No. 20-6518

IN THE

Supreme Court of the United States

BLAINE MILAM,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to
The Texas Court of Criminal Appeals

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

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Assistant Attorney General
Counsel of Record

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

This is a capital case.

QUESTIONS PRESENTED

I. The Texas Court of Criminal Appeals (CCA) explicitly rejected the State's argument in favor of the non-retroactivity of *Moore v. Texas,* 137 S. Ct. 1039 (2017) (*Moore I*), and allowed Milam to return to the trial court for review of the impact of that case on the jury's rejection of Milam's intellectual disability defense. The CCA specifically found that *Moore I* did not implicate Milam's case, and that the errors that occurred in that case did not occur in Milam's trial. Should this Court grant certiorari review to consider whether *Moore I* should apply retroactively, where the state court has already done so and thus any opinion by this Court would be purely advisory as to Milam?

II. The CCA remanded Milam's case for an examination of the jury's verdict on intellectual disability in light of new legal authority—*Moore I*—but dismissed Milam's *Atkins v. Virginia*, 536 U.S. 304 (2002) claim as an abuse of the writ because it could have been but was not raised in his initial writ application, and he could not demonstrate by a preponderance of the evidence that, but for a constitutional violation, no rational jury would fail to find he was intellectually disabled. Is certiorari review of this determination warranted where Milam cannot demonstrate that the CCA's misapplied *Moore I* to his evidence, and where he cannot demonstrate a due process violation from the state court's collateral review procedure?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner Blaine Milam **is scheduled for execution after 6:00 p.m. on January 21, 2021.** Milam was convicted and sentenced to death for the brutal capital murder of his fiancée's thirteen-month-old daughter, Amora Bain Carson. Amora was severely beaten, strangled, sexually mutilated, and had twenty-four human bitemarks covering her entire body in what the medical examiner called the worst case of brutality he had ever seen. 41 RR 235-36. Milam and Amora's mother, Jesseca Carson, initially denied involvement, but Milam eventually confessed to a jail nurse.

At his trial, Milam presented evidence that he was intellectually disabled and thus exempt from execution. His jury was instructed in accord with *Atkins v. Virginia*, 536 U.S. 304 (2002) and the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition's (DSM-IV).[1] However, the jury negatively 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]?" *See* 4 CR 985-88; 56 RR 167-69. Milam unsuccessfully appealed his conviction and sentence through the state and federal courts but did not challenge the jury's determination on intellectual disability or raise an Eighth Amendment claim pursuant to *Atkins*, even when this Court decided *Moore v. Texas,* 137 S. Ct. 1039 (2017) (*Moore I*) while his federal habeas appeal was still pending. An execution date was scheduled for January 15, 2019.

Eight days before his execution date, Milam filed a subsequent habeas

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[1] The Fifth Edition is now utilized.

corpus application in the state court raising four claims, including the allegation that, pursuant to *Atkins,* he "is intellectually disabled and categorically ineligible for the death penalty under the Eighth Amendment's prohibition against cruel and unusual punishment." *Ex parte Milam,* Subsequent Application for Post-Conviction Writ of Habeas Corpus, at 78. The Texas Court of Criminal Appeals (CCA) stayed his execution, concluding he "met the dictates of Article 11.071 § 5(a)(1) with regard to his first two allegations,"[2] and remanded to the trial court for review on the merits. *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. 2019) (Petitioner's Appendix [Pet.'s Appx.] 5). The trial court recommended denying relief, which the CCA adopted. *Ex parte Milam,* 2020 WL 3635921 (Tex. Crim. App. July 1, 2020) (Pet.'s Appx. 1).

Milam now seeks certiorari review of the denial of his subsequent habeas application by the CCA. However, Milam is unable to present any special or important reason for certiorari review because he fails to demonstrate a violation of any federal constitutional right. Certiorari review should therefore be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit Court of Appeals opinion offered a concise summary of the facts of the crime as follows:

> Milam was charged with capital murder for the death of Amora Bain Carson. During the guilt phase of his jury trial, the State's

[2] Milam does not now appeal the denial of the second allegation.

> evidence showed that Amora died from homicidal violence, due to multiple blunt-force injuries and possible strangulation. A search of Milam's trailer, the scene of the murder, revealed blood-spatter stains consistent with blunt-force trauma, blood-stained bedding and baby clothes, blood-stained baby diapers and wipes, a tube of Astroglide lubricant, and a pair of jeans with blood stains on the lap. DNA testing showed that the blood on these items was Amora's. Milam's sister visited Milam in jail a few days after the murder, and that night she told her aunt that she needed to get to Milam's trailer because Milam told her to get evidence out from underneath it. Milam's aunt called the police, who immediately obtained a search warrant and, in a search underneath the trailer, discovered a pipe wrench inside a clear plastic bag that had been shoved down a hole in the floor of the master bathroom. Forensic analysis revealed components of Astroglide on the pipe wrench, the diaper Amora had been wearing, and the diaper and wipes collected from the trailer. The State also proffered testimony from Shirley Broyles, a nurse at the Rusk County Jail, who testified that Milam told her, "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 [Amora's mother] that I love her." *See generally Milam v. State*, No. 76379, 2012 WL 1868458, at *1–6 (Tex. Crim. App. May 23, 2012). The jury convicted Milam of capital murder, in violation of Texas Penal Code section 19.03(a)(8).

Milam v. Davis, 733 F. App'x 781, 782 (5th Cir. 2018).

II. Evidence Related to the Intellectual Disability Special Issue.

A. Subaverage intellectual functioning

The State's expert Dr. Tim Proctor and defense expert Dr. Paul Andrews[3] concluded that Milam's test scores failed to demonstrate subaverage intellectual functioning. 54 RR143-50; 55 RR 135-36. Dr. Proctor relied on Dr. Andrews's administration of the WAIS-IV, on which Milam obtained a full-

[3] Dr. Andrews evaluated Milam for the defense but did not testify.

scale score of 71, and the Stanford-Binet IQ, on which Milam obtained an IQ score of 80. Dr. Proctor also administered the RIAS, on which Milam scored an 80, and a second WAIS-IV, on which Milam obtained a full-scale IQ score of 68. 53 RR 200-02; 55 RR 135-37, 140-41, 149-55.

Dr. Proctor explained that the second WAIS-IV of 68 should have been higher, given the "practice effect," and attributed the lower score to distraction by a window in the testing room or background noise. 55 RR 151-53. 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. Both Dr. Andrews and Dr. Proctor administered effort tests and Milam did well on some but not on others; both doctors surmised that he put forth less-than-adequate effort and was likely distracted. 54 RR 146-50; 55 RR 156-59. Both doctors 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. Dr. Proctor found significant that Milam's reading comprehension scores were in the eighth-grade range, although his education ended at the fourth grade, and persons with mild intellectual disability can read at most at a sixth-grade level. 55 RR 162-64. Dr. Proctor opined that, given the SEM, Milam was someone with below average intellectual functioning, in the borderline range, but he did not believe Milam showed significantly sub-average intellectual functioning. 55 RR 149-50, 160, 165.

In contrast, Dr. Cunningham testified that Milam satisfied the sub-average-intellectual-functioning factor because his IQ score of 70 or below, with an SEM of five points, was in the zone of intellectual-disability eligibility.

