

IN THE
Supreme Court of the United States

BLAINE MILAM,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
tomee.heining@oag.texas.gov

This is a capital case.

QUESTION PRESENTED

Before the federal district court, Milam raised six unexhausted claims alleging ineffective assistance of trial, appellate, and state habeas counsel, as well as a claim of trial-court error. Milam admitted the claims were defaulted but relied on the equitable remedy recognized in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), as cause to excuse the procedural default of all six claims. The district court concluded that the *Martinez/Trevino* exception applied only to the single claim of ineffective assistance of trial counsel. However, that claim remained procedurally barred because Milam could not demonstrate a substantial claim for relief, as required by *Martinez* and *Trevino*. Relying on *Davila v. Davis*, 137 S. Ct. 2058 (2017), as well as controlling Fifth Circuit precedent, the district court concluded that the *Martinez/Trevino* exception did not provide cause to excuse the procedural default of the remaining five claims which did not allege the ineffective assistance of trial counsel.

Did the Fifth Circuit err in denying a certificate of appealability because it concluded that the district court's procedural bar of these claims was not debatable?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION.....	1
TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE.....	2
I. Facts of the Crime.....	2
II. The State-Court and Federal Appellate Proceedings.....	10
REASONS FOR DENYING THE WRIT.....	11
ARGUMENT.....	12
I. The Fifth Circuit Properly Denied COA Because the District Court’s Procedural Dismissal of Milam’s Voluntary-intoxication-instruction Claims was not Debatable. (Claims 1-4)	12
A. Martinez and Trevino do not apply to claims that do not allege IATC.	13
B. Reasonable jurists could not debate, and Milam cannot overcome, the procedural default of his IATC claim.....	15
1.Milam failed to present a substantial IATC claim.....	15
2.State habeas counsel was not deficient.	20
II. The Fifth Circuit Properly Denied COA Because the District Court’s Procedural Dismissal of Milam’s Intellectual-Disability Claims was not Debatable. (Claims 5-6).....	22
A. Martinez does not excuse the default of non-IATC claims.	22
B. The district court’s rejection of Milam’s intellectual-disability claim is undebatable. (Claim 5)	24
1.Moore v. Texas, 137 S. Ct. 1309 (2017), does not apply.....	24
2.Trial counsel was not deficient in the presentation of an intellectual- disability defense, and appellate counsel committed no error in failing to raise related claims.....	25
3. The jury properly considered the evidence.	36

4. State habeas counsel was not deficient.	38
C. Milam is not entitled to relief under Roper. (Claim 6).....	38
CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases

<i>(Terry) Williams v. Taylor</i> , 529 U.S. 362 (2000)	18
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	24
<i>Beazley v. Johnson</i> , 242 F.3d 248 (5th Cir. 2001)	20
<i>Blue v. Thaler</i> , 665 F.3d 647 (5th Cir. 2011)	20
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017)	2, 11, 12
<i>Chauncey v. State</i> , 877 S.W.2d 305 (Tex. Crim. App. 1994)	17
<i>Davila v. Davis</i> , 137 S. Ct. 2058 (2017)	i, 13, 14, 22
<i>Doyle v. Stephens</i> , 535 F. App'x 391 (5th Cir. 2013)	39
<i>Ex parte Briseno</i> , 135 S.W.3d 1 (Tex. Crim. App. 2004)	24, 33
<i>Ex parte Cathey</i> , 451 S.W.3d 1 (Tex. Crim. App. 2014)	37
<i>Ex parte Hearn</i> , 310 S.W.3d 424 (Tex. Crim. App. 2010)	23, 34, 35, 37
<i>Gallo v. State</i> , 239 S.W.3d 757 (Tex. Crim. App. 2007)	33, 34
<i>Graham v. Collins</i> , 506 U.S. 461 (1993)	20
<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014)	36
<i>Hall v. Quarterman</i> , No. 4:06-CV-436-A (N.D.Tex., March 9, 2009)	35, 36, 37
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	16, 18
<i>Harris v. Cockrell</i> , 313 F.3d 238 (5th Cir. 2002)	19
<i>Hearn v. Thaler</i> , 669 F.3d 265 (5th Cir. 2012)	36, 37
<i>Hernandez v. Johnson</i> , 213 F.3d 243 (5th Cir. 2000)	19
<i>Hines v. Thaler</i> , No. 3:06-CV-0320-G (N.D. Tex., March 22, 2010)	35
<i>In re Garner</i> , 612 F.3d 533, 535-36 (6th Cir. 2010)	39
<i>In re Sepulvado</i> , 707 F.3d 550 (5th Cir. 2013)	14
<i>Jaynes v. State</i> , 673 S.W.2d 198 (Tex. Crim. App. 1984)	16
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983)	40

<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	19
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	passim
<i>Mays v. Stephens</i> , 757 F.3d 211 (5th Cir. 2014)	36, 37
<i>Melton v. Sec’y, Fla. Dep’t of Corr.</i> , 778 (11th Cir. 2015)	39, 40
<i>Miller v. Johnson</i> , 200 F.3d 274 (5th Cir. 2000)	23
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	2, 11
<i>Miniel v. State</i> , 831 S.W.2d 310 (Tex. Crim. App. 1992)	19
<i>Moore v. Texas</i> , 137 S. Ct. 1309 (2017)	24, 25
<i>Neal v. State</i> , 256 S.W.3d 264 (Tex. Crim. App. 2008)	33
<i>Parr v. Quarterman</i> , 472 F.3d 245 (5th Cir. 2006)	39
<i>Penry v. Johnson</i> , 532 U.S. 782 (2001)	19
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	19
<i>Roper v. Simmons</i> , 543 U.S. 541 (2005)	22, 38, 39, 40
<i>Slack</i> , 529 U.S. at 482-83; 28 U.S.C. § 2253	11, 12
<i>Smith v. Murray</i> , 477 U.S. 527, 536 (1986)	40
<i>Smith v. Quarterman</i> , 515 F.3d 392 (5th Cir. 2008)	19
<i>Smith v. Robbins</i> , 528 U.S. 259 (2000)	21, 38, 40
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	16, 18, 21
<i>Tabler v. Stephens</i> , 588 F. App’x 297 (5th Cir. 2014)	14
<i>Trevino v. Thaler</i> , 133 S. Ct. 1911 (2013)	i, 1, 13
<i>United States v. Bernard</i> , 762 F.3d 467 (5th Cir. 2014)	39
<i>United States v. Demik</i> , 489 F.3d 644 (5th Cir. 2007)	23
<i>United States v. Mitchell</i> , 502 F.3d 931 (9th Cir. 2007)	39
<i>Wilkins v. Stephens</i> , 560 F. App’x 299, (5th Cir. 2014)	14
<i>Zafiro v. United States</i> , 506 U.S. 534 (1993)	36

Statutes

Tex. P. Code §8.04.....	17
-------------------------	----

Constitutional Provisions

U.S. Const. amend. VIII	19
-------------------------------	----

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Petitioner-Appellant Blaine Milam was convicted and sentenced to death for the brutal capital murder of his girlfriend's thirteen-month-old daughter, Amora Bain Carson. Amora was severely beaten, strangled, sexually assaulted, and had twenty-four human bite marks covering her entire body in what the medical examiner called the worst case of brutality he had ever seen. 41 RR 235-36. Milam and Amora's mother, Jesseca Carson, initially denied involvement, but he eventually confessed to a jail nurse.

Milam now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of a certificate of appealability (COA). Milam asked the Fifth Circuit to grant COA to review the district court's rejection of six claims as unexhausted and procedurally barred. In rejecting his claims, the district court concluded that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), could potentially excuse the default of only a single claim alleging the ineffective assistance of trial counsel (IATC), but Milam failed to prove the necessary cause and prejudice required by *Martinez/Trevino* to avoid the procedural bar of that claim. The Fifth Circuit denied COA, concluding the district court's procedural rulings on all six claims were not debatable.

