No. _____

IN THE

Supreme Court of the United States

BLAINE MILAM

Petitioner,

V.

TEXAS

Respondent.

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

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

INDEX TO APPENDICES

APPENDIX 1

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-79,322-02

EX PARTE BLAINE KEITH MILAM, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. CR-09-066 IN THE 4TH JUDICIAL DISTRICT COURT RUSK COUNTY

***Per curiam*.**

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.[1]

In May 2010, a jury convicted Applicant of capital murder for killing his fiancee's 13-month-old daughter. *See* TEX. PENAL CODE § 19.03(a). The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure. The jury also

[1] All references to "articles" in this order refer to the Texas Code of Criminal Procedure unless otherwise specified.

answered a special issue asking whether Applicant is a person with intellectual disability. In accordance with the jury's answers, the trial court set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal and denied his initial writ filed pursuant to Article 11.071. *Milam v. State*, No. AP-76,379 (Tex. Crim. App. May 23, 2012) (not designated for publication); *Ex parte Milam*, No. WR-79,322-01 (Tex. Crim. App. Sept. 11, 2013) (not designated for publication).

On January 7, 2019, Applicant filed this, his first subsequent writ application, in the trial court. Therein, Applicant raised four claims: (1) current scientific evidence regarding the reliability of bite mark comparison evidence contradicts expert opinion testimony presented by the State at Applicant's trial (Claim 1); (2) Applicant's execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled (Claim 2); the State violated Applicant's right to due process by failing to disclose material exculpatory evidence (Claim 3); and (4) the State obtained Applicant's conviction in violation of due process because he was denied his right to present a defense (Claim 4). The trial court forwarded the record to us for a determination of whether any of Applicant's subsequent writ claims satisfied Article 11.071, § 5(a).

We determined that Applicant's first and second claims satisfied Article 11.071, § 5(a)(1) and remanded those allegations to the trial court for a merits review. *Ex parte Milam*, No. WR-79,322-02 (Tex. Crim. App. Jan. 14, 2019). The trial court entered findings

of +fact and conclusions of law and recommended that we deny habeas relief on Claims 1 and 2.

We have reviewed the record regarding Applicant's two remanded allegations. Based on our review of the record, we find that Applicant is not entitled to habeas relief on either Claim 1 (his bite mark evidence allegation) or Claim 2 (his intellectual disability allegations).

Further, regarding Claim 1, we do not adopt the trial court's findings of fact numbers 29 and 33. Regarding Claim 2, we do not adopt conclusions of law numbers 170 through 177, number 183, or the portion of number 239 that states Applicant's intellectual disability claim is barred under *Teague v. Lane*, 489 U.S. 288 (1989).

Based upon the trial court's findings and conclusions (with the exceptions noted above) and our own review, we deny relief on Claim 1 and Claim 2 of the application, and dismiss Claims 3 and 4 as an abuse of the writ.

IT IS SO ORDERED THIS THE 1ST DAY OF JULY, 2020.

Do Not Publish

APPENDIX 2

DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR 79,322-02)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Court, having considered the Applicant's subsequent application for writ of habeas corpus, the State's Amended Response, and official court documents and records in cause number 09-066, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Applicant, Blaine Keith Milam, was indicted on March 10, 2009, by the Grand Jury of the 4th Judicial District Court, in cause No. 09-066, on four counts of the capital offense of knowingly causing the death of Amora Bain Carson, an individual younger than six years of age. *See* 1 CR 1-4; 39 RR 42-43;[1] Tex. Penal Code § 19.03 (a)(8).

[1] "CR" refers to the Clerk's Record—the transcript of pleadings and documents filed with the clerk during trial, preceded by volume number and followed by page number. "RR" refers to the Reporter's Record of the transcribed state trial proceedings.

2. After a change of venue, a Montgomery County jury convicted Applicant of capital murder and sentenced him to death in May 2010. *See* 41 RR 235-36.

3. Applicant's conviction was affirmed on direct appeal on May 23, 2012. *Milam v. State,* No. AP-76,379, 2012 WL 1868458 (Tex. Crim. App. 2012). He did not seek certiorari review of this decision, and his conviction became final on August 21, 2012.

4. On September 11, 2013, the Texas Court of Criminal Appeals (CCA) adopted this Court's—the Honorable J. Clay Gossett's—recommended findings of fact and conclusions of law and denied state habeas relief. *Ex parte Milam,* No. WR-79,322-01, 2013 WL 4856200 (Tex. Crim. App. 2013).

5. On August 16, 2017, the United States District Court for the Eastern District of Texas, Sherman Division, the Honorable Ron Clark presiding, denied federal habeas relief and a certificate of appealability (COA). *Milam v. Director, TDCJ-CID,* No. 4:13-cv-545, 2017 WL 3537272 (E.D. Tex. 2017).

6. On May 10, 2018, the Fifth Circuit Court of Appeals also denied COA. *Milam v. Davis,* 733 F. App'x 781 (5th Cir. 2018).

7. The United States Supreme Court denied certiorari review on October 9, 2018. *Milam v. Davis,* 139 S. Ct. 335 (2018).

8. On September 11, 2018, this Court signed an order setting Applicant's execution date for January 15, 2019.

9. On September 17, 2018, Applicant's appointed federal habeas counsel, Don Bailey, filed a motion to substitute counsel. *Milam v. Director,* No. 4:13-cv-545 (E.D. Tex.) (ECF No. 40).

10. The district court granted the motion on October 4, 2018, and appointed Jennae Swiergula of the Texas Defender Service and Jeremy Schepers of the Federal Public Defenders Office. *Milam v. Director,* No. 4:13-cv-545 (E.D. Tex.) (ECF Nos. 42-44).

11. On January 7, 2019, Applicant filed his second state habeas application and a motion for stay of his execution date.

12. On January 14, 2019, the CCA granted Applicant's motion for stay, concluding he had "met the dictates of [Texas Code of Criminal Procedure] Article 11.071 § 5(a)(1) with regard to his first two allegations," stayed his execution, and remanded these claims to this Court for a review on the merits. *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. 2019).

13. The State submitted a response pursuant to Article 11.071 § 7, on May 6, 2019, and an amended response on May 14, 2019.

14. On June 3, 2019—the twentieth day from the date the Respondent filed an amended response, *see* Article 11.071 § 8(a) and § 9(a)—this Court notified the parties by letter that it "hereby denies Applicant's State Habeas

Application," and ordered the State "to prepare an order according to this letter pronouncement."

15. The State submitted a proposed order, in accord with the statutory requirements of Article 11.071 § 8, "FIND[ING] that there are no 'controverted, previously unresolved factual issues material to the legality of applicant's confinement.' Accordingly, both parties are ORDERED to provide proposed findings of fact and conclusions of law within thirty days of the date of this order."

16. The Court signed the order on June 5, 2019.

17. On June 12, 2019, Applicant filed a motion to recuse Judge Gossett from proceedings in connection with the adjudication of his writ application.

18. The State filed its opposition to this motion on June 26, 2019.

19. Applicant filed a reply on June 27, 2019.

20. This Court took no action on the motion.

21. The motion was transferred to the Presiding Judge of the Tenth Administrative Judicial Region, The Honorable Alphonso Charles, who held a hearing on the motion on August 2, 2019.

22. Judge Charles denied the motion on August 12, 2019.

FIRST GROUND FOR RELIEF: Applicant claims he is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure because the current relevant scientific evidence related to the reliability of bitemark comparison evidence contradicts expert opinion testimony presented and relied upon by the State at trial.

23. The CCA remanded Applicant's challenge to the admissibility of expert testimony on bitemark evidence, raised pursuant to Article 11.073, concluding that Applicant satisfied the dictates of Article 11.071 § 5(a)(1), "[b]ecause of recent changes in the science pertaining to bite mark comparisons." *Ex parte Milam,* 2019 WL 190209, at *1.

24. Applicant proffered the following new evidence relevant to the science of bitemark comparison testimony: (1) an affidavit from forensic odontologist Dr. Charles Michael Bowers, Applicant's Exhibit 11; (2) a report from the President's Council of Science and Technology entitled *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016 PCAST Report), Applicant's Exhibit 12; (3) a report from the Texas Forensic Science Commission (2016 TFSC Report), Applicant's Exhibit 13; (4) The American Board of Forensic Odontology Revised Standards and Guidelines for Evaluating Bitemarks (ABFO Standards), State's Attachment; and (5) *Ex parte Chaney,* 563 S.W.3d 239 (Tex. Crim. App. Dec. 19, 2018).

25. For the purposes of Article 11.073, relevant scientific evidence is unavailable if it "was not ascertainable through the exercise of reasonable

diligence by the [applicant] on or before the date on which the original application or a previously considered application, as applicable, was filed." Tex. Code Crim. Proc. art. 11.073(c).

26. The Court finds that Dr. Bowers's affidavit, Applicant's Exhibit 11, relies on information dating back to 2009, prior to Applicant's trial. *See* Bowers Report Exhibits (listing exhibits from 2009, 2010, & 2011); *see also* Appl. Exh. 11, at 3 n.5 (It "was already understood at the time of Dr. Williams's testimony" that patterns left in material bitten by human teeth are not "unique."); Appl. Exh. 11, at 4-5 (at time of trial National Academy of Sciences had criticized bitemark methodology).

27. Applicant's remaining exhibits were created after Applicant's trial.

28. Applicant proffers these exhibits to attack the testimony of the State's expert, forensic odontologist Dr. Robert Williams, for purportedly suggesting that human dentition is unique, and human skin is capable of recording a person's biting surface with sufficient fidelity to allow comparisons to be made between the injury and molds of human dentitions, Subsequent Application at 47, 55-57; and for using now-foreclosed terms, "match" and "to a reasonable degree of dental certainty," Subsequent Application at 58-59.

29. The Court finds that Dr. Williams testified that in the context of bitemark analysis, bitemark dentition is not unique as to the general population, and that someone in the State of Texas might have a similar

dentition to Applicant's and might make a mark similar to Applicant's dentition. But, within the limited population Dr. Williams was asked to analyze—dentitions of Applicant, Jesseca Carson, and Danny Milam—Applicant's dentition was extremely unique. *See* 44 RR 255.

30. Applicant does not challenge the credibility of defense expert Dr. George Isaac's testimony.

31. Dr. Isaac testified that teeth patterns are not unique. 47 RR 33-35, 52.

32. Both experts testified that the number of potential human bitemarks submitted for examination in this case—twenty-four—was unusual, and neither expert was aware of another case involving this many bitemarks on one victim. *See* 44 RR 232-33; 45 RR 35-37; 47 RR 68.

33. In this context, the Court finds Dr. Williams used the word "unique" to describe a pattern he recognized across many of these twenty-four bitemark injuries—the distinctive "M" pattern and the petechial pinpoint lacerations—that corresponded with one of the dentition models (Applicant's) but not the others. *See* 44 RR 236-49, 261-68, 273, 284-85; 45 RR 7, 19-20.

34. Dr. Isaac also noticed the "M" pattern in many of the bitemarks. *See* 47 RR 17, 21, 23-30, 35, 39, 41, 51, 54, 64-67.

35. The Court finds Dr. Williams acknowledged that human skin is an imperfect medium for accurately recording dentitions in the following ways:

(a) he explained that the teeth impressions can be affected by the amount of fat a person has under their skin, and the age of the skin, 44 RR 205-08; (b) he noted the variability of skin, and specifically noted that skin thickness and underlying fat layers on a baby should be considered, as well as different skin consistencies and thickness, 44 RR 238, 246, 263; (c) he testified that bitemarks are not an ink-stamp, that movement of the victim will result in distortion and torqueing of the tissues, and the skin can occasionally show drag marks from the teeth, 44 RR 262; and (d) he agreed that skin was "a lousy medium." 45 RR 63-64. The defense also cross-examined Dr. Williams on this point. 45 RR 44-48.

36. Dr. Isaac testified there was "plenty of room for error" in bitemark analysis because of problems with the skin—it's "not the best medium" to record an impression. 47 RR 10; *see also* 47 RR 37 (skin distorts and is pliable).

37. The Court finds that the current ABFO Manual allows an ABFO Diplomate to conclude only that an individual is "Excluded as Having Made the Bitemark," "Not Excluded as Having Made the Bitemark," or "Inconclusive." *See Ex parte Chaney,* 563 S.W.3d at 257. In making this determination, the ABFO requires an odontologist to (1) determine whether the pattern injury is a human bitemark; (2) determine whether there exists sufficient evidentiary value for comparison; (3) compare the pattern injury to a subject dentition and determine whether (a) dentition is excluded as having

made the bitemark, (b) dentition is not excluded as having made the bitemark, or (c) the outcome is inconclusive; and (4) seek independent verification through a second opinion. *See* State's Attachment, at 17; *see also Ex parte Chaney,* 563 S.W.3d at 257.

38. The ABFO also recommends that a different dentist collect the dentition samples for examination and produce a "dental line-up" if only one person of interest is proffered. State's Attachment at 2, 7, 11.

39. Dr. Williams and Dr. Isaac were given three dental models, made by another dentist, to compare to the numerous bitemarks found on Amora's body. Dr. Williams referred to all three dental models as "suspects." 44 RR 222-24, 230.

40. Dr. Williams identified which bitemarks exhibited the unique class characteristics of a human bitemark, and, of those, which ones had evidentiary value. 44 RR 232-47, 260-61.

41. Dr. Williams compared the dentition models to those bitemarks with evidentiary value.

42. Dr. Williams testified that he excluded Jesseca Carson and Danny Milam as the contributor of the bitemark on the left knee but could not exclude Applicant. 44 RR 247-55. Applicant could not be excluded from the bitemark on the right knee, 44 RR 256-60; the upper left tricep, lower inner left forearm, and backside waist, 44 RR 261-66; 45 RR 9-11, 14-17. Jesseca was excluded

from the mark on the left forearm. 45 RR 15-16. Applicant could not be excluded from contributing the bitemark to the upper right bicep, but Jesseca and Danny could be excluded. 44 RR 266-69; 45 RR 12-14. Amora's lower right forearm showed a constellation of three bitemarks, all of which, Dr. Williams testified, were generated by the same person, and Applicant could not be eliminated as that person, 45 RR 6-8; and Applicant also could not be excluded as a contributor of the bitemark on the upper left leg, 44 RR 272-74, or the two bitemarks on the upper right chest, 44 RR 274-76. The bitemark to the inside of Amora's left hand had limited evidentiary value, but Applicant could not be excluded as the contributor. 44 RR 269-72.

