No. _____

IN THE

Supreme Court of the United States

VICTOR SALDAÑO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

In 2017 this Court held that the *Briseno* factors adopted by Texas Court of Criminal Appeals (TCCA) for evaluating an *Atkins* claim were based on superseded medical standards that created an unacceptable risk that a person with intellectual disabilities would be executed in violation of the Eighth Amendment. *Moore v. Texas,* 581 U.S. 1 (2017) (*Moore I*). On remand, the TCCA determined that Moore was not a person with intellectual disability, a determination that this Court held was erroneous in *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*).

Mr. Saldaño has never before raised an *Atkins* claim and last sought relief in state courts in 2008. After the evaluation of experts for Mr. Saldaño and the State – represented here by the Collin County District Attorney's Office (CCDAO) – all experts agreed that Mr. Saldaño met the criteria for IDD.

Subsequently, Mr. Saldaño argued to the TCCA that his claim met the procedural requirements of Texas Criminal Code Article 11.071, Section 5(a)(1) based on the new legal basis of *Moore I* and *Moore II*. The state court did not address any of his arguments on the merits in its ruling, and upended nearly a decade of precedent by holding for the first time that *Moore I* and *Moore II* were not a new legal basis for relief in Texas state court. Additionally, the TCCA also held that despite the unanimous agreement of experts evaluating Mr. Saldaño for Intellectual Developmental Disorder (IDD), Mr. Saldaño did not meet Article 11.071, Section 5(a)(3)'s requirements of demonstrating that by clear and convincing evidence, no reasonable jury would have failed to find him IDD.

No court has ever meaningfully considered the merits of Mr. Saldaño's *Atkins* claim, nor has a court meaningfully considered the State's concession of the procedural gateway and Mr. Saldaño's IDD diagnosis. The questions presented are:

1. Does the TCCA's creation of a novel and unforeseeable procedural bar in its interpretation of Article 11.071 Section 5 preclude review of Mr. Saldaño's *Atkins* claim under federal law?

2. May a state-created procedural rule bar review of an *Atkins* claim consistent with due process where the State has conceded, as here, that the individual meets the criteria for intellectually disability and the procedural gateway necessary to allow for a merits review?

PARTIES TO THE PROCEEDINGS

Petitioner, Victor Saldaño, a death-sentenced person in Texas, was the petitioner in the Texas Court of Criminal Appeals.

Respondent, the State of Texas through the Collin County District Attorney's Office, was the respondent in the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

STATEMENT OF RELATED PROCEEDINGS

Saldaño v. State, No. AP-72,556 (Tex. Crim. App. Sept. 15, 1999)

Ex parte Saldano, No. WR-41,313-01 (Tex. Crim. App. May 5, 1999)

Saldaño v. Texas, 530 U.S. 1212 (2000)

Saldaño v. State, 70 S.W.3d 873 (Tex. Crim. App. 2002)

Saldaño v. Cockrell, 267 F. Supp. 2d 635 (E.D. Tex. 2003)

Saldaño v. State, 232 S.W.3d 77 (Tex. Crim. App. 2007)

Ex parte Saldaño, WR-41,313-04 (Tex. Crim. App. Oct. 29, 2008)

Saldaño v. Davis, Director TDCJ-CID, No. 16-70025 (5th Cir. Feb. 19, 2019)

Ex parte Saldaño, WR-41,313-05 (Tex. Crim. App. April 16, 2025)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that the Court grant a writ of certiorari summarily reversing the judgment below and remanding.

DECISION BELOW

The decision of the Texas Court of Criminal Appeals (TCCA) is unpublished and included in the Appendix (App.) at 1.

JURISDICTION

The judgment of the TCCA sought to be reviewed by this petition was entered on April 16, 2025. App. at 1.

On July 15, 2025, Justice Alito extended the time to file this petition to August 14, 2025. No. 25A53. Justice Alito subsequently granted a second extension of time to file this petition until September 13, 2025. *Id*.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Introduction

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the execution of intellectually disabled (ID)[1] people violated the Eighth Amendment. Although this Court was clear in its pronouncement of this "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, which created the "*Briseño* factors," non-medical and unscientific parameters for raising ID claims. *See Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The TCCA-created *Briseño* factors were struck down by this Court in the 2017 decision in *Moore I*. *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*); *see also Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*). But between the creation of the *Briseño* factors and *Moore I*, those unconstitutional factors barred individuals like Mr. Saldaño from raising their meritorious *Atkins* claims. After *Moore I*, the TCCA has repeatedly found that *Moore* was a "new legal basis" for *Atkins* claims seeking Article 11.071, *Sec.* 5(a)(1) authorization.