Milam is now unable to present any special or important reason to grant certiorari review of the Fifth Circuit's decision. The appellate court obeyed the

command of this Court to conduct no more than a “threshold inquiry” into the claim, *see Buck v. Davis*, 137 S. Ct. 759, 774 (2017 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003))), reasonably concluding that the district court’s procedural rulings were not debatable. Milam offers no compelling reason to grant certiorari review, and such review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the factual background of this case as follows.

A. The State’s Guilt–Stage Evidence.

At 10:37 a.m. on December 2, 2008, [Milam] called 911, and the first thing he said was, “My name is Blaine Milam, and my daughter, I just found her dead.” Rusk County Patrol Sergeant Kevin Roy arrived at [Milam’s] trailer home outside Tatum twenty minutes later. Two ambulances were already there. EMTs were standing in the doorway of the master bedroom, where [Milam] and Jesseca Carson were kneeling on the floor. Sgt. Roy saw “an infant laying on the floor not moving, not breathing, bruised. The baby was laying on its back, and the face of the baby was just one large bruise.” He thought that the circular bruises he saw on the child’s body were caused by a Coke can. He did not recognize them as human bite marks.

After lead investigator Sergeant Amber Rogers arrived, Sgt. Roy took [Milam] aside to talk while Sgt. Rogers talked to Jesseca. [Milam] told Sgt. Roy that he and Jesseca had left Amora alone in the trailer and walked up the road to meet a man named Clark who was going to clear some land for him. They were gone about an hour, and, when they came back, they found “the baby in that condition.” [Milam] was calm, collected, and cooperative. After the interviews, Sgt. Roy read the pair their *Miranda* rights. He told

them that, when the crime-scene investigation was done, they would be taken to the Sheriff's office for more questioning and collection of their clothes.

Shortly thereafter, Kenny Ray, a Texas Ranger, arrived and noticed Jesseca and [Milam] embracing. To Ranger Ray, the two looked like "grieving parents," not suspects. Ranger Ray conducted an hour-long interview with [Milam] in the front seat of his patrol car. [Milam] told the ranger that authorities were "more than welcome" to search his car and home. [Milam] denied involvement in Amora's death. He also gave Ranger Ray names of possible suspects and said that whoever did this should "be hung." In that recorded interview, [Milam] explained that Jesseca was his fiancée and that Amora was Jesseca's child, but that they both lived with him and he was "raising that baby."

[Milam] then told Ranger Ray the same story that he had told Sgt. Roy. He added that, when he and Jesseca got home, they found Amora, not in her crib, but in a hole in the floor in the bathroom that he was remodeling. [Milam] said Amora had a blood ring around her mouth, and "it looked like she had been biting the insulation." She was still breathing, so they called 911. [Milam] later told Ranger Ray that Jesseca called 911 before they found Amora, and that when they found her, she was dead.

Ranger Ray's tone eventually became accusatory. He told [Milam] that he knew he was lying, that no one would believe his story, and that everyone would think he had beat the baby because he was the only male in the house. [Milam] again denied any involvement in Amora's death and offered to take a polygraph test. Finally, Ranger Ray told [Milam] that he was free to go, meaning that he was free to get out of the patrol car, but not to leave the scene. By then, Ranger Ray considered [Milam] a suspect.

The ranger also interviewed Jesseca. At first she "was crying and acting very distraught," but then there was a "pretty drastic" change in her demeanor. She referred to Amora as "that baby" and told Ranger Ray an "extremely bizarre story."

The medical examiner gave Amora's cause of death as homicidal violence, due to multiple blunt-force injuries and possible

strangulation. He detailed her injuries: facial abrasions and bruises; twenty-four human bite marks; bruises, scrapes, and abrasions from head to toe; bleeding underneath the scalp; extensive fracturing to the back of the skull; bleeding between the brain and the skull; a laceration to the brain tissue as well as swelling, bleeding, and bruising; bleeding around the optic nerves; bleeding in the eyes and around the jugular vein; fractures to the right arm and leg; eighteen rib fractures; a tear to the liver; and extensive injury to the genitals. There were no old injuries suggesting a pattern of abuse.

The investigation quickly poked holes in [Milam's] story. Shane and Dwight Clark, of Clark Timber, denied any meeting with [Milam] on December 2nd. Crystal Dopson, manager of the Insta-Cash Pawn Shop in Henderson, said that, shortly after she opened the shop on December 2nd, Jesseca and [Milam] came in and pawned an electric chain saw and an air impact tool. Surveillance video showed the two in the pawn shop for about fifteen minutes. Surveillance video from the Exxon in Henderson picked them up shortly thereafter. Also, [Milam] had called his sister, Teresa Shea, that morning before 9:30 a.m., crying and saying that he had "found Amora dead." Teresa told him to call 911, but [Milam] did not do so until 10:37 a.m.

On December 11th, investigators conducted a second search of [Milam's] trailer and determined that the south end of the trailer, rather than the master bedroom, was probably the crime scene. They found blood-spatter stains, consistent with blunt force trauma, near the south bedroom. Among the items collected from the south bedroom were: blood-stained bedding and baby clothes; blood-stained baby diapers and wipes; a tube of Astroglide lubricant; and a pair of jeans with blood stains on the lap. DNA testing later showed that Amora's blood was on these items.

On December 13th, [Milam's] sister, Teresa, went to see [Milam] in jail. That night, she told her aunt that she "was needing to find a way to get back out to the trailer in Tatum" because "Blaine had told her that she needed to go out there to the trailer to get some evidence out from underneath of it." The aunt called Sgt. Rogers and told her that "she needed to get out to the trailer immediately,

that Teresa was wanting to go out there to get some evidence out from underneath the trailer.”

Sgt. Rogers immediately obtained a search warrant, crawled under the trailer, and discovered a pipe wrench inside a clear plastic bag. The pipe wrench had been shoved down “a hole in the floor of the master bathroom.” Forensic analysis revealed components of Astroglide on the pipe wrench, the diaper Amora had been wearing, and the diaper and wipes collected from the south bedroom.

Dr. Robert Williams, a forensic odontologist, compared the bite marks found on Amora’s body with bite dentition models obtained from [Milam], Jesseca, and [Milam’s] brother Danny Milam. Dr. Williams testified that, to “a reasonable degree of dental certainty,” [Milam’s] dentition matched eight bite marks on Amora. He could exclude Jesseca from all but one of the bite marks, and he could exclude Danny from all of the bite marks.

Shirley Broyles, the nurse at the Rusk County Jail, testified that [Milam] called for her one day in January. She found him crying in his cell. He handed her a written request to talk to Sgt. Rogers, and told Ms. Broyles: “I’m going to confess. I did it. But Ms. Shirley, the Blaine you know did not do this. My dad told me to be a man, and I’ve been reading my Bible. Please tell Jesseca I love her.”

B. The Defense Guilt–Stage Evidence.

[Milam’s] defense focused on Jesseca as the murderer. The defense called Heather Carson, Jesseca’s mother, who said that Jesseca and [Milam] starting [sic] dating around January 2008 and got engaged a few months later. Jesseca moved in with [Milam] and his parents that spring. When Jesseca turned eighteen, she received an insurance settlement from her father’s 2001 death. Heather noticed an immediate change in Jesseca; she became withdrawn and stopped caring about her appearance. Jesseca started harassing Heather with telephone calls. When Heather learned that Jesseca was making serious and unfounded allegations against her, she stopped talking to her.

Lisa Taylor testified that Jesseca was her daughter's best friend while growing up in Alabama. Ms. Taylor knew Jessica as "sweet, outgoing, outspoken, funny." She said that Jesseca, [Mr. Milam], and Amora visited them in Alabama twice in the fall of 2008. First, they came for one night in October. Jesseca was making "bizarre" accusations about her mother. In November, the trio returned to Alabama for about four days and said that they were planning to move there. Ms. Taylor said that there was a "drastic change" in Jesseca's demeanor. She was "[w]eird, hollow ... [l]ike empty." Looking into her eyes was "like looking into a dark space." Jesseca was not taking care of Amora and did not give her a bath for the whole week. She had [Milam] change Amora's diaper and feed her. Jesseca seemed in charge, and when she told [Milam] to do something, he did it. Ms. Taylor was concerned that there was something profound going on in Jesseca's life and was worried about her and her baby.

