No. 20-8253

IN THE

Supreme Court of the United States

BLAINE KEITH MILAM,
Petitioner,

v.

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

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

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

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This is a capital case.

QUESTION PRESENTED

The Fifth Circuit Court of Appeals denied Petitioner Blaine Milam's motion for authorization to file a successive federal habeas petition, holding that the claim he sought to raise under either *Moore v. Texas,* 137 S. Ct. 1039 (2017), or *Atkins v. Virginia,* 536 U.S. 304 (2002), was previously available to him. Milam nevertheless filed a second petition for writ of habeas corpus in the federal district court. The district court concluded that it lacked jurisdiction pursuant to 28 U.S.C. § 2244(b)(3) and transferred the petition to the Fifth Circuit.

Did the Fifth Circuit err in affirming the district court's order transferring Milam's successive petition pursuant to 28 U.S.C. § 2244(b) where the petition was filed after the Fifth Circuit specifically denied authorization to do so?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Petitioner-Appellant Blaine Milam was convicted and sentenced to death for the brutal capital murder of his girlfriend's thirteen-month-old daughter, Amora Bain Carson. Amora was severely beaten, strangled, sexually assaulted, and had twenty-four human 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 he eventually confessed to a jail nurse. Jesseca was sentenced to life in prison for her involvement.

Milam now petitions this Court for a writ of certiorari from the Fifth Circuit's opinion affirming the district court's order transferring a second-in-time petition for writ of habeas corpus to the appellate court. Months before, the Fifth Circuit had denied a motion for authorization to file a successive federal habeas petition, holding that the claim he sought to raise under either *Moore v. Texas* (*Moore I*), 137 S. Ct. 1039 (2017), or *Atkins v. Virginia,* 536 U.S. 304 (2002), was previously available to him. Milam nevertheless flouted the Fifth Circuit's explicit order and filed a second petition for writ of habeas corpus in the U.S. District Court for the Southern District, and an accompanying memorandum of law in support of that court's authority to review the petition. Lacking jurisdiction, the Southern District transferred the

case to the Eastern District, Sherman Division—the court that decided Milam's initial federal habeas petition. The Eastern District recognized its own lack of jurisdiction pursuant to 28 U.S.C. § 2244(b)(3) and transferred the petition to the Fifth Circuit.

While Milam purports to appeal the affirmance of the district court's transfer order, he actually challenges the Fifth Circuit's refusal to grant authorization under 28 U.S.C. § 2244(b). But the grant or denial of an authorization to file a second or successive application "shall not be the subject of a petition . . . for a writ of certiorari." 28 U.S.C. § 2244 (b)(3)(E). Because this petition is statutorily foreclosed under AEDPA, this Court lacks jurisdiction to consider it and it should be denied.

Regardless, Milam's January 21, 2021 execution was stayed by the Texas Court of Criminal Appeals (CCA) and his second subsequent application for habeas relief remanded to the state trial court for consideration of his *Atkins* claim. This proceeding remains pending. Because Milam has received yet another opportunity to raise an otherwise unexhausted and procedurally barred claim in state court, this Court need not now consider his request to carve out an exception to AEDPA to allow the federal courts to consider his foreclosed *Atkins* claim. Because Milam offers no compelling reason to grant certiorari, his petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider a petition for a writ of certiorari seeking review of the judgment of a court of appeals. *See* 28 U.S.C. § 1254(1). However, the Court lacks jurisdiction to consider a petition for a writ of certiorari appealing the denial of a motion for authorization to file a successive federal habeas petition. *See* 28 U.S.C. § 2244(b)(3)(E).

STATEMENT OF THE CASE

I. Facts of the Crime

The CAA summarized the factual background of this case as follows.

