No. _____
(Capital Case)

In the
Supreme Court of the United States

QUINTIN PHILLIPPE JONES, Petitioner,

v.

BOBBY LUMPKIN, Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

QUINTIN PHILLIPPE JONES IS SCHEDULED TO BE EXECUTED ON MAY 19, 2021

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Date: May 17, 2021

QUESTIONS PRESENTED

1. Does *Moore v. Texas*, 137 S.Ct. 1039 (2017) establish a new retroactive rule of constitutional law that Petitioner is eligible for but could not present in prior habeas proceedings?

2. Are a defendant's due process rights under the Fourteenth Amendment violated when a jury's decision to impose the death penalty was based on expert testimony that has since been discredited?

PARTIES TO THE PROCEEDING

Quintin Phillipe Jones, Petitioner

Bobby Lumpkin, Director, TDCJ-ID, Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

RELATED CASES

- *Jones v. State*, 119 S.W.3d 766 (Tex.Crim.App. 2003) (Texas Court of Criminal Appeals ("TCCA") affirmed Jones's conviction and death sentence)

- *Ex parte Jones*, WR-57,299-01, 2005 Tex.Crim.App.Unpub.LEXIS 254 (Tex.Crim.App. Sept. 14, 2005) (TCCA denied the initial state habeas application)

- *Jones v. Stephens*, 2013 U.S.Dist.LEXIS 115325 (N.D.Tex., Aug. 15, 2013) (District court granted the government's motion to dismiss the petition as time-barred)

- *Jones v. Stephens*, 998 F.Supp.2d 529, 532 (N.D.Tex. Feb. 6, 2014) (District court vacated the order dismissing the case and reopened it)

- *Jones v. Stephens*, 2014 U.S.Dist.LEXIS 84098 (N.D.Tex., June 20, 2014) (District court denied the motion for funds for investigative services)

- *Jones v. Stephens*, 157 F.Supp.3d 623 (N.D.Tex. Jan. 13, 2016) (District court denied the second § 2254 petition)

- *Jones v. Davis*, 922 F.3d 271 (5th Cir. 2019) (Denial of § 2254 petition affirmed)

- *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019) (motion for rehearing denied)

- *Jones v. Davis*, 140 S.Ct. 2519 (2020) (petition for writ of certiorari denied)

- *Ex parte Quintin Phillipe Jones*, No. WR-57,299-02 (Tex.Crim.App. May 12, 2021) (Order dismissing second state habeas application under Tex. Code Crim. Proc. Art. 11.071 § 5, see App.001-002)

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Quintin Jones respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the Texas Court of Criminal Appeals:

OPINIONS BELOW

The order of the TCCA is *Ex parte Quintin Phillipe Jones*, No. WR-57,299-02 (Tex.Crim.App. May 12, 2021), Order dismissing second state habeas application under Tex. Code Crim. Proc. Art. 11.071 § 5, *see* App.001-002.

STATEMENT OF JURISDICTION

On May 6, 2021, Jones filed an Application for Writ of Habeas Corpus under Tex. Code Crim. Proc. Art. 11.071 § 5 and moved to withdraw his death warrant in the convicting court. On May 11, 2021, Jones moved for a stay in the TCCA. On May 12, 2021, the TCCA dismissed Jones's application without ruling on its merits and denied the motion to stay the execution. (App.001-002). Thus, the TCCA could not have resolved either Question Presented on independent state grounds. This Court has jurisdiction under 28 U.S.C. § 1254 and 28 U.S.C. § 1331.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eight Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. XIII.

The Fourteenth Amendment provides in relevant part: "…No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

FEDERAL STATUTES AFFECTED

28 U.S.C. § 2244(b) provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless:
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e) provides:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination

of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

Introduction

Jones is set to be executed on May 19, 2021. Jones is restrained of his liberty by Bobby Lumpkin—acting in his capacity as the director of the Texas Department of Criminal Justice Correctional Institutions Division—under a Judgment of Conviction by Jury ("Judgment") and sentence of death entered on February 21, 2001. Jones was convicted of Capital Murder during a robbery under Tex. Penal Code § 19.03(a). (App.005); (CR.408-410; App.005-007).[1] As set forth below, Jones requests

[1] Jones cites from the previous record on appeal in the Fifth Circuit and this Court in Cause No. 16-70003 as "ROA." followed by the page number. Because the trial record was not included in that record on appeal, the reporter's record from the jury trial is cited as "RR" followed by the volume and page or exhibit number. The clerk's record is cited as "CR" followed by the volume and page number. The Appendix to this motion is cited as "App." followed by the page number.

that this Court stay his execution and grant certiorari to prevent an execution in violation of the Eighth and Fourteenth Amendments.

Procedural History

Indictment, trial, and sentencing: Jones was indicted on December 1, 1999 for Capital Murder during a robbery that occurred on or about September 11, 1999 of Berthena Bryant, his great-aunt. (App.003-004). The trial on guilt-innocence began on February 15, 2001. (RR29). On February 21, 2001, Jones was convicted as charged in the Indictment of Capital Murder under Tex. Penal Code § 19.03(a). (CR.408-410; App.005-014). On March 5, 2001, the jury answered the special issues under Tex. Code Crim. Proc. Art. 37.071 and found both that Jones was likely to commit future acts of violence and that there were insufficient mitigating circumstances to warrant a life sentence, and sentenced Jones to death. (App.015-019).

Jones's conviction and death sentence are affirmed on direct appeal: On November 5, 2003, the Texas Court of Criminal Appeals ("TCCA") affirmed Jones's conviction and death sentence.[2] The appeal raised 16 points of error, all of which were overruled by the TCCA.

The state-habeas proceedings: State habeas counsel Strickland failed to file a timely state habeas petition. On September 27, 2004, almost a month after the deadline, Strickland filed the application ("First Application"), raising eight claims for relief, two addressing the admission of evidence, four addressing the timeliness of the appointment of counsel, one addressing newly discovered impeachment evidence,

[2] *Jones* v. *State*, 119 S.W.3d 766 (Tex.Crim.App. 2003).

and one addressing the effects of serotonin levels on behavior.[3] Six of these claims were found to be not cognizable or procedurally defaulted because they should have been—but were not—raised on direct appeal.[4] The remaining two claims were found by the TCCA to lack evidentiary support.[5]

Federal habeas proceedings. After the TCCA rejected the First Application, Jones asked to have substitute or additional counsel appointed. However, the district court appointed Strickland, directing him to timely file the petition. Yet, Strickland filed the federal petition 149 days–almost five months–late. In the petition filed on September 14, 2006 ("First Petition"), Strickland asserted two claims: (1) that the death sentence should be vacated based on punishment evidence obtained in violation of the Fifth Amendment (*Miranda* issue); and (2) ineffective assistance of counsel.[6] Jones repeatedly wrote to Strickland asking for updates on his case, but Strickland failed to respond. On June 4, 2006, Jones wrote a letter to the federal district court asking for help. *Jones*, No. 4:05-CV-0638-Y (N.D.Tex.) (ROA.838); (DKT. 35-15). The district court forwarded the letter to Strickland with an *ex parte* letter, stating that it was "fair for Jones to ask...questions [about the appeal and what to expect]... [and it] believe[d] that an update to Jones is in order." *Jones*, No. 4:05-CV-0638-Y (N.D.Tex.) (ROA.839); (DKT. 35-16).