Every expert who has evaluated Mr. Saldaño agrees that he meets the criteria for an IDD diagnosis. Among the experts who agree that Mr. Saldaño meets the diagnostic criteria for IDD is an expert for the State, the Collin County District

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[1] Intellectual Disability (ID) is now known as Intellectual Developmental Disorder (IDD). These terms are used interchangeably in this petition.

Attorney's Office (CCDAO); indeed, there is no expert who disagrees that Mr. Saldaño is intellectually disabled. Despite the support of the State's expert, and the CCDAO's Brief in Support of Mr. Saldaño's successive application, the TCCA denied Mr. Saldaño authorization to fairly and fully present his *Atkins* claim through two separate procedural pathways available to him in Section 5 of the Texas Code of Criminal Procedure.

The TCCA's application of a novel and unforeseeable procedural bar to merits review of Mr. Saldaño's *Atkins* claim should not be a barrier to review in this case, and this Court should grant Mr. Saldaño's petition for certiorari, vacate the TCCA's judgment, and remand his case to the TCCA for full and fair merits treatment. In the alternative, Mr. Saldano's case merits a summary reversal.

II. Factual and Procedural Background

A. Conviction, Death Sentence, and Direct Appeal

Petitioner Victor Saldaño was born in Cordoba, Argentina and has struggled with intellectual disability for his entire life. Mr. Saldaño left home when he was a teenager, relying primarily on the kindness of strangers to survive, and ended up homeless in the State of Texas in the early 1990s.

Shortly after meeting his co-defendant, Jorge Chavez, Mr. Saldaño was implicated in a carjacking at a local store and related killing of a man in Plano, Texas. Mr. Saldaño was charged with and subsequently convicted of capital murder in July 1996, and the trial court set punishment at death pursuant to the jury's answers to special issues submitted under Texas law. At Mr. Saldaño's 1996 trial, the State

argued in his penalty phase proceedings that Mr. Saldaño was a future danger – required for a death sentence in Texas – in part because he is Hispanic. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals (TCCA) on direct appeal. *Saldaño v. State*, No. AP-72,556 (Tex. Crim. App. Sept. 15, 1999) (not designated for publication).

On petition for a writ of certiorari from Mr. Saldaño's 1999 death sentence, this Court granted Mr. Saldaño's petition, vacated his death sentence, and remanded his case to the TCCA in light of the then-Attorney General's confession of error (namely, the Attorney General agreed that it was unconstitutional error for the State's expert to testify that Mr. Saldaño's race was a factor as to why Mr. Saldaño is a future danger). *Saldaño v. Texas*, 530 U.S. 1212 (2000). Subsequently, the TCCA again affirmed Mr. Saldaño's conviction and death sentence. *Saldaño v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).

B. First State and Federal Collateral Proceedings

Mr. Saldaño's initial application for habeas corpus in state court was subsequently denied. *Ex parte Saldano*, No. WR-41,313-01 (Tex. Crim. App. May 5, 1999) (not designated for publication). In 2003, Mr. Saldaño was granted penalty phase relief in federal court on a claim challenging the unconstitutional ethnic/race discrimination of an expert called by the State to support its case for future dangerousness. *Saldaño v. Cockrell*, 267 F. Supp. 2d 635, 640-2 (E.D. Tex. 2003).

C. Second Penalty Phase and Collateral Proceedings

Mr. Saldaño's second penalty phase proceedings took place in 2004, in a trial where his lawyers did not present mental health or intellectual disability evidence. Mr. Saldaño was resentenced to death. Mr. Saldaño's second death sentence was affirmed on direct appeal. *Saldaño v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007). Mr. Saldaño then unsuccessfully challenged the constitutionality of his sentence on state post-conviction and federal habeas corpus proceedings. *See generally Ex parte Saldaño*, WR-41,313-04 (Tex. Crim. App. Oct. 29, 2008) (unpublished); *Saldaño v. Davis, Director TDCJ-CID,* No. 16-70025 (5th Cir. Feb. 19, 2019).

D. Mr. Saldaño's IDD Diagnosis and *Atkins* Claim

Mr. Saldaño has been in the custody of the Texas Department of Criminal Justice (TDCJ) since his original conviction and death sentence in 1996. Between 1996 and the present, Mr. Saldaño has exhibited severe symptoms of mental illness and TDCJ has treated him for schizophrenia.