A psychiatrist, Dr. Frank Murphy, testified that he was asked to "offer an opinion in this case of the mental state of Jesseca Carson for the time period beginning sometime around August of 2008 through December 2nd of 2008." Dr. Murphy read interviews with Jesseca and other materials but did not talk to Jesseca. Dr. Murphy said Jesseca's symptoms were consistent with a "psychotic depression The depression occurs first, and then it gets severe enough that psychosis or loss of touch with reality then occurs... . Psychosis means someone has lost touch with reality. The vast majority of times, that means either they're hallucinating or they're delusional."

The defense odontologist, Dr. Isaac, studied five of the bite marks, and could not exclude either [Milam] or Jesseca.

Milam v. State, No. AP-76,379, 2012 WL 1868458, *1-4 (Tex. Crim. App. May 23, 2012). The CCA also summarized the punishment-phase evidence.

C. The State's Punishment-Stage Evidence.

The State offered evidence that [Milam] was—at the time of this crime—on probation for solicitation of aggravated sexual assault of a child under the age of fourteen. [Milam] had entered the home

of an eleven-year-old neighbor, Karah Hodges, and left a stack of pages torn from pornographic magazines, marked with salacious notes, in Karah's dresser drawer. [Milam's] probation terms prohibited him from going within "200 feet of a premise where children commonly gather, including school, daycare facility, playground, public or private youth center, public swimming pool, or video facility." [Milam's] "mere presence" with Amora was, therefore, a continuing probation violation.

Ranger Ray was recalled to play the entire patrol-car conversation he had recorded with [Milam]. [Milam] had told Ranger Ray that a third party had forced him to solicit Karah Hodges. He also discussed several assaults, all of which he described as being of the "he had it coming" variety.

Glenda Risinger, who rented an apartment to [Milam] and Jesseca in the fall of 2008, testified that when the pair left, the apartment "was trashed. There was stuff left everywhere. The refrigerator was left open with food still in it.... It was pretty much just like they just went through and trashed it." She also found a lightbulb containing methamphetamine and a hunting knife in the toilet tank.

Bryan Perkins, [Milam's] former boss, testified that [Milam] had "control issues" and a "very short" fuse. [Milam] would bring Jesseca to work to keep an eye on her. Mr. Perkins said, "I started talking to him about his controlling problems, you know, that if he kept on controlling his woman, she was going to leave him. And, you know, he just said it seemed like, you know, with that baby, him and Jesseca were not really going to have a life." Mr. Perkins also described a fight [Milam] had with a customer.

Monty Clark, a Rusk County patrol deputy, testified that, in January 2008, he responded to a fight on the side of the road between [Milam] and his brother, Danny. He arrested [Milam] for assault and family violence.

Kenneth McDade, a fellow inmate, testified that [Milam] told him about a plan to escape from the jail and also threatened to stab him with a pencil.

Jesseca's friend, Crystal Zapata, described an incident that occurred after [Milam's] father died in September but before Amora was killed in December. Ms. Zapata was inside the trailer with Amora, while [Milam] and Jesseca were arguing outside. [Milam] had a gun and threatened suicide; Jesseca was trying to calm him down. Ms. Zapata heard a gunshot. After a few minutes Jesseca came in the door crying and told Ms. Zapata that he had shot into the floorboard of her car when she tried to keep him from leaving. Ms. Zapata characterized [Milam] as dominant in the relationship.

D. The Defense Punishment–Stage Evidence.

The defense sought to rebut the State's future-dangerousness evidence with both lay and expert witnesses.

[Milam's] mother, Shirley Milam, attributed [Milam's] solicitation of aggravated sexual assault to his mental immaturity. She said he stopped maturing emotionally at age twelve. She testified that [Milam] had an on-and-off methamphetamine problem and that he had started using drugs again shortly after his father's death. Shirley testified that, after the second time [Milam] tried to commit suicide to "go be with [his] daddy," she unsuccessfully tried to have him civilly committed. In early November, Jesseca and [Milam] brought a Ouija board to Shirley's work and told her that they could communicate with their dead fathers.

[Milam's] older sister testified that [Milam] was a polite, passive child and a polite, passive adult. This crime was completely out of character for him. [Milam's] childhood friend said that he did not think [Milam] was capable of Amora's murder or aggravated sexual assault. He echoed what [Milam's] family members said about the effect of his father's death: "It affected him really bad, because like him and his dad was real close."

Dr. Patricia Rosen, a medical toxicologist, testified that toxicology reports indicated that [Milam] had 0.17 milligrams of methamphetamine per liter of blood in his system on December 2nd. Dr. Rosen said this was a "high" dose-ten times the therapeutic dose. Another expert testified about the effects of methamphetamine on the brain and gave her opinion that [Milam]

was a chronic methamphetamine user, whose heavy use could have caused severe psychosis.

Dr. Mark Cunningham, a clinical and forensic psychologist, testified that he was asked to evaluate two issues concerning [Milam]: 1) “how did we get here?” and 2) “where do we go from here?” Dr. Cunningham interviewed [Milam] three times, for a total of nearly ten hours. He also interviewed [Milam’s] mother and sisters, and reviewed “a huge volume of records.” Dr. Cunningham summarized the answer to the “how did we get here” question:

There’s mental deficiency, youthfulness, meth dependence, meth psychosis, Jesseca’s psychosis. Those are all interacting with each other. That’s all part of the matrix of his psyche. Now, it’s not just those things, of course. There’s also the trauma and deprivation, the social deprivation I’m describing, as well as the trauma of his dad’s illness, and those experiences. There is the social isolation that came about that robs him of social resources that he might have called upon for some reality testing. There’s premature responsibility. There’s the death of his father. All of these things are being loaded on and are interacting with each other, as we’re coming up to this offense, and the effect of that is this tragedy.

Dr. Cunningham answered the “where do we go from here?” question by outlining the reasons why [Milam] was “likely to have a nonviolent adjustment, in terms of no serious violence, to a life without parole sentence in TDCJ.”

- [Milam’s] “nonviolent adjustment to 17 months jail pretrial”;
- “Appraisal of the correctional staff was not that [Milam] was going to be a predatory inmate that they needed to lock down”;
- [Milam’s] history of employment: starting work at 16, and gaining “a pretty significant employment history for a kid that’s arrested when he’s 18”;

- [Milam's] continuing contact and relationship with family;
- The relatively low rate of major assaults committed by capital inmates serving a life term;
- The fact of serving a sentence of life without parole ("inmates facing life-without-parole sentences and long sentences have more to lose. This is where they're going to be for a very long time and potentially the rest of their lives, and because of that, they are particularly motivated not to make this experience any more horrible on themselves than it has to be.");
- The fact that he would be an inmate in the Texas prison system ("99.9 percent of inmates in Texas prisons in 2009 did not commit an assault resulting in injuries with more than first aid treatment");
- The option of [Milam] going to the Hodge Unit ("a unit for intellectually limited individuals" with a program designed to meet their needs "and help prevent them from being victimized by other inmates");
- The option of protective custody ("because of the nature of his offense ... for his safety so that other inmates didn't act out on him. Those conditions of confinement would look in many ways like administrative segregation.")

On cross-examination, Dr. Cunningham testified that he is always a defense expert because "the research is very clear that the overwhelming majority of capital offenders will never be violent in prison, that the rates of serious violence in prison are very low, that prisons are extraordinarily effective in minimizing the occurrence of serious violence."

Milam v. State, 2012 WL 1868458, at *4-6 (footnotes omitted).

II. The State-Court and Federal Appellate Proceedings.

The CCA affirmed Milam's conviction and sentence on direct appeal.

Milam v. State, 2012 WL 1868458. He did not seek certiorari review. On

September 11, 2013, the CCA adopted the trial court’s recommended findings of fact and conclusions of law, and denied state habeas relief. *Ex parte Milam*, No. WR-79,322-01 (Tex. Crim. App. 2013). The district court denied federal habeas relief and COA. *Milam v. Director, TDCJ-CID*, No. 4:13-cv-545, 2017 WL 3537272 (E.D., Sherman Div. Aug. 16, 2017) (Petitioner’s Appendix 3). The Fifth Circuit also denied COA. *Milam v. Davis*, No. 17-70020, 2018 WL 2171208 (5th Cir. May 10, 2018) (Petitioner’s Appendix 2).

