Addendum A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-41,313-05

EX PARTE VICTOR SALDANO, Applicant

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. W199-80049-96-HC3
IN THE 199TH CRIMINAL DISTRICT COURT
COLLIN COUNTY**

Per curiam.

O R D E R

This is a postconviction application for a writ of habeas corpus filed under Texas Code of Criminal Procedure Article 11.071, Section 5. In it, Applicant raises a single claim: that he "is intellectually disabled and ineligible for execution under the Eighth and Fourteenth Amendment[s]." *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits the execution of "mentally retarded" offenders).[1]

[1] The medical literature now refers to "mental retardation" (MR) as "intellectual disability" (ID) and "intellectual developmental disorder" (IDD). *See, e.g.*, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS,
(Continued . . .)

In July 1996, a Collin County jury found Victor Saldano, Applicant in this case, guilty of capital murder. Based on the jury's answers to the special issues set forth in Article 37.071, the trial court sentenced Applicant to death. In a back-and-forth process that is not relevant here, this Court ultimately affirmed Applicant's conviction and sentence on direct appeal. *See Saldano v. State*, No. AP-72,556 (Tex. Crim. App. Sept. 15, 1999) (not designated for publication); *Saldano v. Texas*, 530 U.S. 1212 (2000); *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002) (on remand from the United States Supreme Court).

Applicant filed his initial 11.071 application in April 1999. This Court denied relief. *Ex parte Saldano*, No. WR-41,313-01 (Tex. Crim. App. May 5, 1999) (not designated for publication). In February 2000, Applicant filed in this Court an "Application for Stay of Execution," which this Court denied. *Ex parte Saldano*, No. WR-41,313-02 (Tex. Crim. App. Feb. 16, 2000) (per curiam).

Applicant eventually obtained federal habeas relief from his death sentence. *Saldano v. Cockrell*, 267 F.Supp.2d 635, 642 (E.D. Tex. 2003). His resentencing took place in November 2004. Although the Supreme Court had decided *Atkins* in June 2002, Applicant did not adduce evidence that he was (in the terminology of the time) mentally retarded. The jury answered the statutory special issues in favor of a death sentence, and

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FIFTH EDITION, TEXT REVISION (DSM-5-TR) 38 (5th ed. 2022); *Hall v. Florida*, 572 U.S. 701, 704–05 (2014) (noting that these terms "describe [an] identical phenomenon").

the trial court sentenced Applicant to death. This Court affirmed Applicant's second death sentence on direct appeal. *Saldano v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007).

Applicant filed his initial 11.071 application following resentencing in February 2007. He did not raise an *Atkins* claim. This Court denied relief. *Ex parte Saldano*, No. WR-41,313-04 (Tex. Crim. App. Oct. 29, 2008) (not designated for publication). In October 2007, Applicant filed his first subsequent 11.071 application following resentencing. Again, he did not raise an *Atkins* claim. This Court dismissed the application as an abuse of the writ. *Ex parte Saldano*, No. WR-41,313-03 (Tex. Crim. App. Jan. 16, 2008) (not designated for publication).

Applicant filed the instant application, his second subsequent 11.071 application, in the convicting court in June 2024. As mentioned, in a single claim, Applicant alleges for the first time that he is intellectually disabled and ineligible for execution. *See Atkins*, 536 U.S. at 321. He argues that this claim satisfies the requirements of Article 11.071, Section 5 because: (A) he could not have presented this claim in a previous 11.071 application, as its legal basis was heretofore unavailable, *see* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1); and (B) if true, the evidence he has marshaled in support of his *Atkins* claim is so "clear and convincing" that no rational factfinder would fail to find him intellectually disabled, *see id.* § 5(a)(3); *Ex parte Blue*, 230 S.W.3d 151, 162–63 (Tex. Crim. App. 2007). The State, meanwhile, has filed a "Brief in Support of Remand," in which it "joins Saldaño's request to return his subsequent writ application to the trial court for further record development and fact findings on his ID claim."

Having reviewed Applicant's application and appendix as well as the records of his initial trial, resentencing, and prior habeas proceedings, we conclude that the instant application does not satisfy the requirements of Article 11.071, Section 5. The legal basis for Applicant's claim is the United States Supreme Court's opinion in *Atkins v. Virginia*, issued in June 2002. *See* 536 U.S. at 304. That legal basis was available to Applicant when he filed his previous 11.071 applications following resentencing. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(d). Therefore, Applicant's claim may not proceed under Article 11.071, Section 5(a)(1). Further, Applicant has not pleaded "sufficient specific facts that, if true, would establish by clear and convincing evidence that no rational fact finder would fail to find him" intellectually disabled. *See Blue*, 230 S.W.3d at 162 (internal quotation marks omitted). For that reason, Applicant's claim may not proceed under Article 11.071, Section 5(a)(3).

