

No. _____

IN THE
Supreme Court of the United States

BLAINE MILAM,
Petitioner

v.

BOBBY LUMPKIN,
DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE
Respondent

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

PETITIONER'S APPENDIX

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APPENDIX 1

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 8, 2021

Lyle W. Cayce
Clerk

No. 20-40849

IN RE: BLAINE KEITH MILAM,

Movant,

CONSOLIDATED WITH

No. 20-70024

BLAINE KEITH MILAM,

Petitioner—Appellant,

v.

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-646

Before ELROD, GRAVES, and HIGGINSON, *Circuit Judges.*

No. 20-40849
c/w No. 20-70024

PER CURIAM:*

Blaine Keith Milam is a Texas state prisoner scheduled to be executed on January 21, 2021. He appeals an order transferring his second-in-time petition for writ of habeas corpus to this Court. He has also filed a motion to stay his execution. We AFFIRM the order of transfer and DENY his motion for stay of execution.

I.

In 2010, Blaine Keith Milam was convicted of capital murder of thirteen-month-old Amora Bain Carson and sentenced to death in Texas state court. His conviction and sentence were affirmed. *Milam v. State*, No. AP-76,379, 2012 WL 1868458 (Tex. Crim. App. May 23, 2012). Milam subsequently sought post-conviction relief in state and federal court. Both habeas petitions were denied. *See Ex parte Milam*, No. WR-79,322-01, 2013 WL 4856200 (Tex. Crim. App. Sept. 11, 2013); *Milam v. Director, TDCJ-CID*, No. 4:13-CV-545, 2017 WL 3537272 (E.D. Tex. Aug. 16, 2017); *Milam v. Davis*, 733 F. App'x 781 (5th Cir. 2018) (declining to grant a Certificate of Appealability), *cert. denied*, 139 S. Ct. 335 (2018). Neither petition included the claim that Milam was categorically ineligible for execution due to an intellectual disability.

In 2019, Milam filed a successive state habeas petition raising several claims, including the claim that he cannot be executed due to his intellectual disability. *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019). His state petition was denied. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921 (Tex. Crim. App. July 1, 2020).

On October 2, 2020, Milam filed a motion to file a successive federal habeas petition raising an intellectual disability claim. We denied the motion,

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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holding that a claim under either *Moore v. Texas*, 137 S. Ct. 1039 (2017), or *Atkins v. Virginia*, 536 U.S. 304 (2002), was previously available to him. *In re Milam*, No. 20-40663, 2020 WL 7658498, at *2-*3 (5th Cir. Oct. 27, 2020).

On December 15, 2020, Milam filed a second-in-time federal habeas petition in the U.S. District Court for the Southern District of Texas. The case was transferred to the Eastern District of Texas, which transferred the petition to this Court for consideration under 28 U.S.C. § 2244(b)(3)(A). Milam appeals the transfer order and moves to stay the execution.

II.

We first address Milam’s argument that the district court erred in transferring the order to this Court based on its “erroneous conclusion” that his motion for authorization to file a successive petition constituted a “prior application” under 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”). To the contrary, the district court did not designate his motion as a prior application under section 2244(b)(1); instead, it addressed his motion solely under the purview of section 2244(b)(3)(A). We thus reject the assertion that the transfer order relied on section 2244(b)(1).

We now turn to section 2244(b)(3)(A), which states that an applicant must move the appropriate court of appeals for an order authorizing the district court to consider a second or successive application before filing it in district court. Relying on this statutory provision, the district court concluded that it lacked jurisdiction to consider Milam’s second-in-time federal habeas petition, finding the application to be a second or successive petition requiring appellate authorization of the district court’s review. Indeed, the question of whether the district court lacked jurisdiction depends on whether Milam’s petition is a “second or successive” petition within the

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meaning of section 2244(b)(3)(A). *Adams v. Tahler*, 679 F.3d 312, 321 (5th Cir. 2012). “Although a prisoner’s application is not second or successive simply because it follows an earlier federal petition, it is the well-settled law of this circuit that a later petition is successive when it: (1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ.” *In re Sepulvado*, 707 F.3d 550, 553 (5th Cir. 2013) (quoting *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)) (internal quotation marks and alterations omitted).

Milam urges us to reject the characterization of his petition as “second” or “successive” because it would bar federal review of his intellectual disability claim and permit execution of an intellectually disabled person, in violation of the Eighth Amendment and the Suspension Clause. But we cannot ignore longstanding precedent that a petition is successive when it raises a claim that could have been raised in an earlier petition. *See Cain*, 137 F.3d at 235. In his second-in-time habeas petition, Milam raises an intellectual disability claim that we have already deemed previously available when considering his motion for authorization to file a successive habeas petition. *See Milam*, 2020 WL 7658498, at *2–*3 (concluding that Milam had the opportunity to seek amendment of his initial federal habeas petition to include an intellectual disability claim in the several months between *Moore* and the petition’s dismissal); *see also In re Soliz*, 938 F.3d 200, 204 (5th Cir. 2019) (denying request to file successive habeas petition raising an intellectual disability claim and seeking relief from execution where relevant court decision was published four months before denial of initial habeas application). We had also noted that Milam presented evidence at trial of his intellectual disability, and the jury did not consider the additional *Briseno* factors struck down by *Moore* when unanimously agreeing that Milam did not prove his intellectual disability by a preponderance of the evidence. *Milam*,