In April 2021, as the State sought an execution date, the convicting court appointed undersigned counsel, the Office of Capital and Forensic Writs (OCFW), to represent Mr. Saldaño. On January 31, 2022, OCFW filed a motion arguing Mr. Saldaño was incompetent to be executed pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), which was supported by voluminous evidence describing Mr. Saldaño's psychiatric condition and neuropsychological testing. The *Ford* motion was supported, in part, by a neuropsychological evaluation that contained an IQ score in the range of intellectual disability. After the State received notice of that evaluation

and IQ score, the parties agreed to a pause in the proceedings to investigate Mr. Saldaño's intellectual disability.

Mr. Saldaño's case presents a strong intellectual disability claim; he has been administered two comprehensive measures of IQ, and two short-form measures, all of which are consistent with IDD. The first of these comprehensive measures was administered by Mr. Saldaño's expert, Dr. Antolin Llorente, on December 6, 2021. Dr. Llorente's assessments included the WAIS-4, Spanish Version, and the Test of Memory Malingering (TOMM), among several other individual measures. The WAIS-4 yielded a full-scale score of 73, which, accounting for the standard error of measurement (SEM), signifies a score in the range of 68-78, plainly within the range of persons with IDD. Just over a year later, Mr. Saldaño was re-administered the WAIS-4 by Dr. Gilbert Martinez, an expert retained for the State, which resulted in a full-scale IQ score of 74. This score obtained by the State's expert is consistent with Dr. Llorente's findings, and likewise within the range of IDD.

An investigation into Mr. Saldaño's adaptive deficits resulted in 13 declarations from Mr. Saldaño's family, friends, former classmates, neighbors, and individuals incarcerated with Mr. Saldaño previously, demonstrating Mr. Saldaño has had lifelong intellectual and adaptive deficits. These deficits included his inability to appropriately bathe, clothe, or feed himself at a developmentally appropriate level. Mr. Saldaño's limitations created academic struggles, causing him to fail the sixth grade, and causing Mr. Saldaño's classmates to remember him as

slow, unable to solve math problems in class, and needing teachers "to explain things several times" to him, and struggling even when he had such help.

Mr. Saldaño's limitations also often put him in danger. For example, Mr. Saldaño was twice hit by a car because, despite the family's best efforts to explain, he was unable to understand how to avoid cars in the street. During one such accident, Mr. Saldaño "went flying through the air, tumbling" was "dazed and disoriented," remained confused for some time, and suffered injuries all over his body. His mother recalled that, after the second time a car hit Mr. Saldaño, his family "could not understand why Victor could not learn" to watch out for cars, and that it was "very worrisome for everyone." Mr. Saldaño was also socially limited. Even when he was older, Mr. Saldaño would say "hi" to everyone he saw, but never said more than that because he was only able to "relate[] to people in a very superficial way." He was regarded by other neighborhood children as "weird" and, as a result, spent much of his time alone. When Mr. Saldaño did try to relate to or play games with other children, his intellectual limitations became apparent. For instance, Mr. Saldaño tried to play ball with kids from his neighborhood, but he was so bad they stopped letting him play. He didn't understand the rules of the game and incorrectly stopped the ball with his chest—a habit that accounts for the mocking nickname "Pecho" ("Chest" in Spanish). The nickname was meant as an insult, but Mr. Saldaño's limitations prevented him from perceiving the humiliation. Mr. Saldaño's impairments also made him a target for violence, with the bullying becoming so bad

that at one point school administrators informed his mother that they did not feel Mr. Saldaño was safe walking home alone from school.

In addition to these observations, a formal instrument measuring adaptive behavior deficits, the Adaptive Behavior Assessment System Third Edition (ABAS-3), was administered by Argentinian psychiatrist and psychotherapist Dr. Eduardo Kopelman, and corroborated Mr. Saldaño's limitations. These kinds of intellectual limitations were documented as well for other members of Mr. Saldaño's family; Mr. Saldaño's younger brother, Daniel, is intellectually limited, two of Mr. Saldaño's maternal cousins live in Argentinian group homes for intellectually disabled adults, and two more maternal cousins have intellectual limitations that require family to care for them.

Ultimately, considering all the evidence of his limitations, Mr. Saldaño's experts – Drs. Llorente and psychiatrist Dr. Lauro Amezcua-Patino – as well as the State's expert, Dr. Martinez, all agree Mr. Saldaño meets the criteria for intellectual disability. Thus, today there is no factual dispute between the parties about whether Mr. Saldaño is intellectually disabled.