With no applicable Section 5 exception, we dismiss this application as an abuse of the writ. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(c).

IT IS SO ORDERED THIS THE 16TH DAY OF APRIL, 2025.

Do Not Publish

Addendum B

WR-41,313-05
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

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EX PARTE VICTOR SALDAÑO, APPLICANT	Writ No. 41,313-05 Trial Cause No. 199-80049-96

Unopposed Suggestion for Reconsideration of Dismissal of Subsequent Application

There is now no factual disagreement about Mr. Saldaño's intellectual disability (ID) or his entitlement to develop facts, as authorized by Section 5 of Article 11.071, in furtherance of his ID claim.[1] Importantly, however, this is not a case that began with an agreement between Mr. Saldaño's counsel and the Collin County District Attorney's office (CCDAO). Indeed, at the time of undersigned counsel's appointment to Mr. Saldaño's case, the CCDAO was imminently seeking Mr. Saldaño's execution, and the parties commenced execution competency proceedings under Tex. Code Crim. Proc. Art. 46.05. It was only after Mr. Saldaño filed his 46.05 motion[2] – which contained, secondarily, Mr. Saldaño's low IQ score of 73 and poor neuropsychological performance – that the CCDAO was alerted to

[1] Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).
[2] Indeed, Mr. Saldaño's 46.05 motion (pursuant to Tex. Crim. Proc. Art. 46.05) is still pending in the district court, and was held in abeyance for the determination of Mr. Saldaño's ID. Should this Court again decline to authorize Mr. Saldaño's subsequent supplication, his Rule 46.05 proceedings will resume.

the possibility Mr. Saldaño was ID. The CCDAO then had Mr. Saldaño evaluated by their own expert – and that expert confirmed that Mr. Saldaño meets the criteria for ID established by *Atkins* and its progeny.

In light of this history, the facts supporting this application, and the new law that now permits and governs the adjudication of this claim, Mr. Saldaño respectfully asks this Court to reconsider its April 16, 2025 Order dismissing Mr. Saldaño's ID claim and subsequent Article 11.071 application.[3] For nearly a decade, this Court has consistently and correctly held that *Moore*[4] was a previously unavailable "legal basis" under Section 5(a)(1). *See infra* Section (I). This Court has also found ID claims like Mr. Saldaño's can be appropriately authorized under Section 5(a)(3). *See infra* Section (II). Mr. Saldaño – with the agreement of two experts for Mr. Saldaño and an expert for the Collin County District Attorney's Office (CCDAO) and over a dozen lay witness declarations in support – pleaded sufficient facts to justify having his day in court on a question of constitutional import he has never before had the opportunity to present. Due process of law requires the consideration and evidentiary

[3] This Court has long held that it has the power to reconsider the denial of capital writ applications. *See Ex parte Moreno*, 245 S.W.3d 419, 427–28 (Tex. Crim. App. 2008).

[4] The United States Supreme Court first found the *Briseño* factors unconstitutional in their failure to apply *Atkins* in *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*). The Supreme Court reaffirmed this finding, after the Texas Court of Criminal Appeals again failed to correctly apply *Atkins*, in *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*). In this filing, *Moore* and *Moore I* are used interchangeably, and should be understood to refer to the first of these cases.

development of this constitutional barrier to execution, as this Court has held in many cases before. *See infra* Section (III).

I. As This Court Has Held in Many Similar Cases, *Moore v. Texas* Established New Law Enabling an Applicant to Meet the Section 5(a)(1) Requirements

In his subsequent application, Mr. Saldaño was required only to plead "sufficient specific facts establishing that: the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or *legal basis* for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. Art. 11.071 §5(a)(1) (emphasis added). "[A] legal basis of a claim" is further defined by statute as one that was "not recognized by or could not have been reasonably formulated" from a final decision of the United States Supreme Court or a federal or state court of appeals before the date of the prior application. *Id*. at § 5(d).

Although the Supreme Court plainly held that the execution of the intellectually disabled was unconstitutional as a "categorical rule" in *Atkins*, 536 U.S. at 320, the *Atkins* decision expressly noted it left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Texas attempted to implement the constitutional mandate of

Atkins in its 2004 announcement of the *Briseño* standard.[5] Prior to the Supreme Court's 2017 decision in *Moore*, individuals with ID claims were required to raise them under *Briseño*, whose parameters barred individuals like Mr. Saldaño from raising their claims. *See infra* Section (I)(A). Thereafter, this Court has repeatedly found that *Moore* was a "new legal basis" for Article 11.071, Sec. 5(a)(1) authorization, and this Court should not abandon that long line of cases now. *See infra* Section (I)(B).