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[3] *Ex parte Jones*, WR-57,299-01, 2005 Tex.Crim.App.Unpub.LEXIS 254 (Tex.Crim.App. Sept. 14, 2005)
[4] *Id.*; *See Jones* v. *Stephens*, No. 4:05-CV-0638-Y (N.D.Tex.) (DKTS. 19-18; 122-3-4).
[5] *Jones*, 2005 Tex.Crim.App.Unpub.LEXIS 254. On September 14, 2005, the TCCA denied the state habeas application. *Jones*, 2005 Tex.Crim.App.Unpub.LEXIS 254.
[6] *Jones*, No. 4:05-CV-0638-Y (N.D.Tex.) (DKT. 19) (ROA.84-119).

On November 17, 2006, the government filed a motion to dismiss the federal habeas petition. *Jones*, No. 4:05-CV-0638-Y (N.D.Tex.) (ROA.751-762) (DKT. 27). Strickland did not file a response, and on September 21, 2007, the federal district court dismissed Jones's habeas application as untimely. (ROA.763-769); (DKT. 28). Strickland did not file a notice of appeal or inform Jones that he was not filing the notice. The federal district court held that equitable tolling, which allows a late filing in certain circumstances, was not available because Strickland failed to explain the delay in filing the First Petition. *Jones*, No. 4:05-CV-0638-Y (N.D.Tex.) (ROA.768); (DKT. 28, p. 6).

On March 21, 2008, the federal district court removed Strickland as counsel and appointed Lydia Brandt. *Jones*, No. 4:05-CV-0638-Y. (ROA.772-773); (DKT. 31). On May 29, 2008, Ms. Brandt filed a motion for relief from judgment under Fed. Rule Civ. Proc. 60(b), *Jones*, No. 4:05-CV-0638-Y (ROA.780-844); (DKT. 35), which the district court granted, permitting Jones to respond to the government's motion to dismiss the petition as time barred. *Jones*, No. 4:05-CV-0638-Y; (ROA.891-900); (DKT. 43). On February 5, 2009, Jones responded and argued that equitable tolling was warranted because Strickland deprived Jones of his statutory right to representation. *Jones*, No. 4:05-CV-0638-Y (ROA.988-1102); (DKT. 55). On February 12, 2009, Jones filed a motion for leave to file an amended petition, asking to include allegations of ineffective assistance of trial counsel. *Jones*, No. 4:05-CV-0638-Y (ROA.1105-1209); (DKT. 57). In March 2009, the district court denied leave to amend and dismissed Jones's petition, concluding that equitable tolling was not warranted.

Jones, No. 4:05-CV-0638-Y (ROA.1223-1234); (DKT. 59). After the Fifth Circuit reversed and remanded, on August 15, 2013, the district court granted the government's motion to dismiss the petition as time-barred under 28 U.S.C. § 2244(d).[7]

The district court ultimately vacated the order dismissing the case and reopened it, finding that "it is difficult to overlook the fact that Jones's concerns about Strickland's ability to provide 'competent' and 'professional' representation proved in retrospect to be justified."[8] Further, the district court found Jones to be entitled to equitable tolling. *Id*.; *Jones*, No. 4:05-CV-0638-Y (DKT. 113, p. 9) (ROA.1679).

On June 3, 2014, Jones asked the district court to authorize mitigation investigative services to assist counsel under 18 U.S.C. § 3599(f) because Ms. Brandt discovered that trial counsel had failed to conduct a thorough background investigation as required by the Sixth Amendment. There was no social history, no history about family lineage to aid in identifying grounds for mitigation at the sentencing phase, nor was there a timeline to show correlations between significant events in Jones's life and behaviors. On June 20, 2014, the federal district court denied the motion for funds for investigative services.[9]

On June 22, 2014, Jones filed the amended federal habeas petition ("Second Petition"), asserting: (1) ineffective assistance of counsel and failure to appoint

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[7] *Jones* v. *Stephens*, 2013 U.S.Dist.LEXIS 115325 (N.D.Tex., Aug. 15, 2013) (ROA.1574-1601).
[8] *Jones*, No. 4:05-CV-0638-Y (DKT. 113, p. 4) (ROA.1671-1674); *Jones* v. *Stephens*, 998 F.Supp.2d 529, 532 (N.D.Tex. Feb. 6, 2014).
[9] *Jones*, No. 4:05-CV-0638-Y (DKT. 127) (ROA.1932-1947); *Jones* v. *Stephens*, 2014 U.S.Dist.LEXIS 84098 (N.D.Tex., June 20, 2014)

counsel at a critical stage; (2) ineffective assistance of counsel based on *Wiggins* (failure to investigate and develop mitigating evidence); (3) ineffective assistance of counsel based on the failure to investigate and develop condition-of-mind evidence; (4) ineffective assistance of counsel based on failure to seek timely evaluations of his mental condition regarding the reliability or voluntariness of his confession and competency to stand trial; and (5) that the Court should vacate Jones's death sentence based on punishment evidence obtained in violation of the Fifth Amendment (*Miranda* issue). *Jones*, No. 4:05-CV-0638-Y (DKT. 129); (ROA.1951-2196).

On January 13, 2016, the district court denied the Second Petition.[10] On February 8, 2016, Jones filed a motion under Fed. Rule Civ. Proc. 59(e). (DKT. 154) (ROA.2523-2533). This motion was denied on March 16, 2016. [11]

Proceedings before the Fifth Circuit and the Supreme Court. Jones appealed the denial of the Second Petition and the Rule 59(e) motion, raising two issues for which a certificate of appealability was granted by the Fifth Circuit: (1) deprivation of his right under 18 U.S.C. § 3599 to quality representation before the federal district court; and (2) during the sentencing phase, the admission of a confession to serious crimes obtained in violation of *Miranda* can never be harmless unless the defendant made the same confession to a nonstate actor that was admitted.[12] On April 15, 2019, the Fifth Circuit affirmed the denials of the petition

[10] *Jones*, No. 4:05-CV-0638-Y (DKT. 152) (ROA.2424-2522); *Jones* v. *Stephens*, 157 F.Supp.3d 623 (N.D.Tex. Jan. 13, 2016)
[11] *Jones*, No. 4:05-CV-0638-Y (DKT. 156).
[12] *Jones* v. *Davis*, 673 Fed.Appx. 369 (5th Cir. 2016)

and Rule 59(e) motion.[13] On April 22, 2019, Jones petitioned for rehearing, which was denied on June 18, 2019.[14]

Jones sought certiorari in this Court on the issue of the deprivation of his rights under 18 U.S.C. § 3599 to quality representation before the district court. The petition was denied on March 23, 2020. [15]

Jones's execution is set for May 19, 2021. On November 18, 2020, the convicting court granted the State's motion to set Jones's execution date and set it for May 19, 2021. (App.028-033).

Jones files the second state habeas application. On May 6, 2021, Jones filed an Application for Writ of Habeas Corpus under Tex. Code Crim. Proc. Art. 11.071 § 5 ("Second Application), raising three grounds: In Ground 1, Jones argued that his death sentence is based on based on false and misleading testimony in violation of the due process clause of the Fourteenth Amendment because a substantial part of the State's case during the punishment phase was the testimony of Dr. Price, who using the Hare Psychopathy Checklist (PCL-R), told the jury that he had "diagnosed" Jones as a "psychopath." Price's testimony has since been discredited, undermining the foundation upon which the State sought imposition of the death penalty.

In Ground 2, Jones argued that the judgment and death sentence were obtained in violation of due process under the Fourteenth Amendment because it was

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[13] *Jones* v. *Davis*, 922 F.3d 271 (5th Cir. 2019).
[14] *Jones* v. *Davis*, 927 F.3d 365 (5th Cir. 2019).
[15] *Jones* v. *Davis*, 140 S.Ct. 2519 (2020).

based on the false scientific evidence and testimony of Dr. Price concerning his purported future dangerousness.