E. The Texas Court of Criminal Appeals' Decision Below

On June 26, 2024, Mr. Saldaño filed a successive postconviction petition raising an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). App. at 14-83. Mr. Saldaño's petition was supported by the opinions of four experts, including the State's expert, all of whom opined that Mr. Saldaño met the criteria for intellectual disability, and numerous declarations from family, friends, and other

individuals who described his developmental challenges and limitations. *See* App. at 19 (Exhibit Index). Mr. Saldaño's successive postconviction petition sought authorization for review under Texas Code of Criminal Procedure, Article 11.071 Section 5(a)(1) or Section 5(a)(3, which provide that a subsequent application for habeas corpus relief for death-sentenced persons may be made if sufficient facts establish that:

> (1) 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 filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> * * *
>
> (3) 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 under Article 37.071, 37.0711, or 37.072.

Tex. Code Crim. Proc. Art. 11.071 §5(a)(1), §5(a)(3).

Specifically, Mr. Saldaño's subsequent application argued that Mr. Saldaño was entitled to evidentiary development and a merits review of his *Atkins* claim under Section 5(a)(1) because his IDD diagnosis and *Atkins* claim could not have been considered under Texas law prior to this Court's decision in *Moore I*. App. at 70-75. This is because between his 2004 trial and *Moore I*, Texas required *Atkins* litigants to meet the criteria found in the now-unconstitutional *Briseño* factors. *Id*. Additionally, Mr. Saldaño argued that he could overcome the separate hurdle in Section 5(a)(3), which required him to demonstrate that "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). App. at 75-79.

Importantly, the State of Texas filed a brief in support of Mr. Saldaño's petition, asking the Court of Criminal Appeals to remand his petition for an evidentiary hearing and a merits determination. App. at 84-87; Brief in Support of Remand, *Ex parte Saldaño*, WR-41,313-05 (Tex. Crim. App. June 26, 2024). There, the State conceded Mr. Saldaño's right to review under Section 5(a)(1) and Section 5(a)(3), the procedural barriers at issue in this case. *Id*.

On April 16, 2025 the Court of Criminal Appeals of Texas issued an unpublished per curiam order dismissing Mr. Saldaño's application for a writ of habeas corpus. Order, *Ex parte Saldaño*, WR-41,313-05 (Tex. Crim. App. Apr. 16, 2025); App. at 1-4 In relevant part, the TCCA dismissed Mr. Saldaño's petition for the following reasons:

> 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).

App. at 4.

On June 11, 2025, Mr. Saldaño filed an Unopposed Suggestion for Reconsideration of Dismissal of Subsequent Application (hereinafter, "Suggestion"), specifically pointing out the TCCA's incongruous treatment of Mr. Saldaño's successor compared with nearly a decade of post-*Moore Atkins* cases which were granted review under Article 11.071 Sec. 5(a)(1) and the successive applications of similarly situated individuals who were granted review under Sec. 5(a)(3) of the same code section. App. at 102-128. Mr. Saldaño's Suggestion also argued that the TCCA's refusal to allow evidentiary development and merits review of his *Atkins* claim was at odds with the Supremacy Clause, which requires that state courts give meaningful effect to substantive rulings of the United States Supreme Court, including those in *Atkins*, *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore*. App. at 123-24. Nonetheless, three weeks later, the TCCA dismissed this Suggestion in an unpublished postcard notice containing no reasoning. App. at 5-13.

REASONS FOR GRANTING THE WRIT

The threshold question presented in this case is essentially the same question presented in *Cruz v. Arizona*, 598 U.S. 17 (2023), namely, whether the procedural ground cited by the TCCA is both adequate and independent, and therefore sufficient to bar merits review of Mr. Saldaño's constitutional claim. *Infra* Section (I). The resolution of this question determines whether, as here, the TCCA may create novel and unforeseeable rules of default to deny a petitioner the ability to fully and fairly present a claim that would make him ineligible for execution, which necessarily jeopardizes the supremacy of federal law in Texas. Further, in light of the State's

concession in this case, due process requires merits consideration of Mr. Saldaño's Eighth Amendment claim. *Infra* Section (II). This Court should grant Mr. Saldaño's petition for certiorari, vacate the TCCA's decision, and remand this case for review on the merits, and/or grant review and reversal in Mr. Saldaño's case.