A. This Court Repeatedly Has Found *Moore v. Texas* to Be a New Legal Basis Under Section 5(a)(1), and Mr. Saldaño Should Be Treated as Other Applicants Have Been Treated

This Court said it best in addressing whether to allow a litigant to be authorized under Section 5(a)(1) where others had already gotten such treatment: "Similarly situated litigants bringing similar claims should be treated similarly." *Ex parte Hood,* 304 S.W.3d 397, 409 (Tex. Crim. App. 2010). When *Moore I* was first decided by the Supreme Court, in numerous cases this Court began ordering the reconsideration by lower courts of the disposition of *Atkins* claims. *See, e.g., Ex parte Lizcano*, No. WR–68,348–03, 2018 WL 2717035, *1 (Tex. Crim. App. June 6, 2018) ("In light of the United States Supreme Court's recent opinion in *Moore v. Texas*, we exercise our authority to reconsider this case on our own initiative. This

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

cause is remanded to the habeas court to allow it the opportunity to develop evidence . . .").

Indeed, since 2017 this Court has repeatedly found *Moore* was a "new legal basis" for the purposes of Section 5(a)(1). *See, e.g., Ex parte Long,* No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018) (not designated for publication) ("In light of the *Moore* decision and the facts presented in applicant's application, we found that applicant's execution should be stayed . . . [and] now find that applicant has satisfied the requirements of Article 11.071, § 5"); *Ex parte Guevara,* WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018) (not designated for publication) ("We find that, in light of *Moore*, applicant has satisfied the requirements of Article 11.071 § 5(a)(1) with regard to his first allegation in the instant subsequent writ application."); *Ex parte Williams*, WR–71,296–03, 2018 WL 2717039 (Tex. Crim. App. June 5, 2018) ("In light of the *Moore* decision and the facts presented in applicant's application, we find that applicant has satisfied the requirements of Article 11.071 § 5."); *Ex parte Segundo*, 663 S.W.3d 705, 705-06 (Tex. Crim. App. 2022) ("This Court determined that, in light of the *Moore* decision and the facts presented in Applicant's subsequent habeas application, the application satisfied the requirements of Article 11.071, Section 5."). These cases and more[6]

[6] Some of these additional citations included*: Ex parte Gallo*, WR-77,940-03, 2024 WL 1644214 (Tex. Crim. App. Apr. 17, 2024) (not designated for publication); *Ex parte Davis*, WR-40,339-09, 2020 WL 1557291 (Tex. Crim. App. Apr. 1, 2020) (not designated for publication); *Ex parte Butler*,

were cited in Mr. Saldaño's subsequent application, *see* Application at 61, fn. 13. This Court should – just as it said in *Hood* – treat similar cases similarly and allow Mr. Saldaño the same Section 5(a)(1) treatment that other similarly situated applicants have received.

B. ID Individuals with *Briseno*-Barred Claims Did Not Have "Available" *Atkins* Claims Before *Moore*

It is uncontroverted that the *Briseño* factors were, from 2004 until *Moore* forced their abandonment in 2017, the legal basis for raising an *Atkins* claim in the State of Texas. As Mr. Saldaño noted in his subsequent application, Briseño posed the following seven questions:

> (1) Did those who knew the person best during the developmental stage think he was mentally retarded at that time, and, if so, act in accordance with that determination?
>
> (2) Has the person formulated plans and carried them through or is his conduct impulsive?
>
> (3) Does his conduct show leadership or does it show that he is led around by others?
>
> (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
>
> (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

WR-41,121-03, 2019 WL 4464270 (Tex. Crim. App. Sept. 18, 2019) (not designated for publication); *Ex parte Gutierrez*, WR-70,152-03, 2019 WL 4318678 (Tex. Crim. App. Sept. 11, 2019) (not designated for publication); *Ex parte Milam*, WR-79,322-02, 2019 WL 190209 (Tex. Crim. App. Jan. 14, 2019) (not designated for publication).

(6) Can the person hide facts or lie effectively in his own or other's interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

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

This was the required legal inquiry prior to *Moore and* excluded many *Atkins* claimants between 2004 and 2017. *Moore* rejected the *Briseño* factors in 2017 – creating for the first time a legal basis by which offenders who did not satisfy those factors –like Mr. Saldaño –could bring their ID claims.

A "new legal basis" is triggered when there is "binding and directly relevant United States Supreme Court precedent" decided *after* an individual has been through trial and exhausted their direct appeal and initial state habeas rights. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007). A new legal basis can ripen in scenarios when the Supreme Court invalidates a state framework that had improperly restricted relief on a federal right. In *Martinez*, for example, the question centered on whether a subsequent *Penry*[7] application was barred by Section 5(a)(1). This Court's treatment of *Penry* claims typifies its approach to situations in which

[7] *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) (finding that the absence of instructions informing a capital jury that it could consider and give effect to mitigating evidence, as provided by Texas law, was unconstitutional); *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) (finding that Texas's supplemental jury instruction regarding mitigation was insufficient to resolve the *Penry I* concern).

the Supreme Court invalidates Texas standards that improperly interfere with collateral relief for federal claims.

