DOCKET NO. 17-6796

IN THE SUPREME COURT OF THE UNITED STATES

Juan David Rodriguez,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTION PRESENTED

[Capital Case]

WHETHER FLORIDA'S COURTS DISREGARDED 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), WHERE THE LOWER COURT PROPERLY APPLIED THIS COURT'S PRECEDENT TO THE DISPUTED FACTS AND FOUND THERE WAS NO EVIDENCE PETITIONER HAD SIGNIFICANTLY SUBAVERAGE INTELLECTUAL FUNCTIONING OR DEFICITS IN ADAPTIVE BEHAVIOR?

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The decision of the Florida Supreme Court (Pet. App. A) is reported at *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017). The circuit court's order is unpublished, but is provided at Pet. App. C.

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on April 20, 2017. A motion for rehearing was denied on June 15, 2017. (Pet. App. B). On August 28, 2017, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including November 12, 2017. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that that statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

1. *Factual Background*. Petitioner robbed and murdered Abelardo Saladrigas on May 13, 1988. The next day, Petitioner engaged in a home invasion at the home of Ralph and Zenaida Leiva. He was indicted for the first-degree murder and armed robbery of Mr. Saladrigas, conspiracy to commit a felony, attempted armed robbery of Mr. Leiva, armed burglary of Mr. Leiva's house with assault, aggravated assault of Ms. Leiva, and attempted first-degree murder of Mr. Leiva. The jury found Petitioner guilty as charged on all counts. Following a penalty phase and a unanimous jury death recommendation, the trial judge sentenced Petitioner to death for the murder of Mr. Saladrigas. *Rodriguez v. State*, 609 So. 2d 493, 495-97 (Fla. 1992), *cert. denied*, 510 U.S. 830 (1993).

2. *Proceedings Below*. The Florida Supreme Court affirmed Petitioner's convictions and sentences on direct appeal. *Id.* at 501. In a motion for postconviction relief, Petitioner raised ineffective assistance of counsel claims relating to his alleged intellectual disability. *Rodriguez v. State*, 919 So. 2d 1252, 1260-61 (Fla. 2005). Dr. Haber, who evaluated Petitioner for trial, and Dr. Latterner, who evaluated Petitioner for postconviction, testified at the evidentiary hearing. The testimony of the experts was conflicting, and the postconviction

court found that, although Petitioner has a low IQ, he is not intellectually disabled. *Id.* at 1266. The Florida Supreme Court affirmed. *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005).

Thereafter, Petitioner filed a successive motion for postconviction relief claiming to be intellectually disabled and entitled to relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). The circuit court summarily denied Petitioner's successive postconviction motion; however, the Florida Supreme Court remanded for an evidentiary hearing on Petitioner's intellectual disability claim. *Rodriguez v. State*, 968 So. 2d 557 (Fla. 2007) (table).

3. *The Evidentiary Hearing.* On Petitioner's behalf, Dr. Weinstein testified that Petitioner was intellectually disabled. Dr. Weinstein administered the Mexican version of the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) but employed the norms for the version of the WAIS used in the United States. He did not believe that testing should accommodate for culture. He described the scores he obtained as a verbal IQ of 59-69, a performance IQ of 55-68, and a full-scale IQ of 55-65. Dr. Weinstein also testified that the Woodcock test produced an IQ of 45-51, and the Comprehensive Test of Nonverbal Intelligence (CTONI) produced an IQ of 44. Dr. Weinstein did not test for malingering and took none of Petitioner's criminal activities

into account when analyzing his adaptive functioning. Dr. Weinstein denied knowing Petitioner had admitted malingering or that he had been found to have malingered previously. (Pet. App. D, pgs. 12-17).

