

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*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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**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.

ORDER

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

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).

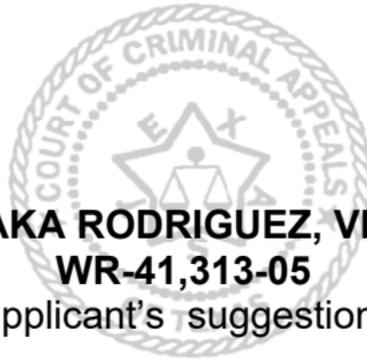
Applicant filed the instant application, his second subsequent 11.071 application, in the convicting court in June 2024. As mentioned, in a single claim, Applicant alleges for the first time that he is intellectually disabled and ineligible for execution. *See Atkins*, 536 U.S. at 321. He argues that 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.

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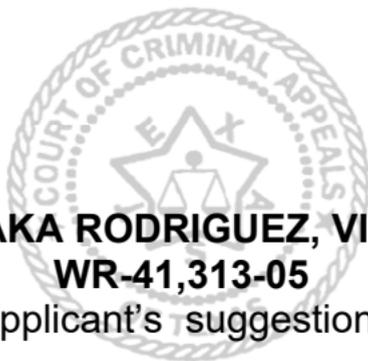
**SALDANO, VICTOR HUGO AKA RODRIGUEZ, VICTOR Tr. Ct. No. W199-
80049-96-HC3
WR-41,313-05**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

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Saldaño v. Texas, Appendix - 005



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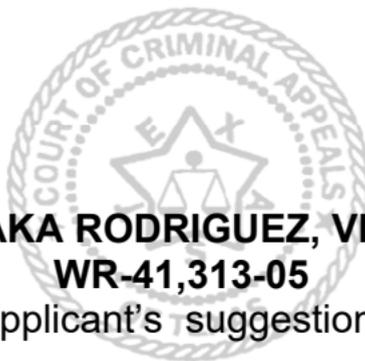
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This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

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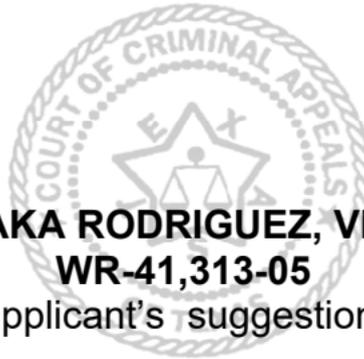
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80049-96-HC3
WR-41,313-05**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

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Saldaño v. Texas, Appendix - 007



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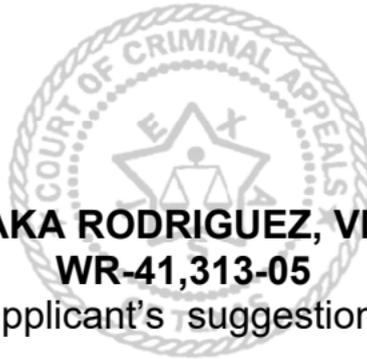
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80049-96-HC3
WR-41,313-05**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

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Saldaño v. Texas, Appendix - 008



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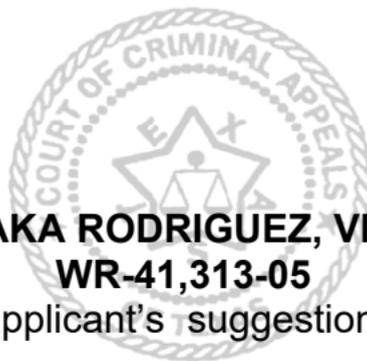
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80049-96-HC3
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Saldaño v. Texas, Appendix - 009



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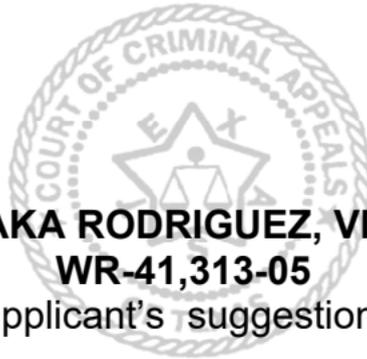
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80049-96-HC3
WR-41,313-05**

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

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Saldaño v. Texas, Appendix - 010



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80049-96-HC3
WR-41,313-05**

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Saldaño v. Texas, Appendix - 011

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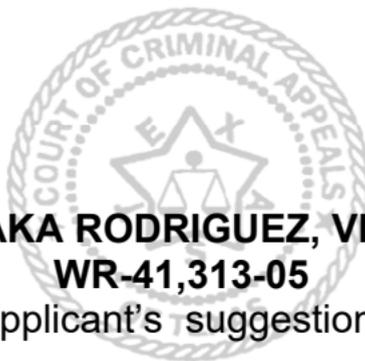
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80049-96-HC3
WR-41,313-05**

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80049-96-HC3
WR-41,313-05**

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Saldaño v. Texas, Appendix - 013

**IN THE 199th DISTRICT COURT
COLLIN COUNTY, TEXAS**

AND

**IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

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

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

Victor Saldaño was born with intellectual disability and has struggled with his disability for his entire life. For decades, he has also suffered from schizophrenia, as diagnosed and treated by the Texas Department of Criminal Justice (TDCJ). Mr. Saldaño spent his formative years in Argentina, where his intellectual limitations were always apparent. He was unable to appropriately bathe, clothe, or feed himself. He so lacked the ability to follow instructions that he was twice hit by cars in the street because he could not remember to look both ways before crossing. Today, three postconviction experts – including the State’s current expert, Dr. Gilbert Martinez – agree that Mr. Saldaño’s functioning is consistent with of Intellectual Developmental Disorder (IDD).

In *Atkins v. Virginia*, the Supreme Court held that because “they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct,” intellectually disabled individuals are ineligible for the death penalty. 536 U.S. 304, 306 (2002). During the almost three decades that Mr. Saldaño has been on death row, both the legal and medical understanding of intellectual disability (now called Intellectual Developmental Disorder), has evolved significantly. Based on his recent diagnosis of IDD under the current prevailing standards, Mr. Saldaño now respectfully requests that the Texas Court of Criminal Appeals (CCA) authorize his claim that he is intellectually disabled and ineligible for execution.

II. FACTUAL BACKGROUND

Mr. Saldaño, mockingly nicknamed “Pecho” because of the awkward way he used his chest during childhood sporting activities, has had profound and obvious intellectual limitations for his entire life. It is now further complicated by his serious mental illness, but Mr. Saldaño’s inability to care for himself without the assistance of others has persisted throughout his lifetime. In 2021, after new neuropsychological testing revealed an IQ score consistent with IDD, counsel for Mr. Saldaño conducted—for the first time—an in-person investigation in Mr. Saldaño’s native Argentina. The following summary of his life and struggles is almost entirely the result of this investigation, which produced more than a dozen declarations from family, friends, neighbors, classmates, and individuals incarcerated with Mr. Saldaño in TDCJ, *see* Ex. 8-20. These declarations support Mr. Saldaño’s IDD claim, and, along with other documentary evidence, culminated in the reports of multiple mental health experts concluding that Mr. Saldaño meets the criteria for IDD. *See* Ex. 1-7.

A. Mr. Saldaño was Born into a Family Struggling with Poverty, Domestic Violence, Mental Illness and Genetic Predisposition to Intellectual Disability

Victor Saldaño was born on October 22, 1971, in Cordoba, Argentina, to his parents Lidia Guerrero and Jose Hugo Saldaño, the third child after his sisters Ada and Sandra. Many members of Mr. Saldaño’s family suffer from cognitive

disabilities and mental health problems, which are still apparent today. Mr. Saldaño's younger brother, Daniel, is intellectually limited, and his sister Sandra has schizophrenia and hallucinates. *See* Ex. 10 at 156 (Silvia Guzman); Ex. 8 at 117 (Ada Saldaño); Ex. 12 at 178 (Victor Carloni). 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. *See* Ex. 10 (Silvia Guzman) at 1; Ex. 11 at 165-6 (Augusto Maldonado) (noting both of his brothers, Mr. Saldaño's maternal cousins, have mental disorders including schizophrenia and intellectual limitations). Mr. Saldaño's paternal aunt was diagnosed with schizophrenia, and his paternal uncle was institutionalized for his mental health issues. Ex. 11 at 165-6 (Augusto Maldonado).

Lidia's pregnancy with Mr. Saldaño was difficult and stressful. Ex. 9 at 141 (Lidia Guerrero). She worked in a factory throughout the pregnancy, chain-smoking to deal with her anxiety and the pressures of supporting her children, and sometimes herself going without food. *Id.* Mr. Saldaño weighed only four pounds at birth, and at the time he was born, the family of five was living in a single rented room. *Id.* By the time Mr. Saldaño was two years old, his father had moved to Brazil, disappearing completely from his children's lives, and leaving Lidia alone to care for her three young children. Ex. 9 at 141 (Lidia Guerrero).

Lidia struggled to make ends meet and to care for Mr. Saldaño and his sisters, working several jobs and relying on neighbors to watch the children while she worked. Ex. 8 at 119 (Ada Saldaño); 20 RR1 229-30; 234-3. The homes Mr. Saldaño grew up in lacked basic necessities, Ex. 12 at 172 (Victor Carloni); one that he lived in for several years had only one room, concrete floors, no roof, no hot water, and no indoor bathroom. Ex. 8 at 119 (Ada Saldaño). Lidia and her children often were forced to live with other family members, and at one point, she, her three children, and her elderly mother, all slept in a single bedroom. Ex. 8 at 117 (Ada Saldaño).

When Mr. Saldaño was about seven years old, Lidia began a relationship with Ramon Barrios, who soon moved in with Lidia and her children. Ex. 8 at 119 (Ada Saldaño). Lidia and Ramon had a son, Daniel, Mr. Saldaño's youngest sibling. Ex. 9 at 142 (Lidia Guerrero). Although Ramon alleviated some of the family's serious financial burdens caused by Jose Saldaño's abandonment, he was violent and would physically abuse both Lidia and her children. Ex. 8 at 118-9. (Ada Saldaño); Ex. 9 at 142 (Lidia Guerrero). Ramon hit Lidia, grabbed her hair, and dragged her around their family home, all in front of the children. Ex. 8 at 118 (Ada Saldaño). Ramon also beat the children and, as Ada recalled, "would use a belt to hit [them] again and again, in the head, and all over [their] bodies." *Id.* Mr. Saldaño's siblings often were able to avoid Ramon and save themselves from his violence, but Mr. Saldaño's limitations made him more of a target; he sustained more beatings than the other

children. Ex. 8 at 118 (Ada Saldaño). Mr. Saldaño was “hit by Ramon all over his body, including in the head, starting when he was seven or eight years old.” *Id.* Although Lidia called the police, no help came for her or her children. *Id.* As the beatings became so severe they “thought Ramon might kill us,” Lidia finally left him, fleeing to her sister’s home when Victor was about 11 or 12 years old. *Id.*; Ex. 9 at 142 (Lidia Guerrero). Eventually, Lidia and her children were able to secure government subsidized housing, which led to more stability for the family, but did not alleviate the difficulties stemming from Mr. Saldaño’s cognitive limitations, difficulties that pervaded his life. *See* Ex. 8 at 119 (Ada Saldaño).

B. Mr. Saldaño’s Intellectual and Cognitive Deficits Were Evident Early in His Life

When the children were very young, Lidia’s attempts to provide for them often took her away from home. So, Mr. Saldaño’s oldest sister, Ada, became the younger children’s primary caretaker. Ex. 8 at 120 (Ada Saldaño). Ada fixed breakfast for her three siblings, ensured they went to school, and took care of the house when Lidia was working. *Id.* Taking care of Mr. Saldaño was especially hard because of his cognitive and development limitations, which were evident from a very young age. *Id.* at 121. Mr. Saldaño could not take care of himself in age-appropriate ways, did not understand when things were dangerous, and could not perform basic tasks on his own. *Id.* Mr. Saldaño “did not bathe unless [they] reminded him over and over again” and “didn’t wash his hair or his clothes.” *Id.* at 121. Someone always had to

ensure that he ate, bathed and was wearing clean and appropriate clothes, because if they didn't Mr. Saldaño would smell and wear dirty clothing over and over again. *Id.* at 121-2; *see also* 10 at 3 (Silvia Guzman) (“Victor also had problem with hygiene. For example, he would not shower or brush his teeth without being told.”).

Signs of Mr. Saldaño's intellectual differences were noted by all of his close family members. Mr. Saldaño often had a blank look about him, was clumsy, and broke things around the house without meaning to. *See* Ex. 8 at 121 (Ada Saldaño). He seemed younger than his age, he was unfocused and “scattered,” and could not express himself. *Id.* at 122. He had trouble understanding basic instructions, consequences, and cause and effect. *Id.* These limitations created other dangerous situations for Mr. Saldaño and his family. For example, multiple family members recalled that Mr. Saldaño once attempted to store bottle rockets – a type of fireworks – in the oven, causing them to go off later when another family member tried to use it. *See, e.g.*, Ex. 9 at 4 (Lidia Guerrero); Ex. 10 at 3 (Silvia Guzman).

Mr. Saldaño's limitations often put him in danger. Most tellingly, he 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. *See* Ex. 8 at 121 (Ada Saldaño); Ex. 9 at 143 (Lidia Guerrero). 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. Ex. 8 at 121 (Ada Saldaño). 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.” Ex. 9 at 143 (Lidia Guerrero).

C. Mr. Saldaño Was Socially Limited and Often Mocked, Bullied, and Without Friends

Mr. Saldaño’s intellectual limitations were not his only struggle; his social struggles were just as profound. Mr. Saldaño was a quiet child, *see* Ex. 16 at 201 (Sonia Maggiore); Ex. 20 at 222 (Nora Klain); Ex. 17 at 206 (Victor Hugo Pedraza), who had few, if any, friends and talked little, *see* Ex. 10 at 154 (Silvia Guzman). He was immature and “fundamentally innocent.” Ex. 10 at 155, 156 (Silvia Guzman); *see also* Ex. 12 at 173 (Victor Carloni). 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.” Ex. 12 at 174 (Victor Carloni); *see also* Ex. 20 at 222 (Nora Klain). He was regarded by other neighborhood children as “weird” and, as a result, spent much of his time alone. Ex. 20 at 1 (Nora Klain).