Penry and its progeny found unconstitutional Texas's legal framework for the consideration of mitigation evidence in the punishment phase of capital trials – namely, that pre-*Penry* capital jurors were not instructed about whether or how they could consider the mitigating evidence in determining whether a death sentence should be imposed. By the time that *Penry* was decided, either in 1989 (*Penry I*) or 2001 (*Penry II*), the underlying rights – that capital jurors should be entitled to consider mitigating evidence, and that this was meaningful to the decision on punishment in capital cases – had long been established. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding unconstitutional a state court's refusal to consider mitigating evidence); *Lockett v. Ohio*, 438 U.S. 586 (1978) (finding unconstitutional state statute that failed to allow a sentencer to give mitigating evidence sufficient weight); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding state statute unconstitutional where it imposed a mandatory death sentence without the consideration of mitigating evidence). Although there was significant jurisprudence that touched on the constitutional concerns about any limitation on a capital defendant's ability to present and have considered mitigation in punishment proceedings on capital cases, the problem *Penry I* and *Penry II* addressed was Texas's legal *application* of those rights.

As a result of the *Penry* line of cases in the Supreme Court, this Court has repeatedly found *Penry* and resulting jurisprudence a "new legal basis" for subsequent habeas applications under Section 5(a)(1). Take, for example, *Ex parte Hood,* 304 S.W.3d 397 (Tex. Crim. App. 2010). Hood "was tried after the Supreme Court decided *Penry I,* but before the Texas Legislature had convened to draft a statutory mitigation special issue to accommodate the *Penry I* holding" and had a special nullification instruction presented to his jury concerning how it should account for mitigation evidence in determining their sentence. *Hood,* 304 S.W.3d at 400-01. Although Hood raised a similar claim on direct appeal, it was rejected in 1993, before the Supreme Court decided *Penry II* in 2001 (which address Texas-developed instructions to deal with the problems elucidated in *Penry I*). Hood then filed his initial state habeas application pursuant to Tex. Code Crim. Proc. Art. 11.071 in 1997, which did not include a claim related to the jury nullification instruction[8] (denied in 1999) and then filed a pro se subsequent 11.071 application in 2004, which likewise did not contain a *Penry*-type claim or cite *Penry II*. *Id*. at 402-03. When Hood filed another subsequent 11.071 application in 2005, this Court initially found it did not meet Section 5's requirements because Hood "should have

[8] This Court noted that Hood "initially challenged the nullification instruction, but then deleted that claim from his amended application." *Id*. at 402. In a footnote, this Court said "[p]resumably applicant eliminated that *Penry* claim because it had already been rejected on direct appeal and this Court does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal" – in other words, this Court accepted that this claim was not pled because it would have been futile to do so. *Id*. at 402 n. 21.

known from the *Penry II* decision that he had a viable claim" *id*. at 404 – implicitly acknowledging *Penry II* was a new legal basis distinct from *Penry I* – and then was called to answer whether Supreme Court cases further defining *Penry* like *Tennard*[9] and *Smith*[10] were also themselves a "new legal basis" for Section 5(a)(1). This Court answered that question in the affirmative, finding that the "new legal basis" standard for Section 5(a)(1) in subsequent 11.071 applications applied not only to *Penry I*, but *Penry II* and its progeny. *Hood,* 304 S.W.3d at 409 ("[W]e already held, in numerous subsequent habeas applications since 2007, that *Tennard*, *Smith*, et al. did announce new law and that those death-row inmates were entitled to have the merits of their *Penry* claims addressed[.]").

This Court's approach to the availability of *Penry* claims as seen in *Hood* is analytically analogous to the availability of *Atkins* claims before *Moore. Penry I, Penry II* and progeny made available for the first time an avenue for challenging the fact that the Texas special issues did not allow for the presentation and meaningful consideration mitigation evidence. *Atkins* claims have a parallel history in Texas. *Moore I* provided for the first time an avenue for *Briseño*-barred individuals to raise their ID claims, just as *Penry I*, *Penry II*, *Tennard*, et al, created such a path earlier. All of these cases have correctly been considered a "new legal basis" for Section

[9] *Tennard v. Dretke*, 542 U.S. 274 (2004).
[10] *Smith v. Texas*, 543 U.S. 37 (2004).

5(a)(1). This Court should not depart in Mr. Saldaño's case from its long history of considering United States Supreme Court cases correcting Texas's wrong legal frameworks as meriting Section 5(a)(1) process now.

C. Under the Facts of His Case, Mr. Saldaño Could Not Have Raised His *Atkins* Claim Prior to *Moore*.

Section 5(a)(1) requires that Mr. Saldaño's claim had "not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable" on the date(s) of any prior applications. True, a handful of *Atkins* claims may have been viable under *Briseño*, and *Moore* would not provide a pathway for authorization of such claims, but Mr. Saldaño's claim plainly was not.

