**No. 20-6518**

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

## REPLY IN SUPPORT OF A 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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## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its Brief in Opposition, the State continues to advocate that Mr. Milam's intellectual disability claim was appropriately decided using Texas's stereotype-laden framework condemned by this Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017). The State also asserts that Mr. Milam received the full retroactive benefit of *Moore*. The State praises the Texas Court of Criminal Appeals' findings—findings counsel for the State in this case drafted in full without any guidance from a court as to the rationale—as "thorough." Br. in Opp'n ("Opp'n") at 23. But these findings neglect to consider the State's argument to Mr. Milam's jury in the penalty phase of his trial urging them to decide the intellectual disability issue based on evidence and factors that do not comply with current clinical and constitutional standards. They also omit any analysis of the substantial evidence of Mr. Milam's adaptive deficits. The State's brief demonstrates either a deep misunderstanding of the constitutional requirements imposed on courts deciding intellectual disability claims or a blatant disregard for this Court's precedent. Because the State drafted the findings of fact and conclusions of law adopted by the CCA, it is no surprise that the court's findings suffer from the same infirmities.

The State argues that Mr. Milam is "unable to present any special or important reason for certiorari review," Opp'n at 2, but, as this Court is well aware, Texas's handling of intellectual disability claims has required repeated intervention by this Court. In *Moore II*,[1] this Court had to again reverse the CCA after that court failed

[1] *Moore v. Texas*, 139 S. Ct. 666 (2019).

to adequately apply the standards announced by this Court in *Moore I*,[2] which struck down Texas's stereotype-laden framework for adjudicating intellectual disability claims. This Court found reversal was required for a second time because, while the CCA's second opinion in *Moore* contained "sentences here and there suggesting other modes of analysis consistent with what [this Court] said [in *Moore I*]," "there are also sentences here and there suggesting reliance upon what we earlier called lay stereotypes of the intellectually disabled." *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (internal quotation marks omitted).

Likewise here, the CCA purported to apply the constitutional standards announced in *Moore I*, but upheld an adjudication under Texas's pre-*Moore* framework notwithstanding that the jury was urged to decide the intellectual disability question based upon lay stereotypes. Thus, the decision in this case continues to defy this Court's decisions in *Moore I* and *II*. Without this Court's intervention, Texas stands poised to execute Mr. Milam without any court having reliably adjudicated Mr. Milam's compelling intellectual disability claim under appropriate standards and free from the application of lay stereotypes. Certiorari review is warranted.

## I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE QUESTION OF WHETHER THE COURT OF CRIMINAL APPEALS FAILED TO GIVE RETROACTIVE EFFECT TO *MOORE V. TEXAS*.

Mr. Milam seeks certiorari review of whether the CCA gave full retroactive effect to *Moore* when it disposed of his intellectual disability claim without actually

[2] *Moore v. Texas*, 137 S. Ct. 1039 (2017).

deciding if Mr. Milam is intellectually disabled under current constitutional standards. Pet. for Writ of Cert. ("Pet.") at 25. A threshold question to this inquiry is whether *Moore* is a new, substantive rule that applies retroactively to cases on collateral review—a question this Court has not yet answered. In its Brief in Opposition, the State argues that this Court need not grant certiorari because it asserts that Mr. Milam has "already received the relief requested" and that the Texas Court of Criminal Appeals ("CCA") "applied *Moore I* retroactively" to Mr. Milam's claim. Opp'n at 11. But the State's conclusory arguments presume the answer to the question Mr. Milam posed to this Court: whether Mr. Milam actually received the benefit of the new rule in light of the state court's upholding of a pre-rule adjudication in which the factfinder was urged to apply the very lay stereotypes this Court rejected in *Moore* to answer whether Mr. Milam is an intellectually disabled person—or whether, under the circumstances of this case, Mr. Milam is entitled to adjudication anew free from the intrusion of the stereotypes rejected by *Moore*. As noted in his Petition for Writ of Certiorari, Mr. Milam does not dispute that the CCA purported to apply this Court's decision in *Moore* retroactively. Pet. at 21. Mr. Milam's argument is that the CCA's treatment of his intellectual disability claim was inadequate to actually give him its full benefit, leaving an adjudication in place that is wholly unreliable under the Eighth Amendment as interpreted by *Moore*.

