No. __- _____

OCTOBER TERM 2017

In The
Supreme Court of the United States

JUAN DAVID RODRIGUEZ,

Petitioner

v.

STATE OF FLORIDA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Did Florida's courts disregard the diagnostic framework for intellectual disability established in *Moore v. Texas*, 137 S.Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by reviewing clinical authority as irrelevant to the requisite findings that are necessary for the determination of intellectual disability and later misapplying standards that were purportedly applied?

LIST OF PARTIES

All relevant parties appear on the cover page of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JUAN DAVID RODRIGUEZ, respectfully petitions for a writ of certiorari to review the errors of the Florida Supreme Court.

OPINION BELOW

The Florida Supreme Court's opinion denying relief is published and reported as *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017). (Appendix A). The order denying the motion for rehearing is referenced as *Rodriguez v. State*, Order, Case No. SC15-1795 (Jun. 15, 2017). (Appendix B). The state circuit court order summarily denying relief is referenced as *State v. Rodriguez*, Order, Case No. F88-18180B (Fla. 11th Cir. Aug. 24, 2015). (Appendix C). The state circuit court order that the Florida Supreme Court references in its 2017 opinion, which provides the factual predicate to Mr. Rodriguez's claim herein that his evidentiary hearing and what has followed does not comport with constitutional or clinical standards is referenced as *State v. Rodriguez*, Order, Case No. F88-18180B (Fla. 11th Cir. Dec. 31, 2010). (Appendix D). The Florida Supreme Court's 2013 order, which affirmed the state circuit court order at issue in this proceeding, is referenced as *Rodriguez State*, Order, Case No. SC11-202 (Feb. 6, 2013). (Appendix E).

JURISDICTION

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

CONSTITUTUIONAL AND STATUTORY PROVISIONS

This capital case involves a state defendant's constitutional rights under the Eighth and Fourteenth Amendments. The Eighth Amendment provides in relevant part:

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

The Fourteenth Amendment provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. Nor deny to any persons within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Juan David Rodriguez, who is intellectually disabled and has limited self-control and organic brain impairment, was given a death sentence in Florida. At an *Atkins* hearing to determine whether Mr. Rodriguez is intellectually disabled, the presiding judge stated on the record—multiple times—that medical authority was irrelevant and immaterial when determining intellectual disability. The State encouraged this position even after *Hall v. Florida*, 134 S. Ct. 1986 (2014).

With clinical authority reviewed as irrelevant throughout the hearing, the state circuit court found that Mr. Rodriguez was not intellectually disabled. On appeal, the Florida Supreme Court ("FSC") affirmed that order and did not address the Judge's statements or State's encouragement of that view. *Rodriguez v. State*, Order, Case No. SC11-202 (Feb. 6, 2013).

Mr. Rodriguez claimed, in a subsequent collateral challenge, that Florida's courts erred in its review of his *Atkins* claim in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). The claim was denied by the FSC. *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017). In the FSC's denial of relief, the FSC openly concluded that this Court's decision in *Moore v. Texas*, 137 S. Ct 1039 (2017) does not apply in Florida. *Id.* at 756

n.6. The FSC also discarded instructive language from this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). *Id.* According to the FSC, *Hall* does not inform state courts on how to make findings—credibility or otherwise. *Rodriguez*, 219 So. 3d 751, 756 (Fla. 2017) ("*Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards."). Reviewed through that lens, the state circuit court's rejection of clinical authority and the facts of the record developed at Mr. Rodriguez's *Atkins* evidentiary hearing was objectively unreasonable. It caused Mr. Rodriguez's Eighth Amendment challenge to be denied.

Because the FSC failed to apply this Court's precedent in its review of Mr. Rodriguez's claim, this petition should be granted and the FSC's opinion should be vacated and remanded. Mr. Rodriguez's sentence and execution are barred by the Eighth and Fourteenth Amendments.

A. Procedural History

Mr. Rodriguez was convicted of first degree murder. Given counsel's failure to provide effective assistance of counsel throughout the trial,[1] it was not surprising that, on March 1, 1990, the advisory jury recommended a death sentence by a vote of twelve to zero. (R. 239-40). The sentencing judge made his findings and imposed a sentence of death on March 28, 1990. The convictions and sentences were affirmed on appeal. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), *cert. denied*, 510 U.S. 830

[1]Mr. Rodriguez was heard audibly commenting throughout the trial. (R. 829). He also appeared to be sleeping while the prosecutor argued for the death penalty. (R. 1856-57). Defense counsel explained that he could not control Mr. Rodriguez. It was as if Mr. Rodriguez could not understand the gravity of his circumstances or simply could not adhere to appropriate courtroom demeanor.

(1993). Mr. Rodriguez was not evaluated for intellectual disability before postconviction.[2]

The FSC reversed a state circuit court's summary denial of Mr. Rodriguez's successive motion, which argued that his intellectual disability bars his execution. The FSC ordered an evidentiary hearing to determine intellectual disability.

The testimony at the evidentiary hearing creates the factual predicate that Florida's courts unconstitutionally reviewed Mr. Rodriguez's claim. At the hearing, the presiding judge repeatedly stated that clinical consensus had no bearing on his decision of whether Mr. Rodriguez is intellectually disabled. *See, e.g.*, (PCR3 Vol. 26, at 334-36) ("But the definition [from the AAIDD and the DSM] **they will not be utilized[.]"**), ("**What's the relevance [of the AAIDD and the DSM]?**") (emphasis added). The State argued that clinical authority was irrelevant to a judge's determination and had the effect of improperly bolstering Mr. Rodriguez's expert. (PCR3 Vol. 24, at 48-49). Despite this and over the State's objection, Mr. Rodriguez was allowed to proffer some evidence on the clinical guidelines and standards, but it was not considered relevant.

After the evidentiary hearing, Mr. Rodriguez's *Atkins* claim was denied in state circuit court. The state circuit court order denying relief quotes clinical definitions of intellectual disability. *State v. Rodriguez*, Order, Case No. F88-18180B

[2] In an initial postconviction motion to vacate, Mr. Rodriguez asserted that trial counsel was ineffective for failing to uncover mitigating evidence concerning Mr. Rodriguez's mental health and intellectual disability. Relief was denied, *see Rodriguez v. State*, 919 So. 2d (Fla. 2005), and is now being sought in the U.S. Court of Appeals for the Eleventh Circuit in a 28 U.S.C. § 2254 habeas petition.

at 50-52 (Fla. 11th Cir. Dec. 31, 2010). It also references Mr. Rodriguez's proffered testimony. But, the findings themselves in that order do not address the clinical authority relied upon by Mr. Rodriguez in the findings. *See State v. Rodriguez*, Order, Case No. F88-18180B at 52-53 (Fla. 11th Cir. Dec. 31, 2010).

In fact, the findings are silent as to how the clinical community applies and interprets the definition of intellectual disability. Instead, the order entirely defers to the State's psychologist, Dr. Suarez, as more credible to conclude that Mr. Rodriguez does not establish any prong of intellectual disability. *Id.* at 52-54. The FSC affirmed.[3] *Rodriguez v. State*, Order, Case No. SC11-202 (Fla. February 6, 2013).

On May 27, 2014, this Court's decision in *Hall v. Florida* issued. Pursuant to Fla. R. Crim. P. 3.851, Mr. Rodriguez filed a successive motion to vacate his sentence in the state circuit court, arguing that *Hall* established that the FSC's previous denial in Mr. Rodriguez's case was a misapplication of *Atkins*. The state circuit court summarily denied relief because it reasoned that *Hall v. Florida* only fixed Florida's interpretation of the Standard Error of Measurement ("SEM") from IQ test scores, an opportunity to provide evidence of deficits was extended because Mr. Rodriguez had experts and lay testimony, and the state courts simply found no evidence of his disability, meaning in its view that *Atkins* and *Hall* had been complied with. An appeal was filed in the FSC.[4]

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[3] Currently, the *Atkins* claim is pending in the U.S. Court of Appeals for the Eleventh Circuit in the habeas petition referenced in *supra* note 2.