Even a brief consideration of the application of the *Briseño* factors to Mr. Saldaño makes it obvious why he could not have raised an *Atkins* claim prior to *Moore*: He satisfies none of them. With respect to the first factor, Mr. Saldaño was not known as mentally retarded (intellectually disabled) during his youth nor did others act in accordance with that belief. Indeed, the evidence that Mr. Saldaño proffered along with his successive application demonstrate that Mr. Saldaño's mother was willfully resistant to her son's intellectual limitations. *See, e.g.*, App. at 120 (Application Exhibit 8, Declaration of Ada Saldaño) ("My mother wanted us to go to school, be smart, and do better for ourselves. *It is very important to her to*

believe that all of her children were smart, no one wants to think that any of their children might have intellectual problems. . . . [she] tried so hard to make Victor do well enough in school, *I think my mother was emotionally invested in the idea that Victor was normal or even smart*.") (emphasis added).

Due to the facts of his underlying crime, Mr. Saldaño would have fared no better under *Briseño* factors two, three and seven. Albeit without the benefit of information about Mr. Saldaño's mental health and intellectual impairments, this Court previously described at length in its 2007 direct appeal opinion how Mr. Saldaño and his co-defendant, Jorge Chavez, "forced" the victim in a car, "took" the victim to a "remote location," where Mr. Saldaño "led the victim into some woods" and shot him at close range. *Saldaño v. State*, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007). Each of these facts evidenced under *Briseño* a formulated plan that was not impulsive, thus failing to satisfy the second factor. Further, this formulated plan arguably required forethought and planning, thus failing the seventh factor. Indeed, this Court noted, that Mr. Saldaño was accused of being "involved in an attempted armed robbery about five days before the victim's murder," *id*., and Mr. Saldaño was characterized as the leader of the robbery and murder in his case, therefore failing the third factor, and further eroding the viability of an *Atkins* claim under *Briseño*.

Similarly, the evidence in the record that this Court credited in its direct appeal opinion would have undermined (and, along with the other factors, *defeated*) Mr.

Saldaño's claim because it demonstrated that Mr. Saldaño could respond to stimuli and questions without wandering from subject to subject (factor five). This Court noted specifically that after the crime, Mr. Saldaño "was confrontational when the police arrested him" and that "several police officers observed that [Mr. Saldaño] was unremorseful and that his situation seemed like 'a joke to him.'" *Saldaño*, 232 S.W.3d at 100. This ability to respond to police – not just on subject but confrontationally, and enough to treat his situation like 'a joke' – would have been another strike against Mr. Saldaño's claim under *Briseño*.

Finally, Mr. Saldaño would not have been able to meet the sixth *Briseño* factor – whether or not he could hide facts or lie in furtherance of his own interests – as evidenced by the case caption in the state district court. Even today, Mr. Saldaño's case is listed in Collin County as "State of Texas v. Victor Rodriguez" – a reference to Mr. Saldaño's first claim when law enforcement encountered him that he was a Mexican man named Victor Rodriguez, rather than an Argentine man named Victor Saldaño, his true identity. This alone would have demonstrated that Mr. Saldaño was capable of lying for his own interest (i.e., evading prosecution), and would have defeated his *Atkins* claim under the sixth factor listed above.

Moreover, in addition to the absolute barrier *Briseño* posed to Mr. Saldaño's *Atkins* claim at the time of his initial state habeas, his IQ scores at that time might have posed a second obstacle to a successful claim. Not until 2014 did Supreme

Court precedent establish that IQ scores between 70 and 75 – like Mr. Saldaño's IQ scores – were qualifying scores for ID claims. *Hall v. Florida*, 572 U.S. 701 (2014).

Thus, it seems clear that the legal framework governing *Atkins* claims at the time of Mr. Saldaño's initial state habeas proceedings posed an insurmountable barrier to the success of his *Atkins* claim, a barrier that new law has removed. As such, under the precedent of this Court, *see supra* Section (I)(A), Mr. Saldaño has met the Section 5(a)(1) gateway. However, if this Court has any question about whether Mr. Saldaño's ID claim was legally available to him given the facts of his case under then-governing *Briseño* framework, that question would be worthy of evidentiary development prior to ruling on the application of Section 5(a)(1). This Court has allowed for additional process in such circumstances in numerous other cases and including *Atkins* cases. *See, e.g.*, *Ex parte Davis*, No. WR-40,339-09, 2020 WL 1557291, at *2 (Tex. Crim. App. Apr. 1, 2020) (remanding for further fact-finding on whether applicant met Section 5 on an *Atkins* claim and directing the Court to make recommendations on the merits of any such claim); *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323, at *3 (Tex. Crim. App. Feb. 14, 2018) (remanding for fact-finding and credibility determinations on Section 5); *Ex parte Storey*, No. WR-75,828-02, 2017 WL 1316348, at *1 (Tex. Crim. App. Apr. 7, 2017) (remanding where applicant arguably met Section 5 but where "the record is not sufficient to determine with assurance whether applicant could have previously

discovered the evidence complained of in the claims."); *Ex parte Hood*, No. WR-41,168-11, 2008 WL 4946276, at *1-2 (Tex. Crim. App. Nov. 19, 2008) (granting a stay of execution and remanding for further fact-finding on whether applicant met Section 5).