Mr. Saldaño lacked the ability to play with others, and when he was included in other children’s activities, he usually was mocked or bullied. Ex. 8 at 123 (Ada Saldaño). Mr. Saldaño tried to play ball with kids from his neighborhood, but he was so bad they stopped letting him play. *Id.* at 122. 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). *Id.* The nickname was meant

as an insult, but Mr. Saldaño's limitations prevented him from perceiving the humiliation. *Id.*

Mr. Saldaño did not have childhood friends besides his cousin, Luis Guzman. Ex. 10 at 154 (Silvia Guzman); Ex. 12 at 174 (Victor Carloni). Luis is approximately ten years older than Mr. Saldaño and is intellectually disabled. 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). Luis had the mentality of a little boy, had trouble communicating and performing simple tasks, and did not have any of his own friends. Ex. 10 at 153 (Silvia Guzman). Luis required daily care by his sister, Silvia Guzman, for his entire life, and he currently resides in a home for intellectually disabled adults. *See id.*; Ex. 13 at 188 (Roxana Galan). In Mr. Saldaño's childhood, his friendship with Luis grew despite their great age difference—because of their shared intellectual limitations, they both engaged in childish activities and struggled to communicate with others. Ex. 10 at 153 (Silvia Guzman); *see also* Ex. 13 at 188 (Roxana Galan). Mr. Saldaño and Luis spent their time listening to music and riding their bicycles trying to catch birds, and they did not engage in developmentally appropriate activities. *Id.*

Because Mr. Saldaño was different from other children, he was a target, and sometimes he was a target for violence. *See, e.g.*, Ex. 9 at 143 (Lidia Guerrero). He had few toys, and his only basketball was stolen from him when he went to play at

apartment complex courts alone. *Id.* at 144. Although Mr. Saldaño was hit by other children at school, he “did not know how to defend himself,” and after being hit would “just stay[] there, not saying anything.” *Id.* at 143. The significant mocking and bullying became so bad that a school administrator walked Mr. Saldaño home and told his mother that Mr. Saldaño was not safe walking home from school on his own. *Id.*

Mr. Saldaño did not fare better in his teen years than he had in his childhood. His inability to express himself or his feelings, and his immaturity, continued to make socializing difficult. *See, e.g.*, Ex. 10 at 156 (Silvia Guzman). When he was not a target for ridicule, his impressionability and gullibility made him a target for people in other ways. *See, e.g.*, Ex. 10 at 157 (Silvia Guzman); Ex. 8 at 123 (Ada Saldaño); Ex. 20 at 1 (Nora Klain). His sister Ada recalled Mr. Saldaño’s “mind was malleable, he didn’t have critical thinking skills. He couldn’t make friends on his own, so he was desperate for any friends, even if they were a group of kids . . . that only wanted him around to laugh at or convince to do things he should not be doing.” Ex. 8 at 123 (Ada Saldaño).

D. Mr. Saldaño Struggled Significantly in School, Required Substantial Support, and Ultimately Dropped Out

Mr. Saldaño attended public schools which lacked resources and infrastructure. Ex. 17 at 206 (Victor Hugo Pedraza); Ex. 12 at 175 (Victor Carloni). The schools were often impoverished, the curriculum was very basic, and the

teachers tried to help students by making it easy to get good grades. Ex. 12 at 175 (Victor Carloni), Ex. 14 at 192 (Marcos Adrian Diaz). Even so, Mr. Saldaño required intense support with school, and his mother would stay up late to get Mr. Saldaño's homework done for him even when he was only in elementary school, because he could not do it on his own. Ex. 8. at 120 (Ada Saldaño).

Mr. Saldaño's struggles in school were memorable to his classmates, who recalled that Mr. Saldaño was academically limited, "slow," and 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). Math was particularly difficult for Mr. Saldaño; his classmates remembered that when Mr. Saldaño was called to do math problems on the board in front of the class he did not know how to solve them. Ex. 16 at 201 (Sonia Maggiore); Ex. 17 at 206 (Victor Hugo Pedraza). Mr. Saldaño's teachers "had to explain things several times" to him, and even then, he struggled. Ex. 16 at 201 (Sonia Maggiore).

Despite the efforts of his teachers and his mother, Mr. Saldaño failed sixth grade, Ex. 17 at 206 (Victor Hugo Pedraza); *see also* Ex. 8 at 120 (Ada Saldaño). Although he was offered the opportunity to take an exam to be promoted to the next grade, Mr. Saldaño failed the exam and was held back. Ex. 17 at 206 (Victor Hugo Pedraza). Unable to keep up, Mr. Saldaño stopped attending school after his early teen years. 20 RR1 235-36. Concerned for his future, Lidia enrolled Mr. Saldaño in

a military school where teenagers with difficulties were able to get more structure, *see* Ex. 8 at 124 (Ada Saldaño), but Mr. Saldaño only attended the military school for a few months. 20 RR1 235-36.

Upon returning home from military school, Mr. Saldaño faced a frustrated, desperate, and disappointed mother, who inadvertently pushed him away. Ex. 8 at 125 (Ada Saldaño). After leaving his family home, Mr. Saldaño attempted to seek shelter at his uncle’s house, but his uncle was not home. *Id.* Unable to stay with his uncle, Mr. Saldaño did not have the sense to seek help or shelter at his nearby paternal grandmother’s house, and instead “spent two days without food, a bathroom, or anything else.” Ex. 9 at 145 (Lidia Guerrero). After two days of waiting for his uncle outside his uncle’s house, Mr. Saldaño started asking truckers for rides, eventually making it to Brazil, where his father was living. *Id.*

From his mid-teen years until his arrest when he was 24 years old, Mr. Saldaño was transient, relying on the help of others he met on the street or wherever he landed. *See, e.g.*, Ex. 8 at 126-7 (Ada Saldaño).

III. PROCEDURAL HISTORY

A. Mr. Saldaño’s 1996 Conviction and Death Sentence

On November 25, 1995, when Mr. Saldaño was 24 years old, he and his co-defendant, Jorge Chavez were arrested for capital murder. Although records of his pretrial incarceration are sparse, Mr. Saldaño received several disciplinary

infractions for failing to flush his toilet and having a dirty cell, as well as for having piled up food trays.

Mr. Saldaño's capital trial began in June 1996. On July 11, 1996, the jury found Mr. Saldaño guilty of capital murder. 18 RR1 874-75. The following day, the State presented the testimony of Dr. Walter Quijano, a psychologist who testified that Mr. Saldaño was a future danger due in part to his Hispanic ethnicity, *see* 20 RR1 75-76, testimony that the Texas Attorney General would later repudiate as constitutional error. Defense expert Dr. James McCabe testified about administering neuropsychological testing to Mr. Saldaño, noting that his IQ tested potentially in the range for intellectual disability, 20 RR1 176, and that Mr. Saldaño was behaving "peculiar[ly]" but that he wasn't sure what to make of Mr. Saldaño's behavior because Mr. Saldaño did not speak English, 20 RR1 209-10. On July 15, 1996, the jury returned its verdict and Mr. Saldaño was sentenced to death. 21 RR1 309. Mr. Saldaño's conviction and death sentence were affirmed on direct appeal. *Saldaño v. State*, No. AP-72,556 (Tex. Crim. App. Sept. 15, 1999).

B. Postconviction Reversal of Mr. Saldaño's Death Sentence Based on Unconstitutional Racial Discrimination

On May 5, 1999, the CCA denied Mr. Saldaño's initial writ of habeas corpus following his first conviction and death sentence. *See Order, Ex parte Saldaño*, WR-41,313-01 (Tex. Crim. App. May 5, 1999). In 2003, Mr. Saldaño was granted penalty phase relief in federal court on a claim that challenged the unconstitutional

ethnic/race discrimination of Dr. Walter Quijano. *See Saldaño v. Cockrell*, 267 F. Supp. 2d 635, 640-2 (E.D. Tex. 2003), *aff'd in part*, appeal dismissed in part *sub nom.*

C. Mr. Saldaño's 2004 Penalty Phase and Death Sentence

Jury selection for Mr. Saldaño's second penalty phase proceeding began on September 17, 2004. *See* 3 RR2. Testimony began on November 10, 2004. *See* 26 RR2. Mr. Saldaño's lawyers did not present mental health or intellectual disability evidence. On November 17, 2004, Mr. Saldaño was resentenced to death. 31 RR 86-87. Mr. Saldaño's second death sentence was affirmed on direct appeal. *Saldaño v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007).

D. Mr. Saldaño's State and Federal Postconviction Proceedings Following His 2004 Death Sentence

On February 15, 2007, Mr. Saldaño filed his first application for writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure following his 2004 death sentence.¹ Mr. Saldaño's application raised eight grounds for relief, including allegations that his counsel was constitutionally ineffective (grounds for relief 1, 2, 5, 7), that his mental illness rendered his execution unconstitutional (ground 3), incompetency (ground 4), that his right to consular access based on

¹ Mr. Saldaño's counsel filed a subsequent application for writ of habeas corpus on October 30, 2007, while his first writ application was still pending. This raised only two allegations of ineffective assistance of counsel on direct appeal, and was dismissed for failing to meet the requirements of Article 11.071 § 5. *See* Order, *Ex parte Saldaño*, No. WR-41,313-03 (Tex. Crim. App. Jan. 16, 2008) (unpublished).

Article 36 of the Vienna Convention on Consular Relations was violated (ground 6), and that the cumulative effect of the failures during his trial violated his due process rights and undermined the constitutionality of his trial (ground 8). *See* 2008 Writ Record, Vol. 1 at p. 3-38, *Ex parte Saldaño*, No. 199-80049-96 (199th Dist. Ct. – Collin County). On October 29, 2008, the CCA denied Mr. Saldaño’s writ application. *See* Order, *Ex parte Saldaño*, WR-41,313-04 (Tex. Crim. App. Oct. 29, 2008). Mr. Saldaño sought federal relief from his conviction and death sentence, which was denied by the United States District Court in the Eastern District of Texas on July 18, 2016. *See* Order, *Saldaño v. Director*, TDCJ-CID, No. 4:08-cv-193, 2016 WL 3883443 (E.D. Tex. July 18, 2016). On February 19, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the district court’s judgment. *Saldaño v. Davis, Director TDCJ-CID*, No. 16-70025 (5th Cir. Feb. 19, 2019).

E. Mr. Saldaño’s Article 46.05 Proceedings

The 199th District Court appointed the Office of Capital and Forensic Writs (OCFW) to represent Mr. Saldaño in April 2021. Thereafter, the OCFW retained Dr. Lauro Amezcua-Patino, a Spanish-speaking and culturally competent psychiatrist, to evaluate Mr. Saldaño’s competency to be executed. Following his evaluation, Dr. Amezcua-Patino recommended that the OCFW retain a Spanish-speaking neuropsychologist to further elucidate Mr. Saldaño’s mental illness. The OCFW then retained Dr. Antolin Llorente, Ph.D. Dr. Llorente conducted a neuropsychological

evaluation of Mr. Saldaño on December 6, 2021. This was the first neuropsychological evaluation of Mr. Saldaño conducted in Spanish, his only fluent language. Dr. Llorente administered the Wechsler Adult Intelligence Scale-Fourth (WAIS-4), Spanish Version, to Mr. Saldaño and obtained an IQ score of 73.

On January 31, 2022, the OCFW filed a motion arguing Mr. Saldaño was incompetent to be executed pursuant to Article 46.05 of the Texas Code of Criminal Procedure, which was supported by the expert reports of Drs. Amezcua-Patino and Llorente. *See* Motion for Determination that Mr. Victor Saldaño is Incompetent to be Executed Pursuant to Tex. Code Crim. Proc. Art. 46.05, *Ex parte Saldaño*, Cause No. 199-80049-96 (199th Dist. Ct. – Collin County Jan. 31, 2022). The motion describes in detail Mr. Saldaño’s psychiatric decompensation and his eventual diagnosis of schizophrenia while in TDCJ custody, as well as Dr. Amezcua-Patino and Dr. Llorente’s findings that Mr. Saldaño is incompetent to be executed. Mr. Saldaño's Article 46.05 motion remains pending.

Following Dr. Llorente’s report, the parties agreed to a pause in the proceedings to investigate Mr. Saldaño’s intellectual disability, which included a voluntary evaluation of Mr. Saldaño by Dr. Gilbert Martinez, a neuropsychologist retained by the State. Like Dr. Llorente, Dr. Martinez obtained a similar WAIS-4 IQ score of 74 – a score consistent with IDD. Following OCFW’s extensive investigation in the United States and Argentina, all three of the present

postconviction experts, Drs. Amezcua-Patino, Llorente, and Martinez, now agree that Mr. Saldaño meets the criteria for a diagnosis of IDD.

IV. CLAIM FOR RELIEF: Mr. Saldaño is Intellectually Disabled and Ineligible for Execution Under the Eighth and Fourteenth Amendment

Mr. Saldaño is a person with an intellectual disability. Mr. Saldaño has significantly subaverage intellectual functioning—a profound limitation supported by all neuropsychological testing ever given to him, and one now acknowledged by counsel for the State. *See infra* Section (IV)(C)(i). Although an IDD diagnosis requires significant deficits in only one domain of adaptive functioning, Mr. Saldaño has significant deficits in all three. Those deficits are evidenced by the declarations of more than a dozen family members, neighbors, and classmates. *See infra* Section (IV)(C)(ii). Because all of this information relates to Mr. Saldaño’s childhood and adolescence, there is no question that his deficits began during the developmental period, *see infra* Section (IV)(C)(iii). Under the medical and legal standard for intellectual disability, *infra* Section (IV)(A-B), Mr. Saldaño is therefore ineligible to be executed.²

² Mr. Saldaño specifically and by reference incorporates all facts and information in *supra* Section (II) (Factual Background and Procedural History) into this claim for relief.

A. The Legal Standard for Intellectual Disability

Atkins v. Virginia established that the execution of people with intellectual disabilities violates the Eighth Amendment of the United States Constitution. 536 U.S. 304 (2002). The Supreme Court explained:

Those [intellectually disabled] persons who meet the law’s requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

Atkins, 536 U.S. at 306-07.

To determine who qualifies for an intellectual disability diagnosis and exclusion from the death penalty, this Court must be guided by the “clinical definitions” of intellectual disability, *see id.* at 317 n. 22, as elucidated by the medical community. *See id.* at 308 n. 3. For example, the state may not use a bright line, cut-off IQ score of 70 to determine intellectual disability because that approach fails to account for the standard error of measurement and is inconsistent with the consensus diagnostic approach of the medical community. *See Hall v. Florida*, 572 U.S. 701, 721 (2014). Likewise, in determining the presence or absence of adaptive deficits associated with intellectual disability, a state must employ a method that is consistent with the medical community’s diagnostic framework. *See Moore v. Texas (Moore I)*, 581 U.S. 1 (2017). Moreover, as the medical community instructs, an evaluation of

adaptation should be focused on the adaptive deficits rather than strengths that manifest in a person’s life, because limitations often coexist with strengths. *See, e.g., Moore v. Texas (Moore II)*, 586 U.S. 133 (2019) (emphasizing the need for courts to follow clinical practice standards while considering intellectual disability, and the importance of relying on adaptive deficits, instead of strengths); *Brumfield v. Cain*, 576 U.S. 305, 320 (2015) (“[I]ntellectually disabled persons may have ‘strengths in social or physical capabilities, strengths in some adaptive skills areas, or strengths in one aspect on an adaptive skill in which they otherwise show an overall limitation’”) (quoting American Association for Mental Retardation (now known as AAIDD) *Mental Retardation: Definition, Classification, and Systems of Supports Manual* (10th ed. 2002) at 8).