[4] During the pendency of that appeal, Mr. Rodriguez sought and received supplemental briefing pursuant to the FSC's decision of *Hall v. State*, 21 So. 3d 628 (Fla. 2016) and this Court's decision in *Hurst v. Florida*, 137 S Ct. 616 (Fla. 2016).

After briefing was completed in the FSC, this Court issued *Moore v. Texas*, 137 S. Ct. 1039 (2017) on March 28, 2017. Shortly after *Moore v. Texas*'s issuance, the FSC issued its opinion in this case on April 20, 2017, affirming the state circuit court's denial of relief. Therein, the FSC, *sua sponte*, addressed the issue of whether *Moore v. Texas* applied in Florida and answered that issue in the negative. The FSC stated:

> Unlike the defendant in Moore, Rodriguez's intellectual disability was evaluated under "the generally accepted, uncontroversial intellectual disability diagnostic definition," and this Court follows the same three-part standard. Moore, 137 S. Ct. at 1045

Rodriguez v. State, 219 So. 3d 751, 756 n.6 (Fla. 2017). In his Motion for Rehearing, Mr. Rodriguez argued that *Moore* establishes that no state can disregard clinical consensus when determining whether an inmate is intellectually disabled.[5] Mr. Rodriguez argued that *Hall v. Florida*, *Moore*, and *Atkins* express the same principle—science is relevant when determining intellectual disability.

Although the FSC held *Moore* was inapplicable in Florida, *Moore* was cited favorably for one proposition: "'*Hall* indicated that being informed by the medical

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[5] In relevant part:

> This Court reasoned that the distinction between this case and *Moore v. Texas* is that the textual definition for intellectual disability in *Moore* was controversial whereas Florida's textual definition is not… **Application, and therefore methodology, of textual definitions matter, as evidenced by *Hall v. Florida*…*Moore* is not simply about the *Briseno* factors but rather—just like *Hall* and *Atkins*—[]clinical science matters [when determining intellectual disability].**

Rodriguez v. State, Motion for Rehearing, Case No. SC15-1795 at 4 n.4 (Fla. May 5, 2017) (emphasis added).

community does not demand adherence to everything stated in the latest medical guide.' *Moore v. Texas*, [137 S. Ct. 1039, 1049] (2017)." *Rodriguez v. State*, 219 So. 3d at 756. The FSC omitted the following language: "But neither does our precedent license disregard of current medical standards." Notably, the qualifying language cautioning against disregarding science immediately follows the only language from *Moore* the FSC relied upon favorably. According to the FSC's logic, therefore, *Moore* is inapplicable in Florida except for its general proposition that *Atkins* hearings are not governed by the latest medical guide.

The FSC concluded that *Moore* and *Hall* do not inform how credibility determinations are made by state court judges in *Atkins* hearings. *See Rodriguez*, 219 So. 3d at 756-57. It reasoned that it would amount to "second guess[ing]" the credibility determinations of the state circuit court judge who presided. *Id.* The effect, as Mr. Rodriguez argued, permits state court judges to make credibility findings on the basis that their gut knows better than what medical consensus indicates. *Rodriguez v. State*, Motion for Rehearing, Case No. SC15-1795 at 38-40 (Fla. May 5, 2017). *See also Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017) ("Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.").

In the Motion for Rehearing, Mr. Rodriguez argued that deeming credibility findings immune from this Court's guidance in *Hall* and *Moore* conflicts with this Court's precedent.[6]

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[6] In relevant part:

> [Reasoning that credibility findings are not influenced by medical consensus in an *Atkins* proceeding] was unconstitutional under the

The FSC also concluded that the scientific testimony, and Mr. Rodriguez's understanding of this Court's precedent, was considered and applied by the state circuit court. *See Rodriguez*, 219 So. 3d at 758. Mr. Rodriguez argued that the FSC made an unreasonable determination of fact in light of the record. Specifically, he argued that the presiding judge's statements throughout the hearing, as well as the order's findings, demonstrates that the scientific testimony was never considered relevant and therefore the determination violated the Eighth Amendment.

Throughout the hearing, the presiding judge stated that the leading clinical guidelines, such as the AAIDD or DSM, would not be utilized or considered as relevant to the *Atkins* determination. *See, e.g.*, (PCR3 Vol. 26, at 334-36) ("But the definition [from the AAIDD and the DSM] **they will not be utilized[.]"**), ("**What's the relevance [of the AAIDD and the DSM]?**") (emphasis added); (PCR3 Vol. 26, at 257-58) ("Why would [knowing what the guidelines are and why they exist] be relevant?"). The state circuit court expressed that reliance on clinical authority had the effect of improperly bolstering Mr. Rodriguez's expert. (PCR3 Vol. 24, at 48-49). *See also Rodriguez v. State*, Motion for Rehearing, Case No. SC15-1795 at 10-11, 46-48 (Fla.

> Eighth Amendment, *Atkins*, and its progeny. As stated earlier, because this case is not one involving clinically appropriate methods, but one of **science versus fabrication**… **State courts must both have textual definitions that are in general conformity with clinical understandings of intellectual disability, *Hall*, 134 S.Ct. at 2000… and apply those textual definitions with general conformity to clinical standards because of their informative (or deferential) effect**. *Id.*

Rodriguez v. State, Motion for Rehearing, Case No. SC15-1795 at 38-40 (Fla. May 5, 2017) (emphasis added).

May 5, 2017). *See also, e.g.*, (PCR3 Vol. 26 at 259) ("[B]ecause you said [Dr. Tasse's] going to testify to **the AAIDD recommendations**, [t]hen **we don't need his recommendation** [.] **They aren't material and relevant**.") (emphasis added).

Mr. Rodriguez asserted throughout all of the proceedings that the opinions of the medical community are relevant to a state court's determination and to show that the State's psychologist employed unconventional methods. Though Mr. Rodriguez quoted the presiding judge's remarks to the FSC, the FSC opinion does not address the dismissive remarks.

Mr. Rodriguez also argued that his expert testified in a manner that was consistent with clinical consensus and that the State's psychologist used unconventional methods. The medical authority and testimony to support that proposition are discussed elsewhere in this Petition. Instead of addressing the clinical authority relied upon by Mr. Rodriguez, the FSC characterized the problem before it as an issue of credibility between the experts and did not probe further.

No state court has addressed the clinical authority relied upon by Mr. Rodriguez. No state court has addressed how the State has yet to rely upon a medical article in support of its own methodology. The FSC has not addressed that the State's psychologist used instruments and analyzed intellectual disability prongs in a fashion that resembles the error in *Moore*. Nor has the FSC addressed that the State's psychologist made an analysis that is identical to much of what the medical community actively discourages.

Moore issued just before the FSC's opinion issued in this case. Recently, in Tavares Wright's case, this Court granted a petition for writ of certiorari, vacated the sentence, and remanded the case to the FSC for further review in light of *Moore v. Texas*. *See Wright v. Florida*, 2017 WL 3480760, at *1 (2017) ("[T]he case is remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*[.]") (overturning *Wright v. State*, 213 So. 3d 881 (Fla. 2017)). The overturned decision in *Wright v. State*, 213 So. 3d 881 (Fla. 2017) issued five weeks before the FSC issued the opinion at issue here. Mr. Rodriguez seeks similar relief from this Court, as *Moore* is an intervening event that should have informed the FSC on how it should have evaluated Mr. Rodriguez's claim.

B. Facts Showing Intellectual Disability "Risk Factors"

Juan David Rodriguez was born intellectually disabled. Mr. Rodriguez's expert reviewed family and personal history from childhood into his adulthood, which showed a history consistent with a diagnosis of intellectual disability. For instance, while Mr. Rodriguez's mother was pregnant with him, his mother barely ate due to the poverty she suffered in eastern rural Cuba. Despite the malnourishment, Mr. Rodriguez's mother drank alcohol at parties while pregnant. Mr. Rodriguez's lineage has been characterized by others as "slow" or "not smart."