In Ground 3, Jones argued that based on the Supreme Court's 2017 holding in *Moore* v. *Texas*, he may be intellectually disabled, so the imposition of the death penalty violates his Eighth and Fourteenth Amendment rights under *Atkins*. Further, additional investigation should be allowed to explore this claim because the first state habeas attorney did not address or pursue this claim (and did not even file the application on time), and Jones was not allowed investigative services by the district court. Jones also filed in the trial court a motion to withdraw the execution date and a motion for a stay of execution in the TCCA.

On May 12, 2021, the TCCA dismissed the Second Application, finding that Jones failed to make a prima facie showing on any of his Grounds, and that the Grounds asserted therefore failed to satisfy the requirements of Article 11.071 § 5. (App.001-002). The TCCA dismissed the Second Application as an abuse of the writ without reviewing the merits of the claim raised per Article 11.071 § 5(c). (App.002). The TCCA also denied Jones's motion to stay the execution. (App.002).

Facts

1. Facts regarding the First Question presented

During trial, Dr. Finn testified that in October 2000, he administered the Weschler Adult Intelligent Scale, Third Addition ("WAIS-III") and the Georgia Court Competency Test ("GCCT"), which is an instrument "specifically designed to test competency for legal proceedings," with 70 and above being a "passing score."

(RR35.142-144); *see, e.g., United States* v. *deBerardinis*, No. 18-cr-030-01-01, 2021 U.S.Dist.LEXIS 40209, *15-16 (W.D.La. Jan. 22, 2021) (description of the GCCT). Dr. Finn assessed Jones's "overall IQ score" at 79. (RR35.144, 168).

Dr. Finn explained that Jones also scored "80" in 1983 when he was four years old, and "100" sometime later. (RR35.170-171). This score of "100" was obtained when Jones was seven years old, when he was administered the WISC-R. (App.084). Thus, Jones's known IQ scores were: 80 (age four); 100 (age seven); and 79 (age 21). The 79 was scored through the WAIS-III. Jones's IQ of 79 was measured when he was 21, using the WAIS-IIII. The WAIS (III or IV depending on when the test was normed) is the "gold standard" for assessing intellectual abilities. As set forth below, see *infra* at section I(D)(1), considering the Flynn Effect, Jones's IQ score under the "gold standard" WAIS-III is 77-78. As explained further below, see *infra* at section I(D)(1) when accounting for the standard error of measurement ("SEM"), Jones's IQ is as low as 72 and as high as 82-83. Using the nonrigid cutoff score of 70, Jones is barely above the threshold.

Further, undersigned counsel discovered evidence that Jones suffered from severe, long-standing, and involuntary alcohol addiction, traumatic, physical, and sexual childhood abuse, severe, long-standing, and involuntary addiction to polysubstances beginning at age 12, and dissociative disorder as a result of traumatic, physical, and sexual childhood abuse. Until he was arrested, Jones engaged in at least eight years of heavy, constant drug and alcohol abuse, including snorting cocaine, snorting heroin, using cocaine, crank, and heroin intravenously, and began

also to smoke crack cocaine. This likely gave rise to subaverage intellectual functioning and deficits in adaptive functioning. Counsel also learned that at no time did prior habeas counsel ask Jones about his drug and alcohol abuse. *Id.*

2. Facts regarding the Second Question presented

The Hare Psychopathy Checklist (PCL-R) is a 20-item checklist and rating scale that is intended to be used by trained professionals to measure the personality disorder of psychopathy. (App.038). The 20 items consist of prototypically psychopathic traits (e.g., remorselessness, grandiosity, superficial charm), and also include items that focus on a history of antisocial and criminal acts (e.g., juvenile delinquency, past revocation of conditional release). The PCL-R is scored based on a semi-structured interview and review of available collateral information (e.g., institutional files, past mental health evaluations). Examinees can be given a score ranging from 0 (zero) to 40, with higher scores indicating that they are being rated by an examiner as more psychopathic. (App.038-039).

During the punishment phase, State expert Dr. Price administered the PCL-R and diagnosed Jones as a "psychopath," telling the jury, "[a] psychopath is a personality disorder that is characterized by a set of traits and behaviors that are, in a nutshell, the person doesn't have a conscious or has little conscience." (RR36.58). Dr. Price related psychopathy to a propensity for future dangerousness within the context of the first special issue. (RR36.74). Dr. Price provided a PCL-R total score of 31, which would place Jones at approximately the 88th percentile compared to the PCL-R's male prisoner normative sample.

Dr. Price's PCL-R score was starkly divergent from the PCL-R score determined by another forensic mental health expert, Dr. Finn, who testified for the defense during the sentencing hearing that his scoring of Jones on the PCL-R was only 9.5. Dr. Finn's score placed Jones between the 8th and 9th percentile when compared to the PCL-R's normative sample, essentially concluding that Jones would be one of the least psychopathic individuals housed in a prison environment. (RR35.164). As Dr. John Edens explains, it is self-evident that two scores ranging from the 8th or 9th to the 88th percentile in a given case reflect extreme disagreement on exactly how "psychopathic" Jones actually was at that time. (App.040).

The inherent unreliability of the PCL-R is summarized in a recent paper published in the Psychology, Public Policy, and Law journal of the American Psychological Association.[16] One of the authors of this study is Dr. John Edens, PhD., Professor of Psychology in the Department of Psychology at Texas A&M University. (App.034-036).[17] As Dr. Edens explains in his affidavit—and as the published paper describes—testimony relying upon the PCL-R is unreliable, unscientific, and misleading in capital cases because the PCL-R/Hare Checklist cannot reliably predict behavior in prison. Because Dr. Price's testimony rested primarily on the PCL-R and Dr. Price testified on the issue of future dangerousness, his testimony was critical.

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[16] DeMatteo, D., *et al,* (2020), *Statement of Concerned Experts On the Use of the Hare Psychopathy Checklist-Revised in Capital Sentencing to Assess Risk for Institutional Violence*. Psychology, Public Policy, and Law, 26, 133-144 (App.060-072).

[17] Since the 1990s, Dr. Edens has conducted research on psychological assessment and the prediction of human behavior and has published over 150 related peer-reviewed journal articles, book chapters, and professional manuals. (App.035). Most of his work is focused on forensic and correctional mental health assessment issues, including the potential for engaging in future violence and other forms of socially deviant behavior.

One of the two questions asked of a capital death penalty jury is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society * * * *" Tex. Code Crim. Proc. Art. 37.071 § 2(b)(1). And in determining whether a defendant poses a continuing threat to society, the jury considers both free society and prison society.[18]

PCL-R evidence provided by examiners in adversarial legal settings is considered highly unreliable and of no probative value concerning prison violence risk. (App.041, 050).[19] "It is very difficult *if not impossible* to argue that labeling a defendant as psychopathic has any demonstrated probative value in capital cases." (App.050) (emphasis added). One of the primary criticisms of the PCL-R is that the scores in adversarial legal cases are so unreliable across different examiners that they lack any substantive probative value. (App.039). This is precisely what happened here during the punishment phase. The unreliability of PCL-R scores is evidenced by the extreme scoring discrepancies on the PCL-R in the competing evaluations of Jones, with Dr. Price's score placing him in the 88th percentile, while Dr. Finn's score placed him in the 8th or 9th percentile, indicating that Jones "would

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[18] *See Morris* v. *State*, 940 S.W.2d 610, 613 (Tex.Crim.App. 1996).