In determining the prevailing medical community consensus, the Supreme Court has relied on both the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders (DSM)* and the American Association on Intellectual and Developmental Disabilities’ *Diagnostic and Statistical Manual of Mental Disorders (AAIDD)*. *See, e.g., Atkins*, 536 U.S. at 308; *Moore I*, 581 U.S. 11-16. Both manuals have been updated since *Atkins* was decided. The updates reflect a definition of IDD that is broadly stable but for which there has been science-informed changes in some granular elements. The most current publications are the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental*

Disorders-Fifth Edition, Text Revision (2022) (DSM-5-TR) and the Twelfth Edition of the American Association on Intellectual and Developmental Disabilities' *Intellectual Disability: Definition, Classification, and Systems of Supports (2021) (AAIDD-12)*. Although these authorities vary slightly in their language, both require: 1) deficits in intellectual functioning; 2) deficits in adaptive functioning; and 3) onset during the developmental period. DSM-5-TR at 37; *see also* AAIDD-12 at 15-17.

B. The Medical Diagnostic Standard for Intellectual Disability

The current version of the DSM, the DSM-5-TR, provides:

Intellectual developmental disorder (intellectual disability) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5-TR at 37.

The AAIDD provides a similar definition:

ID is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.

AAIDD-12 at 13.³

The AAIDD recognizes “equal weight” should be “given to adaptive behavior and intellectual functioning in the diagnosis of ID,” AAIDD-12 at 20, and the DSM-5-TR expands on this point, adding that “the various levels of severity [of an IDD diagnosis] are defined on the basis of adaptive functioning, not IQ scores, because it is adaptive functioning that determines the level of support required.” DSM-5-TR at 38.

i. Prong One: Significantly Subaverage Intellectual Functioning

Prong one of an intellectual disability diagnosis is typically measured by “individually administered and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence,” also referred to as an intelligence

³ The only notable difference between the two is that the AAIDD-12 defines the developmental period as up to age 22, whereas the DSM-5-TR leaves that period undefined, a difference that has no relevance in this case, as the onset of Mr. Saldaño’s disability began before the age of 18, as confirmed by multiple declarants and experts.

quotient (IQ) test. DSM-5-TR at 38. In order to satisfy this prong, an individual must show significantly subaverage intellectual functioning, generally determined by an IQ score approximately two standard deviations below the mean. IQ tests typically have a mean of 100, and two standard deviations below results in an IQ score of 70. Because measurement is imperfect, the significantly subaverage range includes a margin for the standard error of measurement (SEM), which on most IQ tests is ± 5 points. *See* DSM-5-TR at 38; AAIDD-12 at 13.

Hall explicitly recognized the importance of considering the SEM present in testing instruments, as is consistent with the consensus of experts. *See Hall*, 572 U.S. at 713 (“The SEM reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score.”). As a result, an IQ score of 75 is “squarely in the range of potential intellectual disability.” *Brumfield*, 576 U.S. at 315; *see also Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (“[A]ny score could actually represent a score that is five points higher or five points lower than the actual IQ.”); *Ex parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004) (a 70-75 IQ score “generally indicates subaverage intellectual functioning”).

More broadly, the medical community recognizes that there is not an IQ cutoff score for IDD. Test scores are approximations of a person’s intellectual functioning but not sufficient to assess reasoning in real-life situations and mastery of practical tasks. DSM-5-TR at 42. The DSM-5-TR provides, as an example, that a person with

an IQ score somewhat above 65-75 may nevertheless have such substantial adaptive behavior deficits that the person's actual functioning is clinically comparable to that of individuals with a lower IQ score and may qualify for an IDD diagnosis. *Id.*

ii. Prong Two: Deficits in Adaptive Functioning

In addition to intellectual deficits, an intellectual disability diagnosis requires evidence of significant deficits in adaptive functioning. Deficits in adaptive functioning “refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-5-TR at 42; *see also* AAIDD-12 at 29 (“Adaptive behavior is the collection of conceptual, social and practical skills that have been learned and are performed by people in their everyday lives.”). This includes assessing how an individual is able to “function across a variety of dimensions.” *Petetan v. State*, 622 S.W.3d 321, 339 (Tex. Crim. App. 2021) (citing *Brumfield*, 576 U.S. at 317).

The conceptual domain includes skills such as academic skills, problem solving, thinking abstractly, and difficulty communicating thoughts and ideas. AAIDD-12 at 30. The social domain includes functioning in areas such as interpersonal skills, social responsibility, social problem solving, communication, and language skills. DSM-5-TR at 39. The practical domain involves learning and self-management across life settings such as personal care. DSM-5-TR at 42. The

adaptive deficits prong of an intellectual disability diagnosis requires deficits in only one of three domains of adaptive functioning: conceptual, social, and practical. DSM-5-TR at 42 (noting prong two “is met when *at least one* domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across multiple environments, such as home, school, work, and community.”); *see also* AAIDD-12 at 31.

Importantly, because “[w]ithin an individual, limitations often coexist with strengths,” *see, e.g.*, AAIDD-12, the second prong of intellectual disability is met by clinical evaluation of deficits and is not negated by strengths.⁴ It is appropriate to consider clinical evaluations and testing, educational and developmental information, as well as affidavits from knowledgeable informants when evaluating an individual’s adaptive behavior. *See Petetan*, 622 S.W.3d at 339; *see also Ex Parte Van Alstyne*, 239 S.W.3d 815, 820 (Tex. Crim. App. 2007) (finding that it was “standard protocol” to assess individuals adaptation based on information provided by “knowledgeable third-party sources.”). The information obtained from these sources must be interpreted using clinical judgment. DSM-5-TR at 42.

⁴ *See, e.g., Moore II*, 586 U.S. at 139-40 (emphasizing the importance of relying on adaptive deficits instead of strengths).

iii. Prong Three: The Disabilities Manifested During the Developmental Period

An intellectual disability diagnosis requires the onset of a person’s intellectual and adaptive deficits to be during the developmental period.⁵ DSM-5-TR at 42. This prong refers only to recognition that “deficits are present during childhood or adolescence.” DSM-5-TR at 42. This prong, however, does not require a *diagnosis* of intellectual disability during the developmental period, only evidence that such disability *manifested* prior to the end of the developmental period. *Cf. Brumfield*, 576 U.S. at 324 (“If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child.”).

C. Mr. Saldaño Meets the Criteria for Intellectual Disability

Mr. Saldaño has both a significantly subaverage IQ score and significant adaptive deficits that have been present since his developmental period. *See* Ex. 2 (Dr. Amezcua-Patino). Therefore, he meets the three required prongs for an intellectual disability diagnosis. *Id.*

⁵ The AAIDD defines the developmental period as being from birth to age 22. *See* AAIDD-12 at 33. The DSM-5-TR is silent on the upper bound of the developmental period. To the extent that there is any difference between how these two authoritative guides define the developmental period, it is immaterial to Mr. Saldaño’s case, since the adaptive deficits supporting his intellectual disability diagnosis were apparent during his childhood and adolescence in Argentina.

i. Prong One: Neuropsychological Testing Confirms Mr. Saldaño has Significantly Subaverage Intellectual Functioning

Mr. Saldaño 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 as part of Dr. Llorente's neuropsychological battery on December 6, 2021. *See* Ex. 6 at 72 (Dr. Llorente 2022). Dr. Llorente's assessments included the WAIS-4, Spanish Version, and the Test of Memory Malingering (TOMM)⁶, among several other individual measures. Ex. 6 at 89. The WAIS-4 yielded a full-scale score of 73, which, accounting for the SEM, is a score in the range of 68-78, well within the range of persons with IDD. *See* Ex. 2 at 14 (Dr. Amezcua-Patino 2024); Ex. 4 at 55 (Dr. Llorente 2024). Moreover, due to norm obsolescence (the Flynn Effect), it is likely that these scores represent an overestimate Mr. Saldaño's functioning, providing further support for Mr. Saldaño's significantly subaverage intellectual functioning. *See* Ex. 2 at 14 (Dr. Amezcua-Patino 2024); Ex. 4 at 55 (Dr. Llorente 2024).

Approximately a year and three months after Dr. Llorente's evaluation, on March 30, 2023, Mr. Saldaño was re-administered the WAIS-4 by Dr. Gilbert

⁶ There is no allegation that Mr. Saldaño malingered these results, and his performance on the TOMM confirms that. Mr. Saldaño scored within the accepted range for good performance and credible test performance in the TOMM, a probabilistic procedure used to help distinguish whether individuals are malingering.

Martinez, an expert retained for the State by the Collin County District Attorney’s Office (CCDAO), following the agreed pause in Mr. Saldaño’s Article 46.05 proceedings. *See supra* Section (III)(E); Ex. 3 (Dr. Martinez 2023). Dr. Martinez’s administration of the WAIS-4 resulted in a full-scale IQ score of 74, consistent with Dr. Llorente’s findings, and within the range of IDD. Ex. 5 at 62 (Dr. Martinez 2024);⁷ *see also* Ex. 2 at 14 (Dr. Amezcua-Patino 2024). Although the practice effect (i.e., the artificial inflation of test scores due to repeated testing) is diminished when the administration is done over a year later, it is not eliminated completely, requiring Dr. Martinez’s score to be interpreted with the practice effect in mind, and therefore suggesting that the true score may be lower. *Id.* Thus, both comprehensive measures of Mr. Saldaño’s IQ – the WAIS-4 scores by Drs. Llorente and Martinez – are consistent with IDD.

Mr. Saldaño has undergone two short-form measures of his intelligence, namely Dr. Martinez’s 2023 administration of the Test of Nonverbal Intelligence-Fourth Edition (TONI-4), and the 1996 administration of the Wechsler Adult Intelligence Scale-Revised (WAIS-R) by Dr. James McCabe during Mr. Saldaño’s first capital trial. While these are not themselves sufficient to diagnose or negate

⁷ Like Dr. Llorente’s evaluation, there is no indication that Mr. Saldaño malingered during this evaluation, and Dr. Martinez found that Mr. Saldaño “appeared to be trying his best during the testing and his cognitive and intelligence test scores were consistent with expectations based on his educational, demographic, psychiatric, and medical histories.” Ex. 3 at 39; *see also* Ex. 5 at 61 (“Mr. Saldaño’s clinical presentation during the assessment was indicative of positive effort, and there was a high degree of consistency in test scores in accordance with prior assessments.”).

IDD,⁸ these administrations are also consistent with, and therefore corroborate, Mr. Saldaño's IDD diagnosis.

The TONI-4 is a brief nonverbal intelligence measure usually completed in 15-20 minutes. Consistent with his WAIS-4 score, Mr. Saldaño obtained a 77 on the TONI-4 administered by Dr. Martinez, a slightly higher but still significantly low score that “places his performance for nonverbal intelligence in the Poor range.” Ex. 3 at 37 (Dr. Martinez 2023); *see also* Ex. 2 at 14 (Dr. Amezcua-Patino). This TONI-4 score, by Dr. Martinez's analysis, is consistent with Mr. Saldaño's prior test scores and qualification for a diagnosis of intellectual disability disorder. *See* Ex. 5 at 61.

Testing from the time of Mr. Saldaño's first trial likewise corroborates his significantly subaverage intellectual functioning. In July 1996, Dr. James McCabe administered the WAIS-R, an abbreviated IQ test, to Mr. Saldaño. *See* Ex. 6 at 84 (Dr. Llorente 2022). Dr. James McCabe reported Mr. Saldaño's score as a 76, which must be interpreted with a SEM of +/- 6. *See* Ex. 6 at 84.⁹ And it is important to note that, as Dr. Llorente wrote, Dr. McCabe's “evaluation was conducted using an interpreter in spite of the fact that the peer-reviewed, scientific literature indicates

⁸ *See, e.g.*, Ex. 2 at 13 (Opining that although Dr. McCabe's short-form IQ testing helps inform Mr. Saldaño's neuropsychological profile and shows consistency with the rest of his assessment, it is not an appropriate measure for the assessment of intellectual functioning).

⁹ Abbreviated intelligence measures like the WAIS-R result in reduced reliability and a larger standard error of measure. *See* Bradley N. Axelrod & Anthony M. Paolo, *Utility of WAIS-R Seven-subtest Short Form as Applied to the Standardization Sample*, 10 *Psych. Assessment* 33, 37 (1998).

that forensic psychological evaluations should not be conducted using an interpreter.” Ex. 6 at 84, n. 23 (Dr. Llorente 2022). In addition to these concerns, were norm obsolescence to be taken into account, a further reduction of Mr. Saldaño’s WAIS-R score would be seen. Ex. 6 at 84, n. 24 (“Due to the amount of time since the standardization of this version of the [WAIS-R] in 1981 relative to its administration to [Mr. Saldaño] in 1996, a Flynn Effect correction requires that the score be reduced by 4.5 points, or 0.3 points per year times 15 years, leading to a Full Scale of 71.5 (72)”). Dr. McCabe’s score, while an overestimation of Mr. Saldaño’s IQ,¹⁰ is highly consistent with his other test scores and an IDD diagnosis. *See* Ex. 2 at 14 (Dr. McCabe’s score of 76 is “consistent with the comprehensive measures” scores of 73 and 74, “meet[ing] the first criteria, deficits in intellectual functioning, for an IDD diagnosis.”) (Dr. Amezcua-Patino 2024); Ex. 5 at 68 (“When considering standard error of measurement and potential Flynn effects, these scores satisfy criteria for the first prong for a diagnosis of Intellectual Disability.”) (Dr. Martinez 2024). In their updated reports/addendums, Drs. Amezcua-Patino, Llorente, and Martinez agreed that Mr. Saldaño has significantly subaverage IQ

¹⁰ In addition to the SEM, the Flynn Effect, and the research surrounding short form intelligence tests generally, there are good reasons to believe that Dr. McCabe’s WAIS-R score over-estimated of Mr. Saldaño’s intelligence. Academic research notes that WAIS-R scores are on-average higher than their comprehensive WAIS counterparts. *See, e.g.,* Suzanne Fitzgerald et al., *A Comparison of WAIS-R and WAIS-III in Lower IQ Range: Implications for Learning Disability Diagnosis*, 20 J. of Applied Rsch. in Intell. Disability 323, 330 (2007) (noting that the WAIS-R yields scores over 4 IQ points higher than the WAIS-III).

consistent with IDD. Ex. 5 at 62; Ex. 4 at 58-59; Ex. 2 at 14. Dr. Amezcua-Patino summarized:

[...] Victor Hugo Saldaño’s intellectual capacity has been documented consistently in the borderline to impaired range. His IQ scores, derived from standardized intelligence tests conducted over time, remain remarkably consistent [...].

Ex. 2 at 14.

