No. _____

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

TEXAS

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mr. Milam is scheduled to be executed on January 21, 2021, after 6:00 p.m.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did *Moore v. Texas* announce a new substantive rule that is retroactive to cases on collateral review and, if so, did the Texas Court of Criminal Appeals fail to give retroactive effect to *Moore* when it refused to adjudicate Mr. Milam's intellectual disability allegations anew under that standard?

2. Did the Texas Court of Criminal Appeals continue to enforce and apply the same unconstitutional framework to Mr. Milam's intellectual disability claim that this Court condemned in *Moore v. Texas*?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Blaine Milam is a prisoner under sentence of death in the custody of Respondent, the State of Texas. There are no corporate parties involved in this case.

LIST OF RELATED CASES

4th District Court of Rusk County, Texas

State of Texas v. Blaine Milam, No. CR-09-066

Court of Criminal Appeals of Texas

Milam v. State, No. AP-76,379 (direct appeal)

Ex parte Milam, No. WR-79,322-01 (initial state post-conviction proceeding)

Ex parte Milam, No. WR-79,322-02 (second state post-conviction proceeding)

United States District Court for the Eastern District of Texas

Milam v. Director, TDCJ-CID, No. 4;13-cv-545 (federal habeas proceeding)

United States Court of Appeals for the Fifth Circuit

Milam v. Davis, No. 17-70020 (federal habeas appeal)

In re Milam, No. 20-40663 (motion for authorization to file second or successive proceeding under 28 U.S.C. § 2244)

Supreme Court of the United States

Milam v. Davis, No. 18-5494 (certiorari from federal habeas)

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PETITION FOR A WRIT OF CERTIORARI

Blaine Milam petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The unpublished July 1, 2020 order of the Court of Criminal Appeals of Texas ("CCA") denying the habeas corpus application, *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921 (Tex. Crim. App. July 1, 2020), is attached as Appendix 1. The findings of fact and conclusions of law proposed by the State, *Ex parte Milam*, No. CR-09-066 (4th Dist. Ct. Sept. 11, 2019), are attached as Appendix 2. The trial court's order adopting the State's findings of fact and conclusions of law in full, *Ex parte Milam*, No. CR-09-066 (4th Dist. Ct., Rusk Co., Tex., Oct. 16, 2019), is attached as Appendix 3. The trial court's "letter pronouncement" denying Mr. Milam's application is attached at Appendix 4. The unpublished order of the CCA authorizing the application to be considered on the merits with respect to Petitioner's intellectual disability claim, *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019), is attached as Appendix 5.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeal entered its judgment on July 1, 2020. On March 19, in response to the COVID-19 pandemic, this Court entered an Order applicable by its terms to this case and extending the time for petition for certiorari

to 150 dates from the date of the relevant lower court judgment.[1] This petition is timely filed pursuant to the Court's March 19, 2020 Order.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. Introduction

In 2002, this Court announced that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The *Atkins* decision "gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop v. Hill*, 139 S. Ct. 504, 507 (2019) (per curiam). Instead, it "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317) (alterations in original).

In 2004, the Texas Court of Criminal Appeals ("CCA") adopted a substantive standard for determining which capital defendants possessed "that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Ex parte Briseno*, 135 S.W.3d 1,

[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

6 (Tex. Crim. App. 2004). The opinion adopted definitions of intellectual disability contained in the ninth edition of the American Association on Mental Retardation's clinical manual and in the Texas Health and Safety Code, but it also engrafted upon those definitions seven "evidentiary factors" a factfinder could consider for making the Texas-specific determination. *Id.* at 7–9. These factors encompassed various lay stereotypes about persons with an intellectual disability: (1) did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination; (2) has the person formulated plans and carried them through or is his conduct impulsive; (3) does his conduct show leadership or does it show that he is led around by others; (4) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; (5) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; (6) can the person hide facts or lie effectively in his own or others' interests; (7) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose. *Id.* at 8–9.

In 2017, this Court struck down Texas's standard for determining who was intellectually disabled for Eighth Amendment purposes. It held, *inter alia*, that Texas's injection of lay stereotypes into the adaptive functioning analysis "[b]y design and in operation . . . 'creat[ed] an unacceptable risk that persons with intellectual disability will be executed.'" *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) ("*Moore I*")

(quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)). Although the *Moore I* decision was not unanimous, the Court was unanimous as to the inappropriateness of the injection of these factors into intellectual disability determinations under the Eighth Amendment. *See Moore I*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting) ("I agree with the Court today that those factors are an unacceptable method of enforcing the guarantee of *Atkins*."). In 2019, this Court had to reverse the CCA again after it arrived at the same conclusion on remand for "repeat[ing] the analysis we previously found wanting," including its continued reliance on lay stereotypes. *Moore v. Texas*, 139 S. Ct. 666, 670, 672 (2019) ("*Moore II*").

Mr. Milam's capital trial occurred in 2010. The CCA's *Briseno* decision provided the governing legal framework at that time. During sentencing, Mr. Milam presented evidence from a psychologist who opined that Mr. Milam was intellectually disabled. The State presented evidence from a different psychologist that Mr. Milam was not intellectually disabled. The question of Mr. Milam's intellectual disability was put to a jury to decide.[2] During closing argument, and consistent with the

[2] That jury was given an instruction on intellectual disability comporting with the then-existing Texas Health and Safety Code, as endorsed by *Briseno*. The instruction read:

> With respect to Special Issue Number Three, you are instructed that "mental retardation" means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period, onset prior to the age of 18.
>
> "Significantly sub-average general intellectual functioning" refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age group mean for the tests used.
>
> "Adaptive behavior" means the effectiveness with or degree to which a person meets standards of personal independence and social responsibility expected of the person's age and cultural group.

substantive *Briseno* framework, the State urged the jury to reject Mr. Milam's evidence of intellectual disability by resorting to various lay stereotypes, including among others that Mr. Milam "could lie to protect himself;" that he "could carry on a conversation;" that he "used a cell phone;" that he "knew how to use the internet;" that he could talk about "what music he liked;" and that he "wrote letters from the jail." 56 RR 135–36. Under the existing Texas legal framework, defense counsel could not have objected and did not object to these arguments. After deliberating, the jury determined that Mr. Milam had not proven his intellectual disability by a preponderance of the evidence, and he was sentenced to death.

After *Moore*, Mr. Milam filed a habeas corpus application in state court seeking an adjudication of his asserted intellectual disability under the appropriate Eighth Amendment standard. Reflecting its continued tolerance for application of lay stereotypes to intellectual disability determinations, the CCA declined to adjudicate the allegations anew. Instead, it concluded that Mr. Milam's trial adjudication did not run afoul of the substantive Eighth Amendment rules announced in *Moore*, notwithstanding the State's urging the jury to reject Mr. Milam's evidence based upon stereotypes. The question presented by this case are therefore: 1) whether Mr. Milam has actually obtained the benefit of the new substantive rules announced in *Moore* to which he is entitled and; 2) whether the CCA has continued to repeat the errors this

4 CR 980–81. The jury was also instructed that, "[i]n deliberating on Special Issue Number Three you shall consider all the evidence at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background and character and circumstances of the offense." *Id.* at 981.

Court corrected in *Moore II*, including its tolerance for permitting intellectual disability determinations to be based on lay stereotypes.

B. Allegations Below

In his habeas application below, Mr. Milam made substantial allegations—supported by evidentiary proffers and testimony from trial—that he met all three criteria for an intellectual disability diagnosis.