Mr. Rodriguez learned to walk and talk much later than other children. Simple classroom concepts were challenging for him. By the end of third grade, Mr. Rodriguez could barely write his name and could not accurately count even when he used his fingers. Both in and out of the classroom, Mr. Rodriguez behaved differently

compared to others his age, which caused townspeople of all ages to mock him and call him "idiot" or "crazy."

Though a young Mr. Rodriguez was tutored and explained that changing might stop others from calling him "stupid," "idiot," or "bobo,"[7] nothing changed. His family, frustrated with Mr. Rodriguez's impulsivity and "stupid-ness," whipped him, kicked him in the head from room to room, and smashed his head into walls. His uncle would discipline him for his "stupidity" while yelling "I'm going to kill you! You crazy idiot!"

Notwithstanding this abuse, compared to others his age, Mr. Rodriguez was the most eager to help adults with tasks or errands, but he was the least likely to accomplish tasks correctly. Mr. Rodriguez could not grasp concepts of money or value when purchasing items. He struggled at carrying normal conversations as a child. These traits have continued into his adulthood.[8]

C. Subaverage Intellectual Functioning

Mr. Rodriguez suffers from significantly subaverage intellectual functioning. IQ scores are viewed as a range due to the imprecision that the tests create, the subjective nature of scoring IQ tests, and a tested individual's luck in guessing answers correctly. *Hall*, 134 S. Ct. at 1995-96, 2001. As such, IQ scores must take into consideration the Standard Error of Measurement ("SEM") when determining whether someone is intellectually disabled. *Id.* An IQ score, taking into consideration

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[7] The word "bobo" when used as a pejorative noun best translates from Spanish into the word "simpleton."

[8] For example, as a child, Mr. Rodriguez traded a horse used for family travel and used for farming to obtain a bicycle. As an adult, he purchased luxury vehicles and sold them for much less than what he purchased them for.

the SEM, is consistent with a diagnosis of intellectual disability if the score is between 65 and 75.

The SEM range is inapplicable here. Both the State's evaluating doctor and Mr. Rodriguez's expert yielded an IQ score below 70. Mr. Rodriguez's IQ was tested in 1995, 2003, and 2008 in addition to the testing by Dr. Weinstein. The respective IQ scores from those tests showed ranges of 55-69, 53-64, 54-63, and 52-68. In proffered testimony, Dr. Tasse explained that when multiple IQ scores fall into a narrow range that is consistent with a diagnosis of intellectual disability, as they do here, the narrowness of the IQ scores corroborate the scores' validity.[9]

For years, in proceedings unrelated to an *Atkins* determination, Mr. Rodriguez's very low IQ was conceded by the State and acknowledged by judges in state courts. *See, e.g.*, *Rodriguez v. State*, 919 So. 2d 1252, 1266 (Fla. 2005) ("Rodriguez's conduct also **supports the State's contention that although Rodriguez has a low IQ**, he is not mentally retarded.") (emphasis added).

Because Mr. Rodriguez is a Cuban national and predominately speaks Spanish, an IQ test has to be administered in Spanish to accommodate this language predominance. This is consistent with clinical standards.[10] Both doctors conceded

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[9] (PCR3 Vol. 26, at 277) (showing that Dr. Tasse, a leading national expert who is professionally associated with the AAIDD, testified to the clinical reality that the existence of multiple, consistent IQ scores operates as evidence that the IQ scores are valid, especially when they fall within a narrow range). *See also* (PCR3 Vol. 24, at 65-66) (showing Dr. Weinstein relied on this principle)

[10] *See, e.g.*, Ruth, Richard, American Association on Intellectual and Developmental Disabilities, *Intellectual Disability and the Death Penalty: Consideration of Cultural and Linguistic Factors* 238 (2015) (discussing "imperfect

that no IQ test would be a perfect fit for Mr. Rodriguez because there is no Spanish language IQ test with the linguistic traits typically found in Spanish-speaking Cubans. Both doctors, therefore, had to accommodate this cultural aspect as well, consistent with clinical standards.[11]

Dr. Weinstein, Mr. Rodriguez's evaluating expert, administered an evaluation pursuant to his understanding of the AAIDD guidelines and given the challenges of accommodating an incarcerated Cuban national.[12] Mr. Rodriguez's expert, Dr. Weinstein, selected Mexico's translation of the American WAIS-III, which is the most researched and widely used IQ test in the United States for persons whose native language is Spanish.[13] The State's psychologist,[14] Dr. Suarez, used Spain's version of the WAIS-III, which is not as widely used or as researched in this country.

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fits" due to cultural and linguistic accommodations). *See also* American Psychological Association, Standard 9.02 Use of Assessments, Ethical Principles of Psychologists and Code of Conduct (2010).

[11] Ruth, Richard, *Consideration of Cultural and Linguistic Factors*, *supra* note 10, at 238.

[12] Mr. Rodriguez alerted the state courts of the substantial difficulties and obstacles that result when clinicians attempt to diagnose persons, like Mr. Rodriguez, who require language and cultural accommodations. (PCR3 Vol. 26 at 297).

[13] Greenspan, S. & Olley, J. Gregory, American Association on Intellectual and Developmental Disabilities, *The Death Penalty and Intellectual disability: Variability of IQ Test Scores*, at 145-46 (2015) (explaining that the Mexican WAIS-III is "essentially identical to the U.S. Version except that the instructions and items are translated into Spanish"). The U.S. WAIS-III is the most researched and used IQ test in America.

[14] Mr. Rodriguez litigated the issue of whether Dr. Suarez was qualified to be an expert to diagnose intellectual disabilities.

Although Dr. Suarez and Dr. Weinstein yielded IQ scores below 70, Dr. Suarez, believed the IQ score he yielded was invalid. Dr. Suarez suspected Mr. Rodriguez of faking his low IQ. As discussed *infra*, Dr. Suarez had this suspicion because of the results of tests he claimed can detect malingering in subjects that may be intellectually disabled.

Unanimous clinical authority demonstrates the tests Dr. Suarez selected—namely the Validity Indicator Profile ("VIP") test, Minnesota Multiphasic Personality Inventory Test ("MMPI"), and the Dot Counting Test—lack scientific validity and reliability when attempting to identify malingering in subjects that may be intellectually disabled. Indeed, the VIP,[15] the MMPI,[16] and the Dot Counting Test[17] are scientifically invalid, scientifically unreliable, and actively discouraged against in

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[15] The test manual for the VIP also states that it should not be used on people who might be intellectually disabled. Mr. Rodriguez, through his evaluating expert, alerted Florida's courts of this. (PCR3 Vol. 24, at 118-20).

[16] The administration of the MMPI on intellectually disabled persons is exceptionally unsuitable because it requires a certain level of reading comprehension not commonly found in intellectually disabled persons. Thus, without evaluating reading comprehension, doctors cannot ethically administer the MMPI. Mr. Rodriguez's reading levels are too low to test, meaning the MMPI is unsuitable. Also, clinical authority has held that the MMPI's **500 yes/no questions** causes intellectually disabled persons to become so frustrated or resigned that they answer all of the questions without reading or understanding them. *See, e.g.*, Keyes, D. & Freedman, D., American Association on Intellectual and Developmental Disabilities, *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 272 (2015).

[17] In addition, Dr. Weinstein's testimony, as corroborated by a chronometer in a video of Dr. Suarez's evaluation, demonstrates that Dr. Suarez inaccurately timed the test. This had an outcome-determinative effect on Dr. Suarez's conclusion. (PCR3 Vol. 24, at 81-83).

clinical settings as "highly suspect" when administered for the purposes of detecting whether an individual is faking an intellectual disability.[18] Those tests also have a tendency of falsely identifying intellectually disabled people as faking their disability.