A. The State's Guilt–Stage Evidence.

> At 10:37 a.m. on December 2, 2008, [Milam] called 911, and the first thing he said was, "My name is Blaine Milam, and my daughter, I just found her dead." Rusk County Patrol Sergeant Kevin Roy arrived at [Milam's] trailer home outside Tatum twenty minutes later. Two ambulances were already there. EMTs were standing in the doorway of the master bedroom, where [Milam] and Jesseca Carson were kneeling on the floor. Sgt. Roy saw "an infant laying on the floor not moving, not breathing, bruised. The baby was laying on its back, and the face of the baby was just one large bruise." He thought that the circular bruises he saw on the child's body were caused by a Coke can. He did not recognize them as human bite marks.
>
> After lead investigator Sergeant Amber Rogers arrived, Sgt. Roy took [Milam] aside to talk while Sgt. Rogers talked to Jesseca. [Milam] told Sgt. Roy that he and Jesseca had left Amora alone in the trailer and walked up the road to meet a man named Clark who was going to clear some land for him. They were gone about an hour, and, when they came back, they found "the baby in that condition." [Milam] was calm, collected, and cooperative. After the interviews, Sgt. Roy read the pair their *Miranda* rights. He told

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Defense Guilt–Stage Evidence.

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

> Lisa Taylor testified that Jesseca was her daughter's best friend while growing up in Alabama. Ms. Taylor knew Jessica as "sweet, outgoing, outspoken, funny." She said that Jesseca, [Mr. Milam], and Amora visited them in Alabama twice in the fall of 2008. First, they came for one night in October. Jesseca was making "bizarre" accusations about her mother. In November, the trio returned to Alabama for about four days and said that they were planning to move there. Ms. Taylor said that there was a "drastic change" in Jesseca's demeanor. She was "[w]eird, hollow ... [l]ike empty." Looking into her eyes was "like looking into a dark space." Jesseca was not taking care of Amora and did not give her a bath for the whole week. She had [Milam] change Amora's diaper and feed her. Jesseca seemed in charge, and when she told [Milam] to do something, he did it. Ms. Taylor was concerned that there was something profound going on in Jesseca's life and was worried about her and her baby.
>
> A psychiatrist, Dr. Frank Murphy, testified that he was asked to "offer an opinion in this case of the mental state of Jesseca Carson for the time period beginning sometime around August of 2008 through December 2nd of 2008." Dr. Murphy read interviews with Jesseca and other materials but did not talk to Jesseca. Dr. Murphy said Jesseca's symptoms were consistent with a "psychotic depression ... . The depression occurs first, and then it gets severe enough that psychosis or loss of touch with reality then occurs... . Psychosis means someone has lost touch with reality. The vast majority of times, that means either they're hallucinating or they're delusional."
>
> The defense odontologist, Dr. Isaac, studied five of the bite marks, and could not exclude either [Milam] or Jesseca.

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

> **C. The State's Punishment–Stage Evidence.**
>
> The State offered evidence that [Milam] was—at the time of this crime—on probation for solicitation of aggravated sexual assault of a child under the age of fourteen. [Milam] had entered the home

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

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

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

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

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

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

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

D. The Defense Punishment–Stage Evidence.

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

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

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

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

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

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

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

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

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

> • [Milam's] continuing contact and relationship with family;
> • The relatively low rate of major assaults committed by capital inmates serving a life term;
> • The fact of serving a sentence of life without parole ("inmates facing life-without-parole sentences and long sentences have more to lose. This is where they're going to be for a very long time and potentially the rest of their lives, and because of that, they are particularly motivated not to make this experience any more horrible on themselves than it has to be.");
> • The fact that he would be an inmate in the Texas prison system ("99.9 percent of inmates in Texas prisons in 2009 did not commit an assault resulting in injuries with more than first aid treatment");
> • The option of [Milam] going to the Hodge Unit ("a unit for intellectually limited individuals" with a program designed to meet their needs "and help prevent them from being victimized by other inmates");
> • The option of protective custody ("because of the nature of his offense ... for his safety so that other inmates didn't act out on him. Those conditions of confinement would look in many ways like administrative segregation.")
>
> On cross-examination, Dr. Cunningham testified that he is always a defense expert because "the research is very clear that the overwhelming majority of capital offenders will never be violent in prison, that the rates of serious violence in prison are very low, that prisons are extraordinarily effective in minimizing the occurrence of serious violence."

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

II. The State-Court and Federal Appellate Proceedings.

The CCA affirmed Milam's conviction and sentence on direct appeal. *Milam v. State,* 2012 WL 1868458. He did not seek certiorari review. On

September 11, 2013, the CCA adopted the trial court's recommended findings of fact and conclusions of law and denied state habeas relief. *Ex parte Milam,* No. WR-79,322-01 (Tex. Crim. App. 2013). The district court denied federal habeas relief and a certificate of appealability (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,* No. 17-70020, 2018 WL 2171208 (5th Cir. May 10, 2018), *cert. denied, Milam v. Davis,* 139 S. Ct. 335 (2018).

Milam then filed a subsequent state habeas application. The CCA stayed his January 15, 2019 execution date pursuant to Article 11.071 § 5(a)(1), and remanded the application to the trial court for a review of two claims on the merits.[1] *Ex parte Milam,* No. WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. 2019). On July 1, 2020, the CCA denied habeas relief, based upon the trial court's proposed findings and conclusions (with several noted exceptions) and the court's own review. *Ex parte Milam,* 2020 WL 3635921 (Tex. Crim. App. July 1, 2020). This Court denied certiorari review of this decision on February 22, 2021. *Milam v. Texas,* 141 S. Ct. 1402 (2021).

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[1] The CCA remanded Milam's first claim alleging that current relevant scientific evidence related to the reliability of bite mark comparison contradicts expert testimony presented and relied upon at trial; and his second claim, alleging that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled, and citing *Moore I* as a recent change in the law pertaining to the issue of intellectual disability. *Ex parte Milam,* 2021 WL 190209, at *1.

Milam sought permission to collaterally challenge the CCA's decision and file an *Atkins* claim in the federal district court. Milam also asked the Fifth Circuit 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. *See In re Milam,* 838 F. App'x 796, 798-800 (5th Cir. Oct. 27, 2020).

Despite the Fifth Circuit's explicit denial of authorization, on December 15, 2020, Milam nevertheless filed a second petition for writ of habeas corpus in the U.S. District Court for the Southern District, and an accompanying memorandum of law in support of that court's authority to review the petition. *See* ECF No.'s 1 and 4 (E.D. Tex., Case No. 6:20-cv-0066). Lacking jurisdiction, the Southern District transferred the case to the U.S. District Court for the Eastern District—the court that denied Milam's original federal habeas petition—*see* ECF No.'s 6-8, and, on December 17, 2020, the Eastern District transferred the petition to the Fifth Circuit for consideration under 28 U.S.C. § 2244(b)(2), *see* ECF No. 9; *Milam v. Director,* No. 6:20-CV-646, Order of Transfer, at 1-2. (E.D. Tex. Dec. 17, 2020) (Petitioner's Appendix 2, at 6). On December 28, 2020, Milam appealed, in the Fifth Circuit, the district court's

transfer order, and filed a motion for stay of execution. On January 8, 2021, the Fifth Circuit affirmed the order of transfer and denied the motion for stay. *See In re Milam,* 832 F. App'x 918, 921 (5th Cir. Jan. 8, 2021) (Petitioner's Appendix 1, at 5).

On January 12, 2021, Milam filed in the CCA a second subsequent application for habeas relief based upon newly discovered evidence, and a motion for stay of execution, which the CCA granted and remanded to the trial court. *See Ex parte Milam,* No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021). This matter remains pending.

On June 4, 2021, Milam filed the instant petition, appealing the Fifth Circuit's affirmation of the order of transfer.

REASONS FOR DENYING THE WRIT

Milam presents no compelling reason for granting review. *See* Sup. Ct. R. 10. Pursuant to 28 U.S.C. § 2244(b)(3), Milam was required to obtain authorization from the Fifth Circuit Court of Appeals before filing a subsequent application for habeas relief in the federal district court, but the Fifth Circuit denied such authorization. Despite this explicit denial, Milam nevertheless filed a successive application in the district court. Lacking jurisdiction, the district court properly transferred the unauthorized application to the Fifth Circuit which affirmed the district court's order, relying on its prior conclusion that the claim could have been raised in a prior

application. *See* Petitioner's Appendix 1, at 3-5; *see also* § 2244(b)(2) (claim presented in a successive application, not presented in prior application, shall be dismissed unless applicant shows claim relies on new retroactive rule of law, or factual predicate could not have previously been discovered).

Milam fails to establish any error in the Fifth Circuit's denial of authorization and upholding of the district court's transfer order, or any compelling reason for the Court to consider carving out an exception to the statutory prohibition against successive petitions under 28 U.S.C. § 2244. Not only are the circuits in agreement that § 2244(b) precludes review of a previously available intellectual disability claims raised for the first time in federal court following *Moore I,* but this Court has upheld application of § 2244(b)'s restrictions on the filing of succession applications. *See Felker v. Turpin,* 518 U.S. 651, 662 (1996). Regardless, Milam is not without remedy, should the Court deny his petition for review. For these reasons, certiorari should be denied.

ARGUMENT

I. Milam's Petition for Certiorari is Statutorily Prohibited.

Milam's current petition is nothing more than an effort to circumvent AEDPA's restriction on appeal of the denial of authorization to file a successive habeas petition. 28 U.S.C. § 2244(b)(3)(E). Knowing he was statutorily precluded from appealing the Fifth Circuit's denial of authorization, Milam

now seeks relief by appealing the affirmance of the district court's transfer order, transferring a successive petition filed without authorization and filed *after* the Fifth Circuit had already denied authorization to do so. *See* Petition at 4-5. But Milam's attempt to circumvent AEDPA's explicit prohibition on appeals of the denial of authorization should not be permitted.

As set forth above, the Fifth Circuit denied authorization to file a successive petition in the federal district court because Milam failed to demonstrate unavailability of his claim pursuant to § 2244(b)(2)(A). *See In re Milam,* 838 F. App'x 796. In filing this motion for authorization, Milam thus conceded his claim is successive and subject to § 2244(b). He nevertheless flouted the appellate court's order and filed a successive petition in the district court, raising the same claim, and arguing the district court did not need authorization for the reasons he now presents—reasons he did not present to the Fifth Circuit in his original motion for authorization. But the district court was indeed without jurisdiction to consider his successive petition and properly transferred it back to the Fifth Circuit.

By purportedly appealing the denial of transfer, Milam sidesteps the § 2244(b)(3)(E) prohibition on appeal and impermissibly puts the Fifth Circuit's denial of authorization before the Court. The Court should not entertain his efforts to circumvent the statute.

II. The Fifth Circuit Properly Determined Milam Was Not Entitled to Authorization to Appeal his *Atkins* Claim Because He Could Not Satisfy § 2244(b)(2), and Milam Does Not Present a Compelling Reason to Carve Out a Statutory Exception.

The Fifth Circuit rejected Milam's appeal of the denial of the district court's transfer order, holding—as it did in its earlier denial of a motion for authorization to file in the district court—that Milam's intellectual disability claim, pursuant to either *Moore I* or *Atkins*, could have been raised in an earlier petition. Because Milam had sufficient opportunity to raise an intellectual disability claim in a prior petition, the Fifth Circuit must construe his second-in-time habeas petition as successive. *See* Petitioner's Appendix 1 at 4-5. Because the Fifth Circuit had previously concluded that Milam could not establish prior unavailability of his claim and that his petition was barred under § 2244(b)(1), *see In re Milam,* 838 F. App'x at 798-99, the federal district court clearly lacked jurisdiction to consider the petition and correctly transferred it to the Fifth Circuit, who upheld that decision, thus dismissing the claim a second time.

Milam now asks to the Court to grant certiorari to decide whether § 2244(b) can be interpreted to bar first-time federal court merits adjudication of an Eighth Amendment claim of intellectual disability after *Moore I*. Petition at 8. But Milam fails to present any compelling reason to grant certiorari review of this issue. First, he concedes that every circuit to consider the issue has interpreted § 2244(b) to preclude such review. *See* Petition at 8 (citing

Bowles v. Secretary, Fla. Dept. of Corrections, 935 F.3d 1176, 1180 (11th Cir. 2019), *cert. denied, Bowles v. Inch,* 140 S. Ct. 26 (2019) (finding that petitioner's claim in federal court that he was intellectually disabled based on the holding in *Moore I* did not satisfy 28 U.S.C. § 2244(b)); *In re Payne*, 722 F. App'x 534, 538–39 (6th Cir. 2018) (same); *Williams v. Kelley*, 858 F.3d 464, 473 (8th Cir. 2017) (same)). Thus, there exists no conflict for the Court to resolve. *See* Sup. Ct. R. 10(a).

Nevertheless, Milam complains that the outcome reached by every circuit to consider the issue "cannot be reconciled with the Eighth Amendment or the Suspension Clause." Petition at 8. But the concern identified by Milam—that § 2244(b) renders federal courts powerless to enforce the Eighth Amendment prohibition against execution of the intellectually disabled, Petition at 8 (citing *Bourgeois v. Watson*, 141 S. Ct. 507 (2020) (Sotomayor, J., dissenting from denial of certiorari))—does not exist in his case. Milam's execution has been stayed and his case remanded to the trial court for consideration of his *Atkins* claim based upon new evidence. *See Ex parte Milam,* 2021 WL 197088, at *1. Thus, this would be a poor case for the Court to consider creating an exception to AEDPA.

A. The application of § 2244(b) to preclude review of Milam's intellectual disability claim does not violate the Eighth Amendment.

While the Eighth Amendment may categorically prohibit a state from executing an intellectually disabled person, *see Atkins,* 536 U.S. at 31, it does not prevent an appellate court from applying constitutionally permissible restrictions on the filing of successive applications. *See Felker,* 518 U.S. at 662, 664 (The restrictions on repetitive or new claims imposed by §§ 2241(b)(1) and (2) "apply without qualification to any 'second or successive habeas corpus application under section 2254.'")

This Court has indeed recognized that second in time does not necessarily mean second or successive within the meaning of § 2244(b)'s successive writ bar.[2] But § 2244(b) applies to the circumstances at issue here, i.e., where the issue of intellectual disability was litigated and rejected at trial,

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[2] *See e.g., Magwood v. Patterson,* 561 U.S. 320, 323-24 (2010) (holding that habeas application challenging for the first time a new judgment following resentencing was not "second or successive" under § 2244(b)); *Panetti v. Quarterman,* 551 U.S. 930, 945 (2007) (holding "Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a §2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."); *Slack v. McDaniel,* 529 U.S. 473, 487 (2000) (holding that a petition filed after a mixed petition has been dismissed and before the district court adjudicated any claims is treated as a first petition, and not second or successive); *Stewart v. Martinez-Villareal,* 523 U.S. 637, 643-44 (1998) (holding that respondent was not required to obtain authorization to file second or successive application where previously raised and dismissed *Ford v. Wainwright,* 477 U.S. 399 (1986) claim was now ripe for review).

where the petitioner failed to appeal that determination despite availability of the claim in both state and federal court, and where the state court has granted successive review under new legal authority but determined that no error described by that authority occurred in his trial. The Fifth Circuit's refusal to grant permission to file a successive writ, and subsequent upholding of the district court's transfer of an impermissibly filed successive writ, was entirely appropriate under these circumstances.

Milam's reference to *Webster v. Daniels,* 784 F.3d 1123, 1139 (7th Cir. 2015) (en banc), Petition at 9-10, provides little support. In that petitioner's case, the Fifth Circuit denied permission to a federal death row inmate to bring a successive claim under 28 U.S.C. § 2255(h)(1),[3] where the petitioner did not assert that the newly discovered evidence would negate his guilt of the crime. *In re Webster,* 605 F.3d 256, 257 (5th Cir. 2010). The Fifth Circuit declined to interpret the statute beyond the express language contained therein, which limited claims based on newly discovered evidence to those suggesting the petitioner was not "guilty of the offense," rather than the death penalty. *Id.* at 258-59. Webster's efforts to bypass the Fifth Circuit's ruling by filing in the

[3] Because of the similarity of the actions under § 2255 (governing collateral attacks on federal convictions) and §2244 (governing attacks on state court convictions), the two sections "have traditionally been read *in pari materia* where the context does not indicate that would be improper." *In re Webster,* 605 F.3d 256, 257 n.2 (5th Cir. 2010) (citing *United States v. Flores,* 135 F.3d 1000, 1002 n.7 (5th Cir. 1998)).

Seventh Circuit were ultimately successful. *See Webster v. Daniels,* 784 F.3d at 1135-36 (proceeding filed in the Southern District of Indiana where petitioner imprisoned); *see id.* at 1140 (applying the § 2255(h)(1) "savings clause," where records predating trial and suggesting intellectual disability were newly discovered, failure to discover records was not due to lack of diligence by counsel, and records bear directly on the constitutionality of the death sentence). However, the Seventh Circuit acknowledged this was "a rare case." *Id.* That court stated, "this rule cannot apply to all newly discovered evidence, or else there would never be any finality to capital cases involving . . . the intellectually disabled. . . . [I]t would always be possible to conduct more I.Q. and adaptive functioning tests in the prison. Those new scores would have no bearing on the *initial* conviction and sentence, though they would be highly pertinent to the ultimate ability of the government to carry out the sentence. But our concern is with the former, not the latter." *Id.*

Notably, the Seventh Circuit distinguished another capital murder petitioner attempting to raise a successive *Atkins* claim through the federal "savings clause" following *Moore I,* concluding: "Unlike Webster, Bourgeois has no newly discovered evidence. Instead, he had a full and fair opportunity to litigate his intellectual disability claim before the district court that decided his § 2255 motion." *Bourgeois v. Watson,* 977 F.3d 620, 638 (7th Cir. 2020). This

Court declined to grant certiorari review in that case. *Bourgeois v. Watson,* 141 S. Ct. 507 (Dec. 11, 2020).[4]

The Seventh Circuit cases, involving federal death penalty inmates challenging their federal sentences in federal court, recognize that the savings clause can apply where the petitioner would be otherwise ineligible for death, but was prevented from timely raising a claim in a prior petition through no fault of his own (or his counsel's). But, as noted, these circumstances did not occur here. The opportunity to litigate this claim was there, but Milam repeatedly failed to take it. Furthermore, the jury determined that he was not intellectually disabled, and Milam presented little to rebut that determination on his first successive review in the state court. *See Ex parte Milam,* 2019 WL

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[4] Justice Sotomayor dissented, asserting that Bourgeois "puts forth a strong argument that federal prisoners sentenced to death should be able to file new habeas petitions if they can show a potentially dispositive change in the diagnostic landscape following their first petition," while the Seventh Circuit's position "seemingly allows the United States to 'carr[y] out' a death sentence upon a person who 'is' indisputably intellectually disabled under current diagnostic standards, contrary to the FDPA's express terms." *Bourgeois,* 141 S. Ct. at 509 (citing 18 U.S.C. § 3596(c)). Milam relies on this dissent to argue the Court should "resolve the tension between substantive Eighth Amendment constitutional mandates and the operation of Section 2244(b)[.]" Petition at 8. As will be discussed, no such "tension" exists in this case because avenues for relief still exist for Milam, despite his failure to timely raise his claim in his initial writ or demonstrate *Moore I* error in his first successive writ. Furthermore, unlike *Bourgeois,* a jury determined that Milam was not intellectually disabled, and, post-*Moore I*, the state court concluded that the errors identified in *Moore I* did not exist in his trial. *See Ex parte Milam,* 2020 WL 3635921. Thus, Milam sits in a very different posture from *Bourgeois*, where a district court concluded that Bourgeois had made a "strong showing" of intellectual disability under current standards, but the Seventh Circuit declined authorization for successive review based upon a prior court's determination that he was not intellectually disabled relying "heavily" on factors rejected by *Moore I. Bourgeois,* 141 S. Ct. at 507-08 (Sotomayor, J., dissent).

190209 (Yeary, J., dissenting) ("[Milam] 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 Milam now relies "primarily upon the same evidence of intellectual disability that was presented to the jury [.]).

Milam's complaint about the unconstitutionality of § 2244(b) as it applies to him ignores the jury's determination to the contrary. That state court determination merits significant deference in these federal proceedings. As this Court found in *Davila v. Davis,*

> The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. The Constitution twice guarantees the right to a criminal trial, . . . but does not guarantee the right to an appeal at all . . . . The trial "is the main event at which a defendant's rights are to be determined," . . . "and not simply a tryout on the road to appellate review[.]" And it is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, . . . and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review . . . .

137 S. Ct. 2058, 2066 (2017) (internal citations omitted). His continued disagreement with the jury's determination does not warrant carving out an exception to AEDPA's prohibition on successive applications.