The State presumes that the CCA's treatment of Mr. Milam's claim constitutes retroactive application but offers no authority to support that proposition. Instead, case law suggests that where there is an intervening change in substantive law, a

new adjudication untainted by the former standard is required whenever the prior adjudication is inadequate to confer the full benefit of the new rule. *See, e.g.*, *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 intellectual disability constituted mitigating factor but not categorical bar to death penalty at petitioner's trial); *Van 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").

That these cases require a new adjudication where the prior adjudication was subject to a now-impermissible substantive standard is logical. A change in substantive law will necessarily shape the evidence that is presented, the arguments that are given, the objections that are made, and the framework under which the factfinder will decide the question before it. Indeed, as described in detail in Mr. Milam's Petition, Texas's then-standard for adjudicating intellectual disability claims hobbled Mr. Milam's trial counsel's ability to object to arguments and evidence—or to request limiting instructions for otherwise admissible evidence—that is not proper to consider for an intellectual disability determination under *Moore*. Pet. at 27–31.[3]

[3] The State also argues that "the question of retroactivity is more appropriately decided in the federal habeas context." Opp'n at 14. The State bases this argument on the principle that "states are free to give broader effect to new rules than required by this Court." Opp'n at 14 (citing *Danforth v. Minnesota*, 552 U.S. 264, 277 (2008)). Mr. Milam does not dispute the premise that states may

Moreover, the State presses an argument that the evidence and argument at Mr. Milam's trial that ran afoul of *Moore* can still permissibly be considered under certain circumstances when deciding intellectual disability. Opp'n at 23–28. For example, the State argues that it was permissible for a law enforcement officer to testify about his opinion of whether Mr. Milam is intellectually disabled because he was "discussing his impression of a suspect being interviewed for murder." Opp'n at 25. This exception can be found nowhere in *Moore*.

The State also argues that testimony from Mr. Milam's teachers about whether Mr. Milam appeared to be intellectually disabled was permissible because they were "educators with knowledge of Mr. Milam's learning ability." *Id.* at 24. But *Moore* did not carve out an exception for teachers when striking down the *Briseno*[4] factor regarding lay witness opinion testimony about whether a petitioner is intellectually disabled. *Moore*, 137 S. Ct. at 1051–52 (identifying *Briseno* factor that asks "[d]id 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" as lay perception of intellectual disability) (emphasis added).[5] This argument is even more suspect when applied to

promulgate broader retroactivity rules than *Teague v. Lane*, 489 U.S. 288 (1989), requires. However, the State's argument that the question of *Moore*'s retroactivity is better decided in federal habeas omits any mention of this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), which held that "when 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." Therefore, if *Moore* is retroactively applicable, the question of whether the CCA failed to give that decision retroactive effect in disposing of Mr. Milam's state habeas application is perfectly appropriate for this Court to decide in this procedural posture.

[4] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

[5] The State also argues that its questioning of Mr. Milam's teachers would be permissible under today's standards because the teachers' "opinions were relevant for purposes of interpreting [Mr.

the lay opinion testimony from Mr. Milam's neighbor and cousin about whether those witnesses believed Mr. Milam was intellectually disabled. Opp'n at 24. The State asserts that this testimony was not improper because those witnesses were "involved in the effort to homeschool Milam." *Id.* The State makes this argument without any citation—to the record or case law—to support the proposition that these lay witnesses' experience with homeschooling provides a legitimate exception to the otherwise impermissible consideration of *Briseno* evidence.[6]

Additionally, the State argues that its elicitation of testimony from Mr. Milam's former employer that he had never previously heard the words "mental retardation" associated with Mr. Milam did not violate *Moore* because it was in response to defense counsel's questioning on direct. Opp'n at 24–25. However, that defense counsel was eliciting opinion testimony from a lay witness about Mr. Milam's intellectual functioning further underscores the argument that Texas law at the time of Mr. Milam's trial was what governed the framework presented to the jury. And

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Milam's] special education records." Opp'n at 24. But the teacher's testimony highlighted by Mr. Milam in his petition was not referring to his school records. The State elicited testimony from his first grade teacher about whether she had ever referred Mr. Milam for "mental retardation." 54 RR 314. She answered that she did not and when asked why, responded that she "didn't think he needed it." *Id.* at 315. In other words, the State elicited the teacher's opinion about whether she believed Mr. Milam was intellectually disabled—testimony that is clearly foreclosed by *Moore*. *See also* 51 RR 35 (asking another of Mr. Milam's elementary school teachers if she "thought he was [intellectually disabled]").