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2020 WL 7658498, at *3. Thus, because Milam had sufficient opportunity to raise his intellectual disability claim in a prior petition, we must construe his second-in-time habeas petition as successive. *See id.*

Because we conclude the petition is successive, the district court did not have jurisdiction to consider the petition and correctly transferred the case to us. As Milam recognizes, we previously concluded that he could not establish the prior unavailability of his intellectual disability claim and that his petition is barred under section 2244(b)(1). Therefore, federal courts lack jurisdiction over his petition, so we dismiss Milam's successive habeas petition. *See Adams*, 679 F.3d at 323. As there is no basis for a stay, we deny his motion for a stay of execution.

III.

For the foregoing reasons, we AFFIRM the order of transfer and DENY his motion for stay of execution.

APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BLAINE KEITH MILAM,

Petitioner,

v.

DIRECTOR, TDCJ-CID,

Respondent.

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Case No. 6:20-cv-646-JDK

ORDER OF TRANSFER

Petitioner Blaine Keith Milam is a Texas state prisoner on death row and is scheduled for execution on January 21, 2021. Before the Court is his second petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in which Petitioner challenges his capital murder conviction and death sentence, imposed by the 4th Judicial District Court of Rusk County, Texas, in *State of Texas v. Blaine Keith Milam*, Cause Number CR09-066.

Petitioner initially filed this petition in the Southern District of Texas, Houston Division, along with a memorandum of law in support of that court’s authority to review the second or successive petition. Docket Nos. 1, 4. Petitioner argued that the Southern District of Texas should consider his petition because the criminal case was tried in Montgomery County, Texas, within that district. However, the judgment of sentence and execution originated from Rusk County, Texas, within the Eastern District of Texas. Rejecting Petitioner’s venue argument, the Southern District of

Texas transferred this petition to the Eastern District of Texas on December 16, 2020. Docket No. 6.

In the present petition, Petitioner argues that he is ineligible to be executed because he is intellectually disabled. His claim is based on the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). He raised an intellectual disability claim in his first federal habeas petition within the context of *Martinez/Trevino*,¹ which was considered and denied by this Court on the merits. Petitioner argues that the Court should now consider the claim on the merits in light of the Supreme Court's decision in *Moore v. Texas*, 137 S. Ct. 1039, 1051–52 (2017), which rejected several additional factors established by the Texas Court of Criminal Appeals to assess intellectual disability in *Ex parte Briseno*, 135 S.W.3d 1 (2004). For the reasons set forth below, the Court finds that the petition is a second or successive petition, and that it should be transferred to the Fifth Circuit for consideration under 28 U.S.C. § 2244(b)(3)(A) before this Court may consider it.

I. BACKGROUND

In 2010, Petitioner was convicted of the capital murder of thirteen-month-old Amora Bain Carson and sentenced to death in Texas state court.² On direct appeal, the Texas Court of Criminal Appeals (“CCA”) affirmed Petitioner's conviction and sentence on May 23, 2012. *Milam v. State*, No. AP-76,379, 2012 WL 1868458 (Tex. Crim. App. May 23, 2012).

¹ *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013).

² Details of the crime and investigation may be found in *Milam v. Director, TDCJ-CID*, No. 4:13-cv-545, 2017 WL 3537272, at *1–4 (E.D. Tex. Aug. 16, 2017).

On April 1, 2013, Petitioner filed a state habeas petition, which the CCA denied on September 11, 2013. *Ex parte Milam*, No. WR-79,322-01, 2013 WL 4856200 (Tex. Crim. App. Sept. 11, 2013). On October 14, 2014, Petitioner filed his first federal habeas petition in the Eastern District of Texas. The Court denied habeas relief on August 16, 2017. *Milam v. Director, TDCJ-CID*, No. 4:13-cv-545, 2017 WL 3537272 (E.D. Tex. Aug. 16, 2017). The Fifth Circuit denied a Certificate of Appealability on May 10, 2018. *Milam v. Davis*, 733 F. App'x 781 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 335. Neither of these prior habeas petitions included the claim that Milam was categorically ineligible from execution due to an intellectual disability.

On January 7, 2019, represented by new counsel, Petitioner filed a successive state habeas petition. A week later, the CCA stayed the execution “[b]ecause of recent changes in the science pertaining to bite mark comparisons and recent changes in the law pertaining to the issue of intellectual disability.” *Ex parte Milam*, No. WR-79,322-02, 2019 WL 190209, at *1 (Tex. Crim. App. Jan. 14, 2019). On July 1, 2020, the CCA again denied habeas relief. *Ex parte Milam*, No. WR-79,322-02, 2020 WL 3635921 (Tex. Crim. App. July 1, 2020).

