No. _____

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

BOBBY LUMPKIN, DIRECTOR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jason D. Hawkins
Federal Public Defender
Jeremy Schepers*
Supervisor, Capital Habeas Unit
jeremy_schepers@fd.org
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214-767-2746
214-767-2286 (fax)

Jennae R. Swiergula
Texas Defender Service
1023 Springdale Rd. #14E
Austin, TX 78721
512-320-8300
512-477-2153 (fax)
jswiergula@texasdefender.org

**Counsel of Record*

Attorneys for Petitioner

CAPITAL CASE
QUESTION PRESENTED

1. Can 28 U.S.C. § 2244(b) be constitutionally interpreted to bar first-time federal habeas corpus merits review of an Eighth Amendment claim of intellectual disability?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Blaine Milam is a prisoner under sentence of death in the custody of Respondent, Director Bobby Lumpkin. 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)

Ex parte Milam, No. WR-79,322-03 (original writ of mandamus)

Ex parte Milam, No. WR-79,322-04 (third 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)

Milam v. Director, TDCJ-CID, No. 6:20-cv-646 (second 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)

In re Milam, No. 20-40849 (appeal from order of transfer), consolidated with *Milam v. Lumpkin*, No. 20-70024

Supreme Court of the United States

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

Milam v. Davis, No. 20-6518 (certiorari from subsequent state 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 United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished January 8, 2021, opinion of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirming the Order of Transfer from the United States District Court for the Eastern District of Texas ("Order of Transfer"), *In re Milam*, 832 F. App'x 918 (5th Cir. Jan. 8, 2021), is attached as Appendix 1. The December 17, 2020, Order of Transfer is attached as Appendix 2.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on January 8, 2021. In its March 19, 2020, Order in response to the COVID-19 pandemic, this Court extended the deadline to file a petition for writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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 punishment inflicted." The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

28 U.S.C. § 2244(b) provides in relevant part:

> 2(A) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless – the applicant shows that the

> claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
>
> 3(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

STATEMENT OF THE CASE

Blaine Milam alleged in a habeas corpus application below that he is intellectually disabled. He proffered evidence that three of the four experts who have evaluated whether Mr. Milam meets the criteria for a diagnosis of intellectual disability have concluded that he is intellectually disabled.[1] 53 RR 239; ROA 58—60; ROA 105—17. If Mr. Milam can show that he meets the "three core elements" of an intellectual disability diagnosis, the Eighth Amendment categorically prohibits the State of Texas from executing him. *See Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

Mr. Milam alleged intellectual disability at his trial. The State urged the jury to rely on various lay stereotypes of intellectual disability relevant under Texas's then-standard for adjudicating intellectual disability in a capital case to reject Mr. Milam's allegations. The jury answered the special issue on intellectual disability in the negative. 4 CR 987. Mr. Milam did not challenge the jury's determination on

[1] Dr. Timothy Proctor, an expert for the State who testified at Mr. Milam's trial, was the only expert who concluded that Mr. Milam is not intellectually disabled. 55 RR 180. On January 8, 2021, the date on which the Fifth Circuit affirmed the district court's transfer of Mr. Milam's federal habeas petition as second or successive, Dr. Proctor submitted a report in which he concludes, "[b]ased on the information currently available to me and the relevant diagnostic nomenclature and law at this time, *it is my opinion that Mr. Milam meets criteria for intellectual disability*." Subsequent Application For Post-Conviction Writ of Habeas Corpus at Exhibit 1 (emphasis added), *Ex parte Blaine Milam*, WR-79,322-04 (Tex. Crim. App. Jan. 12, 2021). However, that is not a part of the record below.

intellectual disability under Texas's now-unconstitutional *Briseno* framework on direct appeal or during his initial state post-conviction proceedings.

Mr. Milam filed an initial federal petition for writ of habeas corpus on October 14, 2014. Petition for Writ of Habeas Corpus, *Milam v. Stephens*, No. 4:13-cv-545 (E.D. Tex. Oct. 9, 2014). The petition did not allege that the Eighth Amendment prohibited the State from executing Mr. Milam because he is intellectually disabled. At that time, federal courts applied Texas's substantive standard for adjudicating intellectual disability claims. *See Woods v. Quarterman*, 493 F.3d 580, 587 n.6 (5th Cir. 2007) ("We find nothing in *Briseno* that is inconsistent with *Atkins*[.]"); *Simpson v. Quarterman*, 593 F. Supp. 2d 922, 932 (E.D. Tex. 2009) ("Fifth Circuit case law is clear that *Briseno* remains good law[.]"). This Court decided *Moore v. Texas*, striking down Texas's framework for adjudicating intellectual disability claims, on March 28, 2017. 137 S. Ct. 1039 (2017). The district court denied Mr. Milam's petition on August 16, 2017. *Milam v. Director*, No. 4:13-cv-545, 2017 WL 3537272 (E.D. Tex. Aug. 16, 2017).

