No. 25-5749

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR SALDANO,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

(Capital Case)

On Petition for Writ of Certiorari from the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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This is a capital case.

QUESTIONS PRESENTED

Saldano, a Texas death-row inmate, challenges the Texas Court of Criminal Appeals (TCCA) dismissal of his subsequent state habeas writ application raising a claim that he is intellectually disabled and, thus, exempt from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Saldano raises two questions. The first challenges the TCCA's dismissal under article 11.071, § 5(a)(1) and the second under § 5(a)(3). Did the TCCA err in denying Saldano review of the merits of his *Atkins* claim?

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The State files this brief in opposition to Saldano's petition for certiorari review.

STATEMENT OF THE CASE

On November 25, 1995, Victor Hugo Saldano and an accomplice kidnapped Paul King from a grocery store parking lot by forcing him into his own car at gunpoint. The two stole his watch and vehicle and drove him to a wooded area near Lake Lavon where Saldano shot him five times.

Saldano was charged with capital murder, convicted, and sentenced to death on July 25, 1996. The Texas Court of Criminal Appeals (TCCA) affirmed Saldano's conviction and sentence on direct appeal, but on certiorari review, this Court reversed and remanded the case. *Saldano v. State*, No. AP-72,556, 1999 Tex. Crim. Ap. Unpub. LEXIS 2 (Tex. Crim. App. Sept. 15, 1999) (not designated for publication), *vacated*, 530 U.S. 1212 (2000). On remand, the Court of Criminal Appeals reaffirmed the case. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). Then during federal habeas review, the federal district court granted relief and ordered a new punishment hearing. *Saldano v. Cockrell*, 267 F. Supp. 2d 635 (E.D. Tex. 2003).

On retrial, Saldano was again sentenced to death. The TCCA affirmed the sentence on direct appeal, and this Court denied certiorari review. *Saldano v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1232 (2008). The TCCA also subsequently denied Saldano's request for state habeas relief. *Ex parte Saldano*,

No. WR-41,313-04, 2008 Tex. Crim. App. Unpub. LEXIS 778 (Tex. Crim. App. Oct. 29, 2008) (not designated for publication).

The federal district court then denied Saldano's request for federal habeas relief. *Saldano v. Director-TDCJ*, No. 4:08-cv-193, 2016 U.S. Dist. LEXIS 92856 (E.D. Tex. July 18, 2016). The Fifth Circuit Court of Appeals granted certificate of appealability but ultimately denied relief. *Saldano v. Davis*, 759 Fed. App'x. 276 (5th Cir. 2019). And this Court denied certiorari review. *Saldano v. Davis*, 589 U.S. 1071 (2019).

On April 8, 2021, the State moved the trial court to set Saldano's execution date. The court deferred setting a date and gave Saldano nine months to file a motion challenging his competency for execution under article 46.05 of the Texas Code of Criminal Procedure. Saldano filed the motion and supporting exhibits on January 31, 2022. The motion is still pending in the trial court.

Based on evidence tendered in support of Saldano's article 46.05 motion, including a full-scale IQ score of 73 on the Spanish WAIS-IV, the State requested and obtained Saldano's agreement for an evaluation by a State's expert for ID (Intellectual Disability). The State's expert subsequently obtained a similar result (a full scale IQ score of 74) on the same test. With the test's standard error of measurement of +/- 5 points, the scores on both tests placed Saldano's IQ within the range of mild intellectual disability.

Given the IQ scores, the parties agreed to pause the article 46.05 proceedings

to address Saldano's adaptive functioning. OCFW traveled to Argentina to locate and interview informants familiar with Saldano during his childhood. These informants provided written statements describing a variety of adaptive deficits apparent during Saldano's developmental period. Both parties submitted this evidence to their respective experts for evaluation, and the experts generated reports opining that Saldano meets the criteria for ID established by *Atkins*.

On June 26, 2024, Saldano filed a subsequent state habeas application under article 11.071, § 5, raising an *Atkins* claim. Relying on article 11.071, § 5(a)(1) and (a)(3), Saldano argued his application overcame the procedural bar on subsequent writs. The State filed a brief in support of remanding the application to the trial court; the State agreed Saldano's claim was not procedurally barred and asked the TCCA to permit litigation of the merits of the claim. On April 17, 2025, the TCCA dismissed the writ application, holding it did not meet the requirements of § 5(a)(1) or (a)(3). *Ex parte Saldano*, No. 41,313-05, 2025 Tex. Crim. App. Unpub. LEXIS 122 (Tex. Crim. App. Apr. 16, 2025) (not designated for publication). Saldano moved the TCCA to reconsider its dismissal, but the court denied his motion on July 2, 2025. Saldano now seeks certiorari review of the TCCA's dismissal of his subsequent writ.

ARGUMENT

The State agrees the TCCA's Dismissal of Saldano's *Atkins* Claim under article 11.071, § 5(a)(3) was a determination on the merits.

The TCCA has strictly and regularly applied 11.071 § 5(a), and dismissal of a successive habeas application upon such grounds constitutes an adequate and independent state procedural bar. *See, e.g., Moore v. Texas*, 535 U.S. 1044, 1047 (2002) (Scalia, J., dissenting) ("There is no question that this procedural bar is an adequate state ground; it is firmly established and has been regularly followed by Texas courts since at least 1994."); *see also Balentine v. Thaler,* 626 F.3d 842, 856-57 (5th Cir. 2010) ("We have previously held that the [TCCA] regularly enforces the Section 5(a) requirements.").

This Court has explained that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal[.]" *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997); *see also Sochor v. Florida,* 504 U.S. 527, 533-34 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945). The "independent" and "adequate" requirements are satisfied where the court "clearly and expressly" indicates that its dismissal rests upon state grounds that bar relief, and that bar is strictly or regularly followed by state courts and applied to the

majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)); *see also Johnson v. Mississippi,* 486 U.S. 578, 587 (1981).