[19] Dr. Edens is not alone in his criticism of the use of the PCL-R. As the attached *Statement of Concerned Experts On the Use of the Hare Psychopathy Checklist-Revised in Capital Sentencing to Assess Risk for Institutional Violence* shows, in addition to Dr. Edens—who is also a signatory to this Statement—eleven other experts have also stated concerns about its use, explaining that (1) the reliability of PCL-R scores in field settings, and in particular in adversarial contexts, is "problematically low; and (2) the overall association between PCL-R scores and violence at the group level is only moderate in terms of effect size, both in absolute terms and relative to the effect size of other established risk factors for violence; the association between PCL-R scores and violence in institutional settings is small in terms of effect size; and the association between PCL-R scores and serious institutional violence is negligible. (App.064-066).

be one of the *least* psychopathic individuals housed in a prison environment." (App.040, 050) (emphasis added).[20]

Moreover, PCL-R evidence has the strong potential to stigmatize capital defendants with an irrelevant and pejorative label and associated set of personality traits (e.g., remorselessness, conning/manipulative). (App.041, 050). Thus, the jury's decision to impose the death penalty was based on testimony that was unreliable, unscientific, and misleading in relation to the likelihood that Jones would be a future danger to society if serving a life sentence in prison. (App.050).

Dr. Edens's opinion about the PCL-R has been accepted in federal court: In a federal death penalty case, the District Court of Massachusetts found the PCL-R checklist to be unreliable and excluded its use from trial based, in part, on testimony from Dr. Edens.[21] The district court barred PCL-R testimony because of concern that jurors would consider such testimony as evidence of future dangerousness, which the district court ruled would be "misleading" given that, as Dr. Edens testified, "a high PCL-R score does not meaningfully predict aggressive behavior in prison." (App.077-078). Rather, as Dr. Edens testified, the PCL-R is widely used as "a risk assessment tool" in contexts requiring decisions about whether to *release* certain offenders from prison. Thus, the district court found that PCL-R testimony was highly prejudicial

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[20] Such discrepancies are not unique to Jones's case. Dr. Edens was an expert witness in a recent Texas capital murder trial in which Dr. Price administered the PCL-R to the defendant. As in Jones's case, Dr. Price's score was vastly higher—placing the defendant in the 91st percentile—than the score (in the 18th percentile) that a TDCJ-employed mental health professional assigned for the same defendant. (App.040).

[21] *See United States* v. *Sampson*, No. 01-10384-LTS (D.Mass., DKT. 2459, Sealed Memorandum and Order on Rule 12.2 Motions, Sep. 2, 2016) (Order unsealed by DKT. 2979, May 24, 2017) (Excerpts attached as App.073-085).

and precluded its admission because "its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." (App.077-078).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

Under 28 U.S.C. § 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court; **or** (2) resulted in a decision that was based on an unreasonable determination of the facts in light of (i.e., considering) the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d) (2021); *Salazar* v. *Dretke*, 419 F.3d 384, 395 (5th Cir. 2005) (describing standards under 2254(d)).

To determine whether the decision of the state habeas court resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court, a court must consider whether the "state-court decision * * * correctly identifie[d] the governing legal rule * * * [and] applie[d] it reasonably to the facts of a particular prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 405-408 (2000); *see also Harrington* v. *Richter*, 131 S.Ct. 770, 784–786 (2011) ("[u]nder § 2254(d), a (federal) habeas court must determine what arguments

or theories supported or could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). "[A] legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of this Court," which means *the holdings*, as opposed to the *dicta*, of this Court's decisions as of the time of the relevant state-court decision. *Carey* v. *Musladin*, 549 U.S. 70, 74, 77 (2006); *see also Pippin* v. *Dretke*, 434 F.3d 782, 792 (5th Cir. 2005) ("A trial court's credibility determinations made on the basis of conflicting evidence are entitled to a strong presumption of correctness and are 'virtually unreviewable' by the federal courts.").

Further, in a court's assessment of whether the decision was "contrary to, or involved an unreasonable application of, clearly established federal law" under § 2254(d)(1), "the record under review" is "limited to the record that was before the state court that adjudicated the claim on the merits"; "[i]f a claim has been adjudicated on the merits by a state court," "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Cullen* v. *Pinholster*, 131 S.Ct. 1388, 1398, 1401 (2011). [22]

A court may grant relief if the state court's decision resulted in a decision that was based on an unreasonable determination of the facts considering the evidence

[22] Cf. *Martinez* v. *Ryan*, 132 S.Ct. 1309, 1318 (2012) (a federal habeas petitioner may establish cause to excuse a procedural default as to an Ineffective Assistance of Counsel claim by showing: (1) state habeas counsel was constitutionally deficient in failing to include the claim in his first state habeas application, and (2) the underlying IAC claim is "substantial," meaning that it has "some merit."); *Trevino* v. *Thaler*, 133 S.Ct. 1911, 1921 (2013) (applying *Martinez* to *Trevino*, a Texas death-penalty case).

presented in the state court proceeding. A determination of a factual issue made by the state habeas court shall be presumed to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (2021); *Miller-El* v. *Dretke*, 545 U.S. 231, 240 (2005) (In explaining § 2254(e)(1), the Supreme Court held that "the standard is demanding but not insatiable," and "[d]eference does not by definition preclude relief."); *Bell* v. *Cone*, 535 U.S. 685, 693 (2002) (explaining that the provisions of the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law.").

REASONS FOR GRANTING THE WRIT

1. This Court should grant certiorari to determine whether *Moore v. Texas* presents a new rule of constitutional law that Jones is eligible for yet could not present in prior habeas proceedings.

Moore v. *Texas* set forth a new rule of constitutional law that applies retroactively. But Jones did not have the chance to raise a *Moore* claim on habeas review, as he filed his habeas challenges before this Court ruled in *Moore*. Accordingly, this Court should grant certiorari and allow Jones to assert a *Moore* claim in a successive habeas petition. *See* 28 U.S.C. §§ 2244(b), 2254(d)–(e).

i. *Moore* presents a new rule of constitutional law.

"[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (plurality opinion) (internal citations and quotations omitted).

Because precedent did not dictate the rule set down in *Moore*, *Moore* set forth a new rule of constitutional law. See *Id.*

In *Atkins* v. *Virginia,* 536 U.S. 304 (2002), this Court prohibited the execution of intellectually disabled persons. But the Court expressly left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317, *quoting Ford* v. *Wainwright*, 477 U.S. 399, 405, 416-417 (1986) (alterations in original). *Atkins* "did not seek to provide 'definitive procedural or *substantive* guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins*' compass.'" *Moore v. Texas*, 137 S.Ct. 1039, 1058 (2017) (Roberts, J., dissenting), *quoting Bobby* v. *Bies*, 556 U.S. 825, 831 (2009) (emphasis added). In other words, "*Atkins* itself was on the books, but *Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop* v. *Hill*, 139 S.Ct. 504, 507 (2019).

In *Moore*, this Court defined characteristics of those beyond the State's power to execute due to intellectual disability and announced a national standard that "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Moore*, 137 S.Ct. at 1053. Though *Atkins* mentioned that the medical community's consensus on intellectual disability was relevant in the death penalty context, *Moore* mandated that states must use current medical diagnostic criteria in evaluating all prongs of an intellectual disability claim. *Moore* went far beyond what *Atkins* held. *See Shoop*, 139 S.Ct. at 508 (rejecting the conclusion that "the holding in *Moore* was merely an application of what was clearly established by *Atkins*"

(internal citation and quotation marks omitted)). *Moore* announced for the first time that (1) persons who are intellectually disabled per clinical standards are categorically ineligible to receive the death penalty, and (2) states cannot promulgate or enforce standards that create a narrower class of exempt persons, as Texas did there. *Moore*, 139 S.Ct. at 672 (finding that petitioner was intellectually disabled and could not be executed). This rule could not "be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.'" *Shoop*, 139 S.Ct. at 508. Thus, *Moore* establishes a new rule of constitutional law.