In *Moore v. Texas*, this Court held that Texas's standard for evaluating intellectual disability claims violated the Eighth Amendment because it "creat[ed] an unacceptable risk that persons with intellectual disability will be executed." 137 S. Ct. at 1051 (internal quotations and citations omitted). This Court decided that the adjudication by courts of intellectual disability must be informed by "[t]he medical community's current standards[.]" *Id.* at 1053. Mr. Milam, whose jury found he was not intellectually disabled under Texas's since-rejected standard, meets current

criteria for a diagnosis of intellectual disability. 53 RR 239; ROA 58—60; ROA 105—17.

Mr. Milam sought to receive first-time adjudication by a federal court of his intellectual disability claim according to this Court's instructions in *Moore* by seeking authorization from the Fifth Circuit in accordance with the procedure set out in 28 U.S.C. § 2244(b). Motion for Order Authorizing This Court to Consider Second or Successive Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2244(b), *In re Milam*, No. 20-40663 (5th Cir. Oct. 2, 2020). In support, Mr. Milam argued that this Court's decision in *Moore* rendered an intellectual disability claim newly available to him. *Id.* The Fifth Circuit acknowledged that Mr. Milam had adduced evidence in support of the three prongs of intellectual disability as defined by current standards for a diagnosis of intellectual disability. *In re Milam*, 838 F. App'x 796, 799 (5th Cir. Oct. 27, 2020). Nonetheless, the Fifth Circuit denied Mr. Milam authorization and found that Section 2244(b) barred first-time federal review of Mr. Milam's intellectual disability claim on the basis that it was previously available, albeit not presented, in his initial federal habeas proceedings. *Id.* at 798–800.

Mr. Milam then filed in federal district court a petition raising an intellectual disability claim and Memorandum of Law in Support of Authority to Review that claim.[2] Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Milam v.*

[2] Mr. Milam filed his Petition and Memorandum of Law before the United States District Court for the Southern District of Texas, as the court for the district within which Mr. Milam was convicted and sentenced after a change of venue. The district court transferred Mr. Milam's Petition and Memorandum of Law to the United States District Court for the Eastern District of Texas, which encompasses the court where the case originated. Order to Transfer, *Milam v. Lumpkin*, No. H-20-4255 (S.D. Tex. Dec. 16, 2020).

Lumpkin, No. 6:20-cv-00646 (E.D. Tex. Dec. 15, 2020); Memorandum of Law in Support of Authority to Review that claim, *id.* In that Memorandum of Law, Mr. Milam argued that by preventing a federal court from adjudicating whether Mr. Milam is intellectually disabled, Section 2244(b) threatened to empower the State to violate the Constitution by disabling the Eighth Amendment's prohibition on the execution of persons with intellectual disability. The district court transferred Mr. Milam's petition to the Fifth Circuit as "second or successive." Order of Transfer, *Milam v. Director*, No. 6:20-cv-646 (E.D. Tex. Dec. 17, 2020).

On appeal from the district court's transfer of Mr. Milam's federal habeas petition as second or successive, the Fifth Circuit found that Mr. Milam's application (1) constituted a "second or successive" habeas application that (2) failed to satisfy 28 U.S.C. § 2244(b). *In re Milam*, 832 F. App'x at 920. Section 2244(b) thus operates to bar a federal court from *ever* adjudicating whether the Eighth Amendment prohibits Mr. Milam's execution because he is intellectually disabled according to current standards. *See In re Milam*, 838 F. App'x 796, 797 (5th Cir. Oct. 27, 2020) (denying authorization to file a successive federal habeas petition).

Consequently, no federal court has ever adjudicated the merits of Mr. Milam's claim that the Eighth Amendment prohibits his execution because he is intellectually disabled. The Fifth Circuit's ruling that Section 2244(b) bars such review threatens to imbue the State of Texas to do that which the Constitution absolutely prohibits: execute a person who falls within a class of people whose execution is forbidden by

the Eighth Amendment.[3] Should Section 2244(b) permit Texas to execute a person with an intellectual disability, "*Atkins* [would] become a nullity[.]" *Moore*, 137 S. Ct. at 1053 (internal citation and quotation omitted). That outcome, however, is irreconcilable with the Eighth Amendment and the Suspension Clause and renders the federal judiciary unable to enforce categorical limits the Constitution imposes on the state's power to punish.