43. Dr. Williams testified that he was not sure that the mark on Amora's chin was actually a bitemark because it only showed what appeared to be lower dentition with no corresponding upper; but, because it exhibited characteristics of a bitemark pattern, he compared it to Jesseca and Applicant, and excluded Applicant but could not exclude Jesseca as a contributor. 44 RR 281-85; 45 RR 6, 57.

44. In conclusion, Dr. Williams testified that, based upon the quality of the aforementioned-bitemarks and the uniqueness of Applicant's dentition, as compared to Jesseca's and Danny's dentition, Dr. Williams could not exclude Applicant as having contributed these bitemarks—save the one to Amora's chin. 45 RR 24, 27.

45. The Court also finds that, after identifying the marks Applicant could be excluded or not excluded from, Dr. Williams used now-improper terminology for some of the bitemarks. *See* 45 RR 20-23, 27 (bitemark to throat was "unique" and "matched" Applicant to "a reasonable degree of dental certainty"); 45 RR 19-20 (An injury to bottom of Amora's left foot appeared to "match" Applicant's teeth because it exhibited the same "M" pattern); 45 RR 25-33, 72 (concluding to a reasonable degree of dental certainty, that the bitemarks on Amora's throat, upper left arm, upper right arm, one of the marks on her chest, left forearm, the left knee, the right knee, and bottom of the left foot, "matched" with Applicant, and to the exclusion of the Jesseca and Danny); *see also Ex parte Chaney,* 563 S.W.3d at 260-61 (noting that ABFO Manual no longer allows examiners to give opinions to a "reasonable degree of dental certainty" or individualization, i.e. "match").

46. The Court finds that Dr. Isaac corrected the State's use of "match," explaining that "match" was not a good term to use; rather, he stated, the marks are "consistent." 47 RR 55.

47. Dr. Isaac refused to use the terminology, "to a reasonable degree of dental certainty," indicating that those standards described by Dr. Williams had been changed, and that he never elevated his opinion to such a high degree because there was too much room for error in bitemark analysis. 47 RR 55.

48. Dr. Isaac testified there were only five bitemarks of evidentiary value. Of those five, he could not exclude Applicant as a contributor in four bitemarks, and he could not exclude Jesseca as a contributor in three of the bitemarks—one of which he excluded Applicant but not Jesseca—and could not exclude Danny as a contributor of one. 47 RR 29-30, 35-43, 55-56.

49. Dr. Isaac concluded, based upon the models he was given, he could not exclude Applicant as having bitten Amora at least twice: the bitemark to Amora's throat and left knee exhibited the same "M" pattern as was exhibited in Applicant's dentition. 47 RR 64-67; *see also* 47 RR 29-30, 51-52.

50. Dr. Isaac admitted that regarding the bitemarks he felt had no evidentiary value, Dr. Williams did not attribute them to Applicant. 47 RR 50.

51. Dr. Isaac also noted the "M" pattern, identified by Dr. Williams, as the pattern he was looking for in the bitemarks. 47 RR 17, 21, 23-30, 35, 39, 41, 51, 54, 64-67.

52. Dr. Isaac found the bitemark to the left knee to be a very good bitemark for the purposes of examination, and he agreed with Dr. Williams that Applicant could not be excluded as the source of that mark but Jesseca and Danny could be excluded. 47 RR 29-30, 51-52.

53. Dr. Isaac admitted that the bitemark to Amora's throat exhibited the "M" pattern and was as good as the mark to her left knee. 47 RR 64-67.

54. Dr. Isaac could not exclude Applicant and Jesseca from having committed the crime together. 47 RR 67.

55. The Court finds that neither Applicant nor Dr. Bowers challenge the credibility of Dr. Isaac's testimony.

56. Dr. Williams consulted with Dr. Peter Loomis, the chief forensic odontologist for the New Mexico Office of the Medical Investigator, who agreed with Dr. Williams's findings. 45 RR 34-35.

57. The Court finds that admissible expert testimony from Dr. Williams and Dr. Isaac, confirmed on peer-review by Dr. Loomis, indicated Applicant could not excluded as a contributor of at least two of the twenty-four bitemarks.

58. The Court finds that, from the following evidence, only Applicant and Jesseca were with Amora at the time of her murder:

a. Amora's body was found in Applicant's home on December 2, 2008;

b. Applicant, Jesseca, and Amora were the only people home on the evening of December 1, 2008, the night before Amora's body was discovered. 44 RR 138-40.

c. On the evening of December 1, 2008, Shirley Milam was visiting her daughter in Louisiana, and Danny Milam was in jail until the

evening of December 1st, after which he drove to Louisiana and spent the night with his sister and mother. 44 RR 139-40.

d. Applicant and Jesseca were seen with Amora at 9 p.m. on December 1, 2008. 46 RR 96.

e. Applicant called his sister before 9:30 a.m. on December 2, 2008, to tell her Amora was dead. 40 RR 180-82.

f. No other person has been implicated.

59. The Court finds that Applicant and Jesseca took steps to cover up their involvement in Amora's murder:

a. Despite calling his sister at 9:30 a.m., Applicant did not call 911 to report Amora's death until after 10:37 a.m. on December 2, 2008. 42 RR 103-15.

b. Prior to calling 911, Applicant and Jesseca went to a pawn shop, 42 RR 57-61; staged a crime scene, 46 RR 180-83; and came up with a now-discredited alibi, 40 RR 113-23.

c. Applicant told different versions of the events to investigators. *See* State's Exhibit (SX) 15 at 26-30, 33, 49.

60. The Court finds Applicant confessed to jail nurse, Shirley 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." 40 RR 161-66.

61. In closing argument, the State called this confession "monumental," 48 RR 35-36, "unequivocal," and "a perfect gold standard confession," 48 RR 151.

62. The Court finds that forensic testing of the clothing Applicant was wearing after discovery of Amora's body revealed:

a. The entire inside of Applicant's shirt, the entire inside of his underwear, several spots on his jeans, the entire outside of one sock and part of the other, and Applicant's entire jacket all tested presumptively positive for the presence of blood. 43 RR 39-42.

b. Amora's DNA was found on samples taken from Applicant's shirt, 43 RR 116-19, and from the jeans he was wearing, 43 RR 119-20.

63. Jesseca's bra, shoes, shirt, pants, and jacket also tested presumptively positive for trace levels of blood. 43 RR 33-39.

64. The Court finds that the jeans Applicant was observed wearing prior to the discovery of Amora's body were too large and did not fit him. 42 RR 75-76.

65. Applicant's weight was known to fluctuate. 39 RR 157; 44 RR 141-42.

66. A smaller-sized pair of bloodstained jeans were found discarded in the room in which Amora was murdered. *See* 42 RR 201-04, 229-30; 43 RR 73-75, 130-31; 48 RR 28-29.

a. The bloodstain on the smaller-sized jeans was described as "rather large," 46 RR 177-78; *see also* 44 RR 129 ("Nothing involved in this case had as much [bloodstain] as that pair of pants."); and

b. primarily confined to the lap-area of the jeans, 43 RR 75.

67. Crime scene investigator Noel Martin collected the jeans because:

a. the jeans had stains "consistent with contact transfer bloodstains," a blood-spatter term of art meaning that "a bloodstain or a blood-soaked object which contained liquid blood on it at the time came in contact with the blue jeans, transferring blood to the surface of the jean." 42 RR 203-204, 229-30 ("[A] bloodied object come into contact with these jeans[.]"); 46 RR 177-78 ("contact transfer" from "direct contact with a blood object"); and

b. Martin agreed, the "blood-soaked object" in question could have been a child, 42 RR 204; and

c. Martin expected to find Amora's blood on the jeans, 46 RR 178.

68. DNA testing of a sample from the bloodstain on the smaller-sized jeans matched Amora. 43 RR 130-31.

69. The Court finds that Jesseca was observed wearing the same clothing the night before and the morning after Amora's murder. *See* 48 RR 27-28. No witness testified to seeing Jesseca wearing jeans similar to the blood-soaked jeans.

70. No witness testified that the blood-soaked jeans were used to mop up blood.

71. The Court finds that, while Applicant was in jail, he directed his sister to remove evidence from under the house.

72. Applicant's sister testified that he asked her to retrieve a blue cellphone, 40 RR 172-74, 185-87, 195-200; 52 RR 104; but no cellphone was found under the house.

73. The Court finds that police searched under the house after learning of Applicant's request to his sister and found under the house a pipe-wrench in a plastic bag that had been shoved through a hole in the floor of the master bathroom. 40 RR 204-07; 41 RR 28-29; 44 RR 49-50.

74. Forensic analysis revealed the components of Astroglide present on the pipe-wrench, 44 RR 153-54, 159-60; but no blood was detected on the wrench, and no DNA profile was obtained from the samples collected, 43 RR 50-52, 131.

75. The Court finds that silicone-based oil like that used in Astroglide is not water-soluble and would not wash off completely if put in water, while blood and DNA could wash off in water, 43 RR 174; 44 RR 166-67.

76. A bottle of Astroglide, baby wipes, and a blood-stained diaper were all found in the room where Amora was murdered; the components of Astroglide were found on the baby wipes and diaper.

77. The components of Astroglide were found on the diaper Amora was wearing when her body was found. 40 RR 185-87, 195-200, 204-07; 44 RR 49-50, 151-66.

78. The diaper Amora was wearing was removed during the autopsy. 41 RR 190.

79. The autopsy revealed that Amora's vagina and rectum were torn to such an extent that there appeared to be one large opening instead of two, and the injury perforated internally and extended into her body cavity. 41 RR 191-92. The medical examiner stated the injury was so severe, he had never seen anything like it, 41 RR 191-92, and it was likely caused by the insertion of an object other than a penis hours before Amora died, 41 RR 193-96.

80. The Court finds that DNA swabs were taken from the bitemarks on Amora's body:

a. Neither Applicant nor Jesseca could be excluded as a contributor of the DNA on four of the swabbed samples. 43 RR 133-38.

b. On one of those samples taken from Amora's left elbow, the majority of the genetic markers corresponded to Applicant with a statistical probability of 1 in 27,000 Caucasians, 1 in 43,600 African-Americans, and 1 in 47,200 Hispanics. 43 RR 136-137, 183-86.

c. Jesseca also could not be excluded, but the probability of her being a contributor was much less—1 in 123 Caucasians, 1 in 72 African-Americans, and 1 in 105 Hispanics. 43 RR 137.

SECOND GROUND FOR RELIEF: Applicant contends his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled.

81. During Applicant's trial, he presented evidence that he was intellectually disabled and asked the jury to answer a special issue accordingly, thus finding him ineligible for the death penalty.

82. The jury answered the special issue, "Do you find, by a preponderance of the evidence, that the defendant, Blaine Keith Milam, is a person with [intellectual disability]?" negatively, and Applicant was sentenced to death. *See* 4 CR 985-88; 56 RR 167-69.

83. Applicant did not seek review of the jury's decision on direct appeal and did not raise a claim pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002), during state habeas review.

84. In his subsequent writ, filed days before his scheduled execution, Applicant argued for the first time that, pursuant to *Atkins*, his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. Subsequent Application at 78-122.

85. With his subsequent writ, Applicant offered new evidence in support of his intellectual disability claim: (1) a declaration from Dr. Jack

Fletcher, who reevaluated evidence from trial and conducted a new assessment of adaptive behavior (Application Exhibit 18); (2) an unsworn declaration from Dr. Dale Watson, who also reevaluated evidence from trial (Application Exhibit 19); (3) a declaration from Dr. John Gregory Olley, who reevaluated the evidence from trial (Application Exhibit 20); (4) an affidavit and report from Dr. Gripon, an expert hired by the State but not called at trial (Application Exhibits 1 and 2); (5) an affidavit from Juanita Bradford (Application Exhibit 3); (6) an affidavit from Kimberly Graham (Application Exhibit 5); (7) an affidavit from Milton Bennet (Application Exhibit 14); (8) an affidavit from James Wallace (Application Exhibit 15); (9) and an affidavit from Carolyn McIlhenny (Application Exhibit 4), who testified at Applicant's trial.

86. The CCA granted a stay and remanded this claim, pursuant to Article 11.071 § 5(a)(1), because of "recent changes in the law pertaining to the issue of intellectual disability," namely, *Moore v. Texas,* 137 S. Ct. 1039 (2017) (*Moore I*), and *Hall v. Florida,* 572 U.S. 701 (2014). *Ex parte Milam,* 2019 WL 190209, at *1.

87. Following the remand, the Supreme Court decided *Moore v. Texas,* 139 S. Ct. 666 (2019) (*Moore II*), reversing *Ex parte Moore II,* 548 S.W.3d 552 (Tex. Crim. App. 2018), and remanding to the CCA, concluding that the decision "rests upon analysis too much of which too closely resembles what we previously found improper [in *Moore I*]." 139 S. Ct. at 672. Although not part

of the CCA's remand in this case, the Respondent has addressed the applicability of the Supreme Court's subsequent decision in *Moore II*.

88. The CCA did not find that Applicant met the requirements of Article 11.071 § 5(a)(3), with his argument that, but for a constitutional violation, no rational juror could have sentenced him to death.

A. Facts pertaining to the applicability of *Teague v. Lane,* 489 U.S. 288 (1989).

89. The CCA affirmed Applicant's conviction on direct appeal on May 23, 2012, *see Milam v. State,* 2012 WL 1868458; thus, his conviction became final on August 21, 2012, "when [the] time for filing a petition for certiorari expired." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997).

90. *Hall* was decided May 27, 2014; *Moore I* was decided on March 28, 2017; and *Moore II* was decided on February 19, 2019.

B. Facts pertaining to the applicability of *Moore I, Moore II,* and *Hall.*

91. The CCA has adopted the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition's (DSM-V) three-pronged criteria for finding intellectual disability: (A) deficits in general mental abilities, (B) impairment in everyday adaptive functioning, in comparison to an individual's age-, gender-, and socioculturally-matched peers, and (C) onset during the developmental period. *Ex parte Moore II,* 548 S.W.3d at 560.

92. Applicant's jury was similarly instructed, 4 CR 980; 56 RR 4-12; although the Fourth Edition (DSM-IV) was in use at the time of his trial.

93. The Court finds that expert testing by both parties in preparation for trial generated IQ scores of a 68 and 71 on the WAIS-IV, an 80 on the Stanford-Binet IQ, and an 80 on the RIAS. *See* 53 RR 200-02; 55 RR 135-37, 140-41, 149-55.

