Nos. 20-8037, 20A166

IN THE
Supreme Court of the United States

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QUINTIN PHILIPPE JONES,
*Petitioner*,

vs.

STATE OF TEXAS,
*Respondent*.

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

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

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## QUESTIONS PRESENTED

1. Should the Court grant certiorari to decide the non-retroactivity of *Moore v. Texas*, 137 S.Ct. 1039 (2017), where Jones has never raised an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), from the date of his conviction and sentence until twenty years later, just days before his scheduled execution?

2. Should the Court grant certiorari to review Jones's claims about the State's use of the HARE Psychopathy Checklist (PCL-R), where the state court dismissed the claim on a non-merits procedural ground, the rule Jones seeks is barred by principles of non-retroactivity, and evidence based upon the PCL-R was introduced by the State only in rebuttal to Jones's expert who testified first using the same methodology?

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## BRIEF IN OPPOSITION

Petitioner Quintin Jones was convicted and sentenced to death in 2001 for the murder of Berthena Bryant, his elderly great-aunt, in the course of committing robbery. He is scheduled to be executed after **6:00 p.m. (Central Time) on Wednesday, May 19, 2021**. Jones has challenged his conviction and death sentence in both state and federal court. His claims have been rejected in each instance. Jones recently filed a subsequent state habeas application in which he claimed (1) he may be intellectually disabled, but was unable to raise such a claim until this Court's 2017 decision in *Moore v. Texas*; and (2) his right to due process was violated because the prosecution unknowingly presented false testimony during punishment regarding Jones's diagnosis as a psychopath. The Texas Court of Criminal Appeals (CCA) dismissed the application as an abuse of the writ without considering the merits of Jones's claims. Pet. Cert. App .001–002, (Order, *Ex parte Jones*, No. 57,299-02 (Tex. Crim. App. May 12, 2021).

Jones 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. Jones's claims do not warrant this Court's attention.

First, Jones's intellectual disability claim is without any merit whatsoever, and whether *Moore* excuses his failure to raise the claim in the

twenty years since his death sentence was imposed or not, the claim fails. Second, the state court's dismissal of his due process claim rests on an adequate and independent state procedural bar. Jones offers no excuse for his failure to raise the claim in a timely fashion and, in any event, the expert testimony in question was neither false nor material, as it is clear he was not harmed by its admission. Therefore, the Court should deny Jones's petition for a writ of certiorari. For the same reasons, the Court should deny Jones's application for a stay of execution.

## STATEMENT OF JURISDICTION

The Court lacks jurisdiction to review Jones's second question presented—his due process claim regarding expert testimony—because the CCA's dismissal of the claim 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

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

> The victim was [Jones]'s eighty-three-year-old great-aunt, Berthena Bryant. Despite her income of less than $500.00 a month, Bryant occasionally made small loans to various people, including [Jones], and she kept a ledger recording the loans and their repayments. On September 10, 1999, Bryant told her sister, Mattie Long, that she had refused [Jones]'s request for a loan earlier in the day. Long testified that Bryant seemed uneasy about her conversation with [Jones]. The next morning, Bryant's body was discovered in her home by neighbors. A bloody, broken

baseball bat was recovered at the scene. Bryant's car was located a half mile from her house and her purse and wallet were found in the car. The medical examiner, Dan Konzelman, testified to the existence of defensive bruising on Bryant's wrists and arms. Konzelman also described Bryant's various abrasions, bruises, and fractures, which included a broken collarbone and shoulder blade, two fractured ribs, and a fracture at the base of the skull.

[Jones] was arrested for outstanding traffic warrants and for possession of a controlled substance on the same day that Bryant's body was discovered. While in custody, [Jones] was questioned twice about Bryant's murder by Detective Ann Gates. The first interview took place on the day he was arrested. Gates read [Jones] his Miranda warnings when she noticed that [Jones] had no reaction to the news of Bryant's death. [Jones] gave a statement denying any involvement in Bryant's murder and claiming an alibi. The next day, after being informed of his rights again, [Jones] accompanied Gates to various locations in an effort to corroborate his alibi. That same day he took a polygraph examination.

