

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

ARTHUR LEE BURTON,  
*Petitioner,*

v.

STATE OF TEXAS,  
*RESPONDENT.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE TEXAS COURT OF CRIMINAL APPEALS

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APPLICATION FOR STAY OF EXECUTION

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***THIS IS A CAPITAL CASE  
WITH AN EXECUTION SCHEDULE FOR  
WEDNESDAY, AUGUST 7, 2024 AT 6:00 PM***

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To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The State of Texas has scheduled the execution of Petitioner Arthur Lee Burton for **August 7, 2024 at 6:00 p.m. C.D.T.** Mr. Burton requests that the Court

order a stay of execution directing Respondent State of Texas to refrain from executing Mr. Burton pending the consideration and disposition of the petition for writ of certiorari that he is filing simultaneously with this application.

**I. The Accompanying Petition for a Writ of Certiorari Presents Issues Sufficiently Meritorious for Grant of Review**

**A. Mr. Burton is Intellectually Disabled**

Petitioner Arthur Lee Burton is a man with intellectual disability who is scheduled to be executed by the State of Texas on August 7, 2024, at 6:00 p.m. If the Texas Court of Criminal Appeals' decision below stands, Mr. Burton will be executed despite the strong evidence that he is intellectually disabled.

In a subsequent writ of habeas corpus filed on July 30, 2024, Mr. Burton proffered recently-developed evidence of his intellectual disability, including the expert report of a qualified clinical psychologist, Dr. Jonathan DeRight, who opined that Mr. Burton meets the diagnostic criteria for mild intellectual disability pursuant to the current clinical standards in the DSM V, DSM-V-TR and AAIDD-12. Dr. DeRight's opinion was based on the following evidence submitted along with Mr. Burton's subsequent writ of habeas corpus: (1) full-scale IQ scores obtained by Mr. Burton, including Mr. Burton's WAIS-IV score of 77 – which, when taking into account the outdated norms for the WAIS-IV, which will be replaced next month with the WAIS-V, is numerically adjusted to 71.5 – and a prior WAIS-R score; (2) a full battery of neuropsychological testing; (3) school records; (4) a Vineland 3 Comprehensive interview administered to Mr. Burton's mother; and (5) the

declarations of seven individuals who either knew Mr. Burton during the developmental period or are knowledgeable regarding Mr. Burton's performance in school. This un rebutted evidence establishes that Mr. Burton has, for his entire life, exhibited deficits in intellectual functioning and in all three adaptive domains.

**B. The TCCA's Dismissal of Mr. Burton's Subsequent Petition for Writ of Habeas Corpus Was a Merits Decision that Does Not Apply Current Diagnostic Criteria**

Mr. Burton was sentenced to death first in 1998 and then on September 6, 2002, and his most recent habeas application was filed on December 1, 2003. Since that time, this Court's rulings in *Moore v. Texas*, 581 U.S. 1 (2017) ("*Moore I*") and *Moore v. Texas*, 586 U.S. 133 (2019) ("*Moore II*") overruled a long line of TCCA precedent that imposed court-created rules in intellectual disability claims laid out in *Ex parte Briseno*, 135 S.W.3d, 1, 8-9 (Tex. Crim. App. 2004). In addition, since Mr. Burton's last application, the TCCA has recognized the Flynn Effect, which accounts for over-inflation of scores on tests with out-of-date norms. " See *Petetan v. State*, 622 S.W.3d 321, 338 n. 115 (Tex. Crim. App. 2021). As a result of these developments, Mr. Burton has a newly available legal basis for an *Atkins* claim under Texas law. See *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007) (authorizing a claim under § 5(a)(1) when a "subsequent writ is based on binding and directly relevant United States Supreme Court precedent decided after applicant had exhausted [his] claim at trial and on direct appeal and after applicant had filed his first state habeas application").

Mr. Burton pled that he satisfied two of the exceptions to Texas’s abuse-of-the-writ rule by showing that: (1) his *Atkins* claim was not “and could not have been presented previously in a timely initial application or in a previously considered application ... because the ... legal basis for the claim was unavailable on the date the applicant filed the previous application”; or, (2) “by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues.” Tex. Code Crim. Proc. art. 11.071 § 5(a)(1); § 5(a)(3). Although Mr. Burton clearly meets the § 5(a)(1) standard, the TCCA nonetheless dismissed the application “as an abuse of the writ.” App. 1 at 3. In so doing, the TCCA did *not* state that its dismissal of Mr. Burton’s claims was “without considering the merits,” its standard language for procedural dismissals, thus further indicating that the court assessed the merits of the federal constitutional claim.

This Court’s intervention is urgently needed to prevent the imminent execution of Mr. Burton, who the unrebutted evidence strongly indicates is intellectually disabled and therefore categorically exempt from the death penalty. While considering Mr. Burton’s application, a plurality of the TCCA published a four-judge concurrence to an unpublished order denying *Atkins* relief in another case, making plain that the current clinical standards for assessing intellectual disability are not the touchstone for assessing which intellectually disabled death-sentenced prisoners are constitutionally exempt from execution in Texas, in direct contravention of this Court’s precedent. *Ex parte Milam*, \_\_\_ S.W.3d \_\_\_, 2024 WL

3587974, at \*1 (Tex. Crim. App. July 31, 2024) (Keller, P.J., concurring, joined by Year, Keel, Slaughter, JJ.). The TCCA’s summary dismissal—despite Mr. Burton unambiguously meeting the § 5(a)(1) standard—demonstrates that the TCCA is not following this Court’s guidance in *Moore I* and *Moore II*, and this Court should grant a stay of execution, grant a writ of certiorari, vacate the lower Court’s decision, and direct the TCCA to adhere to this Court’s precedents. Without intervention, Mr. Burton will be executed despite his pending petition for certiorari, and despite his intellectual disability and constitutional ineligibility for the death penalty, due to the TCCA’s disregard of this Court’s guidance in *Moore I* and *Moore II*.

## II. Conclusion

This Court should stay Mr. Burton’s execution, grant his petition for a writ of certiorari, and remand this case to the TCCA to address the merits of his Eighth Amendment intellectual disability claim.

Dated: August 3, 2024

By /s/ Steven J. Wells  
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