94. The Court finds that the State's expert, Dr. Proctor, acknowledged and discussed all four of Applicant's IQ scores, explaining the application of the standard error of measurement (SEM), and noting that any score could be lower or higher because of the SEM; he found that the scores placed Applicant in the borderline range. *See* 55 RR 149-67, 199-203. And, relying on the DSM-IV, Dr. Proctor admitted that even the score of 80 would still fall within the borderline range for diagnostic purposes. 55 RR 154.

95. Dr. Proctor ultimately opined that, given the SEM, Applicant was someone with below average intellectual functioning, in the borderline range of intellectual disability, but not someone with significantly sub-average intellectual functioning. 55 RR 149-50, 160-65.

96. The Court finds Dr. Proctor based his ultimate opinion on factors other than just IQ scores, including the fact that, despite having only a fourth-grade education, Applicant's reading comprehension test score put him in an eighth-grade range, while a person with intellectual disability could score, at

most, at a sixth-grade range. 55 RR 162-64; *see* 53 RR 266-67 (Dr. Cunningham confirmed).

97. The Court finds that Dr. Proctor did not encourage the jury to stop deliberating based on his opinion on intellectual functioning but encouraged them to consider adaptive functioning. Dr. Proctor told the jury:

a. "it's not just about how you score on an IQ test, it's also about how you function in the world." 56 RR 167;

b. because the SEM could put many scores in a "borderline" range, falling five points higher or lower, such was "a good demonstration of why the standard for meeting the definition" of intellectual disability was not based just on testing, but "on multiple pieces of information," and the score was just one of those pieces of information. 55 RR 149-50; and

c. because of the SEM, "we want to look at not only the scores, we also want to look at the adaptive functioning." 55 RR 202.

98. The jury also heard defense expert Dr. Cunningham's opinion that Applicant did satisfy the sub-average-intellectual-functioning factor:

a. Dr. Cunningham explained that a finding of intellectual disability entails two aspects: IQ and adaptive functioning. 53 RR 197-98.

b. He explained what an IQ score was, and that a score falls within the zone of intellectual disability eligibility if the score falls at 70 or below. 53 RR 198-99; 248.

c. He explained that, given the inherent inaccuracy involved in IQ testing, a SEM applies, increasing that number to 75 or below, 53 RR 198-203, 208-11, 245-46, and any discrepancy in IQ scores could be the result of variability due to the SEM, 53 RR 254.

d. He discredited the reliability of Applicant's higher IQ scores. 53 RR 197-203, 257-58; 54 RR 139-42.

99. During closing argument, both parties argued all three factors of the intellectual disability test. *See* 56 RR 59-73, 106-08 (defense); 56 RR 40-44, 131-38 (State). No party focused on only one factor or encouraged the jury to stop deliberating if they failed to find sub-average intellectual functioning.

100. The jury charge instructed the jury that, to answer "yes" to the intellectual disability special issue, they must find all three factors, and defined the terms "mental retardation," "significantly sub-average general intellectual functioning," and "adaptive behavior." 4 CR 980-81; 56 RR 8.

101. The Court finds that no expert discussed the now-foreclosed *Briseno*[1] factors in Applicant's trial, and the jury was never instructed to apply the *Briseno* factors. *See Milam v. Director,* 2017 WL 3537272, at *13 (After considering sua sponte if jury charge was constitutional in light of *Moore I,*

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

district court held, "jury charge in this case did not include any of the seven additional '*Briseno*' factors, and comports with constitutional standards.").

102. The Court finds that Dr. Cunningham's testimony in Applicant's trial clearly conveyed a full explanation of the concept of intellectual disability:

a. Dr. Cunningham explained that a finding of mental deficiency entails two aspects: IQ and adaptive functioning.

b. He explained the meaning of IQ score, that a score falls within the zone of intellectual disability eligibility if it falls at 70 or below, and the necessary application of the SEM. *See* Finding of Fact 98; 53 RR 197-203, 208-11, 245-48, 254.

c. He described adaptive functioning as the practical expression of one's intellectual capability. 53 RR 203.

d. He described the diagnostic criteria set forth in the DSM-IV—the applicable standard at the time—explaining the eleven different areas of adaptive functioning and the requirement that, to find someone intellectually disabled, they must have significant deficits in at least two or more of these eleven areas. 53 RR 203-04. Those eleven areas are: functional academic skills, communication, social interpersonal skills, self-care, home living, use of community resources, self-direction, work, leisure, health, and safety. 53 RR 203, 250-61.

e. He identified the diagnostic criteria set forth by the American Association on Intellectual and Developmental Disabilities (AAIDD), which identified a broader set of criterial for adaptive skills: (1) conceptual skills, including language, reading and writing, money, time, and number concepts; (2) social skills, including interpersonal skills, social responsibility, self-esteem, gullibility, naivete, follows the rules, avoids being victimized, and social problem solving; and (3) practical skills, including personal care, occupational skills, use of money, safety, health, health care, travel, use of transportation, and use of the telephone. 53 RR 204-05.

f. He reiterated that the jury need not find deficits in all areas; the jury need only find deficits in two areas described by the DSM-IV, and one area described by the AAIDD. 53 RR 205-06, 260-61.

g. He explained that the diagnosis is based upon deficits, not strengths, and a person could perform well in one area but still be classified as intellectually disabled. 53 RR 205-06. If a person has significantly sub-average IQ scores below 70, and deficits in two areas of adaptive functioning (as described by DSM-IV), a diagnosis of intellectual disability will not be ruled out by the presence of strengths in all other areas. 53 RR 206.

103. Dr. Proctor agreed with Dr. Cunningham's explanation of adaptive functioning. *See* 55 RR 167 (stating Dr. Cunningham explained this concept correctly).

104. Applicant cites to the following questions by the State which he believes invoke the *Briseno* factors without mentioning them:

a. The questioning of teachers and family regarding whether Applicant was ever considered for or diagnosed with an intellectual disability, Subsequent Application at 115;

b. The questioning of lay-witnesses on whether Applicant was dominant in his relationship, Subsequent Application at 114;

c. The questioning of expert Dr. Cunningham on whether he knew Applicant lied to a police officer, Subsequent Application at 116 (citing 54 RR 168); and

d. The questioning of five witnesses regarding whether Applicant conducted himself appropriately at school, work, or around other children, Subsequent Application at 116.

105. Applicant did not object to any of this questioning at trial.

106. The Court finds that Applicant underwent a full and individual evaluation by the school special education department in 2000, but the only diagnosis listed on Applicant's evaluation was speech impediment; he was not referred for any other services, and the evaluators did not identify him as someone with an intellectual deficit. *See* 54 RR 321-23; 55 RR 179.

107. The Court finds the fact that Applicant was evaluated by the special education department during his developmental years, but not

diagnosed or referred for services, to be relevant to the jury's determination on all three factors of the intellectual disability test, especially onset before the age of eighteen.

108. The Court finds that many of Applicant's special education records were destroyed per district policy. 54 RR 323-24.

109. The Court finds that a referral for special education testing is something family and teachers might have knowledge of and might know the purpose for which he was referred.

110. The Court finds that questions regarding Applicant's relationships are related to the DSM and AAIDD criteria for adaptive deficits identified by Dr. Cunningham, such as social interpersonal skills, or whether he has deficits in social skills, including interpersonal skills, self-esteem, gullibility, naivete, or victimization avoidance. *See* 53 RR 204-05.

111. The Court also finds that Applicant presented evidence at both the guilt-innocence and punishment phases, portraying Jesseca as more sophisticated than Applicant, and the likely instigator, if not perpetrator, of this murder. *See* 40 RR 30-32 (describing the dramatic change in Jesseca's demeanor—from grieving to matter-of-fact—once police started questioning her); 41 RR 77-81 (cross-examination of pawn-shop owner suggested Jesseca was agitated with Applicant, and anxious to complete the business transaction); 46 RR 209-10 (Lisa Taylor testified Jesseca appeared in charge of

the relationship); 48 RR 85 (guilt-innocence closing arguments describing differences between Jesseca—high school graduate and attractive—and Applicant—fourth-grade education, first girlfriend); 48 RR 105 (closing argument suggesting Jesseca convinced Applicant to bite baby); 51 RR 271, 281-82 (punishment phase testimony that Applicant never had a date before Jesseca); 51 RR 312 (Jesseca was headstrong, insisted on going to Alabama and confronting her mother); 51 RR 317 (Jesseca was angry with Applicant for wanting to leave Alabama, called him a "wuss"); 52 RR 100 (Applicant's sister saw Jesseca in November; Jesseca would not let Applicant leave her side, looked mad, and would not let him be alone with sister); 52 RR 102 (Applicant loved Jesseca, would do anything for her); 56 RR 82 (punishment closing arguments: Applicant's mental deficiency, youth, and drug abuse, combined with Jesseca's state of mind led to death); 56 RR 87-89 (comparing Applicant's below-average intelligence with Jesseca's greater intelligence and sick mind); 56 RR 104-05 (but for Jesseca's power over Applicant, this crime would not have happened).

112. The Court finds that the State presented evidence during both guilt-innocence and punishment to rebut the defensive claim that Jesseca was more sophisticated and in control of the relationship. *See* 39 RR 108-09 (Amora's aunt said Applicant appeared to be calling the shots); 46 RR 73 (Jesseca was acting submissive and meek in November); 50 RR 37 (Applicant's

boss, Bryan Perkins, testified Applicant appeared to be dominant one in relationship); 50 RR 115 (Jesseca's friend Crystal Zapata testified Applicant was the dominant one in the relationship).

113. The Court finds that questions directed to Dr. Cunningham regarding his knowledge of whether Applicant lied to a police officer, 54 RR 168, were relevant to Dr. Cunningham's expert opinion on adaptive behaviors, *see Moore II,* 139 S. Ct. at 672 (acknowledging that clinicians ask questions similar to the CCA's *Briseno*-related statements that may be relevant, and citing to AAIDD-11, at 44, "noting that how a person 'follows rules' and 'obeys laws' can bear on assessment of her social skills"); as well as to his opinion on whether Applicant was malingering. The testimony is also relevant to the jury's determination of the future-danger and mitigation special issues, and Applicant's culpability as a party to the murder.

114. The Court finds that the State questioned witnesses Nelda Thornton, 51 RR 18-19, 23; Carolyn McIlhenny, 51 RR 37; Melanie Dolive, 54 RR 297; Sherry Brown 54 RR 315; and Melynda Keenon, 55 RR 83, regarding Applicant's ability to conduct himself appropriately at school, work, or around other children.

115. The Court finds that all five witnesses were educators, and that witnesses Thornton and McIlhenny were Applicant's grade-school teachers, 51 RR 5-10, 24-27; witness Brown was a teacher who interacted with Applicant in

small group settings, 54 RR 313-14; and witness Dolive was a special education teacher who knew Applicant, 54 RR 294-97; while witness Keenon was Applicant's cousin who homeschooled her own children and assisted Applicant's mother in her efforts to homeschool Applicant, 55 RR 81-83.

116. The Court finds that Dr. Proctor concluded that Applicant has both deficits and strengths but does not have *significant deficits* in adaptive behavior at the level required for intellectual disability. 55 RR 177, 256-57.

117. The Court finds that Dr. Proctor disagreed with Dr. Cunningham's adaptive-deficits opinion on the following grounds:

a. Dr. Proctor disagreed with Dr. Cunningham's administration of the Adaptive Behavior Scale, Residential and Community, because it did not compare Applicant to a normal population, but rather to a group of developmentally-disabled people living in the community. 55 RR 171-72. Applicant's subsequent writ expert, Dr. Olley also stated that the Adaptive Behavior Scale was "a poor choice." Appl. Exh. 20, at 10.

b. Dr. Proctor disagreed with Dr. Cunningham's reliance upon Applicant's mother, Shirley, as a source of information because Dr. Proctor observed that she deliberately tried to portray Applicant as "slow," and openly encouraged Applicant's sister, Teresa, to do so as well. 55 RR 172-76.

c. Because Dr. Proctor did not place much weight on Shirley's or Teresa's testimony, he disagreed with the accuracy of Dr. Cunningham's

assessment, relying on their input, that Applicant was like a three- or four-year-old in seven of the ten adaptive behavior areas. 55 RR 176.

d. Dr. Proctor found Dr. Cunningham's determination that Applicant fell into the realm of a three-year-old in the category of work questionable given the trial testimony regarding Applicant's work history and vocational ability. 55 RR 176-77, 255-57.

118. Dr. Proctor testified that Applicant's lack of formal education and limited opportunities for socializing could explain Applicant's low intellectual functioning. 55 RR 210-12.

119. Dr. Proctor's opinion that Applicant's low intellectual functioning could be a product of his lack of formal education and limited socialization opportunities rather than intellectual disability was supported by the record:

a. Applicant did not drop out or fail out of school because of any "risk factor," *see Moore I,* 137 S. Ct. at 1051 (identifying childhood abuse and suffering as "risk factors"); but was removed from school in the fourth grade by his parents because they disagreed with the principal's punishment of Applicant. 51 RR 237-40; 53 RR 12.

b. Applicant's parents ceased efforts to homeschool him after six months, and he had limited opportunities for socialization at home. 51 RR 237-40; 53 RR 12.

c. Two adults who attempted to assist with homeschooling Applicant said he could do whatever work they put in front of him, *see* 55 RR 78-84, 89-98, 117-18, 121.

d. Two of Applicant's grade school teachers, who testified on his behalf at trial, said Applicant 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.

e. One of those teachers said Applicant could have been a better student if he had attended school regularly, 51 RR 32-33, 35.

f. A friend confirmed that Applicant was educationally slow because he had been pulled out of school in the fourth grade. 53 RR 12.

g. Applicant's reading comprehension scores were in the eighth-grade range, although his education ended at fourth grade, and persons with mild mental retardation can read at most at a sixth-grade level. 55 RR 162-64; *see also* 53 RR 266-67.

120. The jury alternatively heard Dr. Cunningham's testimony regarding possible "adverse developmental factors" in Applicant's background that could have led to intellectual disability and to the commission of this crime, including his mother's pregnancy complications, childhood illness, physical imperfections, youthfulness at time of offense, predisposition to substance abuse and dependence, removal from school and social isolation,

father's illness, multigenerational family dysfunction, traumatic sexual exposure, alcohol and drug abuse and dependency, premature family responsibilities, father's death, and Jesseca's psychosis. *See* 53 RR 273-347.

C. Facts applicable to the substantive *Atkins* claim.

121. Applicant did not ask the CCA to review the sufficiency of the evidence to support the intellectual disability claim on direct appeal, where the CCA would have had to pay "great deference" to the jury's determination. *Williams v. State,* 270 S.W.3d 112, 114 (Tex. Crim. App. 2008).