Dr. Weinstein found that Petitioner had deficits in adaptive behavior in the areas of functional academics and interpersonal skills. He testified that, although Petitioner could read, he functioned at a sixth-grade level. Dr. Weinstein believed Petitioner's employment history was limited to being a roofer and a painter and claimed to be unaware that Petitioner had run a wrecker service, been a taxi driver, managed a restaurant, and worked as an electrician. Dr. Weinstein stated that he did not recall documents showing Petitioner went to seventh-grade in school. He did admit that Petitioner would have been capable of operating a tow truck and of conducting the financial transactions involved in doing so. (Pet. App. D, pgs. 16-19). Dr. Weinstein knew that Petitioner had purchased a home, several luxury cars, and expensive jewelry, and that Petitioner had traveled internationally while in the Cuban Merchant Marines; however, Dr. Weinstein insisted that an eleven-year-old child could make his own travel arrangements, engage in business dealings, and purchase houses and cars. (Pet. App. D, pg. 20).

The State's expert Dr. Suarez administered the version of

the WAIS that was normed in Spain because, according to Dr. Suarez, Cuba and Spain are culturally similar. He opined that choosing a test normed against a population that was culturally and educationally similar was important because culture and education influence the scores. He stated that one must score an IQ test consistent with the norms for that test to obtain a meaningful score. Dr. Suarez also noted that the publishers of the Mexican WAIS had admitted to over representing educated people in their norming sample such that scores in the low ranges tended to be underestimates. Dr. Suarez obtained a full scale IQ of 60, but an odd range of subset scores made the result questionable. Other tests indicated Petitioner was malingering and overreporting symptoms. Thus, Dr. Suarez concluded that Petitioner did not meet the first prong for intellectual disability. (Pet. App. D, pgs. 36-39).

Dr. Suarez administered a standard test of adaptive functioning to prison personnel in order to get as much information as possible about Petitioner's adaptive functioning. Nevertheless, Dr. Suarez did not base his opinion solely on the information about Petitioner's adaptive functioning in the prison setting. Dr. Suarez noted that Petitioner had demonstrated an ability to form social relationships with friends and girlfriends, and that he had maintained

relationships with people he had known in Cuba. Petitioner had demonstrated the ability to engage in planned criminal behavior, to lead a group of criminals, to arrange and post bond, and to engage in financial transactions. Petitioner had provided his friend, Ms. Dela, with instructions on the paperwork necessary to bring his son for a prison visit, and had directed her on specific items he wanted her to purchase for him. (Pet. App. D, pgs. 39-41).

Petitioner had joined the Cuban Merchant Marines at age thirteen by using a false birth certificate. He assisted the engineer in fixing the engines on the ship, and traveled internationally, including trips to Africa, Mexico, Spain, and Canada. No school records were available; however, Dr. Suarez had seen other records indicating education levels varying between sixth and eleventh grades. Records also indicated that Petitioner had completed an adult education program while in federal prison. Federal prison records further indicated Petitioner had worked as a furniture refinisher, landscaper, unit orderly, and food service worker. (Pet. App. D, pgs. 32-33). Petitioner had been involved in cocaine trafficking, delivering drugs to Georgia, Washington, D.C., Virginia, and Michigan. He made telephone contact with buyers and negotiated deals. (Pet. App. D, pg. 34). Petitioner had told Lisa Wiley, a

psychological specialist with the Florida Department of Corrections, that his attorneys had instructed him to feign intellectual disability. (Pet. App. D, pgs. 7, 44).

Following the evidentiary hearing, the circuit court denied relief. Specifically, the circuit court opined:

> The court finds that the results obtained from Dr. Weinstein on the Mexican WAIS III are not reliable. **Dr. Weinstein conceded that IQ tests must be given to a representative example of the population with whom it is intended to be used**. IQ norming, according to Dr. Suarez, takes into account a person's culture and level of education. He stated that if the person is not a member of the population that was used to formulate the norm, the results are meaningless. **The full scale score of 60 obtained on the WAIS is invalid according to Dr. Suarez, who administered the test, because of the Defendant's malingering. There are no valid results to establish that the Defendant's IQ is less than 70.**
>
> Even if this Court accepts the IQ test results of Dr. Weinstein and it is assumed that the Defendant's IQ is less than 70, **there is absolutely no evidence that Defendant exhibits deficits in his adaptive behavior and that they manifested before the age of 18.** Dr. Weinstein testified that the Defendant 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.
>
> The Defendant has failed to carry his burden of proving the three elements necessary to establish that he is mentally retardation [sic]: significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

(Pet. App. D, pgs. 52-53) (emphasis added). The Florida Supreme Court affirmed, concluding that Petitioner failed to demonstrate adaptive behavior deficits or a reliable IQ score below 70. *Rodriguez v. State*, 110 So. 3d 441 (Fla. 2013) (table).