I. The TCCA's Application of a Novel and Unpredictable Procedural Bar on Mr. Saldaño's *Atkins* Claim Should Not Prevent Review

This Court will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *see also Herb v. Pitcairn*, 324 U.S. 117 (1945) (stating that the prohibition on reviewing judgments of state courts that rest on "adequate and independent state grounds" is based in part on limitations on this Court's jurisdiction). Although this doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules," *Harris*, 489 U.S. at 260-61, the question of when and how defaults in compliance with state procedural rules can preclude this Court's consideration of a federal question is itself a federal question. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Henry v. Mississippi,* 379 U.S. 443, 447 (1965).

A. The Novel Procedural Rule Applied to Bar Section 5(a)(1) Review is Not Adequate

"A state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Johnson,* 486 U.S. at 587 (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)); *Hathorn v. Lovorn,* 457 U.S. 255, 262–263

(1982). Ordinarily, violation of a state procedural rule that is "firmly established and regularly followed" constitutes a state ground "adequate" to foreclose merits review of a federal claim, but in "exceptional cases" a generally sound rule may be applied in a way that "renders the state ground inadequate to stop consideration of a federal question." *Cruz*, 598 U.S. at 26 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). This is because "[n]ovelty in procedural requirements cannot be permitted to thwart review. . . by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457, (1958). *See also Cruz*, 598 U.S. at 25-26; *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question.").

The procedural rule applied to deny Mr. Saldaño review by the TCCA was inadequate, first, because it is novel (i.e., it is not regularly followed), and, second, regardless of its novelty, the application of the rule is an outlier (i.e., it is in the subset of 'exceptional' cases that do not preclude federal review). *See Lee*, 534 U.S. at 376. Mr. Saldaño invoked Texas Code of Criminal Procedure Article 11.071 subsection 5(a)(1) in his subsequent application. The TCCA has previously explained that the section 5(a)(1) exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the TCCA's law governing the claim at the time of the previous application. *See, e.g.*, *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007) (authorizing a claim under section 5(a)(1) when a "subsequent

writ is based on binding and directly relevant United States Supreme Court precedent decided after applicant had exhausted [his] claim at trial and on direct appeal and after applicant had filed his first state habeas application"); *see also Ex parte Hood*, 304 S.W.3d 397, 405 n.40–41 (Tex. Crim. App. 2010) (*Hood II*) (collecting sources largely relying on *Martinez*).

The directly applicable Supreme Court decision at issue here is this Court's decision in *Moore I*, which corrected the unconstitutional legal framework for deciding *Atkins* claims in Texas articulated in *Ex parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The TCCA's novel application of a procedural bar in Mr. Saldaño's case stands in stark contrast to nearly a decade of decisions under Article 11.071 5(a)(1) explicitly and unquestionably finding *Moore I* to be a new legal basis for review. *Moore I* was announced in 2017, and the TCCA 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."). Indeed, even in its treatment of subsequent applications like Mr. Saldaño's, the TCCA has previously noted that the *Briseño* framework caused other applications to fail when they were raised prior to *Moore* – in exactly the time frame that the TCCA now faults Mr. Saldaño for not previously raising his *Atkins* claim. *See, e.g.*, *Ex parte Guevara,* WR-63,926-03, *2 (Tex. Crim. App. Sept. 23, 2020) (not designated for publication) (TCCA finding that though Guevara had previously raised an *Atkins* claim in a 2006 subsequent habeas application, that the TCCA dismissed that application as an abuse of the writ because "[a]t the time of our order, *Briseno* provided the framework for evaluating an intellectual disability claim," but another subsequent application was properly authorized under *Moore*).[2]

[2] The TCCA also faulted Mr. Saldaño for not having previously raised his *Atkins* claim at his second penalty phase (2004) and in his initial habeas application thereafter (filed in 2007), *see* App. at 117-18, but other *Atkins* claimants who received Section 5(a)(1) authorization explicitly because of the new legal basis *Moore* provided had also not previously raised *Atkins* at every prior stage. *See, e.g., Ex parte Guevara,* WR-63,926-03, *1 (Tex. Crim. App. Sept. 23, 2020) (noting that Guevara had filed his initial application in December 2002 – after *Atkins* – but that he did not raise an *Atkins* claim in that application, and raised it instead in his first subsequent application); *Ex parte Long*, 670 S.W.3d 685 (Mem) (Tex. Crim. App. 2023) (Yeary, J., dissenting) ("First of all, Applicant's trial occurred in 2006, four years after *Atkins* was decided. Yet Applicant failed to pursue a claim of intellectual disability at that time."). This demonstrates the inadequacy of the rule, both in its failure to be regularly followed and in its exceptional application in Mr. Saldaño's case.