Dr. Suarez also took issue with Mr. Rodriguez's expert administering Mexico's translation of the WAIS-III while using American norming data. Norming refers to how a test is scored. The testmakers and publishers of the Mexican-translated WAIS-III authorize use of U.S. norming data as one of two scoring options.[19] Dr. Suarez did not defer to those testmakers and publishers, as he believed the Mexican norming option was the only one that could be applied validly. But medical consensus holds that the Mexican norming data should never be used for any clinical or diagnostic purpose.[20] The test publishers of the Mexican translation of the WAIS-III sent notices

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[18] "[With regard to] the **Dot Counting Test, the VIP, and the MMPI**… [r]eviews of these tests [in intellectually disabled persons] have indicated **their reliability and validity are highly suspect.** Keyes, *Retrospective Diagnosis and Malingering*, *supra* note 16 at 271 (internal citations omitted) (emphasis added). Further, use of these tests tend to falsely identify intellectually disabled people as malingerers and those without the disability as non-malingerers. *See id.*

[19] *See, e.g.*, Suen, H.K. & Greenspan, Stephen, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used with the Mexican WAIS-III in Capital Cases* (2008) [hereinafter *Linguistic Sensitivity*] ("The technical manual [of **the Mexican translated WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms."**) (emphasis added). *See also* Greenspan, S. & Olley, J. Gregory, American Assocaition on Intellectual and Developmental Disability, *The Death Penalty and Intellectual disability: Variability of IQ Test Scores*, at 145-46 (2015).

[20] *E.g.*, Suen, H.K. & Greenspan, Stephen, *Serious Problems with the Mexican norms for the WAIS-III when Assessing Mental Retardation in Capital Cases* 20 (2009) ("[T]he use of the Mexican norms has been justified in [*Atkins* cases] in knee-jerk form by Spanish-speaking psychologists on the grounds of cultural sensitivity.

to advise practitioners to exclusively use the test's U.S. norming option over its Mexico norming option.[21] Dr. Suarez, therefore, complained about a clinically backed methodology and suggested that a scientifically invalidated one should have been used in its place.

The state circuit court's order, pursuant to the state's argument, found Dr. Weinstein's evaluation clinically "meaningless" and found Dr. Suarez's evaluation more credible. But, the State and Florida's courts never provided a clinical citation to counter the clinical authority relied upon by Dr. Weinstein. This is telling. *See Hall*, 134 S. Ct. at 2000 ("**Neither Florida nor its amici point to a single medical professional who supports this cutoff**") (emphasis added); *Moore*, 535 U.S. at 1050 n.8 ("But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain [in order to outweigh or negate adaptive deficits], **neither Texas nor the dissent identifies any clinical authority permitting [that]**") (emphasis added).

D. Deficits in Adaptive Functioning

Mr. Rodriguez has deficits in his adaptive functioning, and those deficits are significant and below average. In Florida, a defendant must show significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community

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This argument is perverse, however, if the norms that are used [those being the Mexican norms] are worthless.)

[21] Suen, H.K. & Greenspan Linguistic Sensitivity, *supra* note 19 at 2.

resources, self-direction, functional academic skills, work, leisure, health, and safety. *Oats v. State*, 181 So. 3d 457, 464 (Fla. 2015).

To conclude that deficits in adaptive functioning exist, Dr. Weinstein, Mr. Rodriguez's expert, found deficits in functional academic skills, social/interpersonal skills, and in communication skills. Dr. Weinstein interviewed individuals who knew Mr. Rodriguez as a child and as an adult, reviewed prison records and the records of other professionals that have evaluated Mr. Rodriguez's mental health and intellectual functioning, and made his own personal observations.

Dr. Weinstein relied upon Mr. Rodriguez's poor reading comprehension, Mr. Rodriguez's poor arithmetic skills, and inability to regularly make proper sentences as evidence of Mr. Rodriguez's deficit in functional academic skills. (PCR3 Vol. 24, at 79-80) (relying upon Mr. Rodriguez's inability to recite the alphabet, to multiply and divide, and to construct proper sentences regularly to conclude that Mr. Rodriguez had deficits in functional academic skills). The childhood evidence related to Mr. Rodriguez barely being able write his own name or count on his fingers while in the second grade. Even as an adult, Mr. Rodriguez's reading comprehension is so poor that Dr. Weinstein was unable to administer any test to measure Mr. Rodriguez's actual reading level, which was made all the more impossible by time constraints and

Mr. Rodriguez's lack of patience with reading.[22] (PCR3 Vol. 24, at 79).[23] Mr. Rodriguez was described as being unable to order off of a menu, according to lay testimony. His inability to read well or do basic arithmetic caused the Merchant Marines to task him with duties that were characterized as "fetching" tools. (PCR3 Vol. 24, at 75-76). Dr. Weinstein considered this, as well as Mr. Rodriguez's background in jobs like roofing and painting as evidence that Mr. Rodriguez could not handle "sophisticated task[s]" for work. (PCR3 Vol. 24, at 75-76).

The poor arithmetic, which also established significant deficits in academic functioning, was supported by Mr. Rodriguez's attempts at earning money by selling objects for much less than what they were worth as a child and as an adult. Lay testimony consistently described Mr. Rodriguez as selling items at a loss.

With regard to social/interpersonal skills, Dr. Weinstein relied upon Mr. Rodriguez's sexual inappropriateness, poor communication, and poor judgement skills to conclude that a deficit in Mr. Rodriguez's social/interpersonal skills existed. Dr. Weinstein referenced Mr. Rodriguez's childhood challenges of not understanding instructions or errands as evidence of social limitations. (PCR3 Vol. 24, at 75-76). Poor communication skills also impact the jobs Mr. Rodriguez was able to perform.

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[22] *See e.g.*, Keyes, Retrospective Diagnosis and Malingering, *supra* note 16 at 272 (discussing that effort and attention are often confused with malingering by inexperienced clinicians and that intellectually disabled persons are "susceptible" to "frustration" when they are tested with test that have lots of reading or are conceptually challenging for them)

[23] In 1999, another expert testified that Mr. Rodriguez had academic functioning deficits. (T. Vol. 10, April 5, 1999 hearing, at 143).

Lay testimony, relied upon by Dr. Weinstein, also characterized Mr. Rodriguez's manner of speaking as difficult to follow. (PCR2 Vol. 22, at 4038).

Prison records themselves show that Mr. Rodriguez has a history of gratuitously exposing his genitals to prison staff. According to Dr. Weinstein, these disciplinary reports regarding Mr. Rodriguez's tendency to expose his body in inappropriate contexts reveals Mr. Rodriguez's inability to conform his behavior even within a structured prison setting. (PCR3 Vol. 24, at 79-80). Dr. Weinstein's evaluation looked at all times of Mr. Rodriguez's life (i.e. Mr. Rodriguez's childhood, Mr. Rodriguez's adulthood functioning outside of prison, and Mr. Rodriguez's functioning while in prison) to make this assessment that deficits exist and are significant.

In contrast, Dr. Suarez focused his evaluation on what he perceived as Mr. Rodriguez's adaptive strengths, not his deficits. Clinicians focus on deficits, however. *See Moore*, 137 S. Ct. at 1050 ("But the medical community focuses the adaptive-functioning inquiry on adaptive **deficits**.") (emphasis in original). As an example of relying on perceived strengths, Dr. Suarez testified that because Mr. Rodriguez financed a luxury vehicle, Mr. Rodriguez has an abundance of "awareness of financing, awareness of taking on a responsibility, actually following through and doing it." (PCR3 Vol. 29 at 770). This sort of testimony contravenes the principle that intellectually disabled persons have strengths that coexist with their deficits. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill

areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.' "). This was not an isolated example of Dr. Suarez emphasizing perceived strengths. Dr. Suarez relied upon Mr. Rodriguez's self-reported account, which is clinically problematic in its own right,[24] that he was a taxi driver for the conclusion that Mr. Rodriguez has communication skills. (PCR3 Vol. 29, at 713). Dr. Suarez's evaluation did not acknowledge the existence of any deficits.[25] In Dr. Suarez's view, because Mr. Rodriguez was able to speak some English and learned some job skills, there was "no evidence" that Defendant required the supports indicative of having adaptive deficits. This is not consistent with clinical or constitutional standards. *See Moore*, 137 S. Ct. at 1050 n.8.