[6] Moreover, this argument is even more questionable given the limited experience these witnesses had with homeschooling Mr. Milam. Mr. Milam's cousin Melynda Keenon testified that she only worked with Mr. Milam three times. 55 RR 84. Mr. Milam's neighbor Sarah Hodges testified that she would give Mr. Milam some projects but she never graded them. 55 RR 98. Hodges also testified that she gave Mr. Milam work that was below his grade level. *Id.* at 97. At any rate, it is difficult to ascertain on what basis either witness had the experience or training to assess Mr. Milam's intellectually functioning and render an opinion on whether he was intellectually disabled. Furthermore, the CCA and State's reliance on testimony by a childhood friend of Mr. Milam's that Mr. Milam was "educationally slow because he was removed from school in fourth grade" further demonstrates continued adherence to impermissible *Briseno* evidence. App. 2 ¶ 134; Opp'n at 34 n.13.

despite the State's arguments to the contrary, Opp'n at 25, nothing in *Moore* permits a factfinder making an intellectual disability determination under the Eighth Amendment to consider *Briseno* factors if presented in rebuttal.

The State's argument that Mr. Milam offers no authority for the proposition that the jury charge requiring the jury to consider "all of the evidence at the guilt or innocence stage and the punishment stage" was prohibited under *Moore*, Opp'n at 26, is directly contradicted by *Moore*. *Moore*, 137 S. Ct. at 1046 n.6 ("Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose" is *Briseno* factor rejected by this Court.). Indeed, the State itself cited *Briseno* as the basis for that instruction. 55 RR 285. The State also ignores that it encouraged the jury to consider the circumstances of the offense in deciding the intellectual disability special issue. 56 RR 136. Moreover, the State offers no explanation as to how the facts of the offense are relevant to a determination of whether Mr. Milam is intellectually disabled under current constitutional standards.

Additionally, the State's assertions about why its penalty phase closing arguments encouraging the jury to rely on lay stereotypes do not render Mr. Milam's trial adjudication violative of *Moore* are unsupported by the record. The State argues that it "neither mentioned nor impermissibly invoked the *Briseno* factors and did not rely on impermissible stereotypes. The State invoked the evidence." Opp'n at 27. But the *Briseno* factors rejected unanimously by this Court in *Moore* were explicitly "evidentiary factors" which "factfinders in the criminal trial context might also focus

upon in weighing evidence" to make an intellectual disability determination. *Briseno*, 135 S.W.3d at 8. It is hardly surprising, then, that the State "invoked the evidence" made relevant by *Briseno* to urge the jury to apply the *Briseno* factors. The State's argument does not avoid problem. It *is* the problem.

Moreover, the enumerated *Briseno* factors were not the only aspect of Texas's framework that *Moore* struck down. This Court rejected the *Briseno* factors because they "advanced lay perceptions of intellectual disability." *Moore*, 137 S. Ct. at 1051. Because of that, the *Briseno* factors created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* Consequently, that the State did not explicitly identify the *Briseno* factors to Mr. Milam's jury is immaterial where the State expressly told the jury that it should rely on the types of lay stereotypes condemned in *Moore*. The State's argument that it "did not rely on impermissible stereotypes" is patently false. *See, e.g.*, 56 RR 135 (encouraging the jury to reject prong two because Mr. Milam "had a cell phone" and "had a MySpace account" and because he "could rap on about, you know, what music he liked"); *id.* at 136 (encouraging the jury to reject prong two because "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."); *id.* (encouraging the jury to reject prong two because "He tended to the Ag. Project animals. He played board games."). The State points to no authority that these types of facts are constitutionally permissible.