When [Jones]'s alibi information did not check out and the polygraph indicated deception, Gates interviewed [Jones] a second time. Gates again read [Jones] his Miranda rights, [Jones] agreed to waive them, and [Jones] gave a second written statement (the "Gates statement"). In the Gates statement [Jones] stated that he had "another personality" named James who lived in his head. He stated that James had started living in his head since age ten or eleven when he was molested by his brother and cousin. [Jones] stated that James went to Bryant's house to steal some money. After Bryant let him in and James could not find her purse, [Jones] stated that James lost his temper and started hitting Bryant with a bat she kept by the door. After that, James found Bryant's purse and left in Bryant's car. [Jones] stated there was $30.00 in Bryant's purse. [Jones] then went to a friend's house and bought drugs with the money. He later left Bryant's car in a parking lot.

*Jones v. State*, 119 S.W.3d 766, 770–71 (Tex. Crim. App. 2003).

## II. The State's Punishment Evidence

The CCA also summarized the State's case presented at punishment:

> [Jones] was convicted of several offenses as a juvenile, including an assault of two teachers, possession of a handgun, and an assault on another student by setting fire to her hair. One of the teachers assaulted by appellant, Mark Turner, described [Jones]'s resistance to the teachers' efforts to restrain him: "[[Jones] was] just going crazy, just punching and biting and snarling . . . like the Tasmanian Devil." It took five male teachers and a police officer to restrain and handcuff [Jones]. [Jones] was not allowed to return to the school.
>
> Substantial evidence was introduced of [Jones]'s membership in the Hoova Crips gang. Photographs of [Jones]'s many gang-related tattoos were admitted into evidence. A Fort Worth police officer with experience in the police department's gang unit testified at length about the gang significance of appellant's tattoos. He described nearly all of the tattoos as referring to the Five Deuces Crips gang or the Hoova Crips gang.

*Jones v. State*, 119 S.W.3d at 780–81.

The CCA also discussed at length Jones's involvement in two murders committed three months prior to his murdering his great-aunt. *E.g.*, *id.* at 778–82. The bodies of Marc Sanders and Clark Peoples were discovered in the Trinity River, and law enforcement were led to Jones's residence. *Id.* at 771. Texas Ranger Lane Akin met with Jones, who admitted his involvement in their murders after Ranger Akin "asked what [Jones] would say if [Ranger Akin and fellow investigators] told him they had already talked to [Jones]'s good friend, Ricky "Red" Roosa, and that Red had told them that [Jones] was the 'bad guy,' primarily responsible for the murders." *Id.* The jury heard that

Jones's residence had human blood on the walls, carpet, and on and under couch cushions. *Id.* at 778. The jury also heard testimony that Jones's cohort struck Peoples in the head by while the three of them were in Jones's residence, and that Jones had admitted—after Red had threatened him into participating—that he "held [the victim] down while Red choked him with his hands" and beat the victim; and that Jones provided Red with his own belt to tie down the victim and helped moved the victim. *Id.* at 781 (statement taken given by Jones). Testimony as to Jones's statement also included that Jones had retrieved the other victim—Sanders, a friend of his from elementary school—from the car; Jones, at minimum, stood by and watched Red beat Sanders with a barbell and choked him with it, then Jones brought an extension cord to tie up the Sanders; and Jones helped move both bodies into a car and dump the bodies in a river. *Id.* at 779–81.

### III. Expert Testimony Relevant to Jones's Due Process Claim

The defense called Dr. Raymond Finn, a clinical psychologist who interviewed Jones and his family and gave Jones a battery of tests. Dr. Finn testified that in his opinion, Jones probably did not have a "full blown" multiple personality syndrome, but there was evidence of some kind of dissociative process that manifested itself in the form of an alter-ego. 35 RR[1] 148, 151. He

[1] "RR" refers to the statement of facts of the jury trial in the Reporter's Record, preceded by the volume number and followed by the page number.

believed that this alter-ego—"James"—was the personality actually responsible for Berthena Bryant's murder and that Jones had little or no ability to control James's violent tendencies. *Id*. at 157. Dr. Finn testified that he thought Jones was very remorseful for what he had done, and that he could "work through" his problems through psychotherapy and by refraining from using drugs. *Id*. at 161–62. According to Dr. Finn, Jones had only a moderate to low risk for future violence. *Id*. at 163.

Trial counsel specifically questioned Dr. Finn about his administration of the Hare Psychopathy Checklist. *Id.* at 162. Dr. Finn identified the PCL-R as "a kind of rating scale that you can go through based on interviews and personal contact with the person and also on the review of institutional records like jail records, hospital records, school records, whatever kinds of documents you have about the purpose." *Id.* at 162–63. Dr. Finn further testified that "the purpose is to try to determine whether or not a person is a so-called psychopath," "[a]n implusive kind of amoral conscienceless criminal." *Id.* at 163. Dr. Finn determined Jones's score to be a 9.5, indicating a low risk of further violence if released into the community. *Id.* at 163–65.