1. Mr. Milam alleged significant deficits in intellectual functioning.

IQ testing administered to Mr. Milam pre-trial resulted in scores demonstrating significantly subaverage intellectual functioning. Before trial, both Dr. Paul Andrews, a defense expert, and Dr. Timothy Proctor, an expert for the State, administered the WAIS-IV to Mr. Milam. Mr. Milam scored 71 and 68 on the tests, respectively.[3] Ex. 9, Report of Paul Andrews ("Andrews Report") at 4;[4] 53 RR 200; Ex.

[3] Dr. Andrews also administered a Stanford-Binet 5 (SB-5), another full-scale IQ ("FSIQ") test, to Mr. Milam but miscalculated the score. Dr. Andrews reported that Mr. Milam scored an 80 on the SB-5. Dr. Dale Watson, who reviewed the raw data of the IQ testing administered pretrial in connection with Mr. Milam's state habeas application, discovered a scoring mistake by Dr. Andrews. The correct score on the SB-5 is a 78. Ex. 11, Declaration of Dale Watson ("Watson Dec.") ¶ 20. When the Flynn Correction is factored into this score, Mr. Milam's FSIQ score on the SB-5 is a 75, also in the range for intellectual disability. *Id.* ¶ 22; *id* at ¶ 12 (The Flynn Effect or Flynn Correction "applies to all major intelligence tests, including the WAIS and the Stanford-Binet. Flynn Corrections are calculated according to the following formula: obtained score – (.3 x number of years between the mid-year norming date and administration."). However, even if the SB-5 score is not considered, both WAIS scores are in the range of intellectual disability and this score cannot preclude evaluation of Mr. Milam's adaptive functioning. *See Hall,* 572 U.S. at 707 (court required to evaluate evidence of adaptive functioning where "Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80 . . . but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80") (internal citations omitted).

[4] The exhibits referenced in this petition are the exhibits that were attached to Mr. Milam's Subsequent State Habeas Application filed in the Fourth Judicial District Court, Rusk County, Texas, on January 7, 2019. Because it was the second state habeas application Mr. Milam had filed, it was then transferred to the Court of Criminal Appeals for a determination on whether the application satisfied the requirements of Texas Code of Criminal Procedure Article 11.071 § 5(a) to be considered on the merits. Tex. Code Crim. Proc. art. 11.071 § 5(c).

8, Report of Timothy Proctor ("Proctor Report") at 15; 53 RR 202.[5] That both WAIS scores are within the 65–75 confidence interval indicates that they are reliable. Ex. 11, Declaration of Dr. Jack Fletcher ("Fletcher Dec.") at 5 ("The most reliable finding and the one that should be weighted most highly in Mr. Milam's evaluation is the close proximity of the two WAIS-IV scores of 70 and 67[6] and the fact that both are within the 95% confidence interval of 65–75 established for the WAIS-IV."). Moreover, Dr. Gripon, a psychiatric expert retained by the State who evaluated Mr. Milam before trial, opined that Mr. Milam "clearly has intellectual limitations" and "does not have normal intellectual potential." Ex. 1, Report of Edward Gripon ("Gripon Report") at 14. Dr. Gripon estimated Mr. Milam's IQ "to be in the range of 65 to 70."[7] *Id.*

2. Mr. Milam alleged significant deficits in adaptive functioning.

The second prong of an intellectual disability diagnosis requires deficits in one of the three domains of adaptive functioning. DSM-5 at 33. Mr. Milam's deficits span all three domains. Dr. Jack Fletcher assessed Mr. Milam's adaptive functioning. To do so, Dr. Fletcher reviewed records pertaining to the issue of Mr. Milam's

[5] Dr. Proctor also administered the Reynolds Intellectual Achievement Scales ("RIAS"). 55 RR 141–42. Despite Dr. Proctor's characterization at trial of the RIAS as an intelligence test, 55 RR 141, the RIAS does not yield a full-scale IQ score. 53 RR 202. Instead, the RIAS is only a screening measure. *Id.* at 203; Ex. 18, Fletcher Aff. at 4 ("The RIAS was not designed to assess the full range of abilities captured by either the WAIS-IV or the Stanford-Binet-5."). Regardless, because Mr. Milam had qualifying scores from the WAIS-IV tests administered to him, like the SB-5, the score on the RIAS cannot preclude review of his adaptive functioning. *Hall*, 572 U.S. at 707.

[6] The IQ test scores in Dr. Fletcher's report are adjusted for the Flynn Correction.

[7] Dr. Gripon's report also stated he estimated Mr. Milam's "intellectual level to be in the ranges of an IQ of 65 to 75." Ex. 1, Gripon Report at 14.

functioning, including affidavits and testimony from former teachers, employers, friends, and his Sunday school teacher, as well as reports by Drs. Andrews, Proctor, Gripon, Mark Cunningham, and Dale Watson, and other social history records. Dr. Fletcher also administered the Vineland Scales of Adaptive Behavior–2[8] to Mr. Milam's mother Shirley Milam and his older sister, Teresa Milam Shea. Ex. 10, Fletcher Dec. at 5.

Dr. Fletcher asked Shirley Milam to focus on the period when Mr. Milam was between the ages of 17 and 18 in his administration of the instrument to her. The result yielded "scores of 62 in the Communication domain, 66 in the Daily Living Skills domain, 74 in the Socialization domain, and an adaptive behavior composite of 65 (first percentile)." *Id.* at 7. Dr. Fletcher requested that Ms. Shea focus on the period when Mr. Milam was between 9 and 10 years old. The resulting scores were "67 for Communication, 68 for Daily Living Skills, and [. . .] 75 for Socialization, with an adaptive behavior composite of 69 (first percentile)." Ex. 10A, Addendum to Declaration of Jack Fletcher ("Fletcher Addendum").[9] These scores are consistent with intellectual disability. Ex. 10, Fletcher Dec at 7. Dr. Fletcher noted that the scores obtained separately from Mrs. Milam and Ms. Shea are consistent with each

[8] The Vineland delivered as a semi-structured interview in order to minimize response bias. Ex. 10, Fletcher Dec. at 7.

[9] Exhibit 10A was attached to Mr. Milam's Motion for Order Authorizing the District Court to Consider Second or Successive Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2244 in the United States Court of Appeals for the Fifth Circuit on October 2, 2020. Mr. Milam includes it here because it is an addendum to Dr. Fletcher's report correcting a minor scoring error in his initial report. The minor scoring error did not alter Dr. Fletcher's interpretation of the Vineland results or his "opinion that Mr. Milam meets all three diagnostic criteria for mild intellectual disability." Ex. 10A, Fletcher Addendum.

other. Further, he noted priority should be given to the composite scores—65 and 69 respectively—because they are the most reliable. Ex. 10, Fletcher Dec. at 7; Ex. 10A Fletcher Addendum.

At trial, Dr. Cunningham also conducted a formal assessment of Mr. Milam's adaptive functioning and concluded that he exhibited "substantial" deficits across all domains. 53 RR 262. Dr. Fletcher noted the consistency of the results he obtained with those obtained by Dr. Cunningham from the only other formal assessment of Mr. Milam's adaptive functioning. Ex. 10, Fletcher Dec. at 6. Based on his administration of the Vineland and his review of social history records and witness statements, Dr. Fletcher formed the opinion that Mr. Milam had significant limitations in adaptive functioning during the developmental period. *Id.* at 7.

i. Conceptual skills

The conceptual domain includes language, reading, writing, arithmetic, planning, and time. DSM-5 at 37; AAIDD-11 at 45. Both Dr. Cunningham and Dr. Fletcher concluded Mr. Milam possessed significant deficits in this domain. *See* Ex. 10, Fletcher Dec. at 10. Mr. Milam struggled with receptive language—the ability to understand what was being said—and expressive language—the vocabulary that he used and being able to pronounce and articulate words. 51 RR 184; 53 RR 213.