Other courts have recognized as much. The TCCA recognized *Moore* as a case for which its "legal basis was not recognized by or could not have been reasonably formulated from a final decision of the * * * Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state" before its issuance. *See* Tex. Code. Crim. Proc. Art. 11.071 § 5(d); *Ex parte Milam,* No. WR-79,322-02, 2019 Tex.Crim.App.Unpub.LEXIS 10, at *2 (Tex.Crim.App., Jan. 14, 2019) (not published) (remanding the intellectual disability claim to the convicting court "[b]ecause of * * * recent changes in the law pertaining to the issue of intellectual disability."). Because the *Moore* decision "was not *dictated* by precedent existing at the time the defendant's conviction became final," *see Teague*, 489 U.S. at 301, *Moore* establishes a new rule of constitutional law.

ii. *Moore* applies retroactively.

New rules of constitutional law apply retroactively if the rules are substantive rather than procedural. *Teague*, 489 U.S. at 311; *see also Schriro* v. *Summerlin*, 542

U.S. 348, 351 (2004) ("New substantive rules generally apply retroactively."). Substantive rules "set forth constitutional guarantees that place certain criminal law and punishments altogether beyond the State's power to impose." *Montgomery* v. *Louisiana*, 136 S.Ct. 718, 729 (2016).[23]

Rules that place individuals beyond the State's power to punish or place certain punishments beyond the power of the State to inflict "apply retroactively because they necessarily carry a significant risk that a defendant * * * faces a punishment that the law cannot impose on him." *Summerlin*, 542 U.S. at 352.In two ways, *Moore* enacted such a rule. First, *Moore* struck down the factors that Texas courts used for evaluating *Atkins* claims because they "creat[ed] an unacceptable risk that persons with intellectual disability will be executed." *Moore*, 137 S.Ct. at 1044. In doing so, *Moore* altered the "essential facts bearing on punishment." *Summerlin*, 542 U.S. at 353–354 (where the Supreme Court announces a rule that makes "a certain fact essential to the death penalty," that rule is substantive). By requiring that states adhere to medical standards, *Moore* directed state courts to use substantive medical standards when making an intellectual disability determination in the death penalty context. In effect, this rule creates a new class of people who are intellectually disabled under substantive medical standards and thus ineligible for execution under the Eighth Amendment.

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[23] See also *Summerlin*, 542 U.S. at 352 ("A rule is substantive rather than procedural if it alters the range of conduct or *the class of persons* that the law punishes."); *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989) ("[T]he first exception set forth in *Teague* should be understood to cover * * * rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."), *overruled on other grounds by Atkins*, 536 U.S. 304 (2002).

Second, *Moore* altered the "essential facts bearing on punishment" by abrogating the previous methods used in Texas to define intellectual disability in death penalty cases. Before, under the so-called *Briseno* factors, a capital defendant who met current medical diagnostic standards for intellectual disability but who:

(1) was not identified as intellectually disabled by those who knew them during the developmental period;

(2) could formulate plans and carry them through;

(3) showed leadership;

(4) responded appropriately and rationally to external stimuli;

(5) responded coherently, rationally, and on point to oral or written questions;

(6) was able to hide facts or lie; or

committed an offense that required forethought, planning, and complex execution would not have been considered intellectually disabled. *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex.Crim.App. 2004). So, a defendant with any adaptive strengths or coexisting conditions would have been considered not to be intellectually disabled. *Id.*; see also *Moore*, 137 S.Ct. at 1050–1051.

But under *Moore*, the same defendant is exempt from execution if the clinical standards are met. 137 S.Ct. at 1050–1051 (rejecting the *Briseno* factors). Thus, by abrogating the *Briseno* factors, *Moore* placed a new class of defendants out of the death penalty's reach. This class consists of defendants exempt from execution based on intellectual disability who would not have qualified as intellectually disabled

under *Briseno*'s interpretation of *Atkins*. Because such defendants are considered intellectually disabled under *Moore*, they are no longer eligible for the death penalty. *See Moore v. Texas*, 139 S.Ct. 666, 672 (2019) (*Moore II*) (finding that Moore is intellectually disabled).[24]

By establishing this class, *Moore* "changed the substantive reach" of the Eighth Amendment's prohibition against the execution of intellectually disabled persons. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). After *Moore*, the protected class includes those who meet the medical community's diagnostic framework regardless of lay opinions on intellectual disability. *Moore*, 137 S.Ct. at 1044. Thus, *Moore* is a substantive, retroactive rule because it altered the class of defendants who cannot be executed under the Eighth Amendment. *Moore*, 139 S.Ct. at 672 (Moore "has shown he is a person with intellectual disability."). Because the Court "applied [the new rule] to the defendant in the case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300.

As this Court noted in *Penry*, "if [it] held as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons * * * such a rule (falls) under the first exception to the general rule of nonretroactivity and would

[24] See also, *e.g., Ex parte Henderson*, No. WR-37,658-03, 2020 Tex.Crim.App.Unpub.LEXIS 171, at *2 (Tex.Crim.App. Apr. 15, 2020) (per curiam) (not published) (granting relief on a claim of intellectual disability upon reconsideration under *Moore*); cf. *Ex parte Henderson*, No. WR-37,658-03, 2006 Tex.Crim.App.Unpub.LEXIS 743, at *11-13 (Tex.Crim.App. Jan. 25, 2006) (per curiam) (not published) (denying the intellectual disability claim based on the *Briseno* factors).

be applicable to defendants on collateral review."[25] 492 U.S. at 329–330. *Moore* establishes such a rule and creates a new class of defendants who are ineligible for the death penalty. Thus, *Moore* applies retroactively.

iii. Jones could not have presented any argument based on *Moore* in his prior habeas proceedings.

This Court announced *Moore* on March 28, 2017. 137 S.Ct. at 1039. But on June 22, 2014, Jones filed the Second Petition. (DKT. 129). On January 13, 2016, the district court denied the Second Petition. *Jones*, No. 4:05-CV-0638-Y (DKT. 152); *Jones v. Stephens*, 157 F.Supp.3d 623 (N.D.Tex. Jan. 13, 2016).

On February 8, 2016, Jones filed a timely notice of appeal in the district court to challenge the district court's order denying the Second Petition. *Jones*, No. 4:05-CV-0638-Y (DKT. 152, 155); *Jones*, 157 F.Supp.3d 623 (N.D.Tex. Jan. 13, 2016). This divested the district court of jurisdiction, as generally a case exists only in one court at a time. A notice of appeal transfers a case to the appellate court until it remands it back to the district court: "The filing of a notice of appeal * * * confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); *Marrese* v. *Am. Acad. of*

[25] See also *Tyler* v. *Cain*, 533 U.S. 656, 668–69 (2001) (O'Connor, J., concurring) ("if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review."); *In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) ("By the combined effect of the holding of [(*Graham* v. *Florida*, 560 U.S. 48 (2010)] * * * and the first *Teague* exception, *Graham* was * * * made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*.").

Orthopaedic Surgeons, 470 U.S. 373, 378-379 (1985). Though a few exceptions exist,[26] they do not apply here. Accordingly, Jones could not have "amended" the Second Petition and added a claim under *Moore* when it was handed down on March 28, 2017.