Mr. Saldaño’s IQ has been tested at 73 (yielding a SEM range of 68-78) and 74 (yielding a SEM range of 69-79) on comprehensive, reliable intelligence tests, not accounting for norm obsolescence. These IQ scores are corroborated by highly consistent short-form cognitive testing of other types. Given that a higher score of 75 is “squarely in the range of potential intellectual disability,” *Brumfield*, 576 U.S. at 315, Mr. Saldaño meets prong one of an intellectual disability diagnosis, as confirmed by multiple clinical assessments and the administration of individualized, standardized intelligence testing. *See* Ex. 2 at 14 (Dr. Amezcua-Patino 2024) (“It is my opinion that Victor meets the first criteria, deficits in intellectual functioning, for an IDD diagnosis.”); Ex. 5 at 68 (Dr. Martinez 2024) (“[T]hese scores satisfy criteria for the first prong for a diagnosis of Intellectual Disability.”); Ex. 4 at 56 (Dr. Llorente 2024) (“Mr. Saldaño’s scores are within the range consistent with an IDD diagnosis.”).

ii. Prong Two: Three Experts Agree Mr. Saldaño has Significant Adaptive Deficits in All Three Domains

Although the IDD criteria require deficits in only one domain—either the conceptual, social or practical domain—Mr. Saldaño exhibits significant limitations in all three. Ex. 2 at 19 (Dr. Amezcua-Patino 2024); Ex. 4 at 58 (Dr. Llorente 2024); Ex. 5 at 68 (Dr. Martinez 2024).

1. Mr. Saldaño Has Significant Deficits in the Conceptual Domain

Individuals with mild intellectual disability struggle with “abstract thinking, executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility), and short-term memory, as well as functional use of academic skills (i.e., arithmetic, money management).” DSM-5-TR at 39. As school-age children, they usually need support in one or more of the aforementioned areas to meet age-related expectations. *Id.* Additional examples of deficits in conceptual skills include difficulty anticipating the consequences of behavior, difficulty in self-direction and/or arranging or planning future life activities, and difficulty in choosing a good solution when confronted with a problem or situation. AAIDD-12 at 30.

a. Deficits in Executive Functioning, Abstraction, and Problem-Solving

Mr. Saldaño has struggled with persistent conceptual domain deficits, particularly in executive functioning skills like working memory, problem solving, and other skills, as confirmed by his recent neuropsychological evaluations. Ex. 4 at

57 (Dr. Llorente 2024) (“The neuropsychological evaluations conducted by Dr. Llorente and Dr. Martinez highlighted Mr. Saldaño’s persistent conceptual domain deficits, particularly in working memory and executive functioning.”); *see also* Ex. 5 at 61-2 (Dr. Martinez 2024). As Dr. Amezcua-Patino summarized:

The neuropsychological batteries administered to Victor by Drs. Llorente and Martinez highlight his persistent conceptual domain deficits. Dr. Llorente’s evaluation revealed many significant impairments, and particularly relevant to the conceptual domain are his deficits in memory, and working memory, as well as executive functioning skills such as those associated with planning and organization. Similarly, Dr. Martinez’s evaluation found deficits in working memory and executive functioning skills.

Ex. 2 at 15.

Additionally, as detailed below, family members and classmates remember Mr. Saldaño having multiple deficits in the conceptual domain since early childhood, including impaired academic performance, long-term struggles with learning, and deficits in abstract thinking abilities. *See* Ex. 2 at 17 (Dr. Amezcua-Patino 2024); Ex. 5 at 68 (Dr. Martinez 2024); Ex. 4 at 58-59 (Dr. Llorente 2024). For example, Mr. Saldaño seemed unable to grasp the concept of time; his sister Ada remembers that Mr. Saldaño was able to read a clock, but that he couldn’t relate the abstract concept of time to his everyday activities. Ex. 8 at 123 (Ada Saldaño).

b. Deficits in Academic Skills

Mr. Saldaño has had pervasive deficits in academic skills from a young age, deficits evident from the time he was in school, throughout his incarceration, and in

clinical evaluations in 2021 and 2023. In his childhood, classmates remembered Mr. Saldaño as being “slow,” not able to perform assignments in front of the class, struggling with new topics, having to have things explained to him multiple times, and repeating sixth grade. *See supra* Section (II)(D); Ex. 17 at 206 (Victor Hugo Pedraza); Ex. 16 at 201 (Sonia Maggiore); Ex. 14 at 192 (Marcos Adrian Diaz). Mr. Saldaño’s family also recalled that he had difficulties with schoolwork from an early age and required intense support. Ex. 10 at 155 (Silvia Guzman); Ex. 8 at 120 (Ada Saldaño).

Mr. Saldaño had difficulty with most subjects, but he had a particularly hard time with math. Ex. 17 at 206 (Victor Hugo Pedraza); Ex. 16 at 201 (Sonia Maggiore). His school records indicate he had “special difficulties” in mathematics in at least second, fifth and sixth grade. *See* Ex. 21 at 231, 247 (School records). In sixth grade, he failed arithmetic and geometry and did not graduate to seventh as a result. *See id.* at 259.

While incarcerated, Mr. Saldaño’s poor math skills were evident to those incarcerated with him. *See, e.g.*, Ex. 2 at 20 (Dr. Amezcua-Patino 2024) (“Victor struggled to fill out his commissary order forms properly and needed significant help, showing Victor could not understand simple instructions or do basic math.”).

Mr. Saldaño's difficulty with math was also evidenced in Dr. Martinez's administration of the Bateria IV Woodcock-Muñoz, a test of academic skills. Dr. Amezcua-Patino summarized:

In both Dr. Llorente and Dr. Martinez's evaluations, relevant to Mr. Saldaño's academic skills, Victor had notably poor math skills, although he was able to achieve average or low average performance on some measures of his reading and writing abilities . . . Although Victor presents with relative strengths in reading and writing skills, his significant deficits in many other abilities, including other academic skills like arithmetic, support [an IDD] diagnosis.

Ex. 2 at 15.

c. Deficits in Communication Skills

Mr. Saldaño's classmates, as well as neighbors and family members, remember him as quiet, shy, simple, and unable to communicate ideas having any complexity. Ex. 16 at 201 (Sonia Maggiore); Ex. 17 at 206 (Victor Hugo Pedraza); Ex. 20 at 222 (Nora Klain); Ex. 13 at 189 (Roxana Galan); Ex. 14 at 192 (Marcos Adrian Diaz). Mr. Saldaño was withdrawn and lacked the ability to have conversations, *see* Ex. 20 at 222 (Nora Klain), and he "always seemed like he only had a few words to use to express what he was feeling at any time," Ex. 8 at 122 (Ada Saldaño). He often seemed lost, did not communicate much, and did not start conversations. *Id.* at 121. One of Mr. Saldaño's childhood neighbors, an agetate, recalled that Mr. Saldaño communicated little, mostly just smiling, and did not show complex emotions. Ex. 13 at 189 (Roxana Galan). Throughout Mr. Saldaño's life,

“deficits in communication skills significantly impaired [his] ability to communicate his thoughts and feelings effectively and in a developmentally appropriate manner.” Ex. 2 at 16 (Dr. Amezcua-Patino 2024).

d. Deficits in Self-Direction Skills

Another deficit in Mr. Saldaño’s conceptual skills is in self-direction. As a child, Mr. Saldaño was unusually scattered and required his mother or sister to tell him what to do, and whether something was right or wrong. Ex. 8 at 122 (Ada Saldaño). Even after making mistakes and being told how to do things correctly, Mr. Saldaño was unable to learn from experience. Mr. Saldaño had fantastical ideas but could not accomplish them. *See, e.g.*, Ex. 9 at 144 (Lidia Guerrero); Ex. 10 at 154 (Silvia Guzman); Ex. 12 at 177 (Victor Carloni). Dr. Amezcua-Patino explained “[Mr. Saldaño’s] lack of understanding of how the world worked converged with his impaired ability to self-direct and plan for the future...[he] dreamed of impossible ideas and lacked the appropriate skills to understand how to achieve those goals in any event.” Ex. 2 at 16 (Dr. Amezcua-Patino 2024).

e. Postconviction Experts Agree Mr. Saldaño has Conceptual Domain Deficits

Drs. Llorente, Amezcua-Patino, and Martinez agree that Mr. Saldaño has deficits in the conceptual domain. *See* Ex. 4 at 57; Ex. 2 at 17; Ex. 5 at 68.

2. Mr. Saldaño Has Significant Deficits in the Social Domain

When compared with typically developing peers, individuals with intellectual disability may present difficulty regulating their emotion and behavior as well as difficulty with empathy and awareness of other’s thoughts, feelings and experiences. DSM-5-TR at 39, 42. Usually, “there is a limited understanding of risk in social situations; social judgment is immature for age, and the person is at risk of being manipulated by others,” the latter of which is often referred to as “gullibility.” *Id.* at 39. Other examples of deficits in the social domain include inadequate social response and social judgment, and naïveté. AAIDD-12 at 30.

Mr. Saldaño’s deficits in interpersonal skills and lack of understanding of social cues made comprehending and following rules hard, and those deficits made it easy for others to bully and take advantage of him. His inability to perceive risks and dangers, coupled with his poor judgment, led him to unsafe situations on several occasions—including getting hit by a car twice and accidentally causing a firework explosion in his home. As captured by these circumstances, Mr. Saldaño has deficits in the social domain sufficient to satisfy the adaptive functioning prong of an IDD diagnosis. *See* Ex. 2 at 17 (Dr. Amezcua-Patino 2024).

a. Poor Social Understanding and Immaturity

Friends and family regarded Mr. Saldaño's mentality as that of a child much younger than his age. Ex. 10 at 156 (Silvia Guzman). People who knew him described Mr. Saldaño as being immature and perceived him as much younger than his stated age. *See* Ex. 8 at 122 (Ada Saldaño); Ex. 12 at 173-4 (Victor Carloni); Ex. 20 at 223 (Nora Klain). Mr. Saldaño engaged in childish activities that did not require much concentration. Ex. 10 at 154 (Silvia Guzman).

Understanding and following rules in social settings was challenging for Mr. Saldaño. When Mr. Saldaño tried to play soccer or basketball with other children in his neighborhood, they quickly realized how bad Mr. Saldaño was at sports and would not let him play anymore. Ex. 8 at 122 (Ada Saldaño). Lack of athletic ability wasn't the impediment to participation; lack of comprehension was. When Mr. Saldaño did participate in games, he would play them wrong. He did not understand game rules, would score goals for the other team, and he earned the disparaging nickname "Pecho" from awkwardly trying to stop the ball with his chest. *Id.* Dr. Llorente observed: "From a social standpoint, Mr. Saldaño demonstrated significant deficits in the social domain throughout the developmental period. He was described by those who knew him as being immature and younger than his stated age. He struggled to make friends and displayed early evidence of poor social adaptive functioning and interpersonal social skills." Ex. 4 at 57 (Dr. Llorente 2024).

b. Deficits in Interpersonal Skills

Although Mr. Saldaño was nice to people and said “hi” to everyone passing by, he could not really converse with them or develop meaningful relationships. Ex. 20 at 222 (Nora Klain). He lacked the ability to communicate in sophisticated ways and instead was simple, withdrawn, and quiet. *Id.* Mr. Saldaño seemed much younger than his age, at fifteen he appeared and behaved like a twelve-year-old; he was unable to communicate much, and instead, smiled a lot without showing complex emotions. Ex. 13 at 189 (Roxana Galan); Ex. 20 at 223 (Nora Klain). Mr. Saldaño rarely shared the things that he liked or did not like with people and was unable to start conversations or join them once started. Ex. 8 at 121 (Ada Saldaño).

In at least one of the neighborhoods where Mr. Saldaño lived, children his age thought Mr. Saldaño was “weird” and did not invite him to play with them. Ex. 20 at 222 (Nora Klain). Interestingly, despite a significant age difference of almost ten years, Mr. Saldaño was so childish that he often played with his younger brother Daniel instead of with children his own age. Ex. 20 at 223 (Nora Klain). Mr. Saldaño spent most of his recreational time with his cousin, Luis. They shared similar interests, characteristics, and struggles, and Luis’s severe intellectual disability facilitated their friendship. *See* Ex. 13 at 189 (Roxana Guzman), Ex. 10 at 154 (Silvia Guzman); Ex. 8 at 122 (Ada Saldaño).

That Mr. Saldaño could not relate to his similarly aged peers, and instead spent his time with his intellectually disabled cousin or his much younger brother, is significant evidence of his social deficits. “The reason [Mr. Saldaño’s] only playmate was his older and more severely intellectually disabled cousin, Luis Guzman, was attributed by several informants to his poor interpersonal skills.” Ex. 2 at 17 (Dr. Amezcua-Patino 2024).

c. Gullibility, Naivete, and Suggestibility

Mr. Saldaño “was an easy target for other kids to take things from or take advantage of.” Ex. 8 at 123 (Ada Saldaño). The neighborhood children that nicknamed him “Pecho” were not Mr. Saldaño’s friends. *Id.* They not only bullied him, but at times also took things from him. *Id.* Despite his mother and sister’s warnings, Mr. Saldaño would still be easily coaxed from his house by neighborhood kids and then would do whatever they told him. *Id.* Mr. Saldaño was also bullied at school, to the point where a school administrator worried for Mr. Saldaño’s safety walking home alone. Ex. 9 at 143 (Lidia Guerrero).

Mr. Saldaño was very easily influenced, which concerned both his mother and his sister deeply. *See* Ex. 10 at 156 (Silvia Guzman); *see also* Ex. 8 at 123 (Ada Saldaño). To prevent him from being exposed to bad influences, Mr. Saldaño’s

mother, Lidia, enrolled him in a music conservatory after-school program.¹¹ Ex. 8 at 123 (Ada Saldaño). For some time, this helped keep Mr. Saldaño away from the children that wanted to use him and make fun of him, but he eventually stopped going to the after-school program and things got harder again. *Id.*

As Dr. Amezcua-Patino observed, Mr. Saldaño falling in with a bad crowd that convinced him to skip school and do things he should not be doing, as well as being easily influenced by others, is “demonstrative of Mr. Saldaño’s suggestibility and follower-type behavior, both significant indicia of deficits.” Ex. 2 at 18 (Dr. Amezcua-Patino 2024). Dr. Amezcua-Patino further noted that “Mr. Saldaño’s impairments made it easier for him to be victimized by others...[he] took things very literally and would believe anything he was told.” *Id.*

d. Postconviction Experts Agree Mr. Saldaño Has Deficits in the Social Domain

Each of the three postconviction experts determined that Mr. Saldaño has significant deficits in the social domain. *See* Ex. 2 at 17-8 (Dr. Amezcua-Patino 2024); Ex. 5 at 67-8 (Dr. Martinez 2024); Ex. 4 at 57 (Dr. Llorente 2024). Dr. Amezcua-Patino wrote:

Victor demonstrated significant deficits in the social domain that were present during the developmental period. Major themes in the observation of people who knew Victor as a child included that he

¹¹ “The Conservatory [was] public—whoever wanted to attend could do so, they did not turn away students.... [It] was a program for kids to attend after school.” Ex. 15 at 199 (Paulina Heimsath).

seemed immature and younger than his age, that he was unable to make friends, and that to the extent he did make friends, it was attributable to his follower-type behavior. According to multiple reports, Victor also did not grasp that other people were making fun of him, exemplified best by Mr. Saldaño's lack of understanding that when other children referred to him as "Pecho" (which means "chest" in Spanish) they were referring to his poor ability to play sports, because regardless of whether he was playing soccer or basketball, Victor would incorrectly stop the ball with his chest.