REASONS FOR GRANTING THE WRIT

Mr. Milam's case presents several exceptional circumstances. First, as noted by the Fifth Circuit, Mr. Milam has alleged facts in support of all three prongs of intellectual disability. *See Milam*, 838 F. App'x at 799. Mr. Milam proffered evidence that three of the four of the experts asked to evaluate whether Mr. Milam meets current criteria for a diagnosis of intellectual disability, including an expert retained

[3] This Court's requirement that the adjudication of intellectual disability be informed by the DSM-5 and AAIDD-11 has changed who falls within the class of persons who are intellectually disabled such that the Eighth Amendment prohibits their execution. This expansion in the class of persons whose execution is prohibited by the Eighth Amendment was made clear by this Court in *Moore II*, in which it concluded that Bobby Moore, who was previously adjudicated not to be intellectually disabled, was intellectually disabled and within the class of persons whose execution is prohibited by the Eighth Amendment. *Moore v. Texas*, 139 S. Ct. 666, 672 (2019). Since *Moore*, several defendants who were found not to be intellectually disabled under Texas's now-unconstitutional standard have now been found intellectually disabled under *Moore*. *Ex parte 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); *Ex parte Gutierrez*, No. WR-70,152-03, 2020 WL 6930823 (granting relief on a claim of intellectual disability upon remand of the case in the light of *Moore v. Texas*); *cf. Ex parte Gutierrez,* No. WR-70,152-01, 2008 WL 4417161 (Tex. Crim. App. Oct. 1, 2008); *Ex parte Williams*, No. WR-71,296-03, 2020 WL 7234532 (Tex. Crim. App. Dec. 9, 2020) (granting relief on a claim of intellectual disability upon remand of the case in the light of *Moore v. Texas*); *cf. Williams v. State*, 270 S.W.3d 112 (Tex. Crim. App. 2008) (finding that evidence was sufficient to support jury's negative answer to the intellectual disability issue in the punishment charge at trial).

by the State, concluded that Mr. Milam is intellectually disabled.[4] 53 RR 239; ROA 58—60; ROA 105—17. If this evidence is proven, Texas's execution of him would clearly exceed the limitations on Texas's power placed on it by the Eighth Amendment.

Second, no federal court has ever adjudicated the merits of Mr. Milam's intellectual disability claim. Mr. Milam did not raise a claim of intellectual disability in his first federal habeas petition, which was filed two years before this Court's decision in *Moore* and before federal courts abandoned Texas's now-unconstitutional standard for adjudicating intellectual disability. *See Woods*, 493 F.3d at 587 n.6 ("We find nothing in *Briseno* that is inconsistent with *Atkins*[.]"); *Simpson*, 593 F. Supp. 2d at 932 ("Fifth Circuit case law is clear that *Briseno* remains good law[.]"). Mr. Milam is therefore seeking *one*, *first-time* adjudication by a federal court of his claim that, after *Moore*, he falls within the class of persons whose life Texas is forbidden by the Eight Amendment from taking.

Third, Mr. Milam's case presents this Court with an opportunity to confront the constitutional questions arising from the interpretation of 28 U.S.C. § 2244(b) to bar federal courts from adjudicating *first-time* Eighth Amendment claims that substantively limit a State's power to act. *See In re Williams*, No. 16-8922, Petition for Writ of Certiorari ("Does 28 U.S.C. § 2244(b)(2)(B)(ii) permit a habeas petitioner to file a successive habeas petition based on a claim that he is [intellectually

[4] As noted above, Dr. Proctor, the state's testifying expert at trial and the only expert who previously determined Mr. Milam was not intellectually disabled, has since diagnosed Mr. Milam with intellectual disability under current clinical and legal standards. *Supra*, n. 1.

disabled]?"); *Bowles v. Inch*, No. 19-5672, Petition for Writ of Certiorari (asking, *inter alia*, "Whether procedural obstacles to the consideration of a claim of intellectual disability must cede to the categorical protections of the Eighth Amendment?"). By granting certiorari, this Court can resolve the tension between substantive Eighth Amendment constitutional mandates and the operation of Section 2244(b) that appears to render federal courts powerless to enforce them. *See Bourgeois v. Watson*, 141 S. Ct. 507 (2020) (Sotomayor, J., dissenting from denial of certiorari) ("Waiting to grant certiorari may mean permitting the illegal execution of people with intellectual disabilities.").

I. This Court should grant certiorari to decide the important question whether 28 U.S.C. § 2244(b) can be constitutionally interpreted to bar first-time federal court merits adjudication of an Eighth Amendment claim of intellectual disability.