That *Moore I* is new decisional law rightly allowing for applicants to pass through the Section 5(a)(1) gateway is hardly surprising – it has long been the practice of the TCCA to treat Supreme Court decisional law that corrects unconstitutional application of the death penalty as "new law" for Section 5(a)(1) purposes. One particularly salient example is the TCCA's treatment of *Penry* line of cases. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*); *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). The TCCA found that *Penry*, *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004), each constituted a "new legal basis" for Section 5(a)(1) in subsequent 11.071 applications. *Ex parte Hood*, 304 S.W.3d 397, 409 (Tex. Crim. App. 2010) ("[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[.]"). Just as it treated both *Penry* and cases after *Penry* as "new law" for Section 5(a)(1), the TCCA has long treated *Atkins*, as well as *Atkins* progeny, such as *Moore*, "new law" for purposes of authorizing a subsequent application.

Mr. Saldaño's case deserves this Court's attention for the same reason as other instances in which state supreme courts corrupted their own rules of default to creating new and unforeseen barriers. The relevant procedural facts of this case track those that grounded reversal in *Cruz*. This case, like *Cruz*, challenges "an unforeseeable and unsupported state-court decision on a question of state procedure." *Cruz*, 598 U.S. at 26. Like Cruz, Mr. Saldaño asks for the enforcement of clear federal law in *Atkins*, *Moore I*, and *Moore II*. Both cases involve a state statute that permits

successive petitions where the claim raised is based in new law. The Arizona rule at stake in *Cruz* permitted a defendant to bring a successive petition if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." *Cruz*, 598 U.S. at 20 (internal citation omitted). The applicable Texas statute provides that a court may consider the merits of a subsequent application when "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 filed under this article . . . 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).

Both this case and *Cruz* involve a decision of this Court overturning a decision of the very same state court that then brazenly declared that no new law was created by this Court's decision. After the Arizona Supreme Court repeatedly held that Arizona's sentencing and parole scheme did not trigger application of *Simmons v. South Carolina,* 512 U.S. 154 (1994), this Court summarily reversed that state court in *Lynch v. Arizona*, 578 U.S. 613 (2016) (*per curiam*), holding that that it was fundamental error to conclude that *Simmons* "did not apply" in Arizona. 578 U.S. at 615. Likewise, after the TCCA created and repeatedly applied its "*Briseño* factors" instead of applying a medically-accepted definition of intellectual disability, this Court overturned the TCCA's deviations from clinical consensus in *Moore I* and again in *Moore II*. And finally, the Arizona Supreme Court denied merits review of Cruz's claim after holding that *Lynch* was "not a significant change in the law," *Cruz,* 598

U.S. at 24, and the TCCA denied relief stating that Mr. Saldaño had failed meet Section 5(a)(1) because the "legal basis" created by *Atkins* "was available to [Mr. Saldaño] when he filed his previous 11.071 applications following resentencing." App. at 4.

B. The TCCA's New Section 5(a)(1) Rule Creates a Kafkaesque Scenario Whereby *Atkins*-Eligible Individuals Would Have Had to Raise a Losing Claim Under *Briseño*

Without this Court's review and correction, Mr. Saldaño and other similarly situated individuals are left in a Kafkaesque scenario in which they would have been clearly ineligible to raise an *Atkins* claim under *Briseño*, but then later faulted for not bringing their *Atkins* claim before *Moore* was decided. The new rule Texas applied in Mr. Saldaño's case creates a subset of ID individuals/*Atkins* claimants who will be eligible for execution in spite of this Court's opinion in *Moore I* and *II*, as the TCCA refuses to apply *Moore's* correction to their cases. This Court should not tolerate the creation of such rules that threatens the supremacy of federal law and unreasonably risks the execution of the intellectually disabled in violation of the Eighth Amendment.

The difference between a reasonable application of *Atkins* and what Texas was doing with the *Briseño* factors between 2004 and until this Court's 2017 in *Moore* is significant. The *Briseño* factors were summarized in 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?

(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).