Ex. 2 at 17.

3. Mr. Saldaño has Significant Deficits in the Practical Domain

The practical domain involves learning and self-management skills across life settings such as those required for personal care, recreation, or self-management. DSM-5-TR at 42. Even when individuals with mild intellectual disability function age-appropriately in personal care, they often "need some support with complex living tasks in comparison to peers." *Id.* at 39. This is commonly translated to support required in the areas of eating nutritious meals, dressing, hygiene, household activities, and difficulty managing money. *Id.* at 40. Moreover, recreational skills may resemble those of peers, but "judgment related to well-being and organization around recreation requires support." *Id.* at 39.

Mr. Saldaño's inability to engage in proper hygiene, perform essential household tasks, or understand risk and personal safety are examples of significant practical domain deficits. Specifically, Mr. Saldaño "did not incorporate personal care such as bathing or brushing his teeth, or washing his hands before eating or

keeping his room clean, much less collaborating on household chores” as per the ABAS-3, a formal instrument to comprehensively measure adaptive functioning. Ex. 1 at 2-3 (Dr. Kopleman). Mr. Saldaño has had these deficits in the practical domain since his developmental period consistent with an IDD diagnosis. *See* Ex. 2 at 19 (Dr. Amezcua-Patino 2024).

a. Deficits in Personal Care

As a child, “Mr. Saldaño needed a lot of help caring for himself.” Ex. 8 at 121 (Ada Saldaño). He did not bathe or wash his hair unless his sister Ada, or his mother, Lidia, repeatedly reminded him of the need to do so. *Id.* He did not change his clothes on his own, instead needing his mother or sister to tell him his clothes were too dirty to be worn and needed to be changed. *Id.* Lidia set his clothes in his room for him to wear each week. *Id.* Had Lidia and Ada not told him his clothes were dirty and that he needed to bathe, he would have smelled and looked dirty. *Id.* Other extended family members also noticed Mr. Saldaño’s issues with proper hygiene. *See, e.g.,* Ex. 10 at 155 (Silvia Guzman).

Dr. Amezcua-Patino notes that “although today it is complicated and perhaps exacerbated by his mental health conditions, Victor was not attentive to [his personal hygiene] even at a young age, likely before the onset of schizophrenia.” Ex. 2 at 19 (Dr. Amezcua-Patino 2024).

b. Difficulty Perceiving Risk and Ensuring Personal Safety

Mr. Saldaño's failure to understand when things were dangerous and his need for substantial assistance to understand risk are evidence of practical domain deficits. In the realm of personal safety, Mr. Saldaño demonstrated a serious lack of attention from a young age. His sister Ada recalls having to teach Mr. Saldaño "again and again how to look both ways when he was crossing the street in the neighborhoods [they] lived in, but he couldn't manage to do that." Ex. 8 at 121 (Ada Saldaño). Due to his inability to understand how to safely be in the street, Mr. Saldaño was struck by a car at least twice when he was a child. *Id.*

Mr. Saldaño found himself in situations he did not fully understand because he was not able to perceive the risks or consequences associated with his actions. *See* Ex. 12 at 176 (Victor Carloni); Ex. 10 at 154-5 (Silvia Guzman). He was unaware of how the world worked. *See* Ex. 10 at 154-5 (Silvia Guzman). When riding bikes with his cousin, Luis, they would often end up in dangerous areas. This was not on purpose, but because they lacked the ability to understand and perceive risk and danger. Ex. 10 at 155 (Silvia Guzman).

Mr. Saldaño also often did things without planning ahead or thinking them through first, and sometimes his obliviousness was dangerous. For example,

Once [Mr. Saldaño] put a bottle-rocket fireworks inside the oven at his house. He was storing them in there and he didn't understand that the oven is not a good place to keep bottle rockets. When they turned

the oven on, the fireworks all popped and exploded. Victor did not realize when his behavior was risky.

Ex. 10 at 155 (Silvia Guzman). After the rockets went off, Lidia asked Mr. Saldaño why he had done that and he simply explained he put them away in the oven, as if it was a drawer. Ex. 9 at 143 (Lidia Guerrero). His mother recalled, “Victor did not comprehend the seriousness of what had happened and how dangerous it was.” *Id.*

c. Lack of Domestic Skills

Mr. Saldaño required significant support to be able to do things on his own, and there were things that he simply never did. For instance, he was not asked to go to the grocery store as he would return with the wrong items or forget the purpose of the trip entirely. Ex. 8 at 124 (Ada Saldaño). He was unable to engage in the tasks that were essential to the functioning of the household, even when no one else was around to do them. Ex. 10 at 156 (Silvia Guzman); Ex. 8 at 124 (Ada Saldaño). Instead, he just waited for his sister Ada to cook, clean, and keep the house in order. Ex. 10 at 156 (Silvia Guzman). Ada recalls that she would not have trusted Mr. Saldaño to use any of the kitchen appliances, because she “was afraid he would hurt himself or accidentally break something using it incorrectly.” Ex. 8 at 124 (Ada Saldaño). Additionally, Mr. Saldaño was unable to prepare elaborate foods, instead, he ate what was easy and readily available, like fruit, cheese, or something similar. *Id.*

During adulthood, Mr. Saldaño never had a bank account, never obtained a driver's license, or purchased an automobile. Ex. 6 at 76 (Dr. Llorente 2022). He never had his own lease or utilities in his own name, instead, always depending on friends or family to assist him with his living situation. *Id.* Whenever he lacked such support, Mr. Saldaño was homeless. *Id.*

d. Postconviction Experts Agree Mr. Saldaño Has Deficits in the Practical Domain

Drs. Amezcua-Patino, Llorente and Martinez agree that Mr. Saldaño has demonstrated deficits in the practical domain. Ex. 2 at 19; Ex. 4 at 58; Ex. 5 at 68. Specifically, Dr. Amezcua-Patino found:

That Victor needed significant supports because he could not complete tasks for daily living was apparent to his family members during the developmental period.

Ex. 2 at 19.

4. Mr. Saldaño's Deficits in Each of the Three Domains of Adaptive Functioning are Confirmed by a Formal Instrument That Measures Adaptive Functioning

A formal instrument assessing adaptive behavior provides both qualitative and quantitative information on a person's functioning. Ex. 1 at 2 (Dr. Eduardo Kopelman). For that reason, the DSM-5-TR and the AAIDD-12 both recognize that standardized measures of adaptive behavior may aid in the diagnosis of IDD. *See, e.g.,* DSM-5-TR at 42. The AAIDD-12 currently recognizes four valid and

standardized measures of adaptive functioning, including the Adaptive Behavior Assessment System, Third Edition (ABAS-3). *See* Ex. 2 at 17 (Dr. Amezcua-Patino 2024).

On December 8, 2023, Dr. Eduardo Kopelman, an Argentinean psychiatrist and the former Chief of Psychiatry of the Reina Fabiola Clinic, administered the Spanish version of the Adaptive Behavior Assessment System Third Edition (ABAS-3) to Mr. Saldaño’s oldest sister, Ada Saldaño. Ex. 1 at 2 (Dr. Eduardo Kopelman). The ABAS-3 is a norm-referenced, standardized instrument that involves a knowledgeable informant rating a person’s adaptive functioning. Because Mr. Saldaño is an adult, no longer in the developmental period, the assessment of his adaptive behavior must be done retrospectively. *Id.*

Ada Saldaño lived with Mr. Saldaño until he was approximately 15 years old, and thus the age of 15 was chosen as the age of application of the evaluation. Ex. 1 at 3 (Dr. Eduardo Kopelman). Before administering the instrument, Dr. Kopelman interviewed Ada. Ex. 1 at 2 (Dr. Eduardo Kopelman). The interview helped educate Dr. Kopelman on the family’s background, their financial struggles, their father’s abandonment, and the severe abuse they suffered at the hands of their stepfather. *Id.* Dr. Kopelman was also able to assess Ada’s demeanor and tone to determine her credibility. Throughout the interview and the administration of the ABAS-3, Ada “appeared thoughtful and open.” *Id.* at 3. She changed some of “her ratings after

deliberation, and some of the changes made reflected higher scores” rather than lower scores indicative of more profound disability. *Id.* In addition, Ada accurately answered the imbedded questions used to rule out malingering or feigned symptoms. *Id.* For these reasons, and through the exercise of clinical judgment, Dr. Kopelman found her a credible and knowledgeable respondent. *Id.*

The ABAS-3 administration resulted in quantitative and qualitative scores. On the assessment, Mr. Saldaño scored in the “extremely low” range of all three domains of adaptive functioning—conceptual, social, and practical. Ex. 1 at 3 (Dr. Eduardo Kopelman). His general adaptive composite was also “extremely low” and placed him in the first percentile (or lower) of the general population. *Id.* These results substantially corroborate Mr. Saldaño’s adaptive deficits as reported by multiple informants and, as per Dr. Kopelman’s opinion, are “consistent with the functioning of an intellectually disabled person in the developmental period.” *Id.* at 4.

The administration and results of the ABAS-3, moreover, support and confirm the opinions of Drs. Amezcua-Patino, Llorente, and Martinez that Mr. Saldaño has deficits in all three domains of adaptive functioning. *See* Ex. 4 at 53 (Dr. Llorente 2024); Ex. 5 at 68 (Dr. Martinez 2024); Ex. 2 at 19-20 (Dr. Amezcua-Patino: “I agree with this assessment of Mr. Saldaño’s skills, as delineated more specifically in Dr. Kopelman’s report. It is my opinion that the ABAS-3 results obtained provide

significant corroboration of Mr. Saldaño’s poor adaptive functioning during the developmental period.”).

iii. Prong Three: The Onset of Mr. Saldaño’s Intellectual Disability was During the Developmental Period

Mr. Saldaño experienced intellectual and adaptive deficits before he reached adulthood, and certainly before he was 22 years old. The onset of Mr. Saldaño’s intellectual disability was evidenced by informants’ recollections of his atypical behaviors and significant struggles from an early age, “with more pronounced psychiatric symptoms manifesting by early adolescence.” Ex. 2 (Dr. Amezcua-Patino 2024). Here, all of the anecdotal data regarding Mr. Saldaño’s functioning while in Argentina relate to his functioning as a child or adolescent—in other words, squarely within the developmental period. In addition, the objective data from the ABAS-3 standardized assessment relate to Mr. Saldaño’s disabilities that were present during this period. As such, there is ample evidence of both his intellectual and adaptive deficits in all domains existing during childhood and early adolescence, thus, satisfying the third prong of intellectual disability. *Id.* at 10, *see also* Ex. 5 at 68-9 (Dr. Martinez 2024).

iv. Mr. Saldaño Has Experienced Risk Factors for Intellectual Disability

“Although not formal criteria for IDD, an IDD assessment necessarily includes and considers the presence of risk factors for IDD present in an individual’s

life.” Ex 2 at 21 (Dr. Amezcua-Patino 2024). Although evidence of risk factors is not required for the diagnosis of intellectual disability either by medical communities or courts, the medical community considers “risk factors” as “cause to explore the prospect of intellectual disability further.” *Moore I*, 581 U.S. 16-17. Thus, risk factors are some evidence that an intellectual disability may exist or develop. Among the pre-, peri- and post-natal risk factors associated with intellectual disability are fetal alcohol exposure, traumatic brain injury, social factors such as extreme poverty, and behavioral factors such as abuse. *See, e.g.*, DSM-5-TR at 44; AAIDD-11 Manual at 60; AAIDD-12 at 92-93 (embracing “a multiple-perspectives approach to risk factors associated with the biomedical, psychoeducational, sociocultural, and justice perspectives on ID”).

Mr. Saldaño had several risk factors for intellectual disability during the developmental period. There is an observed relationship between intelligence and familial relationships. Here, an unusual number of Mr. Saldaño’s family members have been diagnosed or even institutionalized with intellectual impairments and/or mental health issues. *See supra* Section II (A) (discussing how Mr. Saldaño has an intellectually limited brother, a schizophrenic sister, two maternal cousins who are institutionalized for intellectual disability, two other maternal cousins who are intellectually limited and live under the care of family, a paternal aunt with schizophrenia, and a paternal uncle institutionalized for mental illness). Mr. Saldaño

experienced extreme poverty during his early childhood development, another risk factor for IDD. His housing situation was volatile most of the time due to his mother's financial instability. There were times when the whole family of five or six individuals lived in a single room. For years, Mr. Saldaño's house did not have a bathroom inside, instead, they had to walk outside to use the bathroom, which did not have a roof or hot water. As a consequence of his exposure to hunger and scarcity, he was found saving pieces of cheese and fruit under his bed, even after they were no longer edible. *See* Ex. 12 at 176 (Victor Carloni).

Mr. Saldaño witnessed and was subject to significant domestic violence between his mother, Lidia, and stepfather, Ramon. *See* Ex. 8 at 118 (Ada Saldaño). The abuse was often directed at the children and occurred constantly for years. *Id.* Starting when Mr. Saldaño was just seven or eight years old, Ramon would beat Mr. Saldaño in the head and all over his body with a belt. *Id.* The abuse occurred repeatedly, only stopping when the family fled Ramon's violence when Victor was approximately 11 or 12 years old. *Id.* Of all the children, Mr. Saldaño is the one that suffered the most physical abuse. Mr. Saldaño also may have endured mild traumatic brain injuries as a result of Ramon's abuse and/or being hit twice by a car when Mr. Saldaño failed to look before crossing the street. *See* Ex. 8 at 118, 121 (Ada Saldaño).

Though not necessary for an intellectual disability diagnosis, Mr. Saldaño’s exposure to the several relevant risk factors should be considered as additional reason to credit a diagnosis of IDD.

v. Intellectual Disability Frequently Co-Occurs with Other Neurodevelopmental Conditions

Individuals with intellectual disability frequently experience co-occurring neurodevelopmental and other mental and medical conditions, “with rates of some conditions...three to four times higher than in the general population.” DSM-5-TR at 45. This is referred to as comorbidity. The epidemiology of intellectual disability co-occurring with psychiatric illness remains poorly understood due to the difficulty of identifying mental illness in individuals with intellectual disability. *See* Morgan, Vera A. et al. “Intellectual Disability Co-Occurring with Schizophrenia and Other Psychiatric Illness: Population-Based Study.” *British Journal of Psychiatry* 193.5 (2008), 364–372. Still, some specific associations have been noted, specifically regarding schizophrenia diagnoses among individuals with intellectual disability. *Id.* According to one study, the risk of schizophrenia in intellectually disabled populations is threefold that of the general population. *Id.*; *see also* Ex. 5 at 63 (Dr. Martinez 2024). Additionally, as noted by Dr. Martinez, “it is critical to acknowledge that a diagnosis of ID and other mental health [diagnoses] cannot be considered independently as the intersectionality between them speaks to adaptive functioning of an individual.” Ex. 5 at 62 (Dr. Martinez 2024).