53 RR 197-200. Dr. Cunningham discounted the RIAS score of 80, calling it a "screening measure," and not a "multi-subtest, fully-developed IQ test, but . . . a measure of intellectual capability." 53 RR 202-03, 257-58; 54 RR 139-42.

B. Adaptive deficits

The jury was not encouraged to cease consideration of the evidence after the discussion of intellectual functioning. Dr. Proctor testified, "It's not just about how you score on an IQ test; it's also about how you function in the world." 55 RR 167. Dr. Cunningham found concurrent deficits in adaptive behaviors in all eleven of the categories listed in the DSM-IV. 53 RR 203-38, 260-62. Of most significance, he found deficits in functional academics, home living, social interpersonal skills, self-direction, and health and safety. 53 RR 259-61. Regarding the AAIDD definition of adaptive deficits, Dr. Cunningham found deficits in all three categories—conceptual, social, and practical. 53 RR 261-62. Dr. Cunningham relied heavily on the testimony of Milam's mother in reaching this decision. *See* 53 RR 153-54, 194, 262; 54 RR 153.

In contrast, Dr. Proctor reviewed the evidence and talked to several former employers, as well as Milam's mother and sister. 55 RR 167-69. First, Dr. Proctor disagreed with Dr. Cunningham's use of the Adaptive Behavior Scale, Residential and Community, to assess someone who is incarcerated because a formal assessment of adaptive behavior should rate a person against a normal population, but this test rated Milam against a group of developmentally disabled individuals living within the community; and it relies upon family member assessment but 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.

Second, Dr. Cunningham's results did not agree with Dr. Proctor's findings; Dr. Proctor suggested Milam's mother deliberately tried to portray her son as slow. 55 RR 172-73. Dr. Proctor supported his suspicion with evidence that Shirley Milam said Milam was slow in reaching developmental milestones such as walking and talking, but the ages she gave were normal. 55 RR 173-74. And when Dr. Proctor talked to Milam's sister Teresa in Shirley's presence, Teresa would state that Milam could do something, like work on cars, but Shirley would interject that Milam was slow and that someone helped him do that; Teresa would then change her answer. 55 RR 173-74. Shirley was also not forthcoming about Milam's drug problem. 55 RR 174-75. Dr. Proctor opined that he could not place much weight on the family's testimony. 55 RR 176.

Dr. Proctor thus disagreed with Dr. Cunningham's results suggesting Milam had the adaptive functioning of a three-or four-year-old. 55 RR 176. Dr. Proctor specifically questioned Dr. Cunningham's opinion that Milam showed deficits in his work history or vocational ability, based upon testimony of those who knew Milam's work history. 55 RR 176-77. Dr. Proctor also believed it was unlikely an auto mechanic could be intellectually disabled given the tasks he performs. 55 RR 255-57. In Dr. Proctor's opinion, Milam had some adaptive deficits as well as strengths, but he did not show *significant* deficits to the level required to demonstrate deficits in adaptive functioning. 55 RR 177, 257. Dr. Proctor also considered whether Milam's adaptive deficits could be caused by

something other than intellectual disability such as drug use, lack of opportunity, deprived environment, or laziness. 55 RR 257-59.

Witness testimony supported Dr. Proctor's findings. Ranger Ray testified that Milam told him about his prior work history as a mechanic and demonstrated knowledge and ability regarding his job. 49 RR 72. An employee of Community Healthcore—a local provider of mental health care and intellectual disability services—testified that he assessed Milam in jail, noting his appearance was appropriate, and he seemed of average intelligence given his adequate vocabulary, his ability to answer questions appropriately, and the lack of lapses in speech and memory. 55 RR 27-29, 37.

Regarding Milam's work history, he got his first job at M & M Express Lube when he was fifteen and held that job for two years. 51 RR 270, 277. Later, Milam worked for Big 5 Tire & Auto, where his duties included diagnostic and mechanical work on cars, changing tires, and changing oil. 50 RR 22. His supervisor, Bryan Perkins, testified that Milam's performance was excellent, and he appeared to have no trouble fulfilling his duties. 50 RR 25-27. Perkins encouraged Milam to work toward a promotion to salesman and began training Milam to use the computer; Milam had no trouble learning. 50 RR 29-30; 54 RR 269-71. Perkins eventually had to fire Milam because he stopped coming to work,[4] but stated that when Milam was working, he was one of the best employees Perkins had. 50 RR 31, 36-37. Co-worker, Gary Jenkins,

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[4] From the evidence, Milam stopped coming to work because Jesseca received money from her father's estate in October 2008, 50 RR 35-37, and Milam began using methamphetamines again around this time, *see* 51 RR 325-27. His drug addiction also explains why Milam and Jesseca moved out of their apartment in November, leaving behind a mess and unpaid bills. *See* 50 RR 8-11.

trained Milam and testified that he could perform job tasks without any problems and could operate machinery and work with tools; Milam 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.

Regarding Milam's education and ability to learn, two of his grade-school teachers—Nelda Thornton and Carolyn McIlhenny—testified that he was a slow student with low grades but was frequently absent due to health issues and an overprotective mother. 51 RR 9, 14, 26-27. McIlhenny opined that Milam could have been a better student if he had attended school regularly. 51 RR 32-33, 35. Neither teacher recalled referring Milam to a diagnostician for determination of intellectual disability, but both recalled he had a speech impediment for which he received treatment. 51 RR 7-8, 13-15, 30-31. Milam's school records reflect that he was never held back, he was routinely absent, and he was evaluated by the special education department and identified as having a speech impediment but no other disability. 54 RR 163-66.

In the fourth grade, Milam's parents removed him from school after he was paddled by the school principal, 51 RR 237-38, but stopped homeschooling him after six months, 51 RR 239-40. Milam's friend, Chris Lay, opined that he was educationally slow for this reason. 53 RR 12.

Melanie Dolive, a special education teacher from Milam's school testified, from personal observation of him in her home, that nothing in his 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. Sherry Brown, a retired

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

Milam's cousin, Melynda Keenon, testified that she met with Milam to help determine his learning style for homeschooling and suggested he sign up for online classes. 55 RR 78-82. Keenon said Milam would do whatever work she put in front of him but was easily distracted. 55 RR 83-84. Keenon did not think Milam showed signs of intellectual disability. 55 RR 84-85. Neighbor Sarah Hodges, who also homeschooled her children, gave Milam schoolwork to do that was below his grade level because he was behind. 55 RR 89-98, 117-18, 121. However, Sarah believed Milam was at the same level as her daughter and foster-child, who were the same age. 55 RR 92, 100.

While Milam's mother described him as slow and was the primary source of information for Dr. Cunningham, she admitted on cross-examination that Milam was evaluated for special education but only needed treatment for his speech problem. 51 RR 340-41. Milam began crawling at seven or eight months, using words at eight months, and walking at eleven or twelve months, 51 RR 341-42; which Dr. Proctor said was normal. Also, Milam could use the computer and met Jesseca on MySpace. 51 RR 283, 286, 344. Shirley testified that Milam cared for Amora by giving her bottles, putting her to bed, and

watching cartoons with her, 51 RR 288-89, 344, and that he cared for his ailing father, 52 RR 117-18. Shirley admitted that Milam could take care of cars and hold a job, 51 RR 344, and that he voluntarily gave his paycheck to his father every week so he would not spend it, 51 RR 347-48.