Thus, *Moore* was unavailable to Jones. Other courts that have considered the issue agree. See *In re Johnson* 935 F.3d 284 (5th Cir. 2019) (finding that a rule was not previously available even when it was announced before any federal habeas application was filed); *In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (same). Similarly, in *In re Wood*, 648 F.Appx. 388, 391 (5th Cir. 2016), the Fifth Circuit held that a new constitutional rule was available if it were feasible to amend an application pending in the district court when the new rule is announced, so the petitioner's *Atkins* claim was previously available only after it determined that the petitioner "could have raised the issue while he was litigating his habeas petition in the district court."

Applying those cases here, since the district court had already entered the final judgment on the Second Petition when *Moore* was decided, Jones did not have an opportunity to present a *Moore* claim during the proceeding. Thus, the *Moore* decision was previously unavailable to Jones.

iv. Under *Moore*, Jones is intellectually disabled and is ineligible for execution.

[26] For example, in criminal cases, exceptions exist under Fed. Rule App. Proc. 4(b)(5) for correcting a sentence under Fed. Rule Crim. Proc. 35, and under Rule 4(b)(3), which allows action in the district court under Rules 29, 33, and 34. And a district court may also consider motions on issues collateral to those on appeal, like a motion for attorney's fees if the issue of fees is not an issue on appeal. *Thomas* v. *Capital Sec. Servs.*, Inc., 812 F.2d 984, 987 (5th Cir. 1987); *see also, e.g.*, *Mahone* v. *Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003).

Based on the Supreme Court's 2017 holding in *Moore*, Jones is intellectually disabled because *Moore* now dictates that the *Atkins* prongs be evaluated using contemporary medical standards. Thus, in light of *Moore*, the imposition of the death penalty violates Jones's Eighth and Fourteenth Amendment rights. At minimum, additional investigation should be allowed to explore this claim. Thus, the state court's dismissal of this claim was a decision that is: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court; and (ii) based on an unreasonable determination of the facts considering the evidence presented in the state court proceeding.

Jones satisfies the *Atkins* test of intellectual disability, now that it is both retroactively available to him and that *Moore* created a new substantive rule for how courts must evaluate the *Atkins* prongs. When evaluating intellectual disability, courts must consider (1) whether the individual has subaverage intellectual functioning; (2) whether the individual has significant limitations or deficits in adaptive behavior in three categories of skills: conceptual, social, and practical adaptive skills; and (3) if the individual's subaverage intellectual functioning and related adaptive deficits manifested before age eighteen. *See Atkins*, 536 U.S. at 318.

States have some discretion in the implementation of the categorical bar on the execution of persons with intellectual disability. *Hall* v. *Florida*, 572 U.S. 701, 719 (2014). This discretion "must be 'informed by the medical community's diagnostic framework,'" and, specifically, by "current medical standards." *Moore*, 137 S.Ct. at 1049 ("*Moore I*"), *quoting Hall*, 572 U.S. at 719. The current medical standards for

intellectual disability as of the time of this petition are governed by the Twelfth Edition of the American Association on Intellectual and Developmental Disabilities (the "AAIDD")'s "Intellectual Disability: Definition, Classification, and Systems of Support" (the "AAIDD-12"), which was published in January 2021, and the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders, 5th Ed." ("DSM-5"). *See id*. at 1048.

The DSM-5 describes intellectual disability as a developmental disability characterized by (1) "deficits" in intellectual functioning; (2) "deficits" in adaptive functioning; and (3) onset during the developmental period. DSM-5 at 31. The diagnosis of intellectual disability results from a "conjunctive and interrelated assessment." *Hall*, 572 U.S. at 723, *citing* DSM-5 at 37. Courts are required to consider all three prongs as part of a holistic evaluation of the clinical definition of intellectual disability when determining whether a defendant falls within the class of persons categorically excluded from the death penalty. *Id.*

Jones's known IQ is close to the intellectual disability "cutoff," and must be considered in the totality of the other evidence, including the fact that the onset of subaverage intellectual functioning and deficits in adaptive functioning likely occurred before the age of eighteen. Current medical standards require that IQ scores and the *Atkins* prongs be considered as part of a complete clinical inquiry and not used as an absolute, stand-alone conclusion to determine intellectual disability. See *Hall*, 134 S.Ct. at 1995 and DSM-5, 37. The overall picture based on current medical trends should consider "deficits in intellectual functions * * * confirmed by both

clinical assessment and individualized, standardized intelligence testing," such as IQ scores and standardized neuropsychological testing. DSM-5, 33. Accordingly, it is clear that the Texas Court of Criminal Appeals failed to consider the evidence in the record when it denied Jones's application.

v. Jones has subaverage intellectual functioning, satisfying *Atkins* prong 1.

In *Moore*, this Court emphasized "the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," and a standard error of measurement shows that there is "inherent imprecision of the test itself." *Moore*, 137 S.Ct. at 1049. The first prong in *Atkins*, as informed by *Moore*, is whether an individual has "significantly subaverage general intellectual functioning." *Atkins*, 536 U.S. at 318. Deficits in intellectual functioning can, to some degree, be measured through the administration of intellectual functioning testing and involve a score of approximately two standard deviations below the mean. DSM-5 at 37. Courts should consider the standard error of measurement ("SEM"), which is plus-or-minus five points from the score. *Hall*, 134 S.Ct. at 2000. After applying the SEM, "[A]n IQ between 70 and 75 or lower is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 fn.5, *citing* Kaplan & Sadock's Comprehensive Textbook of Psychiatry, 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000).

This Court has thus determined that while an IQ score is an important factor in determining an individual's subaverage intellectual functioning, the IQ score is not the only factor. See *Moore*, 137 S.Ct. at 1049; *Hall*, 134 S.Ct. at 1994; *Atkins*, 536

U.S. at 318. This is consistent with the current medical standards that require IQ scores and the *Atkins* prongs be considered as part of a complete clinical inquiry and not used as an absolute, stand-alone conclusion to determine intellectual disability. As explained in the DSM-5 at 37:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

When applying the current medical standards to Jones's IQ score, he is close to the intellectual disability threshold. Jones's IQ score is 77-78, when applying the "Flynn Effect," which accounts for the substantial increases in measured intelligence test performance over time. Frank M. Gresham & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, Intellectual and Development Disabilities, Vol. 49, No. 3: 131-140 (June 2011) (App.094-103). Because the WAIS-III was normed in 1996, Jones was administered the test in 2000, and 0.311 IQ points per year (times four years) must be accounted for due to the Flynn Effect. The Flynn Effect is a well-established psychometric fact documenting substantial increases in measured intelligence test performance over time. *Id.* These increases are not "gains" in the construct of intelligence but are creeping obsolesce of test norms. Flynn's 1984 review of the literature established that Americans gain an average of approximately 0.311 IQ points per year or about three points per decade

in measured intelligence. A similar increase exists in measured intelligence worldwide. An intelligence test normed in 1977 that is used in 2007 today has a population mean of 112 (0.311 X 30 years = 12 points). An IQ score on this test of 75 using the obsolete norms from 1977 is 2.47 standard deviations below the population mean and is comparable to an IQ score of 63 if the actual population mean of 100 with a standard deviation of 15 is applied.

The Flynn Effect is widely accepted by scholars, measurement experts, and researchers in intellectual measurement, and is critically important in clinical assessment practice. (App.094). When applied to *Atkins* cases, it may reflect a life-or-death decision regarding a convicted capital defendant's eligibility for the death penalty. If the population mean changes systematically with the degree of obsolesce of test norms, then IQ scores over time become more inaccurate. Test scores on measure of intellectual functioning only become meaningful through comparisons to population means, meaning that they are norm-referenced measures.