122. Applicant did not raise an *Atkins* claim in his first state habeas writ.

123. Such a claim, including the new evidence, was available and discoverable.

124. The CCA granted a stay and remanded Applicant's intellectual disability claim, pursuant to Article 11.071 § 5(a)(1), "because of recent changes in the law pertaining to the issue of intellectual disability," but did not grant remand on Applicant's attempt to challenge the substance of his *Atkins* claim pursuant to the actual-innocence-of-the-death-penalty provision in Article 11.071 § 5(a)(3). *See Ex parte Milam,* 2019 WL 190209, at *1.

125. The Court finds that the following evidence supports the jury's determination that Applicant failed to demonstrate sub-average intellectual functioning:

a. State's expert Dr. Proctor and defense expert Dr. Andrews, who evaluated Applicant but did not testify, concluded that Applicant's test scores failed to satisfy this factor. 54 RR143-50; 55 RR 135-36.

b. Dr. Proctor relied upon psychological testing data from Dr. Andrews, who administered the WAIS-IV, on which Applicant obtained a full-scale score of 71, and the Stanford-Binet IQ, on which Applicant obtained an IQ score of 80. Dr. Proctor also administered the RIAS, on which Applicant scored an 80, and well as a second WAIS-IV, on which Applicant obtained a full-scale IQ score of 68. 53 RR 200-02; 55 RR 135-37, 140-41, 149-55.

c. Dr. Proctor explained that the second WAIS-IV of 68 should have been higher, given the "practice effect." 55 RR 151-53.

d. Both Dr. Andrews and Dr. Proctor agreed that it was unusual for someone to score better on the Stanford-Binet than the WAIS-IV. 55 RR 155-56.

e. Both Dr. Andrews and Dr. Proctor administered effort tests and Applicant did well on some but not on others; from this both doctors surmised that Applicant put forth less-than-adequate effort and was likely distracted. 54 RR 146-50; 55 RR 151-53, 156-59.

f. Dr. Andrews and Dr. Proctor 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.

g. Dr. Proctor also found significant that Applicant's reading comprehension scores were in the eighth-grade range, although his education ended at the fourth grade, and persons with mild mental retardation can read at most at a sixth-grade level. 55 RR 162-64.

h. Dr. Proctor opined that, given the SEM, Applicant was someone with below average intellectual functioning, in the borderline range, but he did not believe Applicant showed significantly sub-average intellectual functioning. 55 RR 149-50, 160, 165.

126. The jury also heard evidence in favor of a finding of intellectual disability.

a. Dr. Cunningham testified that Applicant satisfied the sub-average-intellectual-functioning factor. 53 RR 197. Of note:

i. Dr. Cunningham testified that the application of the SEM to any IQ score of 70 or below is considered in the zone of intellectual-disability eligibility. 53 RR 199-200.

ii. Dr. Cunningham discounted Dr. Proctor's RIAS score of 80, describing that test as not a "multi-subtest, fully-developed IQ test, but . . . a measure of intellectual capability," and a "screening measure," whereas the WAIS-IV and the Stanford-Binet are considered the more valid measures of IQ. 53 RR 202-03, 257-58; 54 RR 139-42.

b. Dr. Cunningham testified that Applicant suffered concurrent deficits in adaptive behaviors in all eleven of the categories listed in the DSM-IV, *see* 53 RR 203-38, 260-62, including deficits in functional academics, home living, social interpersonal skills, self-direction, and health and safety, 53 RR 259-61; and Applicant suffered deficits in all three categories identified by the AAIDD definition of adaptive deficits—conceptual, social, and practical, 53 RR 261-62.

127. The Court finds Dr. Cunningham relied heavily on the testimony of Applicant's mother in reaching his conclusion on adaptive deficits. *See* 53 RR 153-54, 194, 262; 54 RR 153.

128. The Court finds credible Dr. Proctor's opinion that Applicant 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 mental retardation test. 55 RR 177, 257.

129. In support of this opinion Dr. Proctor reviewed a significant amount of evidence and talked to several former employers, as well as Applicant's mother and sister. 55 RR 167-69.

130. Dr. Proctor disagreed with Dr. Cunningham's use of adaptive behavior rating scales to assess someone who is incarcerated because it is difficult for a family member to accurately rate an incarcerated person, and a family member is likely to show bias when answering the questions, 55 RR

170-71, 259-60; and disagreed with the actual scale used by Dr. Cunningham—the Adaptive Behavior Scale, Residential and Community—because a formal assessment of adaptive behavior should rate a person against a normal population to see if he falls in the bottom two to three percent, but this test rated Applicant against a group of developmentally disabled individuals living within the community. 55 RR 171.

131. One of Applicant's subsequent writ experts, Dr. Olley, agreed with Dr. Proctor that the Adaptive Behavior Scale was "a poor choice." Appl. Exh. 20, at 10

132. Dr. Proctor disagreed with Dr. Cunningham's reliance upon Applicant's mother, who Dr. Proctor believes deliberately tried to portray her son as slow. 55 RR 172-73.

a. Shirley Milam told Dr. Proctor, and also testified, that Applicant was slow in reaching developmental milestones such as walking and talking, but the ages she actually gave for her son's reaching those milestones were normal. 55 RR 173-74; *see* 51 RR 341-42 (Applicant began crawling at seven or eight months, using words at eight months, and walking at eleven or twelve months)

b. When Dr. Proctor talked to Applicant's sister Teresa in her mother's presence, Teresa would state that Applicant could do something—like

work on cars—but Shirley would interject that Applicant was slow and that someone helped him; Teresa would then change her answer. 55 RR 173-74.

c. Shirley was not forthcoming with Dr. Proctor about Applicant's drug problem. 55 RR 174-75.

d. For these reasons, Dr. Proctor did not place much weight on the family's testimony, 55 RR 176; and

e. disagreed with Dr. Cunningham's results that suggested Applicant had the adaptive functioning of a three- or four-year-old. 55 RR 176.

133. Dr. Proctor found questionable Dr. Cunningham's opinion that Applicant showed deficits in his work history or vocational ability, given the testimony of other witnesses who knew Applicant's work history. 55 RR 176-77, 255-57. Testimony demonstrated:

a. Applicant got his first job at M & M Express Lube when he was fifteen and held that job for two years. 51 RR 270, 277.

b. Applicant worked for Big 5 Tire & Auto, where his duties included diagnostic and mechanical work on cars, changing tires, and changing oil. 50 RR 22.

c. Applicant's supervisor at Big 5, Bryan Perkins, testified that Applicant's performance was excellent and that he appeared to have no trouble fulfilling his duties. 50 RR 25-27.

d. Perkins encouraged Applicant to work toward a promotion to salesman and began training Applicant to use the computer in connection with this promotion; Applicant had no trouble learning. 50 RR 29-30; 54 RR 269-71.

e. Perkins had to fire Applicant because he stopped coming to work, but he stated that when Applicant was working, he was one of the best employees Perkins had. 50 RR 31, 36-37.

f. Co-worker, Gary Jenkins, trained Applicant and testified that Applicant could perform job tasks without any problems, could operate machinery and work with tools, did very well in training, did not have any safety issues at work, performed his job duties, and kept the shop and tools clean without prompting. 54 RR 263-69.

g. When interviewed by Ranger Ray in connection with this crime, Applicant told Ray about his prior work history as a mechanic and demonstrated knowledge and ability regarding his job. 49 RR 72.

134. Other evidence supports Dr. Proctor's conclusion that Applicant was not a person with intellectual disability:

a. An employee of Community Healthcore—a local provider of mental health care and intellectual disability services—testified that he assessed Applicant in jail, noting that Applicant'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 27-32.

b. Two of Applicant's grade school teachers—Nelda Thornton and Carolyn McIlhenny—testified that Applicant 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. McIlhenny opined that Applicant could have been a better student if he had attended school regularly. 51 RR 32-33, 35. Neither teacher recalled referring Applicant to a diagnostician for determination of intellectual disability, but both recalled Applicant had a speech impediment for which he received treatment. 51 RR 7-8, 13-15, 30-31.

c. Applicant's school records reflect that he was never held back in school, that he was routinely absent from school, and that he was evaluated by the special education department and identified as having a speech impediment but no other disability. 54 RR 163-66.

d. In the fourth grade, Applicant's parents removed him from school after he was paddled by the school principal and unsuccessfully attempted to homeschool him for only about six months. 51 RR 237-40.

e. Applicant's friend Chris Lay testified Applicant was educationally slow because he was removed from school in the fourth grade. 53 RR 12.

f. Melanie Dolive, a special education teacher from Applicant's former school testified, from personal observation of him in her home, that nothing in Applicant's behavior 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.

g. Sherry Brown, a retired teacher who regularly interacted with Applicant, testified that he was able to do the work she asked him to do and attributed any difficulties to his repeated absences from school; she never felt the need to refer him for intellectual-disability screening. 54 RR 313-15.

h. Cindy Smith, Special Education Director for Rusk County Shared Services Arrangement, examined Applicant's records and testified that his last full and independent evaluation, dated February 8, 2000, indicated a speech impediment only. 54 RR 321-23.

i. Applicant's cousin, Melynda Keenon, testified that she met with Applicant to help determine his learning style for the purposes of homeschooling and suggested that Applicant sign up for online classes. 55 RR 78-82. Keenon said Applicant would do whatever work she put in front of him but was easily distracted. 55 RR 83-84. Keenon did not think Applicant showed signs of intellectual disability. 55 RR 84-85.

j. Neighbor Sarah Hodges, who also homeschooled her children, gave Applicant schoolwork to do that was below his grade level

because he was behind, but she believed he was at the same level as her daughter and foster-child, who were the same age. 55 RR 92, 89-100, 117-18, 121.

135. The Court finds that Shirley Milam admitted:

a. Applicant began crawling at seven or eight months, began using words at eight months, and began walking at eleven or twelve months, 51 RR 341-42; which Dr. Proctor said was normal.

b. Applicant could use the computer and met Jesseca on MySpace. 51 RR 283, 286, 344.

c. Applicant took care of Amora—he gave her a bottle, put her to bed, and watched cartoons with her, 51 RR 288-89, 344, and that he assumed the role of caring for his dad when he lived at home—fixing him food and getting him things. 52 RR 117-18.

d. Applicant could take care of cars and hold a job. 51 RR 344.

e. Applicant voluntarily gave his paycheck to his father every week so that he would not be able to spend it. 51 RR 347-48.

f. Applicant was evaluated for special education but only needed treatment for his speech problem. 51 RR 340-41.

136. Dr. Proctor suggested Applicant's adaptive deficits could be caused by something other than intellectual disability such as drug use, lack of opportunity, a deprived environment, or laziness. 55 RR 257-59.

137. Finally, regarding onset of intellectual disability before the age of eighteen, Dr. Proctor found no evidence to support this. 55 RR 178, 180.

a. Applicant's school records indicated a speech impediment but specifically left blank a section where a secondary impediment—like intellectual disability or learning disability—could have been indicated. 55 RR 178.

b. A letter from the school district indicated Applicant had undergone a full and individual evaluation in 2000 but noted no intellectual-disability diagnosis. 55 RR 178-79.

CONCLUSIONS OF LAW

FIRST GROUND FOR RELIEF: Applicant claims he is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure because the current relevant scientific evidence related to the reliability of bitemark comparison evidence contradicts expert opinion testimony presented and relied upon by the State at trial.

138. Article 11.073 provides an applicant with a potential remedy regarding "certain scientific evidence."

139. To take advantage of the statute, an applicant must file a state habeas application, pursuant to Article 11.071, "containing specific facts indicating that" the "relevant scientific evidence is currently available and was not available at the time of the [applicant's] trial because the evidence was not ascertainable through the exercise of reasonable diligence" and that the

"scientific evidence" would be admissible under the Texas Rules of Evidence. Tex. Code Crim. Proc. art. 11.073(b)(1)(A)–(B).

140. If those prerequisites are met, an applicant must also show that, by a preponderance of the evidence, "had the scientific evidence been presented at trial . . . the [applicant] would not have been convicted." Tex. Code Crim. Proc. art. 11.073(b)(2).

141. The Court concludes that, while Applicant proffers some "relevant scientific evidence" that was not available at the time of his trial, and such would be admissible under the Texas Rules of Evidence, *see* Tex. Code Crim. Proc. art. 11.073(b)(1)(A)–(B), he cannot demonstrate, by a preponderance of the evidence, that "had the scientific evidence been presented at trial . . . the [applicant] would not have been convicted." Tex. Code Crim. Proc. art. 11.073(b)(2).

142. The Court concludes that Dr. Bowers's affidavit, criticizing Dr. Williams's testimony as "misleading and unfounded at the time it was given," relies upon data that was known or available for cross-examination purposes at the time of trial. *See* Bowers Report Exhibits (listing exhibits from 2009, 2010, 2011); *see also* Appl. Exh. 11, at 3 n.5 (It "was already understood at the time of Dr. Williams's testimony" that patterns left in material bitten by human teeth are not "unique."); Appl. Exh. 11, at 4-5 (at time of trial National

Academy of Sciences had criticized bitemark methodology). Therefore, Article 11.073(b)(1)(A) forecloses use of this evidence in these proceedings.

143. The Court concludes that the remaining exhibits—the 2016 PCAST Report, the 2016 TFSC Report, the updated ABFO Standards, and *Ex parte Chaney*—were indeed unavailable at the time of trial.

144. The Court concludes that the 2016 PCAST Report, the 2016 TFSC Report, the updated ABFO Standards, and *Ex parte Chaney* do not render bitemark analysis testimony inadmissible in Texas.

145. The Court concludes that bitemark testimony is admissible under the Texas Rules of Evidence. *Ex parte Chaney,* 563 S.W.3d at 256 (citing *Coronado v. State*, 384 S.W.3d 919, 926–28 (Tex. App.—Dallas 2012, no pet.) (holding bitemark testimony can reliably be used to *exclude* suspects in a closed population)); *see also* State's Attachment at 8 (ABFO Standards) ("[T]he admissibility of bitemark evidence in a legal proceeding is a determination made solely by the court."); and would be admissible under the current ABFO Manual which allows an ABFO Diplomate to conclude only that an individual is "Excluded as Having Made the Bitemark," "Not Excluded as Having Made the Bitemark," or "Inconclusive." *Ex parte Chaney,* 563 S.W.3d at 257; State's Attachment at 2-3.

146. The Court concludes that the 2016 PCAST Report, the 2016 TFSC Report, the updated ABFO Standards, and *Ex parte Chaney* do not render all of Dr. Williams's and Dr. Isaac's trial testimony unreliable or inadmissible.

