Nos. 15-8589, 15A964

IN THE

# Supreme Court of the United States

ADAM KELLY WARD,
*Petitioner,*
v.

STATE OF TEXAS,
*Respondent.*

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

## PROOF OF SERVICE

I hereby certify that on the 17th day of March, 2016, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari and Application for a Stay of Execution** was sent by mail and electronic mail to: David R. Dow, 100 Law Center, Houston, Texas 77204-6060, ddow@central.uh.edu. All parties required to be served have been served. I am a member of the Bar of this Court.

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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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**Capital Case**

## QUESTION PRESENTED

Petitioner Adam Kelly Ward was found guilty and sentenced to death in 2007 for his killing of City of Commerce Code Enforcement Officer Michael Walker. During his initial federal habeas corpus proceedings in 2011, Ward raised a claim that his death sentence violates the Eighth Amendment because he suffers from a severe mental illness and evolving standards of decency dictate that the execution of the severely mentally ill constitutes cruel and unusual punishment. The claim was rejected by the district court, Fifth Circuit, and this Court. Eighteen days before his scheduled execution, Ward filed a subsequent state habeas application raising the very same claim. The Texas Court of Criminal Appeals (CCA) dismissed the application as an abuse of the writ without considering the merits of Ward's claim.

Nothing has changed since the time Ward first raised his Eighth Amendment claim. The claim was and is entirely without merit, Ward alleges no new evidence, and the claim is now procedurally defaulted.

These facts raise the following question:

> Should the Court grant certiorari to review Ward's claim that the execution of the severely mentally ill violates the Eighth Amendment where the state court dismissed the claim on procedural grounds without considering its merits and where no jurisdiction or legislature in the country prohibits the execution of the severely mentally ill?[1]

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[1] Ward lists as a second question, "[h]ave society's standards of decency evolved to the point that the death penalty now violates the Eighth Amendment?" Pet. Cert.

## BRIEF IN OPPOSITION

Petitioner Adam Kelly Ward was convicted and sentenced to death in 2007 for his murder of City of Commerce Code Enforcement Officer Michael Walker. He is scheduled to be executed **after 6:00 p.m. (Central Time) on Tuesday, March 22, 2016**. Ward has unsuccessfully challenged his conviction and death sentence in both state and federal court. During his initial federal habeas proceedings, Ward raised a claim that his death sentence violated the Eighth Amendment because he is severely mentally ill and the execution of the severely mentally ill constitutes cruel and unusual punishment. The claim was denied. *Ward v. Stephens*, 777 F.3d 250, 269 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 86 (Oct. 5, 2015). Ward recently filed a subsequent state application for a writ of habeas corpus in which he raised the claim presented in the instant petition. The state court dismissed the application as an abuse of the writ without considering the merits of Ward's claim. *Ex parte Ward*, No. 70,651-03 (Tex. Crim. App. 2016) (unpublished order).

Ward now seeks review in this Court, six days before his scheduled execution, of the state court's dismissal of his subsequent state habeas

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at i. Ward does not, however, brief such an argument at all. Consequently, any such claim is forfeited. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2254-55 (2014). The undersigned notes that Ward also did not raise the claim in the court below. *Ex parte Ward*, No. 70,651-03 (Tex. Crim. App. 2016) (Alcala, J., concurring) (designated for publication) ("[Ward] has not presented any complaint that the death penalty as a whole violates the Eighth and Fourteenth Amendments to the United States Constitution.").

application. *See generally*, Pet. Cert. He argues that he is severely mentally ill and that evolving standards of decency dictate that the execution of the severely mentally ill constitutes cruel and unusual punishment. *Id.* Ward is not entitled to relief.

The state court's dismissal of Ward's subsequent state habeas application rested on an adequate and independent procedural bar. His attempt to avoid the consequences of his procedural default of his Eighth Amendment claim are of no avail. The claim presents nothing with respect to the landscape of the imposition of the death penalty that has changed since the time he first raised the claim in 2011 that shows that the execution of the severely mentally ill is now unconstitutional. Further, his assertion that he is actually innocent of the death penalty relies critically on the merits of his own Eighth Amendment claim, the merits of which have never been recognized in any court in the country. Finally, his claim is plainly without merit. The Court should, therefore, deny Ward's petition for a writ of certiorari.

## STATEMENT OF JURISDICTION

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

## STATEMENT OF THE CASE

### I. Facts of the Crime

The Court of Appeals for the Fifth Circuit summarized the evidence supporting Ward's capital murder conviction:

> Ward was convicted of capital murder for an incident involving a code citation for unsheltered storage that went tragically and horribly wrong. Ward was living with his father Ralph at the time. Ward had an unusually close relationship with his father, and, according to expert trial testimony, they suffered from similar shared delusions. They apparently believed that there was a conspiracy among the governing bodies in the City of Commerce against their family, and that the "Illuminati," an apocryphal secret society of enlightened individuals, essentially controlled the majority of government. The record indicates that the Ward family hoarded rubbish inside and outside their home, together with an arsenal of guns and ammunition.
>
> The Ward family was cited numerous times for failing to comply with the City of Commerce's housing and zoning codes. Michael Walker, a City of Commerce Code Enforcement Officer, went to the Ward home to record a continuing violation for unsheltered storage on June 13, 2005. Wearing his City of Commerce work shirt and driving a marked truck, Walker approached the residence unarmed and carrying only his digital camera. When Walker arrived, Ward was washing his car in the driveway.
>
> After Walker walked the perimeter of the property taking pictures, Walker and Ward began to argue. Ward's father came outside and attempted to calm the men down. Ward then sprayed Walker with water from the hose that he was using to wash his car. Walker then used his cell phone to call his office to request officer assistance. When Ward's father noticed that Ward was no longer outside, he advised Walker that it might be "best if he left the property." Ward's father then ran to look for Ward, believing that Ward kept a gun in his room. Ward's father did not warn Walker about this. Walker remained near the property waiting in the back of his truck for officer assistance to arrive.

> Before Ward's father could intervene, Ward ran out of the house toward Walker and fired a .45 caliber pistol at him. Despite Walker's attempts to escape, Ward shot Walker several times. After Walker fell, Ward shot him again at close range. Walker sustained nine gunshot wounds in total and died.
>
> Ward confessed to killing Walker shortly thereafter, explaining that he believed "the City" was after his family. He believed that Walker and the former Code Enforcement Director had threatened to tear down the family home. He claimed that he feared for his life because Walker had "threatened to call the cops," and to believe that, if the cops showed up to arrest him, he would probably end up dead. Ward believed this because he claimed to have been beaten up by the local police previously—though, there was no evidence to substantiate this claim.

*Ward v. Stephens*, 777 F.3d at 253-54.

## II. The State's Punishment Case

The State introduced during the punishment phase of Ward's trial evidence showing that Ward constituted a future danger. That evidence included the brutal, deliberate, and callous nature of the capital murder. In retaliation for, and in obstruction of, Mr. Walker's enforcing city codes, Ward went into his house and retrieved a gun and two loaded magazines when Mr. Walker began taking pictures of Ward's residence and called for dispatch to assist him. 37 RR 19-20; 38 RR 59, 69; 39 RR 26, 52-56.[2] Ward chased and shot

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[2] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SX" and "DX" refer to the State's exhibits and the defense's exhibits,

Mr. Walker, emptying the first magazine. 36 RR 60-62, 173, 185-86. The last shots were fired while Ward stood over Mr. Walker lying on the ground. *Id.* at 85, 178. Ward bent down, grabbed Mr. Walker by the shirt, and told Mr. Walker "you won't be taking no more pictures." *Id.* at 86. He attempted to reload the weapon before being stopped by his father. *Id.* at 65.

Additionally, evidence showed that Ward had a high I.Q., measured to be as high as 123. 21 RR 116; 42 RR 114, 162; 43 RR 74. At the time of the crime, Ward had graduated from high school and taken college courses. 42 RR 14; 43 RR 115, 155. Ward came very near to achieving the level of Eagle Scout when he was thirteen years old. 42 RR 130; 43 RR 168. But Ward also exhibited violent behavior throughout his life. While on a hike during Boy Scout camp, Ward pushed a boy down and cut another with a buck knife. 43 RR 6-7. John Llamas testified regarding an incident where Ward stabbed him in the leg in the bathroom of their high school. 41 RR 34-36. Ward threatened to kill Llamas if he told anyone. *Id.* Several police officers testified regarding an incident in which Ward had threatened a neighbor with either a knife or pruning shears and then assaulted officers when they attempted to search him. 41 RR 76-81, 88; 43 RR 84-85, 87, 91-92. The State also introduced testimony showing Ward's disrespectful, aggressive, and violent behavior he exhibited while in

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respectively, admitted during the trial. "PX" refers to the exhibits submitted by Ward along with his petition for a writ of certiorari.

jail. 41 RR 12, 26-27, 55, 57-60, 66-67, 71. Jail officials testified that Ward had hidden razor blades in his cell inside his Bible. 41 RR 47-48.

## III. Ward's Mitigation Case

The Fifth Circuit detailed Ward's trial counsel and state habeas counsels' mitigation investigations and presentations:

> Ward's history of mental illness was a central issue throughout his criminal trial and appeal. On state habeas review, Ward challenged his trial counsel's mitigation investigation. Ultimately, the CCA rejected this claim and held that Ward's counsel was not unconstitutionally deficient.
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> . . .
>
> Initially, defense counsel challenged Ward's competency to stand trial. The testimony and expert reports from the competency proceedings pertain to the state habeas court's assessment of trial counsel's mental-health investigation. Defense psychiatrist Dr. Heidi Vermette and psychologist Dr. Kristi Compton reviewed Ward's medical, school, and prison records; evaluated Ward; and interviewed his parents. They testified that Ward first exhibited behavioral problems, specifically uncontrollable rage, beginning at age three. He was admitted to the Children's Medical Center in Dallas, where doctors diagnosed him with bipolar disorder at age four. Dr. Vermette and Dr. Compton described the myriad medications prescribed including Depakote, lithium, Haldal, Ritalin, Elavil, Thorazine, Respiradol, and Dicertarin) and the numerous diagnoses (including bipolar disorder, personality disorder, schizoaffective disorder, depression, and oppositional-defiant disorder). They also noted that Ward's intelligence was above average and that he had dyslexia. The court found Ward competent to stand trial.
>
> Counsel's strategy at the guilt phase was to argue that Ward's childhood and family caused a delusional mental state toward the City of Commerce that precluded the required intent for capital murder—retaliation. Dr. Vermette testified to this effect and

stated that, in her opinion, Ward's symptoms are consistent with a "psychotic disorder" and that he has "paranoid delusions." This conclusion was supported by Ward's father's testimony about, and records of, the city-code violations at the Ward home dating back to 1993—including photographs of the Ward home and references to illegal rubbish and to the demolition of the home. The jury considered this evidence and found Ward guilty of capital murder.

At the penalty phase, defense counsel emphasized that Ward was mentally ill from an extremely young age and that his parents exacerbated his illness and did not follow up on needed therapy. The defense introduced school and medical records and testimony indicating that Ward was aggressive in elementary school toward his fellow students, had difficulty forming friendships, and was unable to feel empathy. By sixth grade, Ward was diagnosed with depressive disorder and a personality disorder "with narcissistic features." Although doctors repeatedly recommended that Ward's parents seek individual and family therapy, they did not do so.

Ward's parents believed Ward was not getting appropriate school services because of school officials' vendetta against the family. For their part, health examiners believed that his parents' derogatory statements toward the school contributed to Ward's disrespect for school authorities. By eighth grade, Ward used vulgar language with teachers and peers, arrived to class late and left early, and, when his behavior was out of control, it took three male staff members to restrain him. At this time, Dr. Douglas Keene observed Ward to be "frankly psychotic." In ninth grade, Ward's aggression escalated when he fought one of his teachers. In eleventh grade, he was accused of stabbing another student in the leg. After this incident, he was homeschooled until graduation. At age eighteen, he was charged with assault on a public servant and resisting arrest. By this time, experts testified that Ward had been diagnosed with bipolar disorder, depression, learning disorder, and attention deficit hyperactivity disorder, and he was taking Depakote and lithium.

Ward briefly attended college but dropped out, citing disagreements with instructors whom he described as deceitful and political. When he was twenty-one, Ward's father hit him in

the head with the butt of a revolver to keep him from going next door and killing his neighbors, giving Ward a mild concussion.

In his federal habeas petition, Ward primarily challenge[d] counsel's effectiveness by attacking the diagnoses of Dr. Compton, Dr. Vermette, and Dr. Randall Price. Ward contends these diagnoses were inaccurate and based on counsel's insufficient investigation, which prejudiced his defense.

Dr. Compton testified at trial that her primary diagnosis was that Ward had shared psychotic disorder. As discussed above, Ward had an unusually close relationship with his father. Dr. Compton believed that Ward and his father suffered from similar delusions that there was a conspiracy in the town against the family that included the school district, government, and court system. Dr. Compton testified that Ward's father possessed delusional, odd beliefs that he imposed on his son. She also diagnosed Ward with delusional disorder (persecutory type), bipolar disorder by history, learning disorder, and personality disorder with "strong signs of narcissistic, obsessive compulsive, and antisocial features."

Dr. Vermette relied on a competency evaluation by Dr. Michael Pittman (the trial court's expert), who diagnosed Ward with bipolar disorder and a personality disorder with "paranoid, antisocial, and narcissistic traits." Dr. Vermette also relied on a 2007 neuropsychological evaluation by Dr. Price, another defense expert, that found Ward's clinical picture consistent with "delusional disorder, bipolar mood disorder, obsessive-compulsive and narcissistic personality traits, severe learning disabilities, and antisocial behaviors." Dr. Price also believed that Ward and his father suffered from similar delusions that constituted "a shared delusional type psychosis."

The jury also heard testimony from Ward's special-education teachers and service providers detailing the Ward family's opposition to various mental-health interventions. The director of the agency that delivered special-education services to Ward's school district testified that Ward was labeled seriously emotionally disturbed. The agency brought in behavioral consultants from a university and developed a behavioral-management program for Ward that his parents rejected. Ward's

special-education teacher for kindergarten through first grade brought a box of records to court that she had kept for fifteen years out of fear that Ward's parents would sue her—Ward's father had apparently threatened her more than once. She testified that Ward would attack her, and he choked, bit, hit, and kicked other children every week. Her records contained a 1992 report by a psychologist that said Ward's parents noticed a problem in their son when he was between eighteen and twenty-four months of age. A diagnostician with the special-education-service agency testified that Ward's father was confrontational and difficult to work with. She testified about an incident when, after Ward had hurt a teacher, Ward's father showed up at her office and threatened her because he did not want his son punished. She explained that the Wards regularly declined extended-year services from the school district, and that Ward's father often threatened her job and threatened to sue the school district. The school district feared litigation so much so that it instructed her to take a lawyer with her to every meeting with the Wards. She summarized that the Wards opposed their son's special education, and that Ward used this to manipulate school personnel by threatening to call his parents.

Ward's defense counsel also presented testimony further illustrating the background, behavior, and personality of Adam Ward's father, Ralph. Ralph Ward testified about his education, which included a master's degree in manufacturing engineering technology and a doctor of education degree. At the time of Adam Ward's trial, Ralph Ward was unemployed and had been "for some time." He believed he had sacrificed his professional aspirations, education, and degrees to stay at home to protect his son from society and society from his son. He confirmed his interest in the "Illuminati" and his belief that the city singled out and picked on his home[.] Specifically, he believed that the head of code enforcement was connected with the city council, which was connected with the school district, and the school district was "scared to death" of a lawsuit he had threatened to file.[3]

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3 Ward's mother and father, Nancy and Ralph Ward, testified that their family hoarded many items that filled several rooms in their house to the extent that they could not move freely throughout their house. 42 RR 19-21; 43 RR 128-29. The family did not have a social life, nor did the family have much money. 42 RR 29-30; 43 RR

The mother of one of Ward's former youth-baseball teammates also testified about a memorable incident involving Ralph and Adam Ward. She recalled an occasion when, after a young Adam Ward was upset about losing a baseball game, Ralph Ward abruptly brought his son to the ground and held him down for about five minutes.

Two Commerce police officers testified about another incident in 2006 (after the murder but before the trial), when they were dispatched to the Wards' street to stand by while a city worker read meters. They testified that Ralph Ward backed his car out of his driveway, and, when he drove past the city crew working on a sewer line across the street, he extended his hand out of the window in a gun-shaped gesture and simulated firing it at the city workers.

Adam Ward also testified against his attorney's advice during the penalty phase. Ward said he believed the school board wanted retribution against his parents and summarized: "[t]he superintendent runs the school board. The school board runs city council. The city council runs everybody else." He claimed other families had been conspired against, but most had the sense to get out of town and "scatter to the wind," though he could not think of specific examples.

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120. Ralph stopped working so he could stay home to raise Ward and "protect him from society." 42 RR 33; 43 RR 118-20. Ralph owned a dozen or more guns, produced his own ammunition, was often unemployed, and was very controlling. 42 RR 20-29; 43 RR 118-20, 125-26, 173. He would extensively chastise Nancy for having her hair cut. 42 RR 27-29. He was mentally and physically abusive toward her. 42 RR 30-32; 43 RR 159-60. The abuse included choking and hitting her, which sometimes occurred in Ward's presence. *Id.* Nancy said that Ward spoke to her in the same disrespectful manner that Ralph did. 42 RR 112-13.

Nancy and Ralph also testified as to Ward's history of mental illness and their efforts at obtaining treatment for him. *Id.* at 35-65, 85. They testified that they rarely followed the recommendations of doctors that they attend therapy, even though they were told that their going to therapy was crucial. *Id.*; 43 RR 110-11, 113-14. Their failure to obtain therapy was caused, at least in part, by Ralph's belief that it was too intrusive on their personal life. 42 RR 85.

The defense's expert forensic psychologist, Dr. Price, testified at the penalty phase about his neuropsychological evaluation of Ward. Dr. Price explained that Ward exhibited paranoia during his evaluation interview: "He was very paranoid, thought the system and everybody was against him and he was not responsible for any of his problems." Dr. Price testified that Ward "thought everybody in the system, that the Commerce Schools . . ., all of the police in Commerce, all authorities were somehow conspiring against him and his family to get them, to catch them, to persecute them." Dr. Price characterized Ward as delusional, but noted that his delusions were "moderate" and "very fixed," explaining: "I've seen worse. I've seen a lot more—more—more—more severe and pervasive delusional thinking but he's—he's quite delusional and . . . narcissistic." Dr. Price also observed that Ward's "elevated sense of mood" during his interview "were all consistent with a bi-polar kind of disorder in a manic phase." On cross-examination, Dr. Price acknowledged that there is no treatment effective in reversing the trends of an antisocial personality disorder, though he noted on redirect that people can age out of antisocial personality tendencies in a structured environment (such as prison), particularly after they reach age forty.

After considering extensive mitigation evidence during the penalty phase, the jury sentenced Ward to death. In total, the trial court allocated more than $136,000 for Ward's counsel to retain various experts to testify during the competency, guilt, and penalty phases of the trial including: a psychologist, a psychiatrist, a neuro-psychologist, a fact investigator, and a mitigation specialist.

During closing argument in the penalty phase, defense counsel focused his argument on Ward's mental illness. Defense counsel noted that Ward has been mentally ill since the age of two and that multiple evaluations over the years correctly predicted he would end up in a courtroom. Counsel discussed Ward's childhood and family life, and observed that Ward has not received proper mental-health treatment. Counsel noted that the Wards had been continually told by medical professionals to "get him some help" and to get "family counseling," but they did not do so. Counsel stressed that, if given a life sentence, Ward would have proper "continuing mental health treatment which he's never had before."

Counsel also underscored Dr. Price's testimony that antisocial personality disorders "burn out after about 20 years."

. . .

Ward's state habeas application challenged trial counsel's mitigation investigation and argued that these deficiencies led to the inaccurate diagnosis of "Shared Delusional Disorder." The habeas mitigation specialist interviewed Ward, his parents, and nineteen other people, and reviewed relevant records including the notes and reports of a mitigation investigator and consulting psychologists.

The state habeas IA[T]C claim also relied on the following new evidence from witnesses who ostensibly could have testified as mitigation witnesses during the penalty phase of Ward's trial:

- An affidavit from university psychologist Steven Ball regarding his desire to testify at the trial about his "long-standing professional understanding" of Ward.
- Affidavits from Commerce residents Judy and Michael Fane who said that Code Officer Walker had been hostile and inappropriate about city-code issues several days before his death.
- An affidavit from a secretary at Ward's middle school who felt sorry for Ward as a boy, felt that the school's disciplinary methods were somewhat barbaric, and was upset by Ward's trial and sentence.
- An affidavit from Charles Sleeman, a fellow Boy Scout who considered Ward to be his best friend and said Ward was bullied by students and picked on by teachers his whole life, but had a strong spirit and stood up for others.
- An interview with Leon and Loretta Harrison, neighbors of the Wards, who treated Ward as their adopted son. Leon acted as Ward's spiritual advisor and had been approached to testify on Ward's behalf but did not do so and later regretted it.

*Ward v. Stephens*, 777 F.3d at 259-63 (footnote added).

## IV. Trial, Direct Appeal, and Postconviction Proceedings

Ward was convicted and sentenced to death for the murder of Michael Walker, a City of Commerce Code Enforcement Officer. 1 CR 27-28, 3638-40; 40 RR 36; 46 RR 49. The CCA upheld Ward's conviction and death sentence on direct appeal. *Ward v. State*, No. 75,750 (Tex. Crim. App. 2010) (unpublished opinion). The CCA denied Ward's state habeas application based on the trial court's findings of fact and conclusions of law, rejecting some of the trial court's findings and conclusions. *Ex parte Ward*, No. 70,651-02 (Tex. Crim. App. 2010) (unpublished order); SHCR-02 at 86-94.[4]

Ward then filed his amended federal habeas petition. *Ward v. Stephens*, Civ. Act. No. 3:10-CV-2101 (N.D. Tex. 2014). The district court denied habeas corpus relief and denied a COA. *Id.* Ward appealed the district court's denial of relief to the Fifth Circuit, which also denied habeas relief. *Ward v. Stephens*, 777 F.3d at 269. Ward then filed in this Court a petition for a writ of certiorari, which was denied. *Ward v. State*, 136 S. Ct. 86 (2015). The state trial court then scheduled Ward's execution date as March 22, 2016.

Ward filed on March 4, 2016, a subsequent state habeas application. *Ex parte Ward*, No. 70,651-03 (Tex. Crim. App. 2016) (unpublished order). The

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[4] "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Ward*, No. 70,651-03. Ward's state court proceedings under cause number 70,651-01 pertain to a writ of mandamus that was filed pursuant to his direct appeal.

CCA dismissed the subsequent application on March 14, 2016. *Id.* Ward then filed a petition for a writ of certiorari.[5] The instant Brief in Opposition follows.

## ARGUMENT

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

Ward's petition implicates nothing more than the state court's proper application of state procedural rules for collateral review of death sentences. The state court's disposition, which relied upon an adequate and independent state procedural ground, forecloses certiorari review. *Walker v. Martin*, 562 U.S. 307, 315-16 (2011); *Long*, 463 U.S. at 1041-42. Specifically, when Ward filed a subsequent state habeas application raising the claim presented in the instant petition, he was cited for abuse of the writ. *Ex parte Ward*, No. 70,651-03 (unpublished order) (citing Tex. Code Crim. Proc. art. 11.071, § 5 (West 2016)). The CCA dismissed the subsequent state habeas application "without considering the merits of the claim." *Id.* Nonetheless, Ward argues that the state court's dismissal of his subsequent application involved a merits determination of his claims. Pet. Cert. at 1-3. He is mistaken.

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[5] Ward contemporaneously filed a petition for an original writ of habeas corpus. *In re Ward*, Nos. 15-8590, 15A965.

### A. The CCA's dismissal of Ward's subsequent state habeas application relied upon an adequate and independent state procedural bar.

The state court's dismissal of Ward's subsequent state application creates an adequate and independent procedural bar. *See Balentine v. Thaler*, 626 F.3d 842, 854-57 (5th Cir. 2010); *Rocha v. Thaler*, 626 F.3d 815, 838 (5th Cir. 2010) (holding that the CCA's dismissal of claim does not constitute a merits determination and stating that, "absent an express indication otherwise, the CCA assesses the merits of a successive state habeas application only if it first concludes that the factual or legal basis for the claim was unavailable"); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("The [CCA] did not need to consider or decide the merits of Hughes's constitutional claims in reaching its decision to dismiss those claims as an abuse of the writ pursuant to Article 11.071, [§] 5."). The state court explicitly declined to address the merits of Ward's claim. The claim is, therefore, procedurally barred in this Court.

Ward cites to *Ex parte Blue* to argue that the state court's dismissal involved a merits determination of his Eighth Amendment claim. Pet. Cert. at 1-3 (citing *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007)). That case is inapposite. The habeas applicant in *Ex parte Blue* claimed that he was intellectually disabled and, therefore, ineligible under *Atkins v. Virginia*, 536 U.S. 304 (2002), for execution. *See Balentine*, 626 F.3d at 856. The CCA held

in *Ex parte Blue* that "a state habeas applicant alleging [intellectual disability] for the first time in a subsequent writ application will be allowed to proceed to the merits of his application under the terms of Section 5(a)(3)"[6] if he presents clear and convincing evidence showing no rational factfinder would fail to find that he is intellectually disabled. 230 S.W.3d at 162. The holding was, of course, based on this Court's holding in *Atkins*.

Ward claims that the *Atkins* holding extends to prohibit the execution of the severely mentally ill. *See generally* Pet. Cert. He attempts to bootstrap his defaulted claim in order to avoid the consequences of his default of that claim by arguing the merits of the claim. His argument is circular. This Court has never held that the execution of the severely mentally ill is unconstitutional. Consequently, Ward's reliance on *Ex parte Blue* is entirely misplaced because, unlike the petitioner in *Ex parte Blue*, Ward is absolutely unable to demonstrate the merit of his underlying constitutional claim. Additionally, the CCA has never applied the rationale of *Ex parte Blue* to a claim that a petitioner is ineligible for execution due to a severe mental illness.