II. Mr. Saldaño Meets His Section 5(a)(3) Burden Because There is No Factual Dispute Regarding Mr. Saldaño's Intellectual Disability Diagnosis

To pass through the procedural gateway of Article 11.071, Section 5(a)(3), Mr. Saldaño was only required to plead facts that, if true, would demonstrate "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial[.]" Tex. Code Crim. Proc. Art. 11.071 §5(a)(3). Mr. Saldaño met his burden under Section 5(a)(3), by virtue of the strong, undisputed evidence that he pleaded in his subsequent application. *See infra* Section (II)(A). That Mr. Saldaño met this standard should be evident by, if nothing else, the fact that several *Atkins* cases before Mr. Saldaño's case were granted authorization for evidentiary development under Section 5(a)(3), and one case recently won relief. *See infra* Section (II)(B). This Court cannot square its rulings in other cases with its decision in Mr. Saldaño's case, and should reconsider its order finding Mr. Saldaño did not meet Section 5(a)(3).

A. There is No Factual Dispute that Mr. Saldaño is Intellectually Disabled, and No Reasonable Juror Could Find Otherwise

In addition to meeting Section 5(a)(1) by virtue of *Moore*, *see supra* Section (I), the facts Mr. Saldaño pled in his subsequent application met the burden imposed by Section 5(a)(3). Importantly, although Section 5(a)(3) imposes a "clear and convincing" standard in the statutory text of Article 11.071, this Court "do[es] not construe Section 5(a)(3), however, to require that the subsequent applicant must necessarily convince this Court by clear and convincing evidence, *at the threshold*, that no rational factfinder would fail to find he is [ID]." *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphasis in original). The only question at this juncture is whether this Court should allow the subsequent writ to "proceed in the ordinary course as initial writ would," given a "*threshold* showing of evidence that would at least be *sufficient* to support an ultimate conclusion." *Id*. at 163 (emphasis in original).

Mr. Saldaño's case meets this threshold showing. After noting Mr. Saldaño's low IQ score of 73 in his Rule 46.05 motion, the CCDAO sent in their own independent expert, Dr. Gilbert Martinez, to conduct an evaluation. Mr. Saldaño's second IQ score was 74, a remarkably consistent score, and Dr. Martinez likewise noted that Mr. Saldaño had significant other deficits. Dr. Martinez subsequently determined, just as Mr. Saldaño's experts found, that Mr. Saldaño's scores evinced an intellectual deficit under *Atkins* et al. *See, e.g*., App. Ex. 5 at 68 (Dr. Martinez:

"[T]hese scores satisfy criteria for the first prong for a diagnosis of Intellectual Disability."). Undersigned counsel then completed an investigation into Mr. Saldaño's adaptive deficits, which resulted in 13 declarations from Mr. Saldaño's family, friends, former classmates, neighbors, and individuals incarcerated with Mr. Saldaño previously, all supporting his intellectual and adaptive deficits. *See* App. Ex. 8-20. Additionally, a formal instrument (ABAS-3) corroborated Mr. Saldaño's limitations, which existed when he was still in the developmental period. *See* App. Ex. 1 (Declaration of Dr. Eduardo Kopelman). Ultimately, Mr. Saldaño's experts – Drs. Llorente and Amezcua-Patino – as well as the State's expert, Dr. Martinez – have all agreed Mr. Saldaño meets the criteria for intellectual disability, and the CCDAO supported Mr. Saldaño's request for Section 5 authorization. The wealth and strength of this information necessitated this conclusion, and thus today *there is no factual dispute about whether or not Mr. Saldaño is intellectually disabled*. Because of this unique circumstance, where the parties have both had independent evaluations of Mr. Saldaño and come to the same conclusion, Mr. Saldaño has at least met the "threshold showing" required by *Ex parte Blue*. There is no factual dispute about Mr. Saldaño's ID – *all mental health experts are in agreement* – and where all evidence points to only that conclusion, no rational juror would conclude otherwise. Mr. Saldaño meets this threshold showing, and thus, this Court should grant Mr. Saldaño authorization to develop his ID claim under Section 5(a)(3).