The Flynn Effect was first recognized by the Fifth Circuit in *Moore* v. *Quarterman*, 454 F.3d 484 (5th Cir. 2006). It should apply to Jones because of its near "unchallenged existence" in the courts.[27]

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[27] See, e.g., *Thomas* v. *Allen*, 614 F.Supp.2d 1257, 1276-1278, 1281 (N.D.Ala. 2009); *Walker* v. *True*, 399 F.3d 315, 322-323 (4th Cir. 2005); *Walton* v. *Johnson*, 407 F.3d 285, 296-297 (4th Cir. 2005); *Winston* v. *Kelly*, 592 F.3d 535, 557 (4th Cir. 2010); *Black* v. *Bell*, 664 F.3d 81, 96 (6th Cir. 2011); *Sasser* v. *Hobbs*, 735 F.3d 833, 847 (8th Cir. 2013); *Holladay* v. *Allen*, 555 F.3d 1346, 1350 fn.4, 1358 (11th Cir. 2009); *Thomas* v. *Allen,* 607 F.3d 749, 757 (11th Cir. 2010); *Wiley* v. *Epps*, 668 F.Supp.2d 848, 894-898 (N.D.Miss. 2009); *United States* v. *Hardy*, 762 F.Supp.2d 849, 866-868 (E.D.La. 2010); *United States* v. *Smith*, 790 F.Supp.2d 482, 491 & fn.43 (E.D.La. 2011);*Thomas* v. *Allen*, 614 F.Supp.2d 1257, 1276-1278, 1281 (N.D.Ala. 2009); *Green* v. *Johnson,* 431 F.Supp.2d 601, 615-616 (E.D.Va. 2006); *Williams* v. *Campbell*, No. 04-0681-WS-C, 2007 U.S.Dist.LEXIS 27050, *145-146 (S.D.Ala., April 11, 2007); *United States* v. *Davis*, 611 F.Supp.2d 472, 485-488 (D.Md. 2009); *United States* v. *Lewis*, No.

Thus, when considering the Flynn Effect, Jones's IQ score under the "gold standard" WAIS-III is 77-78. When accounting for the SEM, Jones's IQ is as low as 72-73. Using the nonrigid cutoff score of 70, Jones's score is barely above the threshold and is approximately at the cutoff.

It is important to consider that the clinical standard does not "require" an IQ of 75 or below. The standard is that it is *approximately* two standard deviations below the mean, or *approximately* 75 as measured by reliable IQ tests like the WAIS-III or WAIS-IV. 77 is *approximately* 75. Beyond Jones's "gold standard" IQ score, adjusted to approximately 72 when considering the SEM and the Flynn Effect, current medical standards require that IQ scores and the *Atkins* prongs be considered as part of a complete clinical inquiry and not used as an absolute, stand-alone conclusion to determine intellectual disability.

vi. *Atkins* prong 2.

The second *Atkins* prong considers whether the individual has significant limitations or deficits in adaptive behavior in any one of three categories of skills: conceptual, social, or practical adaptive skills. *Atkins*, 536 U.S. at 318; *Hall*, 572 U.S. at 724; *Moore I*, 137 S.Ct. at 1050; DSM-5 at 33. An applicant need show deficits in only one domain of adaptive functioning to satisfy the second *Atkins* prong. DSM-5 at 38. Examples of conceptual skills include reading and writing, math reasoning, and competence in language; social skills include interpersonal skills, responsibility,

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1:08-CR-404, 2010 U.S.Dist.LEXIS 138375, at *11-15 (N.D. Ohio 2010); *United States* v. *Wilson*, 922 F.Supp.2d 334, 349-351, 357-358 (E.D. N.Y. Feb. 3, 2013); *United States* v. *Williams*, 1 F.Supp.3d 1124, 1142-1145 (D.Haw. 2014).

and self-esteem; and practical skills include personal care, money management, and school and work task organization. AAIDD, *Mental Retardation: Definition, Classification, and Systems of Supports*, 82, Table 3.1 at 42 (10th ed. 2002).

The AAIDD-12 cautions that persons with intellectual disability may display some pockets of adaptive strength. These strengths do not negate the presence of adaptive deficits. AAIDD-12 at 1. The focus of the second prong rests on the presence of *deficits*. *Moore I*, 137 S.Ct. at 1050, *citing* AAIDD-11 at 47 ("significant limitations in conceptual social, or practical skills [are] not outweighed by the potential strengths in some adaptive skills"); *see also* DSM-5 at 33, 38 (explaining that the inquiry should focus on "[d]eficits in adaptive functioning"). Jones's adaptive deficiencies are discussed *infra* in section I(D)(3).

vii. Atkins prong 3.

The third consideration under *Atkins* is whether the onset of subaverage intellectual functioning and deficits in adaptive functioning occur before the age of eighteen. *Atkins*, 536 U.S. at 318. It does not require that intellectual disability have been diagnosed or identified during the developmental period. Rather, intellectual disability may be diagnosed retrospectively. AAIDD-12 at 41-42. The presence of risk factors for intellectual disability, although not necessary to diagnosis intellectual disability, can corroborate the diagnosis. *Moore I*, 137 S.Ct. at 1051.

There is evidence of multiple deficits in adaptive behavior for Jones before the age of eighteen. Jones was treated for several incidents of self-inflicted gunshot wounds to his body as a child, demonstrating severe low self-esteem. The trial record

also raises the likelihood that Jones was addicted to drugs and alcohol at a very early age. See *Jones*, No. 4:05-CV-0638-Y (DKT. 124).

Undersigned counsel has also discovered multiple aspects of Jones's childhood that likely gave rise to subaverage intellectual functioning and deficits in adaptive functioning that Jones's prior state habeas counsel should have investigated.[28] Jones was subjected to traumatic physical and sexual childhood abuse from close family members. He also suffered from severe, long-standing, and involuntary alcohol addiction. Until he was arrested, Jones engaged in at least eight years of heavy, constant drug and alcohol abuse, including snorting cocaine, snorting heroin, using cocaine, crank, and heroin intravenously, and also began to smoke crack cocaine.

viii. In the alternative, *Atkins* presents a new rule of constitutional law made retroactive by this Court to cases on collateral review that was previously unavailable to Jones.

If this Court determines that *Moore* is not a new, retroactively applied rule of constitutional law, then Jones should be deemed to meet the requirements of 28 U.S.C. § 2244(b)(2)(A) because an *Atkins* claim was not available to him until this Court's decision in *Moore*. When he filed both the First and Second Petitions, under then-binding Fifth Circuit and Texas law, evidence of low IQ, evidence of adaptive deficits, and evidence that these deficits appeared during the developmental period, were insufficient to establish that the Eighth Amendment prohibited his execution.

[28] Jones's prior state habeas counsel failed to investigate any of these issues, so if the Court determines that insufficient evidence is available on this Ground, then it should remand for further investigation.

Until *Moore*, the Fifth Circuit found "nothing in *Briseno* that is inconsistent with *Atkins*." *Woods* v. *Quarterman*, 493 F.3d 580, 587 fn.6 (5th Cir. 2007).

