Merillat's testimony that inmates are "automatically" classified upon their arrival was false, and even if his testimony implying that all capital murderers, including Runnels, would be initially classified as G-3 was misleading because

the prison system had discretion to initially classify Runnels in a custody stricter than G-3 (e.g., by placing a security precaution designator on him), Runnels was not harmed by it.

Again, Merillat testified that inmates considered as posing a risk could be classified in a custody stricter than G-3. 16 RR 124. Consequently, the jury knew that the prison system could place Runnels in a more restrictive classification if necessary. Indeed, several witnesses testified that Runnels was housed in administrative segregation after he murdered Mr. Wiley. 16 RR 55, 60, 86, 91. Despite the restrictions of administrative segregation, and even though he would soon stand trial for capital murder, Runnels committed several assaults against correctional officers.[15]

Tonia Brown testified that, in 2003, she worked in the administrative segregation section at the Coffield Unit where the twelve "most dangerous" inmates, including Runnels, were housed. 16 RR 54–56. That section was the "most confined" area of administrative segregation where inmates who attempted to escape or harm staff were housed. 16 RR 62. Runnels was transferred to the administrative segregation section of the Coffield Unit after

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[15] Runnels's confinement pending trial was discussed during an August 31, 2004, pre-trial hearing. *See Runnels v. Stephens*, 2016 WL 1274132, at *4. The Clements Unit did not want Runnels housed there and there was difficulty in finding a unit that could house him so that he could have access to counsel and experts. *Id*. Runnels was ultimately housed in the Potter County jail where he was considered a high-risk inmate, which required extra security precautions to be taken any time Runnels was removed from his cell. *Id*.

he killed Mr. Wiley. 16 RR 60. In November 2003, Brown went to Runnels's cell to deliver paperwork, and he threw a light bulb at her. 16 RR 56.

On cross-examination, Brown was asked to describe the restrictions on inmates in administrative segregation. She testified that the cells in administrative segregation are only fifty-four square feet. 16 RR 57. Brown testified that the inmates in the most confined section of administrative segregation are under constant observation. 16 RR 62. Brown also testified that inmates in administrative segregation, like Runnels, are allowed out of their cells for only one hour per day. 16 RR 65. Correctional officers strip search and handcuff the inmates before removing them from their cells. 16 RR 66–67. In the most confined section of administrative segregation, where Runnels was housed, a supervisor was required to be present when an inmate was removed from his cell. 16 RR 69. Brown also described the "intense training" correctional officers receive regarding defensive tactics and how to restrain inmates. 16 RR 80–81. Nonetheless, inmates in administrative segregation can inflict severe injuries. 16 RR 77–78.

Brown also explained that there are three custody levels within administrative segregation to which inmates are assigned depending on their disciplinary history. 16 RR 71. She also described the general population classification. 16 RR 75–76. She explained that a G-3 inmate is one who is serving a sentence of fifty or more years. 16 RR 76. Brown also explained that

an inmate may be given a "security precaution designator," which would place the inmate in a more restrictive custody such as G-4. 16 RR 76. The classification process is performed "immediately" upon an inmate's arrival and, then, yearly. 16 RR 76–77.

Catherine McKinney was also a correctional officer at the Coffield Unit in May 2003 where Runnels was housed in administrative segregation. 16 RR 84, 86. She escorted inmates in administrative segregation to and from recreation and the shower. 16 RR 85. On May 3, 2003, McKinney wrote a disciplinary report against Runnels for masturbating. 16 RR 85. Later that day, she escorted another inmate to his cell. 16 RR 85. As McKinney was closing the inmate's cell door, Runnels threw urine in her face. 16 RR 85. McKinney testified that Runnels arrived at the Coffield Unit in February 2003 and, to her knowledge, had been housed in administrative segregation until May 2003. 16 RR 88.

Robert Threadgill was a correctional officer at the Coffield Unit in June 2004. 16 RR 91. He was assigned to the "Super Seg" section of the unit where Runnels was housed. 16 RR 91. While Threadgill was escorting inmates to shower, Runnels threw a "foot tub full of human feces" at him, which splashed under Threadgill's shield and onto his boot. 16 RR 92.