C. Onset before age eighteen.

Finally, regarding onset of before the age of eighteen, Dr. Proctor found no evidence to support this, relying on Milam's school records indicating a speech impediment, but specifically leaving blank a section where a secondary impediment, like intellectual disability, could have been indicated. 55 RR 178, 180. Also, a letter from the school district indicated Milam had undergone a full and individual evaluation in 2000 but noted no intellectual-disability diagnosis. 55 RR 178-79. In contrast, Dr. Cunningham concluded Milam's deficits did originate prior to the age of eighteen. 53 RR 240.

III. The State-Court and Federal Appellate Proceedings.

The CCA affirmed Milam's conviction and sentence on direct appeal. *Milam v. State,* 2012 WL 1868458. He did not seek certiorari review. On September 11, 2013, the CCA adopted the trial court's recommendation and denied state habeas relief. *Ex parte Milam,* No. WR-79,322-01 (Tex. Crim. App. 2013). The district court denied federal habeas relief and COA. *Milam v. Director, TDCJ-CID,* No. 4:13-cv-545, 2017 WL 3537272 (E.D., Sherman Div. Aug. 16, 2017). The Fifth Circuit also denied COA. *Milam v. Davis,* 733 F. App'x 781 (5th Cir. May 10, 2018), *cert. denied,* 139 S. Ct. 335 (2018).

The CCA stayed his January 15, 2019 execution date pursuant to Article 11.071 § 5(a)(1), and remanded to the trial court for a review of two claims on

the merits. Pet.'s Appx. 5. The trial court recommended denial of relief, Pet.'s Appx. 2, which the CCA adopted on July 1, 2020, Pet.'s Appx. 1.

Milam sought permission to collaterally challenge this decision and file an *Atkins* claim in the federal district court. Milam also asked the appellate court to certify to this Court, pursuant to 28 U.S.C. § 1254(2) and Supreme Court Rule 19, the following question: "Does the new rule of constitutional law announced by [this Court] in [*Moore I*] apply retroactively to cases on collateral review?" The Fifth Circuit denied his motion for authorization, finding both *Moore I* and *Atkins* were previously available, and denied his motion for certification as moot. *In re Milam,* No. 20-40663, *5-7 (5th Cir. Oct. 27, 2020) (Respondent's Appendix). Milam filed the instant petition appealing the CCA's denial of his claims on the merits on November 27, 2020.

REASONS FOR DENYING THE WRIT

The questions that Milam presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, Milam advances no compelling reason to review his case, and none exists.

Review of Milam's first issue is unnecessary as he already received the requested relief—the CCA applied *Moore I* retroactively but determined it did not undermine Milam's death sentence. Thus, any opinion by this Court would be purely advisory, and would have no impact on the outcome of his case. in

the alternative, his arguments regarding the state court's application of *Moore I* are unsupported by the record and meritless.

Milam's second issue stems from the lower court's application of Article 11.071, which provides a purely statutory, non-constitutional exception to the prohibition against abuse of the writ. The CCA determined that he could not demonstrate the unavailability of an *Atkins* claim in his first state habeas application and, alternatively, he failed to demonstrate that, but for a constitutional violation, no rational juror would have failed to find him intellectually disabled. The Court does not have jurisdiction to reach the first conclusion, and Milam fails to demonstrate that the state court applied the wrong legal standard in reaching the second conclusion. Finally, his efforts to challenge the state habeas process are not cognizable in federal court and, alternatively, fail to demonstrate a denial of due process. Milam, therefore, presents no important questions of law to justify the exercise of certiorari jurisdiction.

I. Certiorari to Consider the Retroactivity of *Moore I* Is Unnecessary Because the CCA Applied *Moore I* Retroactively in Reviewing the Jury's Rejection of Milam's Intellectual Disability Issue.

A. An opinion by this Court on the retroactivity of *Moore I* would be purely advisory as to Milam because the CCA already applied *Moore I* to his claim.

Milam seeks certiorari review to consider whether *Moore I* should apply retroactively to his case on state collateral review. Relying on *Shoop v. Hill,* 139 S. Ct. 504 (2019) (per curium), the State opposed retroactive application in the state court, arguing that, if *Moore I* announced a new rule of law, it was

not a substantive rule, and should not apply retroactively to Milam's conviction which was final prior to that decision.[5] However, the CCA specifically rejected the State's argument that retroactive application of *Moore I* is barred by *Teague v. Lane,* 489 U.S. 288 (1989). Pet.'s Appx. 1 at 3 (rejecting conclusions of law 170-177, 183, and "the portion of number 239 that states [Milam's] intellectual disability claim is barred under [*Teague*]."); *see also* Pet.'s Appx. 2, at 56-61, 79. The CCA adopted the trial court's proposed findings weighing the impact of *Moore I* on the outcome of Milam's trial. Pet.'s Appx. 1 at 3; Pet.'s Appx. 2 at 59-74. The CCA specifically concluded that *Moore I* did not implicate Milam's case, the jury's determination on the intellectual disability special issue did not run afoul of any Supreme Court precedent, the errors identified

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[5] As the State argued, in *Shoop*, this Court held that the Sixth Circuit erred in applying *Moore I*, which was not "clearly established law" at the time. 139 S. Ct. at 507. Implicit in the Court's ruling is the determination that *Moore I* is not retroactive, as retroactive application would have afforded Shoop relief. Milam has argued that *Moore I* is a substantive rule of law that should be applied retroactively, but identifies no court that has actually done so. *See* Pet. at 23-26. Indeed, 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). *Moore I* struck down the Texas framework utilized by the CCA to evaluate his *Atkins* claim. By doing so, this Court created a rule 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). Because Milam's conviction was final when *Moore I* was decided, and because he cannot demonstrate that the new rule announced in *Moore I* falls within in an exception to the non-retroactivity rule of *Teague*, the State maintains he should not benefit from retroactive application.

in *Moore I* did not occur in Milam's trial, and the now-foreclosed *Briseno*[6] factors were not a part of Milam's trial. Pet.'s Appx. 2 at 59-61, ##178, 180, 184-85; 65, #195; 70, #209; 74, #220. Therefore, certiorari review of the retroactivity issue, as it pertains to Milam, should be denied because such review would be irrelevant. Milam received the retroactive application that he now asks for, but the CCA still denied relief.

Regardless of how the Court ultimately comes down on the issue of retroactivity, the outcome of Milam's case would not change. Should the Court determine that *Moore I* was not retroactive, the state court committed no error in giving Milam *more* than he was entitled to under federal law. *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. *Danforth v. Minnesota,* 552 U.S. 264, 266, 282 (2008). Therefore, even if the Court were to conclude that *Moore I* is not retroactive, the CCA was still free to apply it retroactively, as they did.

Because the states are free to give broader retroactive effect to new rules than required by this Court, the question of retroactivity is more appropriately decided in the federal habeas context. *See Danforth,* 552 U.S. at 277 ("A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal habeas and therefore had no bearing on whether States could provide broader relief in their own postconviction proceedings than required by that opinion."); *id.* at 278 ("Justice O'Connor's

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

opinion clearly indicates that *Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute.") Indeed, most of the cases cited by Milam in favor of granting certiorari review are federal habeas cases—which, notably, refused to apply *Moore I* retroactively. *See* Pet. at 22-23.