147. The Court concludes Dr. Williams and Dr. Isaac relied upon the ABFO guidelines, applicable at of the time of trial, and significant portions of their testimony would still be admissible today—namely, their testimony that Applicant was "excluded" or "not excluded" from having made certain bitemarks. *See* 44 RR 247-76; 45 RR 6-17, 24, 27; 47 RR 29-30, 35-43, 51-56, 64-67. Any evolution in the ABFO guidelines since Applicant's trial does not contradict this part of their testimony or undermine those conclusions.

148. The Court concludes that the procedures utilized to collect the dentition models used for comparison by Dr. Williams and Dr. Isaac—including enlisting a third dentist to collect the dentition models, and the collection of three different models which were all considered "suspects"—comports with the ABFO guidelines for "blinding." *See* State's Attachment at 2, 7, 11; 44 RR 222-24, 230.

149. The Court concludes that both Dr. Williams and Dr. Isaac acknowledged that human dentition was not unique, and that human skin was an imperfect medium for accurately recording bitemarks and did not ignore these principles when arriving at their conclusions. *See* 44 RR 205-08, 238, 246, 255, 262-63; 45 RR 44-48, 63-64; 47 RR 10, 33-37, 52.

150. The Court concludes that Dr. Williams's use of the word "unique" to describe a pattern he recognized across the twenty-four bitemark injuries on one victim—the distinctive "M" pattern and the petechial pinpoint lacerations—that corresponded with one of the dentition models (Applicant's) but not the others, was reasonable, *see* 44 RR 236-49, 261-68, 273, 284-85; 45 RR 7, 19-20; and did not ignore the principal that human dentition itself is not unique.

151. The Court concludes that, while Dr. Williams did use now-improper terminology to describe some of the bitemarks, *see* 45 RR 19-33, 72; *see also Ex parte Chaney,* 563 S.W.3d at 260-61 (noting that ABFO Manual no longer allows examiners to give opinions to a "reasonable degree of dental certainty" or individualization, i.e. "match"); he did so in conclusion, after permissibly stating which bitemarks Applicant could not be excluded from.

152. The Court concludes that the changes to the ABFO guidelines since the time of Applicant's trial would impact some of Dr. Williams's trial testimony, but the newly proffered evidence does not impact significant and compelling portions of both Dr. Williams's and Dr. Isaac's expert testimony.

153. The Court concludes that Dr. Williams and Dr. Isaac could permissibly testify, under current ABFO standards, that Applicant could not be excluded as the source of at least two bitemarks found on Amora's body—the bitemarks to Amora's throat and left knee—but Jesseca and Danny could

be excluded as the source of these bitemarks. 44 RR 247-55; 45 RR 20-25; 47 RR 29-30, 51-52, 64-67.

154. From the testimony of Dr. Williams and Dr. Isaac, the Court concludes that Applicant and Jesseca cannot be excluded from having committed the crime together. 44 RR 281-85; 45 RR 6, 57; 47 RR 67.

155. The Court concludes that Dr. Williams sought independent verification of his findings from Dr. Peter Loomis, in compliance with ABFO guidelines. State's Attachment at 2. Dr. Loomis agreed with Dr. Williams's findings. 45 RR 34-35, 40-41.

156. The Court concludes that neither Applicant, nor his appellate expert Dr. Bowers, challenge the credibility of Dr. Isaac's testimony. Therefore, the Court concludes that Dr. Isaac's testimony, which supports Dr. Williams's testimony on many points, is credible.

157. The Court concludes that this case is distinguishable from *Ex parte Chaney,* in that neither Dr. Williams nor Dr. Isaac have changed their opinions. 563 S.W.3d at 258 (State conceded "'that the science behind forensic odontology, as it relates to bite mark comparison, has considerably evolved since the time of trial in 1987' and that '[u]nder today's scientific standards, Dr. Hales relayed that he 'would not, and could not' testify as he did at trial, nor could he testify that there was a 'one to a million' chance that anyone other than [Chaney] was the source of the bite mark.")

158. The Court concludes that Applicant cannot demonstrate, by a preponderance of the evidence, that had Dr. Williams's testimony been rebutted with Applicant's current evidence or even entirely excluded from trial, Applicant would not have been convicted. Tex. Code Crim. Proc. art. 11.073(b)(2).

159. The Court also concludes that Applicant cannot demonstrate, by a preponderance of the evidence, that had Dr. Williams's testimony been limited to being unable to exclude Applicant as a source of at least two of the twenty-four bitemarks on Amora's body—as confirmed by Dr. Isaac at trial, and Dr. Loomis on peer-review—Applicant would not have been convicted. Tex. Code Crim. Proc. art. 11.073(b)(2).

160. The Court concludes that, unlike *Ex parte Chaney*—where investigators initially had few leads and Chaney was only identified as a suspect through an anonymous phone call, 563 S.W.3d at 245-47—given their access and proximity to the victim and the crime scene, and their attempts to cover up their involvement in the crime, *see* Findings of Fact 58-59, Applicant and Jesseca Carson were the primary suspects and ultimately the only people who could be responsible for Amora's brutal murder.

161. The Court concludes that the following evidence directly implicates Applicant in the murder (*see* Findings of Fact 58-80):

a. Applicant confessed to the murder, a confession the State, in closing arguments, called "monumental," 48 RR 35-36, "unequivocal," and "a perfect gold standard confession," 48 RR 151.

b. Applicant's clothing was forensically linked to Amora through blood and DNA evidence.

1. The Court concludes that, while Jesseca's clothing was also forensically linked to Amora, the State argued that Jesseca was also involved in the murder, and

2. the trace levels of blood found on her clothing do not negate or explain the presumptively positive readings found on the *entire inside* of Applicant's shirt and underwear, the *entire outside* of his sock, and his *entire* jacket.

c. Applicant was observed prior to the discovery of Amora's body wearing jeans that were too large on him, while a smaller pair of jeans were found at the crime scene, covered in the victim's blood.

1. The blood-stain on those jeans was "rather large," 46 RR 177-78, concentrated primarily in the lap area, and described as a "contact transfer bloodstain"—a stain created by contact with a blood-soaked object, 42 RR 203-04, 229-30;

2. The Court concludes that this evidence strongly suggests someone wearing the jeans sat a bleeding Amora on his lap, and later changed out of the bloodstained jeans. *See* 56 RR 121-22.

3. The Court concludes that there is no evidence to suggest Jesseca wore the blood-soaked jeans, or that the jeans were used to mop up blood. These explanations lack credibility.

d. While in jail, Applicant directed his sister to remove evidence from under the house.

1. The Court does not find credible Applicant's sister's testimony that Applicant asked her to retrieve a blue cellphone from under the house because no cellphone has been found.

2. Police investigators located a pipe-wrench in a plastic bag that had been shoved through a hole in the floor of the master bathroom.

e. The pipe-wrench was connected by trace-evidence analysis to other incriminating evidence found at the crime scene and on the victim's body:

1. the components of the lubricant Astroglide were found on the wrench;

2. a bottle of Astroglide was found in the crime-scene bedroom, and

3. the components of Astroglide were found on babywipes, and a blood-stained diaper, all collected from the room where Amora was murdered, as well as on the diaper she was wearing when her body was found;

f. The diaper Amora was wearing that contained the components of Astroglide, was removed during her autopsy to reveal her mutilated vagina and rectum which were torn to such an extent that there appeared to be one large opening instead of two, and the injury perforated internally and extended into her body cavity and was likely caused by the insertion of an object other than a penis hours before she died.

g. Neither Applicant nor Jesseca could be excluded as a contributor of the DNA on four samples swabbed from the numerous bitemarks on Amora's body; and, on the sample taken from Amora's left elbow, the majority of the genetic markers corresponded to Applicant with a statistical probability of 1 in 27,000 Caucasians, 1 in 43,600 African-Americans, and 1 in 47,200 Hispanics. 43 RR 136-137, 183-86.

1. While Jesseca also could not be excluded, the probability of her being a contributor was much less—1 in 123 Caucasians, 1 in 72 African-Americans, and 1 in 105 Hispanics. 43 RR 137. Given that only two people were known to be with Amora on the night of her murder, the Court

concludes this DNA evidence taken from injuries on her body more strongly points to Applicant as the contributor.

2. The Court does not find credible the explanation that DNA could have been left on Amora's elbow while Applicant attempted to perform CPR.

162. The Court concludes that, while the bitemark testimony was significant, the very existence of twenty-four bitemarks on this child's bruised and battered body, coupled with the circumstantial evidence implicating Applicant in this brutal murder, DNA evidence linking him to the injuries, his considerable efforts to cover up his involvement and hide evidence after the fact, and his confession were all indicative of his guilt. Applicant and Jesseca were the only two people who could have inflicted these injuries upon Amora the night of her murder.

163. The Court concludes that, given this evidence, if bitemark testimony were excluded all together, Applicant still could not demonstrate, by a preponderance of the evidence, that he would not have been convicted as either the primary perpetrator or as a party to this capital murder. Tex. Code Crim. Proc. art. 11.073(b)(2); *see also* 4 CR 934 (jury charge on capital murder instructing jury to find beyond a reasonable whether, acting alone or as a party, Applicant caused Amora's death).

164. The Court alternatively concludes that, because bitemark-comparison testimony is still admissible, and even with the ABFO's new guidelines limiting Dr. Williams's testimony, the jury could still hear that Applicant could not excluded as a contributor of at least two bitemarks (as corroborated by Dr. Isaac), while Jesseca could be excluded as to both. Given all the evidence, Applicant cannot show, by a preponderance of the evidence, that he would not have been found guilty if the newly available evidence—limiting Dr. Williams's testimony only to the fact that Applicant could not be excluded as a contributor of two bitemarks, and foreclosing him from using the terms "matched," or "to a reasonable degree of dental certainty"—had been admitted at this trial.

165. The Court concludes that relief on this claim should be denied.

SECOND GROUND FOR RELIEF: Applicant contends his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled.

A. Court's review is limited to the procedural claim.

166. The Court concludes that the CCA implicitly rejected Applicant's Article 11.071 § 5(a)(3), actual-innocence-of-the-death-penalty argument by narrowly finding that Applicant met only the dictates of Article 11.071 § 5(a)(1). *See Ex parte Milam,* 2019 WL 190209, at *1.

167. The Court concludes that the CCA effectively severed the procedural claim—applying *Moore I* and *Hall*—from the substantive *Atkins* claim. Therefore, the substantive *Atkins* claim is not before the Court.

168. The Court concludes that any new evidence offered in support of this claim pertains to the substantive *Atkins* claim, and will not considered in reference to the procedural claim.

169. The Court concludes its review is thus limited to the applicability of new Supreme Court authority—*Moore I, Moore II,* and *Hall*—and whether the procedural flaws identified in those cases occurred in Applicant's trial.

B. Retroactive application of *Moore I* is barred by *Teague*.

170. The Supreme Court recently held that *Moore I* is a new rule of law. *See Shoop v. Hill,* 139 S. Ct. 504 (2019).

171. Habeas review is generally not an appropriate avenue for the recognition of new constitutional rules; thus, new constitutional rules usually do not apply to convictions final before the new rule was announced. *Teague*, 489 U.S. at 310 (plurality opinion).

172. The CCA "follows *Teague* as a general matter of state habeas practice." *Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013); *see also Ex parte Lave,* 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (applying *Teague* to Article 11.071).

173. The Court concludes that Applicant's conviction became final on August 21, 2012, before *Hall, Moore I,* or *Moore II* were decided.

174. The Court concludes that, because *Moore I* is a new rule of law, it should not be retroactively applied to undermine Applicant's pre-*Moore* state court decision.

175. The Court also concludes that Applicant does not meet an exception to the *Teague* bar:

a. While *Atkins* itself was a substantive rule in that it barred death sentences for intellectually disabled persons as a class, *see Atkins*, 536 U.S. at 321, the rule announced in *Moore I* is not—*Moore I* "neither decriminalize[s] a class of conduct nor prohibits imposition of capital punishment on a particular class of persons." *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

b. The Court concludes that, in rejecting the methods adopted by the CCA for examining *Atkins* claims in *Moore I,* and rejecting Florida's rule restricting the application of *Atkins* to defendants with an IQ of 70 or less in *Hall,* the Supreme Court created rules of procedure, not substance. *See Shoop,* 139 S. Ct. at 507-08 (While *Atkins* noted standard definitions of mental retardation included "significant limitations in adaptive skills ... that became manifest before age 18" as a necessary element, it did not definitively resolve how that element should be evaluated leaving application to the States; in *Hall*

and *Moore I,* the Court "expounded on the definition of intellectual disability" in ways that could not have been "teased" out of *Atkins* Court's brief comments on intellectual disability.) (citing *Atkins,* 536 U.S. at 317-18).

c. The Court concludes *Moore I* and *Hall* do not create any watershed rule of criminal procedure, "necessary to prevent an impermissibly large risk of an inaccurate conviction[.]" *Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (quoting *Schriro v. Summerlin,* 542 U.S. 348, 356 (2004)) (internal quotation marks omitted). Applicant does not challenge his conviction but his punishment; if this exception is even applicable to punishment, Applicant fails to prove that his new rule would "'seriously diminish[] the likelihood of obtaining an accurate determination' in his sentencing proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Butler v. McKellar*, 494 U.S. 407, 416 (1990)); *see id.* at 478 (holding that the failure to provide a mitigation special issue was not a watershed rule of criminal procedure).

d. The Court also concludes that Applicant does not meet the second watershed-rule-of-criminal-procedure prong—Applicant's new rule "simply lacks the 'primacy' and 'centrality' of the [entitlement-to-trial-counsel rule of] *Gideon[v. Wainwright*, 372 U.S. 335 (1963)] and does not qualify as a rule that 'alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" *See Bockting,* 549 U.S. at 420–21 (third alteration in original) (citations omitted).

176. The Court concludes that *Moore II*, reversing *Ex parte Moore II* for analysis that "too closely resembles" what the Supreme Court found improper in *Moore I*, fails to meet any *Teague* exception for the same reasons discussed. 139 S. Ct. at 672.

177. The Court concludes, because Applicant's conviction was final when *Moore I* was decided, and because Applicant cannot demonstrate that the new rule announced in *Moore I* falls within in an exception to the non-retroactivity rule of *Teague*, he cannot benefit from retroactive application.

C. *Moore I, Moore II,* and *Hall* do not mandate relief.

178. In the alternative, the Court concludes that, if *Moore I, Moore II,* and *Hall* do apply retroactively, they do not implicate Applicant's case and he is entitled to no relief.