REASONS FOR DENYING THE WRIT

Milam presents no compelling reason for granting review on writ of certiorari. *See* Sup. Ct. R. 10 (Certiorari review “is not a matter of right but of judicial discretion,” and “will be granted only for compelling reasons.”) Milam was required to obtain COA as a jurisdictional prerequisite to obtaining appellate review by the Fifth Circuit. 28 U.S.C. § 2253 (c)(1)(A); *Miller-El*, 537 U.S. at 335–36; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The COA statute requires the circuit court to make only a “threshold inquiry into whether the circuit court may entertain the appeal,” and permits issuance of a COA only where petitioner “has made a substantial showing of the denial of a constitutional right.” *Miller-El*, 537 U.S. at 336 (citing *Slack*, 529 U.S. at 482–83; 28 U.S.C. § 2253 (c)(2)); *see also Buck*, 137 S. Ct. at 773–74. This standard “includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that

the issues presented were adequate to deserve encouragement to proceed further.” *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted). And where the district court has denied claims on procedural grounds, a COA should issue only if it is demonstrated that “jurists of reason would find it debatable whether the petition states a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 484 (emphasis added).

The Fifth Circuit made a proper “threshold inquiry” into the district court’s procedural rulings, concluding that the district court’s application of the procedural bar to all six claims was undebatable. Milam argues generally that, in denying COA on any claim, the Fifth Circuit “totally abdicated their duty under *Buck v. Davis*,” Petition at 19, but completely fails to establish how the Fifth Circuit erred or why any such error is so compelling that this Court’s intervention is called for. Certiorari review should therefore be denied.

ARGUMENT

I. The Fifth Circuit Properly Denied COA Because the District Court’s Procedural Dismissal of Milam’s Voluntary-intoxication-instruction Claims was not Debatable. (Claims 1-4)

In four related claims, Milam argued: (1) Trial counsel was ineffective for failing to secure a mitigation instruction at punishment regarding voluntary intoxication; (2) the trial court erred in failing to include such an

instruction; (3) appellate counsel was ineffective for failing to raise this issue in a motion for new trial or on direct appeal; and (4) state habeas counsel was ineffective for failing to assert the forgoing claims. Petition at 19-20, 24-27. Milam asserted the ineffectiveness of state habeas counsel under *Martinez/Trevino* as cause to excuse his procedural default of all four claims.

The district court denied relief concluding that each claim was unexhausted and procedurally barred, and Milam could not overcome the procedural default through *Martinez*. Petitioner's Appendix 3, at 6-10. The Fifth Circuit found the district court's conclusions undebatable and denied COA. Petitioner's Appendix 2-5. For reasons that will be discussed below, the appellate court did not err and certiorari review should be denied.

A. *Martinez* and *Trevino* do not apply to claims that do not allege IATC.

As the district court and Fifth Circuit correctly concluded, *Martinez* does not extend beyond claims alleging IATC. Thus, Claims Two and Three—alleging trial-court error and the ineffectiveness of direct-appeal counsel—do not fall within the scope of *Martinez* and were properly rejected as procedurally barred. Petitioner's Appendix 2, at 5; Petitioner's Appendix 3, at 10. This Court specifically refused to extend *Martinez* to ineffective-assistance-of-appellate-counsel claims, see *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017), and the Fifth Circuit has similarly refused to extend *Martinez* beyond IATC claims, *Wilkins*

v. Stephens, 560 F. App'x 299, 306 n.44 (5th Cir. 2014); *Tabler v. Stephens*, 588 F. App'x 297, 306 (5th Cir. 2014), *vacated in part on other grounds*, 591 F. App'x 281 (5th Cir. 2015).

While acknowledging *Davila*, Milam argues this Court recognized a potential exception to *Martinez* where it is necessary “to ensure that meritorious claims of trial error receive review by at least one state or federal court.” Petition at 21 (citing *Davila*, 137 S. Ct. at 2067). This Court did not identify any exception but, rather, reiterated that unreviewed IATC claims were “the chief concern identified by this Court in *Martinez*.” *Davila*, 137 S. Ct. at 2067. In fact, the Court recognized that *Martinez* already provides a vehicle for review of an unpreserved, defaulted claim of trial error through an IATC claim, thus ensuring that trial errors can be reviewed by at least one court. *Id.* at 2068. Milam’s trial-error claim is potentially reviewable through his IATC claim. Thus, the district court’s reliance on *Davila* is undebatable, and the Fifth Circuit did not err in denying COA.

The Fifth Circuit also did not err in finding undebatable the district court’s conclusion that Claim Four, asserting a stand-alone claim of the ineffectiveness of state habeas counsel, is not cognizable in federal court, even after *Martinez/Trevino*. Petitioner’s Appendix 2, at 5; Petitioner’s Appendix 3, at 10-11 (citing *Martinez*, 566 U.S. at 17; *In re Sepulvado*, 707 F.3d 550, 554 (5th Cir. 2013)).

Because Claim 4 remains non-cognizable, and *Martinez* cannot excuse the procedural default of Claims and 2 and 3, the Fifth Circuit did not err in denying COA on procedural grounds, and certiorari review should be denied.

B. Reasonable jurists could not debate, and Milam cannot overcome, the procedural default of his IATC claim.

Martinez provides potential cause to excuse the procedural default of only Claim One, alleging the ineffectiveness of trial counsel. To do so, Milam must establish not only “cause”—the deficient performance of state habeas counsel—but also “prejudice” by demonstrating the merits of his underlying claim. *Martinez*, 566 U.S. at 14. Under *Martinez*, “[t]o overcome the default, a prisoner must also demonstrate that the underlying [IATC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Id.* Because Milam failed to show deficiency in or prejudice from trial counsel’s representation, Milam failed to prove a substantial claim. Therefore, the district court concluded Milam could not overcome the procedural default of Claim One, Petitioner’s Appendix 3, at 9-10; and the Fifth Circuit agreed, Petitioner’s Appendix 2, at 4-5. Milam fails to show that the Fifth Circuit erred, or that certiorari review is warranted.

1. Milam failed to present a substantial IATC claim.

Milam argued that trial counsel was constitutionally ineffective for presenting extensive evidence regarding Milam’s drug use and “drug induced

psychosis” at the time of the crime, but then failing to provide the jury with a vehicle to consider the testimony as mitigation at the punishment phase. Trial counsel’s performance was neither deficient nor prejudicial.

Trial counsel was not deficient in his pursuit of a voluntary-intoxication instruction during the punishment phase of trial. To demonstrate deficient performance Milam must show that counsel’s conduct fell beyond the bounds of prevailing, objective professional standards. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). There is a presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. “[T]he standard for judging counsel’s representation is a most deferential one.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011). The question for the reviewing court to ask “is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms[.]’” *Id.* (citing *Strickland*, 466 U.S. at 690). Milam failed to meet this high standard.

Prior to trial, counsel filed several motions, including a motion to preclude submission, at the punishment phase, of an adverse instruction advising the jury that evidence of voluntary intoxication must rise to the level of temporary insanity. 1 CR 116-17; see *Jaynes v. State*, 673 S.W.2d 198, 202 (Tex. Crim. App. 1984) (proper for trial court to instruct jury that voluntary intoxication is not a defense to a crime), *overruled on other grounds*, *Chauncey*

v. State, 877 S.W.2d 305 (Tex. Crim. App. 1994). Trial counsel asked that the jury instead be given the definition contained within Texas Penal Code §8.04 (d)—“‘intoxication’ means disturbance of mental or physical capacity resulting from the introduction of any substance into the body”—and instructed: “In arriving at your answer to [Special Issue No. 4] above, you may consider the Defendant’s voluntary intoxication as a mitigating circumstance to warrant that a sentence of life imprisonment rather than a death sentence be imposed.” 1 CR 117-18. The trial court carried the motion, as well as fourteen others, until a later date. 2 CR 453-60.