Petitioner filed a federal habeas petition in the Southern District of Florida, which was denied. *Rodriguez v. Secretary, Fla. Dept. of Corr.*, Case No. 1:13-cv-24567-JAL (S.D. Fla. Jan. 4, 2016). His appeal from the denial of habeas relief is pending before the Eleventh Circuit Court of Appeals, where certificates of appealability were granted as to the following questions:

> Whether the district court erred in the *de novo* determination of Juan David Rodriguez's ineffective assistance of penalty phase counsel claim?
>
> Whether or not the Florida Supreme Court's determination of Juan David Rodriguez's claim that he is mentally retarded pursuant to *Atkins v. Virginia* was an unreasonable determination of the facts as required by the AEDPA?
>
> Whether the Florida Supreme Court's determination that Mr. Rodriguez is not intellectually disabled was contrary to or based on an unreasonable application of clearly established federal law. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Hall v. Florida*, 134 S. Ct. 1986 (2014), *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Kilgore v. Sec'y, Fla. Dept. of Corr.*, 805 F.3d 1301 (11th Cir. 2015).

Case No. 16-11258-P.

4. *The Second Successive Postconviction Motion*. On May 26, 2015, Petitioner filed a second successive motion for

postconviction relief in state court claiming that *Hall v. Florida*, 134 S. Ct. 1986 (2014), entitled him to continue to litigate his intellectual disability claim. The circuit court held a hearing on Petitioner's intellectual disability claim pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (providing that in death penalty cases, a postconviction court must hold a hearing for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion for postconviction relief). At the *Huff* hearing, Petitioner "agreed he had presented evidence regarding all the elements of intellectual disability in prior proceedings." Nevertheless, Petitioner "claimed he was entitled to a new evidentiary hearing under *Hall* because *Hall* made improper the requirement of concurrent adaptive deficits to establish intellectual disability." The circuit court summarily denied Petitioner's second successive postconviction motion, finding that Petitioner's "prior evidentiary hearing on intellectual disability and other proceedings provided him with the full protections afforded by *Atkins* and *Hall*." (Pet. App. A, pgs. 7-8).

5. *The Ruling Below*. The Florida Supreme Court affirmed the denial of Petitioner's second successive postconviction motion. The court rejected Petitioner's claim that the circuit court's

credibility findings as to the experts conflicted with medical standards established by the American Association on Intellectual and Developmental Disabilities (AAIDD), contrary to *Hall*. The court opined:

> The language [Petitioner] cites in *Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards. Instead, the language justifies the expansion of Florida's definition of intellectual disability to encompass more individuals than just those with full-scale IQ scores below 70. *See Hall*, 134 S. Ct. at 1993-94. ***Hall* looks to the medical community "[t]o determine if Florida's cutoff rule is valid," but does not change credibility determinations in intellectual disability proceedings. *Id.* at 1992. The United States Supreme Court has clarified that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, 2017 WL 1136278, slip op. at 10 (March 28, 2017).** [FN6] This Court does not reweigh evidence or second guess a circuit court's credibility determinations. *Nixon v. State*, 2 So. 3d 137, 141 (Fla. 2009) (quoting *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007)).
>
> > [FN6] Unlike the defendant in *Moore*, Rodriguez's intellectual disability was evaluated under "the generally accepted, uncontroversial intellectual-disability diagnostic framework," and this Court follows the same three-part standard. *Moore*, 2017 WL 1136278, slip op. at 6.