Because the CCA was permitted to, and did apply *Moore I* retroactively, any opinion by this Court on the issue of retroactivity would be purely advisory as to Milam. This Court does not render advisory opinions and should decline to do so now. *See United Public Workers of America (C.I.O.) v. Mitchell,* 330 U.S. 75, 89 (1947) ("As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); *see also United States v. Raines*, 362 U.S. 17, 21 (1960) (In the exercise of that jurisdiction, [this Court] is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'") (citing *Liverpool, New York, and Philadelphia S.S. Co. v. Commissions of Emigration,* 113 U.S. 33, 39 (1885)).

B. The CCA correctly applied *Moore I.*

Milam seeks to avoid the CCA's clear pronouncement that it applied *Moore I* retroactively by suggesting that the court did not *actually* do so. *See* Pet. at 26-32. But, as demonstrated below, the trial court's findings and conclusions, adopted by the CCA, belie this assertion. The Court should deny certiorari review.

The CCA remanded the claim under Art. 11.071 § 5(a)(1) (allowing subsequent application where factual or legal basis was unavailable on date previous application filed) "because of recent changes in the law pertaining to the issue of intellectual disability." Pet.'s Appx. 5 at 2-3. The CCA thus focused review on the applicability of new Supreme Court authority—*Moore I, Moore II,*[7] and *Hall*[8]—and whether the procedural flaws identified in those cases occurred in Milam's trial. Pet.'s Appx. 2 at 56, #169. The CCA concluded that none of these cases, if applied retroactively, were implicated in Milam's trial. *See id.* at 59, #178. "[T]he jury's determination, by a preponderance of the evidence, that [Milam] 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." Pet.'s Appx. 2 at 60, #180.

The CCA recognized the four errors identified by this Court in *Moore I* which occurred in their rejection of Moore's *Atkins* claim on collateral review: (1) the CCA refused to account for the standard error of measurement (SEM) when considering borderline IQ scores, in violation of *Hall*; (2) the CCA overemphasized adaptive strengths over deficits; (3) the CCA required the defendant to demonstrate that his adaptive deficits were not related to a risk factor or a personality disorder; and (4) the CCA's use of the *Briseno* factors to evaluate adaptive functioning departed from "current medical standards."

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[7] *Moore v. Texas,* 139 S. Ct. 666 (2019). *Moore II* was decided after remand, but the CCA still found it did not implicate Milam's trial. Pet.'s Appx. 2 at 59, #178.

[8] *Hall v. Florida,* 572 U.S. 701 (2014).

Pet.'s Appx. 2 at 61, #184 (citing *Moore I,* 137 S. Ct. at 1049-52). But, the CCA concluded, these errors did not occur in Milam's trial. Pet.'s Appx. 2 at 61, #184.

First, the CCA found that the errors that occurred in *Hall* did not occur in Milam's trial, because the Texas statutory scheme does not restrict the presentation or consideration of evidence when a defendant's IQ score rises above 70. Pet.'s Appx. 2 at 60, ##181, 182. Furthermore, the jury was neither instructed nor encouraged to stop deliberations after expert testimony was presented both for and against sub-average intellectual functioning. The CCA concluded that, through expert testimony and jury instruction, the jury had the proper diagnostic framework for assessing sub-average intellectual functioning. Pet.'s Appx. 2 at 62, #186. The experts did not discount the SEM, the jury was not encouraged to disregard the SEM, and no evidence suggests the jury disregarded the SEM or ceased deliberations after considering the intellectual-functioning factor. *Id.* at 23-24, ##97-100; 62-65, ##187-94; *see Hall,* 572 U.S. at 711-14; *Moore I,* 137 S. Ct. at 1049-50.

Second, the jury was not encouraged to emphasize adaptive strengths over deficits. *See Moore I,* 137 S. Ct. at 1050; Pet.'s Appx. 2 at 70, #210. From the evidence, the CCA concluded that, in finding Milam was not a person with intellectual disability, "Dr. Proctor did not focus on [Milam's] strengths, but, rather, concluded that [Milam] has both deficits as well as strengths, but does not have *significant deficits* in adaptive behavior at the level required for intellectual disability." Pet.'s Appx. 2 at 70, #211; *see also* 55 RR 177, 256-57. The CCA noted that Dr. Proctor's testimony did not focus on Milam's strengths, "but, rather, explained why [Dr. Proctor] 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." Pet.'s Appx. 2 at 70, #212; 55 RR 170-76; *see id.* at 31-32, ##116-17. The CCA concluded 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." Pet.'s Appx. 2 at 71, #213; *compare Moore I,* 137 S. Ct. at 1050 (CCA recited perceived strengths—Moore lived on streets, mowed lawns, and played pool for money—as evidence adequate to overcome objective evidence of adaptive deficits.)

Third, the CCA concluded that the State did not mischaracterize risk factors associated with intellectual disability as reason to doubt deficiencies in intellectual function. Pet.'s Appx. 2 at 71, #214; *see Moore I,* 137 S. Ct. at 1051. Rather, Dr. Proctor testified that Milam's lack of formal education and limited opportunities for socialization could explain his low intellectual functioning. 55 RR 210-12. But, the court concluded, Dr. Proctor's assessment is supported by the record and a reasonable interpretation of the evidence from trial. *See* Pet.'s Appx. 2 at 72-73, #217; *see id.* at 32-33, ##118-19. Evidence from trial indicated that Milam's parents removed him from school in the fourth grade because they disagreed with the principal's punishment of Milam, 51 RR 237-40; 53 RR 12; but ceased efforts to homeschool him after only six months, 51 RR 237-40; 53 RR 12. However, several educators, including homeschool and public school teachers, believed Milam was capable of learning, 51 RR 32-33, 35; 54 RR 313-15; 55 RR 83-84, 94-99; and Milam 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 Milam's lack of formal education and limited opportunities for socialization outside of school could explain his low intellectual functioning. *See* Pet.'s Appx. 2 at 71, ##215.

While this Court faulted the CCA in *Moore I* for dismissing evidence of academic failures as possibly attributed to these risk factors rather than intellectual disability, 137 S. Ct. at 1051, *Moore I* does not foreclose expert examination of "risk factors" associated with intellectual disability. As the CCA concluded, the State was permitted to present expert testimony in response to Dr. Cunningham's testimony that certain risk factors—his mother's pregnancy complications, childhood illness, physical imperfections, predisposition to substance abuse, removal from school and social isolation, father's illness, multigenerational family dysfunction, traumatic sexual exposure, alcohol and drug abuse and dependency, premature family responsibilities, to name a few— could have led to Milam's intellectual disability. *See* 53 RR 273-347. This 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, but the Court did not suggest that a clinician cannot himself conclude those "risk factors" did not demonstrate intellectual disability. *See* Pet.'s Appx. 2 at 72, #216. Dr. Proctor's assessment did not mischaracterize the evidence but provided a reasonable explanation, especially based upon Milam's demonstrated ability to read far beyond the level of someone with a fourth-grade education and purported intellectual disability.

Finally, after thorough discussion of the evidence and the record, the CCA concluded that the *Briseno* factors had no place in Milam's trial. *See* Pet.'s Appx. 2 at 65-70, ##195-209; *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,* No. 77,047, 2018 WL 6332526, *17-18 (Tex. Crim. App. Dec. 5, 2018) (granting relief, in part, because State's expert explicitly relied on *Briseno* factors in forming adaptive functioning opinion and jury did not have the proper framework for assessing intellectual disability).