Contrary to Milam’s assertions, *see* Petition at 25-27, trial counsel did not fail to reassert the motion. Following the close of punishment evidence, the defense reminded the trial court, “you had carried a couple of motions that are appropriate to have you rule on at this time,” and identified one of the motions pertaining to Milam’s mental age. 55 RR 286-87. While counsel did not specifically mention the motion for the voluntary intoxication instruction, he noted “other arguments made and set forth in our motion that you carried.” 55 RR 287. The trial court denied the motion, and did not give the instruction. *Id.*

Trial counsel nevertheless argued during closing arguments for the jury to consider Milam’s voluntary-intoxication evidence as mitigating. Trial counsel Hagen reminded the jury about the experts’ testimony on the effects of methamphetamine, *see* 56 RR 52-57; referred to Dr. Lundberg-Love’s opinion

that the facts of this crime were “insanity,” 56 RR 83-84; and argued there were mitigating circumstances warranting the imposition of life over death, 56 RR 84. Trial counsel Jackson argued Milam was prone to drug addiction because of a family history, 56 RR 98-99; and told the jury: “we talk about intoxication or drug use is not a defense to the ultimate crime. It is a defense in mitigation to whether or not you should kill somebody for what happened.” 56 RR 99.

Given these facts, the district court concluded that “[t]rial counsel appropriately pursued this issue and presented it to the jury. Counsel’s representation did not fall below an objective standard of reasonableness.” Petitioner’s Appendix 3, at 10; *see Strickland*, 466 U.S. at 688. The Fifth Circuit found this conclusion undebatable. Petitioner’s Appendix 2, at 5. And because Milam could not show deficient performance, the appellate court found the IATC claim insubstantial and insufficient to satisfy *Martinez*. *Id.*

While the Fifth Circuit did not reach the prejudice prong,¹ Milam also failed to affirmatively prove prejudice by demonstrating “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (citing *Strickland*, 466 U.S. at 694). The “likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at

¹ The district court found simply that Milam had not shown prejudice. Petitioner’s Appendix 3, at 10.

112. Here there is no reasonable probability of a different result had trial counsel asked the judge to rule on this specific motion.

The CCA has specifically held that the jury need not receive any special instruction on how to incorporate evidence of voluntary intoxication into the mitigation special issue. *Miniel v. State*, 831 S.W.2d 310, 320 (Tex. Crim. App. 1992); *see also Hernandez v. Johnson*, 213 F.3d 243, 250 (5th Cir. 2000). Therefore, regardless of whether trial counsel sufficiently followed up on his pretrial motion for an instruction, the trial court would have denied any request for an instruction, and committed no error in doing so.

Regardless, the jury could make a reasoned moral response to voluntary intoxication evidence through the future dangerousness issue. *See Smith v. Quarterman*, 515 F.3d 392, 409-10 (5th Cir. 2008); *Harris v. Cockrell*, 313 F.3d 238, 242 (5th Cir. 2002). And the mitigation instruction given in Milam's trial complies with this Court's Eighth Amendment requirements that the jury be able to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (*Penry I*) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)), and that the jury have a vehicle to "consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*Penry II*) (citing *Penry I*, 492 U.S. at 319); *see also Beazley v.*

Johnson, 242 F.3d 248, 260 (5th Cir. 2001). This Court has said that “virtually any mitigating evidence” can have some bearing on a person’s moral blameworthiness. *Graham v. Collins*, 506 U.S. 461, 476 (1993); *see also Blue v. Thaler*, 665 F.3d 647, 666 (5th Cir. 2011).

Therefore, there is no possibility that, without further instruction, the jurors were left considering intoxication as only an aggravating factor. *See* Petition at 27. Furthermore, given the horrific brutality Milam inflicted upon a thirteen-month old child, it is unlikely that any juror would assess a punishment less than death, regardless of the evidence proffered in mitigation.

For the forgoing reasons, the Fifth Circuit correctly concluded that reasonable jurists could not debate the conclusion that trial counsel was not deficient in his representation of Milam, and this failure to show a substantial claim precludes a finding of cause and prejudice under *Martinez*.² Because he cannot excuse the procedural default of any claim, the Fifth Circuit did not err in denying COA and certiorari review should be denied.

2. State habeas counsel was not deficient.

Milam also fails to establish “cause” to excuse the procedural default of any claim because the performance of state habeas counsel was not deficient.

² And because the instruction was neither required nor warranted, the trial court committed no error in refusing the instruction, (Claim 2), and appellate counsel was not ineffective for failing to raise claims regarding trial counsel’s performance or the trial court’s determination, (Claim 3).

Martinez, 566 U.S. at 14. Appellate counsel’s effectiveness is measured by the same *Strickland* standard applied to trial counsel: whether the performance was objectively reasonable and whether any deficient performance prejudiced the proceeding—that is, whether there was a reasonable probability that the petitioner would have won on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). State habeas counsel’s performance was objectively reasonable.

As discussed in the previous section, there is no reasonable probability that, had state habeas counsel raised any of the now-proposed claims, Milam would have obtained relief. Furthermore, state habeas counsel did not perform in an objectively unreasonable manner in failing to raise the IATC claim because trial counsel’s performance was more than reasonable. Trial counsel filed a motion seeking the voluntary intoxication instruction, re-urged the motion at the close of punishment, and asked the jury in closing arguments to consider the evidence as mitigating. There is little else trial counsel could have done, and state habeas counsel did not perform deficiently by pursuing other claims. And because the instruction was not warranted and the jury had a vehicle to consider the evidence, state habeas counsel was not deficient in failing to raise any related claim.

Because Milam cannot meet his burden of showing deficient performance of state habeas counsel, he fails to demonstrate “cause” to avoid any procedural default of this evidence. *Martinez* 566 U.S. at 14.

II. The Fifth Circuit Properly Denied COA Because the District Court's Procedural Dismissal of Milam's Intellectual-Disability Claims was not Debatable. (Claims 5-6)

In two related claims, Milam argued that appellate and state habeas counsel were ineffective for failing to argue in state court that (1) the evidence at trial was sufficient to demonstrate Milam was intellectually disabled and thus exempt from execution; and (2) the evidence showed he was functioning at an emotional level of someone between the ages of eight and sixteen, and thus ineligible for a death sentence under *Roper v. Simmons*, 543 U.S. 541 (2005). Petition at 20-22, 27-31. The Fifth Circuit did not err in concluding that reasonable jurists could not debate the district court's rejection of these claims.

A. *Martinez* does not excuse the default of non-IATC claims.

The district court found, once again, that *Martinez* does not extend to allegations of ineffective assistance of appellate counsel. Petitioner's Appendix 3, at 12-13; *citing Davila, supra*. And free-standing ineffective-assistance-of-state-habeas-counsel claims remain non-cognizable in federal court. Petitioner's Appendix 3, at 12; *Martinez*, 566 U.S. at 17. Therefore, Claims Five and Six were properly rejected as unexhausted and procedurally barred. Petitioner's Appendix 2, at 6; Petitioner's Appendix 3, at 12-13.

Although Milam did not explicitly raise an IATC claim, as will be discussed below, the district court alternatively considered and rejected Milam's arguments in terms of IATC. Petitioner's Appendix 3, at 12-13. The

Fifth Circuit, however, concluded that Milam’s single reference to trial counsel’s failure to challenge a State expert was insufficient to state a cognizable IATC claim, and did not reach the merits. Petitioner’s Appendix 2, at 6. The Fifth Circuit did not err.

In his statement of the issues, Milam challenged only the performance of direct appeal and state habeas counsel. *See* COA Application at 12; Petition at 20. Milam’s only complaint about trial counsel was buried deep within his appellate-counsel argument, alleging only that trial counsel was ineffective for failing to challenge—pursuant to *Ex parte Hearn*, 310 S.W.3d 424, 431 (Tex. Crim. App. 2010)—State’s expert Dr. Proctor’s reliance on the Reynolds Intellectual Assessment Scales (RIAS). COA Application at 45-46, 48. The Fifth Circuit found that Milam’s conclusory statement regarding trial counsel’s performance was insufficiently briefed. *See United States v. Demik*, 489 F.3d 644, 646 (5th Cir. 2007) (“[C]onclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel.” (quoting *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000))). Milam reurges this argument now but does not address the Fifth Circuit’s findings. Petition at 30. He thus fails to show any error in this determination.