In rebuttal, the State called their own clinical psychologist, Dr. Randall Price, who had interviewed and evaluated Jones. Dr. Price testified that he did

not believe that Jones had a mental disorder, and he was skeptical that the dissociative identity disorder discussed by Dr. Finn even exists. 36 RR 31–50. He was also very skeptical of the existence of "James," as the fact that he only appears when Jones is on drugs or in some kind of trouble indicates that he is using this identity to avoid responsibility. *Id*. at 53–56. Dr. Price agreed that Jones does have a personality disorder—among other things, the fact that he has little or no conscience and fails to accept responsibility indicate that he is a psychopath. *Id*. at 57–90. But according to Dr. Price, Jones's violent tendencies were not a product of an abusive or neglectful childhood, but rather are more likely caused by Jones's drug addiction and the fact that he is a psychopath. *Id*. 90–92. In his opinion, the results of a variety of tests he administered to Jones—including the PCL-R—indicated there is a significant probability that Jones will commit violent acts in the future, no matter where he is located. *Id*. at 90. Regarding the PCL-R, Dr. Price testified as to a list of the traits on that checklist and cited specific incidents to show how he arrived at his scores for each trait, ultimately ending at a score of 31. *Id*. at 57–87, 61. Dr. Price also discussed examples of Jones's self-injurious behavior, as well as Jones's substance abuse. *Id*. at 65–66; *e.g.*, *id*. at 67–69, 85.

## IV. Procedural History

The Fifth Circuit Court of Appeals summarized Jones's case history as follows:

> Jones was convicted by a Texas jury of capital murder and sentenced to die. [*Jones v. State*, 119 S.W.3d 766, 770 (Tex. Crim. App. 2003).] The [CCA] affirmed his conviction and sentence. [*Id.*] The United States Supreme Court denied certiorari. [*Jones v. Texas*, 542 U.S. 905 (2004).] Jones then filed a state petition for habeas corpus, which the [CCA] denied. [*Ex parte Jones*, No. WR–57,299–01, 2005 WL 2220030 (Tex. Crim. App. Sept. 14, 2005).]
>
> Jones filed a federal petition for habeas corpus in the Northern District of Texas. [*Jones v. Quarterman*, No. 4:05-cv-6384, 2007 WL 2756755 (N.D. Tex. Sept. 21, 2007).] His petition was dismissed as time-barred. [*Id.*] The district court appointed new counsel and vacated its dismissal to give Jones a chance to respond. [*Jones v. Quarterman*, No. 4:05-cv-6384, 2008 WL 4166850 (N.D. Tex. Sept. 10, 2008); *see Jones v. Quarterman*, No. 4:05-cv-638, ECF Nos. 31, 43.] After his response, his petition was again dismissed as time-barred. [*Jones v. Quarterman*, No. 4:05-cv-638, 2009 WL 559959 (N.D. Tex. June 17, 2010).] Jones appealed, and we vacated and remanded for reconsideration in light of the principles of equitable tolling announced in the Supreme Court's then-recent decision *Holland v. Florida*[, 560 U.S. 631 (2010)]. [*Jones v. Thaler*, 383 F.App'x 380, 380 (5th Cir. 2010) (unpublished).] On remand, the district court found that no grounds existed for equitable tolling and once again dismissed Jones's federal habeas petition as time-barred. [*Jones v. Stephens*, No. 4:05-cv-638, 2013 WL 4223968 (N.D. Tex. Aug. 15, 2013).] Then on Jones's motion to alter judgment, the district court reversed course, persuaded that equitable tolling relieved Jones's petition from the AEDPA limitations bar. [*Jones v. Stephens*, 998 F.Supp.2d 529 (N.D. Tex. 2014).] It granted leave to file an amended petition for federal habeas with additional briefing by both parties. [*Id.*]

*Jones v. Davis*, 673 F. App'x 369, 371 (5th Cir. 2016) (footnotes replaced by citations).

Following that briefing, the district court denied Jones's federal habeas petition and a certificate of appealability (COA). *Jones v. Stephens*, 157 F.