(Pet. App. A, pg. 11) (emphasis added).

The court further noted that even if *Hall* increased deference to medical standards, "the circuit court in the prior proceeding weighed the testimony of multiple experts and made

its findings based on competent, substantial evidence" after finding "Dr. Suarez's testimony most credible." (Pet. App. A, pgs. 11-12). The court also rejected Petitioner's claim that the lower court improperly relied on current adaptive functioning in the prison setting contrary to standard medical practices. The court found that although the circuit court considered IQ along with present adaptive functioning, "it also considered evidence from family and friends as [Petitioner] argues the AAIDD and *Hall* require." (Pet. App. A, pgs. 14-15).

The court rejected Petitioner's argument that the circuit court in the prior proceeding failed to evaluate all of the prongs of intellectual disability in tandem and did not evaluate manifestation before age 18. The court noted that the circuit court "considered [Petitioner's] current IQ and adaptive deficits based on the experts' tests and testimony." Further, "[t]he circuit court made findings as to [Petitioner's] IQ, adaptive functioning deficits, and age of onset in its order finding that he is not intellectually disabled[.]" Although the Florida Supreme Court acknowledged that it did not discuss in its opinion affirming the circuit court's order whether evidence showed onset before age 18, the court explained that it "had the full record below at its disposal, including the circuit court's holistic review of all three prongs, in determining that

[Petitioner] had not demonstrated intellectual disability." **"While [Petitioner] is correct that this Court did not mention evidence of onset before age 18 in affirming the circuit court's decision, he cannot demonstrate that this Court did not consider the record, which shows no reliable evidence of early onset presented at his prior evidentiary hearing."** (Pet. App. A, pgs. 15-18) (emphasis added).

The court concluded that Petitioner was not entitled to litigate his intellectual disability claim any further based on *Hall* because Petitioner had a full evidentiary hearing pursuant to *Atkins*, a prior hearing discussing his intellectual disability relative to an ineffective assistance of counsel claim, "and a robust defense at each proceeding." (Pet. App. A, pgs. 18-19).

Petitioner now seeks certiorari review of the Florida Supreme Court's decision denying his second successive postconviction motion.

REASONS FOR DENYING THE WRIT

THERE IS NO BASIS FOR CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT'S DECISION FINDING THAT PETITIONER FAILED TO MEET HIS BURDEN OF ESTABLISHING INTELLECTUAL DISABILITY AS THE LOWER COURT PROPERLY APPLIED THIS COURT'S PRECEDENT TO THE DISPUTED FACTS AND FOUND THERE WAS NO EVIDENCE PETITIONER HAD SIGNIFICANTLY SUBAVERAGE INTELLECTUAL FUNCTIONING OR DEFICITS IN ADAPTIVE BEHAVIOR.

Petitioner asserts that the Florida Supreme Court disregarded this Court's holdings in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), when rejecting his intellectual disability claim. Contrary to Petitioner's argument, it is clear that the Florida Supreme Court properly followed this Court's diagnostic framework when analyzing Petitioner's intellectual disability claim. Petitioner is simply dissatisfied with the court's denial of his claim based on the court's resolution of disputed facts and credibility determinations regarding witness testimony. The state postconviction court heard extensive testimony concerning Petitioner's scores on standardized intelligence tests and his adaptive behavior, and both the state postconviction court and the Florida Supreme Court followed this Court's precedent and agreed that Petitioner failed to establish that he had significantly subaverage intellectual functioning or concurrent

deficits in his adaptive behavior and manifesting prior to age 18. As such, Petitioner has failed to offer any persuasive reasons for this Court to grant certiorari review.

In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), this Court held that the Eighth Amendment's prohibition against cruel and unusual punishment bars the execution of an intellectually disabled defendant, but this Court left to the States "the task of developing appropriate ways" to identify intellectually disabled defendants and to enforce this constitutional protection. As this Court noted in *Bobby v. Bies*, 556 U.S. 825, 831 (2009), the *Atkins* decision "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled.