At school, Mr. Milam's "intellectual functioning was the lowest of the class." Ex. 4, Affidavit of Carolyn McIlhenny ("McIlhenny Aff.") ¶ 3 According to Ms. McIlhenny, who taught second and third grade and had Mr. Milam as a student, "Blaine struggled with everything he did academically and required significant one-

on-one attention. I had to modify instructions and adapt exercises to his academic limitations." *Id.* Similarly, Juanita Bradford, who taught Mr. Milam in fourth grade remembered, "Blaine often seemed confused by instructions and required a lot of one on one attention." Ex. 3, Affidavit of Juanita Bradford, ("Bradford Aff.") ¶ 6; *see* 51 RR 14; 51 RR 32 (elementary school teachers describing Mr. Milam as "slow").

Mr. Milam similarly needed instructions repeated at work. He often needed to be shown how to do something, rather than instructed verbally. Even then, demonstrations sometimes had to be repeated. According to a former employer,

> When Blaine was a young teenager, I hired him to help me with small projects around the land, like raking leaves, hauling trash, and small building repairs. We worked side by side and I always supervised what Blaine was doing. When I showed Blaine how to something, he would not remember how to do it the next time, and I had to show him again. For example, I had to show Blaine how to read a tape measurer and make a small mark with a pencil on a board to be cut. However, I would have to show him how to read the tape measure again the next time I asked him to do it.

Ex. 6, Affidavit of Milton Bennett ("Bennett Aff.") ¶ 5.

Jim Wallace supervised Mr. Milam at Nichols Marine, where he was hired to wash and vacuum boats, check them for marks and scratches, and sweep and empty the shop. According to Mr. Wallace, "Blaine could not complete a task as instructed. If he washed the outside of a boat, he would not vacuum the inside. I would have to check every boat Blaine washed and had to tell him to go back and do something again." Ex. 7, Affidavit of James Wallace ("Wallace Aff.") ¶ 5. "[H]e could not complete a task independently and required a lot of supervision." *Id.* ¶ 6.

Gary Jenkins supervised Mr. Milam at Big 5 Tire. He testified that when Mr. Milam first started, Mr. Jenkins had to show him what to do, not just tell him, even

though Mr. Milam had been working on cars for years. 54 RR 285–86. Dr. Fletcher summarizes, "[l]ike Ms. McIllhenney, both Ms. Shea and [] Milam indicated that he had difficulty following directions, paralleling descriptions from his co-worker and supervisor, Mr. Wallace . . . ." Ex. 10, Fletcher Dec. at 8.

Mr. Milam also had difficulty with reading and writing. *See* Ex. 1, Gripon Report at 15 ("his primary adaptive deficit is writing"). Mr. Milam's vocabulary development was limited; he used simple words; and it was difficult to understand what he was attempting to express. 53 RR 213. Mr. Milam struggled with reading and his spelling was poor. *Id.* at 214. His mother had to fill out employment applications for him. 53 RR 207. Dr. Cunningham and Dr. Proctor both tested his spelling and obtained a score of a 77, which is in the deficient range. 53 RR 214. Dr. Fletcher reports, "Ms. Shea, who worked with him closely on schoolwork, said his writing was hard to read and it was difficult for him to write in sentences." Ex. 10, Fletcher Dec. at 8. Dr. Gripon concluded, "Blaine Milam has serious limitations in his ability to read and write. I/We asked him to write a sentence and he did print a short sentence. It was not grammatically correct and some of the words that should have ended in 'ing' did not." Ex. 1, Gripon Report at 3 (referring to interview conducted along with Dr. Proctor).

Similarly, in school, Mr. Milam struggled with reading comprehension and could not spell. Ex. 3, Bradford Aff. ¶ 6. In the fourth grade, he was referred to resource, the then-equivalent for special education, to benefit from individualized academic support in reading and math. *Id.* Mr. Milam's poor reading skills were also

apparent in Sunday school, where he struggled to read along. "[H]e did not read as well as the other children in the class." Ex. 6, Bennett Aff. ¶ 3; *see* 53 RR 214 (Mr. Milam had difficulty reading out loud, would stumble over larger words, would sometimes get mixed up about sequences and characters in trying to recall what he had read).

Mr. Milam was referred to special education services for a speech impairment in second, third, and fourth grade. Ex. 17, TEA Records at 3. He was in a group of kids who Sherry Brown, a teacher at Tatum Primary School, pulled out of class because they needed extra help on alphabet and sounds. 54 RR 313.

Additionally, Dr. Gripon observed Mr. Milam had "significant difficulty with mathematics as it applies to handling money, etc." Ex. 1, Gripon Report at 15; *see* Ex. 3, Bennett Aff. ¶ 6 ("At the end of the day, when I told Blaine how many hours he had worked and his pay per hour, he could not figure out how much I owed him."); 51 RR 276; 53 RR 224–25.

Mr. Milam also struggled with shopping. He did not look to see if the size of the clothing he was purchasing was the right size for him. His family members often had to exchange his clothing purchases for him. 51 RR 274. He could not read the time correctly on an analog watch. 53 RR 217.

ii. Social skills

The social domain includes interpersonal skills, self-esteem, gullibility, naïveté, and social problem solving. AAIDD-11 at 45. Dr. Gripon observed that Mr. Milam "has very simplistic ideas, is very naïve, extremely gullible, easily led . . . ."

Ex. 1, Gripon Report at 13. Mr. Milam was remembered as a particularly quiet, shy and self-conscious child. Ex. 3, Bradford Aff. ¶ 3 ("He was shy . . . . If I called on him, he would stay silent and not give an answer."); Ex. 6, Bennett Aff. ¶ 3 ("Blaine was very self-conscious about reading aloud in Sunday School."). In the classroom, Mr. Milam was "bashful" and "shy," "didn't want to meet your eye too much," and "h[u]ng his head." 51 RR 28; Ex. 4, McIlhenny Aff. ¶ 4 ("He did not make eye contact. . . . He was often alone in class."); 51 RR 19 (Mr. Milam had "one or two friends" in school.).

The rest of Mr. Milam's family was social, but he was "awkward and shy." Ex. 5, Affidavit of Kimberly Graham ("Graham Aff.) ¶ 3. As a teenager, Mr. Milam was "desperate" to have a girlfriend but "had a hard time with girls." *Id.* Mr. Milam struggled to maintain friendships as he aged and his emotional immaturity became more pronounced. He became "socially isolated." 51 RR 212; Ex. 10, Fletcher Dec. at 8 ("Ms. Shea and Ms. Digby indicated that he was socially isolated and that he didn't have age appropriate social skills. Ms. McIlhenny and Ms. Bradford both report that socially, he was shy and isolated. His employer Jim Wallace indicated that Mr. Milam did not have many friends.").

Even as a young teenager, Mr. Milam watched Scooby Doo and played with cars for hours with his niece Neva, who is ten years younger. 51 RR 233. Coworkers described him as "like a child." Ex. 8, Proctor Report at 8. At the age of 16, Mr. Milam seemed to be closer to the age of 10 emotionally. 52 RR 101. His family members described his throwing temper tantrums in his mid-to-late teens, as if he were a much

younger child. 53 RR 220. Jim Wallace said, "Blaine appeared to be a follower and wanted to do what [his older brother] Danny did." Ex. 7, Wallace Aff. ¶ 8.

iii. Practical skills

The practical domain captures activities of daily living, occupation skills, use of money, safety, health care, travel/transportation, and schedules/routines. AAIDD-11 at 45. Mr. Milam has never lived independently and required the significant support of family and peers in all activities of daily living. Dr. Fletcher reports, "[a]t a younger age, [Mr. Milam's] self-care skills were under-developed and he needed many reminders to do simple tasks like brush his teeth." Ex. 10, Fletcher Dec. at 8.