179. *Atkins* held that "the Constitution places a substantive restriction on the State's power to take the life of a[n] [intellectually disabled] offender." 536 U.S. at 321. But, recognizing that not all offenders who claim intellectual disability "will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus," the Supreme Court charged the States to develop "appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id*. at 317.

180. The Court concludes that the jury's determination, by a preponderance of the evidence, that Applicant was not a person with intellectual disability, *see* 4 CR 985-88; 56 RR 167-69, did not run afoul of any Supreme Court precedent.

181. The Court finds that the errors that occurred in *Hall* did not occur in Applicant's trial. *See* 572 U.S. at 711-12 (finding Florida's intellectual-disability scheme unconstitutional because it adopted "strict IQ test score cutoff of 70," without allowing consideration of SEM margins, and foreclosing presentation of other evidence indicating petitioner's faculties were limited where evidence indicated IQ score above 70).

182. The Court finds that "Texas has never adopted the bright-line cutoff at issue in *Hall,*" *Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014), and Texas does not restrict the presentation of evidence when an IQ score rises above 70, *Mays,* 757 F.3d at 218; *see also Garcia v. Stephens*, 757 F.3d 220, 226 (5th Cir. 2014). *Hall* did not identify Texas as one of the states impacted by the decision. *See* 572 U.S. at 714-17.

183. In *Moore I,* the Supreme Court did not extend *Hall* to the Texas framework for analyzing the intellectual functioning prong, but to the CCA's refusal to consider, on appellate review, all of Moore's evidence suggesting sub-average intellectual functioning. *See* 137 S. Ct. at 1048-49. The Supreme Court found that the CCA had contravened *Hall* by refusing to consider all the IQ

scores. Specifically, the CCA rejected five of Moore's seven IQ scores, including a score as low as 59, and settled on only one score of 78. *See Ex parte Moore I,* 470 S.W.3d at 518-19. The CCA also disregarded the lower SEM associated with Moore's scores, and concluded his score fell above the intellectually disabled range. *Id.* at 513.

184. The Supreme Court faulted the CCA's rejection of Moore's *Atkins* claim, finding the CCA (1) refused to account for the SEM when considering borderline IQ scores, in violation of *Hall*; (2) overemphasized adaptive strengths over deficits; (3) required that the defendant demonstrate that his adaptive deficits are not related to a risk factor or a personality disorder; and (4) the CCA's use of the *Briseno* factors to evaluate a defendant's adaptive functioning departed from "current medical standards." *See Moore I,* 137 S. Ct. at 1049-52. The Court concludes that these errors did not occur in Applicant's trial.

184. The Court concludes that, because Applicant did not raise his *Atkins* claim on appeal, the errors committed by the CCA on postconviction review, as identified by the Supreme Court in *Moore I* and *Moore II,* did not occur in Applicant's case.

185. The Court also concludes that the errors that occurred in *Hall, Moore I,* and *Moore II* did not arise in the jury's determination of the intellectual disability special issue during Applicant's trial.

186. Regarding the first step of the intellectual disability analysis, the Court concludes that, through the combination of expert testimony and jury instruction, the jury had the proper diagnostic framework for assessing sub-average intellectual functioning, *see cf. Thomas v. State,* 2018 WL 6332526, at *18, (suggesting proper framework for adaptive functioning criteria could be conveyed "by evidence presented [or] by the trial court's definitional instructions"), and there is no evidence that the jury failed to apply the proper standard. *See Zafiro v. United States,* 506 U.S. 534, 540-41 (1993) (citing *Richardson v. Marsh,* 481 U.S. 200, 211 (1987) ("'[J]uries are presumed to follow their instructions.'").

187. The Court concludes that the experts did not discount the SEM; and the jury was not encouraged or permitted to disregard the SEM, or to cease consideration of the intellectual disability special issue if they concluded Applicant did not show sub-average intellectual functioning. *See Hall,* 572 U.S. at 711-12; *see also Moore I,* 137 S. Ct. at 1049-50. And there is no evidence that the jury actually disregarded the SEM or ceased deliberations after considering the intellectual-functioning factor.

188. The Court concludes that Dr. Proctor's expert testimony did not preclude the jury from considering evidence or encourage the jury to cease deliberations after hearing his opinion on intellectual functioning, without considering all the evidence. Dr. Proctor's testimony did not encourage the jury

to refuse to entertain evidence of intellectual disability, "narrow the test-specific standard error range," or disregard current medical standards in reaching his opinions. *Moore I,* 137 S. Ct. at 1049; *Hall,* 572 U.S. at 723.

189. The Court concludes that Dr. Proctor encouraged the jury to also consider the adaptive-functioning evidence apart from his opinion that Applicant did not demonstrate subaverage intellectual functioning. *See* 56 RR 167 (testifying that "it's not just about how you score on an IQ test, it's also about how you function in the world."); 55 RR 149-50 (because the SEM could put many scores in a "borderline" range, falling five points higher or lower, such was "a good demonstration of why the standard for meeting the definition" of intellectual disability was not based just on testing, but "on multiple pieces of information," and IQ score was just one of those pieces); 55 RR 202 (agreeing that because of the SEM, "we want to look at not only the scores, we also want to look at the adaptive functioning").

190. The Court concludes that Dr. Proctor's testimony indicating Applicant's IQ scores placed him in the borderline range, *see* 55 RR 149-67, 199-203; remains compatible with current law and diagnostic standards. Contrary to Applicant's argument, *see* Response to State's Motion to Dismiss at 11, n.2, the Supreme Court did not foreclose the use of this terminology. *See Moore II,* 139 S. Ct. at 668 (citing *Moore I,* 137 S. Ct. at 1048-50) ("[W]e wrote that Moore's intellectual testing indicated his was a *borderline* case, but that

he had demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning.") (emphasis added).

191. The Court concludes that, while the jury heard Dr. Proctor's ultimate opinion that Applicant was not someone with significantly sub-average intellectual functioning, 55 RR 149-50, 160-65, the Supreme Court does not foreclose expert opinion on the ultimate conclusion, and the jury was free to disregard this opinion in favor of Dr. Cunningham's opinion that Applicant did satisfy the sub-average-intellectual-functioning factor, and his testimony discrediting the reliability of the higher IQ scores. 53 RR 197-203, 257-58; 54 RR 139-42.

192. The Court concludes that the Supreme Court did not foreclose the presentation of expert testimony regarding a spectrum of IQ scores, and the potential reliability of some scores over others. Rather, the Supreme Court condemned the CCA's *refusal to consider* all the IQ scores. *See Moore I,* 137 S. Ct. at 1049-50; *Ex parte Moore I,* 470 S.W.3d at 513, 518-19 (rejecting five of Moore's seven IQ scores, including score of 59, and settling on one score of 78, and disregarding the lower SEM associated with Moore's scores, concluding his score fell above the intellectually disabled range).

193. This Court rejects an interpretation of *Moore I, Moore II,* and *Hall* as precluding the State from presenting evidence in rebuttal of a defendant's intellectual disability claim.

194. At issue in *Moore I, Moore II,* and *Hall* was whether the trier of fact was precluded from considering evidence or encouraged to cease deliberations without considering all the evidence. The Court concludes this did not happen in Applicant's case. The jury heard evidence and was instructed on all three factors of the intellectual disability test.

195. The Court next concludes that, in the jury's consideration of the adaptive-functioning factor, the *Briseno* factors had no place in Applicant's trial. *See Moore I,* 137 S. Ct. at 1051-52 (condemning the CCA's analysis of the adaptive functioning evidence through application of the *Briseno* factors, rejecting those factors as advancing "lay perceptions of intellectual disability," rather than current medical standards); *see also Moore II,* 139 S. Ct. at 679 (reversing the CCA again, concluding that, although the state court appeared to abandon *Briseno,* it continued to "pervasively infect[t]" the court's analysis); *Thomas v. State,* 2018 WL 6332526, at *17-18 (CCA granted relief, in part, because State's expert explicitly relied on the *Briseno* factors in forming his opinion on adaptive functioning; thus, jury did not have the proper framework for assessing intellectual disability).

196. The Court concludes that witnesses were not impermissibly questioned about the *Briseno* factors, and the jury had the proper diagnostic framework for assessing adaptive deficits.

197. The Court rejects Applicant's efforts to parse *Briseno* references from the testimony at his trial and finds that Applicant fails to demonstrate error under *Moore I* or *II*. The Court concludes that the State's questioning of experts and lay witnesses—which Applicant believes invoke the *Briseno* factors without mentioning them—was either distinctly relevant under the specific circumstances of this case, or entirely unrelated to the *Briseno* factors.

198. The Court concludes that the questioning of teachers and family regarding whether Applicant was ever considered for, or diagnosed with, an intellectual disability was appropriate to put into context record evidence that Applicant underwent a full and individual evaluation by the school special education department in 2000, but was only diagnosed with a speech impediment; he was not referred for any other services, and the evaluators did not identify him as someone with an intellectual deficit. *See* 54 RR 321-23; 55 RR 179. Given that many of Applicant's special education records were destroyed per district policy, 54 RR 323-24, family and teachers alike could have knowledge of this special education evaluation and the purpose for which he was referred. The Court concludes that these questions were appropriate and unrelated to any *Briseno* factor.

199. The Court concludes that, the fact that Applicant was evaluated by the special education department during his development years but not diagnosed with intellectual disability or referred for services, is relevant to the jury's determination on all three factors of the intellectual disability test, especially onset before the age of eighteen.

200. The Court concludes that the questions presented to Bryan Perkins and Crystal Zapata regarding whether, from their personal observations, Applicant was dominant in his relationship with Jesseca, 55 RR 37, 115, was directly relevant to rebutting Applicant's repeated efforts during both phases of trial to portray Jesseca as more sophisticated and the likely instigator, if not perpetrator, of this murder. The Court concludes that these questions were appropriate and unrelated to any *Briseno* factor.

201. The Court also concludes that the questions regarding relationships would be directly related to the DSM and AAIDD criteria for adaptive deficits identified by Dr. Cunningham, such as social interpersonal skills, or whether he has deficits in social skills, including interpersonal skills, self-esteem, gullibility, naivete, or victimization avoidance. *See* 53 RR 204-05.

202. The Court concludes that questioning Dr. Cunningham about whether he knew Applicant lied to a police officer, 54 RR 168, was relevant to whether Applicant was naïve and followed the rules and was a permissible question to ask of an expert offering an opinion. *See Moore II,* 139 S. Ct. at 672

(acknowledging that clinicians ask questions similar to the CCA's *Briseno*-related statements that may be relevant, and citing to AAIDD-11, at 44, "noting that how a person 'follows rules' and 'obeys laws' can bear on assessment of her social skills").

203. The Court also concludes that an expert's knowledge of Applicant's ability to lie and his adherence to that lie is also relevant to the jury's determination of the future-danger and mitigation special issues, as well as Applicant's culpability as a party to the murder. The Court concludes that this question to Dr. Cunningham was appropriate and unrelated to any *Briseno* factor.

204. The Court concludes that the five witnesses questioned regarding Applicant's ability to conduct himself appropriately at school, work, or around other children, were educators and thus not "lay witness" offering perceptions of children and their behavior. *See Moore I,* 137 S. Ct. at 1051-52 (rejecting reliance on lay witness perceptions of Moore's placement in a normal classroom, father's reaction to academic challenges, and sister's perception of his intellectual disability). The Court concludes that these questions were appropriate and unrelated to any *Briseno* factor.

205. The Court concludes that, under the circumstances of this case, the above-cited questioning, *see* Findings of Fact 104-15, did not invoke *Briseno.* Rather, the cited questions evoked evidence directly relevant to the adaptive-

deficit and age-of-onset factors contained within the AAIDD and DSM-IV, as explained by Dr. Cunningham, as well as the other special issues presented to the jury, or served as rebuttal to the defense's claim that Jesseca was in control.

206. The Court concludes that, even if it were to draw a comparison between the cited questioning and testimony and the now-foreclosed *Briseno* factors, these remote similarities do not demonstrate that "*Briseno* pervasively infected the [jury's] analysis." *Moore I*, 137 S. Ct. at 1053; *Moore II,* 139 S. Ct. at 672. Especially considering Dr. Cunningham's explanation of adaptive functioning, and the *lack* of any testimony or instruction on the *Briseno* factors.

207. The Court concludes that, unlike the CCA, which created the *Briseno* factors and explicitly relied upon them in *Moore I,* and implicitly in *Moore II,* Applicant's jury had no knowledge of *Briseno,* and received no instruction on it. Therefore, the "lay stereotypes of the intellectually disabled" that infected the CCA's application of the *Briseno* factors did not infect this jury's determination of the intellectual disability special issue. *Moore I,* 137 S. Ct. at 1052; *Moore II,* 139 S. Ct. at 672 (comparing *Ex parte Moore II*, 548 S.W.3d at 570–571: finding evidence that Moore "had a girlfriend" and a job as tending to show he lacks intellectual disability, with AAIDD–11, at 151: criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children").

208. The Court concludes that the Supreme Court did not foreclose the presentation of relevant evidence, through expert or lay testimony, but condemned the CCA's analysis of the adaptive functioning evidence through application of the *Briseno* factors. *Moore I,* 137 S. Ct. at 1051-53; *Moore II,* 139 S. Ct. at 672.

209. The Court concludes that, because the *Briseno* factors were not a part of this trial, Applicant's conviction does contravene *Moore I* or *II. See Moore I,* 137 S. Ct. at 1051-53; *Moore II,* 139 S. Ct. at 672; *Thomas,* 2018 WL 6332526, at *17-18.

210. The Court next concludes that, in reaching his conclusion, the State's expert Dr. Proctor, did not overemphasize Applicant's adaptive strengths over deficits. *See Moore I,* 137 S. Ct. at 1050.

211. The Court concludes that Dr. Proctor did not focus on Applicant's strengths, but, rather, concluded that Applicant has both deficits as well as strengths, but does not have *significant deficits* in adaptive behavior at the level required for intellectual disability. 55 RR 177, 256-57.

212. The Court concludes that, in reaching this conclusion, Dr. Proctor did not focus on Applicant's strengths but, rather, explained why he disagreed with Dr. Cunningham's adaptive-deficits opinion through an analysis of the testing and the credibility of the underlying data relied upon by Dr. Cunningham. 55 RR 170-76; *see* Findings of Fact 116-20.