Supp.3d 623 (N.D. Tex. 2016). The Fifth Circuit granted a COA on one of two issues raised by Jones—his claim that his confession was erroneously admitted at sentencing—and the district court's denial of investigative funding, but ultimately the court affirmed the district court's denial and again on petition for rehearing and rehearing en banc. *Jones v. Davis*, 673 F. App'x at 376; *Jones v. Davis*, 922 F.3d 271 (5th Cir. 2019); *Jones v. Davis*, 927 F.3d 365 (5th Cir. 2019). This Court denied Jones's petition for certiorari for both his appeal of the Fifth Circuit's partial denial of a COA and its affirmance of the district court's denial of relief. *Jones v. Davis*, -- U.S. --, 137 S. Ct. 2188 (2017); *Jones v Davis*, -- U.S. --, 140 S. Ct. 2519 (2020).

On November 18, 2020, the Criminal District Court No. 1 of Tarrant County entered an order setting Jones's execution date for May 19, 2021. On April 19, 2021, Jones sought to intervene and moved for a stay of execution in *Busby v. Collier*, et al., No. 4:21-cv-00297 (N.D. Tex.) on the basis of his denied request for a spiritual advisor to be present in the execution chamber. ECF Nos. 31, 32. But he moved for voluntary dismissal on May 12, 2021, after the Texas Department of Criminal Justice – Correctional Institution Division (TDCJ) approved his spiritual advisor to be present. ECF No. 46. The district court granted Jones's motion. ECF No. 47.

While those motions were pending, Jones filed a second state habeas application for writ of habeas corpus; the CCA dismissed that application as

an abuse of the writ under Texas Code of Criminal Procedure art. 11.071 § 5. Pet. Cert. App. 001–002 (*Ex parte Jones*, No. WR-57,299-02 (Tex. Crim. App. May 12, 2021)).

On May 17, 2021, Jones filed in the Fifth Circuit a motion for authorization to file a successive petition and motion to stay his execution. The Fifth Circuit denied his motions on May 18, 2021. *In re Jones,* No. 21-10507.

Also on May 17, 2021, Jones filed in this Court a petition for certiorari and an application for a stay of execution. The instant brief in opposition follows.

## REASONS FOR DENYING THE WRIT

The questions that Jones presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Jones advances no compelling reason to review his case, and none exists.

Review of Jones's claims stems from the lower court's application of Texas Code of Criminal Procedure Article 11.071, which provides a purely statutory, non-constitutional exception to the prohibition against abuse of the writ. The CCA determined that Jones failed to make a prima facie showing on

any claim, and that his allegations did not satisfy the requirements of article 11.071 § 5. The CCA thus dismissed his application as an abuse of the writ without reviewing the merits of any claim. This Court does not have jurisdiction to reach claims dismissed pursuant to an adequate and independent state procedural ground. Regardless, specifically pertaining to his *Moore I* issue, Jones fails to prove any of the three requirements necessary for an intellectual disability claim. And because he cannot present a prima facie claim for relief, the Court need not determine the retroactivity of *Moore I* at this time. Jones also fails to demonstrate that the State knowingly presented false or material expert testimony. Jones, therefore, presents no important questions of law to justify the exercise of certiorari jurisdiction.

## ARGUMENT

### I. Certiorari Review is Foreclosed Because Jones's Claims Are Procedurally Defaulted.

In his subsequent writ, Jones complained on two grounds that his death sentence was obtained in violation of the Fourteenth Amendment due process clause because it was based upon false and misleading evidence, and that he was intellectually disabled and thus exempt from execution. The CCA dismissed his application for failure to make a prima facie showing on any allegation. *Ex parte Jones,* No. WR-57,299-03 (Tex. Crim. App. May 12, 2021). And because the allegations did not satisfy the requirement of Texas Code of

Criminal Procedure article 11.071 § 5, the court dismissed the application "as an abuse of the writ without reviewing the merits of the claim [sic] raised." *Id.*

The CCA has strictly and regularly applied § 5(a), and dismissal of a successive habeas application upon such grounds constitutes an adequate and independent state procedural bar. *See, e.g., Curtis Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting) ("There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *see also Balentine v. Thaler,* 626 F.3d 842, 856-57 (5th Cir. 2010) ("We have previously held that the [CCA] regularly enforces the Section 5(a) requirements.").