Because he does not raise an IATC claim, *Martinez* does not apply. For the reasons already discussed in Section I.A., the Fifth Circuit did not err in denying COA, and certiorari review should be denied.

B. The district court's rejection of Milam's intellectual-disability claim is undebatable. (Claim 5)

Although Milam did not explicitly raise an IATC claim, the district court alternatively construed his claim in terms of trial and state habeas counsel's performance, concluding that Milam failed to show deficient performance of either, and thus could not avoid the procedural bar through *Martinez*. Petitioner's Appendix 3, at 12-13. This alternative finding was reasonable.

1. *Moore v. Texas*, 137 S. Ct. 1309 (2017), does not apply.

As an initial matter, Milam cites generally to *Moore v. Texas*, 137 S. Ct. 1309 (2017), as grounds for granting COA of this issue. Petition at 21. This Court decided *Moore* while Milam's federal petition was pending. The district court thus examined sua sponte the intellectual-disability instructions given at trial, concluding that the trial court instructed the jury in a manner "consistent with the definition of intellectual disability that the Supreme Court described in *Moore* as generally accepted and uncontroversial." Petitioner's Appendix 3, at 11-12 (citing *Moore*, 137 S. Ct. at 1045); *see also Atkins v. Virginia*, 536 U.S. 304, 321 (2002). And since the trial court instructed the jury on the three core elements of the definition of intellectual disability and none of the rejected *Briseno*³ factors, *see* 4 CR 980-81, *Moore*'s criticism of *Briseno* had no impact on the jury's decision nor any ensuing state court decision. The

³ *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004).

court found no basis to reevaluate the case in light of *Moore*. Petitioner's Appendix 3, at 11-12. Milam does not challenge the trial court's instruction or the district court's analysis. Mere citation to *Moore* does not provide a compelling reason to grant certiorari review.

2. Trial counsel was not deficient in the presentation of an intellectual-disability defense, and appellate counsel committed no error in failing to raise related claims.

Reasonable jurists could not debate the district court's conclusion that trial counsel's pursuit and presentation of an intellectual disability defense did not fall below an objective standard of reasonableness, and was neither deficient nor prejudicial. Petitioner's Appendix 3, at 12. The district court concluded that trial counsel "vigorously pursued" this defense, presenting evidence in support of all three elements, seeking and arguing for an alternative definition of intellectual disability, and arguing an unsuccessful motion for a directed verdict on the issue. *Id.* Despite counsel's efforts, the evidence did not support an affirmative finding of intellectual disability.

First, the evidence does not support Milam's claim of subaverage intellectual functioning. State's expert Dr. Proctor concluded that Milam's test scores failed to satisfy this factor. 54 RR 142-52; 55 RR 135-36. Dr. Proctor reviewed psychological testing data from defense expert Dr. Andrews,⁴ which

⁴ Dr. Andrews evaluated Milam but did not testify.

included a WAIS-IV⁵ full-scale score of 71, and a Stanford-Binet IQ score of 80. Dr. Proctor administered the RIAS, on which Milam scored an 80, and a second WAIS-IV, on which Milam obtained a full-scale IQ score of 68. 53 RR 200-02; 55 RR 135-37, 140-41, 149-55. Dr. Proctor explained that the second WAIS-IV of 68 should have been higher, given the “practice effect,” and attributed the lower score to distraction. 55 RR 151-53. Dr. Proctor agreed with Dr. Andrews that it was unusual for someone to score better on the Stanford-Binet than the WAIS-IV. 55 RR 155-56. Both Dr. Andrews and Dr. Proctor administered effort tests on which Milam did well on some but not on others; from this both doctors surmised that Milam put forth less-than-adequate effort and was likely distracted. 54 RR 146-49; 55 RR 157-59. Dr. Proctor opined that, given the standard error of measurement (SEM), Milam was someone with below average intellectual functioning, in the borderline range of intellectual disability, but did not show significantly subaverage intellectual functioning. 55 RR 149-50, 160, 165.

Because the scores fell in the borderline range, Dr. Proctor relied on additional information. 55 RR 150. Dr. Proctor found significant that Milam’s reading comprehension scores were in the eighth-grade range, even though his education ended at fourth grade, and persons with mild intellectual disability

⁵ Wechsler Intelligence Scale, Fourth Edition.

can read at most at a sixth-grade level. 55 RR 162-64. Dr. Andrews's report is consistent with Dr. Proctor's opinion, and both agreed that a lack of education can affect IQ testing; Dr. Proctor also suggested anxiety, depression, emotional upset, and drug abuse could impact testing. 55 RR 165-66.

In contrast, defense expert Dr. Cunningham believed that Milam satisfied the subaverage-intellectual-functioning factor. 53 RR 197. He relied on the fact that an IQ score of 70 or below, with an SEM of five points, is considered in the zone of intellectual-disability eligibility. 53 RR 199-200. Dr. Cunningham discounted Dr. Proctor's RIAS score of 80, describing that test as not a "multi-subtest, fully-developed I.Q. test, but . . . a measure of intellectual capability." 53 RR 202. Dr. Cunningham stated that the WAIS-IV and the Stanford-Binet are considered the more valid measures of IQ than the RIAS, which he called a "screening measure." 53 RR 202-03, 257-58; 54 RR 139-42.⁶

Dr. Cunningham's testimony focused predominantly on the adaptive-deficits factor, finding concurrent deficits in adaptive behaviors in all eleven categories listed in the DSM-IV, *see* 53 RR 203-38, 259-62, and all three categories from the American Association on Intellectual and Developmental

⁶ Milam refers to uncalled State's expert, Dr. Gripon, who found Milam had an IQ between 65-70. Petition at 29. But the jury heard that Dr. Cunningham relied on Dr. Gripon's report, *see* 53 RR 207-08, 211, 215-19, 233, 244; 54 RR 224; 55 RR 207, 235; and the defense noted, in closing argument, the State's failure to call Gripon, 56 RR 64. The jury nevertheless found Dr. Proctor more credible.

Disabilities definition of adaptive deficits, 53 RR 261-62. Dr. Cunningham relied heavily on the testimony of Milam's mother in reaching this decision. *See* 53 RR 153-54, 194, 262; 54 RR 153.

In contrast, Dr. Proctor reviewed the evidence and talked to Milam's former employers, as well as his mother and sister. 55 RR 167-69. First, Dr. Proctor disagreed with Dr. Cunningham's use of the adaptive behavior rating scale because it is difficult for a family member to accurately rate a person who is incarcerated, and a family member is likely to show bias when answering the questions. 55 RR 170-71, 259-60. Dr. Proctor also disagreed with the actual adaptive behavior scale used by Dr. Cunningham because a formal assessment of adaptive behavior should rate a person against a normal population, but Dr. Cunningham's test rated Milam against a group of developmentally disabled individuals living within the community. 55 RR 171.

Second, Dr. Proctor disagreed with Dr. Cunningham's results—which relied heavily on Milam's mother, Shirley—because Dr. Proctor believed Shirley, deliberately portrayed her son as slow, and discouraged Milam's sister from accurately answering questions. 55 RR 172-74, 176. Shirley was also not forthcoming about Milam's drug problem. 55 RR 174-75.

Dr. Proctor also questioned Dr. Cunningham's opinion that Milam showed deficits in his work history or vocational ability, based upon testimony of witnesses who knew of his work history. 55 RR 176-77. Dr. Proctor thought

it unlikely that an auto mechanic could be intellectually disabled given the tasks performed. 55 RR 255-57. In Dr. Proctor's opinion, Milam had some adaptive deficits as well as strengths, but he did not show *significant* deficits to the level required to meet the second prong of the intellectual disability test. 55 RR 177, 257. Dr. Proctor also considered whether Milam's adaptive deficits could be caused by other factors such as drug use, lack of opportunity, deprived environment, or laziness. 55 RR 257-59.