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[6] Texas Code of Criminal Procedure Article 11.071 § 5(a)(3) provides that a court may not consider the merits of a claim presented in a subsequent habeas application unless the applicant shows by clear and convincing evidence that, "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 that were submitted to the jury in the applicant's trial."

Ward's attempt to avoid his procedural default of his Eighth Amendment claim presupposes the existence of a holding of this Court that prohibits the execution of the mentally ill. No such holding exists, nor has any other court made such a holding. Consequently, Ward necessarily could not meet the standard of Tex. Crim. Proc. Art. 11.071 § 5(a)(3) because no constitutional violation occurred at Ward's trial. Unlike a petitioner claiming intellectual disability, Ward is unable to rely on any constitutional rule that prohibits his execution. Therefore, he cannot avoid his procedural default by showing that he is "actually innocent of the death penalty." Certiorari review should, therefore, be denied.

Further, Ward's assertion that "there is no difference between a § 5(a)(3) disposition of an *Atkins* claim and a § 5(a)(3) disposition of the claim here" is plainly incorrect. Again, the difference is that there is an available constitutional claim underlying an *Atkins* claim whereby a habeas applicant might show that he is "actually innocent of the death penalty." In this case, no such constitutional claim is available.

Moreover, Ward's reliance on the concurring opinions in the court below is misplaced. Pet. Cert. at 2-3. Ward asserts that Judge Alcala's concurring opinion shows that the CCA must have considered the merits of Ward's constitutional claim. Pet. Cert. at 2. Not so. Indeed, Judge Alcala stated that because she "[found] against" Ward on the issue of whether his claim could be

properly raised in a subsequent application, she did not reach the merits of the claim. *Ex parte Ward*, No. 70,651-03, at *1-2 (Tex. Crim. App. Mar. 14, 2016) (Alcala, J., concurring); *id.* at *9 ("[B]efore this Court may consider the merits of [Ward's] contentions . . . , [Ward] must show that his complaint is not subject to procedural default. Here, [Ward] has failed to do so.") (internal citation omitted). Similarly, Judge Newell stated explicitly in his concurring opinion that Ward's Eighth Amendment claim was procedurally defaulted and did not meet the standard of § 5(a)(3). *Ex parte Ward*, No. 70,651-03, at *1-3 (Tex. Crim. App. Mar. 14, 2016) (Newell, J., concurring). Ward's claim is foreclosed by an adequate and independent state procedural bar and certiorari review is unwarranted.

### B. Ward's claim was previously available at the time he filed his initial state habeas application.

Ward argued in the court below that his Eighth Amendment claim was "unavailable" to him at the time he filed his initial state habeas application in December 2009 because "the circumstances used to define the contours of the Eighth Amendment have evolved such that the factual and legal bases of the claim did not exist at the time of Mr. Ward's initial application." *Ex parte Ward*, No. 70,651-03 (citing Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1)).[7] He argued

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[7] Texas Code of Criminal Procedure Article 11.071 § 5(a)(1) provides that a court may not consider the merits of a claim presented in a subsequent habeas application unless the claim has not and could not have been presented previously because the

that the previous unavailability of the claim permitted the CCA to review the claim's merits in his subsequent application. Although Ward does not argue in the instant petition that his claim met the standard of § 5(a)(1), it should be noted that his failure to meet the standard provided an additional adequate and independent state-law basis on which the CCA dismissed his subsequent application.

It must be noted again that Ward raised the very claim he now pursues when he filed in October 2011 his federal habeas petition.[8] *Ward v. Thaler*, No. 3:10-CV-2101 (N.D. Tex.). And Ward cites to no pertinent development in the law since the time he filed his initial state habeas application regarding the constitutionality of imposing capital punishment on the severely mentally ill. He cites to no court that has held that the Eighth Amendment prohibits the execution of the severely mentally ill, nor does he cite to any state that

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factual or legal basis for the claim was unavailable when the applicant filed the previous application.

[8] The only relevant time period over which Ward could argue an "evolution of the standards of decency" occurred is, therefore, from December 2009 thru October 2011. Because he argues that his Eighth Amendment claim was unavailable at the time he filed his initial state habeas application because standards of decency had not evolved at that point, it would strain credulity to suggest that his Eighth Amendment claim was unavailable to him even when he raised the very claim in 2011 and pursued the claim for the next four years as a part of his federal habeas proceedings.

currently prohibits the execution of the severely mentally ill.[9] Further, he cites to no other pertinent "trend" that has developed since the time he filed his initial state habeas application that supports the categorical constitutional prohibition he now seeks.

Importantly, Ward's history of mental illness was a "central issue" throughout Ward's trial and initial habeas proceedings. *Ward v. Stephens*, 777 F.3d at 259. Ward alleges no new facts or evidence that were not and could not have been presented earlier. Indeed, all of Ward's exhibits, PX A-X, were previously submitted at his trial or during the initial habeas proceedings. Ward's claim is, therefore barred by an adequate and independent state bar and certiorari review should be denied.

## II. Ward's Eighth Amendment Claim is Barred by Principles of Non-Retroactivity and Is Entirely Unsupported by Precedent.

Ward argues that the Court's holding in *Atkins v. Virginia* should be extended to create a categorical exemption from execution for capital

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[9] Connecticut previously implemented legislation prohibiting the execution of a mentally ill capital offender. *See Comonwealth v. Baumhammers*, 960 A.2d 59, 105 n.4 (Pa. 2008) (Todd, J., concurring). That legislation prohibited the execution of an offender whose "mental capacity was significantly impaired" or "ability to conform [his] conduct to the requirements of the law was significantly impaired but not so impaired . . . as to constitute a defense to prosecution." Conn. Gen. Stat. Ann. § 53a-46a(h) (2012). Connecticut subsequently repealed the death penalty in 2012. *See State v. Roszkowski*, 2013 WL 5614585, at *7 (Conn. Super. Ct. 2013). Critically, Connecticut's legislation prohibiting the execution of the mentally ill was implemented as early as 2008 prior to the date Ward filed his initial state habeas application.

murderers who suffer from a severe mental illness because the execution of such individuals violates the Eighth Amendment's prohibition of cruel and unusual punishment. *See generally* Pet. Cert. Ward's petition does not present a compelling reason justifying the Court's exercise of certiorari review because, in addition to being procedurally barred, his claim is barred by principles of non-retroactivity and is entirely unsupported. Therefore, the Court should decline certiorari review.

### A. Ward's claim is barred by principles of non-retroactivity.

Ward seeks to create a categorical exemption from execution for the mentally ill because, he argues, there is no meaningful difference in terms of moral culpability between a mentally ill and an intellectually disabled person. Pet. Cert. at 29-38. To this extent, Ward seeks the creation of a new constitutional rule on habeas review and, consequently, he cannot obtain relief because *Teague v. Lane*, 489 U.S. 288 (1989), prohibits the retroactive application of such rules.