Dr. Cunningham found that Mr. Milam did not perform household chores and did not prepare any meals beyond using a microwave. 53 RR 224. Mr. Milam never had his own bank account and never managed his own finances. *Id.* at 224–25. Similarly, Dr. Gripon concluded Mr. Milam could not manage his bank accounts independently, could not memorize the pin number to his debit card, and was unable to learn how to use his debit card to purchase. Ex. 1, Gripon Report at 9 ("As an example, in an area where he would purchase gas, [Mr. Milam] would actually give the people, whom he knew, his PIN number and they would actually operate the machine for him."). Dr. Fletcher concluded, "He needed considerable support for any form of independent living." Ex. 10, Fletcher Dec. at 8. And, indeed, Mr. Milam only ever lived outside his family home for a period of thirteen weeks and never lived independently.

Mr. Milam's employment involved repetitive, low-skilled tasks. Ex. 6, Bennett Aff. ¶ 5; Ex. 7, Wallace Aff. ¶ 4. At the boat marina where he did light janitorial work, his supervisor recognized that Mr. Milam was unable to learn his duties and could not complete any task as instructed. *Id.*; Ex. 8, Proctor Report at 8. Mr. Milam remained employed there for about one month. Ex. 8, Proctor Report at 8.

Mr. Milam's mother filled out his application for employment at M&M Lube, 53 RR 207, where Mr. Milam was eventually employed as a lube tech. Ex. 8, Proctor Report at 6. His duties were limited to changing oil and fuel filters. His employer reported that he was unable to train Mr. Milam to handle money. *Id.* at 7. Finally, Mr. Milam was employed as a "tire buster" at Big 5 Tire to change oil and air filters, and change and fix flat tires. He did not perform any mechanical or body work. 50 RR 20, 27. Despite reporting good work performance, both Mr. Milam's manager and direct supervisor reported incidents involving tardiness and missed work days resulting in Mr. Milam's termination after only four months of employment. Ex. 8, Proctor Report at 8; 50 RR 48. While Mr. Milam was able to learn "tasks that are repetitious and routine," he was "not able to progress beyond this point to more complex mechanical work." Ex. 10, Fletcher Dec. at 6.

Mr. Milam's medical records further reflected work-related accidents requiring medical attention and treatment, including a head injury sustained after being struck with pipe tongs, Ex. 14, Longview Regional Medical Center at 1, and being knocked out by an open car door, Ex. 13, UTMB Health Services Archive at 7.

3. Mr. Milam alleged his deficits manifested during the developmental period.

The third prong of intellectual disability requires that deficits in intellectual and adaptive functioning manifested during the developmental period. DSM-5 at 37. First, Mr. Milam's IQ test scores date from when he was between the ages of 19 and 20. There is no evidence to suggest that an IQ test performed before the age of 18 would have produced meaningfully different results.

Second, Mr. Milam was 18 at the time of his arrest in the present case. Consequently, all—or almost all—of the evidence of adaptive deficits necessarily dates from the developmental period. Indeed, much of it comes from teachers, employers, and friends who knew him from early childhood through his mid-to-late teens. Similarly, Dr. Fletcher's evaluation of Mr. Milam's adaptive deficits focused on the ages of 8–9 and 17–18. Ex. 10, Fletcher Dec. at 5. Dr. Fletcher concluded, "[t]he difficulties described by Ms. Shea and Ms. Milam, and corroborated by others, clearly occurred early in his development and persisted." *Id.* at 7.

4. Mr. Milam alleged exposure to risk factors linked to intellectual disability.

Exposure to risk factors is not a diagnostic criterion, but their presence corroborates evidence reflecting that a person may be intellectually disabled. Risk factors linked to the development of intellectual disability include maternal illness, family poverty and chronic illness in the family, social deprivation, lack of formal education, and inadequate family support. AAIDD-11 at 59. Mr. Milam was exposed to risk factors associated with intellectual disability.

First, Mr. Milam's mother Shirley was twice hospitalized while she was pregnant with him. The first time she was diagnosed with pneumonia, which resulted in a high fever. 51 RR 175. This resulted in a four-day hospitalization. She later contracted a blood infection, was again hospitalized for two to three days, and was treated with antibiotics. 51 RR 176. Dr. Cunningham testified that there is "some possibility that the pregnancy complications contributed to" Mr. Milam's intellectual disability. 53 RR 273.

Second, teachers recalled limited involvement from Mr. Milam's parents in his educational development. Ex. 3, Bradford Aff. ¶ 8 ("Shirley Milam was quiet and rarely came to school."). Mr. Milam was eventually removed from school in the fourth grade by his parents and was not homeschooled for any significant period of time. 51 RR 239–40. His access to any support services was therefore limited and, after fourth grade, entirely eliminated. Dr. Cunningham noted that withdrawing from school "very significantly [] took him out of those social interactions that are an important part of developing as a person." 53 RR 301; *see* Ex. 12, Declaration of John Gregory Olley ("Olley Dec.") ¶ 27 (lack of formal education is a risk factor for intellectual disability). These risk factors corroborate that the deficits and limitations evident in Mr. Milam's intellectual functioning and adaptive behavior indicate an intellectual disability.

REASONS FOR GRANTING THE WRIT

In *Moore v. Texas*—a case arising out of state collateral review—this Court struck down Texas's framework for adjudicating intellectual disability claims because

it "creat[ed] an unacceptable risk" that "persons with intellectual disability will be executed." *Moore I*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 704). This Court condemned several facets of the CCA's intellectual disability analysis. With regard to the first prong of intellectual disability, the CCA improperly "disregard[e]d the lower end of the standard-error range" when it found that Moore did not establish that he suffered from significantly impaired intellectual functioning. *Id.* at 1049. Because the FSIQ score that CCA relied on, when "adjusted for the test's standard error, [fell] within the clinically established range for intellectual functioning," the CCA was required to "move on to consider Moore's adaptive functioning." *Id.* at 1049–50.

Additionally, this Court found five primary errors in the CCA's evaluation of adaptive deficits. First, the court "overemphasized Moore's perceived adaptive strengths." *Id.* at 1050. Second, the CCA relied on Moore's improved functioning while incarcerated. *Id.* Third, it "concluded that Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his intellectual and adaptive deficits were related." *Id.* at 1051. Fourth, the court required Moore to "show that his adaptive deficits were not related to 'a personality disorder.'" *Id.* Finally, the CCA relied on the *Briseno* factors in assessing the evidence of Moore's adaptive function. *Id.* This Court held that the *Briseno* factors impermissibly "advanced lay perceptions of intellectual disability." *Id.* Consequently, consideration of those factors in the adjudication of intellectual disability "creat[es] an unacceptable risk that persons with intellectual disability will be executed." *Id.* (quoting *Hall* 572 U.S. at 704); *see also Moore II*, 139 S. Ct. at 668–70.

Under Texas law, an applicant who has already filed an initial state habeas application can have an intellectual disability claim raised in a subsequent habeas application reviewed on the merits via two procedural mechanisms. The first requires a showing that

> the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). While not enumerated in the text, the CCA has also interpreted this provision to include a requirement that an applicant must make a prima facie showing that a new legal basis applies to his claim. *Ex parte Brooks*, 219 S.W.3d 396, 400 (Tex. Crim. App. 2007).

The second procedural gateway to obtain merits review of an intellectual disability claim in a subsequent state habeas application requires a showing

> 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 . . . .

Tex. Code Crim. Proc. art. 11.071 § 5(a)(3); *see Ex parte Blue*, 230 S.W.3d 151, 160–61 (Tex. Crim. App. 2007). Mr. Milam sought authorization of his intellectual disability claim raised in light of *Moore* on both of these grounds.