However, in reviewing *Atkins* claims in subsequent habeas applications, precedent is clear that the TCCA necessarily considers the merits of the federal constitutional claim. *See Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) ("For the post-*Atkins* applicant who bypassed the opportunity to raise mental retardation at trial or in an initial writ, Section 5(a)(3) mandates that his subsequent application 'contain[ ] sufficient specific facts' that, if true, would establish 'by clear and convincing evidence' that no rational fact finder would fail to find him mentally retarded."); *Busby v. Davis*, 925 F.3d 699, 709 (5th Cir. 2019) (citing *Blue,* held TCCA's conclusion that evidence did not meet subsection 5(a)(3) threshold "was not a denial of relief on purely state-law procedural grounds, independent of federal law, because in addressing the *Atkins* claim, the TCCA necessarily considered federal law in assessing the sufficiency of the facts supporting the claim.")

The TCCA held Saldano's subsequent writ application could not proceed under § 5 (a)(1) or (a)(3). *Saldano*, 2025 Tex. Crim. App. Unpub. LEXIS 122, at *3-4. In dismissing the application under (a)(3), the court held that Saldano 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." *Id*. at *4.

The TCCA's decision under § 5(a)(3) was not independent of federal law. Rather, TCCA precedent demonstrates that the decision necessarily involved a prima facie determination of the merits of Saldano's *Atkins* claim. *See Ex parte Woods,* 296 S.W.3d 587, 605-606, 613 (Tex. Crim. App. 2009) (holding Woods failed to demonstrate evidence was "new" under subsection 5(a)(1), thus, court addressed whether it may consider merits of successive application under 5(a)(3), ultimately concluding additional evidence did not satisfy statute); *Ex parte Blue,* 230 S.W.3d at 163; *Ex parte Campbell,* 226 S.W.3d 418, 422 (Tex. Crim. App. 2007) (holding unavailability is only the first hurdle and habeas applicant must also demonstrate prima facie showing of entitlement to relief). An applicant filing a subsequent writ pursuant to article 11.071 § 5(a)(3) necessarily must make a prima facie showing of intellectual disability to be granted leave to file the writ. *Blue,* 230 S.W.3d at 162.

The prima facie determination is not a full merits review. *Blue,* 230 S.W.3d at 162 ("We do 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 mentally retarded.") But it is sufficient to remove the question of whether the court applied an independent state procedural ground. It did not. This Court thus has jurisdiction to

review the decision.[1]

The State agrees Saldano made a prima facie showing that he is intellectually disabled under *Atkins*.

In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), this Court held the execution of intellectually disabled persons to be unconstitutional. In *Hall v. Florida*, 572 U.S. 701, 712 (2014), the Court clarified that courts cannot disregard "established medical practice" in examining an *Atkins* claim; that while there is a distinction between a medical and legal conclusion regarding an intellectual disability claim, a court's determination must be "informed by the medical community's diagnostic framework." In *Moore v. Texas*, 581 U.S. 1, 20 (2016), this Court held that the latest editions of the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the American Association on Intellectual and Developmental Disabilities (AAIDD) *Definition Manual* constitute "current medical standards" that supply "the best available description of how mental disorders are expressed and can be recognized by a trained clinician."

In *Petetan v. State*, 622 S.W.3d 321, 332-33 (Tex. Crim. App. 2021), the TCCA explained that while the APA and AAIDD clinical manuals are quite similar, a legal

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[1] Relying *Cruz v. Arizona*, 598 U.S. 17 (2023), Saldano argues the TCCA's refusal to authorize his subsequent writ under § 5(a)(1) after *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore* I) and *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*) violated due process and the Supremacy Clause. He contends the TCCA's rejection of the § 5(a)(1) exception must be deemed an inadequate ground to support the CCA's judgment. Because the TCCA's decision

determination of ID should hew close to the APA's DSM since its clinical purpose is more in keeping with the rationale underpinning *Atkins*. Applying the current version of the DSM to this case – the DSM-5-TR – ID is characterized by significant deficits in (1) intellectual and (2) adaptive functioning (3) during the developmental time period. An individual must satisfy each of the three criterion in order to be classified as IDD. DSM-5-TR at 37. Of importance to the instant writ is the DSM-5-TR requirement that "the diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual functions, standardized neuropsychological tests, and standardized tests of adaptive functioning. *Id*. at 38.

In support of his ID claim, Saldano presents expert opinion evidence, including the report of the State's expert, and numerous statements from individuals in Argentina attesting to Saldano's adaptive deficits during his developmental period. As stated in Saldano's petition, both Saldano's experts and the State's expert agree that he meets the criteria for ID under *Atkins*. Petition at 2-3; Petitioner's Appendix at 98-99. Post-conviction IQ testing yielded scores of 73 (WAIS-IV Spanish version), 74 (WAIS-IV Spanish version), 77 (TONI-4 English version). With a standard error of measurement of +/- 5 points, Saldano's scores on the two WAIS-IV tests put his IQ somewhere between 68 and 79. Petitioner's

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is not independent of the federal law question, however, *Cruz* is irrelevant.

Appendix at 90-91. Thus, his IQ may be 70 or below. Furthermore, the witness statements describe behavior indicative of a variety of adaptive deficits displayed before Saldano turned 18. Petitioner's Appendix at 94-98.

In light of these facts, the State believes Saldano made a prima facie showing of ID that warrants litigation of his *Atkins* claim on the merits.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that the Court grant Saldano's petition for writ of certiorari, vacate the TCCA's dismissal of his subsequent writ application, and remand to the TCCA to address the merits of Saldano's *Atkins* claim.

Respectfully submitted,

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