As to Mr. Milam and similarly situated petitioners seeking adjudication by a federal court of their intellectual disability claim after *Moore*, 28 U.S.C. § 2244(b) has been interpreted to preclude such review. *In re Milam*, 832 F. App'x at 920; *see also Bowles v. Inch*, 935 F.3d 1176, 1180 (11th Cir. 2019) (finding that petitioner's claim in federal court that he was intellectually disabled based on the holding in *Moore* did not satisfy 28 U.S.C. § 2244(b)); *In re Payne*, 722 F. App'x 534, 538–39 (6th Cir. 2018) (same); *Williams v. Kelley*, 858 F.3d 464, 473 (8th Cir. 2017) (same). This outcome, however, cannot be reconciled with the Eighth Amendment or the Suspension Clause.

1. The application of 28 U.S.C. § 2244(b) to prevent the first-time adjudication of an intellectual disability claim violates the Eighth Amendment.

The Eighth Amendment's prohibition on the execution of persons with an intellectual disability is "a substantive limitation" on states' power to carry out a sentence of death. *Atkins*, 536 U.S. at 321 (internal citation and quotation omitted). In short, states do not have the power to execute persons with intellectual disability. This substantive limitation on the states' power cannot be forfeited by inaction or waived by the parties. The Eighth Amendment itself requires this conclusion: a punishment imposed in violation of a substantive rule "is not just erroneous but contrary to law and, as a result void." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). Here, states do not have the power to impose a sentence of death as to a person with intellectual disability and the waiver or forfeiture of an intellectual disability claim cannot operate to restore that power.

To hold otherwise would, for example, permit a 15-year-old person facing capital murder charges and who has been certified to stand trial as an adult to waive the Eighth Amendment restriction against execution of juveniles, or to forfeit that protection by inaction. If, after conviction and death sentence, such a person sought to enforce the Eighth Amendment restriction in a federal habeas corpus proceeding for the first time, the Eighth Amendment would require disregarding the waiver or forfeiture. To do otherwise would empower the State to do what the Constitution substantively disempowers it from doing. *See Webster v. Daniels*, 784 F.3d 1123, 1139 (7th Cir. 2015) (en banc) ("To hold [a substantive Eighth Amendment claim forfeited

by inaction] would lead in some cases . . . to the intolerable result of condoning an execution that violates the Eighth Amendment.").

As to Mr. Milam's intellectual disability claim, Section 2244(b) operates to prevent a federal court from adjudicating for the first time the merits of Mr. Milam's claim that his sentence of death is unconstitutional and that the Eighth Amendment categorically bars Texas from executing him because he is intellectually disabled. Interpreting Section 2244(b) to in effect allow such a forfeiture of first time federal review of Mr. Milam's intellectual disability claim would thus threaten to empower the State to violate the Eighth Amendment. This outcome, however, would violate the immovable principle that the Constitution is the "the *supreme* law of the land[.]" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (emphasis in original). A statute—in this instance, Section 2244(b)—that would enable the state to act in contravention of the Constitution must yield to the Constitution. Failure to follow this principle would "subvert the very foundation" on which our country is based. *Id.* at 138.

2. The application of 28 U.S.C. § 2244(b) to prevent first-time adjudication of an intellectual disability claim violates the Suspension Clause.

The operation of 28 U.S.C. § 2244(b) to prevent federal courts from reaching a first-time Eighth Amendment intellectual disability claim also raises constitutional concerns under the Suspension Clause. In this case, Section 2244(b) has functioned to place the claim that Texas lacks the power to execute Mr. Milam under the Eighth Amendment beyond the reach of federal courts' habeas jurisdiction. Although this

Court has rejected the argument that Section 2244(b) is an unconstitutional suspension of the writ in general, that determination was made in a case that did not implicate the interplay between Section 2244(b) and a claim raising a substantive limitation on the State's power to act, as Mr. Milam's does. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996). By contrast, Mr. Milam's claim that the Eighth Amendment prohibits his execution goes to the "core purpose of habeas corpus [namely] to prevent a custodian from inflicting an unconstitutional sentence." *Webster*, 784 F.3d at 1139. As to an intellectually disabled person, such as Mr. Milam, a sentence of death is void and an execution would violate the Eighth Amendment.

The *Felker* Court did, moreover, assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* The Eighth Amendment has similarly evolved to reflect that executing certain classes of persons violates its prohibition on cruel and unusual punishment. It would be anomalous to find that the writ did not similarly evolve to ensure that the Eighth Amendment could be given effect in habeas corpus as to those classes of persons. *Harris v. Nelson,* 394 U.S. 286, 291 (1969) ("The scope and flexibility of the writ [of habeas corpus]—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.").

CONCLUSION

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

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

/s/ Jeremy Schepers

Jeremy Schepers
Supervisor, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746
214-767-2286 (fax)
Jeremy_Schepers@fd.org

Jennae R. Swiergula
Texas Defender Service
1023 Springdale Road #14E
Austin, TX 78721
512-320-8300
512-477-2153 (fax)
jswiergula@texasdefender.org