B. This Court's Decision in Mr. Saldaño's Case Cannot Be Squared With Its Favorable Ruling in Other Cases, Such as *Ex Parte Mays*

The treatment of Mr. Saldaño's case is at significant odds with this Court's treatment of another recent post-*Moore* ID claim, *Ex parte Randall Mays*, 686 S.W.3d 745 (Tex. Crim. App. 2024). Although Mays was originally convicted and sentenced to death in a 2008 capital murder prosecution – almost six years after *Atkins* – he did not raise an intellectual disability issue at trial or on appeal. Likewise, in his initial state postconviction claim, Mays did not raise an ID claim. Then, Mays raised an ID claim for the first time in his 2020 subsequent application. This Court authorized Mays's subsequent application on his ID claim, specifically doing so under Section 5(a)(3). *See Ex parte Mays*, No. WR-75,105-02 (Tex. Crim. App. May 7, 2020) (not designated for publication).

This Court's prior order dismissing Mr. Saldaño's application under Section 5(A)(3) cannot be squared with its treatment of *Mays*. In both cases, the applicants were tried and sentenced to death *after* the Supreme Court's 2002 decision in *Atkins*, and neither presented ID claims at trial. In both cases, the applicants raised their ID claims in subsequent applications *for the first time* after *Moore*, when the Supreme Court corrected Texas's impermissible framework for the implementation of *Atkins* under *Briseño*. And yet in 2020, this Court found that Mr. Mays – whose ID claim was then vigorously *opposed* by the State – met the threshold showing for Section 5(a)(3). Now, with the agreement of not one, but three experts, one of which was

retained by the State, this Court finds Mr. Saldaño's application insufficient under that section. There is no procedural or evidentiary reason for this conclusion; in fact, Mr. Saldaño presents a stronger case in his subsequent application than Mr. Mays did in his 2020 application.

Here, it is more than the agreement of the three experts that supports Mr. Saldaño's ID diagnosis and subsequent application. Mr. Saldaño also provided the report of a fourth expert – Dr. Eduardo Kopelman – who administered a standardized instrument to support that Mr. Saldaño has adaptive deficits consistent with his intellectual disability. *See* App. Ex. 1 at 4 ("It is my opinion that the results of the ABAS-3 administration are consistent with the functioning of an intellectually disabled person in the developmental period."); *id*. at 3 (finding that Mr. Saldaño's scores in the conceptual, social, and practical domain were each in the "Extremely Low" range, at the functional level of 1% or less of his age-appropriate peers).

Information from Mr. Saldaño's family, friends, and other individuals who have known him throughout his life further support the existence and extent of his intellectual and adaptive limitations. Mr. Saldaño's younger brother and multiple family members have intellectual limitations, some of which are so severe they are institutionalized. *See* Ex. 10 at 156 (Silvia Guzman); Ex. 8 at 117 (Ada Saldaño); Ex. 12 at 178 (Victor Carloni). Ex. 11 at 165-6 (Augusto Maldonaldo). Mr. Saldaño himself suffered significant head injuries as a child, including being beat by his

stepfather in the head as young as seven years old, and being hit by cars twice for failing to watch for cars when crossing the street, despite his family explicitly trying to teach him to do so. *See* Ex. 8 at 121 (Ada Saldaño) (recounting Mr. Saldaño being hit by a car); Ex. 9 at 143 (Lidia Guerrero) (same). Mr. Saldaño struggled with basic tasks, including hygiene, throughout his childhood; he "did not bathe unless [they] reminded him over and over again" and "didn't wash his hair or his clothes." App. Ex 8 at 121. If others did not clean or care for Mr. Saldaño, he would smell and wear dirty clothing over and over again. *Id*. at 121-2; *see also* App. Ex. 10 at 3 (Silvia Guzman) ("Victor also had problem with hygiene. For example, he would not shower or brush his teeth without being told.").

Mr. Saldaño was known as immature and "fundamentally innocent" by everyone that knew him. Ex. 10 at 155, 156 (Silvia Guzman); *see also* Ex. 12 at 173 (Victor Carloni). His limitations meant that he was often mocked or bullied, Ex. 8 at 123 (Ada Saldaño), for example, leading to the derisive nickname of "Pecho" (chest in Spanish) caused by his inability to understand sports and using his chest to stop balls that came his way, *id*. at 122. The bullying of Mr. Saldaño as a result of his intellectual limitations was so significant that a school administrator told Mr. Saldaño's mother that he was not safe walking home from school on his own. Ex. 9 at 143 (Lidia Guerrero).

Mr. Saldaño's most significant friend in his childhood was his cousin, Luis Guzman, who is so intellectually limited that he is now institutionalized. *See, e.g.*, Ex. 8 at 6 (Ada Saldaño); Ex. 10 at 153 (Silvia Guzman); Ex. 12 at 174 (Victor Carloni); Ex. 11 at 166-7 (Augusto Maldonado); Ex. 13 at 188 (Roxana Galan). Through school, classmates of Mr. Saldaño regarded him as academically limited, "slow," and noted that Mr. Saldaño was not able to understand and follow simple classroom rules. Ex. 16 at 201 (Sonia Maggiore); Ex. 17 at 206 (Victor Hugo Pedraza); Ex. 14 at 192 (Marcos Adrian Diaz). After leaving home as a teenager, Mr. Saldaño never functioned as an adult – he was homeless, and nearly completely reliant on the help of others, until he was arrested at the age of 24. *See, e.g.*, Ex. 8 at 126-7 (Ada Saldaño).