The jury was properly instructed on the three-pronged criteria for finding intellectual disability, as established in the DSM-IV and endorsed by this Court in *Atkins*: (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. 4 CR 980; Pet.'s Appx. 2 at 21-22, ## 91, 92; *see Atkins,* 536 U.S. at 318. As found by both the CCA and the federal district court, the jury was never instructed on *Briseno* or told to apply the *Briseno* factors. Pet.'s Appx. 2 at 24, #101; *Milam v. Director,* 2017 WL 3537272, at *13 (After considering sua sponte if jury charge was constitutional in light of *Moore I,* district court held, "jury charge in this case did not include any of the seven additional '*Briseno*'

factors, and comports with constitutional standards."). "[T]he *Briseno* factors had no place in [Milam's] trial." Pet.'s Appx. 2 at 65, #195; *id.* at 70, #209.

Furthermore, no expert discussed the now-foreclosed *Briseno* factors in Milam's trial. Pet.'s Appx. 2 at 24, #101. Instead, Dr. Cunningham's testimony clearly conveyed a full explanation of the concept of intellectual disability, without discussion of *Briseno*. Pet.'s Appx. 2 at 25, #102 (citing 53 RR 197-211, 245-61). Dr. Cunningham described the diagnostic criteria set forth in the DSM-IV, 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, 250-61. He also 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. He reiterated that 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. Dr. Proctor agreed with Dr. Cunningham's explanation of adaptive functioning. Pet.'s Appx. 2 at 26, #103 (citing 55 RR 167). Through jury instruction and expert testimony, the CCA

concluded that "the jury had the proper diagnostic framework for assessing adaptive deficits." Pet.'s Appx. 2 at 66, #196; 73-74, #218-20.

Of most significance to the arguments Milam now makes, *see* Pet. at 27-29, the CCA concluded that the witnesses were not impermissibly questioned about the *Briseno* factors. Pet.'s Appx. 2 at 66, #196. The CCA rejected Milam's "efforts to parse *Briseno* references from the testimony at his trial," finding that "the State's questioning of experts and lay witnesses—which [Milam] 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." Pet.'s Appx. 2 at 66, #197; *id.* at 68-69, #205; *see also id.* at 66-68, ##198-99 (finding questioning of teachers and family regarding whether Milam was ever considered for, or diagnosed with, an intellectual disability appropriate to put special education records into context); #200-01 (finding questions presented to two witnesses on whether Milam was dominant in his relationship with Jesseca directly relevant to rebutting Milam's efforts to portray Jesseca as more sophisticated and the likely instigator or perpetrator, of murder, as well as the DSM and AAIDD criteria identified by Dr. Cunningham); #202 (finding questions to Dr. Cunningham about whether he knew Milam lied to a police officer relevant to whether Milam was naïve and followed the rules, and permissible question to ask of an expert offering an opinion); #203 (finding expert's knowledge of Milam's ability to lie and adherence to the lie relevant to jury's determination of future-danger and mitigation special issues, as well as Milam's culpability as a party to the murder, and unrelated to any *Briseno* factor); #204 (finding

five witnesses questioned regarding Milam's ability to conduct himself appropriately at school, work, or around other children, were educators and thus not "lay witness" on perceptions of children and their behavior, and questioning did not invoke *Briseno*).

This Court did not foreclose the presentation of relevant evidence—through expert or lay testimony—to contravene the defendant's evidence in favor of intellectual disability. Instead, the Court 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. But the State must be permitted to rebut the defendant's case, and most of the evidence Milam challenges fell into this category. The challenged questioning was relevant and permissible and had no connection to *Briseno.* And to the extent that any comparison to *Briseno* factors can now be drawn, those "remote similarities do not demonstrate that '*Briseno* pervasively infected the [jury's] analysis,'" especially considering Dr. Cunningham's accurate instruction to the jury and the *lack* of instruction on *Briseno.* Pet.'s Appx. 2 at 69, #206 (citing *Moore I*, 137 S. Ct. at 1053; *Moore II,* 139 S. Ct.at 672). Indeed, unlike the CCA in reviewing *Moore,* Milam's jury had no knowledge of *Briseno*, and should be presumed to have followed the instructions as given to them. *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.'").

In his attempt to undermine the CCA's thorough examination of the jury's decision and determination that *Moore I* did not undermine the validity of that decision, Milam again tries to parse *Briseno* inferences from the record.

He cites to witness questioning, jury instruction, and closing argument, to contend that the jury was urged by the State to consider lay stereotypes consistent with the *Briseno* factors. Pet. at 26-32. But, as noted, the CCA considered and rejected Milam's efforts to infer *Briseno* factors from the record, finding "the State's questioning . . . either distinctly relevant under the specific circumstances of this case, or entirely unrelated to the *Briseno* factors." *See* Pet.'s Appx. 2 at 66, #197. The instant argument fairs no better.

He cites first to the State's questioning of "lay witnesses" about whether they thought Milam was intellectually disabled. Pet. at 28. But, as discussed above, these witnesses were appropriately questioned under the circumstances. Milam's cousin and neighbor—who were both involved in the effort to homeschool Milam, Pet.'s Appx. 2 at 40-43, #134—and his teacher were all educators with knowledge of Milam's learning ability, whose opinions were relevant for purposes of interpreting his special education records, as well as supporting Dr. Proctor's disagreement with Dr. Cunningham. *See* Pet.'s Appx. 2, at 30-31, #114-15;[9] *id.* at 66, #198.

Regarding co-worker Jenkins who was asked, on redirect examination, if the term "mentally retarded" was ever associated with Milam, the question was asked in direct response to cross-examination by Milam's counsel. Trial counsel repeatedly questioned Jenkins on whether he thought Milam was "slow;" Jenkins indicated that he did think that at first but did not "recall him

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[9] Neighbor Sarah Hodge was not listed as one of the "educators" in findings #114 and 115, but, like Milam's cousin Melynda Keenon—who was listed—Hodge occasionally homeschooled Milam with her children, and the CCA noted her opinion that she believed he was on grade level. Pet.'s Appx. 41-42, #134(j).

being that slow." 54 RR 282-83. Trial counsel suggested that someone with intellectual disability could learn vocational skills, implying the job that Jenkins and Milam were doing was not that difficult. 54 RR 283-85.[10] On re-direct, the State referenced this line of questioning, asking if Jenkins considered himself slow, or had ever been diagnosed with an intellectual disability—Jenkins humbly agreed he was slow but not intellectually disabled. The State then asked, "were the words 'mentally retarded' . . . ever associated with [Milam], prior to him being charged with capital murder?" Jenkins replied, no. 54 RR 292-93. This testimony was a direct rebuttal to the questions asked by counsel, and not an impermissible *Briseno* reference.