The State's attempts to draw a distinction that its stereotype-laden closing argument did not violate *Moore* because it "invoked the evidence" fall flat. Opp'n at 27. After *Moore*, it would be objectionable argument to leverage clinically irrelevant evidence—whether otherwise admissible at the trial or not—to urge a jury to make an intellectual disability determination. *Moore* contemplates no exception to the jury's consideration of unconstitutional factors regardless of whether they are supported by evidence in the record. Indeed, that this type of testimony was in evidence because of its relevance under *Briseno* and that the jury was encouraged to rely on it in deciding whether Mr. Milam is intellectually disabled only further underscores Mr. Milam's arguments that his trial was tainted by Texas's pre-*Moore* framework. The CCA's determination that it was not, and that Mr. Milam received the benefit of *Moore* at his trial, was wrong.

Finally, the State's arguments that there was evidence presented at Mr. Milam's trial that would still be permissible today by which the jury could have found that Mr. Milam is not intellectually disabled miss the point. *Moore* was concerned with an "unacceptable risk" that a person with an intellectual disability would be executed. Mr. Milam does not dispute that at his trial, his jury heard some evidence that would be permissible for a factfinder to consider under current constitutional standards. But the critical point is that the jury also heard testimony and argument that would not be permissible under *Moore*, and that the defense had no way to prevent that from happening under the then-governing *Briseno* framework. Despite not being able to ascertain the factual basis on which the jury decided the intellectual

disability special issue, the CCA upheld Mr. Milam's death sentence by merely reviewing the trial record and determining the jury's verdict could be upheld, even in light of *Moore*. As such, Mr. Milam has had no merits adjudication of his intellectual disability claim by a factfinder based on evidence and argument free from the influence of an unconstitutional legal standard. *See Moore II*, 139 S. Ct. at 672 ("We conclude that the appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found improper."). If *Moore* is retroactive, he is entitled to such an adjudication.

## II. THIS COURT CAN REVIEW THE COURT OF CRIMINAL APPEALS' MISAPPLICATION OF *MOORE V. TEXAS* TO MR. MILAM'S INTELLECTUAL DISABILITY CLAIM.

In its Brief in Opposition, the State argues that this Court lacks jurisdiction to review Mr. Milam's allegation that the CCA misapplied *Moore* when it rejected Mr. Milam's claim under Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure.[7] Opp'n at 28–31. This argument likewise lacks merit because the CCA's determination that Mr. Milam failed to meet the dictates of Article 11.071 § 5(a)(3)[8]

[7] In his Petition, Mr. Milam also asserted under this reason for granting the writ that the CCA similarly misapplied *Moore* in determining that his trial was not affected by Texas's pre–*Moore* intellectual disability framework. Pet. at 37. However, the State only addressed Mr. Milam's arguments relating to Section 5(a)(3). Opp'n at 31–36. Consequently, those are the only arguments addressed here.

[8] The State also argues that the CCA found that Mr. Milam "could not demonstrate the unavailability of an *Atkins* claim in his first state habeas application" in declining to authorize his intellectual disability claim under Section 5(a)(3). Opp'n at 12. There is no requirement in Texas law that authorization under Section 5(a)(3) requires a showing of prior unavailability. Indeed, the CCA has held the opposite—that Section 5(a)(3) provides a mechanism for petitioners who could have previously raised an intellectual disability claim (or other innocence-of-the-death-penalty claim) but failed to do so to have that claim reviewed in a subsequent application. *See Ex parte Blue*, 230 S.W.3d 151, 159–60 (Tex. Crim. App. 2007) (in enacting Section 5(a)(3) "[t]he Legislature quite obviously

of the Texas Code of Criminal Procedure is not independent of the federal constitutional question.

This Court has held that where a state procedural rule "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The CCA's conclusions here rejected Mr. Milam's challenge under Section 5(a)(3) because the court found that Mr. Milam could not meet the pleading burden to establish an Eighth Amendment violation. Inherent in that analysis is an assessment of Mr. Milam's claim that his execution would violate the Eighth Amendment because he is intellectually disabled.[9] Thus, although the ruling is procedural—that is, all the CCA decided was whether Mr. Milam met his pleading burden necessary to obtain merits review of his claim—that ruling was nevertheless intertwined with federal law. The Court clearly has jurisdiction to correct any misapplication of substantive Eighth Amendment law by a state court.