By contrast, at the time of filing his subsequent application, Mr. Mays had the support of only one expert diagnosing him with ID, and nine other declarations about his adaptive functioning. Mr. Mays did not support his evaluation with the use of a standardized instrument, measuring his adaptive functioning and deficits, and did not have the support of an expert selected and retained by the State. By comparison, it is clear – not only are Mr. Mays and Mr. Saldaño in identical postures, but Mr. Saldaño presents a stronger case than Mr. Mays did at the time of filing. Just as this Court found Mr. Mays met his threshold showing to pass through Section 5(a)(3), so should Mr. Saldaño.

III. Due Process Requires that Mr. Saldaño Be Given an Opportunity to Present His *Atkins* Claim and Be Heard Under State and Federal Law

Mr. Saldaño pleads a categorical bar to his execution that no court has yet heard. As Mr. Saldaño has noted above, Texas state law compels authorization of his subsequent application. Mr. Saldaño has supported his pleading by significant documentary evidence. Mr. Saldaño has asked only for the ability to develop his *Atkins* claim in the district court so he may present evidence supporting his claim, and ultimately have his claim heard on its merits. Due process requires that Mr. Saldaño be allowed that opportunity at a minimum. *See Blue v. Thaler*, 665 F.3d 647, 656-57 (5th Cir. 2011) (holding that a habeas petitioner raising a claim of intellectual disability is entitled to "a set of core procedural due process protections: the opportunity to develop and be heard on his claim that he is ineligible for the death penalty"); *Ex parte Simpson*, 136 S.W3d 660, 663 (Tex. Crim. App. 2004) (explaining that an evidentiary hearing on an *Atkins* claim is necessary where the habeas applicant relies on extra-record evidence, rather than on trial testimony alone); *see also Hall v. State*, 160 S.W.3d 24, 40 (Tex. Crim. App. 2004) (Price, J., concurring) (concluding that "[w]hen an applicant's status as a mentally retarded person is contested, a hearing by affidavit will generally be inadequate."); *id.* at 41 (Johnson, J., dissenting) (noting that "[n]o trier of fact in this case has ever heard live testimony, subject to testing on cross examination, on the specific issue of whether appellate is mentally retarded. The hearing at issue here was had on

affidavits only, thus Appellant's claim that he is [intellectually disabled] . . . has never been directly and thoroughly litigated").

Both Texas state law and the Unites States constitution compel this conclusion. Texas courts are obligated to give meaningful effect to substantive rulings of the United States Supreme Court by virtue of the supremacy clause,[11] including *Atkins, Hall,* and *Moore*, and cannot create procedural barriers that circumvent federal law; in particular, where, as here, the treatment of a case is inconsistent with other applications of the cited procedural barrier, that barrier must yield.[12] Because *Atkins* is a categorical barrier to execution, and because Mr. Saldaño has never gotten the opportunity to fully or fairly present his *Atkins* claim, due process requires that Mr. Saldaño be given this opportunity now.

IV. Conclusion & Prayer for Relief

Mr. Saldaño respectfully requests that this Court reconsider its prior order dismissing his subsequent Article 11.071 application, authorize evidentiary development of his *Atkins* claim, and/or remand his application to the district court.

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[11] *See Montgomery v. Louisiana,* 577 U.S. 190, 198 (2016) ("States may not disregard a controlling, constitutional command in their own courts."); *id*. at 204-05 ("If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'") (citation omitted).

[12] *Cruz v. Arizona*, 598 U.S. 17, 32 (2023) ("In exceptional cases where a state-court judgment rests on a novel and unforeseeable state-court procedural decision lacking fair or substantial support in prior state law, that decision is not adequate to preclude review of a federal question.").

Respectfully submitted,

DATED: June 11, 2025

/s/ Benjamin B. Wolff
/s/ Kelsey Peregoy

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CERTIFICATE OF CONFERENCE

I hereby certify that on June 10, 2025, I conferenced this Suggestion for Reconsideration of Denial of Subsequent Application with counsel for the State, Assistant District Attorney Lisa Braxton and First Assistant District Attorney Bill Wirskye, who indicated that the State was unopposed to the relief sought herein.

*/s/ Benjamin Wolff*__
Benjamin Wolff

CERTIFICATE OF SERVICE

On June 11, 2025, service has been accomplished by electronic service of this pleading to counsel for the State, Collin County Assistant Criminal District Attorney Lisa Braxton (lbraxton@co.collin.tx.us).

*/s/ Benjamin Wolff*__
Benjamin Wolff

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