When Dr. Suarez was not relying upon his perceived adaptive strengths from the self-reported account of a potentially intellectually disabled subject, he relied upon prison staff's perceived strengths of Mr. Rodriguez. Dr. Suarez relied upon the observations of prison staff by administering the ABAS questionnaire to prison staff. However, using prison staff or prison guards for an ABAS is not a clinically sound

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[24] (PCR3 Vol. 26, at 307). It is axiomatic that reliance on self-reported accounts of a potentially intellectually disabled subject for factual evidence is not a reliable methodology in clinical or legal practice. *See. e.g.*, *Hall v. Florida*, 134 S.Ct. at 1993 (Intellectually disabled persons "are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel.").

[25] *Rodriguez v. State*, Order, Case No. F88-18180B (Fla. 11th Cir. Dec. 31, 2010) ("Defendant was able to communicate in writing fairly well even though he tended to write phonetically."), ("Defendant had completed an adult education program."), ("Defendant was able to follow directions."), ("Defendant played pool and baseball in his leisure time."), (Defendant had been able to provide his family with housing, purchased a home for them, and purchased several luxury cars for their use.").

methodology, according to Dr. Oakland who designed the ABAS and testified at Mr. Rodriguez's *Atkins* hearing as part of a proffer over the State's objection.[26] According to clinical standards, if ever a respondent guesses too many times, that specific ABAS questionnaire is clinically invalid and unreliable. (PCR3 Vol. 27, at 390-94); (PCR3 Vol. 26, at 277-278, 280-81). Those that were given the ABAS questionnaire were revealed to have guessed beyond the clinically tolerable amount, meaning Dr. Suarez's ABAS administration had an additional layer of scientific unreliability. (PCR3 Vol. 27, at 407). Dr. Oakland reviewed the forms and depositions of the prison personnel in this case and concluded that prison personnel lacked sufficient information to produce any scientifically reliable results.[27] *Id.*

It is well-established that prison guards cannot be used to identify whether an individual has adaptive deficits. *Moore*, 137 S. Ct. at 1050 (relying on AAIDD-11 User's Guide that counsels against "reliance on behavior in jail or prison" and the DSM-5). This is because tests, like the ABAS, require questionnaire respondents to identify behaviors that are impossible to observe in a prison. *See, e.g.*, Everington,

[26] Dr. Oakland explained that the ABAS cannot be used on prison populations because highly structured environments, like a prison, do not qualify as a community for the purposes of detecting deficits in adaptive functioning.

[27] ABAS questionnaire respondents "should have frequent and ongoing contact with the person being rated" and the person being rated should be "in a natural environment" with the person doing the rating having been able to "observe that person during an extended period of time, to display the presence or absence of skills." (PCR3 Vol. 26, at 358-60). Mr. Rodriguez does not have any qualifying persons, however.

Caroline, AAIDD, *The Death Penalty and Intellectual disability: Challenges in the Assessment of Adaptive Behavior*, at 206.

Although Dr. Suarez's office and practice is located in Miami, Florida, he never interviewed anyone that knew Mr. Rodriguez before his incarceration during his time in Miami. To the extent that Dr. Suarez's evaluation relied upon interviewing persons, it entirely relied upon prison guard observations and self-reported accounts of a potentially intellectually disabled person—a clinically problematic methodology.

The State Circuit Court's order stated "there is absolutely no evidence that [Rodriguez] exhibits deficits in his adaptive behavior." The State Circuit Court's analysis on whether Mr. Rodriguez had deficits in adaptive functioning cited to one example in Mr. Rodriguez's life and reinterpreted evidence of a deficit as evidence that Mr. Rodriguez is no different than "millions of men."[28] Mr. Rodriguez argued that the analysis discarded the wealth of other evidence in the record and that this amounted to a strength-focused assessment of his adaptive deficits.

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[28] That analysis is as follows:

> Dr. Weinstein testified that [Rodriguez] leaving the Merchant Marines because he fell in love is an example of poor judgment. Millions of men who are not mentally retarded have left the military for a job, a family and even the love, or perceived love, of a woman. **The fact that he may have acted on impulse and not reasoning does not render him mentally retarded.**

Rodriguez v. State, Order, Case No. F88-18180B at 53 (Fla. 11th Cir. Dec. 31, 2010). The state circuit court omitted that abandoning the Merchant Marines while he was in Spain rendered Mr. Rodriguez as a Cuban defector. The state circuit court failed to note that "millions of men" do not defect from an oppressive government, get away with it, and turn themselves in.

The FSC's opinion deferred to perceived adaptive strengths to conclude that Mr. Rodriguez's adaptive functioning was properly analyzed by the state circuit court. *Rodriguez*, 219 So. 3d at 758 ("Rodriguez's friends familiar with him before age 18 testified that he **had** good hygiene, **could** care for himself, and **could** drive.") (emphasis added).

This sort of analysis was in conformity with the FSC's pattern of reviewing adaptive functioning when *Atkins* claims were presented before them. *See, e.g.*, *Jones v. State*, 966 So. 2d 319, 328 (Fla. 2007) (relying on Jones' ability to write requests to see doctors, exercise daily, and having a girlfriend as evidence that Jones is not intellectually disabled); *Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008) (relying on Phillips having purchased a car and typewriter, taking children to get ice cream, and driving as evidence that Phillips is not intellectually disabled); *Williams v. State*, 2017 WL 2806711 (Jun. 29 2017) (relying on Williams' ability to conceal his involvement in the murders, that Williams worked as a cook and sandwich maker, and driving as evidence that Williams is not intellectually disabled); *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (relying on the perceived complexity of the crime committed by Wright, using the phone, reading the bible, and sending birthday and holiday cards as evidence that Wright is not intellectually disabled), *overturned by*, *Wright v. Florida*, 2017 WL 3480760, at *1 (2017) ("[T]he case is remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*[.]").

Aside from its typical reliance on perceived strengths, the FSC's opinion primarily defers to the state circuit court's findings on the basis that *Atkins*, *Hall*,

and *Moore* do not inform how state courts make credibility findings in *Atkins* hearings. *Rodriguez*, 219 So. 3d 751, 756 (Fla. 2017) ("*Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards.").

E. The *Atkins* Hearing: The state circuit court's Remarks of Disregard for Clinical Authority and the State's Open Encouragement of Discarding Clinical Authority

Throughout the *Atkins* hearing to determine whether Mr. Rodriguez is intellectually disabled, the presiding judge stated that the leading clinical guidelines, such as the AAIDD or DSM, would not be utilized or considered as relevant to Mr. Rodriguez's *Atkins* determination. (PCR3 Vol. 26, at 259) That disregard for science was not an isolated event.[29] The judge expressed cynicism of clinical authority whenever Mr. Rodriguez's attorneys sought to establish that the DSM and the AAIDD are the leading authorities in defining and establishing the methodology of diagnosing intellectual disability. Its disregard was also shown whenever Mr. Rodriguez's attorneys sought to show the evaluation administered by and opinions of Dr. Suarez, the State's psychologist, were unusual under recognized scientific standards.

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[29] *See also* (PCR3 Vol. 26, at 334-36) ("But the definition [from the AAIDD and the DSM] **they will not be utilized[.]"**), ("**What's the relevance [of the AAIDD and the DSM]?**") (emphasis added); (PCR3 Vol. 26, at 257-58) ("Why would [knowing what the guidelines are and why they exist] be relevant?"); (PCR3 Vol. 30, at 836) (refusing to take judicial notice of scientific articles). The state circuit court expressed that reliance on clinical authority had the effect of improperly bolstering Mr. Rodriguez's expert. (PCR3 Vol. 24, at 48-49).