Mr. Saldaño was first diagnosed with Schizoaffective Disorder in 2001 while in TDCJ custody. By 2003, his diagnosis had changed to Paranoid Schizophrenia. Details of his mental health deterioration and diagnosis can be found in his motion pursuant to Article 46.05 of the Texas Code of Criminal Procedure. As noted by Dr. Amezcua-Patino, “the observed intellectual and adaptive deficits in [Mr. Saldaño’s] case cannot be solely attributed to his mental illness. Despite severe psychiatric symptoms, the historical consistency of borderline IQ scores and the extent of functional impairment over time suggest these deficits are intrinsic to his intellectual functioning.” Ex. 2 at 20 (Dr. Amezcua-Patino 2024).

**D. Mr. Saldaño’s *Atkins* Claim Should Be Authorized Under
Tex. Code of Crim. Proc. art. 11.071 § 5(a)(1) or art.
11.071 § 5(a)(3)**

Article 11.071 § 5(a) specifies different gateways for authorizing litigation of a subsequent Texas post-conviction application. This *Atkins* claim should be authorized for either of two distinct reasons: (1) under § 5(a)(1) and *Moore v. Texas (Moore I)*, 581 U.S. 1 (2017), because *Moore I* produced a previously unavailable legal basis justifying further litigation; and (2) under § 5(a)(3) and *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007), because there is clear and convincing evidence that, if true, shows that any rational factfinder would find that Mr. Saldaño to be intellectually disabled.

**i. This Claim Should be Authorized Under Article 11.071 §
5(a)(1)**

Under Section 5 of Article 11.071, this Court may consider the merits of a subsequent application for writ of habeas corpus only if the application contains sufficient facts showing that one of three exceptions is met. Tex. Code Crim. Proc. art. 11.071 § 5(a). Mr. Saldaño’s *Atkins* claim should be authorized under the first exception, Section 5(a)(1), because the Supreme Court’s decision in *Moore I* created a previously unavailable legal basis for the claim.

In relevant part, the Section 5(a)(1) 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 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). Subsection 5(d), in turn, provides that a legal basis was “unavailable on or before [the date of the previous post-conviction application filing] if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.” Tex. Code Crim. Proc. art. 11.071 § 5(d).

The CCA has explained that this exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the CCA’s law at the time of the previous application. *Ex parte Martinez*, 233 S.W.3d 319, 322

(Tex. Crim. App. 2007) (authorizing a claim under § 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 (Hood II)*, 304 S.W.3d 397, 405 n.40-41 (Tex. Crim. App. 2010) (collecting sources largely relying on *Martinez, supra*).

That is exactly what occurred here. In 2017, the Supreme Court decided *Moore I*, drastically changing the framework for assessing intellectual disability in Texas and creating new law directly applicable to Mr. Saldaño’s *Atkins* claim. At that time, through *Moore I*, the Supreme Court found that key features of Texas’s framework were not properly informed by the current medical community and did not reflect appropriate neuropsychiatric expertise.

First, *Moore I* held that the *Briseño* factors¹² used by Texas to assess intellectual disability claims were not based on medical standards, and created too

¹² The *Briseño* factors are as follows: (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).

great a risk that layperson stereotypes would result in the wrongful denial of meritorious *Atkins* claims. *See Moore I*, 581 U.S. at 20. The Court’s invalidation of the impermissibly non-clinical *Briseño* factors modified Texas’s framework to determine intellectual disability. *See id.*

Second, the Court reiterated the requirement set in *Hall*, “that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, *adjusted for the test’s standard error*, falls within the clinically established range for intellectual-functioning deficits.” *Moore I*, 581 U.S. at 15 (emphasis added).

Third, *Moore I* rejected Texas’s consideration of adaptive functioning by emphasizing an individual’s perceived adaptive strengths, contrary to the medical community’s focus on adaptive deficits. *Moore I*, 581 U.S. at 15. The Court alluded to the medical authorities on the subject at the time, and the need to consider deficits in adaptive functioning even if present in only one of the three adaptive skills domains, and even in the presence of potential strengths in some adaptive skills. *Id.* (citing the DSM-5 and AAIDD-11).

Lastly, the Court found improper the use of an individual’s comorbid mental health conditions and/or traumatic experiences to counter the case for an intellectual disability determination. *See Moore I*, 581 U.S. at 16-17. The medical community recognizes co-occurring mental, neurodevelopmental, medical and physical

conditions are frequent in IDD diagnoses. *See id.* Along the same lines, the medical community also relies on traumatic experiences, known as “risk factors,” as cause to further explore the prospect of intellectual disability, not to counter it, and as diagnostic corroboration; thus, the appropriate legal standard for determining intellectual disability treats them as such. *See id.*

Consequently, since 2017, this Court has repeatedly found that *Moore I* represents a new, previously unavailable legal basis for *Atkins* claims filed in subsequent habeas applications pursuant to Article 11.071 § 5(a)(1). *See, e.g., Ex parte Segundo*, 663 S.W.3d 705, 705-06 (Tex. Crim. App. 2022) (holding *Moore I* as a previously unavailable legal basis for *Atkins* claim filed in a subsequent application pursuant to 11.071 § 5(a)(1)).¹³ Specifically, *Moore I* triggers the §

¹³ In many unpublished decisions, the Court of Criminal Appeals has held that *Moore v. Texas*, 3137 S. Ct. 1039 (2017) represents a new legal basis under Texas Code of Criminal Procedure Article 11.071 § 5(a), or at least the occasion to decide the merits of an *Atkins* claim in a subsequent posture. While the holdings of these cases do not serve as precedent, *see* Tex. R. App. P. 47.7(a), their reasoning is persuasive. *See, e.g., 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*, 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); *Ex parte Segundo*, WR-70,963-09 (Tex. Crim. App. Oct. 31, 2018) (not designated for publication); *Ex parte Long*, No. WR-76,324-02, 2018 WL 3217506 (Tex. Crim. App. June 27, 2018) (not designated for publication); *Ex parte Guevara*, WR-63,926-03, 2018 WL 2717041 (Tex. Crim. App. June 6, 2018) (not designated for publication). *See also Ex parte Lizcano*, No. WR-68,348-03, 2018 WL 2717035, at *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.”); *Ex parte Henderson*, No. WR-37,658-03, 2018 WL 4762755 (Tex. Crim. App. October 3, 2018) (exercising inherent authority to reconsider the prior disposition an *Atkins* claim in light of *Moore* (not designated for publication); *Brownlow v. State*, AP-77,068, 2020 WL 718026 (Tex. Crim.

5(a)(1) exception because it is binding, directly relevant Supreme Court law that was decided after the filing of the last-in-time habeas applications.

Mr. Saldaño filed his last habeas application in 2007, and his current *Atkins* claim directly contradicts the CCA’s law on intellectual disability claims at the time of his previous application(s).

At the time of Mr. Saldaño’s last 11.071 application in 2007, Texas’s framework for assessing intellectual disability was inextricably bound to the since-discarded *Briseño* factors. The new legal basis announced by the Supreme Court in *Moore I* in 2017 had not yet been recognized as of Mr. Saldaño’s previous post-conviction writ. As such, the legal basis for this claim—intellectual disability under the clinical framework mandated by *Moore I*—was unavailable. *See* Tex. Code Crim. Proc. art. 11.071 § 5(d). Thus, this Court should allow Mr. Saldaño’s *Atkins* claim to proceed under the “new legal basis” exception of § 5(a)(1).¹⁴

App. Feb. 12, 2020) (reversing the appellant’s death sentence on direct appeal because the intellectual disability determination at trial was made under *Briseño*).

¹⁴ This Court has never held that in order to rely on a “new legal basis” for the litigation of a claim in a subsequent habeas application, one had to either have raised and lost a claim under a legal framework that formerly applied or have been dissuaded by the former legal framework from having done so. Thus, for the purposes of Section 5(a)(1) authorization under the new legal basis of *Moore I*, it is irrelevant that this is the first time Mr. Saldaño has argued that he is intellectually disabled. That said, however, Mr. Saldaño notes several aspects of his present claim that would have received less favorable reception under the pre-*Moore I* standard. Mr. Saldaño has been consistently diagnosed and treated for paranoid schizophrenia for over 20 years by the mental health professionals employed by TDCJ. Under the pre-*Moore I*, *Briseño* framework, this Court would require applicants to prove that their proffered adaptive deficits were not the consequence of a mental health disorder instead of an intellectual disability. *See, e.g., Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (adaptive deficits must be related to a deficit in

ii. In the Alternative, Mr. Saldaño’s *Atkins* Claim Should Be Authorized Under Article 11.071, Section 5(a)(3) and *Ex parte Blue*

If not under Article 11.071 § 5(a)(1), Mr. Saldaño’s *Atkins* claim should be authorized under the third exception, § 5(a)(3), because Mr. Saldaño demonstrates “that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is [intellectually disabled].” *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007).¹⁵

intellectual functioning and not a psychiatric disorder); *Ex parte Moore*, 470 S.W.3d 481, 488 (Tex. Crim. App. 2015), *rev’d sub nom. Moore v. Tex.*, 581 U.S. 1 (2017) (finding early school problems more likely caused by “emotional problems” than intellectual disability). And, under *Briseño*, to the extent that his responses to questions commonly “wander from subject to subject” instead of being “coherent[], rational[], and on point,” Mr. Saldaño would have had to prove that his manner of communication was related to intellectual disability rather than decades-long serious mental illness. But as the Supreme Court has since noted, co-morbid mental health disorders are frequently seen among the intellectually disabled. *Moore I*, 581 U.S. at 17. In addition, shortly after Mr. Saldaño was arrested, he gave the interrogating officer a false name “Victor Rodriguez” and attempted to give a self-serving statement; under the *Briseño* standards, however, the use of an alias and attempting to advance one’s interests by lying was a contraindicator of intellectual disability. But as the Supreme Court has recognized, lying to further interests is not corroborative of intelligence and is irrelevant to a reliable, constitutional determination of intellectual disability. *Id.* at 9.

¹⁵ While this Court sometimes simply authorizes under § 5 without specifying the subsection providing the basis for authorization, *see, e.g., Ex parte Gallo*, WR-77,940-03 (Tex. Crim. App. Feb. 8, 2017) (not designated for publication), this Court has explicitly relied upon Article 11.071 §5(a)(3) in at least two similar, recent situations aside from *Blue*. *See Ex parte Mays*, No. WR-75,105-02 (Tex. Crim. App. May 7, 2020) (not designated for publication) (authorizing under §5(a)(3)); *Ex parte Milam*, WR-79,322-04 (Tex. Crim. App. Jan. 15, 2021) (not designated for publication) (same).

Recognizing the importance of the Eighth Amendment interest to be protected, this Court in *Blue* created a gateway for the litigation of intellectual disability claims brought by persons who had failed to avail themselves of an earlier meaningful opportunity to raise an intellectual disability claim. *Id.*¹⁶ More precisely, *Blue* requires an individual with an *Atkins* claim receiving § 5(a)(3) treatment to provide “sufficient specific facts that, *if true*, would establish by clear and convincing evidence that no rational fact finder would fail to find [ID].” *Id.* at 162 (emphasis added). *Blue* expressly requires that the § 5(a)(3) inquiry be treated as a sufficiency-of-the-pleading question, and that it not be used to conduct the type of analysis that takes place in the forum for primary fact-finding. In other words, *Blue* does not allow this Court to draw inferences against Mr. Saldaño, as it is “only to review the adequacy of the pleading.” 230 S.W.3d at 163; *see also id.* (“It would be

¹⁶ Mr. Saldaño, however, has yet to have an opportunity to raise a claim of intellectual disability under *Moore I*; this is his first opportunity. As such, *Blue* involved a different slightly scenario than the one presented here. In *Blue*, the applicant raised an intellectual disability claim in a subsequent application, after having neglected to do so in his initial writ which he filed one year after *Atkins*. Because there was no intervening change of law, the applicant did not seek to have his claim reviewed under Section 5(a)(1). *Ex parte Blue*, 230 S.W.3d 151, 153 (Tex. Crim. App. 2007). Just as in *Blue*, Mr. Saldaño raises the instant intellectual disability claim for the first time in a subsequent writ after having failed to plead one previously in a post-*Atkins* filing. Unlike in *Blue*, Mr. Saldaño relies on a new, previously unavailable legal basis (*Moore I*) and seeks authorization, in the first instance, under Section 5(a)(1). Because this is Mr. Saldaño’s first opportunity to raise an intellectual disability after the new legal basis of *Moore I* was recognized, he should not be subjected to the higher threshold of Section 5(a)(3). Nevertheless, if he is, Mr. Saldaño easily surpasses this threshold inquiry.

anomalous to require the applicant to actually convince us by clear and convincing evidence at this stage.”).

Several different examiners at several different times have administered Mr. Saldaño IQ tests, but the results have been consistent: Mr. Saldaño scores in the required range for a diagnosis of intellectual disability disorder. His adaptation in every area of his life has been significantly impaired since his early life, as demonstrated and corroborated by a dozen informants and an objective, standardized retrospective measure of adaptive functioning. The onset of Mr. Saldaño’s deficits in both intellectual and adaptive functioning began in his childhood, and those deficits have continued to impair his functioning throughout his life. Three experts, including an expert for the State, have found Mr. Saldaño intellectually disabled. Here, “the medical community [is] of one mind,” just as in *Petetan*, where this Court considered the factual sufficiency of a claim of intellectual disability. *Petetan*, 622 S.W.3d at 360. In the absence of contrary evidence, where all experts who have been ever asked to opine on the question of intellectual disability agree that Mr. Saldaño meets the criteria for intellectual disability, no reasonable factfinder would fail to find Mr. Saldaño is intellectually disabled. *Cf. id.* (“After *Moore I* and *Moore II*, a factfinder cannot substitute its opinion for that of *all* of the examining doctors.”) (emphasis in original).

Given the strength of the evidence of intellectual disability and the unanimity of every expert ever asked to opine on the question of Mr. Saldaño's intellectual disability, Mr. Saldaño has surpassed his burden of pleading specific facts that, if true, would establish by clear and convincing evidence that no rational fact finder would fail to find IDD. *See Blue*, 230 S.W.3d at 162. As such, this Court should authorize Mr. Saldaño's *Atkins* claim under Article 11.071 § 5(a)(3), if it does not authorize the litigation of this claim under § 5(a)(1).

V. CONCLUSION

Mr. Saldaño respectfully requests that the CCA authorize the above claim for further factual development by the 199th District Court and findings of fact and conclusions of law regarding whether he is intellectually disabled and exempt from the death penalty under the Eighth Amendment.

Respectfully submitted,

DATED: June 26, 2024

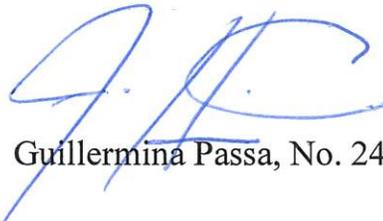
The Office of Capital & Forensic Writs *by*



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Counsel for Mr. Saldaño

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2024, I have caused a true and correct copy of the foregoing Subsequent Application for Writ of Habeas Corpus to be served by email on counsel for the State, Lisa Braxton, Collin County District Attorney's Office, at lbraxton@co.collin.tx.us.