The CCA initially authorized Mr. Milam's intellectual disability claim under § 5(a)(1), or the "new law" provision, of Article 11.071. *Ex parte Milam*, No. WR-72,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019) (due to "recent changes in the law pertaining to the issue of intellectual disability, we find that

applicant has met the dictates of Article 11.071 § 5(a)(1)").[10] Indeed, in a concurring opinion, Judge Richardson noted that Mr. Milam's "claim of intellectual disability has not been assessed under what the Supreme Court deemed, in 2017, the 'medical community's diagnostic framework'" and consequently, Mr. Milam is "legally entitled to have his claim of intellectual disability evaluated under the proper standard." *Id.* (Richardson, J., concurring) (quoting *Moore I*, 137 S. Ct. at 1043). The CCA remanded Mr. Milam's intellectual disability claim "to the trial court for a review of the merits . . . ." *Id.*

Mr. Milam never received that merits review. Instead, the CCA subsequently adopted findings of fact and conclusions of law, drafted by the State and signed verbatim by the trial court, which concluded that, despite its earlier authorization, Mr. Milam was not entitled to merits review on his intellectual disability allegations. The CCA adopted findings that limited their application of *Moore* to a determination of whether "the errors that occurred" in *Moore* arose "in the jury's determination of the intellectual disability special issue during Applicant's trial." *Ex parte Milam*, No. CR-09-066, State's Proposed Findings of Fact and Conclusions of Law ("App. 2"), ¶ 185, and Order ("App. 3"). The CCA also adopted a conclusion that its prior order authorizing Mr. Milam's intellectual disability claim under Article 11.071 § 5(a)(1) had "implicitly rejected Applicant's attempt to challenge the substance of his *Atkins* claim pursuant to the actual-innocence of the death penalty provision under Article 11.071 § 5(a)(3)." *Id.* ¶ 221.

[10] The CCA's authorization order was silent about whether Mr. Milam had met the dictates of Section 5(a)(3).

The CCA therefore made two rulings. First, it held that Mr. Milam already obtained the benefit of any new substantive rules of constitutional law announced by this Court in *Moore* because his trial adjudication was not incompatible with *Moore*. Second, it held that Mr. Milam had failed to allege intellectual disability sufficient to permit consideration of the merits under Texas's innocence-of-the-death-penalty gateway for subsequent habeas applications. In reaching both of these conclusions, however, the CCA relied on or effectively endorsed the same unconstitutional framework condemned by this Court in *Moore I* and *Moore II*. Consequently, Texas stands poised to execute a person whom current clinical standards clearly recognize to be intellectually disabled.

I. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF *MOORE V. TEXAS* ANNOUNCED A SUBSTANTIVE RULE THAT IS RETROACTIVE TO CASES ON COLLATERAL REVIEW AND, IF SO, WHETHER THE COURT OF CRIMINAL APPEALS FAILED TO GIVE RETROACTIVE EFFECT TO *MOORE* WHEN IT REFUSED TO ADJUDICATE MR. MILAM'S INTELLECTUAL DISABILITY ALLEGATIONS ANEW UNDER THAT STANDARD.

Mr. Milam does not dispute that the Court of Criminal Appeals purported to apply *Moore* when it rejected his subsequent state habeas application. However, the CCA did not assess whether Mr. Milam, based on the evidence from trial and the evidentiary proffers attached to his application, is intellectual disabled under the substantive Eighth Amendment standards announced in *Moore*. Instead, the CCA cursorily reviewed the record of a pre-*Moore* jury adjudication rejecting Mr. Milam's intellectual disability defense, concluding that the "jury's determination, by a preponderance of the evidence . . . did not run afoul of any Supreme Court precedent,"

including *Moore*. App. 2 ¶ 180; *see id.* ¶ 167 (concluding that "the substantive *Atkins* claim is not before this Court"). It therefore left the trial adjudication occurring under the *Briseno* framework undisturbed.

A. This Court should resolve the question of whether *Moore* is a new, substantive rule.

This Court has not explicitly answered the question of whether *Moore* is a new, substantive rule that applies retroactively to cases on collateral review.[11] In *Shoop v. Hill*, the Court recognized that "*Atkins* gave no comprehensive definition of "mental retardation" for Eighth Amendment purposes." 139 S. Ct. at 507. It held the lower federal court had erred by treating *Moore* as having been "clearly established" by *Atkins* for purposes of the relitigation bar exception contained in 28 U.S.C. § 2254(d)(1). *See id.* at 508 (lower court "did not explain how the rule [*Moore*] applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation'").

The few federal courts to have addressed the question of *Moore's* retroactivity have generally held that it either did not announce substantive rules of constitutional law or that it has not yet been "made" retroactive to cases on collateral review. In *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017), the Eighth Circuit declined to authorize a successive habeas corpus application under 28 U.S.C. § 2244(b)(1)(A), determining that this Court has not yet made any rules announced in *Moore* retroactive to cases on collateral review, *id.* at 474. The court noted, however, that

[11] The CCA rejected the trial court's conclusion that *Moore* is not retroactive for purposes of *Teague*, *Milam*, 2020 WL 3635921, at *1, but it did not itself expressly address *Moore*'s retroactivity. However, as discussed *infra*, the CCA has been applying *Moore* retroactively in other cases.

"[t]he observation by Chief Justice Roberts" in *Moore* "that the Court had crafted 'a constitutional holding' . . . may presage an eventual ruling by the Court that *Moore* will be given" retroactive effect. *Id.* (*Moore I*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting)). The Eleventh Circuit has held that *Moore* announced a new rule of constitutional law that was not substantive in nature and was not otherwise retroactive. *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1338–39 (11th Cir. 2019). The Sixth Circuit, in an unpublished case, held likewise, *In re Payne*, 722 F. App'x 534, 538 (6th Cir. Feb. 8, 2018), and an intermediate Ohio Court has followed suit, *State v. Jackson*, --- N.E.3d ---. 2020 WL 4578597, at *9 (Ohio Ct. App. 2020). The Fifth Circuit, in a recent decision in Mr. Milam's own case, held *Moore's* retroactivity to be an open question in the circuit, noting that the court has "not definitively rejected or supported the contention that *Moore* is a new retroactive rule of constitutional law in the context of successive habeas petitions sought under 28 U.S.C. § 2244."[12] *In re Milam*, No. 20-40663, Slip Op. at *4 (5th Cir. Oct. 27, 2020).

Yet, there are strong arguments that *Moore* is, in fact, a substantive rule to which full retroactive effect must be given. "A rule is substantive rather than procedural if it *alters* the range of conduct or *the class of persons* that the law punishes." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (emphasis added). *Moore* unequivocally struck down as too narrow in substance the framework promulgated by Texas to determine whether persons are included in the protective reach of the

[12] The Kentucky Supreme Court has held that a similar decision from this Court, *Hall v. Florida*, announced substantive rules of constitutional law that must be applied retroactively. *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), *abrogated on other grounds*, *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

Eighth Amendment. That standard "creat[ed] an unacceptable risk that persons with intellectual disability [as understood by clinical criteria] will be executed." *Moore*, 137 S. Ct. at 1044 (internal quotations omitted). In striking down Texas's standard, *Moore* altered the "essential facts bearing on punishment," *Summerlin*, 542 U.S. at 353, and consequently the class of people exempt from the death penalty because they are intellectually disabled. That *Moore* did so is particularly apparent when examining who is eligible for execution under Texas's pre-*Moore* and post-*Moore* standards. For example, previously in Texas a person who met current medical diagnostic standards for intellectual disability but who: 1) was not identified as intellectually disabled by those who knew them during the developmental period; 2) had the ability to formulate plans and carry them through; 3) showed leadership; 4) responded appropriately and rationally to external stimuli; 5) responded coherently, rationally, and on point to oral or written questions; 6) was able to hide facts or lie; and/or 7) committed an offense that required forethought, planning, and complex execution, would not have been included in the class of people considered intellectually disabled by Texas courts. *See Briseno*, 135 S.W.3d at 8–9. Similarly, a person with any adaptive strengths or coexisting conditions would have been deemed outside the protected class. *See Moore I*, 137 S. Ct. at 1050–51. Under *Moore I*, however, that person would be exempt from execution if clinical standards were otherwise met.[13] *Id.* at 1051–52.