When Ward's conviction became final this Court had not categorically restricted the states' ability to execute the mentally ill, and it has never done so. Indeed, mental illness affects the states' ability to execute an inmate only if such illness distorts the inmate's ability to comprehend that he has an impending execution, the reason for his execution, and a rational connection between the two. *See Panetti v. Quarterman*, 551 U.S. 930, 958–60 (2007).

Conversely, a mental illness which does not implicate such concerns does not pose a barrier to execution.

The term "severe mental illness" is broad and can encompass a host of diagnoses, including psychotic disorders explained by organic defects to personality disorders with no known etiology. This Court's description of those who may be executed despite an irrational refusal to accept responsibility, for example, fits the latter "mental illness." *See id.* at 959–60 ("Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality."). Given the breadth of the term "severe mental illness" that Ward uses, almost anyone could escape a penalty of death for something as seemingly common as depression.

Ward has not provided this Court with any support to categorically exempt such a wide swath of persons from the death penalty, and he has not provided this Court with a workable solution for where to draw the line for such a broad term as "severe mental illness" as it relates to the death penalty. Nor does Ward attempt to cabin the expansive rule he seeks. In light of the absence of *any* meaningful limitation of even the particular mental illnesses that would exempt an individual from execution, Ward's request to impose a blanket and categorical prohibition on the execution of individuals with a

mental illness is entirely overbroad. Ward's request would grant a categorical exemption from capital punishment to individuals who suffer a severe mental illness even where the illness has little or no relation to his or her moral culpability, and where it could not be said that the penological justifications for capital punishment are not served. Indeed, it is altogether possible that the prohibition Ward seeks could exempt defendants with anti-social personality disorder from capital punishment. 44 RR 197-98 (testimony of Ward's expert forensic psychologist that Ward's antisocial personality disorder meant that Ward was narcissistic, believed that rules did not apply to him, and lacked empathy and a conscience); *cf. Kansas v. Crane*, 534 U.S. 407, 412 (2002) (noting that 40-60% of the male prison population is diagnosable with antisocial personality disorder).[10] He essentially asks the Court to "establish a new, ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case." *State v. Hancock*, 840 N.E.2d 1032, 1059-60 (Ohio 2006). Such imprecision inherent in Ward's request is an

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[10] Indeed, following Ward's rationale would lead to the exception (for the mentally ill) swallowing the rule. *See "Are All Murderers Mentally Ill?"*, Wallace, Lane <http://www.theatlantic.com/national/archive/2010/12/are-all-murderers-mentally-ill/67295/> (last visited March 17, 2016) (relying on expert opinions to suggest that *all* murderers are necessarily mentally ill because "[t]o deliberately kill someone requires crossing a profound boundary" that murderers can cross only because of mental illness).

important reason to reject the request for a blanket and categorical prohibition of the execution of individuals with a severe mental illness.

Accordingly, Ward's argument that his mental illness renders him categorically exempt from the death penalty seeks the creation of a new rule of constitutional law and relief must be denied under *Teague*. *See Ripkowski v. Thaler*, 438 F. App'x 296, 303 (5th Cir. 2011).

### B. Ward's claim is unsupported by any precedent.

The Court has recognized categorical exemptions from capital punishment for the intellectually disabled,[11] capital murderers who were under the age of eighteen when he or she committed the murder,[12] and the insane.[13] The Court has never held that the mentally ill are exempt from capital punishment and there is no consensus in favor of creating such an exemption. Ward's Eighth Amendment claim is, therefore, unsupported and unsupportable.

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11 *Atkins*, 536 U.S. at 321.

12 *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

13 *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

### 1. The lack of any consensus or emerging consensus in favor of prohibiting the execution of capital murderers with a severe mental illness renders Ward's claim meritless.

The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12. In considering whether to impose a categorical bar to the death penalty, the Court's "beginning point" is "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). The Court relies on these objective factors "to the maximum possible extent." *Atkins*, 536 U.S. at 312.

In *Atkins*, the Court revisited its earlier decision in *Penry*, in which the Court had determined that there was no national consensus against executing an intellectually disabled individual. *Id.* at 314 (citing *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989)). The Court noted in *Atkins*, "[m]uch has changed since" *Penry* was decided. 536 U.S. at 314. Only two state legislatures had enacted prohibitions against executing intellectually disabled individuals at the time *Penry* was decided, but eighteen states had banned such executions and similar legislation was pending in several other states at the time the Court decided *Atkins*. *Id.* at 314-15. The Court noted that it was "not so much the number of

these States that [was] significant, but the consistency of the direction of change," *id.* at 315, and further noted that its conclusion was bolstered by the increasingly infrequent execution of such individuals even in states without bans. *Id.* at 316.

In *Simmons*, the Court likewise relied on a "national consensus" to determine the scope of the categorical ban on the execution of a juvenile capital offender. 543 U.S. at 574. The Court described the national consensus against the death penalty for juveniles as "similar, and in some respects parallel" to the national consensus relied upon in *Atkins*. *Id.* at 565. The Court summarized that,

> the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as categorically less culpable than the average criminal.

*Id.* at 567 (internal quotation marks omitted).

*Hall v. Florida* reaffirmed that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection."134 S. Ct. 1986, 1998 (2014). *Hall* made clear that the "national consensus" identified in *Atkins* defined that scope. Thus, in assessing whether Florida's strict cutoff of a seventy I.Q. in identifying capital offenders with intellectual disability was permissible, the Court once again looked to state legislatures to determine the

prevailing "national consensus." *Id.* at 1996-98. Finding that only one other state imposed a strict I.Q. cutoff, the Court concluded, "[t]he rejection of the strict [seventy] cutoff in the vast majority of States and the 'consistency in the trend' toward recognizing the [standard error of measurement] provide strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id.* at 1998 (quoting *Simmons*, 543 US at 572). Thus, each of the Court's decisions adopting a categorical ban on the death penalty has done so based on a clearly identifiable objective indicia of a national consensus that executions of a person in that particular category should be prohibited.