In 1999, before Mr. Wiley's murder, Runnels was serving a seventy-year prison sentence in the Robertson Unit where Frances Madigan was a

correctional officer. 16 RR 44–46. Runnels was classified in "closed custody" at that time.[16] 16 RR 46. On January 19, 1999, Madigan saw Runnels outside of his assigned area. 16 RR 45. Madigan ordered Runnels to return to his cell. 16 RR 45. Runnels punched Madigan in the jaw and ran back to his cell. 16 RR 45.

The testimony of Merillat and the correctional officers whom Runnels assaulted established that (1) the prison system had measures available to strictly confine inmates like Runnels who posed a threat to prison staff, (2) the prison system had the option to place a security precaution designator on an inmate, which would classify him in a strict custody, (3) Runnels was housed in the "most confined" area within administrative segregation after he murdered Mr. Wiley, and (4) Runnels assaulted correctional officers despite being housed in such restrictive conditions. 16 RR 62, 76, 91. Runnels's pattern of violence—even in restrictive custody—proved his future dangerousness irrespective of any testimony from Merillat. *See Devoe*, 717 F. App'x at 427 (denying a COA as to claim that Merillat testified falsely where "there was significant evidence supporting a conclusion of potential dangerousness apart from *any* of Merillat's testimony") (emphasis in original); *Velez v. State*, 2012 WL 2130890, at *33 (Tex. Crim. App. 2012) (holding that appellant was

[16] Merillat testified that an inmate classified as G-4 is in "closed custody." 16 RR 107.

harmed by Merillat's false testimony regarding prison classification because evidence of appellant's guilt was circumstantial, almost all his prior criminal offenses were non-violent, and he had a "clean" disciplinary record in jail). Moreover, it is likely the jury would have deduced from the witnesses' testimony that Runnels would remain in administrative segregation after his capital murder conviction and would not be automatically re-classified as G-3. The jury would *undoubtedly* have found Runnels to be a future danger no matter how strict his classification.

Runnels argues that the purportedly false or misleading testimony from Merillat was exacerbated by the prosecutor's closing argument. Pet. Cert. at 28–29. The prosecutor argued in closing that Merillat's testimony showed "[t]here are no safe places in prison, nowhere" because violence occurs even on death row in the "highest level security" in the prison system. 17 RR 35. Runnels asserts that this argument was based on Merillat's misleading testimony that Runnels "would be placed in an unsecure environment." Pet. Cert. at 28–29. Not so. The prosecutor's argument related to Merillat's testimony regarding the violence that occurs even among inmates housed in strict confinement, which Runnels's own actions confirmed. 16 RR 118; 17 RR 35 (the prosecutor's statement that Runnels's actions since the capital murder "show his unwillingness to conform").

Runnels's claim essentially asserts that he would have been sentenced to life if the jury knew that the prison system had the discretion to continue housing him in administrative segregation after his capital murder conviction as opposed to initially re-classifying him as G-3 with the ability to later place him in stricter custody if necessary. But the jury heard similar testimony from Brown. 16 RR 76–77. And there is simply no likelihood that the jury would have found Runnels not to be a future danger but for Merillat's testimony. Runnels's assaults of correctional officers while in administrative segregation belie his contention.

Lastly, Runnels complains that trial counsel did not present any witnesses in mitigation, although he does not raise a claim related to this complaint. Pet. Cert. at 2. It is worth noting, however, that Runnels's claim during his federal habeas corpus proceedings alleging that trial counsel was ineffective for failing to present mitigating evidence was denied because trial counsel obtained the assistance of two mental-health experts. One of the experts, a psychiatrist, could not help the defense "because of her findings." *Runnels v. Stephens*, 2016 WL 1274132, at *18. The other expert, a neuropsychologist, conducted a psychological evaluation of Runnels that revealed damaging evidence regarding Runnels's "planning of the murder, his lack of remorse and belief that the murder was justified, his dislike of correctional officers, and his assertion that he was not going back to jail alive."