Tex. Code Crim. Proc. sec. 5(a)(1) required that Mr. Saldaño's claim had "not been and could not have been presented previously in a timely initial application . . . because the factual or legal basis for the claim was unavailable" on the date(s) of any prior applications. 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– i.e., such a claim was unavailable to him – prior to *Moore*: He satisfies none of them. As Mr. Saldaño pleaded in the underlying litigation, and particularly in his Suggestion, App. at 107-116, Mr. Saldaño was not known as intellectually disabled in his youth in Argentina (factor one). The TCCA had previously found in Mr. Saldaño's direct appeal that he and his co-defendant, Jorge Chavez, had formulated a plan that was not impulsive (failing the second factor), and which arguably required forethought and planning (failing the seventh factor). *See Saldaño v. State*, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007). Mr. Saldaño was characterized as the leader of the robbery

and murder in his case, therefore failing the third factor. *Id*. The TCCA's prior opinion also demonstrated that Mr. Saldaño could respond to stimuli and questions without wandering from subject to subject (factors four and five). *Saldaño*, 232 S.W.3d at 100. Mr. Saldaño would not have been able to meet the sixth *Briseño* factor – whether he could hide facts or lie in furtherance of his own interests – because when law enforcement encountered him, Mr. Saldaño first claimed that he was a Mexican man named Victor Rodriguez, rather than an Argentine man named Victor Saldaño, his true identity. Thus, this clearly would have demonstrated that Mr. Saldaño was capable of lying for his own interest (i.e., evading prosecution), and is demonstrative of the kind of nonmedical issue that would have defeated his *Atkins* claim. For these failures to meet the arbitrary *Briseño* factors, Mr. Saldaño's *Atkins* claim, regardless of strength or merit, then, falls clearly into the situation that *Moore I* was intended to rectify were it not for the newly created rule at issue here.

This is why cases like Mr. Saldaño's – where *Moore I* would have made the difference between a doomed *Atkins* claim and a successful one – were routinely reviewable through the Section 5(a)(1) gateway until Mr. Saldaño's case in 2025. In both *Cruz* and Mr. Saldaño's case, contrary to their state court's reasoning, "[i]t is hard to imagine a clearer break from the past." *Cruz,* 598 U.S. at 27. Mr. Saldaño pleaded at length in his underlying subsequent writ of habeas corpus as well as in his Suggestion to the TCCA's first dismissal that not only is it undisputed that he meets the criteria for an intellectual disability, but that the TCCA's unconstitutional framework for handling *Atkins* claims – namely, the application of the *Briseno* factors

– would have prevented him from presenting his ID previously. This is not a unique position, and is why time and time again, the TCCA has authorized successive litigation of ID claims and recognized that *Moore* was new law. Now, the TCCA seeks to evade a full and fair presentation and adjudication of a first-time ID claim in Mr. Saldaño's case by suddenly reversing course and declaring that *Moore* was not new law. TCCA should not be permitted to do so.

C. The Procedural Bar Applied is Not Independent of the Federal Question

"A state ground of decision is independent only when it does not depend on a federal holding . . . and also is not intertwined with questions of federal law." *Glossip*, 604 U.S. at 242 (internal citations omitted). As discussed above, because the purported state procedural barrier is patently inadequate, it cannot bar this Court's merits review of the federal question. *See Cruz*, 598 U.S. at 29. But that purported bar cannot bar relief for a second reason: it was not independent of the merits of the federal claim. To preclude review, the TCCA's judgment must rest on a ground that is *both* adequate and independent; one or the other is not enough. *See Harris v. Reed*, 489 U.S. 255, 260 (1989). Whether or not a rule is independent is itself also a federal question. *See Johnson v. Mississippi*, 486 U.S. 578, 587 (1988).

Both Section 5 subsections require the TCCA to complete an analysis of the factual sufficiency of a claim, and in ID claims like Mr. Saldaño's, it includes a minimal analysis of whether the applicant's facts, if true, would establish relief (i.e., that Mr. Saldaño is intellectually disabled). Although the holding of the TCCA with respect to Mr. Saldaño's Section 5(a)(1) determination rested on its wrong

determination that *Moore* was not "new law," in defiance of its own precedent, the Section 5(a)(3) determination involved an inquiry into whether there is "a violation of the United States Constitution." Tex. Code Crim. Proc. Art. 11.071 sec. 5(a)(3). This required that the TCCA review the "adequacy of the pleading" for the factual sufficiency of the underlying claim to pass through the Section 5(a)(3) gateway. *Ex parte Blue*, 230 S.W.3d 151, 163 & n.51 (Tex. Crim. App. 2007).