[13] That *Moore* changed the class of people exempt from execution based on intellectual disability is further evidenced by the fact that defendants who were found not to be intellectually disabled under Texas's standard created in response to *Atkins* have now been found intellectually disabled under *Moore*. *Moore*, 139 S. Ct. at 672 (finding Moore intellectually disabled); *Ex parte*

If *Moore I* is retroactive, Texas was required to give it retroactive effect. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."); *see Am. Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 1778 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions.").

Further, substantive rules must have retroactive effect because "[a] conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void." *Montgomery*, 136 S. Ct. at 731. Therefore, "a court has no authority to leave in place a conviction or sentence that violates a substantive rule." *Id.* When a new, substantive rule is announced, petitioners are "entitle[d] to an adjudication" that is "governed by the substantive federal baseline." *Panetti v. Quarterman*, 551 U.S. 930, 935 (2007).[14] If *Moore* is retroactive, the question therefore arises whether the CCA was correct to refrain from re-adjudicating Mr. Milam's intellectual disability allegations and to leave undisturbed a pre-*Moore*

Henderson, No. WR-37,658-03, 2020 WL 1870477 (Tex. Crim. App. Apr. 15, 2020) (per curiam) (granting relief on a claim of intellectual disability upon reconsideration of the case in the light of *Moore v. Texas*); *cf. Ex parte Henderson*, No. WR-37,658-03, 2006 WL 167836 (Tex. Crim. App. Jan. 25, 2006) (per curiam) (adopting trial court's recommendation to deny intellectual disability claim); *Ex parte Lizcano*, No. 68,348-03, 2020 WL 5540861 (Tex. Crim. App. Sept. 16, 2020) (per curiam) (granting relief on a claim of intellectual disability upon remand of the case in the light of *Moore v. Texas*); *cf. Ex parte Lizcano*, No. 63,348-03, 2015 WL 2085190 (Tex. Crim. App. Apr. 15, 2015) (per curiam) (adopting trial court's recommendation to deny intellectual disability claim).

[14] *Panetti*, of course, also requires a "preliminary showing" of entitlement to relief. 551 U.S. at 934. In authorizing Mr. Milam's application, the CCA necessarily found that Mr. Milam had made a prima facie showing of an intellectual disability claim. *Brooks*, 219 S.W.3d at 400.

jury verdict that Mr. Milam is not intellectually disabled under the circumstances of his case—circumstances that included the jury being urged to reject his evidence based in part on lay stereotypes about the intellectually disabled.[15]

B. Mr. Milam's pre-*Moore* adjudication of his intellectual disability allegations was made by a jury who was urged by the State to apply lay stereotypes consistent with the *Briseno* factors.

As noted above, to determine whether Mr. Milam was entitled to a new adjudication of his intellectual disability allegations, the CCA purported to scrutinize Mr. Milam's trial adjudication to ascertain whether he already received the benefit of the rules announced in *Moore*. App. 2 ¶ 168–69. At the penalty phase of trial, the defense presented testimony by Dr. Mark Cunningham, who evaluated Mr. Milam pre-trial and determined that Mr. Milam met the diagnostic criteria for intellectual disability. 53 RR 239. The State presented testimony from Dr. Timothy Proctor, who disputed Dr. Cunningham's diagnosis. 55 RR 180. The jury also heard lay witness testimony about Mr. Milam's adaptive functioning from family, employers, teachers, and neighbors. *See, e.g.*, 51 RR 8–9, 27–30, 212–14, 275–78; 52 RR 84–88, 101, 54 RR

[15] The CCA's treatment of Mr. Milam's claim of intellectual disability violated the retroactivity principle of "treating similarly situated defendants the same." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). For example, while the CCA merely reviewed the record from Mr. Milam's trial to determine if the jury's adjudication of Mr. Milam's claim ran afoul of *Moore*, the CCA afforded a full readjudication to Juan Lizcano. Like Mr. Milam, Mr. Lizcano had presented allegations of intellectual disability while *Briseno* was the controlling standard in Texas. *Ex Parte Lizcano*, Trial Court's Findings of Fact and Conclusions of Law, No. W05-59563-S(A), at *2 (282nd Dist. Ct. Mar. 29, 2019) (Lizcano presented evidence of intellectual disability at trial and in initial state habeas application). However, the CCA did not just examine the previously presented evidence to determine if the prior fact-finders' intellectual disability determination were valid under *Moore*. Instead, the CCA remanded Mr. Lizcano's subsequent application filed post-*Moore* to the trial court so that it could "receive evidence from mental health experts and any witnesses whose evidence the court determines is germane to the question of intellectual disability." *Ex parte Lizcano*, No. WR-68,348-03, 2018 WL 2717035, at *1 (Tex. Crim. App. June 6, 2018). The CCA also ordered that the trial court "shall then make findings of fact and conclusions of law regarding the issue of intellectual disability." *Id.*

285–86. The State then argued that the jury should not find Mr. Milam intellectually disabled based on lay stereotypes about intellectual disability. 56 RR 134–36. The jury was instructed that it was required to "consider all the evidence at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background and character and the circumstances of the offense" in answering the intellectual disability special issue. 4 CR 967.

The CCA concluded that "the jury's determination, by a preponderance of the evidence, that Applicant was not a person with an intellectual disability . . . , did not run afoul of any Supreme Court precedent." App. 2 ¶ 180. In doing so, the court ignored that the jury had heard testimony that would be impermissible for it to consider in making an intellectual disability determination under the current constitutional standard, which defense counsel could not exclude from the jury's consideration under the prevailing law at the time. The court also disregarded the fact that the State encouraged the jury apply the same stereotypes that would later be denounced by this Court—and that, because of the existing framework in place at the time of trial that had endorsed those stereotypes, defense counsel were legally powerless to object to it. Thus, the CCA's adoption of State-authored findings in this case purporting to conclude that the jury's verdict on the intellectual disability allegations was not affected by *Moore* reflects the CCA's continued tolerance of lay stereotypes about the intellectually disabled and aclinical standards to decide questions of intellectual disability under the Eighth Amendment. This is demonstrated in several ways.

First, the State questioned numerous lay witnesses about whether they believed Mr. Milam was intellectually disabled. *See* 49 RR 76 (Texas Ranger stating that he did not believe he was speaking to "a person that was mentally retarded" when interviewing Mr. Milam after offense); 54 RR 293 (prior employer had never heard words "mentally retarded" associated with Mr. Milam); 54 RR 314 (Mr. Milam's teacher did not refer him for an evaluation for intellectual disability); 55 RR 85 (Mr. Milam's cousin never heard of any indication that Mr. Milam was intellectually disabled); 55 RR 114 (neighbor did not believe Mr. Milam was intellectually disabled). *See Moore*, 137 S. Ct. at 1051–52 (rejecting *Briseno* factor that asked if "those who knew the person best during the developmental stage—his friends, family, teachers, employers, authorities—think he was mentally retarded at that time").

Second, the jury determination left in place by the CCA was rendered at the conclusion of a capital sentencing trial in which the jury heard evidence the State presented, *inter alia*, about Mr. Milam's alleged future dangerousness. The jury was directed in its charge that when considering whether Mr. Milam is intellectually disabled, it "shall consider all the evidence at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background and character and circumstances of the offense." 4 CR 981. Mr. Milam's defense counsel objected to the inclusion of this language, specifically that the jury "shall" consider the circumstance of the offense when deliberating on his intellectual disability. 55 RR 282. The State disagreed, because "under *Briseno*, the Court of Criminal Appeals has said the circumstances of the offense are relevant to the issue of mental retardation."