On October 2, 2020, Petitioner moved at the Fifth Circuit for leave to file a successive federal habeas petition raising the claim that he cannot be executed due to his intellectual disability pursuant to *Moore v. Texas*, 137 S. Ct. 1039 (2017), or alternatively, *Atkins v. Virginia*, 536 U.S. 304 (2002). *In re Milam*, No. 20-40663 (5th Cir. Oct. 2, 2020). On October 27, 2020, the Fifth Circuit denied his motion to file a successive petition. The Fifth Circuit noted that this Court had acknowledged *Moore*

when denying Petitioner’s first habeas petition, stating that “since the trial court instructed the jury on the three core elements of the definition of intellectual disability and none of the additional *Briseno* factors, the additional requirements criticized in *Moore* had no impact on the jury’s decision nor on the State courts’ various decisions.” *In re Milam*, No. 20-40663, slip op. at 5 (5th Cir. Oct. 27, 2020) (quoting *Milam*, 2017 WL 3537272, at *13). The Fifth Circuit found that because a *Moore* claim was available to Petitioner during his initial federal habeas application, *Moore* did not justify a second habeas application.

Petitioner filed the present petition on December 15, 2020. Petitioner argues that his intellectual disability claim should be reconsidered in light of *Moore*.

Petitioner’s execution is scheduled for January 21, 2021.

II. DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) places strict limitations on inmates filing more than one habeas action:

[n]o circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus.

28 U.S.C. § 2244(a). The AEDPA enumerates limited circumstances in which an inmate may litigate a “second or successive habeas corpus application.” 28 U.S.C. § 2244(b)(2). Further, even in those limited circumstances, a habeas petitioner must “obtain leave from the court of appeals before filing a second habeas petition in the district court.” *Felker v. Turpin*, 518 U.S. 651, 664 (1996). “Indeed, the purpose and intent of [28 U.S.C. § 2244(b)(3)(A)] was to eliminate the need for the district courts

to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit.” *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)).

The threshold question of whether this Court has jurisdiction over a successive federal habeas petition “depends on whether [the] petition is a ‘second or successive’ petition within the meaning of 28 U.S.C. § 2244.” *Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012), *cert. denied*, 566 U.S. 971 (2012). The AEDPA does not define “second or successive.” *Id.* Under Fifth Circuit precedent, “a later petition is successive when it: 1) raises a claim challenging the petitioner’s conviction or sentence that was or could have been raised in an earlier petition; or 2) otherwise constitutes an abuse of the writ.” *Id.* at 322 (citing *In re Cain*, 137 F.3d at 235). To the extent a habeas petitioner “brings the same . . . claim[] in his successive habeas petition as he did in his initial federal habeas petition,” his “petition is barred under 28 U.S.C. § 2244(b)(1).” *Id.* at 323.

In the present case, the Fifth Circuit has already considered and rejected Petitioner’s intellectual disability claim based on *Atkins* and *Moore*—finding that his intellectually disabled claim could have been raised in his first federal habeas. *In re Milam*, No. 20-40663. Petitioner is asking this Court to reconsider the merits of his intellectual disability claim in light of *Moore*. His motion therefore constitutes a successive habeas petition that requires authorization under 28 U.S.C. § 2244(b)(3). Because the Fifth Circuit has not issued an order authorizing this Court to consider

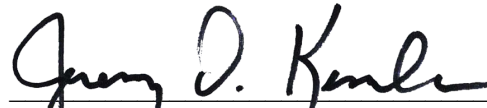
a successive petition, the Court lacks jurisdiction to consider it. *In re Sepulvado*, 707 F.3d 550, 556 (5th Cir. 2013), *cert. denied*, 571 U.S. 952.

The AEDPA vests exclusive authority in the Fifth Circuit to permit the filing of a successive habeas action. Federal procedure allows a district court to transfer a successive habeas petition to the circuit court for review under 28 U.S.C. § 2244(b)(2). *See In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997). A district court may either dismiss the case for lack of jurisdiction or transfer it to the Fifth Circuit. *See In re Hartzog*, 444 F. App'x 63, 65 (5th Cir. 2011) (citing *Key*, 205 F.3d at 774). “Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating.” *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). These concerns are heightened when considering whether to stay an execution. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (discussing special concerns arising in capital proceedings leading up to an execution); *Hearn v. Thaler*, No. 3:12-cv-2140-D, 2012 WL 2715653 (N.D. Tex. July 9, 2012). The Fifth Circuit has regularly found that successive death penalty petitioners were appropriately transferred for consideration under § 2244(b)(2). *In re Cathey*, 857 F.3d 221, 223 (5th Cir. 2017) (affirming transfer of successive petition based on *Atkins* after issuance of *Moore*); *Sepulvado*, 707 F.3d at 557; *Adams*, 679 F.3d at 322.

The Court finds that it is in the interest of justice to transfer the motion to the Fifth Circuit rather than to dismiss. Accordingly, the Court therefore **ORDERS** that Petitioner’s successive petition for a writ of habeas corpus is **TRANSFERRED** to the

United States Court of Appeals for the Fifth Circuit. The Clerk of Court shall transfer the case forthwith and without delay.

So **ORDERED** and **SIGNED** this **17th** day of **December, 2020**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE