No. 25-5712

IN THE
Supreme Court of the United States

In re BLAINE KEITH MILAM,
Petitioner.

On Original Petition for a Writ of Habeas Corpus

RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION AND MOTION FOR STAY OF EXECUTION

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QUESTION PRESENTED

Petitioner Blaine Keith 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. Milam eventually confessed. Only Milam and Amora's mother, Jesseca Carson, were with Amora at the time of her murder, both were charged and convicted under the law of parties, and no other person has ever been implicated in this crime. Milam now contends that he is actually innocent, and that certain scientific evidence introduced at his trial rendered the proceeding fundamentally unfair.

Milam now requests that this Court grant him the extraordinary remedy of a writ of habeas corpus by way of an original petition. His original writ petition presents the following question:

> Should the Court exercise its original habeas corpus jurisdiction where Milam had an adequate remedy in state and federal court, the Fifth Circuit applied the appropriate standard in denying his motion for authorization of these claims, and he has abjectly failed to make a prima facie showing of innocence or a due process violation?

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BRIEF IN OPPOSITION

Petitioner Blaine 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[1] 235–36. Milam and Amora's mother, Jesseca Carson, initially denied culpability, but Milam eventually confessed to a jail nurse. As found by the Texas Court of Criminal Appeals (CCA) in a prior subsequent writ application, only Milam and Jesseca were with Amora at the time of her murder, and no other person has been implicated in this crime.[2] *See* 2 SHCR-02, at 186–87, #58; 223, #160; *Ex parte Milam*, No. 79,322-02, 2020 WL 3635921, at *1 (Tex. Crim. App. July 1, 2020) (adopting findings, with limited exceptions).

Milam was convicted in May 2010. At his trial, he presented evidence in support of a defense that he was intellectually disabled (ID), pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002), and thus exempt from execution. The jury rejected this defense. *See* 4 CR 985–88; 56 RR 167–69.

Milam has unsuccessfully challenged his conviction and sentence in state and federal court. Milam did not appeal the jury's determination on ID until eight days

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[1] "RR" refers to the Reporter's Record for Petitioner's 2010 trial, while "SHCR" refers to the Clerk's Record from one of Milam's four state habeas proceedings, preceded by volume number, followed by a dash and writ number, then page number.

[2] Both were charged and convicted under the law of parties after separate trials. 4 CR 933–41; *Carson v. State,* 422 S.W.3d 733, 737 (Tex. App.—Texarkana 2013, pet. ref'd).

before his January 15, 2019 execution date, which was stayed by the CCA for merits adjudication of two claims: (1) Whether Milam is entitled to relief under article 11.073 of the Texas Code of Criminal Procedure because the current relevant scientific evidence related to the reliability of bitemark comparison contradicts expert opinion testimony presented and relied upon by the State at trial; and (2) whether, pursuant to 11.071 § 5(a)(1), Milam's execution would violate the Eighth and Fourteenth Amendments because he is ID. *Ex parte Milam,* No. 79,322-02, 2019 WL 1902209, at *1 (Tex. Crim. App. Jan. 14, 2019). The CCA denied relief, *Ex parte Milam,* No. WR-79,322-02, 2020 WL 3635921 (Tex. Crim. App. July 1, 2020), *cert. denied Milam v. Texas,* 141 S. Ct. 1402 (2021), federal appeal was unsuccessful, *see In re Blaine Milam,* 838 F. App'x 796, 798–800 (5th Cir. 2020); *In re Milam,* No. 20-40849 c/w No. 20-70024, 832 F. App'x 918 (5th Cir. 2021), *cert. denied, Milam v. Lumpkin,* 142 S. Ct. 172 (2021), and the trial court reset Milam's execution date for January 21, 2021.

Six days before his second execution date, the CCA again granted a stay and remanded for merits review of his intellectual disability claim, after the State's trial expert changed his opinion following discovery of a scoring error and subsequent changes in the law. *See Ex parte Milam,* No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021). Milam was reexamined by a new expert and achieved IQ scores substantially higher than those achieved eleven years earlier. Following a two-day evidentiary hearing, the trial court again recommended denial of habeas relief, which the CCA adopted. *Ex parte Milam,* No. WR-79,322-04, 2024 WL 3595749 at *1 (Tex. Crim. App. July 31, 2024), *cert. denied*, *Milam v. Texas*, 145 S. Ct. 1334

(2025). On May 21, 2025, the trial court signed an order setting Milam's third execution date for September 25, 2025.

Since that time, Milam has sought discovery from the trial court in the form of DNA records from trial, and filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983, challenging the district attorney's refusal to produce such records—fifteen years after their creation and ten years after Milam was first notified of errors in the FBI database used by DPS "as well as many other crime laboratories across the country" for calculating match statistics in criminal investigations since 1999, and was invited to request recalculation of his DNA evidence. Milam did not request recalculation at that time. The trial court—which lacked jurisdiction to grant the motion—denied discovery, and the district court dismissed the § 1983 lawsuit with prejudice. *See Milam v. Jimerson,* No. 6:25-cv-00267, ECF Nos. 14 (Memorandum Opinion and Order) & 15 (Final Judgment). Milam appealed the district court's decision to the Fifth Circuit and filed a motion for a stay. *See Milam v. Jimerson,* No. 25-70015 (E.D. Tex.), ECF Nos. 18, 19, & 20. Milam also filed a motion for authorization to file a successive habeas petition, seeking to appeal the denial of his most-recent ID claim, as well as raising the due-process and free-standing actual innocence claims that are the subject of this proceeding. In a consolidated order, the Fifth Circuit affirmed the dismissal of the § 1983 lawsuit and denied the motions for authorization and a stay. *Milam v. Jimerson,* No. 25-70015, c/w No. 25-40579, Order (5th Cir. Sept. 19, 2025) (published); Pet. App'x A.

Milam also filed in the CCA his third subsequent application for habeas relief, this time raising claims of actual innocence, new and relevant scientific evidence pursuant to Art. 11.073, a due process violation, a false-testimony claim, and a general challenge to his execution under the Texas Constitution. The CCA dismissed the application as an abuse of the writ without considering the merits and denied a stay. *Ex parte Milam,* No. WR-79,322-05, Order at *2–3 (Tex. Crim. App. Sept. 23, 2025); Pet. App'x B.

Milam now seeks the extraordinary remedy of a writ of habeas corpus by way of an original petition. *See generally* Pet. While acknowledging that this Court has previously rejected actual innocence as a basis for federal habeas relief, *see Herrera v. Collins,* 506 U.S. 390, 393 (1993), Milam argues that the Court should grant his petition for original writ to make clear that the Constitution forbids the execution of an innocent person. Pet. 25. Additionally, Milam asks the Court to grant his petition to answer the question of whether a conviction based upon now-discredited scientific evidence violates due process. Pet. 26. Milam is not entitled to the extraordinary relief he requests. First, Milam is appealing the CCA's dismissal of these claims as an abuse of the writ pursuant Article 11.071 § 5, which he admits the Court lacks jurisdiction to review. Pet. 2. The CCA has strictly and regularly applied the Section 5 bar and dismissal on this ground 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.").

Second, he is appealing the Fifth Circuit's denial of his motion for authorization, but such an appeal is expressly prohibited by 28 U.S.C. § 2244(b)(3)(E).

The limitations of § 2244(b) "certainly inform[s]" this Court's consideration of Milam's original petition, *Felker v. Turpin*, 518 U.S. 651, 663 (1996), and the Fifth Circuit's well-justified conclusion that Milam's claims failed to satisfy the statute's prima facie standard—a conclusion similar to the one the state court made in light of the same evidence[3]—supports the denial of Milam's request for this extraordinary remedy. Consequently, Milam is not entitled to a writ of habeas corpus.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider an original petition for a writ of habeas corpus. 28 U.S.C. § 2241(a); *see Felker*, 518 U.S. at 660–62.

STATEMENT OF THE CASE

I. Statement of Facts

The Fifth Circuit previously summarized the facts and evidence underlying Milam's capital murder conviction in its prior opinion denying a COA 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 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

[3] The CCA provided no explanation for its dismissal, finding only that Milam failed to satisfy the requirements of Article 11.071 § 5, and dismissed the claim as abusive without reviewing the merits. Pet. App'x B.02–03. Therefore, the Respondent's argument focuses primarily on the Fifth Circuit's opinion.

> 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." The jury convicted Milam of capital murder[.]

Milam v. Davis, 733 F. App'x 781, 782 (5th Cir. 2018) (citation omitted); *see also Milam v. State,* 2012 WL 1868458, at *4–6.

II. The State-Court and Federal Appellate Proceedings.

Milam was convicted and sentenced to death in May 2010, for the capital murder of thirteen-month-old Amora Bain Carson, a child under the age of six. The CCA affirmed Milam's conviction and sentence on direct appeal, *Milam v. State,* No. AP-76,379, 2012 WL 1868458, at *21 (Tex. Crim. App. May 23, 2012), and denied his first state habeas application in 2013 upon the trial court's recommendation, *Ex parte Milam,* No. WR-79,322-01 (Tex. Crim. App. Sept. 11, 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, at *51 (E.D. Tex. Aug. 16, 2017). The Fifth Circuit Court of Appeals also denied a COA, *Milam v. Davis,* 733 F. App'x 781 (5th Cir. 2018), *cert. denied,* 586 U.S. 924 (2018).

The CCA stayed Milam's January 15, 2019 execution date pursuant to Article 11.071 § 5(a)(1) and Article 11.073, and remanded to the trial court for a review of

two claims on the merits. *Ex parte Milam,* 2019 WL 1902209, at *1. The CCA adopted the trial court's recommended denial of relief on July 1, 2020. *Ex parte Milam*, 2020 WL 3635921, at *1, *cert. denied, Milam v. Texas*, 141 S. Ct. 1402 (2021). Federal appeal was unsuccessful. *See In re Blaine Milam,* 838 F. App'x 796, 798–800 (5th Cir. 2020) (unpublished); *In re Milam,* No. 20-40849 c/w No. 20-70024, 832 F. App'x 918 (5th Cir. 2021), *cert. denied, Milam v. Lumpkin,* 142 S. Ct. 172 (2021). The trial court reset Milam's execution date for January 21, 2021.

The CCA stayed this second execution date on January 15, 2021, and remanded Milam's second subsequent writ to the trial court for merits review of his intellectual disability claim, this time pursuant to Article 11.071 § 5(a)(3), after the State's trial expert changed his opinion on intellectual disability days before the execution. *Ex parte Milam,* No. 79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021). Following court-ordered reexamination by a new expert and a two-day evidentiary hearing in the trial court, the CCA adopted the trial court's recommendation and again denied relief, concluding Milam was not intellectually disabled. *Ex parte Milam,* 2024 WL 3595749, at *1. This Court denied certiorari review on March 10, 2025. *Milam v. Texas,* 145 S. Ct. 1334 (2025). On May 21, 2025, the trial court set Milam's third execution date for September 25, 2025.

On July 18, 2025, Milam filed in the federal district court a civil-rights action pursuant to 42 U.S.C. § 1983. *See Milam v. Jimerson,* No. 6:25-cv-00267 (E.D. Tex.), ECF No. 1. The federal district court dismissed this complaint with prejudice on August 29, 2025. *Milam v. Jimerson,* No. 6:25-cv-00267, ECF Nos. 14 & 15. Milam

appealed this decision to the Fifth Circuit and filed a motion for stay. *See Milam v. Jimerson,* No. 25-70015, ECF Nos. 18, 19, & 20. Milam also filed a motion for authorization to file a successive habeas petition, seeking to appeal the denial of his most-recent ID claim, his due process claim concurrently raised in the CCA, and his free-standing actual innocence claim. In a consolidated order, the Fifth Circuit affirmed the dismissal of the § 1983 lawsuit and denied the motions for authorization and a stay. Pet. App'x A.

Milam also filed his third subsequent writ of habeas corpus in the trial court on September 2, 2025. The clerk transferred it to the CCA on September 3, 2025. Milam filed a separate motion for stay of execution on September 16, 2025. On September 22, 2025, The CCA dismissed the subsequent application as abusive and denied the motion for stay. Pet. App'x B.

Milam did not seek certiorari review of either of those decisions. Instead, on September 23, 2025, at 6:00 p.m., Milam filed in this Court an original petition for a writ of habeas corpus and a motion for stay of execution. The instant brief in opposition follows.

ARGUMENT

I. Milam Is Not Entitled to the Extraordinary Remedy of a Writ of Habeas Corpus.

Milam asks the Court to grant an original writ of habeas corpus because he has "no adequate remedy at law" to obtain relief. Sup. Ct. R. 20.4(a). He concedes that certiorari review is foreclosed by the CCA's denial of his subsequent state habeas application on independent and adequate state law grounds, and the statutory

prohibition against filing a petition for writ of certiorari from the Fifth Circuit's denial of his motion for authorization. Pet. 2; § 2244(b)(3)(E). But this Court should not permit an end run around the statutory and jurisdictional barriers precluding relief on Milam's claims. Furthermore, Milam's petition amounts to nothing more than a request for error correction by this Court (foreclosed by Supreme Court Rule 10), and he utterly fails to justify the extraordinary remedy he seeks.

A. Milam had avenues available to raise both his actual innocence and his due process claims, and his original petition is an end-run around AEDPA.

Supreme Court Rule 20.4(a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker*, 518 U.S. at 665 (explaining that Rule 20.4(a) delineates the standards under which the Court grants such writs). Milam fails to advance an exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

Milam is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had available state and federal remedies. Indeed, as Milam admits, he raised the underlying claims in both state and federal court. While Fifth Circuit precedent—like this Court's precedent—does not recognize a free-standing actual innocence claim in a federal habeas corpus proceeding, it does permit such claims to serve as a gateway to overcome both procedural default and

expiration of the statute of limitations. *See Reed v. Stephens,* 739 F.3d 753, 766 (5th Cir. 2014); Pet. App'x A.11. The CCA, however, does recognize a free-standing actual innocence claim upon a showing, "by clear and convincing evidence that, in light of some newly discovered evidence, no reasonable juror would have convicted him[.]" *Ex parte Reed,* 670 S.W.3d 689, 744 (Tex. Crim. App. 2023); *see also Ex parte Elizondo*, 947 S.W.2d 202, 208–09 (Tex. Crim. App. 1996). Milam raised an actual innocence claim in both courts, in addition to advancing actual innocence as a "gateway" through § 2244(b)((2)(B)(ii) and Article 11.071 §5(a)(2). But, as made clear by the Fifth Circuit's denial of Milam's motion for authorization raising the same claims, Milam "cannot meet the standard that no reasonable factfinder would have found him guilty." *See* Pet. App'x. A.11.

Moreover, in a prior subsequent writ application, the CCA remanded for merits review of a claim regarding the continued reliability of bitemark analysis—the same allegation Milam now relies upon as part of his innocence and due process claims. The CCA denied relief, citing the State's significant evidence pointing to Milam's guilt aside from bitemark evidence, *Ex parte Milam,* 2020 WL 3635921, at *1; 2 SHCR-02, at 184–92, ##58–80, and concluding that the bitemark evidence could have been excluded altogether at trial with the same outcome, 2 SHCR-02, at 227, #163; *see also* 223–27, ##160–63 (conclusions on evidence); 2 SHCR-02, at 227, #162. Given that multiple avenues existed for presenting his claims, Milam fails to show that "adequate relief [could] not be obtained in any other forum or from any other court,"

and he is not entitled to the extraordinary relief he seeks in this Court. *Felker*, 518 U.S. at 652.

Milam is also not entitled to the extraordinary relief he seeks because his original petition is, in effect, an effort to circumvent AEDPA's restriction on successive habeas petitions. § 2244(b)(3)(E). Milam's attempt to circumvent AEDPA should not be condoned. Indeed, the Court in *Felker* held that while § 2244(b)(3)(E) did not repeal the Court's authority to entertain original habeas petitions, § 2244(b)(1) and (2) "certainly inform [the Court's] consideration" of them. *Felker*, 518 U.S. at 662–63. Consequently, the fact that Milam failed to make a prima facie showing that his claims satisfied § 2244(b)(2)(B)(ii) innocence provision should "certainly inform" the Court's consideration of Milam's original petition, and it provides an additional basis on which to deny Milam's extraordinary request. *Felker*, 518 U.S. at 662–63.

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Milam's original habeas petition is actually a successive habeas petition, and he simply disagrees with the circuit court's denial of his motion for authorization. His original petition should be denied.

Milam fails to show that the Fifth Circuit erred in considering and relying on his evidence and concluding it was insufficient—in light of the evidence as a whole—to make a prima facie showing under § 2244(b)(2)(B)(ii). For the same reasons, Milam fails to show that the Fifth Circuit exceeded its jurisdiction in denying his motion for

authorization. What Milam actually seeks is for this Court to correct the Fifth Circuit's application of a properly stated rule of law. But Milam's dissatisfaction with the Fifth Circuit's decision is a plainly inadequate justification for this Court to not only jettison the statutory limit on this Court's certiorari jurisdiction but also reach a question this Court does not grant certiorari to address. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)). His request for the extraordinary remedy of a writ of habeas corpus by way of an original petition should be denied.

B. The Fifth Circuit properly considered the evidence and determined that Milam was not entitled to authorization because he did not make a prima facie showing of innocence.

Milam moved in the Fifth Circuit for authorization to file a successive federal habeas petition raising three claims: (1) the introduction of prejudicial evidence rendered his trial fundamentally unfair under the Due Process Clause; (2) his death sentence violates the Eighth Amendment because he is ID; and (3) he is actually innocent. Milam also alleged he met the innocence requirement of § 2244(b)(2)(B)(ii). The Fifth Circuit denied authorization, in part, because Milam failed to make a prima facie showing of innocence under the clear and convincing standard set forth in § 2244(b)(2)(B)(ii). Pet. App'x A.10–11. In so finding, the court held:

> There is still ample evidence a reasonable jury could use to convict him, including his confession, the fact that he and his fiancée were the only

> ones in the house the night of the murder, his waiting to report the victim's death to the authorities, the presence of the victim's blood on his clothing, and his instructions to his sister to hide evidence. Without more, we cannot say that no reasonable factfinder could convict.

Pet. App'x A.11 (internal footnote omitted). Despite Milam's multiple avenues to consideration of his claims of innocence, including a state-recognized actual innocence claim, Milam now seeks to invoke this Court's original jurisdiction to reconsider his evidence under a more-restrictive and never-before recognized *Herrera* actual-innocence claim to make clear that the Constitution forbids the execution of an innocent person. Pet. 25. Milam then reurges the same argument and evidence that was rejected by the both the CCA and the Fifth Circuit—as either a stand-alone or gateway claim. Milam cannot justify the extraordinary relief he seeks in the face of that evidence.[4]

This Court has never recognized freestanding claims of innocence. *Herrera*, 506 U.S. at 404–05. Rather, a claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera*, 506 U.S. at 404). Moreover, in *Herrera,* this Court made

[4] Additionally, the Fifth Circuit noted that "some" of Milam's arguments and evidence were "either possibly or certainly time-barred" in addition to not qualifying for a "miscarriage of justice" exception. Pet. App'x A.11. Milam's ID claim was definitely barred by the one-year statute of limitations. Pet. App'x A.12. A motion for authorization may be denied where the claims the movant seeks to raise are time-barred. *In re Mathis*, 483 F.3d 395, 399 (5th Cir. 2007). The federal statute of limitations for habeas claims provides yet another impediment to relief that the Court would have to disregard to find that Milam is entitled to the extraordinary relief he requests.

clear that "a truly persuasive demonstration of 'actual innocence'" would only warrant federal habeas relief "if there were no state avenue open to process such a claim." 506 U.S. at 417.

But, as noted, Texas has an avenue by which to pursue innocence claims. *See Ex parte Elizondo*, 947 S.W.2d at 208–09. Milam raised an *Elizondo*-based claim before the CCA but the court dismissed it as abusive under Article 11.071 § 5. The Court should not now circumvent the CCA's resolution of this state-created avenue. Indeed, "because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera,* 506 U.S. at 417. Milam's claim falls woefully short under any threshold.

Indeed, to prevail on an actual-innocence claim in state court, a habeas applicant must show "by clear and convincing evidence that, in light of some newly discovered evidence, no reasonable juror would have convicted him[.]" *Ex parte Reed,* 670 S.W.3d at 744. The applicant "must do more than merely raise doubts about his guilt—he must produce 'affirmative evidence' of innocence." *Id.* (citation omitted). Furthermore, to allow assessment of a prima facie claim of constitutional error raised in a subsequent application, an applicant need only satisfy the lesser *Schlup*-type preponderance-of-the-evidence standard established in Article 11.071 § 5(a)(2). The Fifth Circuit requires the same "clear and convincing" standard as the CCA's actual

innocence precedent. *See* § 2244(b)2(B)(ii). Milam's claims failed to rise to the necessary standard in either court. Because he could not meet the lesser standard, his claim also fails to meet the "extraordinarily high" standard necessitated to prove a *Herrera* claim. The Court need not grant the extraordinary relief request.

Milam argues "new" evidence purportedly undermines the reliability of the bitemark evidence, DNA, and blood pattern analysis (BPA) from his trial, suggesting that no reliable forensic evidence links him to the murder. He asserts, the State can thus only establish his presence in the home at the time of Amora's death, and he confessed only because he is naïve and ID. Pet. 25–34. Milam further speculates that Carson *could* have been suffering from prosopometamorphopsia (PMO), an incredibly rare visual-perception disorder which causes sufferers to see distorted versions of people's faces causing them to look like demons, providing motive for her to kill Amora. Pet. 34–37.

The Fifth Circuit correctly concluded that Milam failed to demonstrate that, if the facts underlying this claim were proven, the evidence as a whole "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." § 2244 (b)(2)(B)(ii); Pet. App'x A.10–11. There was "ample evidence" for a reasonable jury to convict. Pet. App'x A.11. This conclusion is abundantly reflected by the record.

1. Evidence of guilt

Amora died of "homicidal violence, due to multiple blunt-force injuries and possible strangulation." *Milam,* 2012 WL 1868458, at *2. The medical examiner detailed her extensive injuries as follows:

> [F]acial 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.

Id. The medical examiner found no old injuries suggesting a pattern of abuse. *Id.*; 41 RR 198–99. And some of the injuries—specifically the mutilation of her genitals caused by the insertion of an object other than a penis, that extended into her body cavity—occurred hours before she died. 41 RR 190–96. In short, Amora was tortured to death over an extended period of time.

It is beyond question that Milam and Carson are the only people who could be responsible for Amora's brutal murder—whether individually or as parties.[5] Amora was found dead in Milam's home, and he and Carson were the only people in the house with Amora in the hours before her dead body was reported to the police. 44 RR 138–40. They were seen with Amora at 9 p.m. the night before the murder, 46 RR 96; and Milam called his sister before 9:30 a.m. the next day to tell her Amora was

[5] And even if, hypothetically, Milam was found guilty *only* through the law of parties, the evidence still fully supports this conviction.

dead, 40 RR 180–82. Despite calling his sister at 9:30 a.m., Milam did not call 911 to report Amora's death until after 10:37 a.m. 42 RR 103–15. Before finally calling 911, Milam and Carson went to a pawn shop, 42 RR 57–61; staged a crime scene in the house, 46 RR 180–83; and came up with a now-discredited alibi, 40 RR 113–23. Milam told several different versions of the events to investigators. *See* 39 RR 229–31, SX 15; 59 RR SX F1 at 26–30, 33, 48–49 (pretrial hearing exhibit). Apart from now accusing each other of sole responsibility, no other person has ever been credibly implicated, even now. *See Milam v. Jimerson,* No. 6:25-cv-00267 (E.D. Tex.), ECF No. 9, at 5–6 (Milam stating he does not intend to rely upon DNA evidence of a third party to prove actual innocence).

Further, Milam confessed to the crime. Milam told jail nurse, Shirley Broyles: "I'm going to confess. I did it. But Ms. Shirley, the Blaine you know did not do this. . . . My dad told me to be a man, and I've been reading my Bible. Please tell Jesseca I love her." 40 RR 161–66.[6] In closing arguments, the State broke this confession down to its parts, explaining the importance and credibility of each word. *See* 48 RR 145–51. The State called this confession "monumental," 48 RR 35–36, "unequivocal," and "a perfect gold standard confession," 48 RR 151. Milam's own words are damning.

Milam's clothing was forensically linked to Amora. Regarding the clothes Milam was wearing after discovery of Amora's body, the entire inside of Milam's shirt, the entire inside of his underwear, several spots on his jeans, the entire outside of

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[6] Milam's suggestion he was merely covering for Carson, does not negate his own guilt and the State has always argued the two were parties to this crime. *See, e.g.,* 48 RR 26.

one sock and part of the other, and his entire jacket all tested presumptively positive for the presence of blood. 43 RR 39–42. Amora's DNA was found on a sample swabbed from Milam's shirt, 43 RR 116–19, and a sample from the jeans he was wearing at arrest, 43 RR 119–20.

Further, Milam was observed at the pawn shop shortly before Amora's body was reported to 911 wearing jeans that were too large and obviously did not fit him, 42 RR 75–76, while a smaller-sized pair of bloodstained jeans were found discarded in the room where Amora was murdered.[7] *See* 42 RR 201–04, 229–30; 43 RR 73–75, 130–31; 48 RR 28–29. The bloodstain on the smaller jeans was described as "rather large," 46 RR 177–78; *see also* 44 RR 129 ("Nothing involved in this case had as much [bloodstain] as that pair of pants."), and primarily confined to the lap-area of the jeans, 43 RR 75. Crime scene investigator Noel Martin testified that he collected those jeans because they had stains "consistent with contact transfer bloodstains," a blood-spatter term of art meaning that "a bloodstain or a blood-soaked object which contained liquid blood on it at the time came in contact with the blue jeans, transferring blood to the surface of the jean." 42 RR 203–204, 229–30 ("[A] bloodied object come into contact with these jeans[.]"); 46 RR 177–78 (agreeing "contact transfer" comes from "direct contact with a blood object"). Martin agreed, the "blood-soaked object" could be a child, 42 RR 204, and he expected to find Amora's blood on the jeans, 46 RR 178. DNA testing of a sample from the bloodstain did, in fact, match Amora. 43 RR 130–31. This evidence strongly suggests the person wearing the jeans

[7] Milam's weight was known to fluctuate. 39 RR 157; 44 RR 141–42.

sat a bleeding Amora on his lap and later changed out of the bloody jeans.[8] 56 RR 121–22.

Milam also directed his sister, from jail, to remove evidence from under the house that was later connected by trace-evidence analysis to other incriminating crime-scene evidence.[9] Specifically, under the house, police found a pipe-wrench in a plastic bag that had been shoved through a hole in the floor of the master bathroom. 40 RR 204–07; 41 RR 28–29; 44 RR 49–50. Forensic analysis revealed the components of Astroglide on the pipe-wrench. 44 RR 153–54, 159–60. A bottle of Astroglide, babywipes, and a blood-stained diaper were found in the room where Amora was murdered; the components of Astroglide were found on these items as well as on the diaper Amora was wearing. 40 RR 185–87, 195–200–07; 44 RR 49–50, 151–66. The diaper was removed in the autopsy to reveal Amora's mutilated vagina and rectum, which were torn to such an extent that there appeared to be one large opening instead of two, and injury perforated internally, extending into her body cavity. 41 RR 190–92. The medical examiner said the injury was likely caused by insertion of an object other than a penis. 41 RR 191–96. While no blood was detected on the wrench, and no DNA profile obtained, 43 RR 50–52, 131, trial testimony revealed that silicone-based oil like that used in Astroglide is not water-soluble and would not wash off

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[8] The jury was shown video footage of Carson wearing the same clothing the night before and the morning after Amora's murder, *see* 48 RR 27–28, thus refuting any argument that Carson was wearing the blood-soaked jeans.

[9] Milam's sister testified that he asked her to retrieve a blue cellphone from under the house, 40 RR 172–74, 185–87, 195–200; 52 RR 104; but no cellphone was found under the house.

completely if put in water, while blood and DNA could wash off in water. 43 RR 174; 44 RR 166–67.

Regarding the DNA evidence now at issue, at trial, the DNA analyst testified that neither Milam nor Carson could be excluded as a contributor of DNA on four of the samples swabbed from the numerous bitemarks on Amora's body. 43 RR 133–38. On one of those samples taken from Amora's left elbow (No. 20I), the majority of the genetic markers corresponded to Milam with a statistical probability of 1 in 27,000 Caucasians. 43 RR 136–137, 183–86.[10] While Carson also could not be excluded, the probability of her being a contributor was only 1 in 123 Caucasians. 43 RR 137.

Finally, expert testimony from two forensic odontologists—including a defense expert, confirmed on peer-review by a third—indicated that Milam could not excluded as a contributor of at least two of the twenty-four bitemarks, possibly more. *See* 2 SHCR-02, 178–86, ##23–57; 218–23, ##141–60.

Milam's sole defense is that Carson acted alone while he apparently stood by and did nothing, and he confessed because he was naïve and ID. *See* Pet. 34–37. But the jury rejected this defense at trial, and the trial court and the CCA have twice determined Milam is not ID. *See* SHCR-04 373, 426–35. The second determination came after expert reexamination—where Milam's IQ score increased substantially—and a live evidentiary hearing. SHCR-04 at 386–408.

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[10] Milam contends this DNA could have been left when he attempted CPR, *see* Pet. 30 n.16, but the CCA previously found this contention not credible. 2 SHCR-02, at 227, #161(g)(2). Amora was cold to the touch and completely stiff when police arrived, 39 RR 145–46, suggesting she had been dead for a while when 911 was finally called. Regardless, CPR does not explain the presence of DNA on her elbow.

The jury also rejected the notion that Milam stood by innocently while Carson alone beat, strangled, bit, and mutilated her child over a period of hours. His purported inaction while a child was being tortured to death in his home demonstrates complicity in the crime, but his actions after her death confirm his involvement. After her death, Amora's body was moved to the master bedroom, a crime scene was staged, and evidence was hidden under the house; Milam and Carson delayed calling 911 to report the death, prepared an alibi, and lied to the police. Milam then tried to tamper with evidence from jail and later confessed. The actions of Milam and Carson before, during, and after the murder demonstrate their guilt under, at least, the law of parties and the facts of the crime alone support the sentence of death. *Cf. Guevara v. State,* 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (in reviewing sufficiency of the evidence to support conviction by law of parties, court should look at "'events occurring before, during and after the commission of the offense and may rely on actions of the defendant which show an understanding and common design to do the prohibited act.'") (citing *Cordova v. State,* 698 S.W.2d 107, 111 (Tex. Crim. App. 1985), and *Thompson v. State,* 697 S.W.2d 413, 416 (Tex. Crim. App. 1985), *superseded by statue, Ex parte Patterson,* 969 S.W.2d 16 (Tex. Crim. App. June 10, 1998)). And the State has always maintained the two did the crime together, even with Milam's confession.

Milam now tries to shift blame to Carson with new evidence of an extremely rare medical disorder—one that she has not been diagnosed with—to suggest she had motive to commit murder. He additionally tries to dissect the State's forensic evidence

with new experts and reports, much of which could have been discovered and presented in his first subsequent state writ; or with details that were thoroughly developed at trial or could have been developed. At best, much of Milam's evidence is just fodder for additional cross examination. And none of the evidence even suggests Carson alone committed murder, while Milam did not. None of the evidence meets the "clear and convincing" standard necessary to satisfy § 2244(b)(2)(B)(ii). It certainly does not rise to "truly persuasive demonstration" required by *Herrera.*

2. Milam's new evidence

Milam's new evidence does not provide even clear and convincing evidence that no reasonable factfinder would find him not guilty. First, Milam raised a claim alleging the unreliability of bitemark evidence in 2019 under Article 11.073, which the CCA rejected. *See Ex parte Milam*, 2020 WL 3635921, at *1. Milam offers a new report from 2023, from the National Institute of Standards and Technology's ("NIST") entitled "Bitemark Analysis: A NIST Scientific Foundation Review," to again argue that new scientific evidence demonstrates that bitemark evidence is unreliable junk science and would not be admissible on retrial, thereby eliminating the forensic link to Amora's injuries. Pet. 26–28.

But the very existence of twenty-four human bitemarks covering Amora's body would still be admissible testimony. Even if the State could no longer offer testimony including or excluding Milam from those bitemarks, the exclusion would not support Milam's innocence. Again, Milam and Carson were the only two people who could be responsible for leaving those bitemarks on Amora's body. The State's inability to

prove which assailant bit her twenty-four times does not negate the fact that Milam was present, was fully aware that a torturous murder was happening, either participated or did not stop it, and then took steps to cover up their involvement and tamper with evidence afterwards. And then he confessed.

Following merits review of the 11.073 claim in the trial court, the CCA recited the State's significant evidence pointing to Milam's—and Carson's—guilt, aside from bitemark evidence, 2 SHCR-02, at 184–92, ##58–80, and concluded, in part, that given the evidence, "if bitemark testimony were excluded all together, Milam still could not demonstrate, by a preponderance of the evidence, that he would not have been convicted as either the primary perpetrator or as a party to this capital murder." 2 SHCR-02, at 227, #163; *see also* 223–27, ##160–63 (conclusions on evidence); 2 SHCR-02, at 227, #162 (concluding, "the very existence of twenty-four bitemarks on this child's bruised and battered body, coupled with the circumstantial evidence implicating [Milam] in this brutal murder, DNA evidence linking him to the injuries, his considerable efforts to cover up his involvement and hide evidence after the fact, and his confession were all indicative of his guilt. [Milam] and [Carson] were the only two people who could have inflicted these injuries upon Amora the night of her murder.").

Additionally, in a 2017 Texas Forensic Sciences Commission (TFSC) report, the TFSC considered Milam's case for review, but ultimately declined to reexamine the bitemark evidence, citing "overwhelmingly inculpatory case facts."[11] Even the

[11] *See* https://www.txcourts.gov/media/1445768/bite-mark-review-report.pdf at

commission advocating against admission of bitemark analysis testimony does not find such evidence probative of Milam's guilt or innocence. For these reasons, this evidence falls well short of the "extraordinarily high" showing needed to prove his innocence.

Moreover, the SWIFS DNA recalculation in not exculpatory.[12] At trial, the jury heard that neither Milam nor Carson could be excluded as a contributor of the DNA found on four of the samples swabbed from the numerous bitemarks on Amora's body—swabs 20A, 20I, 20Q, and 20R. 43 RR 133–38. On sample 20I taken from Amora's left elbow, the majority of the genetic markers corresponded to Milam with a statistical probability of 1 in 27,000 Caucasians, while Carson's probability of being a contributor was only 1 in 123 Caucasians. 43 RR 137. While Milam has always downplayed the significance of this DNA, *see Milam v. Jimerson,* No. 6:25-cv-00267, ECF No. 1, at 4, 6–7, the CCA found it relevant in denying his 2019 subsequent writ, given they were the only two people with Amora on the night of her murder, and

14 (link to Bite Mark Case Review Reports Exhibits) (Exhibit D: Bite Mark Case List Final)

[12] The prior availability of this evidence since 2015, and Milam's utter failure to seek recalculation of the DNA evidence until 2025, was discussed at length in both the CCA and the Fifth Circuit. *See, e.g., Milam v. Jimerson,* No. 6:25-cv-00267 (E.D. Tex.), ECF No. 23, at 15–21. The Fifth Circuit agreed with the Respondent that "[s]ome of his arguments regarding "new" evidence are either possibly or certainly time-barred." Pet. App'x A.11. For the sake of brevity, the Respondent will not belabor the fact that Milam did not seek retesting of the DNA evidence until SWIFS urged him to do so following his filing of a complaint against SWIFS in 2025. Since Milam only sought recalculation of four samples, SWIFS urged the State to recalculate all samples, to which the State agreed. But the failure to initiate recalculation until ten years after he was initially urged to do so a problem of Milam's own making.

Milam now blames Carson. Thus, the DNA evidence taken from injuries on Amora's body strongly pointed to Milam as the contributor of those injuries, rather than Carson, thereby undermining his argument. *See* 2 SHCR-02, at 191–95, #80; 226–27, #161(g).

The recent recalculation of the DNA only strengthens the State's argument and lends no support to Milam's claim of innocence. While recalculation of sample numbers 20A, 20Q, and 20R excluded him, Milam was still included as a contributor to sample number 20I, but now with a statistical probability of 1 in 492,000—significantly higher than the statistical probabilities attested to at trial—while Carson is now excluded entirely. Mot. Exh.[13] 12, at 7–8. Thus, while Milam could now argue DNA does not link him to three of the bitemark injuries,[14] the DNA evidence still links Milam to the bitemark on Amora's elbow, even more convincingly than it did at trial. But it is one piece of evidence supporting conviction, and certainly not the deciding factor in determining his guilt. *See* 2 SHCR-02, at 186–92, #57–80; 223–28, #160–64.

Regarding the swabbing taken from Milam's shirt—sample 10AT1—SWIFS analyst Angela Fitzwater testified that it appeared to be a complete single-source

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[13] "Mot. Exh." refers to the exhibits proffered with Milam's Motion for Authorization in the Fifth Circuit.

[14] At trial, the SWIFS analyst testified that she could include Amora, Carson, and Milam as possible contributors to these samples but nothing more. 43 RR 133–35. On cross-examination she admitted the possibility that all the genetic markers in these three samples could be accounted for by Amora's DNA alone. 43 RR 155–56. Thus, the probative value of this evidence at trial was already minimal.

profile corresponding to Amora, but she also observed a single genetic marker, detected at trace levels that corresponded to genetic markers in the profiles of Milam, Carson, and Danny Milam. 43 RR 116–17. She calculated the statistical probability that an unrelated person could match Amora's profile as 1 in 2.58 trillion Caucasians. 43 RR 118. Following recalculation, the likelihood of the sample including Amora fell to a probability of 1 in 674 billion, but also included Carson, Danny Milam, and Milam, each with the probability of 1 in 2. Mot. Exh. 12 at 7. Milam argues evidence no longer supports the State's argument that the DNA on the shirt came from Amora's blood. Pet. 31–33; 48 RR 39. But Fitzwater admitted on cross-examination that she could not confirm that this sample was Amora's blood and not some other form of DNA. 43 RR 141–45. And the SWIFS "recantation" still strongly suggests the DNA belonged to Amora, with a small possibility it could be Danny, Milam, or Carson. Even with additional rebuttal testimony this the new SWIFS report might provide, the jury could still conclude that the DNA came from Amora, and it could be her blood.

While Milam argues that the SWIFS report fails to demonstrate whether samples are saliva, and "makes explicit" that the DNA evidence does not provide information on how or when the evidence was transferred, Pet. 29, Fitzwater admitted this at trial. She could not confirm that 10AT1 was actually Amora's blood and not some other form of DNA, she could not conclusively say that the source of any of the bitemark samples was saliva, it could have been skin cells, and she also could not tell the jury how the DNA got there, 43 RR 141–49; and she admitted that the presence of DNA from Milam, Carson, and Amora were "expected results." 43 RR 113.

Any argument that either the original testing or the recalculation is "demonstrably suspect driven" is specious. *See* Pet. 29–30. As noted, only two people could be responsible for this murder—those two suspects were necessarily tested. Milam's brother[15] was nevertheless included in the analysis and reinterpretation, as well as the victim, and results were obtained for all four people. In the recalculation Milam was *eliminated* from samples. Any suggestion of partiality on the part of SWIFS is unfounded and does not undermine the results. While Milam's continuing challenges to the adequacy of SWIFS procedures might provide useful cross-examination, it would not exclude the evidence at trial. Notably, SWIFS has recently denied any such bias in response to yet another late-filed complaint against them. *See* Resp. App'x A.9–10.

Again, only Milam or Carson, or both, could have killed Amora, and both were charged as parties. As with the bitemark evidence, one could eliminate the DNA testimony connecting Milam to those bitemarks altogether, but it would not undermine the existence of the bitemarks or the fact that Milam was fully involved in the events surrounding Amora's murder. DNA was but one piece of evidence cited by the State to connect Milam to the murder, it was not the entire case.

Milam also argues that forensic testing does not confirm the presence of Amora's blood on any clothing known to be worn by Milam. Pet. 31. But no trial witness testified to this. *See* 43 RR 141–45 (no confirmation that 10AT1 was actually

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[15] Any reference to Danny Milam is a red herring. Danny was in jail on the evening of December 1, after which he drove to Louisiana to spend the night with his sister and mother. 44 RR 139–40. Neither he nor his mother were suspects.

Amora's blood). In an effort to undermine any connection between him and the bloody jeans, Milam tries to undermine the BPA testimony provided by Noel Martin, suggesting it was not methodically sound and therefore unreliable. Pet. 31–33; Mot. Exh. 6. At best, the new exhibit from Angela Tanzillo-Swarts could provide additional cross-examination regarding improper scene processing, post-crime contamination, methodologically unsound analysis and procedure, and poor documentation by Martin. But much of this was or could have been discussed at Milam's 2010 trial. Indeed, her report is largely based upon reexamination of the trial evidence.

The problems with the processing of the crime scene—including the delayed discovery of the actual murder scene, the family having access to the crime scene for several days before discovery, and the presence of animals, feces, and the overall dirtiness of the house—were thoroughly discussed at trial. *See, e.g.,* 42 RR 214–16; 46 RR 162–74, 191. Milam's trial counsel recalled Martin as his own witness to examine Martin's protocols. 46 RR 110–74, 186–94. Martin essentially admitted the house was not processed by normal protocols and he would have done it differently if he had been on the scene December 2nd, rather than December 11th. 46 RR 143.

Milam's argument primarily focuses on Martin's testimony regarding the discovery of the blood-stained jeans. Martin testified that the jeans were found discarded in the second room, *see* 42 RR 201–04, 229–30; 43 RR 73–75, 130–31; 48 RR 28–29—the room where Amora was murdered. Martin discussed discovering the jeans during a "layer search," noting that they are not visible in earlier pictures, and admitting that evidence in that room had been moved during the time between the

murder, the initial search, and his search of the room days later. 46 RR 176–78, 186–89, 194–95.[16] The "rather large" bloodstain on the jeans, 46 RR 177–78; *see also* 44 RR 129 ("Nothing involved in this case had as much [bloodstain] as that pair of pants."), primarily confined to the lap-area of the jeans, 43 RR 75, led Martin to collect them. He believed they had stains "consistent with contact transfer bloodstains," a blood-spatter term of art meaning that "a bloodstain or a blood-soaked object which contained liquid blood on it at the time came in contact with the blue jeans, transferring blood to the surface of the jean." 42 RR 203–04, 229–30; 46 RR 177–78. Martin agreed, the "blood-soaked object" could be a child, 42 RR 204, and he expected to find Amora's blood on the jeans, 46 RR 178. DNA testing of a sample from the bloodstain confirmed Amora's blood. 43 RR 130–31. This evidence strongly suggests the person wearing the jeans sat a bleeding Amora on his lap and later changed out of the bloody jeans. 56 RR 121–22.

While Tanzillo-Swarts tries to undermine Martin's methodology, she does not dispute that the blood-stained jeans could have been worn by a person at the time the blood was deposited and that the bloodstains could be the result of contact transfer, just as a Martin speculated. She just cannot confirm that opinion from the evidence she reviewed, fifteen years after the trial. Mot. Exh. 6, at 27. Her criticism of his technique does not render the results unreliable. Nor does it explain how the jeans

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[16] Initially Martin appeared to say that the bloodstained jeans had been moved into that room and that other jeans were discovered in the layer search. But on further examination by the State, he maintained that the bloodstained jeans were found in the layer search. 46 RR 186–89, 194–95.

got there, why they were covered in the victim's blood, or why Milam was wearing different jeans that did not properly fit him the day after the murder, while Carson was wearing the same clothing. *See* 2 SHCR-02 188–89. This evidence is not clear and convincing evidence of innocence.

Finally, Milam argues he could now present evidence of PMO disorder as motive for Carson to murder Amora. Based upon statements Carson made to investigators, that were not introduced at trial, Milam speculates that both Amora and Milam looked demon-faced to Carson, causing her to believe Amora was possessed by a demon and thus providing motive for Amora's murder. *See* Pet. 34–35. In no way does this theory demonstrate Milam's innocence or even Carson's guilt.

Carson has not been diagnosed with this condition. Milam presents an affidavit from PMO expert Brad Duchaine who reviewed Carson's statements and ultimately concluded, Carson's "perceptions of her child's face and [Milam's] face are consistent with what someone experiencing face distortions might report. In addition, her statements are consistent with what someone experiencing voice distortions might report." Mot. Exh. 7, at 11. This cursory suggestion that Carson's comments were "consistent" with statements that someone suffering from the condition "might report," based upon review of two transcripts, is a far cry from diagnosis. Indeed, the condition is incredibly rare. *Id*. at 1. And Duchaine did not suggest he would actually diagnose Carson with this disorder, or that he would even be willing to attest to such a connection if called at trial. Finally, at no point does Duchaine describe a violent or homicidal reaction to seeing the distorted faces due to PMO.

Milam suggests PMO provides motive because there was no explanation for why Carson believed her daughter was possessed by a demon. Pet. 3–4. To the contrary, the evidence at the punishment phase of trial showed that Milam and Carson were using a Ouija Board to purportedly contact their dead fathers, after which they began behaving strangely. 51 RR 307–14, 349–52; 52 RR 98, 109, 120–21; 55 RR 245, 269–70. The defense argued the "demon-possession" defense to the jury, bolstered by the Ouija Board evidence, but the jury was unpersuaded.

Carson's statements were not admitted at trial, but they support the Ouija Board defense.[17] Carson mentioned the Ouija Board to Ranger Ray once he convinced her to tell him what really happened, and says, around this time she observed Milam purportedly change into a demon. *See* Mot. Exh. 24, at 7–14; Mot. Exh. 25 at 79–84. According to Carson's statements, Milam also began speaking to Carson in a scary voice and telling her he was not Blaine. Carson did not actually witness most of the changes to Amora she describes in her statements, as Milam kept Amora away from Carson. Milam told Carson Amora was evil and possessed by a demon and described Amora's distorted features and her violent behavior. *See* 3 SHCR-01, at 315–16, #8; *see also* Mot. Exh. 25, at 84–99, 107–09; Mot. Exh. 24, at 13–20. The evidence

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[17] The State successfully fought to keep these hearsay statements out of Milam's trial, thus negating any suggestion that "the State adopted Carson's narrative." Pet. 3, 5. Carson's statements are consistent with the Ouija Board defense, with Carson suggesting the bizarre turn of events began with their use of the board to contact their dead fathers. Mot. Exh. 24, at 7–14; Exh. 25 at 79–84. Regardless, the statements clearly reflect that Milam was manipulating Carson into believing he and Amora were possessed. *See* 3 SHCR-01, 315–16. The exclusion of these statements was the subject of unsuccessful appellate issues in Milam's first and second state writs. *See* 3 SHCR-01, at 314-30; *see also Ex parte Milam,* 2020 WL 3635921, *1.

regarding the Ouija Board and Carson's interest in the movie *The Exorcist*, 51 RR 316–17, would undercut any speculation that she might suffer from PMO.

Milam argues there is "no comparable evidence about why [he] would commit such an offense." Pet. 8. However, Milam's former boss, neighbor and friend, Bryan Perkins, testified that Milam was jealous and had "control issues" over Carson and did not trust her. 50 RR 37–41. Perkins described Milam as having a temper and short fuse, 50 RR 41, 51; and described occasionally hearing Milam and Carson fighting in the apartment while the baby cried, 50 RR 43–44. When Perkins tried to talk to Milam about his control issues, Milam responded that, "with that baby," he and Carson were never going to have a life. 50 RR 44–45. Further, evidence from the punishment phase demonstrated Milam was a registered sex offender for a solicitation crime against an eleven-year-old neighbor and was not even permitted to be around children. *See* 49 RR 31–39. Such evidence suggests he was not the doting, loving father he would now like to portray.

The jury rejected the defense that Carson solely beat and shook her child to extract demons from her. *See* 48 RR 107–08. It is vanishingly unlikely that unfounded speculation that she was suffering from PMO would create a different result. It certainly does not absolve Milam of involvement in the murder.

In total, Milam's evidence fails to provide facts that "would be sufficient to establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense." Pet. App'x A.10. Indeed, he cannot deny his presence and involvement after the crime. This evidence does

nothing to shift the blame to only Carson. Because Milam cannot make a prima facie showing of innocence despite having been afforded opportunities to do so, there is no basis to grant the extraordinary remedy he seeks for an actual innocence claim under the "extraordinarily high" standard required by *Herrera*. Milam's original petition for a writ of habeas corpus should be denied.

C. The Fifth Circuit properly determined Milam failed to make a prima facie showing of a due process violation.

Neither the CCA nor the Fifth Circuit reached the merits of the due process claim, and the Fifth Circuit did not do so because Milam's "arguments regarding the 'new' evidence are either possibly or certainly time-barred and do not qualify for a miscarriage of justice exception" to that time-bar, and alternatively Milam could not satisfy the innocence exception under § 2244(b)(2)(B)(ii). Pet. App'x A.11. For the same reasons, this Court should not exercise the extraordinary remedy he now seeks to answer the question of whether conviction based on now-discredited scientific evidence violates due process. Pet. 25–26.

Milam's proposed due process claim requires the Court to recognize a new constitutional rule. To be sure, this Court has recognized that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citation omitted); *Kansas v. Carr*, 577 U.S. 108, 123 (2016) (citation omitted); *Andrew v. White*, 604 U.S. 86, 91–92 (2025). But in those cases, the Court did not rule that scientific evidence presented at trial—*later* discredited or undermined to some degree by scientific

advancements—was so unduly prejudicial that it rendered the trial fundamentally unfair.[18] Rather, in *Payne*, *Carr*, and *Andrew*, the Court, respectively, addressed the introduction of victim impact statements during sentencing, the issue of a joint sentencing proceeding, and the introduction of potentially irrelevant evidence. *Id.*

Thus, where this Court has considered the admission of certain evidence unduly prejudicial such that it rendered the trial fundamentally unfair, the Court was tasked with determining whether the evidence was wrongfully (i.e., unduly) admitted *at the time of trial*. This is not the same as Milam's claim. Milam does not argue that the admission of bitemark, DNA, and BPA evidence was wrongfully admitted at the time of trial; instead, he argues that because scientific advancements now undermine the reliability of such evidence, his trial was fundamentally unfair in violation of the Due Process Clause.[19] This Court has not created a constitutional rule that the admission of scientific evidence—which was called into question many years

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[18] Milam relies on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) for the notion that "[f]alse or unreliable forensic evidence has long been recognized as unduly prejudicial." Pet. 25. But as in the other cases he cites, the Court in *Daubert* was assessing the reliability of the scientific evidence as assessed at the time of trial. 509 U.S. at 582. Milam does not complain that the evidence at-issue was improperly admitted at the time of trial. *Daubert* does not speak to whether later scientific advancements, which call into question the reliability of certain forensic evidence admitted at trial, can serve as a basis to a due process claim.

[19] This distinction matters. Milam is not contending that some *process* employed in his case—for instance, the trial court's admission of irrelevant evidence or a prosecutor's improper argument—deemed his trial fundamentally unfair. He shoehorns a non-cognizable actual-innocence claim based on new scientific developments into a due process claim. *Herrera*, 506 U.S. at 400.

after the fact due to scientific advancements—deems a trial fundamentally unfair or gives rise to a due process claim.

To extend precedent in the way Milam now proposes would violate the rule against retroactive application of a new constitutional rule in habeas proceedings. *See Teague v. Lane,* 489 U.S. 288, 311 (1989); *see also* 28 U.S.C. § 2254(d)(1) (barring federal habeas relief unless the state court's "decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). The Fifth Circuit was correct to decline to consider such a claim because Milam could not make a prima facie showing that he meets § 2244(b)'s requirement that "but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." § 2244(b)(2)(B)(ii).[20]

Teague-bar aside, the purportedly newly-found evidence does not show Milam's trial was fundamentally unfair. Regarding the bitemark testimony, as noted, the victim was covered in twenty-four human bitemarks, and the Milam was one of only two people who could possibly be responsible for those marks and the victim's murder. The CCA previously concluded, "if bitemark testimony were excluded all together, Milam still could not demonstrate, by a preponderance of the evidence, that he would

[20] Milam's claim more squarely fits under the principles underlying false testimony claims. But this Court in that context has held that "a conviction obtained through use of false evidence, known to be such my representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Milam does not contend the State knew of any falsity of the bitemark, DNA, or serology evidence at the time of trial. Milam also fails to make a prima facie showing under § 2244(b) to move forward on a false testimony claim.

not have been convicted as either the primary perpetrator or as a party to this capital murder." 2 SHCR-02, at 227, #163; *see also* 223–27, ##160–63 (conclusions on evidence). And the TFSC declined to reexamine Milam's case citing "overwhelmingly inculpatory case facts." Therefore, the admission of this testimony, even if not admissible under current standards, did not render Milam's trial fundamentally unfair.

Similarly, the limited value of the DNA opinion testimony established that Milam could not be excluded as a contributor of DNA on swabs taken from bitemarks on Amora's body, and that Amora's DNA likely on his shirt and was possibly blood. The evidence still establishes these points. Further, Milam has argued and a trial witness has admitted that DNA from Amora, Milam, and Carson was expected to be at the scene. 43 RR 113, and the DNA from Milam's shirt may not have been blood. 43 RR 141–45. The DNA refuted—and still refutes—Milam's argument that only Carson was responsible for causing the injuries that led to Amora's death but it was not the linchpin which led to his conviction. Again, only Milam and Carson could be responsible, and the evidence overwhelmingly demonstrates they were active participants before, during, and after Amora's murder. *And Milam confessed*.

Regarding the BPA evidence, while the new expert tries to undermine the State expert's methodology and technique, she cannot refute his theory that the blood-stained jeans were worn by a person at the time the blood was deposited and that the bloodstains could be the result of contact transfer, just as a Martin speculated. Mot. Exh. 6, at 27. Her criticism provides no explanation for the presence

of blood, or why Milam was wearing ill-fitting jeans the day after the murder, while Carson was wearing the same clothing. *See* 2 SHCR-02 188–89. Milam's evidence does not render Martin's testimony inaccurate. It is certainly not so prejudicial as to render his trial fundamentally unfair.

Milam fails to prove exceptional circumstances warranting the Court's exercise of discretionary powers. Milam's request for an original petition should be denied.

II. The Court Should Deny a Stay of Execution.

Milam's motion for a stay of execution should be denied. The relevant equitable considerations weigh against Milam. He should not be permitted to further delay the carrying out of his just sentence. A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). "It is well-established" that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id.* at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case where the State and the victims have for years borne the

"significant costs of federal habeas review." *Herrera*, 506 U.S. at 421 (O'Connor, J., concurring); *see also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and victims have an important interest in a sentence's timely enforcement).

Thus, in deciding whether to grant a stay, the Court must consider four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Ramirez v. Collier,* 595 U.S. 411, 421 (2022). The equities weigh against granting Milam a stay of execution.

As demonstrated above, Milam fails to state a claim for which relief can be granted and the CCA's application of an adequate and independent state ground to deny relief precludes a federal court from granting him the relief he seeks. Thus, he cannot demonstrate the likelihood of success on the merits of any claim on appeal. Furthermore, while "the death penalty itself is irreversible, there comes a time when the legal issues have been sufficiently litigated and re-litigated so that the law must be allowed to run its course." *United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020) (quotation and citation omitted). Milam has challenged his conviction for fifteen years. He has pursued relief in state and federal court multiple times. He has been given the opportunity to litigate his conviction and his claims regarding intellectual disability twice, including an evidentiary hearing. The legal issues in his case have

been sufficiently considered and the law should be allowed to run its course.

A federal court must also consider "the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Nelson*, 541 U.S. at 649. Indeed, "there is a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650. Here, Milam's claims and request for a stay are plainly dilatory. Despite insisting he is not responsible for failing to seek DNA recalculation prior to 2025, Mot. at 4, the record shows otherwise. Even by Milam's own account, he did not request the complete DNA records until 2024, and even then, he requested the records through SWIFS, not the district attorney. *See* ROA.12–14. Thus, the request for DNA at the center of his current complaint came nearly fifteen years after his conviction, after the disposition of his initial state habeas application, after the state court's consideration of multiple subsequent state habeas applications, and after the trial court set his third execution date.

Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Milam insists any harm to the State or the victims is mitigated because a stay is "only a temporary measure[.]" Mot. 4. But further delay of his execution would "work[] a 'miscarriage of justice'" on the State and the victims. *Price v. Dunn*, 587 U.S. 999, 1008–09 (2019) (Thomas, J., concurring). Milam's challenges to his death sentence have persisted since 2010 and he has successfully stayed two prior execution dates. These delays have proven to be more than temporary and he should not now be permitted to litigate

evidence he was aware of at trial and would not prove his innocence.

Milam's third subsequent application was properly dismissed by the CCA, as was his motion for authorization by the Fifth Circuit. Milam cannot make a strong showing that he is likely to succeed on the merits of his original writ to this Court. Moreover, when considering the significant delay in Milam's pursuit of DNA evidence, he cannot overcome the strong presumption against granting a stay. He also cannot demonstrate that the balance of equities falls in his favor. Milam tortured and mutilated a thirteen-month-old baby, in an attack that lasted hours before Amora finally died from her injuries. Milam confessed, and no other suspect—aside from Carson, who the State agreed was an accomplice and who was convicted in her own trial—has ever been implicated. It is long past time for Amora and her family to receive the justice she deserves. Milam is not entitled to a stay of execution.

CONCLUSION

"[C]hallenges to lawfully issued [capital] sentences" must be resolved "fairly and expeditiously." *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). To guard "against attempts to use such challenges as tools to interpose unjustified delay," courts should apply a strong presumption against equitable relief for a capital litigant making a last-ditch plea to avoid his sentence. *Id.*; *Hill*, 547 U.S. at 584. Accordingly, this Court should therefore deny Milam's petition for original writ of habeas corpus. Moreover, the State's strong interest in the timely enforcement of a sentence is not outweighed by the unlikely possibility that Milam's petition will be granted. Thus, Milam's application for a stay of execution should be denied as well.

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