The TCCA was explicit that it had analyzed the facts of Mr. Saldaño's case and determined that those facts did not make out a colorable claim for *Atkins* relief; the opinion states that Mr. Saldaño had "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." App. at 4 (citating *Blue*, 230 S.W.3d at 162). The Court found that "[f]or that reason, [Mr. Saldaño's] claim may not proceed under Article 11.071, Section 5(a)(3)." *Id.* Because the parties agreed that Mr. Saldaño meets the criteria for intellectual disability, the TCCA's analysis should have involved an application of those agreed upon and conceded facts (though it is silent on the concession). It is difficult to discern how in those agreed upon circumstances that the TCCA could find a pleading burden not met, as it apparently did.

Regardless, because the TCCA purportedly conducted an analysis of the merits of the federal claim (albeit at the threshold pleading level) to reach its decision, its decision is not independent of federal law (namely, *Atkins* and progeny). *Cf. Glossip v. Oklahoma*, 604 U.S. 226, 257 (2025) (explaining that where a state's reliance on a "procedural rule whose application turned on the merits of a federal claim" did not

preclude review); *see also Glossip*, 604 U.S. at 259 (Barrett, J., concurring in part and dissenting in part) ("[W]hen a state-law ground of decision is intertwined with analysis of a federal question, we will treat the decision as independent *only if* the state court 'make[s] clear by a plain statement' that its resolution of the state-law question does not depend on its resolution of the federal question.") (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)) (emphasis added). In the absence of clarity in a state court's option, however, this Court has been clear that "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, *we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so*." *Long*, 463 U.S. at 1040-41 (emphasis added). Here, the TCCA's judgment in Mr. Saldaño's case relied on federal law, and review should not be precluded on this basis.

II. Due Process Requires the Remand for a Merits Consideration of Mr. Saldaño's *Atkins* Claim Because the State and Its Expert Have Agreed that Mr. Saldaño Meets the Criteria for Intellectual Disability

Here, as in every case, "[p]rosecutors have a special 'duty to seek justice, not merely to convict.'" *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (citation omitted). Mr. Saldaño's case, just as in *Glossip v. Oklahoma*, 604 U.S. 226 (2025), presents the question of whether due process requires the reversal of a judgment because the "State no longer seeks to defend it." *See* p. i, Petition for Certiorari, *Glossip v. Oklahoma*, No. 22-7466 (U.S.).

It was not a simple path to the current posture of Mr. Saldaño's case, in which both parties and their experts unanimously agree that: 1) Mr. Saldaño meets the criteria for intellectual disability; and 2) the Texas courts should review his claim through either the Article 11.071 Section 5(a)(1) or Section 5(a)(3) gateway. Mr. Saldaño's counsel was appointed to his case because the State was seeking an execution date for Mr. Saldaño and there were significant concerns about Mr. Saldaño's competency to be executed. The State fought vigorously against Mr. Saldaño, before and after current counsel was appointed, and through Mr. Saldaño's competency (*Ford*) proceedings. It was only after Mr. Saldaño was evaluated in the context of those adversarial proceedings, which included an appropriate Spanish-language IQ test, that the State was alerted of Mr. Saldaño's ID-qualifying IQ score.

The State's own expert, and then the State, subsequently conceded that Mr. Saldaño meets the criteria for intellectual disability, agreeing with multiple experts for Mr. Saldaño. There is no factual dispute between the parties on Mr. Saldaño's diagnosis. In addition, the State conceded in its brief to the TCCA not only that Mr. Saldaño meets this criterion, but that he meets the criteria for review under Article 11.071 Section 5(a)(1) and 5(a)(3). The TCCA's order denying Mr. Saldaño's application barely mentioned the State's concession, and did not meaningfully consider how that concession on the facts (i.e., Mr. Saldaño's ID diagnosis), should factor into its analysis of the factual sufficiency of the claim. These concessions are meaningful and should be respected in the rare circumstances in which they occur. This Court has reversed cases in similar postures, *see Escobar v. Texas*, 143 S. Ct.

557 (2023) (mem.), separate and apart from this Court's opinion in *Glossip*. The TCCA's decision completely ignores the import of this concession and the lack of factual dispute between the parties and their experts. In doing so, it violated Mr. Saldano's rights under the due process clause. As such, like it has done in the past, this Court should reverse Mr. Saldaño's case in light of these facts and consistent with the Due Process clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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