The State regularly made objections on the basis that clinical standards were irrelevant to an *Atkins* determination in Florida. *E.g.* (PCR3 Vol. 26, at 334-36). The State encouraged Florida's courts to disregard science multiple times and in a variety of ways.[30]

In the appeal below, the State acknowledged that it understood Mr. Rodriguez's argument that clinical consensus, such as that of the AAIDD, is relevant and informative in light of *Hall v. Florida*. Answer Brief, *Rodriguez v. State*, Case No. SC15-1795, at 54 (Fla. Mar. 10, 2016). Notwithstanding its acknowledgement, the State argued that Mr. Rodriguez was not allowed to assert that Florida's courts applied a textual definition so inconsistently with medical consensus that it violated *Atkins*/*Hall*. *See* Answer Brief, *Rodriguez v. State*, Case No. SC15-1795, at 65 (Fla. Mar. 10, 2016). *But see Hall v. Florida*, 134 S. Ct. at 1994-95 (explaining that the Florida's statute "could be interpreted consistently with *Atkins*" if reviewed "on its face" but that Florida's application of this statute violated the Eighth Amendment).[31]

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[30] *E.g.*, (PCR3 Vol. 24, at 169) ("Once again, Judge Prescott will be the judge of [what the definition of intellectual disability is]" after Dr. Weinstein testified that the clinical community evaluates adaptive functioning by focusing on adaptive deficits, not strengths); (PCR3 Vol. 24, at 48-49) (objecting that **reliance on clinical authority is improper bolstering**) (emphasis added). The State and its evaluating psychologist, as referenced elsewhere, relied upon perceived adaptive strengths in an effort to negate the existing deficits, notwithstanding that clinicians and this Court looks at adaptive deficits. *See, e.g.*, (PCR3 Vol. 29, at 713, 770) (relying upon Mr. Rodriguez's self-reported account that he drove a taxi and evidence that he bought a car).

[31] In the last week, the State is still arguing that Florida's courts cannot look at clinical authority when determining intellectual disability even after *Hall* and *Moore*. *State v. Franqui*, State's Motion for Clarification, Case Nos. CF92-002141-B & CF92-006089-B (Fla. 11th Cir. Nov. 2, 2017) ("[T]he State respectfully requests that, as no "learned treatises" were admitted into evidence, this Court should only

The FSC concluded that this Court's precedent does not inform how findings, such as credibility determinations, are made for the purposes of identifying intellectually disabled persons under *Atkins*. *See Rodriguez v. State*, 219 So. 3d 751, 756-58 (Fla. 2017) (stating that "*Hall* does not change the standards for credibility determinations" and reasoning that credibility findings are not improper "when they conflict with medical standards."). The FSC also reasoned that even if Mr. Rodriguez's interpretation of this Court's precedent was correct, there was no error because clinical standards were adhered to. *Id.* at 758. In his Motion for Rehearing, Mr. Rodriguez argued that the FSC misapplied the clinical standards it claimed were applied to Rodriguez's case because the FSC exclusively focused on adaptive strengths as opposed to focusing on adaptive deficits. *See id.* at 758 (relying on testimony that Mr. Rodriguez had "good hygiene" and "could drive" while never mentioning the deficits relied upon by Mr. Rodriguez). Finally, the FSC reasoned that it did not have to adhere to this Court's precedent because, in its view, *Moore* does not apply to Florida. *Id.* at 756 n.6.

look to the expert witness and substantive evidence provided to make a determination on the three prongs of intellectual disability…").

REASONS FOR GRANTING THE WRIT

Did Florida's courts disregard the diagnostic framework for intellectual disability established in *Moore v. Texas*, 137 S.Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by reviewing clinical authority as irrelevant to the requisite findings that are necessary for the determination of intellectual disability and later misapplying standards that were purportedly applied?

This Court should grant this petition and vacate the FSC's decision in order to protect Mr. Rodriguez from an illegal execution. The Eighth Amendment bars the execution of intellectually disabled persons. *Atkins*, 536 U.S. at 320. This Court acknowledged that intellectually disabled persons have a diminished culpability due to their difficulties in understanding information, inability to learn from experience relative to others, ineptitude in logical reasoning, and impossibility of controlling impulses. *Id.* at 318-20. For this reason, executing intellectually disabled persons does not serve any "legitimate penological purpose" upon which the death penalty is predicated. *Hall v. Florida*, 136 S. Ct. at 1992-93. Because intellectually disabled persons face "a special risk of wrongful execution," the bar on their execution serves to insure the integrity of the trial process, as intellectually disabled persons are less able to give meaningful assistance to counsel and make poor witnesses. *Id.* at 1988 (relying upon *Atkins*, 536 U.S. at 320-21).[32]

[32] It follows then that behavior that is consistent with an intellectual disability diagnosis would not endear a defendant to a jury that is not advised that the defendant is intellectually disabled.

Florida has a statute that protects intellectually disabled persons from execution. *See* Fla. Stat. § 921.137(1) (2013). On its face, Florida's statutory definition is consistent with clinical standards. *See Hall v. Florida*, 136 S. Ct. at 1994. However, textual conformity was not enough for this Court in *Hall v. Florida*. There, this Court demonstrated that the application of an intellectual disability statute must also be informed by clinical consensus in order to comport with the Eighth Amendment. Because Florida's courts created great risks and unconquerable standards for persons that are intellectually disabled, this Court held that Florida's courts denied a "fair opportunity to show that the Constitution prohibits [an intellectually disabled person's] execution." *See Hall v. Florida*, 136 S. Ct. at 2001. The FSC has not provided Mr. Rodriguez with a "fair opportunity."

In *Hall v. Florida*, this Court corrected Florida's disregard for the standard error of measurement ("SEM"), which medical professionals consider when assessing a defendant's intellectual functioning due to the imprecise nature of IQ exams. *Hall v. Florida*'s holding could not have been reached unless this Court reasoned that clinical consensus—at the very least—matters and is relevant when evaluating individuals for intellectual disability.

Likewise in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), this Court could not have reached its conclusion that Brumfield's IQ of 75 was entirely consistent with intellectual disability unless medical consensus was viewed as relevant to a court's review of the findings.

Following that same precept that science is relevant to the findings, *Moore v. Texas* issued. There, this Court crafted a standard for assessing adaptive functioning that was entirely consistent with medical consensus. The first component of that standard explains that intellectual disability claims cannot overemphasize behavior that is perceived as an adaptive strength, as "the medical community focuses the adaptive-functioning inquiry on **deficits**." *Moore*, 137 S. Ct. at 1050 (emphasis in original). Adaptive deficits are not negated by the existence of any adaptive strengths. *Id.* n.8. *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.' ") (quoting the AAIDD, formerly known as the AAMR, intellectual disability definition). By limiting the emphasis on adaptive strengths, it also safeguards against the tendency to reinterpret deficits as "normal" behavior. *Moore*, 137 S. Ct. at 1051-52. To do so, as this Court indicated, would counteract the medical community's efforts to dispel stereotypes about intellectually disabled persons. *See id.* Second, deficits in one of three domains is sufficient for a finding of intellectual disability.[33] *Id.* at 1059. Third, where there is a history of childhood trauma or what appears to be a learning disability, such history should be flagged as a risk factor and not as an alternative explanation for the client's behavior

[33] Florida has cited two standards for the adaptive functioning inquiry. *See, e.g.*, *Jones v. State*, 966 So. 2d 319, 326-27 (Fla. 2007) (applying the American Psychiatric Association's definition); *Williams v. State*, 2017 WL 2806711 (Jun. 29 2017) (applying the AAIDD definition).

or deficits. *Id.* at 1051. Again, this instruction could not have been reached unless this Court considered clinical authority constitutionally relevant and material to a Court's review and to the determination of whether an individual is intellectually disabled. *See id.* at 1053. Florida's courts have failed to understand that, as demonstrated by this case.