/s/ Benjamin Wolff
Benjamin Wolff

CERTIFICATE OF COMPLIANCE

I hereby certify that this Subsequent Application for Writ of Habeas Corpus was computer generated and contains 15,153 words, in compliance with per Tex. R. App. Proc. 9.4(i)(2)(A).

/s/ Benjamin Wolff
Benjamin Wolff

VERIFICATION

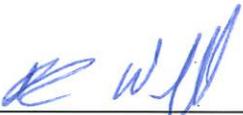
BEFORE ME, the undersigned authority, on this day personally appeared Benjamin Wolff, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for Mr. Victor Saldaño having authority to prepare and verify Mr. Saldaño's Subsequent Application for Writ of Habeas Corpus.

3. I have prepared and have read the foregoing Subsequent Application, and I believe all allegations therein to be true to the best of my knowledge.

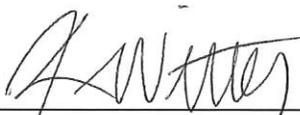
Signed under penalty of perjury:



Benjamin Wolff

June 25, 2024
Date

State of Texas, County of TRAVIS, SWORN to and SUBSCRIBED before me, the undersigned authority, on 25 day of June, 2024, by the person whose signature appears above, who is personally known to me OR presented me with valid photo-identification.



Notary Public, State of Texas

My Commission Expires: 06/06/2026



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Benjamin Wolff on behalf of Benjamin Wolff

Bar No. 24091608

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Filing Description: SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

Status as of 6/26/2024 10:28 AM CST

Associated Case Party: Victor Saldano

Name	BarNumber	Email	TimestampSubmitted	Status
Kelsey Peregoy		kelsey.peregoy@ocfw.texas.gov	6/26/2024 10:13:57 AM	SENT
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Ben Wolff		benjamin.wolff@ocfw.texas.gov	6/26/2024 10:13:57 AM	SENT

Associated Case Party: Collin County District Attorney

Name	BarNumber	Email	TimestampSubmitted	Status
Lisa Braxton		lbraxton@co.collin.tx.us	6/26/2024 10:13:57 AM	SENT

199-80049-96

State of Texas	§	In the 199th Judicial
	§	
v.	§	District Court of
	§	
Victor Hugo Saldaño aka Victor Rodriguez	§	Collin County, Texas

Brief in Support of Remand

The State of Texas, by and through the District Attorney of Collin County, Texas, files this brief in support of remanding Victor Hugo Saldaño’s subsequent article 11.071 writ application. In his application, Saldaño alleges he is intellectually disabled (ID). In light of marked changes in the law governing ID claims since Saldaño’s last state writ and the recent discovery of evidence of Saldaño’s intellectual and adaptive functioning, the State joins Saldaño’s request to return his application to the trial court to address his claim.

Evolution of Saldaño’s ID Claim

In the spring of 2021, after protracted federal and state court review of Saldaño’s conviction and death sentence, the State moved to set Saldaño for execution. Saldaño objected to the setting and notified the trial court of his intent to file an article 46.05 motion alleging his incompetence for execution. In response, the State obtained and reviewed Saldaño’s extensive TDCJ medical and mental health records and retained two mental health experts. Saldaño subsequently filed

an article 46.05 motion accompanied by reports from two experts - a psychiatrist and a neuropsychologist; both opined that he was incompetent for execution. Notably, the neuropsychologist attested that Saldaño had recently been administered the Spanish version WAIS-IV and that it had yielded a full-scale score of 73. At the State's request, Saldaño agreed to allow the State's own neuropsychologist to administer another IQ test to assess the validity of that score. The subsequently administered Spanish version WAIS-IV measured Saldaño's IQ at 74. With the test's standard error of measurement of +/- 5 points, this score places Saldaño's IQ within the range of mild intellectual disability.

Given the consistency in scores, the parties agreed to pause the article 46.05 proceedings to address Saldaño's adaptive functioning. OCFW traveled to Argentina to locate and interview informants familiar with Saldaño during his childhood. These informants provided written statements describing a variety of adaptive deficits apparent during Saldaño's developmental period. Both parties submitted this evidence to their respective experts for evaluation, and each of the experts generated a report documenting his professional opinion. Most notably for the State, its own expert opines that Saldaño meets the criteria for ID established by *Atkins* and its progeny. See Appendix A (May 2, 2024 Report of Dr. Gilbert Martinez, Ph.D.).

Application Meets Subsequent Writ Requirements

Although Saldaño presents his ID claim in a subsequent writ application, the State believes the application is excepted from the procedural bar to subsequent writs.

First, the State recognizes that the law governing ID claims has changed substantially since Saldaño's prior state habeas application. As noted in Saldaño's current application, the law no longer requires a firm IQ score of 70 or below, comorbidities and adaptive strengths may not preclude a finding of ID, and the criteria for assessing ID must be informed by the medical community's standards, which have continued to evolve since *Atkins*. Thus, the State believes Saldaño's ID claim qualifies for habeas review under section 5(a)(1) of article 11.071. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a)(1) (authorizing subsequent writ application based on unavailability of legal claim at time of prior writ application's filing).

Second, the State believes the recent IQ test scores, along with the recently acquired evidence of adaptive deficits that arose during Saldaño's developmental period, constitute new evidence of ID, which would be per se mitigating. Thus, no rational juror could have negatively answered the mitigation issue, making Saldaño's ID claim reviewable under section 5(a)(3), as well. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a)(3) (authorizing subsequent writ application based on clear

and convincing evidence that no rational juror could have answered the special issues in favor of the death penalty).

Conclusion

For the foregoing reasons, the State 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.

Respectfully submitted,

GREG WILLIS

Criminal District Attorney
Collin County, Texas

/s/ Lisa Braxton

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Certificate of Service

A copy of this pleading has been e-served on Saldaño's appellate counsel, Benjamin Wolff, Benjamin.Wolff@ocfw.texas.gov, Kelsey Peregoy, Kelsey.Peregoy@ocfw.texas.gov, Guillermina Passa, at Guillermina.passa@ocfw.texas.gov, with the Office of Capital and Forensic Writs, on June 26, 2024.

/s/ Lisa Braxton
Lisa Braxton

Appendix A

(5/2/2024 Report of Dr. Gilbert Martinez, Ph.D.)

GILBERT MARTINEZ, Ph.D., ABPP-CN
LICENSED PSYCHOLOGIST
BOARD CERTIFIED IN CLINICAL NEUROPSYCHOLOGY

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ADDENDUM REPORT OF INTELLECTUAL ASSESSMENT

Name: Victor Hugo Saldaño
Date of Birth: 10/22/1971

Age: 52
Report Date: 5/2/2024

Examiner: Gilbert Martinez, Ph.D., ABPP-CN
Referral Source: Lisa Braxton, Assistant Criminal
District Attorney, Collin County

Re: Cause No. 199-80049-96 *State of Texas v. Victor Hugo Saldaño aka Victor Rodriguez*. In the 199th Judicial District Court of Collin County, Texas.

Training/Experience

I am a licensed psychologist, board-certified clinical neuropsychologist, and native Spanish-speaker with a specialty in neuropsychological assessment of Spanish-speakers and the evaluation and treatment of neurological and psychological conditions in adults and children, including brain injury, dementia, depression, and posttraumatic stress. I am board certified in Clinical Neuropsychology by the American Board of Professional Psychology. A major portion of my training and experience has been in the area of standardized psychological testing. I have more than 30 years of experience in conducting neuropsychological and psychological assessment and intervention with individuals suffering from a broad range of intellectual, neurological, behavioral, and emotional disorders, with a subspecialty in head trauma rehabilitation. In addition to my independent practice and staff and directorship appointments with several major hospital systems, I am also regularly appointed by courts in the field of clinical psychology and clinical neuropsychology in both civil and criminal matters. I am licensed in Texas and Louisiana and also serve as a case reviewer for the American Board of Professional Psychology, and have served as an oral examiner with the Texas State Board of Examiners of Psychologists, and as President of the Hispanic Neuropsychological Society. Please refer to my curriculum vitae for greater detail.

Case Background/Referral

Mr. Victor Saldaño is a 52-year-old primarily Spanish-speaking Argentinian-American male who was previously referred for intelligence testing by Lisa Braxton, Assistant Criminal District Attorney of Collin County, Texas. A report of the results of intelligence testing, administered on

March 30, 2023, along with a review of prior testing, was previously submitted on June 29, 2023. Please refer to the previously submitted report for greater detail regarding standardized test results and interpretations.

More recently, several declarations have been received, along with a request to review and review and evaluate these documents in reference to Mr. Saldaño’s intellectual functioning, and provide supplemental opinions if necessary.

Standardized Test Summary

As noted previously, the results of recent and prior standardized testing of Mr. Saldaño’s intellectual functioning, along with previous records and documents available for review, were described in the report submitted on June 29, 2023. Please note the information in this section is not intended to represent a complete summary of prior testing, as a more comprehensive description of prior evaluation methodology and results can be found in the previous report. Briefly, Mr. Saldaño was noted to have previously undergone interpretable intelligence testing on two occasions, including in 1996 by Dr. James McCabe and 2021 by Dr. Antolin Llorente, with the following results:

<u>Year</u>	<u>IQ Score/Index</u>	<u>Test</u>	<u>Examiner</u>
1996	76	WAIS-R (US Data?)	Dr. James McCabe
2021	73	WAIS-IV (Mexico Data)	Dr. Antolin Llorente

The evaluation conducted by Dr. Llorente utilized the most currently available version of the Wechsler Adult Intelligence Scale, as standardized in Mexico. The psychological “raw data” from this test administration by Dr. Llorente was available for review. This evaluation yielded index scores ranging from 55 for Working Memory, to 84 for Verbal Comprehension with a full scale IQ score of 73, within the 4th percentile. These scores were obtained within the context of a reported history of intellectual and behavioral deficiencies beginning during the developmental period, and in the context of a history of severe chronic mental illness, including symptoms of schizophrenia.

During a more recent assessment, I was allowed an opportunity to administer an intelligence test battery with supportive measures to Mr. Saldano on March 30, 2023. Although Mr. Saldano was cooperative with the assessment, he exhibited attentional deficits secondary to his apparent mental disorder which may have adversely affected his test engagement. However, Mr. Saldaño’s clinical presentation during the assessment was indicative of positive effort, and there was a high degree of consistency in test scores in accordance with prior assessments. It was determined the scores were likely reliable and interpretable,, and the results of intelligence test scores obtained on March 30, 2023, are as follows:

<u>Year</u>	<u>IQ Score/Index</u>	<u>Test</u>	<u>Examiner</u>
2023	74	WAIS-IV (Mexico Data)	Dr. Gilbert Martinez
2023	77	TONI-4 (US Data)	Dr. Gilbert Martinez

On the Wechsler Scales of Intelligence administered in March, 2023, there was a similar pattern of Index Composite Scores as compared to those obtained during prior assessments, with slightly higher scores on a Verbal Comprehension Index (VSI = 80), and lower scores on the Working Memory Index (WMI = 66). The obtained Full Scale IQ score of 74 was comparable statistically to the score of 73 obtained in 2021.

It was determined that although Mr. Saldaño’s intelligence test scores fell within the Borderline Range of Intelligence, consideration of the Standard Error of Measurement and pertinent adjustments for the Flynn Effect may also yield a reasonable interpretation for these scores within a lower functional classification, especially within the context of Mr. Saldaño’s apparent cognitive and behavioral deficits, as well as his reported developmental history.

Current Basis and Definitions

Definitions of Intellectual Disability: The DSM-5 (now DSM-5-TR, 2022) defines intellectual disability (ID) as belonging to a class of neurodevelopmental disorders that begin in childhood and are characterized by intellectual deficits as well as deficiencies in conceptual, social, and practical areas of living. The American Association for Intellectual and Developmental Disability (AAIDD) and the International Classification of Diseases (10th Edition) embrace a similar definition. Specifically, a DSM-5-TR diagnosis of ID requires the satisfaction of three criteria:

1. Deficits in intellectual functioning—“reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience”—confirmed by clinical evaluation and individualized standard IQ testing (APA, 2013, p. 33);
2. Deficits in adaptive functioning that significantly hamper conforming to developmental and sociocultural standards for the individual's independence and ability to meet their social responsibility; and
3. The onset of these deficits during childhood.

Inclusively, the DSM-5-TR provides descriptors of the severity of the intellectual disability as mild, moderate, severe, and profound. It is important to note that individuals with mild severity continue to have difficulty functioning in society; though their adaptation may appear adequate at the surface level (APA, 2013). Furthermore, it is critical to acknowledge that a diagnosis of ID

and other mental health cannot be considered independently as the intersectionality between them speaks to adaptive functioning of an individual. Individuals with disorders of ID are a highly vulnerable group that often also experienced poor physical and mental health (Emerson et al. 2016), are three to four times more likely to suffer from mental health problems (Reiss 1994; Rojahn & Tassé 1996; Stremme & Diseth 2000; Smiley 2005; Cooper et al. 2007; Fletcher et al. 2016), and are often excluded from full participation in societies and experience significant discrimination (Bruininks et al. 1988; Llewellyn et al. 2015).

Definition of Adaptive Behavior: Adaptive Behavior includes conceptual, social, and practical skills that are necessary to function in everyday life. These learned behaviors are specific to the environment and culture of the individual. Additionally, they are constantly changing. For example, making a phone call now is different than the skills necessary to make a phone call decades ago. Below are skill areas to define these three domains:

1. Conceptual skills: Literacy; self-direction; concepts of number, money and time
2. Social skills: interpersonal skills, social responsibility, self-esteem, gullibility, naiveté, social problem solving, following rules, obeying laws, and avoid being victimized
3. Practical skills: activities of daily living (personal care), occupational skills, money, safety, health care, travel/transportation, schedules/routines, and use of telephone

To assist in the diagnosis of ID, Tassé et al., 2019, developed behavioral indicators in each category. These behavioral indicators are useful when appropriate standardized tests or professionals trained to administer such instruments are unavailable or limited. In these situations, a diagnosis of disorders of ID might be possible through the assessment of behavioral indicators to inform the professional's clinical judgement regarding the presence and severity of impairments in both intellectual functioning and adaptive behavior across conceptual, social and practical skills. These behavioral indicators were considered in the conceptualization of Mr. Saldaño's capabilities.

(Continued on following page)

Current Document Review

On February 12, 2024, twelve declarations pertaining to Mr. Saldaño were provided to me by Ms. Lisa Braxton, Assistant Criminal District Attorney of Collin County, Texas. These declarations were initially obtained in written Spanish and were translated to English, and include the following:

<u>Declarations:</u>	<u>Relation to Mr. Saldaño</u>
Declaration of Ada Saldaño	Sister
Declaration of Augusto Maldonado	Cousin
Declaration of Dr. Eduardo Kopelman	Psychiatrist
Declaration of Lidia Guerrero	Mother
Declaration of Marcos Diaz	Classmate
Declaration of Nora Klein	Neighbor
Declaration of Paulina Heimsath	Music Student – Relation Unclear
Declaration of Roxana Galan	Childhood Acquaintance
Declaration of Silvia Guzman	Cousin
Declaration of Sonia Maggiore	Classmate
Declaration of Victor Carloni	Cousin
Declaration of Victor Hugo Pedraza	Classmate

The following section includes a brief summary of information in these declarations that may provide information regarding Mr. Saldaño's adaptive functioning but is not intended to represent a comprehensive review of these documents.