55 RR 285. The State then argued that, in determining whether Mr. Milam had met prong two, the jury could rely on its assertion that he "knew not to hurt Amora [the decedent] when Danny [his brother] and his mom were around." 56 RR 136.

Third, and most critically, the State's closing arguments encouraged the jury to rely heavily on stereotypes only relevant to an "intellectual disability" determination under the *Briseno* factors rejected by this Court in *Moore*. For example:

> And the fact of the matter is, from the evidence, what you heard where the adaptive functioning is concerned is a whole lot of things that tell you that this prong is not met, this second prong . . .
>
> *You know that he could lie to protect himself.* I mean, you heard that interview with [Texas Ranger] Kenny Ray. He didn't budge . . . .
>
> *He could carry on a conversation, as you yourself have heard on several and multiple occasions. And he could hang out with kids of his own age and play with them appropriately. Those are all things, when you look at that, you should consider.*

56 RR 134–36 (emphasis added). *See Briseno*, 135 S.W.3d at 8; *cf. Moore*, 137 S. Ct. at 1051 ("By design and in operation, the *Briseno* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'") (quoting *Hall*, 572 U.S. at 704).

Much of the rest of the State's argument regarding Mr. Milam's adaptive functioning encouraged the jury to focus on Mr. Milam's perceived strengths and propagated "lay stereotypes" of intellectual disability. The State encouraged the jury to reject that Mr. Milam had met his burden of proving that he had significant adaptive deficits because:

> You heard that he kept his shop area clean and neat. That he used his cell phone, that he had a cell phone, that he had a MySpace account,

> that he used computers. He knew how to use the internet. He knew his D.L. He knew his social security number. He could rap on about. . . what music he liked, about fixing cars . . . . [H]e could arrange to buy drugs, because he did so. You knew that he could pay for drugs. You know that he could execute trades for drugs. You know that he could hide his drug transactions from the police, from his family, from Jesseca.[16]

56 RR 135; *see id.* at 134 (encouraging the jury to reject prong two because "He drove a car. He wrote letters from the jail. He read books in the jail. He changed people's oil."); *id.* at 136 (encouraging the jury to reject prong two because "He replaced spark plugs. He tended to the Ag. Project animals. He played board games. He could do schoolwork."). Moreover, the State urged the jury to disregard the standard psychological instrument given by the defense expert used to objectively measure Mr. Milam's adaptive functioning, telling the jury, "You know, it is just not appropriate for you to make a decision based upon that test." 56 RR 137. Mr. Milam's counsel did not object—and could not have objected—to these arguments because the *Briseno* framework under which the trial occurred embraced those very stereotypes and aclinical standards generally. It was the governing law.

Whether Mr. Milam was intellectually disabled was the most contested issue at sentencing. The State itself anticipated the sentence—life or death—would be determined based on the jury's answer to the intellectual disability special issue, telling the jury during its opening statement, "I anticipate that there will be evidence before you to suggest that this defendant is mentally retarded. I anticipate that that may very well be where you go." 49 RR 11. In rendering that verdict, the jury was not asked to express conclusions about any particular prong of intellectual disability. It

[16] Jesseca Carson was Mr. Milam's fiancée and his co-defendant.

was asked only to answer "yes" or "no" to the question, "Do you find, by a preponderance of the evidence, that the defendant, Blaine Keith Milam, is a person with mental retardation?" 4 CR 987. As the jury was instructed that it must consider every piece of evidence introduced at both phases of the trial in deciding its answer to this question, it is unknown what information and evidence the jury actually relied upon when answering it negatively. But there is no reason to believe the jury did not take the State up on its offer to reject Mr. Milam's allegations because he "could lie to protect himself," 56 RR 135, or because he "could carry on a conversation," 56 RR 136, two *Briseno* factors deemed unacceptable in *Moore*.

Under the law at the time, there was no legal basis for Mr. Milam's counsel to object to the above testimony and argument. Nor was there a basis to request limiting instructions with respect to certain evidence irrelevant to the jury's intellectual disability determination or to request jury instructions in the charge that would have adequately guided the jury's factual determination of intellectual disability and preclude any reliance on stereotype.[17] *Cf. Thomas v. State*, No. AP-77,047, 2018 WL

[17] Indeed, for the reasons articulated here, readjudication is critical where the substantive law has changed because that change in law will necessarily shape the evidence the parties introduce, what they object to, and what jury instructions or legal standard they request. Consequently, this Court and lower courts have found that where there is an intervening change in substantive law, a "full and fair opportunity" to readjudicate a claim under the correct legal standard is required. For example, the Kansas Supreme Court, when remanding the case back to the trial court for redetermination of an intellectual disability issue in light of *Moore* and *Hall*, stated, "We are also cognizant the parties may need to revise their previous arguments based on the changes to the statutes, developments in the caselaw, and this court's decision. . . . The district court may need to consider whether additional evidence is required or made relevant by the present federal constitutional standards and state statutory revisions as we have interpreted them." *State v. Thurber*, 420 P.3d 389, 452–53 (Kan. 2018); *see also Bobby v. Bies*, 556 U.S. 825, 836–37 (2009) (State entitled to a "full and fair opportunity to contest" claim of intellectual disability where it previously conceded intellectual disability as a mitigating factor but not as a categorical bar to death penalty at petitioner's trial); *Miller, v. City of Ithaca*, 758 F. App'x 101, 104 (2d Cir. 2018) (remanding for new trial where courts were required to give "full retroactive effect" to new law that changed causation standard); *Van*

6332526, at *2, 18–19 (Tex. Crim. App. Dec. 5, 2018) (reversing death sentence where defense expert testified to current clinical standards used to evaluate intellectual disability but State's expert testified about *Briseno* and court's instructions did not guide jury's discretion). Nonetheless, the CCA ignored the now-wholly improper evidence and argument introduced at Mr. Milam's trial and instead concluded that the errors identified by this Court in *Moore* did not occur at Mr. Milam's trial. App. 2 ¶ 184. Based on that finding, it held that Texas did not need to reassess whether the Eighth and Fourteenth Amendments prohibited it from executing Mr. Milam because is a person with intellectual disability. This Court should grant certiorari, hold that *Moore* announced substantive rules of constitutional law that are retroactive to cases on collateral review, and hold that Mr. Milam has yet to receive the benefit of those rules.

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE TEXAS COURT OF CRIMINAL APPEALS'S CONTINUED ENFORCEMENT AND APPLICATION OF THE SAME UNCONSTITUTIONAL FRAMEWORK CONDEMNED BY THIS COURT IN *MOORE V. TEXAS*.

Even if this Court declines to answer the question of whether *Moore* is a new, substantive rule retroactively applicable to cases on collateral review and whether the CCA failed to give adequate effect to that rule, it still should grant certiorari to correct the CCA's continued misapplication the principles announced by *Moore*. The CCA relied on factors rejected by this Court in *Moore* when it determined Mr. Milam

Tran v. Colson, 764 F.3d 594, 605 (6th Cir. 2014) (where "the constitutional protection depends on the content of state law that has changed retroactively since the relevant state court ruled, and the relevant state court ruled unreasonably in light of the change," petitioner should be granted a conditional writ of habeas corpus to permit the state court to re-adjudicate the intellectual disability allegations "under the now-governing legal standard").

did not meet his pleading burden of alleging clear and convincing evidence of intellectual disability under the state "innocence of the death penalty" gateway for obtaining review in successive habeas corpus applications under Texas Code of Criminal Procedure Article 11.071.[18] With regard to prong one, it discounted the low-end of the standard error of measurement of Mr. Milam's qualifying IQ scores, at least in part based on factors disavowed by this Court, and ignored Mr. Milam's evidentiary proffer that another IQ score was miscalculated at trial. The court relied heavily on existing evidence of Mr. Milam's perceived adaptive strengths in the trial record to reject Mr. Milam's claim on prong two. Finally, the CCA concluded that Mr. Milam could not meet his pleading burden under prong three because he was never diagnosed with intellectual disability before the age of 18—a requirement found nowhere in current medical standards or the law.