In order for a defendant to establish a claim of intellectual disability under Florida law, the defendant must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. *See* § 921.137(1), Fla. Stat. (2016).

> The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term

> "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

§ 921.137(1), Fla. Stat. (2016).

In *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014), this Court noted that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." This Court stated that Florida's statutory definition of intellectual disability, on its face, was consistent with the views of the medical community, but that the Florida Supreme Court's narrow interpretation of the statue, foreclosing further evidentiary development when a defendant had an IQ score above 70, was unconstitutional. *Id.* at 1999-2001.

Respondent submits that the Florida Supreme Court correctly followed this Court's precedent and the relevant clinical standards when analyzing Petitioner's claim, and as such, certiorari review of this factual dispute is inappropriate.

Petitioner argues that *Hall* requires states to conform their legal definitions of intellectual disability to the views of the scientific community and that the Florida courts ignored

clinical standards in concluding that he failed to establish the first prong of the test. As to the first prong of Florida's intellectual disability test, Petitioner claims that the state courts, without adequate explanation, rejected the language and cultural accommodations his mental health expert, Dr. Weinstein, used for the administration of IQ testing. Petitioner further faults the state courts for relying on evidence showing malingering because, he claims, the use of "malingering" tests was contrary to scientific authority.

Petitioner's assertion that *Hall* requires states to conform the legal definition of intellectual disability to the views of the scientific community is contrary to the express language of *Hall* itself. There, this Court expressly stated that the work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. Instead, this Court stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993. Thus, Petitioner's assertion that *Hall* requires Florida to adopt the American Association on Intellectual Disabilities (AAIDD) definition of intellectual disability and to interpret the definition so adopted in conformance with that organization's views is incorrect. The

holding of *Hall* was limited to a determination that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits in adaptive behavior when their IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. In *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017), this Court clarified that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide."

Furthermore, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), shows that Petitioner's suggestion that this Court adopted a nationwide standard for intellectual disability based on the views of the medical community is false. In *Brumfield*, this Court held that, on the record before it, the Louisiana trial court violated 28 U.S.C. § 2254(d)(2) by not affording the inmate a hearing on his intellectual disability claim where the IQ scores he presented were "entirely consistent with intellectual disability" and the record raised questions about his "impairment . . . in adaptive skills." *Brumfield*, 135 S. Ct. at 2277, 2279. Thus, *Brumfield* announced a procedural requirement that Louisiana afford an inmate an evidentiary hearing on an intellectual disability claim where there is some "reasonable doubt" as to his or her intellectual disability. *Id.*

at 2281. In finding that the state court acted unreasonably, this Court did not apply a nationwide standard for intellectual disability but rather relied on Louisiana law defining and analyzing intellectual disability. *Id.* at 2278-79. In any event, Petitioner herein received a full hearing on his intellectual disability claim in which he was afforded an opportunity to present evidence as to all three prongs of the test.

Petitioner's expert, Dr. Weinstein, testified that he administered the Mexican version of the WAIS-III but employed the norms for the version of the WAIS used in the United States. Dr. Weinstein stated that any testing of Petitioner had to be based on a comparison to the United States population because the testing should not include an accommodation for culture. Dr. Weinstein's testing using the WAIS yielded a full scale IQ of 55 to 65. He stated that the Woodcock test produced an IQ of 45 to 51, and the CTONI produced an IQ of 44.

Dr. Weinstein did not believe it was possible to test for malingering, only for effort. He testified that the TOMM and the Rey 15-item tests he gave measured effort and that Petitioner was putting forth effort. He did not consider administering the MMPI because it tested personality and psychopathology and because he believed it was inappropriate for intellectually disabled persons as it required an eighth-grade reading level.

He also felt that using the Validity Indicator Profile (VIP) was inappropriate because its verbal section was available only in English and because it produced false positive results in intellectually disabled persons. Dr. Weinstein believed it would be difficult to malinger intellectual disability unless the IQ scores were close to the minimum score given to anyone who takes the IQ test. Significantly, Dr. Weinstein denied knowing that Petitioner had admitted malingering or that he had been found to have malingered previously.