The State also again argues incorrectly that the CCA did not misapply *Moore* in rejecting Mr. Milam's claim under Section 5(a)(3). *See* Opp'n at 31. First, the State's

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intended this provision, at least in some measure, to mimic the federal doctrine of 'fundamental miscarriage of justice,'" which "operates to excuse procedural default").

[9] *See* App. 2 ¶ 227 ("The Court concludes that, even if considered in light of *Moore I*, *Moore II*, and *Hall*, Applicant's evidence fails to demonstrate clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled."); *id.* ¶ 230 ("The Court concludes that sufficient evidence exists to support the jury's determination that Applicant failed to demonstrate intellectual disability by showing (1) deficits in general mental abilities; (2) impairment in adaptive functioning; and (3) onset during the developmental period."); *id.* ¶ 237 ("The Court concludes that Applicant's new evidence is not compelling, nor does it 'dramatically undermine the previously considered substantial evidence that support[ed] a finding that applicant [was] not [intellectually disabled]" and "a rational finder of fact could still find that applicant [was] not [intellectually disabled]."); *id.* ¶ 238 ("The Court concludes that Applicant is not 'so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus' against execution." (quoting *Atkins*, 536 U.S. at 317)).

attempt to elide the CCA's misapplication of *Moore* by claiming the issue was only of competing credibility lacks merit. The State claims that the CCA is "permitted to find one expert more credible than another," Opp'n at 33, and that therefore the CCA did not err in relying on the testimony of the State's trial expert Dr. Timothy Proctor in finding that Mr. Milam had not met his burden of pleading that he had substantial impairments in intellectual functioning. Opp'n at 32–33. However, a credibility assessment is not what is at issue here. It is that the CCA's reasoning for its finding that Mr. Milam did not meet his pleading burden of establishing significantly subaverage intellectually functioning runs afoul of *Moore*.

Unlike in *Moore*, the CCA did not remove Mr. Milam's qualifying IQ scores from its consideration altogether because of unreliability. The SEM of Mr. Milam's WAIS scores—a 68 and a 71—place him in the qualifying range for an intellectual disability diagnosis. Therefore, the CCA had to "move on" to consider Mr. Milam's adaptive functioning. *Moore*, 137 S. Ct. at 1049. Instead, the court relied on expert testimony that "a lack of education" and "anxiety, depression, emotional upset, and drug abuse could impact testing." App. 2 ¶ 125. The court relied on that expert's testimony that "given the SEM," Mr. Milam's intellectual functioning was in "the borderline range" and that consequently Mr. Milam failed to meet his burden under prong one. *Id.* But these are exactly the type of considerations that this Court rejected in *Moore* when it held that "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. That is precisely the import of the

CCA's findings here. Finding that Mr. Milam was "in the borderline range" "given the SEM" is merely another way of the court finding that Mr. Milam's "true" IQ is in the higher range of the SEM of his 68 and 71 scores, and discounting the lower end of those qualifying IQ scores on that basis.[10]

Second, the State is also incorrect that "the CCA did not rely on perceived strengths in evaluating adaptive functioning." Opp'n at 33. The State claims that "[t]he findings Milam cites in support of his argument are not a recitation of Milam's strengths, but the record evidence relied upon by Dr. Proctor, and cited by the court, to discredit Dr. Cunningham's findings of adaptive deficits." *Id.* Yet, the CCA entirely omitted any analysis of the evidence and evidentiary proffers of adaptive deficits that were before it, running afoul of this Court's instructions in *Moore*. *See Moore II*, 139 S. Ct. at 670 (criticizing CCA's opinion because it "again relied less upon the adaptive *deficits* to which the trial court had referred than upon Moore's apparent adaptive *strengths*" and its "discussion of Moore's communication skills does not discuss the