Other witnesses supported Dr. Proctor's findings. Ranger Ray testified that Milam told him about his work history and demonstrated knowledge and ability regarding his job; demonstrated he could both read and write, and hold a normal conversation; and conducted himself appropriately. Ranger Ray did not believe he was intellectually disabled. *See* 49 RR 72-76.

An employee of Community Healthcore, a provider of mental health care and intellectual disability services who assessed Milam in jail, noted that Milam's appearance was appropriate, and he seemed of average intelligence given his adequate vocabulary, his ability to answer questions appropriately, and the lack of lapses in speech and memory. 55 RR 27-29. During the evaluation, Milam seemed depressed, but not delusional or paranoid. 55 RR 30-32. A licensed counselor confirmed this assessment, and Milam was not admitted for treatment. 55 RR 37.

Regarding Milam's work history, Milam got his first job at M & M Express Lube when he was fifteen and held that job for two years. 51 RR 270, 277. Later, Milam worked for Big 5 Tire & Auto, where he performed diagnostic and mechanical work on cars, changed tires, and changed oil. 50 RR 22. His supervisor, Bryan Perkins, testified that Milam's performance was excellent and he had no trouble fulfilling his duties. 50 RR 25-27. Perkins encouraged Milam to work toward a promotion to salesman and began training Milam to use the computer; Milam had no trouble learning. 50 RR 29-30; 54 RR 269-71. Perkins fired Milam because he stopped coming to work, but stated that when Milam was working, he was one of his best employees. 50 RR 31, 36-37. Gary Jenkins trained Milam at Big 5, and said Milam could perform job tasks without problems, operate machinery, and work with tools. 54 RR 263-69. Milam did very well in training, did not have any safety issues, performed his job duties, and kept the shop and tools clean without prompting. 54 RR 269.

Regarding Milam's education and ability to learn, two of his grade school teachers said that Milam was a slow student with low grades, but that he was frequently absent due to health issues and an overprotective mother. 51 RR 9, 14, 26-27. One teacher opined that Milam could have been a better student if he had attended school regularly. 51 RR 32-33, 35. Neither teacher recalled referring Milam for a determination of intellectual disability or ADHD; rather, Milam received treatment for a speech impediment. 51 RR 7-8, 13-15, 30-31.

Milam's school records identified no disability other than speech impediment, and reflected that he was routinely absent but never held back. 54 RR 163-66.

In the fourth grade, Milam's parents removed him from school after he was paddled by the school principal. 51 RR 237-38. They attempted to homeschool him for about six months. 51 RR 239-40. Milam's friend confirmed that he was educationally slow because he was removed from school. 53 RR 12.

A special education teacher testified, from personal observation of Milam outside of school, that nothing led her to believe there was anything wrong with him and that his available school records did not indicate any disability other than speech impediment. 54 RR 294-97, 305-10; SX 298, 300. Another teacher said Milam could do the work she asked of him and attributed any difficulties to his absences from school; she never felt the need to refer him for intellectual-disability screening. 54 RR 313-15. Finally, the Special Education Director for Rusk County Shared Services Arrangement examined Milam's records and testified that his last full and independent evaluation, dated February 8, 2000, indicated a speech impediment only. 54 RR 321-23; SX 300.

Melynda Keenon evaluated Milam to determine his learning style for homeschooling purposes and suggested that Milam sign up for online classes. 55 RR 78-82. Keenon said Milam could do the work but was easily distracted. 55 RR 83-84. Keenon saw no signs of intellectual disability. 55 RR 84-85.

Neighbor Sarah Hodges testified that she homeschooled her daughters and, when Milam visited during school time, she gave him schoolwork. 5 RR 89-98, 117-18, 121. While Milam was behind, Sarah believed he was at the same level as her daughter and foster-child who were Milam's age. 55 RR 92, 100. Sarah said Milam liked to fix mechanical things and had a degree of mechanical ability. 55 RR 103-04. Sarah never thought he was intellectually disabled. 55 RR 114-15.

While Milam's mother described him as slow and was the primary source of information for Dr. Cunningham, she admitted on cross-examination that Milam was evaluated for special education but only needed treatment for his speech problem. 51 RR 340-41. Milam began crawling at seven or eight months, talking at eight months, and walking at eleven or twelve months, 51 RR 341-42; which Dr. Proctor said was normal, 55 RR 172-74. Also, Milam used the computer and met Jesseca on MySpace. 51 RR 283, 286, 344. Shirley indicated that Milam took care of Amora, 51 RR 288-89, 344, and cared for his ailing father, 52 RR 117-18. Shirley also admitted Milam could take care of cars and hold a job, 51 RR 344, and she told the grand jury that Milam voluntarily gave his paycheck to his father every week so he would not spend it, 51 RR 347-48.

Finally, regarding onset of intellectual disability before the age of eighteen, Dr. Proctor found no evidence to support this, noting Milam's school records. 55 RR 178, 180. Dr. Proctor also found significant a letter from the

school district indicating Milam had undergone a full and individual evaluation in 2000, but noting no intellectual-disability diagnosis. 55 RR 178-79. In contrast, Dr. Cunningham gave a conclusory answer that Milam’s deficits originated before the age of eighteen. 53 RR 240.

Both sides presented evidence in support or against all three factors of the intellectual disability test, but the jury ultimately concluded that Milam did not meet his burden of proving by a preponderance of the evidence that he is intellectually disabled. Had appellate counsel raised a claim regarding the sufficiency of this evidence on direct appeal, it would have been unsuccessful because the evidence did not support a finding of intellectual disability. The jury’s determination was not against the “great weight” of the evidence. *See Neal v. State*, 256 S.W.3d 264, 273 (Tex. Crim. App. 2008) (In reviewing sufficiency of the evidence to support jury determination on intellectual disability, CCA determines whether failure to find intellectual disability “is ‘so against the great weight and preponderance of the evidence so as to be manifestly unjust.’”) (citing *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007)). Dr. Proctor’s objective opinion—supported by Dr. Andrews’s report, Milam’s school records, and the testimony of numerous witnesses who knew Milam as a child and young adult—was far more credible than Dr. Cunningham’s, which relied primarily on the biased observation of Milam’s mother. *See Ex parte Briseno*, 135 S.W.3d at 18 (“[W]hile there is expert opinion

testimony in this record that would support a finding of [intellectual disability], there is also ample evidence, including expert and lay opinion testimony, as well as written records, to support the trial court's finding that applicant failed to prove that he is mentally retarded.") "The jury [is] ultimately in the best position to make credibility determinations and evaluate this conflicting evidence." *Gallo*, 239 S.W.3d at 774. Therefore, any claim by appellate counsel regarding this evidence would have been unsuccessful.

Regarding Milam's complaint that trial counsel was ineffective for failing to challenge Dr. Proctor's reliance on the RIAS, Petition at 30, Milam misinterprets *Ex parte Hearn* as precluding reliance on anything other than the Stanford-Binet, WAIS, or Kaufman Assessment Battery when assessing intellectual disability. The CCA made no such finding. In *Ex parte Hearn*, the petitioner attempted to substitute neuropsychological test results in place of full-scale IQ scores. 310 S.W.3d at 430-31. The CCA rejected his request noting that it would "significantly alter the current definition of [intellectual disability]," and concluded that, while applicants can "present clinical assessment to demonstrate why his or her full-scale IQ score is within that margin of error, applicants may not use clinical assessment as a replacement for full-scale IQ scores in measuring intellectual functioning." *Id.* at 430-31. Milam presents no proof that the RIAS is not an accepted test for measuring IQ. See 54 RR 143-44 (manual on how to administer RIAS indicates test is not

abbreviated or short-form intellectual assessment); 55 RR 140-41 (Dr. Proctor testimony that RIAS is “well-thought-of . . . comprehensive intelligence test” that can be used to assess intellectual disability); *see also Hall v. Quarterman*, No. 4:06-CV-436-A, 2009 WL 612559, at *39 (N.D.Tex., March 9, 2009) (credible expert testimony established “RIAS is an accepted test for measure IQ”); *Hines v. Thaler*, No. 3:06-CV-0320-G, 2010 WL 3291820, at *3-5 (N.D. Tex., March 22, 2010) (RIAS administered by defense, admitted as evidence of intellectual disability).