When the First and Second Petitions (September 14, 2006 and June 22, 2014, respectively) were filed, to prevail on an *Atkins* claim, Jones had to prove that: (1) his adaptive deficits were not outweighed by perceived adaptive strengths; (2) his adaptive deficits were not contradicted by perceived adaptive gains in prison; (3) risk factors for intellectual disability did not detract from a determination that his intellectual and adaptive deficits were related; (4) his adaptive deficits were not attributable to a personality disorder; and (5) he satisfied the *Briseno* factors. *Moore*, 139 S.Ct. at 668–669. *Moore* removed this standard. Jones must show only that he satisfies the "three core elements" of the clinical definition of intellectual disability to qualify. *Moore*, 137 S.Ct. at 1045. Only after *Moore* was decided does the Eighth Amendment protect mildly intellectually disabled persons in Texas from execution.

ix. In the alternative, the proposed petition meets the requirements of 28 U.S.C. § 2244(b)(2) because the allegations—if proven true—require review to avoid a miscarriage of justice.

Federal courts may authorize consideration of a second or successive habeas corpus petition if it is necessary to prevent a miscarriage of justice per 28 U.S.C. § 2244(b)(2), which here is the execution of a person the State is categorically forbidden by the Eighth Amendment from executing. *See Holland* v. *Florida*, 560 U.S. 631, 646 (2010) ("[E]quitable principles have traditionally governed the substantive law of habeas corpus," and federal courts will "not construe a statute to displace courts' traditional equitable authority absent the clearest command."). In *Holland*, this

Court concluded that the traditional equitable tolling exception to a limitations period defense survived the passage of 28 U.S.C. § 2244(d) despite the statutory tolling provision for habeas corpus proceedings that did not include equitable tolling. *Holland*, 560 U.S. at 645; *see also McQuiggin* v. *Perkins*, 569 U.S. 383, 393 (2013) (the miscarriage of justice exception may be applied as an equitable exception to a limitations period defense despite its absence in the AEDPA as an exception).

Further, "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, *void*." *Montgomery* v. *Louisiana*, 136 S.Ct. 718, 731 (2016) (emphasis added). Habeas corpus addresses whether the government has the power to inflict a certain punishment. See, *e.g.*, *Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015) ("[A] core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence.").

The judgment sentencing Jones to death was obtained in violation of the constitution and is void. The State has no power to impose it or carry it out because "[a] void judgment is a legal nullity." *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 270 (2010); *see also Ex parte Siebold*, 100 U.S. 371, 377 (1879) ("[I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes."). Thus, federal courts have "no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Id*. Correcting void judgments imposing unconstitutional sentences is what habeas corpus addresses. This invokes the suspension clause, which precludes Congress from preventing federal courts from

granting writs of habeas corpus. Congress may effect a suspension of the writ by "work[ing] an unconstitutional limitation upon the jurisdiction of federal habeas courts." *Mueller* v. *Angelone*, 181 F.3d 557, 573 (4th Cir. 1999). The suspension clause, "at a minimum, 'protects the writ as it existed in 1789,' when the Constitution was adopted." *Dept. of Homeland Sec.* v. *Thuraissigiam*, 140 S.Ct. 1959, 1969 (2020), *quoting INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001). In *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996), this Court held that § 2254(b)'s limitations on the consideration of second or successive habeas corpus applications did not on its face run afoul of the suspension clause. Like the holding in *Webster*, this Court should recognize that Congress did not intend to retract the equitable authority of the federal court to hear second or successive habeas corpus applications that present allegations of void judgments and substantively unconstitutional punishments under the Eighth Amendment. [29]

2. Jones's due process rights under the Fourteenth Amendment were violated because the jury's decision to impose the death penalty was based on expert testimony that has since been discredited.

A substantial part of the State's case during the punishment phase was based on the testimony of Dr. Price, who, using the Hare Psychopathy Checklist (PCL-R), told the jury that he had diagnosed Jones as a "psychopath." Price's testimony has since been discredited, undermining the foundation upon which the State sought imposition of the death penalty. As the affidavit of Dr. John Edens (App.034-059)—

[29] Jones notes that in *In re Sparks*, 939 F.3d 630 (5th Cir. 2019), this Court denied a request for an order authorizing district court review of a second or successive habeas corpus application because the petitioner did not allege actual innocence of the crime. However, it did not decide whether to recognize an innocence of the death penalty exception in the statute, noting only that "even if 'actual innocence of the death penalty' suffices," the movant in that case had not qualified for it. *Id*. at 633.

executed April 19, 2021—and the other facts and arguments below show, this was false and misleading testimony that affected the outcome of the sentence.

28 U.S.C. § 2244(b)(2)(B)(ii) applies here, as at least one court has held that § 2254(b)(2)(B)(ii) "permit[s] a petitioner to establish by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Babbitt v. Woodford*, 177 F.3d 744, 745-746 (9th Cir. 1999) (internal quotation marks omitted).

A defendant's due process rights under the Fourteenth Amendment are violated if the State unknowingly presents false or perjured evidence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The principle that the State may not knowingly use false evidence—including false testimony—to obtain a tainted conviction, implicit in any concept of ordered liberty, "does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a * * * witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* [30]

Here, the false and misleading testimony was presented during the State's rebuttal and elicited by the State. The jury's decision to impose the death penalty was based on this false and misleading testimony that there was scientific proof that Jones was a "psychopath." As Dr. Edens explains, the PCL-R evidence upon which the jury relied was inaccurate, meaning that a significant basis of the imposition of

[30] *See also United States* v. *O'Keefe*, 128 F.3d 885, 893 (5th Cir. 1997).

Jones's death sentence was based on flawed and unreliable evidence that misled the jury into believing that Jones was a psychopath who posed a grave danger to others for which the death penalty was necessary.

Dr. Price's testimony was critical since an inmate's behavior in prison and propensity for violence in prison is a central component of "future dangerousness." If the testimony provided by a State witness on this issue is false or lacking in probative value, then the defendant did not receive a fair trial on this question, and his death sentence is not valid. For these reasons, it is imperative to consider whether an appropriate risk assessment was done, and it was not.

Instead, Dr. Price administered the PCL-R and diagnosed Jones as a "psychopath," and directly linked his purported PCL-R score to Jones's psychopathy and his propensity for future dangerousness within the context of the first special issue. (RR36.58, RR36.74). And the fact that Dr. Price's PCL-R score was starkly divergent from the PCL-R score determined by Dr. Finn underscores its inherent unreliability and lack of probative value concerning prison violence risk. (App.041, 050). As Dr. Edens explains, "it is very difficult *if not impossible* to argue that labeling a defendant as psychopathic has any demonstrated probative value in capital cases." (App.050) (emphasis added).

It is also critical that PCL-R evidence has the strong potential to stigmatize capital defendants with an irrelevant and pejorative label and associated set of personality traits (e.g., remorselessness, conning/manipulative). (App.041, 050). As the district court determined in *United States* v. *Sampson*, see *supra* at 15 n. 22, PCL-

R testimony is unreliable and should be barred because of the risk that jurors would consider such testimony as evidence of future dangerousness, which the district court ruled would be "misleading" given that, as Dr. Edens testified, "a high PCL-R score does not meaningfully predict aggressive behavior in prison." (App.077-078). The finding of the federal judge corroborates Dr. Edens's testimony that Dr. Price's testimony and the use of the PCL-R was materially misleading to the jury and contributed to the death sentence.

In sum, because Jones has also shown that, but-for this Fourteenth Amendment violation, a reasonable jury would not have found him to be a future danger and would not have sentenced him to death, this Court should grant certiorari and grant a temporary stay of execution, as set forth in the accompanying application.

CONCLUSION

For the reasons stated here and in the Motion for a Stay, this Court should stay Jones's execution and grant certiorari.

Respectfully submitted,

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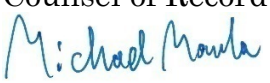

/s/ Michael Mowla
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