Ward does not even attempt to demonstrate through objective indicia that a national consensus currently exists against imposing the death penalty on individuals with a severe mental illness. Pet. Cert. at 27 (acknowledging "state capital punishment laws do not yet fully reflect the emerging national consensus that exists for exempting the severely mentally ill from execution"). Indeed, courts have repeatedly refused to extend the *Atkins* holding to the mentally ill based on the assertion that they suffer from similar impairments as the intellectually disabled. *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014); *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012); *People v. Boyce*, 330 P.3d 812, 849-53 (Cal. 2014) ("[T]here is no objective evidence that a national consensus has developed against executing persons with intellectual impairment *short* of intellectual disability or insanity.") (emphasis in original);

*State v. Mammone*, 13 N.E.3d 1051, 1089-90 (Ohio 2014) (noting that no court "has ever recognized the seriously mentally ill as a category of offenders who cannot be constitutionally executed"); *State v. Dunlap*, 313 P.3d 1, 35-36 (Idaho 2013) (collecting cases); *Malone v. State*, 293 P.3d 198, 216 and n.10 (Okla. Crim. App. 2013); *id.* at 216 n.10 (collecting cases); *Commonwealth v. Robinson*, 82 A.3d 998, 1019-22 (Pa. 2013); *Carroll v. State*, 114 So.3d 883, 886-88 (Fla. 2013); *Schoenwetter v. State*, 46 So.3d 535, 562-63 (Fla. 2010) (refusing to extend *Atkins* to capital offender with Asperger's Syndrome, ADHD, or frontal lobe damage); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); *State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010); *Commonwealth v. Baumhammers*, 960 A.2d 59, 96-97 (Pa. 2008); *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007); *State v. Hancock*, 840 N.E.2d 1032, 1059-60 (Ohio 2006); *Matheney v. State*, 833 N.E.2d 454, 456-58 (Ind. 2005) *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005); *Battaglia v. State*, 2005 WL 1208949, at *10 (Tex. Crim. App. 2005) (refusing to extend *Atkins* to capital offender with bipolar disorder). Consequently, Ward has not demonstrated that a national consensus exists in favor of prohibiting the execution of individuals with a severe mental illness.

Virtually all of Ward's effort to demonstrate a consensus in favor of prohibiting the execution of the severely mentally ill is premised on the notion that some states have enacted legislation prohibiting or gubernatorial

moratoriums against *any* executions and that some states that permit capital punishment have not carried out executions in recent years. Pet. Cert. at 15-28. But Ward cannot, in the absence of *any* objective indicia of a consensus in favor of the prohibition he seeks, conflate a state's prohibition of capital punishment generally with the notion that states have prohibited the execution of the severely mentally ill specifically. *See Ex parte Ward*, No. 70,651-03 (Alcala, J., concurring) ("He has not presented any complaint that the death penalty as a whole violates the Eighth and Fourteenth Amendments to the United States Constitution, yet almost all of his evidence addresses that matter rather than the particular question he has presented to this Court.").

While the Court has taken into account states that have prohibited capital punishment altogether when assessing the number of states that have prohibited a particular punishment, the Court has not found a consensus unless a number of states that permit capital punishment *also* specifically prohibited the particular punishment at issue. *See Graham*, 560 U.S. at 62 ("Six jurisdictions do not allow life without parole sentences for any juvenile offenders."); *Simmons*, 543 U.S. at 564 (noting that eighteen states banned the execution of the intellectually disabled at the time *Atkins* was decided and eighteen states banned the execution of juveniles at the time *Simmons* was decided). Also, important to the Court in *Atkins* and *Simmons* was the rate of change in which states had prohibited the execution of the intellectually

disabled and juveniles since the time the Court had upheld those punishments. But here, no such change has occurred.

Ward also argues that prosecution and sentencing trends reveal a consensus in favor of prohibiting the execution of the severely mentally ill. In support, Ward refers to "a survey of thirty death penalty lawyers from ten death penalty states." Pet. Cert. at 20; *id.* at 23 ("The experiences of capital defense attorneys . . . evince an increasing opposition to imposing death upon the severely mentally ill."). It is not clear who conducted the survey (although it appears counsel for Ward conducted the survey), the rigor involved to ensure accuracy in the results, or the basis (if any other than their own judgment) on which the survey's respondents concluded that their clients were mentally ill. There is no confirmation either of the respondents' purported assertions that their clients did not receive the death penalty solely due to their mental illness. Nor is there any reflection of the specific mental illnesses with which the respondents' clients had been diagnosed. Additionally, only capital defense attorneys were surveyed. The probative value of such a survey with self-selected (and potentially biased) respondents and an entirely opaque methodology is clearly minimal. While the Court has cited with approval to prosecution and sentencing trends and "objective" indicia of a consensus, Ward's reliance on an unverified and unverifiable survey of capital defense

attorneys and a cherry-picked quote from one prosecutor is entirely subjective, unscientific, and is of no probative value.

Ward also argues that a consensus exists because many states that permit capital punishment require a jury to consider a defendant's mental illness as a mitigating factor. Pet. Cert. at 17-18. But that fact indicates that those states have likely deliberately declined to enact a categorical prohibition against the execution of the severely mentally ill and, instead, explicitly permitted juries to consider a defendant's mental illness when assessing punishment. Consequently, Ward's argument weighs in favor of a finding that those states have deliberately rejected the very prohibition Ward now seeks. Further, accepting Ward's logic, almost any mitigating factor could form the basis for a categorical constitutional prohibition of capital punishment. For example, capital juries are often presented with mitigating evidence that a defendant had a disadvantaged upbringing, suffered abuse at the hands of his parents, witnessed domestic abuse, was raised by a drug addicted parent, was raised by a single parent, or that the defendant began abusing drugs at a young age. It can hardly be said that the mere fact that juries might consider those kinds of evidence mitigating justifies a categorical prohibition of imposing capital punishment on defendants who, say, were raised by a drug addicted parent. Ward's attempt to demonstrate a national consensus by virtue of juries

considering mitigating evidence of a defendant's mental illness, consequently, fails.

Moreover, Ward's reliance on opinions of professional organizations, public polling, and the international community is misplaced. Pet. Cert. at 23-27. In the absence of *any* legislative or court-imposed prohibition of the execution of the severely mentally ill, Ward cannot rely solely on these more subjective indicia. *See Atkins*, 536 U.S. at 312 (stating that the Court's resolution of an Eighth Amendment claim like Ward's "should be informed by objective factors to the maximum possible extent") (internal quotation marks omitted); *id.* at 316 n.21 (stating that subjective indicia are "by no means dispositive" and that "their *consistency with the legislative evidence* lends further support to our conclusion that there is a consensus among those that have addressed the issue") (emphasis added).