Milam also refers to a question presented to Ranger Ray, whether he thought he was "talking to a person that was mentally retarded?" 49 RR 76. In context, Ray testified that, while questioning Milam about the offense and after Milam said he only had a sixth-grade education, Ray asked some questions to determine whether Milam could understand him. Ray stated that Milam answered the questions satisfactorily; he did not appear intoxicated, was intelligent enough to follow his questions, and indicated he was not mentally ill. Ray stated he did not think he was talking to an intellectually disabled person. 49 RR 72-77. Given that Ray was a law enforcement officer

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[10] In his discussion of the evidence, Milam suggests as proof of adaptive deficits, that Jenkins had to show him what to do at his job, not just tell him. Pet. at 10-11. But Jenkins clarified that he had to do this with all employees, not just Milam. 54 RR 286. Jenkins actually testified that Milam 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.

discussing his impression of a suspect being interviewed for a murder, the question, in context, was appropriate and did not invoke *Briseno.*

Milam next cites to the jury charge instructing the jury, when answering the special issues, to "consider all the evidence at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background and character and circumstance of the offense." Pet. at 28 (citing 4 CR 981; 55 RR 282-85). But he fails cite to any authority, including *Moore I,* prohibiting this instruction or prohibiting the jury from considering the facts of the crime. Milam likely sites this passage now because it is one of the few instances where the State mentioned *Briseno* on the record, albeit outside the jury's presence.[11] But he fails to demonstrate that the charge itself violated any constitutional right.

Third, he argues that the State's closing argument encouraged the jury to rely on stereotypes endorsed by the *Briseno* factors. Pet. at 29 (citing 56 RR 134-36). In context, the State told the jury to decide between the experts—one who says he is intellectually disabled and one who says he is not—then contrasted the evidence from trial, telling the jury, "here's the facts." 56 RR

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[11] This subject arose in a pre-trial hearing on whether experts could discuss the facts of the crime with Milam; defense counsel opposed on grounds that it violated Milam's constitutional rights. The State responded, in part, that, pursuant to *Briseno*, the facts of the crime are relevant to the evaluation. The court ultimately sided with the defense, prohibiting the experts from discussing the facts of the offense with Milam. 22 RR 124-32. At trial, Dr. Proctor was limited to testifying only that he did not speak to Milam about the facts of the crime, 55 RR 180-85, thereby leaving the jury with the impression that it was not relevant. The State also argued, in opposition to a pre-trial motion to empanel a separate jury to decide the intellectual disability issue, that the judge should determine the issue pursuant to *Briseno* and the *Briseno* factors. 2 CR 486-95. The judge rejected these suggestions, in favor of a jury determination at trial, with *Briseno*-free instructions.

132. The State proceeds to recite, without pause, the evidence introduced at trial. 56 RR 133-36. As noted, the State is entitled to present evidence to rebut the defendant's claims, and the evidence is relevant the experts' discussion of the adaptive behavior under the diagnostic criteria set forth by the AAIDD and the DSM-IV. *See* 53 RR 203-41, 259-62. The State neither mentioned nor impermissibly invoked *Briseno* factors and did not rely on impermissible stereotypes. The State invoked the evidence.

Milam also argues that the State impermissibly encouraged the jury to disregard a psychological instrument used to measure adaptive functioning. Pet. at 30 (citing 56 RR 137). This argument appears to refer to Dr. Proctor's disagreement with Dr. Cunningham's administration of the Adaptive Behavior Scale, Residential and Community, which is administered by interviewing someone close to the individual at issue—in this case, Milam's mother. 53 RR 23-33. Dr. Proctor disagreed with its usage because it did not compare Milam to a normal population, but rather to a group of developmentally-disabled people living in the community, and because Dr. Proctor doubted the credibility of Milam's mother, who assisted Cunningham with this test. 55 RR 171-72.[12] But *Moore I* does not preclude experts from disagreeing over testing or results, or from the State relying on those experts in closing. Indeed, the jury heard Dr. Cunningham's disagreement with Dr. Proctor's administration of the RIAS, on which Milam scored an 80. 53 RR 202-03, 257-58; 54 RR 139-42. The State's

[12] Milam's own subsequent writ expert, Dr. Olley also stated that the Adaptive Behavior Scale was "a poor choice." Sub. Writ Appl. Exh. 20, at 10.

reliance on Dr. Proctor's disagreement with Dr. Cunningham in closing argument is not foreclosed by *Moore I*.

II. The CCA Correctly Dismissed Milam's *Atkins* Claim as an Abuse of the Writ. Regardless, the State Court Applied the Correct Legal Standard in Denying Review and Did Not Deny His Right to Due Process.

Milam asks the Court to grant certiorari to "correct the CCA's continued misapplication [of] the principles announced in *Moore,*" attacking the CCA's refusal to consider his *Atkins* claim pursuant to Art. 11.071 §5(a)(3), Pet. at 32-37, and argues throughout his petition that the trial court's procedures in reviewing his claims deprived him of due process, *see* Pet. at 20, 27, 33 n.18. But the CCA's dismissal of his *Atkins* claim rests on a state-law procedural ground, which is not subject to federal court review. Alternatively, Milam fails to demonstrate that the state court's dismissal of his *Atkins* claim rested on an impermissible standard, or that state court procedures violated his right to due process. Certiorari review on these grounds should be denied.

A. This Court lacks jurisdiction to review an adequate and independent state procedural bar.

As noted, the CCA remanded this claim "[b]ecause of . . . recent changes in the law pertaining to the issue of intellectual disability," finding only that Milam "met the dictates of Article 11.071 § 5(a)(1)." Pet.'s Appx. 5 at 2-3. The court thus limited its remand to this provision, despite Milam's alternative challenge to the substance of his *Atkins* claim pursuant to the actual-innocence-of-the-death-penalty provision in Article 11.071 § 5(a)(3). By limiting the remand to "changes in the law" under § 5(a)(1), the CCA implicitly rejected Milam's § 5(a)(3) challenge. The CCA confirmed its intent to so limit

review of the claim on remand by adopting proposed findings and conclusions limiting review to an examination of the new legal authority under § 5(a)(1), and finding that "the substantive *Atkins* claim is not before the Court." Pet.'s Appx. 2 at 55-56, ##166-69. For this reason, the CCA also refused to consider any new evidence offered in support of the substantive claim, except for in the alternative. *Id.* at 56, ##168; 74-79, #221-38.

The CCA's decision to limit its review to only the application of new legal authority is well founded. The jury found Milam was not intellectually disabled, after a thorough presentation of the evidence at trial. Milam did not appeal the jury's verdict on direct appeal; he did not raise an *Atkins* claim supported by the new evidence he now proffers (none of which does he claim was previously undiscoverable) on state habeas review; and he did not attempt to raise an *Atkins* claim in federal district court, even though *Moore I* was handed down while his case was still pending, *see* Respondent's Appendix at 5 (Denying permission to file successive writ in federal district court, finding "Milam had the opportunity to seek amendment of his federal petition, stay federal proceedings, and exhaust his *Atkins* claim in state court after *Moore* was decided, but he failed to do so. . . . Because a *Moore* claim was available to Milam during his initial federal habeas application, we conclude that *Moore* does not justify authorization to proceed in a second habeas application.") Indeed, given the jury's rejection of the special issue on substantially similar evidence to the newly presented evidence, his utter failure to seek review of the jury's determination would have foreclosed any successive review of this claim by the CCA, but for *Moore I.*

The CCA has strictly and regularly applied § 5(a), and dismissal of a successive habeas application upon such grounds constitutes an adequate and independent state procedural bar. *See, e.g., Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting) ("There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *see also Balentine v. Thaler,* 626 F.3d 842, 856-57 (5th Cir. 2010) ("We have previously held that the [CCA] regularly enforces the Section 5(a) requirements.").