A. The FSC Erred by Relying on an Expert that Advanced Unconventional and Clinically Unbacked Methods for Evaluating Intellectual Functioning and Discarding Relevant Clinical Authority Establishing that Prong One was Satisfied.

The state courts found Mr. Rodriguez's clinical authority immaterial to the requisite findings. Specifically, it ignored clinical authority in concluding that Dr. Weinstein's evaluation, Mr. Rodriguez's expert, was meaningless and that Dr. Suarez's scientifically unbacked theory of malingering was more credible. Had clinical authority been actually reviewed as relevant information, Mr. Rodriguez might have had a "fair opportunity" to prove his intellectual disability.

This Court has explained that "this Court, **state courts**, and state legislatures **consult and are informed by the work of medical experts** in determining intellectual disability." *Hall v. Florida*, 136 S. Ct. at 1994 (emphasis added). Because "professional[s] use their learning and skills to study and consider the consequences of classification schemes[,]" it is unsurprising that "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Id.* Thus, this Court held that "**[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.**" *Id.* (emphasis added). In addition, when consulting medical consensus, state courts should consider

current medical standards as relevant over standards that are outdated or no longer applied by clinicians. *See Moore*, 137 S. Ct. at 1053. It follows then that, for the purposes of identifying the intellectually disabled, the absence of clinical standards is tantamount to or worse than using outdated standards. *See id.*

Therefore, the FSC acted contrary to *Hall*, *Moore*, and to the precept that science is relevant by deeming Mr. Rodriguez's clinical authority immaterial to the credibility findings. *See id.* According to the FSC's logic, it was enough that Mr. Rodriguez's clinical authority was superficially heard but not considered relevant.[34] *Rodriguez*, 219 So. 3d at 757 ("*Hall* does not change the standards for credibility determinations..."). Perhaps worse than being found not intellectually disabled under antiquated medical standards, as in *Moore*,[35] Mr. Rodriguez was found not intellectually disabled by ignoring science altogether. This disregard is shown in the hearing transcript, and the State requested this disregard. Because of the state court's cynicism of clinical authority, Mr. Rodriguez was afforded a hollow hearing in violation of the Eighth Amendment. *See Hall*, 134 S. Ct. at 2001 ("Persons facing the most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). The FSC's indifference to this sort of hearing and its uninformed review deepened the constitutional violation. *See Moore*, 137 S. Ct. at 1053 (explaining that state courts failing to adequately inform themselves of "the

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[34] Members of this Court expressed that the FSC has failed to adequately address claims that came before them. *See Truehill v. Florida*, Case No. 16-9488 Slip. Op. at 2 (2017) (dissenting, J., Sotomayor joined by J., Breyer and J., Ginsburg).

[35] *See Moore*, 137 S. Ct. at 1044 (discussing Texas's outdated standards).

medical community's diagnostic framework" "infected" the Texas appellate court's analysis).

Had Florida's courts considered Mr. Rodriguez's clinical information relevant, Mr. Rodriguez would have been identified as intellectually disabled. Both experts yielded an IQ score below 70.[36] Although Dr. Suarez theorized that Mr. Rodriguez faked his low IQ, his theory depends on the validity and reliability of the so-called malingering tests he administered. Because clinical authority finds the reliability and validity of the very tests Dr. Suarez administered as "highly suspect," [37] the low IQ score yielded by Dr. Suarez stands on its own beside the consistent IQ score administered by Dr. Weinstein. Further, clinical authority supports the validity of the low IQ scores, as every IQ test administered on Mr. Rodriguez shows that his IQ scores fall within a very narrow range. (PCR3 Vol. 24, at 65-66) (showing Dr. Weinstein expressed this clinical principle); (PCR3 Vol. 26, at 277) (showing that Dr. Tasse, a leading national expert who is professionally associated with the AAIDD, testified to the clinical reality that the existence of multiple, consistent IQ scores operates as evidence that the IQ scores are valid, especially when they fall within a narrow range).

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[36] In relevant part, Dr. Enrique Suarez, the State's psychologist, testified that **"60 was the full scale" IQ** on his administration of the WAIS-III and that Dr. Weinstein's administration scored an **IQ of 58**. (PCR3 Vol. 30, at 837-839, 869) (emphasis added).

[37] *See* Keyes, Retrospective Diagnosis and Malingering, *supra* note 16.

Although Mr. Rodriguez alerted Florida's courts to the fact that the malingering tests are scientifically invalid and unreliable, neither the State nor any state court has supplied clinical authority for Dr. Suarez's theory for identifying which subjects are faking their disability. This is extremely problematic given that Dr. Suarez's test selection is scientifically unusual and actively discouraged by unanimous medical consensus as "highly suspect."

Florida's courts also ignored the history of judges and the State conceding that Mr. Rodriguez's low IQ was "beyond dispute." *See Rodriguez v. State*, 919 So. 2d 1259, 1266 (Fla. 2005) ("**all of the experts who examined Rodriguez concluded he has low intelligence.**") (emphasis added); *id.* (quoting state circuit court's assessment that there is **"no doubt [Rodriguez] has a low IQ"**) (emphasis added). *See also State v. Rodriguez*, Order Summary Denial, Case No. F88-18180B (Fla. 11th Cir. May 1, 2006) ("**it is beyond dispute** that both the trial court and the Florida Supreme Court have determined that based on the evidence, **[Rodriguez] has a low IQ.**") (emphasis added). By overlooking the clinical authority and this history of Mr. Rodriguez's undoubtedly low IQ, Florida's courts unconstitutionally reviewed Mr. Rodriguez's intellectual functioning.

In addition, an abundance of clinical authority corroborates Dr. Weinstein's evaluation and selection of accommodations, contrary to the state circuit court's view that the evaluation was clinically "meaningless." *But see Hall*, 134 S. Ct. at 2000 ("**Neither Florida nor its amici point to a single medical professional who supports this cutoff**") (emphasis added); *Moore*, 535 U.S. at 1050 n.8 ("But even if clinicians

would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain [in order to outweigh or negate adaptive deficits], **neither Texas nor the dissent identifies any clinical authority permitting [that]**") (emphasis added). Because Dr. Weinstein used the most widely researched and used Spanish-language IQ test in America, whereas Dr. Suarez did something else, as explained earlier, the most reliable IQ test was the one administered by Dr. Weinstein. More importantly, because both evaluations yielded IQ scores below 70 even when using different accommodations, Mr. Rodriguez established that he has deficits in his intellectual functioning.

B. The FSC Erred by Relying on an Expert that Advanced Unconventional and Clinically Unbacked Methods for Evaluating Deficits in Adaptive Functioning and Discarding Relevant Clinical Authority Establishing that Prong Two was Satisfied

A number of things went wrong in Florida's attempts to analyze Mr. Rodriguez's adaptive functioning. Similar to their review of Mr. Rodriguez's intellectual functioning, Florida's courts either considered current medical and constitutional standards as immaterial to the requisite findings—credibility or otherwise—or rendered those standards immaterial by applying them inadequately. With regard to the second prong of intellectual disability, Florida's courts made a strength-focused assessment when reviewing Mr. Rodriguez's claim. However, that sort of review contradicts *Moore* and unanimous clinical authority.

Florida's courts also failed to consider the record when it concluded that there is no evidence of any deficits despite Mr. Rodriguez's life-long history exhibiting such deficits. As discussed earlier, Dr. Weinstein found deficits in communication,

social/interpersonal skills, and academic functioning. He relied upon evidence acquired throughout Mr. Rodriguez's life. That alone is enough to satisfy prong two. Notwithstanding this, the state circuit court's order shows that the presiding judge did not grapple with the impact of clinical authority tending to corroborate Dr. Weinstein's evaluation while discrediting the State's methodology, which advanced a strength-focused evaluation.