213. The Court concludes that Dr. Proctor's rational disagreement about Dr. Cunningham's interpretation of the evidence relied on to support his opinion, is supported by the record and does not amount to overemphasizing strengths. *See Moore I,* 137 S. Ct. at 1050 (CCA recited perceived strengths—Moore lived on the streets, mowed lawns, and played pool for money—as evidence adequate to overcome objective evidence of adaptive deficits.)

214. The Court concludes that the State did not mischaracterize risk factors associated with intellectual disability as reason to doubt deficiencies in intellectual function. *See Moore I,* 137 S. Ct. at 1051 (CCA attributed Moore's limitations in academic and social-interaction skills to childhood trauma, undiagnosed learning disorders, repeatedly changing elementary schools, racially motivated harassment and violence at school, history of academic failure, drug abuse, and absenteeism, rather than intellectual disability, *see Ex parte Moore I,* 470 S.W.3d at 526; the Supreme Court reversed, noting "[t]hose traumatic experiences . . . count in the medical community as '*risk factors*' *for* intellectual disability.").

215. The Court concludes that Dr. Proctor's testimony that Applicant's lack of formal education and limited opportunities for socialization could explain his low intellectual functioning, 55 RR 210-12, did not mischaracterize

risk factors associated with intellectual disability as reason to doubt deficiencies in intellectual function.

216. The Court concludes, once again, that the Supreme Court did not foreclose expert testimony on "risk factors," and the State is permitted to present expert testimony in response to Applicant's testimony that certain risk factors could have led to his intellectual disability. *See* 53 RR 273-347; Findings of Fact 118-20. While the Supreme Court noted that "[c]linicians rely on such [risk] factors as cause to explore the prospect of intellectual disability further," *Moore I,* 137 S. Ct. at 1051, the Court did not suggest that a clinician cannot himself conclude those "risk factors" did not demonstrate intellectual disability. Rather, the Court faulted the CCA for dismissing evidence of academic failures as possibly attributed to these risk factors rather than intellectual disability. *Id.*

217. The Court concludes that Dr. Proctor's assessment that a lack of formal education and limited opportunities for socialization could explain Applicant's low intellectual functioning, is supported by the record and is a reasonable interpretation of the evidence. *See* Finding of Fact 118-19. Applicant was believed capable of learning, 51 RR 32-33, 35; 54 RR 313-15; 55 RR 83-84, 94-99, and could read within an eighth-grade range, even though his education ended at fourth grade, and persons with mild mental retardation can

read at most at a sixth-grade level, 55 RR 162-64. This evidence strongly supported Dr. Proctor's opinion that Applicant's lack of formal education and limited opportunities for socialization could explain his low intellectual functioning, and is not foreclosed by *Moore I*.

218. The Court concludes that, through a combination of jury instruction and Dr. Cunningham's and Dr. Proctor's expert testimony, the jury received the proper diagnostic framework for considering the adaptive functioning criteria. *See Thomas,* 2018 WL 6332526, at *17-18 (concluding that, while the jury instruction properly incorporated basic requirements of adaptive behavior, the instruction did not incorporate "a full explanation of the three domains" including in the DSM-V's concept of adaptive functioning, and did not include language explaining that the jury need only find deficiency in one of the three domains to find intellectual disability; but court indicated this information could be "fully conveyed to the jury . . . *by the evidence presented* [or] by the trial court's definitional instructions.") (emphasis added).

219. The Court concludes that Dr. Cunningham's testimony clearly conveyed a full explanation of the concept of intellectual disability, including a full and thorough explanation of adaptive functioning and the requirements for finding intellectual disability, *see* Findings of Fact 102-03; Dr. Proctor's testimony confirmed Dr. Cunningham's explanation, 55 RR 167, 239-40; and

the jury charge instructed the jury that, to answer "yes" to the intellectual disability special issue, they must find all three factors, and defined the terms "mental retardation," "significantly sub-average general intellectual functioning," and "adaptive behavior." 4 CR 980-81; 56 RR 8.

220. The Court concludes that this information fully conveyed to the jury the proper standard applicable at the time of Applicant's trial. Furthermore, neither the instructions nor the witness testimony discussed the now-foreclosed *Briseno* factors. The instructions and evidence at trial did not "deviate from prevailing clinical standards," *see Thomas,* 2018 WL 6332526, at *18 (citing *Moore I,* 137 S. Ct. at 1051), or encourage the jury to cease consideration of the evidence, *see Hall,* 572 U.S. at 711-12. The Court concludes that the jury received the proper diagnostic framework for considering the intellectual-disability evidence. *See Thomas,* 2018 WL 6332526, at *17-18.

D. The substantive *Atkins* claim is procedurally barred and otherwise meritless.

221. The Court concludes that, by limiting its remand of Applicant's intellectual disability claim, pursuant to Article 11.071 § 5(a)(1), "because of recent changes in the law pertaining to the issue of intellectual disability," *see Ex parte Milam,* 2019 WL 190209, at *1, the CCA implicitly rejected Applicant's attempt to challenge the substance of his *Atkins* claim pursuant to the actual-innocence-of-the-death-penalty provision in Article 11.071 § 5(a)(3).

Therefore, the Court concludes that, outside of the impact of *Hall, Moore I,* and *Moore II* on the jury's determination as discussed above, the substantive *Atkins* claim is procedurally barred, and the Court will not revisit the jury's rejection of the intellectual disability issue.

222. The Court concludes that Applicant cannot avoid the procedural bar to appellate review of his intellectual disability claim.

223. The Court concludes that, because Applicant did not ask the CCA on direct appeal to review the sufficiency of the evidence to the support the jury's determination on intellectual disability, he is now foreclosed from seeking such review in this habeas court. *See Ex parte Gardner,* 959 S.W.2d 189, 199 (Tex. Crim. App. 1996).

224. The Court concludes that because Applicant did not timely challenge the jury's determination on intellectual disability pursuant to *Atkins* in any court, and because this substantive claim was not part of the CCA's original remand, this Court may only consider such a challenge pursuant to the Article 11.071 § 5(a)(3) standard, paying significant deference to the jury's determination.

225. The Court concludes that it cannot review Applicant's substantive challenge unless he demonstrates by clear and convincing evidence that, but for a constitutional violation, no rational juror would have answered the intellectual disability special issue in favor of death. Article 11.071 § 5(a)(3);

see Ex parte Woods, 296 S.W.3d 587, 606 (Tex. Crim. App. 2009) ("The issue then is whether, considering the prior evidence and findings, [A]pplicant's additional evidence reasonably shows, by clear and convincing evidence, that no rational finder of fact would fail to find that he is [intellectually disabled]."); *see also Ex parte Blue,* 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007).

226. The Court concludes that the jury's negative answer to the intellectual disability special issue in Applicant's trial must carry significant weight in a successive analysis. *See Ex parte Woods,* 296 S.W.3d at 605-06 (where applicant filed successive application presenting same *Atkins* claim previously rejected on the merits by the same court, but relying on additional new evidence, CCA held "prior evidence and findings are relevant to a determination of whether applicant's current pleading meets the requirements of Article 11.071, § 5(a)(3)[.]")

227. The Court concludes that, even if considered in light of *Moore I, Moore II,* or *Hall,* Applicant's evidence fails to demonstrate clear and convincing evidence such that no rational factfinder would fail to find him intellectually disabled. *See Ex parte Milam,* 2019 WL 190209, at *1 (Yeary, J., dissenting) ("Applicant presented a prima facie case for intellectual disability at the punishment phase of his capital murder trial in 2010, but the jury rejected it[,]" and Applicant now relies "primarily upon the same evidence of intellectual disability that was presented to the jury[.] . . . [T]he evidence does

not satisfy the *Blue* standard even if taken in light of *Moore*'s rejection of *Briseno."*); *Ex parte Blue,* 230 S.W.3d at 162.

228. The Court concludes that Applicant fails, once again, to demonstrate that he is intellectually disabled.

229. The Court concludes that, as discussed above, *Moore I* and *II* do not render the evidence from trial inadmissible.

230. The Court concludes that sufficient evidence exists in the record to support the jury's determination that Applicant failed to demonstrate intellectual disability by showing (1) deficits in general mental abilities; (2) impairment in adaptive functioning, and (3) onset during the developmental period. *See Ex parte Moore II,* 548 S.W.3d at 560; *see also* Findings of Fact 125-37.

231. The Court concludes that, while both sides presented significant evidence in support of or against all three factors of the intellectual disability test, the jury ultimately concluded that Applicant did not meet his burden of proving by a preponderance of the evidence that his is intellectually disabled. *Neal v. State,* 256 S.W.3d 264, 273 (Tex. Crim. App. 2008). The jury's determination was not against the "great weight" of this evidence. *Id.*; *Gallo v. State,* 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).

232. The Court concludes that Dr. Proctor's opinion—supported by the report of defense expert Dr. Andrews, Applicant's school records, and the

testimony of numerous witnesses who knew Applicant and observed him as a child and young adult—was far more credible than that of Dr. Cunningham, which relied primarily on the biased observation of Applicant's mother. "The jury [is] ultimately in the best position to make credibility determinations and evaluate this conflicting evidence." *Gallo,* 239 S.W.3d at 774; *see also Williams v. State,* 270 S.W.3d 112, 114 (Tex. Crim. App. 2008) (reviewing court pays "great deference" to jury's finding in deciding whether finding is "so against the great weight and preponderance of the evidence so as to be manifestly unjust." (citing *Neal,* 256 S.W.3d at 273)).

233. The Court concludes that Applicant's new evidence does not undermine the jury verdict.

234. The Court concludes that Applicant's new experts essentially reexamined the same evidence admitted at trial, in addition to the new expert and lay-witness affidavits which conveyed information similar to that admitted at trial. Only Dr. Fletcher performed any additional analysis—he administered the Vineland Scales of Adaptive Behavior-2 to Applicant's mother and sister, Teresa.

235. The Courts concludes that Dr. Fletcher's assessment, relying on the testimony of Applicant's mother and sister, is no more credible than Dr. Cunningham's assessment relying on the same sources, which Dr. Proctor found lacking in credibility and which the jury rejected.

236. The Court concludes that the jury has already rejected Dr. Cunningham's assessment of Applicant, as well as his reliance on Dr. Gripon's report at trial, *see* 53 RR 207-08, 211, 215, 217, 219, 233, 244; 54 RR 224; 55 RR 207, 235; 56 RR 64; finding in favor of Dr. Proctor's testimony. The Court concludes that the jury was ultimately in the best position to make credibility determinations and evaluate conflicting evidence proffered in connection with the intellectual disability special issue. *See Hunter v. State,* 243 S.W.3d 664, 671-72 (Tex. Crim. App. 2007); *Gallo,* 239 S.W.3d at 774; *Hall v. State*, 160 S.W.3d 24, 40 (Tex. Crim. App. 2004).

237. The Court concludes that Applicant's new evidence is not compelling, nor does it "dramatically undermine the previously considered substantial evidence that support[ed] a finding that applicant [was] not [intellectually disabled]" and "a rational finder of fact could still find that applicant [was] not [intellectually disabled]."*Ex parte Woods,* 296 S.W.3d at 613; *see* Findings of Fact 85.

238. The Court concludes that Applicant is not "so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus" against execution. *Atkins,* 536 U.S. at 317.

239. The Court concludes that this claim is procedural barred. In the alternative, relief on this claim should be denied on the merits.

DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR-79,322-02)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number CR 09-066 and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the applicant's pleadings filed in cause number CR09-066, including his subsequent application for writ of habeas corpus;

2. All of the Respondent's pleadings filed in cause number CR09-066, including the State's Amended Response to Application for Writ of Habeas Corpus;

3. Any affidavits filed in cause number CR09-066;

4. Any orders entered by this Court in this matter;

5. Any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause number CR09-066;

6. This court's findings of fact, conclusions of law and order denying relief in cause number CR09-066; and

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number CR09-066, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel:

Micheal Jimerson
County Attorney, Rusk County, Texas
115 North Main
Henderson, Texas 75652

Lisa Tanner
Assistant Attorney General/Assistant County Attorney
Post Office Box 12548, Capitol Station
Austin, Texas 78711

Tomee Heining
Assistant Attorney General/Assistant County Attorney
Post Office Box 12548, Capitol Station
Austin, Texas 78711

Jennae R. Swiergula
Williams Boggs
Kathryn Hutchinson
Texas Defender Service
1023 Springdale Rd. #14E
Austin, Texas 78721

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NUMBER CR09-066.

SIGNED this _____ day of _____, 2019.

_____
JUDGE PRESIDING
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

APPENDIX 3

DISTRICT COURT NO. CR 09-066
(TEXAS COURT OF CRIMINAL APPEALS NO. WR-79,322-02)

Ex parte	§	IN THE 4TH JUDICIAL
BLAINE KEITH MILAM,	§	
Applicant	§	DISTRICT COURT OF
	§	
	§	RUSK COUNTY, TEXAS

ORDER

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1. All of the applicant's pleadings filed in cause number CR09-066, including his subsequent application for writ of habeas corpus;

2. All of the Respondent's pleadings filed in cause number CR09-066, including the State's Amended Response to Application for Writ of Habeas Corpus;

3. Any affidavits filed in cause number CR09-066;

4. Any orders entered by this Court in this matter;

5. Any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or Respondent in cause number CR09-066;

6. This court's findings of fact, conclusions of law and order denying relief in cause number CR09-066; and

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number CR09-066, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel:

Micheal Jimerson
County Attorney, Rusk County, Texas
115 North Main
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Lisa Tanner
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Jennae R. Swiergula
Williams Boggs
Kathryn Hutchinson
Texas Defender Service
1023 Springdale Rd. #14E
Austin, Texas 78721

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NUMBER CR09-066.

SIGNED this 16th day of October, 2019.

FILED
2019 OCT 16 PM 12:08
TERRI PIRTLE WILLARD
RUSK COUNTY DISTRICT CLERK
BY _____ DEPUTY

JUDGE PRESIDING
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

APPENDIX 4

Court Coordinator
Annette Griffin

Official Court Reporter
Terri Boling

Telephone
903-657-0358

Fax
903-655-1250

J. CLAY GOSSETT

JUDGE
FOURTH JUDICIAL DISTRICT COURT
RUSK COUNTY COURTHOUSE, SUITE 303
115 NORTH MAIN
HENDERSON, TEXAS 75652

FAX COVER SHEET

DATE: **June 3, 2019**

TO: **Lisa Tanner**
VIA FAX – 512-474-4570

Tomee M. Heining
VIA FAX 512-320-8132

FROM: **J. CLAY GOSSETT**
JUDGE

RE: **Applicant Blaine Keith Milam**

TOTAL PAGES (INCLUDING COVER SHEET) 2

COMMENTS:

LETTER RE: BLAINE KEITH MILAM'S STATE HABEAS APPLICATION

Court Coordinator
Annette Griffin

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J. CLAY GOSSETT

JUDGE
FOURTH JUDICIAL DISTRICT COURT
RUSK COUNTY COURTHOUSE, SUITE 303
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June 3, 2019

Micheal Jimerson
County Attorney, Rusk County, Texas
Hand Delivered

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VIA EMAIL - KHUTCHINSON@TEXASDEFENDER.ORG

RE: APPLICANT BLAINE KEITH MILAM

Ladies and Gentlemen:

The Court, in the above reference case, hereby denies Applicant's State Habeas Application.