The Court has explained that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997); *see also Sochor v. Florida,* 504 U.S. 527, 533-34 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The "independent" and "adequate" requirements are satisfied where the court "clearly and expressly" indicates that its dismissal rests upon state grounds that bar relief, and that bar is strictly or regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)); *see also Johnson v. Mississippi,* 486 U.S. 578, 587 (1981).

The CCA clearly and unambiguously limited successive review of this claim to a reexamination of the jury's decision based upon a new "legal basis" that was unavailable on the date he filed his previous application. *See* Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1). The Court did not permit review of the *Atkins* claim because it could have been raised before, and he could not meet an 11.071 exception. Because this denial is based on clearly established state law grounds, there is no jurisdictional basis for granting certiorari review in this case. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (holding federal review of a claim is procedurally barred if the last state court to consider claim expressly and unambiguously based its denial of relief on a state procedural default); *Harris v. Reed,* 489 U.S. 255, 265 (1989). Because the lower state court's decision clearly and expressly rests on adequate and independent state grounds, certiorari review should not be granted.

B. The CCA did not misapply *Moore I.*

Regardless, the CCA did not misapply *Moore I* in concluding that Milam did not meet the § 5(a)(3) burden of demonstrating by clear and convincing evidence that, but for a violation of the Constitution, no rational juror would have sentenced him to death. Rather, giving significant weight to the jury's negative answer to the intellectual disability special issue, *cf., Ex parte Woods,* 296 S.W.3d 587, 605-06 (Tex. Crim. App. 2009) (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)[.]") the CCA correctly determined that, even if considered in light of the new legal authority, Milam's evidence failed to demonstrate he is intellectually disabled. *See* Pet. Appx. 2 at 75-76, #225-28.

Milam rehashes his arguments regarding the CCA's application of *Moore I*, but fails to demonstrate the court misapplied the legal authority to this determination. First, the CCA did not refuse to apply the SEM to Milam's I.Q. scores. Pet. at 33-34. The CCA never denied that Milam had scores that, with application of SEM, placed him within the intellectual disability range. Pet.'s Appx. 2 at 22-24, ##93-100. For this reason, the jury was encouraged to move on to the adaptive-functioning prong. *See id.* at 23, #97 (finding, "Dr. Proctor did not encourage the jury to stop deliberating based on his opinion on intellectual functioning but encouraged them to consider adaptive functioning," stating (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). In concluding the CCA had contravened *Hall, Moore I* 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 for refusing to consider a full range of scores. *See Ex parte*

Ex parte Moore I, 470 S.W.3d 481, 513, 518-19 (Tex. Crim. App. 2015), v*acated and remanded by Moore I.* But *Moore I* did not foreclose expert opinion on the ultimate conclusion, and both the jury and the CCA are permitted to find one expert more credible than another.

Second, as discussed in the prior section, the CCA did not rely on perceived strengths in evaluating adaptive functioning. Pet. at 35. The CCA found more credible Dr. Proctor's opinion that Milam "had some adaptive deficits as well as strengths, but he did not show *significant* deficits to the level required to meet the second prong of the mental retardation test." Pet.'s Appx. 2 at 37, #128 (55 RR 177, 257). The findings Milam cites in support of his argument are not a recitation of Milam's strengths, but the record evidence relied upon by Dr. Proctor, and cited by the court, to discredit Dr. Cunningham's findings of adaptive deficits. Specifically, Dr. Proctor "found questionable Dr. Cunningham's opinion that [Milam] showed deficits in his work history or vocational ability, given the testimony of other witnesses who knew [Milam's] work history." Pet.'s Appx. 2 at 39, #133; 55 RR 176-77, 255-57. The CCA then recited testimony regarding Milam's work history, positive performance ratings, promotions, ability to work with machinery, success in training, and lack of safety issues. *Id.*

Dr. Proctor also disagreed with Dr. Cunningham's reliance upon Milam's mother as a primary source of information regarding adaptive deficits because Dr. Proctor believed she deliberately tried to portray her son as slow. *See* Pet.'s Appx. 2 at 38, #132; 55 RR 172-73. Milam cites to a finding of the CCA in which Milam's mother admits a number of factors contrary to her representation to

the experts that Milam was "slow." Pet. at 35 (citing Pet.'s Appx. 2 at 43, #135). This finding serves as further support for the CCA (and the jury's) deference to the credibility of Dr. Proctor's opinion over Dr. Cunningham but does not amount to reliance on strengths over weaknesses.

Third, Milam complains that the CCA relied on testimony that Milam's teachers were not aware of any intellectual-disability diagnosis before he was withdrawn from school in the fourth grade, suggesting that these findings amount to *Briseno* factors, and impermissibly require that he prove *diagnosis* before the age of eighteen rather than just manifestation of symptoms. Pet. at 35. Milam is wrong on both counts. First, the CCA specifically concluded:

> [T]he questioning of teachers and family regarding whether [Milam] was ever considered for, or diagnosed with, an intellectual disability was appropriate to put into context record evidence that [Milam] 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 [Milam'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.

Pet.'s Appx. 2 at 66, #198.[13]

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[13] Milam's argues that his friend, cousin, and neighbor were impermissibly questioned, in his effort to draw trial evidence under the *Briseno* umbrella. Pet.at 28, 35-36. But his cousin and neighbor fall into the same category as teachers: both were trained in homeschooling and worked with Milam. Pet.'s Appx. 2 at 40-42, #134. The CCA concluded that, like teachers, they were educators with knowledge of Milam's learning ability, whose opinions were relevant for interpreting his special education records, as well as supporting Dr. Proctor's disagreement with Dr. Cunningham. *See* Pet.'s Appx. 2, at 30-31, #114-15; *id.* at 42-43, #134(i), (j); *id.* at 66, #198. Milam's

Furthermore, the CCA did not require that Milam prove that he was *diagnosed* before the age of eighteen. Pet. at 33, 35. Rather, the CCA concluded that, "the fact that [Milam] 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." Pet.'s Appx. 2 at 67, #199 (emphasis added); *see also id.* at 27-28, #107; *id.* at 44, #137 (Dr. Proctor found no evidence to support onset before eighteen, relying upon school records and school district letter indicating no intellectual-disability diagnosis despite evaluation. 55 RR 178-80). The fact that Milam was specifically evaluated for disability but never diagnosed as intellectually disabled is compelling evidence that he failed to meet, at the least, the third prong of the intellectual disability standard. But the CCA did not require that he demonstrate diagnosis before the age of eighteen to be entitled to relief.

Milam undermines his own argument that the CCA continues to misapply the principals of *Moore I* by also complaining that the CCA has, post-*Moore I,* reexamined and granted relief in other cases, *see* Pet. at 24 n.13, but is treating him differently, *see id.* at 26 n.15.[14] That the CCA has chosen to

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friend, Chris Lay, testified on cross-examination that Milam was "educationally slow" because he left school in fourth grade. 53 RR 12. The CCA found this testimony also supported Dr. Proctor's opinion. Pet.'s Appx. 2 at 41, #134(e).