See Runnels v. Davis, 2017 WL 5028243, at *4; *Runnels v. Davis*, 2017 WL 5004843, at *6. The psychological evaluation showed that Runnels was "not a good candidate for a sentence of life imprisonment," was "resistan[t] to institutionalization," and became frustrated when housed in administrative segregation and entertained himself with negative behaviors. *Runnels v. Davis*, 2017 WL 5028243, at *4. This was consistent with an earlier evaluation of Runnels showing his "'cold resistant attitude,' his difficulty dealing with stress that may lead to aggression, and his inflexible thinking and values that [made] him a challenging candidate for therapeutic change." *Runnels v. Davis*, 2017 WL 5004843, at *6.

Trial counsel also had the assistance of an investigator who conducted an extensive mitigation investigation. *See Runnels v. Davis*, 2017 WL 5004843, at *1. The defense team arranged for several of Runnels's family members to testify in mitigation, but the witnesses rendered themselves unavailable to testify by violating the Rule or by leaving the courthouse and refusing to return. *Id.* As the magistrate judge explained, "[a]ny present contention that the family members could have contributed to a significant mitigation defense is in direct conflict with the fact that the family was unwilling to do so at the time of trial." *Id.* at *6; *see Runnels v. Davis*, 664 F. App'x at 373, 376–77.

Moreover, as the magistrate judge stated, trial counsel was successful in excluding from evidence over twenty of Runnels's disciplinary infractions,

which included refusing to submit to hand restraints, setting fire to his mattress, and kicking shut his cell door during a cell search. *Runnels v. Stephens*, 2016 WL 1274132, at *10 n.9. Runnels's attempt to bolster his current claim by reference to the lack of mitigating evidence at trial is baseless.

The evidence of Runnels's future dangerousness was overwhelming. His unprovoked murder of Mr. Wiley and his continued recalcitrance while housed in the most confined section of administrative segregation after the murder thoroughly proved his future dangerousness. Consequently, his claim is patently meritless and does not warrant this Court's attention. His petition should be denied.

IV. Runnels Is Not Entitled to a Stay of Execution.

Runnels is not entitled to a stay of execution because he cannot demonstrate that a substantial denial of a constitutional right would become moot if he were executed. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994). Further, a stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It 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." *Id.*

As demonstrated above, Runnels's claim is procedurally barred, barred by principles of non-retroactivity, and entirely without merit. Even if Runnels were to obtain merits review of his claim under the new rule he seeks, he would

be absolutely disentitled to relief. The evidence of Runnels's future dangerousness was plainly overwhelming, irrespective of any testimony from Merillat. Thus, Runnels cannot demonstrate the likelihood of success on the merits of his claim; nor can he demonstrate that his claim amounts to a substantial case on the merits that would justify the granting of relief.

Further, this Court applies "a strong equitable presumption against the granting of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Runnels cannot rebut that strong presumption where his claim is plainly dilatory. *See id*. Even accepting Runnels's argument that his claim could not have been raised until the CCA issued its opinion in *Ex parte Chabot*, his claim is dilatory because the CCA did so ten years ago. Runnels's initial state habeas application was denied in 2012, more than two years after *Ex parte Chabot* was issued. Order, *Ex parte Runnels*, No. 46,226-02 (Tex. Crim. App. March 7, 2012). Runnels's initial federal habeas proceedings were pending from 2012 to 2018, and the proceedings on his motion for relief from judgment were pending from 2017 to this year. At no time during those proceedings did Runnels request a stay to return to state court to raise this due process claim. *See Ex parte Soffar*, 143 S.W.3d 804, 807 (Tex. Crim. App. 2004) (modifying state court's abstention doctrine to allow "consideration of the merits of a subsequent writ, not

otherwise barred by article 11.071, § 5 if the federal court having jurisdiction over a parallel writ enters an order staying all of its proceedings"). A stay of execution would be inappropriate in light of Runnels's delay.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

MARK PENLEY
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: jay.clendenin@oag.texas.gov

Counsel for Respondent