Furthermore, while denial of a motion for authorization is not appealable, § 2244(b)(3)(E) did not repeal this Court's jurisdiction to entertain original habeas petitions. *See Felker,* 518 U.S. at 658-63. Milam does not now

seek such review but asks this Court to create an exception to AEDPA. The Court should decline to do so when he has not exhausted all available remedies.

To that end, Milam fails to inform the Court that an additional remedy still exists. He notes that new evidence has come to light, after the Fifth Circuit denied permission to file a successive writ pursuant to § 2244. *See* Petition at 2 n.1, 7 n.4. Based upon this evidence, Milam returned to state court, where the CCA stayed his pending execution and remanded his second successive writ to the trial court for consideration of an *Atkins* claim. *See Ex parte Milam,* 2021 WL 197088, at *1. Milam nevertheless asks the Court to grant certiorari review to "resolve the tension" between the Eighth Amendment prohibition against the execution of the intellectually disabled and the operation of § 2244(b) "that appears to render federal courts powerless to enforce them," Petition at 8; *Bourgeois,* 141 S. Ct. at 509 (Sotoymayor, J., joined by Kagan, J., dissenting), without acknowledging that any "tension" no longer exists in this case.

The discovery of new evidence and subsequent stay and remand by the CCA aligns Milam's case with *Webster*. *See Webster v. Daniels,* 784 F.3d at 1140 (allowing a petitioner to use the § 2255(h)(1) savings clause where records predating trial and suggesting intellectual disability were discovered, failure to discover records was not due to lack of diligence by counsel, and records bear directly on the constitutionality of the death sentence); *see also Bourgeois,* 977

F.3d at 638 ("Unlike Webster, Bourgeois has no newly discovered evidence.") Because Milam's new evidence was not discovered until *after* the Fifth Circuit denied authorization and affirmed the district court's transfer, the appellate court never considered it. Nevertheless, AEDPA encourages state court resolution of issues in the first instance, *see* 28 U.S.C. § 2254, thus the claim currently resides in the proper court of jurisdiction, awaiting resolution. This Court should not interfere by unnecessarily granting certiorari to review the Fifth Circuit's decision.

Because Milam still has an avenue to relief available in the state court, this Court need not consider creating a statutory exception to AEDPA.

B. Section 2244(b) does not violate the Suspension Clause.

Finally, Milam complains that the operation of § 2244(b) results in a violation of the Suspension Clause. Milam acknowledges that the Supreme Court has already rejected the argument that § 2244(b) constitutes an unconstitutional suspension of the writ but argues that his case is different because it involves a substantive limitation on the State's power to act, and the Eighth Amendment has "evolved." Petition at 10-11.

This argument is insufficient to overcome *Felker*. Indeed, this Court specifically noted that, "[t]he added restrictions which [AEDPA] places on second habeas petitions are well within the compass of this evolutionary process, and . . . do not amount to a 'suspension' of the writ contrary to Article

I, § 9." *Felker,* 518 U.S. at 664; *see also McCleskey v. Zant,* 499 U.S. 467, 487-88 (1991) ("[T]he doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions."). Indeed, as this Court acknowledged, AEDPA's requirement that a habeas petitioner must obtain leave from the court of appeals before filing a second petition in the district court "simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court[.]" *Felker,* 518 U.S. at 664.

Milam's arguments now are based on nothing more than his disagreement with the jury's determination that he is not intellectually disabled, and with the Fifth Circuit's conclusion that he cannot meet an exception to the statutory prohibition to his claim. But Milam could have challenged the jury's determination in any of his prior state or federal appeals. Furthermore, as found by the Fifth Circuit, he could have amended his federal petition and sought to return to state court following the issuance of the *Moore I* decision. *See In re Milam,* 838 F. App'x at 798-99. He did not. This Court's application of § 2244(b) to preclude filing a successive writ now does not amount to an unconstitutional suspension of the writ.

And, as noted, Milam is not without recourse as his intellectual disability claim is currently pending in the state court. This Court need not disturb long-

standing precedent or carve out an exception to statutory law under these circumstances.

CONCLUSION

The Fifth Circuit correctly denied Milam's motion for authorization to file a successive writ and affirmed the district court's transfer of the subsequently filed successive application. For all the reasons discussed above, the Court should deny Milam's petition for a writ of certiorari.

Respectfully submitted,

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