Regardless, trial counsel sufficiently challenged the reliability of the RIAS through Dr. Cunningham’s testimony, establishing that he did not value it as a testing instrument. 53 RR 202-03, 257-58; 54 RR 139-42. And Dr. Proctor did not rely exclusively on the RIAS, but on all four test scores, including two administrations of the WAIS-IV and the Stanford-Binet. Dr. Proctor addressed Dr. Cunningham’s concerns about the RIAS, *see* 55 RR 141, 153, but ultimately his testimony about that score covered three pages of the record and was intertwined with references to the WAIS-IV and Stanford-Binet tests. *See* 55 RR 153-55. Therefore, even if trial counsel should have further challenged the RIAS score, Dr. Proctor’s reliance on that test was minimal and in conjunction with the three remaining scores that met with the CCA’s approval in *Ex parte Hearn*, 310 S.W.3d at 428 n.7. Thus, Milam was not prejudiced from any deficiency in trial counsel’s performance.

3. The jury properly considered the evidence.

Milam also cites to *Hall v. Florida*, 134 S. Ct. 1986 (2014), suggesting the jury did not fully consider his intellectual-disability evidence but impermissibly halted its examination upon hearing that Milam had an IQ score above 70. Petition at 27-30. There is no support for this accusation.

As found by the district court, trial counsel presented evidence and argued that he had satisfied all three factors of the intellectual disability test, while the State presented evidence in rebuttal and argued that Milam had not met his burden on all three factors. Petitioner's Appendix 3, at 12. Neither party focused on only one factor. Furthermore, the jury was clearly instructed that it must find all three factors before it could answer "yes" to the intellectual disability issue and that it must consider all the evidence in arriving at its conclusion. Nothing from the record suggests that the jury ignored these instructions. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993).

Furthermore, the Fifth Circuit has specifically held that *Hall* does not implicate Texas because "Texas has never adopted the bright-line cutoff at issue in *Hall*."⁷ *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014); *see also Hearn v. Thaler*, 669 F.3d 265, 269 (5th Cir. 2012) (allowing SEM

⁷ The *Hall* Court found Florida's intellectual-disability scheme unconstitutional because it adopted a "strict IQ test score cutoff of 70," without allowing SEM margins, and foreclosing presentation of other evidence indicating petitioner's faculties were limited where evidence indicated an IQ score above 70. 134 S. Ct. at 1994.

approximately five points in either direction when assessing IQ). And, unlike Florida, Texas does not restrict the presentation of evidence when an IQ score rises above 70. *Mays*, 757 F.3d at 218; *see also Garcia*, 757 F.3d at 226. Indeed, *Hall* did not identify Texas as one of the states impacted by this decision. *See* 134 S. Ct. at 1996-97. Thus, *Hall* has no application to the Texas system. And, as applied to this case, Milam was still permitted to present evidence of adaptive deficits and early onset despite his above-70 test scores. Milam's *Hall* argument was foreclosed by Circuit precedent and contrary to the facts.

Finally, despite Milam's selective quotation from *Ex parte Hearn*, 310 S.W.3d at 431, Petition at 28, (the CCA "interprets the 'about 70 language of the AAMR's definition of [intellectual disability] to represent a rough ceiling, above which a finding of [intellectual disability] in the capital context is precluded"), *Hearn* specifically requires application of an SEM of approximately five points when assessing IQ, as well as evidence of significant limitations in adaptive functioning. 310 S.W.3d at 428. Therefore, unlike the situation in *Hall*, Texas does not cease inquiry or development of a defendant's intellectual disability defense simply because he receives an IQ score above 70. *See also Ex parte Cathey*, 451 S.W.3d 1, 10-11 & n.21 (Tex. Crim. App. 2014) (allowing evidentiary development where petitioner had IQ score of 77; citing *Hall*'s rejection of firm cut-off score, explaining that subaverage intellectual

functioning is a flexible assessment). Any effort by appellate counsel to raise this issue would have been unsuccessful.

4. State habeas counsel was not deficient.

Finally, apart from Milam's failure to demonstrate "prejudice" through a "substantial claim" for relief, Milam also fails to establish "cause" to excuse his procedural default. *Martinez*, 566 U.S. at 14. State habeas counsel's performance was objectively reasonable. *Smith*, 528 U.S. at 285. As noted, trial counsel did not perform deficiently in pursuit of this defense therefore habeas counsel was not deficient for failing to pursue any claim. And because the evidence did not support an affirmative answer to the third special issue, there was no likelihood of success on appeal had appellate counsel challenged the sufficiency of the evidence. Milam cannot demonstrate the ineffectiveness of state habeas counsel, and the district court's conclusion that Milam cannot overcome the procedural bar was undebatable. Petitioner's Appendix 3, at 12.

C. Milam is not entitled to relief under *Roper*. (Claim 6)

Milam argues that, because the evidence was sufficient to demonstrate that he was functioning at an emotional level below the age of eighteen, his death sentence violates *Roper*'s prohibition against executing a person who committed a crime while under the age of 18, and both appellate and state habeas counsel were deficient for failing to pursue related claims on appeal. Petition at 30-31. Although not the issue raised, the district court found that

trial counsel pursued this issue at trial and was, thus, not ineffective. Petitioner's Appendix 3, at 13 (citing 2 CR 312-24; 55 RR 286-87).

The district court alternatively concluded, and the Fifth Circuit agreed, this claim is meritless because any extension of *Roper* to emotional immaturity is foreclosed by Supreme Court and Fifth Circuit precedent. Petitioner's Appendix 2, at 6; Petitioner's Appendix 3, at 13. Milam fails to demonstrate any error in this finding.

In *Roper*, this Court created a bright-line rule limiting its Eighth Amendment prohibition against execution, holding, “[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.” 543 U.S. at 574. The Fifth Circuit has clearly foreclosed extension of *Roper* beyond chronological age. *United States v. Bernard*, 762 F.3d 467, 482-83 (5th Cir. 2014); *Doyle v. Stephens*, 535 F. App'x 391, 395-96 (5th Cir. 2013); *Parr v. Quarterman*, 472 F.3d 245, 261 (5th Cir. 2006). Other circuits have similarly rejected claims arguing a “developmental age” theory. *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015); *In re Garner*, 612 F.3d 533, 535-36 (6th Cir. 2010); *United States v. Mitchell*, 502 F.3d 931, 981 (9th Cir. 2007).

Milam argues this issue is worthy of consideration because this Court has not specifically decided it. Petition at 31. But even the Eleventh Circuit

case Milam cites in support finds it undebatable that the Florida Supreme Court reasonably applied clearly established federal law in rejecting the petitioner's *Roper*-based emotional-age argument. *Melton*, 778 F.3d at 1237.

There is simply no support for Milam's emotional immaturity argument, thus appellate counsel was not ineffective for failing to raise this issue on appeal. *See Smith v. Murray*, 477 U.S. 527, 536 (1986 (process of “winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail,” the hallmark of effective appellate advocacy.” (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983). And because this claim has been squarely rejected by the Fifth Circuit, there is no reasonable probability that Milam would have won on appeal. *Robbins*, 528 U.S. at 285.

For these reasons, even if *Martinez* applied to this claim, state habeas counsel was not ineffective for failing to raise these frivolous allegations. Milam can demonstrate neither “cause” nor “prejudice” to excuse the procedural default. The Fifth Circuit did not err in denying COA.

CONCLUSION

The Fifth Circuit correctly concluded that reasonable jurists could not debate the district court's rejection of these claims as procedurally barred. For all the reasons discussed above, the Court should deny Milam's petition for a writ of certiorari.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

/s/ Tomee M. Heining
*TOMEE M. HEINING

*Attorney in charge

Assistant Attorney General
Texas Bar No. 24007052
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

tomee.heining@oag.texas.gov

Telephone: (512) 936-1600
Telecopier: (512) 320-8132