The Court has explained that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997); *see also Sochor v. Florida,* 504 U.S. 527, 533-34 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The "independent" and "adequate" requirements are satisfied where the court "clearly and expressly" indicates that its dismissal rests upon

state grounds that bar relief, and that bar is strictly or regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)); *see also Johnson v. Mississippi,* 486 U.S. 578, 587 (1981).

Because the state court dismissal is based on clearly established state law grounds, there is no jurisdictional basis for granting certiorari review in this case. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (holding federal review of a claim is procedurally barred if the last state court to consider claim expressly and unambiguously based its denial of relief on a state procedural default); *Harris v. Reed,* 489 U.S. 255, 265 (1989). The lower state court's decision clearly and expressly rests on adequate and independent state grounds, thus certiorari review should not be granted.

## II. Alternatively, Certiorari to Consider the Retroactivity of *Moore* Is Unnecessary Because the CCA Already Considered the Merits of Jones's *Atkins* Claim in Concluding he Failed to Demonstrate a Prima Facie Claim for Relief.

Jones's conviction was final at the time *Moore* was decided in 2017. *See Jones v. State,* 119 S.W.3d 766 (Tex. Crim. App. 2003), *cert. denied,* 542 U.S. 905 (2004) (affirming conviction on direct appeal). Jones now seeks certiorari review to consider whether *Moore* should apply retroactively to his case on state collateral review. *See* Pet. at 18–36. This Court should deny such review. Even if *Moore* announced a new rule of law, it was not a substantive rule—it

"neither decriminalize[s] a class of conduct nor prohibits imposition of capital punishment on a particular class of persons." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). Therefore, the rule should not apply retroactively.[2] Regardless, his is not the appropriate case for determining retroactive application because the CCA has already performed the desired review in determining that Jones cannot demonstrate a prima facie claim for relief under *Atkins* and *Moore.*

In determining that he did not demonstrate a prima facie claim for relief the CCA necessarily considered the merits of the *Atkins* claim and found them to be lacking. Therefore, the CCA already performed the requested merits review. *See Rocha v. Thaler,* 626 F.3d 815, 831 (5th Cir. 2010) (The CCA's prima-facie review of the substantive merits of *Atkins* claim essentially robbed § 5(a)(1) dismissals of independent state law character). As will be discussed in Section III(A), the CCA's determination that Jones failed to make a prima facie showing was correctly decided—Jones could not show any of the three mandatory requirements for an *Atkins* claim. The failure to make this showing precluded review of this claim in the state court, regardless of the

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[2] To retroactively apply *Moore,* Jones must prove *Moore* is either a substantive rule or a watershed rule of criminal procedure. *See O'Dell v. Netherland*, 521 U.S. 151, 156–57 (1997). Jones does not suggest that *Moore* is a watershed rule of criminal procedure. Indeed, this Court has recently and definitively stated, "no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly continue to suggest otherwise to litigants and courts." *Edwards v. Vannoy,* No. 19-5807, ---S. Ct. ---, 2021 WL 1951781, *8 (May 17, 2021).

retroactivity question.

Had Jones made a prima facie showing, the CCA was free to remand for reconsideration, regardless of whether this Court ultimately determines that *Moore* applies retroactively. *See Danforth v. Minnesota,* 552 U.S. 264, 266, 282 (2008) (holding that *Teague* does not constrain "the authority of state court to give broader effect to new rules of criminal procedure than is required by that opinion"). Indeed, the CCA has repeatedly done just that. *See e.g., Ex parte Milam,* no. 79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019); *Ex parte Guevara,* No. 63,926-03, 2020 WL 5649445 (Tex. Crim. App. Sept. 23, 2020); *Ex parte Gutierrez,* No. 70,152-03, 2019 WL 4318678 (Tex. Crim. App. Sept. 11, 2019). Because the states are free to give broader retroactive effect to new rules than required by this Court, the question of retroactivity is more appropriately decided in the federal habeas context. *See Danforth,* 552 U.S. at 277 ("A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion."); *id.* at 278 ("Justice O'Connor's opinion clearly indicates that *Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute.")

Because the CCA was permitted to apply *Moore* retroactively, any

opinion by this Court on the issue of retroactivity would be purely advisory as to Jones. This Court does not render advisory opinions and should decline to do so now. *See United Public Workers of America (C.I.O.) v. Mitchell,* 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); *see also United States v. Raines*, 362 U.S. 17, 21 (1960) (In the exercise of that jurisdiction, [this Court] is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'") (citing *Liverpool, New York, and Philadelphia S.S. Co. v. Commissions of Emigration,* 113 U.S. 33, 39 (1885)).