First, the CCA found that Mr. Milam could not meet his burden of establishing that he had significant intellectual deficits. In doing so, the court relied, *inter alia*, on reasoning that Drs. Proctor and Andrews, who administered the WAIS-IV tests that returned FSIQ scores of 68 and 71, respectively, believed that Mr. Milam may have

[18] The State-authored findings make credibility determinations about Dr. Jack Fletcher, one of Mr. Milam's experts, whose declaration was never submitted into evidence and who never testified. App. 2 ¶ 235. The findings also conclude that, "in the alternative, relief on this claim should be denied on the merits." App. 2 ¶ 239. However, as noted above, the trial court issued a "letter pronouncement" denying Mr. Milam's application in one sentence. App. 4. Mr. Milam was never afforded any opportunity to present evidence and prove his claim of intellectual disability and, to the extent that the CCA denied Mr. Milam's claims on the merits, that decision creates significant due process concerns. *Fuentes v. Shervin*, 407 U.S. 67, 80 (1972). However, the State-authored findings are inconsistent and unclear and because they dispose of Mr. Milam's intellectual disability claim under Section 5(a)(3) without it ever having been authorized under that mechanism, Mr. Milam reads the findings to ultimately conclude that he failed to meet his pleading burden. *See Blue*, 230 S.W.3d at 163 ("The statutory scheme as a whole does not call upon us to make a determination of the merits of a subsequent writ application at [the pleading stage].").

been distracted. App. 2 ¶ 125. Similarly, the court relied on a finding that psychologists "agreed that a lack of education can affect IQ testing; Dr. Proctor also suggested anxiety, depression, emotional upset, and drug abuse could impact testing." *Id.* The court relied on Dr. Proctor's opinion that, "given the SEM, Applicant was someone with below average intellectual functioning, in the borderline range, but he did not believed Applicant showed significantly sub-average intellectual functioning." *Id.*

However, "the presence of other sources of imprecision in administering the test to a particular individual . . . cannot *narrow* the test-specific standard-error range." *Moore*, 137 S. Ct. at 1049; *compare Ex parte Moore*, 470 S.W.3d 481, 517–18 (Tex. Crim. App. 2015) (State's expert testified that "childhood trauma can cause low IQ scores because the stressful environment makes it difficult for the child to get enough rest, focus, and learn," that "many inmates are depressed and that depression can lower IQ scores," and that "applicant's affect was flat during her evaluation and he seemed a little depressed"), *and id.* at 519 (relying, *inter alia*, on fact "[a]pplicant also took the WAIS–R under adverse circumstances; he was on death row and facing the prospect of execution, and he had exhibited withdrawn and depressive behavior" to conclude that Moore's "actual IQ" might be "in a somewhat higher portion of that 69 to 79 range").[19]

[19] Additionally, the CCA entirely omitted additional supporting facts attached to Mr. Milam's application that the SB-5, administered before trial, was miscalculated by Dr. Andrews. Dr. Andrews reported that Mr. Milam scored an 80 on the SB-5. Dr. Dale Watson recalculated the score and the correct score is a 78. Ex. 19, Watson Dec. ¶ 20. If calculated using the Flynn correction, the score on the SB-5 is a 75 and, consequently, a third qualifying score for intellectual disability. *Id.* at ¶ 22.

Second, in concluding that Mr. Milam had failed to meet his pleading burden, the CCA's relied on a recitation of Mr. Milam's perceived strengths in evaluating Mr. Milam's adaptive functioning. It omitted any mention of the substantial evidence of adaptive deficits presented both at trial, as well as included in the additional supporting facts attached to Mr. Milam's habeas application. *See* App. 2 ¶ 133 (discussing Mr. Milam's work history as an employee at oil change shops); *id.* at App. ¶ 135 ("Applicant could use a computer;" "Applicant took care of Amora—he gave her a bottle, put her to bed, and watched cartoons . . . ;" "Applicant could take care of cars and hold a job.").

The CCA also relied heavily on testimony from Mr. Milam's teachers that they were not aware of him being diagnosed with intellectual disability before he was withdrawn from school in the fourth grade. App. 2 ¶ 134; *id.* ¶ 137 (noting that Mr. Milam's school records did not reflect an intellectual disability diagnosis). These findings are problematic in several ways. First, there is no requirement that an individual be *diagnosed* with an intellectual disability prior to age 18—the requirement is that the symptoms *manifest* during the developmental period. AAIDD-11 at 27; *Moore II*, 139 S. Ct. at 668. Moreover, the CCA's reliance on this testimony echoes one of the *Briseno* factors. *Briseno*, 135 S.W.3d at 8 ("Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?"). And indeed, the CCA also cited to testimony from Mr. Milam's friend, cousin, and neighbor as additional evidence that

Mr. Milam's intellectual deficits were due to lack of education, not intellectual disability. App. 2 ¶ 134.

In its findings and conclusions, the CCA entirely ignored the trial testimony, as well substantial allegations and evidentiary proffers attached to Mr. Milam's application, supporting Mr. Milam's adaptive deficits. The court summarily referred to the testimony regarding Mr. Milam's adaptive deficits in one paragraph which states that Dr. Cunningham, Mr. Milam's expert at trial, testified that Mr. Milam "suffered concurrent deficits in adaptive behaviors in all eleven of the categories listed in the DSM-IV . . . ." App. 2 ¶ 126. With regard to the evidentiary proffers attached to Mr. Milam's habeas application, the court merely stated that it "concludes that Applicant's new experts essentially reexamined the same evidence admitted at trial, in addition to new expert and lay-witness affidavits which conveyed information similar to that admitted at trial."[20] *Id.* ¶ 234. However, the court engaged in no actual analysis of Mr. Milam's alleged deficits. In doing so, the CCA engaged in the same improper analysis struck down by this Court in *Moore*. 137 S. Ct. at 1050 ("[T]he CCA overemphasized Moore's perceived adaptive strengths" but "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." (emphasis in original)).

[20] The court also relied on a finding that the State's expert, Dr. Proctor, was more credible than the defense expert, Dr. Cunningham, in part because Dr. Cunningham relied on information from Mr. Milam's mother and his sister Teresa. App. 2 ¶ 235. It dismissed the new report by Dr. Jack Fletcher out of hand because he relied "on the testimony of Applicant's mother and sister." App. 2 ¶ 235. This bare analysis ignores the fact that Dr. Fletcher reinterviewed Mr. Milam's mother and sister, obtained very similar results to the results reported by Dr. Cunningham, and that he corroborated the information provided by Mr. Milam's family members with lay witness affidavits, trial testimony, and social history records.

The errors committed by the CCA in *Moore* pervaded its analysis of whether Mr. Milam met the dictates of Article 11.071 § 5(a)(3). For all the reasons identified above, the CCA also necessarily misapplied *Moore* when it held that Mr. Milam's trial was not affected by it, given the State's injection of lay stereotypes the Court unanimously rejected in *Moore*. *See* App. 2 ¶ 195 ("The Court next concludes that, in the jury's consideration of the adaptive-functioning factor, the *Briseno* factors had no place in Applicant's trial."). Consequently, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

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