

No. 25-5749

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IN THE  
**Supreme Court of the United States**

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VICTOR SALDAÑO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

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**REPLY BRIEF FOR PETITIONER**

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***THIS IS A CAPITAL CASE***

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## REPLY BRIEF FOR THE PETITIONER

### I. Introduction

Mr. Saldaño and the State of Texas agree that this Court has jurisdiction and should exercise its authority in this case of an intellectually disabled, death-sentenced man. Mr. Saldaño and the State also agree that Mr. Saldaño met his burden in the Texas Court of Criminal Appeals (TCCA) to meet the procedural requirement imposed by Tex. Code Crim. Proc. Art. 11.071, and that Mr. Saldaño demonstrated at least a prima facie claim of intellectual disability (also known as Intellectual Developmental Disorder (IDD)) pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). Although the State initially sought to set an execution date for Mr. Saldaño, because the State's expert and Mr. Saldaño's three other experts agree that Mr. Saldaño is a person with an intellectual disability, the State now has conceded that he is ineligible under *Atkins*. The facts alleged by Mr. Saldaño and not disputed by the State (either here or in the courts below) warranted evidentiary development of Mr. Saldaño's IDD claim and consideration on its merits in the TCCA, but the TCCA's nonetheless denied that development and merits review of his claim. This denial both flew in the face of the TCCA's own precedent and ignored the agreement of the parties as to all relevant procedural and factual issues. This Court can and should correct the TCCA's unsupportable decision. For these reasons and those below, this Court should vacate the TCCA's judgment and remand his case to the TCCA for this consideration.

## **II. The Parties Agree that the TCCA’s Refusal to Authorize Mr. Saldaño’s *Atkins* Claim Does Not Rest on an Independent State Ground**

There is unusual agreement of the parties about the facts and procedural issues in this case. The parties are also agreed that the state procedural rule applied by the TCCA in this case with respect to Article 11.071, sec. 5(a)(1) was not independent, and therefore does not preclude this Court’s review.

In the TCCA, the State agreed that Mr. Saldaño met the “new legal basis” gateway subsection in Article 11.071 Section 5(a)(1), thus permitting a subsequent state habeas application, and in its response to this Court, it does not dispute that Mr. Saldaño was entitled to review under Section 5(a)(1). Moreover, in its Brief in Opposition (BIO) – really a Brief in Support – the State agrees that the TCCA’s determination was not independent of the merits of the *Atkins* claim and therefore does not preclude this Court’s review. Citing previous cases, the State correctly observes, “in reviewing *Atkins* claims in subsequent habeas applications, precedent is clear that the TCCA necessarily considers the merits of the federal constitutional claim.” BIO at 5.

## **III. The State Takes No Position on Whether the TCCA’s Application of Section 5(A)(1) Is Adequate As Applied In Mr. Saldaño’s Case**

Additionally, although the State contends that Section 5(a) *generally* is an adequate ground, *see* BIO at 4, it is silent on whether the TCCA’s application of Section 5(a)(1) is adequate as applied in Mr. Saldaño’s case. While willing to concede Mr. Saldaño’s entitlement to review under Section 5(a)(1), the State may be concerned that a broad declaration that Article 11.071 is not “adequate” would have implications

in many other cases in which the State continues to seek executions. But the State does not address whether Mr. Saldaño’s case is one of the “rarest of situations” where “an 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.” *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Bowie v. City of Columbia*, 378 U.S. 347, 354 (1964)). Which form of inadequacy – whether generic or case-specific – is present here in Mr. Saldaño’s case makes no difference.<sup>1</sup> Either way, an inadequate state ground cannot thwart federal review.

More broadly, any disagreement about the presence or breadth of adequacy can be postponed for another day. As this Court has repeatedly admonished, most recently in *Cruz*, to bar federal review, a rule must be *both* independent of the federal question *and* adequate to support the judgment. Because there is no disagreement that the state procedural bar is dependent on federal law, there is no barrier to this Court’s review.

The State has not changed its position that Mr. Saldaño met Section 5(a)(1) and it does not defend the TCCA’s actions because the TCCA’s actions cannot be defended. Nor does it argue that the TCCA’s decision precludes either review or relief.

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<sup>1</sup> As set forth at length in Mr. Saldaño’s petition, the inadequacy argument is founded not only on the language of Texas Code of Criminal Procedure Article 11.071, but the history of *Atkins* litigation in Texas; after *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), the CCA frequently entertained *Atkins* claims with *Moore* as the explicit supporting “new legal basis.” See Pet. at 14-15. Regardless of whether the TCCA’s application of Section 5(a)(1) is novel only to *Moore I* and *Moore v. Texas*, 139 S.Ct. 666 (2019) (*Moore II*) cases or whether it was novel only to Mr. Saldaño, it is inadequate and cannot operate to preclude review.

## CONCLUSION

This Court should grant a writ of certiorari, vacate the decision of the TCCA, and either remand the case to the TCCA or review the decision below on the merits.

Respectfully submitted,

*/s/ Benjamin Wolff*

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