## III. Jones Fails to Make a Prima Facie Claim for Relief.

### A. Jones fails to demonstrate a prima facie claim for relief under *Atkins*.

The current legal standard, which is generally accepted by the medical community, identifies three requirements for a diagnosis of intellectual disability: (1) intellectual-functioning deficits, which is indicated by an IQ score of roughly 70, after being adjusted for the standard error of measurement; (2) adaptive deficits or the inability to learn basic skills and adjust behavior; and (3) the onset of such deficits occurred before the age of

eighteen. *Moore I*, 137 S. Ct. at 1045; *see also Atkins,* 536 U.S. at 318-21.

Here, Jones has not only never been diagnosed as intellectually disabled, he has never specifically pursued such ground for relief during his post-conviction litigation.[3, 4] In his state habeas application, Jones did not claim that he "is" intellectually disabled but, instead, claimed that he "may" be intellectually disabled. *See* Application for Writ of Habeas Corpus Filed Under Tex. Code Crim. Proc. Art. 11.071 § 5, at 48, 81. And in his petition before this Court, while Jones asserts he "is intellectually disabled because *Moore* now dictates that the *Atkins* prongs be evaluated using contemporary medical standards," he still only requests that, "[a]t minimum, additional investigation should be allowed to explore this claim"—in other words, he provides no support for his implication that he meets the *Atkins* prongs, other than providing the Court with an IQ score of 79. Petition at 26.

The State does not take issue with Jones's assertion that the gold-standard for determining a person's IQ is the Wechsler Adult Intelligence Scale

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[3] Jones also did not present such mitigation evidence during the punishment phase of his trial. Although defense expert Dr. Finn recognized Jones's varying IQ scores, he testified, "I don't think [Jones] is mentally challenged at all." 35 RR 170–72. He also agreed with the State on cross-examination that the exam which yielded an IQ score of 79 was administered when Jones was "around four" years old, and "the psychologist who tested him at that time noted that they thought that was an underestimation of his IQ." *Id.* at 171–72.

[4] Further, Jones does not argue that the CCA misapplied *Atkins* in evaluating his claim that he is intellectually disabled—likely because, prior to his subsequent state habeas application, Jones had never raised an *Atkins* claim.

(WAIS). *See* Pet. at 11, 31. Assuming, without conceding, that the Flynn Effect should apply in this instance, Jones's 1999 IQ score would be a 77 or 78 and his IQ range, accounting for the standard error of measurement, would be between a 72 or 73 and an 82 or 83—above the generally accepted IQ score of roughly 70 that indicates that a person has intellectual-functioning deficits. *See Moore*, 137 S. Ct. at 1045 (continuing to set out 70 as the accepted rough score for prong one of an intellectual disability diagnosis).

While an IQ score is not the sole defining factor to be considered in evaluating whether an individual is intellectually disabled, *see Hall v. Florida,* 572 U.S. 701, 711–14 (2014), Jones makes no effort to provide this Court with any other facts to consider that would support a claim of intellectual disability. Jones makes no showing under the second and third prongs of an intellectual disability analysis. *See* Pet. at 31–33. Jones must demonstrate, not only intellectual-functioning deficits to establish that he is intellectually disabled, but also that he has adaptive deficits, or the inability to learn basic skills and adjust behavior, and that the onset of such deficits occurred before the age of eighteen.[5] *Moore*, 137 S. Ct. at 1045. Instead of presenting sufficient facts to

[5] Jones presented two other IQ scores—an 80 from 1983, when he was four years old, and a 100 from when he was apparently seven years old. *See* Application for Writ of Habeas Corpus Filed Under Tex. Code Crim. Proc. Art. 11.071 § 5, at 48. These scores undermine both his intellectual functioning arguments and any claim of onset before the age of eighteen.

the CCA or this Court, Jones requested that he be given an opportunity to investigate whether he is intellectually disabled. *See* Pet. at 26; *see also* Application for Writ of Habeas Corpus Filed Under Tex. Code Crim. Proc. Art. 11.071 § 5, at 79–82.

Since this Court handed down *Atkins* in 2002, Jones has had nineteen years to investigate such a claim. At no point during his post-conviction litigation has he raised a claim of intellectual disability. Jones blames prior counsel for the failure to investigate and pursue such a claim, but current counsel was appointed in 2014 during Jones's federal habeas proceedings, and the trial court set Jones's execution date on November 18, 2020. If indeed there was evidence to support the second and third prongs of an intellectual disability analysis, Jones has had ample time to gather it.