In addition to relying on a finding of a national consensus in favor of prohibiting a particular sentence, the Court has also relied upon its independent evaluation in assessing the constitutionality of the sentence. To be sure, the Court in *Atkins* discussed the "reduced capacity" of intellectually disabled individuals as a justification for the categorical ban on executing such individuals and examined other evidence of a consensus beyond the "objective" indicia of legislative enactments. *Atkins*, 536 US at 320. But the Court did so in the context of providing "reasons consistent with the legislative consensus

that the mentally retarded should be categorically excluded from execution," and in the context of making an "independent evaluation" of the issue. *Id.* at 318, 320. *Atkins* does not suggest that in the absence of a national consensus, or *any* objective indicia of such a consensus, the reduced capacity of a group of individuals who are not intellectually disabled provides grounds for a new categorical ban on their execution or that subjective indicia can alone suffice to justify a categorical constitutional prohibition. Indeed, the Court undertakes such an independent evaluation only after finding that a consensus exists. *Id.* at 313 ("[I]n *cases involving a consensus*, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.") (quoting *Coker v. Georgia*, 433 US 584, 597 (1977)) (emphasis added; internal citation omitted). But, as noted above, Ward has not demonstrated the existence of such a consensus. Consequently, Ward has not demonstrated that the Eighth Amendment prohibits the execution of individuals with a severe mental illness and the issue is not worthy of the Court's attention. Certiorari review should, therefore, be denied.

**2. Ward has failed to demonstrate that the penological purposes of capital punishment are not served by permitting the execution of individuals with a severe mental illness.**

Even assuming Ward had demonstrated a consensus in favor of prohibiting the execution of the severely mentally ill, he has nonetheless failed

to show that the penological purposes of capital punishment are not served through such punishment of the mentally ill. *Graham*, 560 U.S. at 67 (stating that, in addition to finding objective indicia of a consensus, the Court considers in the exercise of its independent judgment whether the particular sentence at issue is cruel and unusual when applied to certain defendants based on their culpability and whether the sentence serves legitimate penological goals). The Court stated in *Atkins*, for example, that intellectually disabled individuals "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." 536 U.S. at 318. Those deficiencies "diminish [the intellectually disabled's] personal culpability" such that their execution does not "measurably contribute" to either penological goal of the death penalty, retribution or deterrence.[14] *Id.* The Court stated that the execution of the intellectually disabled would not serve as a deterrent because intellectually disabled individuals are, due to their diminished ability to engage in logical reasoning or control impulses, unable to premeditate and deliberate prior to

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[14] Again, *Atkins* does not permit the consideration of the Court's own judgment absent a national consensus as reflected by objective indicia. 536 U.S. at 318 ("In light of these deficiencies, our death penalty jurisprudence provides two reasons consistent with the legislative consensus that the [intellectually disabled] should be categorically excluded from execution.").

committing a murder by controlling their conduct based on the possibility of receiving the death penalty. *Id.* at 320. Moreover, the Court stated that the intellectually disabled's "reduced capacity" creates a risk that those individuals will falsely confess, fail to make a persuasive showing in mitigation, or be able to assist their counsel. *Id.* at 320-21.

Ward argues that the execution of the severely mentally ill does not serve the penological purposes of capital punishment. Pet. Cert. at 29-38. He argues that the goal of retribution is not served because individuals with a mental illness have impaired judgment, diminished capacity to process information, and an inability to learn from experience or to control impulses. *Id.* A categorical exemption from capital punishment is necessary, he claims, because the mentally ill are poor witnesses because they convey a lack of remorse, are more likely to falsely confess, and are unable to assist their counsel. *Id.* at 33-36.

While Ward makes broad judgments regarding the culpability and capacity of the severely mentally ill, he does not attempt to cabin in any meaningful way the category of offenders who would qualify for the categorical exemption he seeks to have the Court create. That being the case, Ward necessarily cannot demonstrate that the proposed class of murderers, the "seriously mentally ill," are categorically less culpable than other capital murderers. *Hancock*, 840 N.3.2d at 1059 ("Mental illnesses come in many

forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees."). Indeed, the only disorder with which Ward has been diagnosed, and which he identifies in his Petition as warranting a categorical exemption from execution, is bipolar disorder. Pet. Cert. at 3. But he does not show that individuals with bipolar disorder are necessarily less culpable than others.

Testimony given at Ward's trial shows that individuals like Ward do not warrant a categorical exemption from capital punishment. Dr. Lisa Clayton (a forensic psychiatrist called by the prosecution) testified at Ward's trial that Ward was narcissistic, but not psychotic. 21 RR 184, 200-01. Further, Ward was able to communicate with his lawyers. *Id.* at 200. Dr. Frank Murphy (a psychiatrist called by the prosecution) testified that Ward suffered from conduct disorder rather than bipolar disorder and that Ward was able to consult with his lawyers. 22 RR 31-33, 59. Dr. Murphy also noted that Ward had "abnormally high intelligence." *Id.* at 50. Dr. Compton testified that Ward did not suffer from hallucinations. *Id.* at 97. Ward's expert, Dr. Price, diagnosed Ward with antisocial personality disorder. 44 RR 197-98. Joan Walvoord, a school teacher of Ward's from kindergarten through third grade, testified that Ward was smart and manipulative. 42 RR 210. Ward testified during the punishment phase of trial and was able to effectively express remorse for his killing of Mr. Walker. 44 RR 69-70. Ward also testified that he

was able to comply with probation conditions resulting from a charge of assault on a public servant and discharged "five years[']  worth of probation terms in just two years," which included performing 350 hours of community service. *Id.* at 129.

Ward has not shown that his mental illness prevented him from knowing right from wrong, from making a convincing case in mitigation, or from effectively expressing remorse. Indeed, the extensive evidence presented at Ward's trial negates the assertion that Ward's mental illness precluded him from doing so. Further, the evidence in mitigation presented at Ward's trial belies the suggestion that Ward was unable to adequately assist his trial counsel in presenting his case. Moreover, Ward did not act as a "follower" in the commission of this capital murder. And, as several witnesses testified, Ward was highly intelligent, manipulative, and violent. All of this evidence contradicts the assertion that Ward's bipolar disorder rendered him less morally culpable than other murderers.

Ward presented an extensive amount of testimony and documentary evidence at trial of his mental illness and his upbringing. That evidence was fully before the jury, and the jury properly considered it when it answered the special issues. The jury is the proper arbiter in a case like this to weigh the evidence and make the determination of whether the death penalty is warranted. Ward has failed to show that the penological purposes served by

the death penalty do not apply to him or generally to individuals with a severe mental illness, and he effectively disclaims any effort to distinguish any of the multitude of mental illnesses that may have entirely different effects on an individual's culpability and ability to conform his conduct. For these reasons, Ward fails to justify a blanket and categorical ban on executions of individuals with a severe mental illness. He does not present an issue worthy of the Court's attention.

## III. Ward Is Not Entitled to a Stay of Execution.

Ward is not entitled to a stay of execution because she cannot demonstrate that a substantial denial of a constitutional right would become moot if she 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, Ward's claim is procedurally barred, barred by principles of non-retroactivity, and entirely without merit. Thus, Ward 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. Under the circumstances of this case, a stay of execution would be inappropriate.

## CONCLUSION

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

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