[14] Milam's case is readily distinguishable from *Ex parte Lizcano. See* Pet. at 26 n.15. In Lizcano's trial, the State did not present expert testimony to rebut his evidence of intellectual disability. *Lizcano v. State,* 2010 WL 1817772, *10 (Tex. Crim. App. 2010). Lizcano raised timely challenges to the jury's rejection of his intellectual-disability defense on direct appeal and state habeas, where the CCA denied relief after applying the *Briseno* factors. *Id.* at 10-15; *see also Ex parte Lizcano,* 2015 WL

reexamine other convictions and granted relief on the very grounds Milam now seeks undermines any argument that the CCA continues to misapply *Moore I*. *See* Pet. at 32. Rather, the CCA concluded that Milam's case just did not meet the standard necessary to merit relief, and the jury's decision should be upheld.

Milam failed to timely raise his *Atkins* claim on appeal and cannot demonstrate that he meets an exception to avoid the procedural bar. For this reason, the Court should decline to grant certiorari review of the CCA's rejection of his § 5(a)(3) challenge.

C. The state collateral proceedings did not violate Milam's right to due process or deprive him of the opportunity to be heard.

Finally, Milam's argument that he was deprived of due process because the trial court denied him the opportunity to present evidence, the trial court denied relief in a "letter pronouncement," and the trial court and CCA adopted "State-authored findings," falls flat. Pet. at 20, 27, 33 n.18. The State followed statutorily mandated procedures and provided him an opportunity to be heard. Milam's complaint arises from disagreement with the trial court's refusal to

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2085190, *1-2 (Tex. Crim. App. 2015) (Alcala, J., dissenting) (Judge Alcala disagreed with denial of *Atkins* claim without explanation, and application of *Briseno* factors). Following *Moore I,* his case was remanded by the district court to the CCA, who agreed to reconsider its disposition of the writ; the CCA remanded to the trial court for review on the merits. *Ex parte Lizcano,* 2018 WL 2717035, *1-2 (Tex. Crim. App 2018). The CCA later adopted the trial court's recommendation and granted relief. *Ex parte Lizcano,* 2020 WL 5540165 (Tex. Crim. App. 2020). In contrast to Lizcano, the State opposed Milam's presentation of intellectual disability evidence at trial, Milam failed to timely challenge the jury's verdict in any way on appeal, the *Briseno* factors were never applied, and the trial court did not recommend granting relief. Milam's suggestion that he is being treated differently than "similarly situated defendants" lacks any justification.

hold hearing or grant relief but demonstrates no denial of due process.

First, Milam has no due process right to collateral proceedings at all. *See Murray v. Giarratano,* 492 U.S. 1, 7-8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Therefore, any alleged failure to follow state statutory procedures in the successive collateral proceeding implicates no due process right. For this reason alone, the Court should decline to grant certiorari review.

Moreover, where a State allows for postconviction proceedings, "the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 559; *cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief). Indeed, as the Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

But even assuming arguendo that a state habeas court's noncompliance with article 11.071 could rise to the level of a due process violation, the record plainly shows that Milam was afforded due process's core protection, i.e., the opportunity to be heard. *Ford v. Wainwright*, 477 U.S 399, 413 (1986) ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted). It is Milam who failed to exercise this right.

Milam does not present a full picture of the proceedings in the trial court. Milam's case was remanded to the trial court and presided over by Judge

Gossett—the same judge who presided over his trial and initial state writ proceeding. On the twentieth day after the filing of the State's response to Milam's subsequent application—a time frame statutorily mandated by Article 11.071 § 8(a) and § 9(a)—the trial court notified the parties by letter that it "hereby denies [Milam's] State Habeas Application," and ordered the State "to prepare an order according to this letter pronouncement." Recognizing the procedural error, the State, however, submitted a proposed order, in accord with the statutory requirements of Article 11.071, § 8 finding no controverted, previously unresolved factual issues material to the legality of Milam's confinement, and ordering the parties to submit proposed findings of fact and conclusions of law within thirty days of the date of the order. Judge Gossett signed the proposed order. *See* Pet. Appx. 2 at 3-4.

Milam immediately filed a motion to recuse Judge Gossett, which was transferred to the Presiding Judge, the Honorable Alphonso Charles, thereby staying habeas proceeding until Judge Charles denied the motion on August 12, 2019. The State filed an advisory on September 3, 2019, notifying the trial court and Milam that, with denial of the motion to recuse, the State believed the stay was lifted, and the court's order was in effect; thus, findings and conclusions were due within thirty days of the denial of recusal, or September 11, 2019. Milam filed no opposition. Accordingly, the State timely filed proposed findings and conclusions, but Milam filed nothing. On October 16, 2019, the trial court signed the State's Proposed Findings of Fact and Conclusions of Law—the only findings before it—and ordered transmittal of the case to the CCA. Milam filed several motions in the CCA, demanding

recusal, remand for adjudication by another judge, and alleging denial of due process; but the CCA denied his subsequent application without ruling on the motions.

In remanding his claim to the trial court, the CCA did not order an evidentiary hearing, and the trial court retains discretion to hold one pursuant to Article 11.071, § 8 and § 9. *See e.g., Ex parte Garcia,* No. WR-78,112-01, 2013 WL 2446468 (Tex. Crim. App. June 5, 2013) ("We remand this application for the trial court to resolve the issues raised by any means it deems appropriate." (citing art. 11.071 §§ 8, 9)); *Ex parte Sosa,* No. WR-24,852-02, 2006 WL 1266940 (Tex. Crim. App. May 10, 2006) (finding Applicant meets requirements for consideration under 11.071 § 5, and remanding case "to the convicting court to resolve the factual issues raised by the application according to Article 11.071, sections 7 through 9.") There is certainly no prohibition to the trial court denying the claims on the existing record, which was thoroughly developed at trial. *See Ex parte Simpson,* 136 S.W.3d 660, 663 (Tex. Crim. App. 2004) (although it is advisable to have evidentiary hearing to determine intellectual disability claims raised for the first time in post-*Atkins* habeas applications, it is not necessary where applicant relies primarily upon trial testimony, both sides had opportunity to fully develop pertinent facts at trial, and habeas judge had opportunity to assess credibility and demeanor of witnesses at trial); *see also Ex parte Hines,* No. WR–40,347–02, 2005 WL 3119030, *1 (Tex. Crim. App. Nov. 23, 2005) ("While we have said that the better practice is to conduct a live hearing in cases such as this, . . . the evidence before the trial court was extensive and we did not specify that a live hearing

was necessary when we remanded the case."). Indeed, the trial court was well aware of the intellectual disability evidence from trial and capable of reviewing the existing record to determine if any *Moore I* violation occurred.

And while the trial court was initially confused on procedures following the completion of briefing, the court signed a statutorily compliant order and gave both parties the opportunity to present proposed findings of fact and conclusions of law. The court even waited thirty days beyond the proposed due date before ruling. But Milam chose to forego presenting his own findings and conclusions. Finally, the CCA did not rubber-stamp the "State-authored findings" but rejected several of the findings and conclusions. Therefore, even if this Court were to the consider the state court process, Milam cannot demonstrate he was denied Due Process. Certiorari review on these grounds should also be denied.

CONCLUSION

The CCA correctly denied and dismissed Milam's successive state habeas application. For the reasons set forth above, this petition for a writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

Tomee M. Heining
*TOMEE M. HEINING

*Attorney in charge

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

tomee.heining@oag.texas.gov

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