The Attorney for the State is to prepare an order according to this letter pronouncement.

Sincerely,

J. Clay Gossett
Judge

APPENDIX 5

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,322-02

EX PARTE BLAINE KEITH MILAM, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. CR09-066 IN THE FOURTH JUDICIAL DISTRICT COURT RUSK COUNTY

***Per curiam*. RICHARDSON, J., filed a concurring opinion in which WALKER, J., joined. YEARY, J., filed a dissenting opinion. KELLER, P.J., and SLAUGHTER, J., dissent.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay applicant's execution.[1]

In May 2010, a jury found applicant guilty of the December 2008 capital murder of

[1] Unless otherwise indicated, all future references to Articles are to the Texas Code of Criminal Procedure.

a thirteen-month-old child. The jury answered the special issues submitted pursuant to Article 37.071, and an issue asking if applicant was a person with mental retardation, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Milam v. State*, No. AP-76,379 (Tex. Crim. App. May 23, 2012)(not designated for publication).

In his initial application for a writ of habeas corpus, applicant raised four allegations asserting various instances of ineffective assistance of his trial and appellate counsel. This Court reviewed the merits of the claims and denied relief. *Ex parte Milam*, No. WR-79,322-01 (Tex. Crim. App. Sept. 11, 2013)(not designated for publication).

Applicant's counsel filed this subsequent writ application in the trial court on January 7, 2019. Applicant raises four claims in the application. In the first claim, applicant asserts that current relevant scientific evidence related to the reliability of bite mark comparison contradicts expert testimony presented and relied upon at trial. In the second claim, applicant asserts that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. In the third and fourth claims, applicant asserts that the State failed to disclose material exculpatory evidence, and he was denied his right to present a defense in violation of due process.

Because of recent changes in the science pertaining to bite mark comparisons and recent changes in the law pertaining to the issue of intellectual disability, we find that applicant has met the dictates of Article 11.071 § 5(a)(1) with regard to his first two

allegations. We therefore stay his execution and remand these claims to the trial court for a review of the merits of these claims.

IT IS SO ORDERED THIS THE 14th DAY OF JANUARY, 2019.

Do not publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,322-02

EX PARTE BLAINE KEITH MILAM, Applicant

ON SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION CAUSE NO. CR09-066 IN THE FOURTH JUDICIAL DISTRICT COURT RUSK COUNTY

RICHARDSON, J., filed a concurring opinion in which WALKER, J., joined.

CONCURRING OPINION

Upon further review, Applicant may ultimately lose his battle to avoid the death penalty given to him. But, based upon two claims he has raised in his subsequent writ application, he is at least entitled to a stay. Applicant's claim of intellectual disability has not been assessed under what the Supreme Court deemed, in 2017, the "medical community's diagnostic framework." *Moore v. Texas*, 137 S.Ct. 1039, 1043 (2017). He is legally entitled to have his claim of intellectual disability evaluated under the proper standard. *See Ex parte*

Moore, 548 S.W.3d 552 (Tex. Crim. App. 2018). In order for that to happen, we must grant his request for a stay.

Preservation of error is not at issue here. Applicant did not fail to preserve error regarding his claim of intellectual disability because his attorney failed to challenge the *Briseno* factors at trial, on appeal, or in his first writ—all of those events predated the Supreme Court's 2017 decision in *Moore v. Texas*. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004) was the state of the law when Applicant's punishment was assessed and when Applicant filed his initial writ application. There was no legal basis upon which to challenge the use of the *Briseno* factors as the proper diagnostic standard for evaluating claims of intellectual disability. Applicant did not forfeit *then* his right to a stay of execution *now* simply because his trial and writ attorneys lacked clairvoyance. This Court does not require an attorney to preserve error that is not error. And, if we are going to start requiring defendants to preserve error by requiring them to raise an objection based upon minority positions taken in unpublished concurring and dissenting opinions from this Court, and especially if we are going to make that rule retroactive, then we should issue a published majority opinion setting out a rational basis for doing so.

Applicant also raises a claim based upon new scientific bitemark evidence. Less than a month ago, this Court recognized, in *Ex parte Chaney*, No. WR-84,091-01, 2018 WL 6710279 (Tex. Crim. App. Dec. 19, 2018), that the body of scientific knowledge underlying the field of bitemark comparisons has evolved. Applicant claims that in his trial the State

relied heavily on what is now faulty bitemark evidence. In light of *Chaney*, this claim warrants further review.

This was a gruesome and brutal offense. The thirteen month old victim was savagely and viciously tortured, beaten, and raped before she was murdered. But, we must grant all defendants the process they are due under the Constitution. "The nature of the crime, no matter how senseless or heinous, is not the criteria." *Boyle v. State*, 820 S.W.2d 122, 137 (Tex. Crim. App. 1989) ("Law enforcement officers are not free to choose under what circumstances they will remain true to the mandates of the Federal and State Constitutions."); *Franklin v. State*, 606 S.W.2d 818, 832 (Tex. Crim. App. 1978) (Phillips, J., dissenting) ("Although the crime committed was heinous, the rule of law must still control our determination.").

Because Applicant has raised claims requiring further review, he is legally entitled to a stay.

DELIVERED: January 14, 2019

DO NOT PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,322-02

EX PARTE BLAINE KEITH MILAM, Applicant

ON SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION CAUSE NO. CR09-066 IN THE FOURTH JUDICIAL DISTRICT COURT RUSK COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

In this subsequent post-conviction writ application, Applicant claims he was intellectually disabled at the time of his capital offense, and that his execution would therefore violate the Eighth Amendment under *Atkins v. Virginia*, 536 U.S. 304 (2002). He argues that his claim satisfies Article 11.071, Section 5(a)(3), in that he can prove by clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled. TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(3); *Ex parte Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007). Applicant presented a prima facie case for intellectual disability at

the punishment phase of his capital murder trial in 2010, but the jury rejected it. He relies primarily upon the same evidence of intellectual disability that was presented to the jury, but argues that, when that evidence is considered in light of the recent opinion of the United States Supreme Court in *Moore v. Texas*, 137 S. Ct. 1039 (2017), it satisfies the *Blue* standard.

Appellant apparently seeks another opportunity to litigate the issue absent what the Supreme Court regarded in *Moore* as the corrupting influence of the factors this Court identified in *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004).[1] In my view, the evidence does not satisfy the *Blue* standard even if taken in light of *Moore*'s rejection of *Briseno*. Nor do I agree with the Court today that Applicant's subsequent writ application "contains sufficient specific facts establishing that . . . the current (intellectual disability) claim[ ] . . . could not have been presented previously in a timely initial application . . . because the . . . legal basis for the claim was unavailable on the date [Applicant] filed the previous application[.]" TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

It might be argued that Applicant's intellectual disability claim was unavailable under the law because the United States Supreme Court had not yet decided *Moore* as of the time of Applicant's initial writ application filed in April of 2013. But it does not appear that

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[1] It is unclear to me from Applicant's current pleading whether he seeks an altogether new punishment hearing before a jury, a new punishment hearing before a jury that is limited to the issue of his intellectual disability, or simply a binding post-conviction declaration from this Court that he cannot constitutionally be executed because, in the absence of any consideration of the *Briseno* factors, he has definitively proven that he was intellectually disabled at the time of his offense.

Applicant has challenged *Briseno* at any earlier stage in these capital murder proceedings. If there was any trial objection, it was not reiterated and pursued on direct appeal. *Milam v. State*, No. AP-76,379, 2012 WL 1868458 (Tex. Crim. App. May 23, 2012) (not designated for publication). And Applicant failed to complain in his initial writ application about the jury's rejection of his intellectual disability claim—in any respect, including any potential erroneous reliance on *Briseno* by the State or the trial court. *Ex parte Milam*, No. WR-79,322-01, 2013 WL 4856200 (Tex. Crim. App. Sept. 11, 2013) (not designated for publication).

Was such an argument "unavailable" as of the date of his initial writ application, such that Article 11.071, Section 5(a)(1), will excuse his failure to pursue it in his initial writ application? Section 5 of Article 11.071, our statutory abuse-of-the-writ provision, elaborates on what it means to say that a claim was legally "unavailable" as of a relevant earlier date. Subsection (d) of Section 5 provides that "a legal basis of a claim is unavailable" under two circumstances. TEX. CODE CRIM. PROC. art. 11.071, § 5(d). First, it would be "unavailable . . . if the legal basis was not recognized by . . . a final decision of the United States Supreme Court[.]" *Id*. To be sure, the Supreme Court did not "recognize" until last year that *Briseno* did not rely on the proper diagnostic criteria for assessing intellectual disability for Eighth Amendment purposes. This was well after Applicant filed his initial writ application. But, according to the statute, a claim is also "unavailable . . . if the legal basis . . . could not have

been reasonably formulated from a final decision of the United States Supreme Court[.]" *Id*.[2] Stated positively, this means that if the legal basis for a claim raised for the first time in a subsequent writ application *could* reasonably have been formulated from Supreme Court precedent when the initial writ application was filed, then "a court may not consider the merits" of that claim in the subsequent application. TEX. CODE CRIM. PROC. art. 11.071, § (5)(a).[3]

Applicant filed his initial application in 2012. Almost two years before that, a separate opinion in a direct appeal of a capital murder conviction in this Court, reflecting the view of three judges, took the position that the *Briseno* factors were not constitutionally

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[2] In essence, we have read Section 5(d) to declare a legal basis to be "unavailable" if it has *neither* been recognized by Supreme Court precedent *nor* could it reasonably have been formulated from Supreme Court precedent. *See Ex parte Hood*, 211 S.W.3d 767, 774 (Tex. Crim. App. 2007) ("This 'not . . . or' phrasal structure is the equivalent of 'nor,' and indicates negation of both elements in the series."); *id*. at 775 ("Another point that deserves emphasis is that lack of recognition is not enough to render a legal basis unavailable. If the legal basis *could have been reasonably formulated* from a decision issued by a requisite court, then the exception is not met.").

[3] Last week the United States Supreme Court issued a per curiam opinion in *Shoop v. Hill*, ___ S. Ct. ___, No. 18-56, 2019 WL 113038 (Jan. 7, 2019), a case involving federal habeas review of a state conviction under the terms of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Shoop* involved federal review of a state conviction that was upheld on direct appeal in state court and in state post-conviction habeas corpus proceedings—all of which state-court proceedings pre-dated the Supreme Court's 2017 decision in *Moore*. Under the AEDPA, a federal habeas court may not grant federal habeas corpus relief unless the state court's judgments were contrary to "established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C.A. § 2254(d)(1). The Supreme Court held that the Sixth Circuit Court of Appeals erred to rely upon *Moore* to grant federal habeas corpus relief, since *Moore* did not represent "clearly established" Supreme Court precedent at the time the state court decisions were rendered. Nothing about the holding in *Shoop* informs how this Court should construe our own statutory abuse-of-the-writ provisions, as embodied in Section 5 of Article 11.071. Specifically, a Supreme Court decision need not "clearly establish" a principle of law before a claim based upon that legal principle may be "reasonably formulated" from that decision, under Section 5(d)'s definition of an "unavailable" claim.

sustainable. *Lizcano v. State*, No. AP-75,879, 2010 WL 1817772 (Tex. Crim. App. June 30, 2010) (Price, J., joined by Holcomb and Johnson, JJ., concurring and dissenting) (not designated for publication). It was the position of these three judges that this Court's adoption of the *Briseno* factors was fundamentally at odds with the Supreme Court's opinion in *Atkins* itself, in which it first declared that execution of intellectually disabled offenders violates the Eighth Amendment. *See id*. at *35 (arguing that to the extent that the *Briseno* factors authorize a jury to consider non-diagnostic criteria, they are inconsistent with *Atkins*'s apparent ratification of the diagnostic criteria utilized by the relevant mental health community); *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (noting the then-current diagnostic criteria for assessing mental retardation). At least as of 2010, it is clear enough that an argument could reasonably have been fashioned—and was in fact being fashioned by, among others, several judges of this Court—from Supreme Court precedent that *Briseno* should be overruled.

Applicant should therefore have raised his intellectual disability claim in his initial writ application. A majority of the judges on this Court would no doubt have rejected it then. I would certainly have been open to an argument, post-*Moore*, however, that we should re-open Applicant's initial writ application, had he raised the claim at that time since, in the Supreme Court's belated estimation, we would have been "wrong" to have rejected it. *See Ex parte Moreno*, 245 S.W.3d 419, 428 (Tex. Crim. App. 2008) (holding that this Court may reconsider its original disposition of an initial capital writ application "if there is a

compelling reason to believe that it may not have been 'correct' on original submission"). But to authorize the convicting court to entertain Applicant's claim now, although raised for the first time in a subsequent writ application when the argument was readily available to be raised in his initial writ application, would violate both the letter and certainly the spirit of our codified abuse-of-the-writ provision in Section 5 of Article 11.071.

Applicant also raises a claim under Article 11.073, arguing that the science of forensic odontology has changed since his trial in 2010, and relying on our recent opinion in *Ex parte Chaney*, ___ S.W.3d ___, No. WR-84,091-01 , 2018 WL 6710279 (Tex. Crim. App. Dec. 19, 2018). TEX. CODE CRIM. PROC. art. 11.073. Suffice it to say that *Chaney* raised the issue in an initial writ application, and that the facts of this case are, in any event, quite different. Even assuming that Article 11.073 constitutes new law upon which Applicant may rely to satisfy Section 5(a)(1) of Article 11.071, he has not made a prima facie showing, by a preponderance of the evidence, that presentation of the new science at this trial would have resulted in him not being convicted. TEX. CODE CRIM. PROC. art. 11.073, § (b)(2); TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1); *Ex parte Campbell*, 226 S.W.3d 418, 422 (Tex. Crim. App. 2007).

On these bases, I respectfully dissent to the Court's order staying Applicant's execution and permitting him to pursue his untimely claims of intellectual disability and new science.

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