[10] That the CCA relied on expert testimony to make this finding does not distinguish Mr. Milam's case from *Moore*. In *Ex parte Moore*, the CCA's conclusions rejected by this Court were also based on expert opinions at Mr. Moore's state habeas hearing. *See Ex parte Moore*, 470 S.W.3d 481, 517 (Tex. Crim. App. 2015) (expert "acknowledged that factors unrelated to a person's actual mental ability can lower test scores, including depression, psychosis, and external motivations to obtain a lower score, such as facing the death penalty"); *id.* (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"); *id.* (expert testified that "many inmates are depressed and that depression can lower IQ scores" and that Moore had "exhibited withdrawn and depressive behavior throughout his time on death row, and he demonstrated similar behavior earlier in his life"); *id.* at 519 (CCA concluding "by the time he took the WAIS–R, applicant had a history of academic failure, something that his own expert stated could adversely affect effort. Applicant 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. These considerations might tend to place his actual IQ in a somewhat higher portion of that 69 to 79 range."); *compare Moore*, 137 S. Ct. at 1049 (rejecting argument that "CCA properly considered factors unique to Moore in disregarding the lower end of the standard-error range").

evidence relied upon by the trial court") (emphasis in original) (internal quotation marks and alterations omitted).

For example, Mr. Milam presented evidence to the CCA that: an expert retained by the State before trial opined that Mr. Milam "has serious limitations in his ability to read and write" and that he "has very simplistic ideas, is very naïve, extremely gullible, easily led . . . ." Ex. 1, Gripon Report at 3; Mr. Milam did not know how to use a debit card and "would give the people, whom he knew, his PIN number and they would actually operate the machine for him" *id.* at 9; an elementary school teacher reported that Mr. Milam's "intellectual functioning was the lowest in the class," McIlhenny Aff. ¶ 3; former employers reported that "[w]hen I showed Blaine how to something [like using a tape measure], he would not remember how to do it the next time, and I had to show him again," Bennet Aff. ¶ 5, and "Blaine could not complete a task as instructed," Wallace Aff. ¶ 5; and that Mr. Milam never lived independently. 50 RR 8, 33. Nowhere in the CCA's findings of fact and conclusion of law does the court grapple with these evidentiary proffers of adaptive deficits submitted in support of the allegations of intellectual disability. Instead, the findings rely on Mr. Milam's perceived strengths. This is inconsistent with this Court's decision in *Moore*. *Moore I*, 137 S. Ct. at 1050.[11]

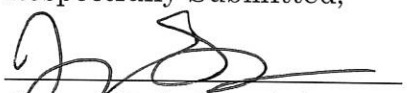
[11] The State also argues that "Milam undermines his own argument that the CCA continues to misapply the princip[le]s of *Moore I* by also complaining that the CCA has, post-*Moore I*, reexamined and granted relief in other cases . . . but is treating him differently . . . ." Opp'n at 35. Mr. Milam pointed out the procedural disparities between how Mr. Milam's claim was treated versus other state habeas applicants in similar procedural postures to support his argument that the CCA did not give *Moore* full, retroactive effect as applied to Mr. Milam. That the CCA has granted relief in other cases does not in any way establish that the CCA applied this Court's precedent correctly here. This Court need look no further than the State-authored Findings of Fact and Conclusions of Law adopted by the CCA in Mr. Milam's case to make that determination. Moreover, the procedural differences between

The CCA committed the same type of errors in its rejection of Mr. Milam's intellectual disability claim that this Court found unconstitutional in *Moore*. Consequently, this Court should grant certiorari, reverse the decision of the court below, and remand for further proceedings.[12]

## CONCLUSION

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

Respectfully Submitted,



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Mr. Milam's case and Mr. Lizcano's case invoked by the State are inapposite. Mr. Milam's point was simply that Mr. Lizcano, like Mr. Milam, raised intellectual disability at trial, which took place post-*Atkins*, and it was presented to his jury as a special issue that would preclude imposition of the death penalty. If all that was required to determine if relief was required under *Moore* was to reexamine the trial evidence, that likewise could have been done in Mr. Lizcano's case. But that is not what occurred. Instead, Mr. Lizcano was provided an opportunity to present additional evidence and have his intellectual disability claim adjudicated anew under the proper constitutional framework.

[12] The State's Brief in Opposition also argues that the Texas courts did not violate Mr. Milam's due process rights in their adjudication of Mr. Milam's intellectual disability claim. Opp'n at 36–40. Mr. Milam disagrees with the State's arguments but his certiorari petition does not present a question about due process in the manner by which the CCA decided Mr. Milam's intellectual disability claim.