In fact, the state circuit court's order merely recites what was testified to during the hearing and then entirely defers to the State's evaluation as more credible where the findings are made. Though state courts do not need to adhere to "everything stated in the latest medical guide," this Court's "precedent **does not license disregard of current medical standards.**" *Moore*, 137 S. Ct. at 1049. Thus, any credibility findings or other requisite findings necessary for "the determination [of intellectual disability] must be informed by the medical community's diagnostic framework." *Id.*

As explained earlier, the State's psychologist entirely relied upon perceived adaptive strengths, such as Mr. Rodriguez playing billiards or baseball, as part of his evaluation. *See Rodriguez v. State*, Order, Case No. F88-18180B (Fla. 11th Cir. Dec. 31, 2010). To the extent the state circuit court attempted to conduct an adaptive functioning evaluation in spite of the State's overemphasis on perceived strengths, the state circuit court unconstitutionally and unscientifically re-characterized a

relied-upon deficit as normal behavior that "millions of men" would exhibit.[38] *Rodriguez v. State*, Order, Case No. F88-18180B (Fla. 11th Cir. Dec. 31, 2010). No other analysis was made, meaning the adaptive functioning evaluation exclusively reviewed adaptive strengths, contrary to clinical and constitutional standards. *See Moore*, 137 S. Ct. at 1052.

The FSC also contended that clinical consensus was considered and adhered to. However, that contention contradicts the hearing transcript and the order. Moreover, the FSC's attempts at showing that an adaptive deficit analysis was conducted in conformity with clinical standards reveals the FSC's unfamiliarity with the guidelines crafted by clinicians. Specifically, the FSC opinion relied entirely upon adaptive strengths and made no mention of deficits that exist in the record. *See Rodriguez*, 219 So. 3d at 758 (relying on "good hygiene" and driving as the reason why Mr. Rodriguez is not intellectually disabled). *But see Moore*, 137 S. Ct. at 1050.

The manner by which the FSC analyzed Mr. Rodriguez's adaptive functioning reflects its pattern of over emphasizing perceived adaptive strengths in other *Atkins* case. *See, e.g.*, *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (relying on the perceived complexity of the crime committed by Wright, using the phone, reading the bible, and sending birthday and holiday cards as evidence that Wright is not intellectually disabled), *overturned by*, *Wright v. Florida*, 2017 WL 3480760, at *1 (2017) ("[T]he case is remanded to the Supreme Court of Florida for further consideration in light

[38] One would be hard-pressed to argue that "millions of men" would unknowingly defect from an oppressive regime over pursuing a woman, get away with it, and turn themselves in.

of *Moore v. Texas*[.]"). It also reflects the State's insistence, even after *Moore v. Texas*, that clinical authority is not part of a judge's consideration of whether one expert's evaluation adhered better to clinical standards. *See supra* note 31.

Because this Court and clinicians focus on deficits, the FSC's attempts at portraying Mr. Rodriguez's adaptive deficits analysis as consistent with constitutional and clinical standards exposes how Florida's courts have failed at conducting a constitutionally adequate review.

None of the deficits relied upon by Mr. Rodriguez were discussed or weighed in state court findings. None of the clinical authority relied upon was discussed. No one is discussing that Mr. Rodriguez had and has adaptive deficits. Instead, Florida has been focused on Mr. Rodriguez's adaptive strengths. *But see Moore*, 137 S. Ct. at 1050

C. The FSC Erred by Concluding that There is No Manifestation of Mr. Rodriguez's Intellectual Disability before the Age of 18.

In Florida, onset that the disability existed at the age of 18 is satisfied if there is any manifestation of the disability before adulthood. *Oats v. State*, 181 So. 3d 457, 460 (Fla. 2015). This does not mean a formal diagnosis. *See id.* For the reasons stated above, Florida's courts were unable to review prong three adequately because Florida's courts conducted a strength-focused assessment. In short, Florida's courts unconstitutionally ignored the record evidence of Mr. Rodriguez's childhood, contrary to clinical standards, to find prong three unsatisfied.

D. The FSC Erred by Reasoning that *Moore v. Texas* is Inapplicable in Florida, which Caused the FSC to Review Mr. Rodriguez's Case in an Unconstitutional and Scientifically Unconventional Manner.

Compounding the situation, the FSC could have reviewed Mr. Rodriguez's claim adequately pursuant to *Moore*'s instruction on the importance of clinical authority when identifying intellectual disability. But, the FSC believes that *Moore* does not apply in Florida. The FSC did not correct its opinion after Mr. Rodriguez pointed out that *Moore* dealt with more than the *Briseno* factors. Further, this Court has already indicated that *Moore* applies in Florida when it granted a petition for writ of certiorari on those very grounds. *See Wright v. Florida*, 2017 WL 3480760, at *1 (2017) ("[T]he case is remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*[.]") (overturning *Wright v. State*, 213 So. 3d 881 (Fla. 2017)).

Worse than a review under the outdated 1992 AAMR standards that were applied in Texas,[39] Mr. Rodriguez received something less scientific, as all of his clinical authority was reviewed with cynicism. For instance, the state circuit court sustained an objection that Mr. Rodriguez's reliance on clinical authority amounted to improper bolstering. (PCR3 Vol. 24, at 48-49). As discussed earlier in this Petition, the state circuit court made numerous rulings and remarks on the record that clinical authority had no place in Florida when determining whether Mr. Rodriguez is intellectually disabled.

In *Wright*, the Florida Supreme Court relied upon the testimony of the State's expert without regard to learned treatises or clinical literature. *See Wright v. Florida*, 2017 WL 3480760, at *1 (2017) ("[T]he case is remanded to the Supreme Court of

[39] *See Moore*, 137 S. Ct. at 1044.

Florida for further consideration in light of *Moore v. Texas*[.]") (overturning *Wright v. State*, 213 So. 3d 881 (Fla. 2017)). That is exactly what occurred in this case, as discussed throughout this Petition.

When the FSC tried to portray that the state circuit court's *Atkins* determination was made in conformity with clinical standards, the FSC revealed its own unfamiliarity with those standards and with this Court's instruction in *Moore*. As explained earlier, the FSC relied upon Mr. Rodriguez's "good hygiene" and ability to "drive a car" as evidence that he is not intellectually disabled even though that sort of adaptive functioning inquiry violates *Moore*. *Compare Rodriguez*, 219 So. 3d at 758, *with Moore*, 137 S. Ct. at 1050 n.8 (explaining that the adaptive functioning inquiry focuses on deficits, and pointing out that Texas provided no scientific authority for its theory that perceived strengths, such as Moore's ability to mow a lawn, may be used to negate or outweigh existing deficits). *See also Brumfield*, 135 S. Ct. at 2281 (explaining that people that are identified as intellectually disabled may have strengths that coexist with their deficits).

CONCLUSION

This is not a case where two arguably valid evaluations resulted in divergent diagnoses. Rather, this case presents the issue of whether state courts may deem unified clinical authority irrelevant when making the requisite findings—credibility or otherwise—for intellectual disability. Mr. Rodriguez's evaluation was characterized as "meaningless" and "not credible" because science itself was meaningless at his *Atkins* hearing and because the FSC has declined to review the

findings. Had science truly been viewed as relevant to the findings, Mr. Rodriguez would have been able to show that the State's evaluation defied clinical standards and that his evaluation proves his disability. Because requisite findings—credibility or otherwise—must be informed by clinical consensus, Mr. Rodriguez must be provided that "fair opportunity" to show the constitution prohibits his death sentence. Florida has created "an unacceptable risk that persons with intellectual disability will be executed" with a standard that, either by design or operation, removes the informative role that medical consensus has on the requisite findings for an *Atkins* determination. *See Moore*, 137 S. Ct. at 1051 (relying upon *Hall*, 134 S. Ct. at 1990)). To provide Mr. Rodriguez that "fair opportunity" to prove his disability and that his execution is barred by the Constitution, the Petition should be granted with instructions to remand this case back to the Florida Supreme Court or with an order for further briefing. *See Hall v. Florida*, 136 S. Ct. at 2001.

Respectfully Submitted,

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