Jones's arguments regarding unavailability of the claim pursuant to 28 U.S.C. § 2244 (b)(2)(A), or the application of the "miscarriage of justice" exception to excuse default pursuant to § 2244 (b)(2), Petition at 34–36, have no bearing on this Court's review of the CCA's dismissal of a successive state writ. Section 2244 is the statute through which a petitioner seeks permission to file a successive *federal* habeas corpus petition in a federal district court. Jones is not now asking the Court to review the denial of a motion for authorization by the Fifth Circuit Court of Appeals. Regardless, the denial of a motion for authorization pursuant to § 2244(b) is not appealable through a

petition of writ of certiorari, or any other means. *See* § 2244(b)(3)(E).

### B. Jones failed to make a prima facie claim regarding the presentation of false testimony.

Jones argues that his due process rights were violated because the jury imposed his sentence based upon expert testimony that Jones alleges has since been discredited—namely, Dr. Price's diagnosis of Jones as a psychopath, using the Hare Psychopathy Checklist (PCL-R). Petition at 36–39.

Jones cites § 2244(b)(2)(B)(ii) as grounds for permitting review of this issue. But, once again, this provision, through which the Fifth Circuit may authorize a federal district court to consider a successive application for federal habeas corpus relief, is not appealable through a petition of writ of certiorari, or any other means. *See* § 2244 (b)(3)(E). And it is not applicable to the Texas CCA's denial of a subsequent writ pursuant to 11.071 § 5(a) of the Texas Code of Criminal Procedure.

Regardless, his claim raised pursuant to *Napue v. Illinois,* 360 U.S. 264 (1959), fails because he cannot demonstrate that the State knowingly presented false testimony through an expert whose methods may have been discredited at some time after trial. The State denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue*, 360 U.S. 264; *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996).

However, to obtain relief on such a claim, a petitioner must show the following: (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material. *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). That is, "[c]onflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001). Additionally, a difference in opinion between experts does not demonstrate that testimony is false or misleading. *See Clark v. Johnson*, 202 F.3d 760, 766–67 (5th Cir. 2000) (holding that a disagreement between experts regarding the conclusions to be drawn from the physical evidence was insufficient to overcome the presumption of correctness afforded a state habeas court's factual finding that an expert trial witness had not testified falsely at trial or otherwise misled the jury). And further, perjured testimony is only material if it is also shown that there was any reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154; *see also Barrientes v. Johnson*, 221 F.3d 741, 753, 756 (5th Cir. 2000).

Certainly, expert opinion that relies on false assumptions rebutted by undisputed record evidence is unreliable. *E.g.*, *Moore v. Int'l Paint, L.L.C.*, 547 Fed. App'x 513, 515 (5th Cir. 2013) (discussing requirements under Fed. R. Evid. 702(b)). But here, Jones fails to show Dr. Price's testimony was false because the facts underlying his testimony of the reasons for his scoring on certain factors in the PCL-R were true, based on his interview with Jones and

review of Jones's school files. 36 RR 62–90. This failure causes Jones's argument to fall apart, as there would thus be no false evidence for the prosecutor to know about, nor false testimony to be material. Jones therefore cannot make a prima facie claim for relief.

## IV. Jones Is Not Entitled to a Stay of Execution.

Jones 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, Jones's claims are procedurally barred, barred by principles of non-retroactivity, and entirely without merit. Even if Jones were to obtain merits review of his claims under each new rule he seeks, he would be absolutely disentitled to relief. Again, Jones did not pursue an intellectual disability claim until nearly twenty years after he was convicted (and four years after the decision from which he seeks a new rule to be announced), and does nothing more than point to sources reviewed by either his pretrial and trial psychology experts—all of which relate not to the factors for establishing intellectual disability, but Jones's mental health and possible

mental illness. Additionally, the evidence of Jones's future dangerousness was plainly overwhelming. Thus, Jones 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)). Jones cannot rebut that strong presumption where his claim is plainly dilatory. *See id*. Jones's initial federal habeas proceedings spanned from 2006 to 2019, including his motions for relief from judgment. At no time during those proceedings did Jones request a stay to return to state court to raise his instant claims. *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 Jones's delay.

## CONCLUSION

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

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