A declaration by Ms. Ada Saldaño notes she is the older sister of Mr. Saldaño and describes a family history of mental disorders and intellectual disability, as well as estrangement from their father, Jose Hugo Saldaño, since Mr. Saldaño was about two years old. This declaration describes housing instability, poverty, and subsequent partner physical abuse of Mr. Saldaño's mother by Mr. Saldaño's stepfather, Ramon Barrios. It was noted that Mr. Saldaño was also abused by Mr. Barrios, as he "didn't have the sense the rest of us did to avoid Ramon and save ourselves from him." The declaration describes substantial financial hardship and recurring violence by Mr. Barrios towards the family. Ms. Ada Saldaño noted that while she was able to advance academically, the other siblings had more difficulty. She recalled that Mr. Saldaño's mother helped him the most, stating "My mother and I stayed on top of Victor, making sure his homework got done one way or another, and that he ate, bathed, and was clothed." She reported taking care of her siblings because she was older, and elaborated, "but taking care of Victor was especially hard because [he] had many challenges," because he "was not like other kids." She reported the family would try to assist him with his education, stating "we devoted a lot of time to Victor's schooling, and the grades he got were thanks to our help." Mr. Saldaño's mother was reportedly very concerned about him being perceived as "smart" and to help him complete his education. Mr. Saldaño reportedly was unable to function adequately without the family's assistance, as Ms. Ada Saldaño stated, "it was so much effort by us to keep him in school and

doing well. I know that he could not have done it on his own, because when my mother did not have time to help him anymore, everything fell apart.”

Ms. Ada Saldaño also noted Mr. Saldaño was easily influenced by other people, did not speak very much or start conversations, and “always had a look like he was lost.” He was also described as clumsy and with difficulty taking care of himself. He reportedly had difficulty understanding when things were dangerous, and he required continuous assistance with safety awareness, as it was noted, “we had to teach him again and again how to look both ways when he was crossing the street in the neighborhoods we lived in, but he couldn’t manage to do that.” She provided several examples of Mr. Saldaño being struck by cars due to poor safety awareness.” He also reportedly had difficulty understanding the consequences or dangerousness of his behavior. He reportedly did not bathe unless reminded, and required assistance in washing and cleaning his clothes. Mr. Saldaño reportedly spent most of his time with an older cousin who is intellectually disabled, and “did not make his own friends,” usually spending most of his time in his room alone. He was also described as being very immature, “scattered,” and unable to complete tasks, and did not describe his thoughts or feelings. He also was reportedly unable to play soccer adequately with children in the neighborhood, although this was reportedly a very easy activity to engage. Ms. Ada Saldaño stated, “Victor tried this a few times, but he was so bad that they stopped letting him play. Victor didn’t really understand the rules of the game or what to do with the soccer ball once he got it.” He also had difficulty learning other sports, such as basketball, and was bullied often by other children because he “was an easy target for other kids to take things from or take advantage of.” He was also reportedly very suggestible, as his “mind was malleable, he didn’t have critical thinking skills.”

Mr. Saldaño also reportedly had difficulty keeping track of time and was inattentive. His mother reportedly placed him in a music conservatory to try to shield him from getting in trouble with other children. He was unable to prepare elaborate food and could not be trusted to prepare meals. He was unable to assist with household chores, as he “never did anything on his own.” His mother reportedly spent a considerable amount of time teaching him how to do things at home or navigate in the neighborhood. When it was determined that he would not be able to do well in school, he was sent to a military school for increased discipline and structure. He was later expelled from the military school, to the disappointment of his mother. He attempted to live with other family members, including an uncle and his father, but was unsuccessful, eventually traveling to the United States.

A declaration of Ms. Lidia Guerrero, Mr. Saldaño’s mother, was also available for review. She reported having four children, including three children with Mr. Saldaño’s father, who was reported to have a familial history of mental illness. Mr. Victor Saldaño was reported to be her third child, and she recalled her pregnancy with Mr. Saldaño was very stressful due to financial hardship that required her to work in a demanding factory job. She reported smoking “a lot” during her pregnancy with Mr. Saldaño because of stress, and described poor eating habits during her pregnancy, stating “there were days I barely ate.” She reported Mr. Saldaño weighed about 4 pounds at birth, and was “the smallest of all my babies,” stating that she worried about his low birth weight. He was also reported to be sick as an infant, and was diagnosed with osteomyelitis in an ER, which resulted in a two month hospitalization and a leg surgery. She reported that as Mr. Saldaño got older she initially did not realize he was having problems

because she was busy working to provide for the family. She reported that family stress kept her from understanding the severity of Mr. Saldaño's difficulties, including being bullied by other children and being unable to defend himself. She also provided specific examples of Mr. Saldaño not being able to understand basic concepts, such as knowing when to move away from the street because cars were coming, which resulted in his being hit by cars twice. She also described other incidents of poor judgment, inability to understand consequences, and difficulty understanding what people were telling him.

Mr. Saldaño also reportedly communicated less with others, and was obsessed with the idea of traveling to the United States. In providing examples of Mr. Saldaño's poor judgment, Ms. Guerrero described an incident where he waited outside of an uncle's house for two days because he was not there, despite there being other family members nearby that could have easily helped him. She elaborated, "he spent two days without food, a bathroom, or anything else, when his family lived a couple of blocks away. Victor just did not think ahead on what to do like that." He reportedly later showed up at his father's house in Brazil, after which he did not communicate very much with his family.

Several declarations of Mr. Saldaño's cousins were also available for review. A declaration by Mr. Augusto Maldonado, Mr. Saldaño's maternal first cousin, noted that he is 12 years older than Mr. Saldaño and provides information about some of the family hardships and troubled relationships. The declaration states that Mr. Maldonado had difficulty establishing relationships with some of his cousins because of their "mental disabilities" and "traits of schizophrenia and other mental illnesses." The disabilities of Mr. Maldonado's brother are described, along with other family members. However, Mr. Maldonado states in his declaration that he had limited knowledge of Mr. Saldaño's history, stating "*I haven't heard much about Victor's life. I know that Victor's father left and abandoned him when he was very young. I heard that Victor was weird. I know that one day he dropped out of school and left. I also know that somehow he made it to Brazil, but I don't know how or why. Actually, I wouldn't be surprised if Victor had the same disability that my brother and cousins have.*"

A declaration of Sylvia Guzman notes she is also Mr. Saldaño's maternal first cousin. She reported that each of the sisters in her mother's family "has a son with mental or neurological problems," including intellectual disability, schizophrenia, substance use, or other functional deficits, which in some cases resulted in long term institutionalization. She provided specific examples of mental disability in her first-degree relatives, as well as recollections of her interaction with Mr. Saldaño. She reported Mr. Saldaño was very similar to her brother Luis who is mentally disabled. She reported Mr. Saldaño, like her brother, was "very reserved and was alone a lot," without socializing in groups. She also recalled that he "struggled to communicate with most people," and that Mr. Saldaño and her brother "did simple, childish activities that did not require a lot of concentration." She recalled that Mr. Saldaño "lived in a fantasy world at times," and did not appear to have a reasonable sense of what is needed in order to accomplish his dreams. She provided an example of Mr. Saldaño stating he would like to become a Mormon, even though he did not know anything about the religion and had never been exposed to Mormonism. She also provided her opinion that Mr. Saldaño "wasn't aware of how the world worked," and lacked the ability to reason and think about the consequences of his actions." She recalled an example where Mr. Saldaño had put fireworks inside an oven at his house, without

understanding the consequences, which eventually exploded. She also recalled Mr. Saldaño struggled in school and had difficulty with his homework “because he couldn’t understand it.” He also exhibited poor hygiene, difficulty focusing on tasks, and was unable to complete essential household tasks. He also reportedly was “unable to express his feelings to other people his age” and “had the mentality of a child much younger than his age,” according to Ms. Guzman. She recalled he was easily influenced by others and was impressionable.

Victor Carloni, who is also reported to be a maternal first cousin of Mr. Saldaño, also provided a declaration. He reported being aware of substantial financial and social hardship endured by Mr. Saldaño’s family, and recalled family visits. During these visits he noticed Mr. Saldaño was “childish” and appeared much younger. Mr. Carloni recalled that although Mr. Saldaño would reportedly greet people initially, he did not appear to have substantive conversations with anyone, and did not appear to develop meaningful or lasting friendships in his neighborhood. Mr. Saldaño also had difficulty understanding and following the rules of childhood games. Mr. Carloni recalled Mr. Saldaño was called “Pecho” by the other children in his neighborhood because he tended to block the ball with his chest in an exaggerated manner while playing soccer. Mr. Carloni also recalled that Mr. Saldaño seemed to get along best with his cousin Luis, who was also disabled and had difficulty communicating. Mr. Saldaño reportedly attended public school in Argentina, where he likely did not receive much individual attention, according to Mr. Carloni. Mr. Saldaño reportedly did not understand how to help his family during their financial hardship, as did most other older children. He recalled that Mr. Saldaño “wasn’t conscious of his role and responsibility within his family,” and “would get himself in situations that he didn’t fully understand.” He also described a pattern of immaturity, stating “Victor never stopped being a child,” and recalled he harbored unrealistic dreams and expectations.

Retrospective information about Mr. Saldaño was also provided by several classmates. A declaration of Victor Hugo Pedraza noted that he was Mr. Saldaño’s classmate in the fourth, fifth, and sixth grade. He described an impoverished school environment, where students would be given good grades if they showed some work. He recalled Mr. Saldaño was “reserved and often silent” and “struggled with learning,” and had difficulty with different subjects, especially mathematics. He also recalled Mr. Saldaño had to repeat the sixth grade because he did not pass his subjects, and was unable to do what was needed to take a passing exam.

A declaration of Marcos Adrian Diaz noted he was also a classmate of Mr. Saldaño’s in the fifth and sixth grade. He also recalled that Mr. Saldaño had to repeat sixth grade, had difficulty focusing, and was “very scattered and distracted.” He reportedly had difficulty understanding course material and following classroom rules. In describing Mr. Saldaño’s distractibility, Mr. Diaz noted “it was easier for him to play because he did not have to focus on difficult things when he was playing.” He recalled never having a “deep conversation or serious conversation” with Mr. Saldaño, because he was unable to understand the seriousness of topics at hand and “everything was a joke with Victor.”

A declaration of a third classmate of Mr. Saldaño, Ms. Sonia Maggiore, notes she was also his classmate in the fifth and sixth grades. She recalled he was quiet and shy, and “seemed younger than his age to me.” She also reported he was not very sociable and there were concerns that he had family problems or mistreatment at home. Ms. Maggiore provided her impression that Mr.

Saldaño struggled with learning and was “slow”. He reportedly had difficulty with most subjects and required multiple explanations to understand what was being taught. She also recalled that teachers gave Mr. Saldaño and other students with academic difficulties additional classes so they could improve and pass the school year.

A declaration of Roxana Galan noted that she was a neighbor to Mr. Saldaño’s family, and she was aware of some of the severe mental disabilities and neurological problems of Mr. Saldaño’s cousins. She recalled that Mr. Saldaño appeared much younger than her and communicated very little. She noted he “smiled a lot but didn’t show complex emotions.” He also reportedly did not communicate very well with his family regarding his activities, and seemed to spend most of his time with his cousin who was apparently severely mentally disabled.

With respect to informant based measures of adaptive functioning, a declaration by psychiatrist Dr. Eduardo Kopelman documents the results of the administration of the Adaptive Behavior System – Third Edition (ABAS-3), along with an interview of Mr. Saldaño’s sister, Ada Saldaño on December 8, 2023. During her interview with Dr. Kopelman, she was noted to have provided information similar to that documented in her declaration. She reported low frustration tolerance for Mr. Saldaño, as well as not incorporating personal care such as bathing or brushing his teeth, not collaborating with household chores, and his school failures. In documenting the results of the ABAS-3, Dr. Kopelman noted it appeared Ms. Saldaño appeared to understand the procedures of the testing and the questions being asked, and responded appropriately to individual items. The responses provided by Ms. Saldaño on the ABAS-3 yielded scores that were in the Extremely Low range in all areas, including Conceptual (SS=61; <1%), Social (SS=62; <1%), Practical(SS=60; 1%), and General Adaptive Composite(SS=58; <1%). Dr. Kopelman then provides the clinical opinion that “the results of the ABAS-3 administration are consistent with the functioning of an intellectually disabled person in the developmental period.”

OPINIONS

The information contained in the declarations of Mr. Saldaño’s family members, childhood classmates, neighbors, and the administration of the ABAS-3 to his sister, is supportive of the presence of deficits in adaptive functioning beginning during the developmental period and contributes to a diagnosis of Intellectual Disability.

Standardized testing of Mr. Saldaño’s intellectual functioning from 1996 to 2023 has yielded Full Scale IQ scores ranging from 73 to 76. When considering standard error of measurement and potential Flynn effects, these scores satisfy criteria for the first prong for a diagnosis of Intellectual Disability.

The deficits in Mr. Saldaño’s conceptual skills, social skills, and practical skills documented in the reviewed declarations are consistent with impairment in adaptive functioning and behavior that satisfies criteria for the second prong for a diagnosis of Intellectual Disability.

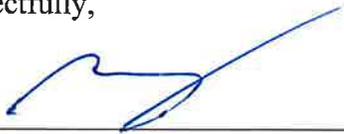
The adaptive deficits described in these declarations are noted to have been present since an early age and throughout Mr. Saldaño’s childhood, satisfying the third prong for a diagnosis of

Intellectual Disability requiring the onset of these deficits during the developmental period.

In summary, within reasonable psychological probability, the information obtained through repeated standardized testing, clinical assessment, and collateral informant declarations meets AAIDD and DSM-5-TR diagnostic criteria for a diagnosis of Intellectual Disability for Mr. Saldaño. This diagnosis can also be referred to as (F70) Intellectual Developmental Disorder, Mild (DSM-5-TR, 2022).

The opinions described in this report represent my conclusions based on information available to me as of May 2, 2024. I reserve the right to review or modify my opinions if other information becomes available. Thank you for allowing me to work with Mr. Saldaño. Please do not hesitate to contact me if I can be of further assistance.

Respectfully,



Gilbert Martinez, PhD, ABPP-CN
Licensed Psychologist: *Texas 30743 Louisiana 1249*
Board Certified Clinical Neuropsychologist

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IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE)	Writ No. 41,313-05
VICTOR SALDAÑO,)	
APPLICANT)	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 motion² – 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 more⁶

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 instruction⁸ (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 Maldonado). 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 United 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.

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 Wirsky, 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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