The State's expert, Dr. Suarez, administered the version of the WAIS normed in Spain because, according to Dr. Suarez, Cuba and Spain were culturally similar. He opined that choosing a test normed against a population that was culturally and educationally similar was important because culture and education influence the scores. He stated that one had to score an IQ test consistent with the norms for that test to obtain a meaningful score. Dr. Suarez also noted that the publishers of the Mexican WAIS had admitted to over representing educated people in their norming sample such that scores in the low ranges tended to be underestimates. Dr. Suarez obtained a full scale IQ of 60, but an odd range of subset scores made the result questionable. He also administered the CTONI and received results that were so low as to be incredible.

Dr. Suarez administered the nonverbal portion of the VIP and the Dot Counting tests as symptom validity tests because both the DSM and the National Academy of Neuropsychology required validity testing in forensic evaluations. The profile Petitioner obtained on the VIP was classified as irrelevant, which indicated Petitioner answered randomly. The results of the Dot Counting test indicated malingering.

Dr. Suarez also administered the MMPI-II because a person's mental state affects his test performance. Petitioner's profile on the test was invalid because he over reported symptoms. Additionally, a comparison between the drawings Petitioner included in his letters to his friend Ms. Dela and the drawing he did for Dr. Weinstein during testing suggested that Petitioner was malingering. Based on the test results and his records review, Dr. Suarez opined that Petitioner had malingered during his evaluations and that his IQ scores were therefore unreliable. Based on the evidence before it, the State postconviction court found that there were "no valid test results to establish that the Defendant's IQ is less than 70." (Pet. App. D, pg. 53).

Petitioner simply disagrees with the state postconviction court's credibility determinations in finding that Petitioner failed to satisfy the first prong of the intellectual disability

test. However, this Court does not "redetermine credibility of witnesses whose demeanor has been observed by the state trial court" but not by this Court. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (citing *United States v. Oregon Medical Society*, 343 U.S. 326 (1952)). Petitioner did not put forth credible evidence that he has significantly subaverage general intellectual functioning as required by the first prong of the intellectual disability test under Florida law.

The court below did not end its analysis at that point, but continued to consider Petitioner's adaptive behavior. Petitioner alleges that the Florida Supreme Court's analysis deviated from this Court's precedent and prevailing medical standards by considering current medical and constitutional standards "immaterial to the requisite findings . . . or rendered those standards immaterial by applying them inadequately," and by inappropriately focusing on adaptive strengths. (Pet. at 34). Contrary to Petitioner's assertions, both the state postconviction court and the Florida Supreme Court extensively analyzed all of the evidence and testimony available in the record and properly concluded that Petitioner failed to establish that he had concurrent deficits in his adaptive behavior. The Florida Supreme Court's analysis of this aspect of Petitioner's intellectual disability claim was consistent with

this Court's pronouncements in *Moore v. Texas*, 137 S. Ct. 1039 (2017), and prevailing clinical standards.

As previously noted, under Florida law, a defendant claiming intellectual disability as a bar to execution must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing **concurrently** with deficits in adaptive behavior and manifested during the period from conception to age 18. § 921.137(1), Fla. Stat. (2016). Section 921.137 further defines the term "adaptive behavior" as the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. *See also Atkins*, 536 U.S. at 308 n.3 (2002) (noting that the AAIDD definition of deficits in adaptive functioning refers to "substantial limitations in **present** functioning" and requires showing that the adaptive functioning deficits exist "**concurrently with**" the low IQ score) (emphasis added). Thus, the definitions of intellectual disability the medical community provides for general use are fully consistent with Florida law.

Here, the state postconviction court considered evidence concerning Petitioner's long-term adaptive functioning, including testimony from Petitioner's friends who had known him

when he was young, and from Dr. Weinstein who reviewed records and interviewed Petitioner's friends, family members, and a former teacher, and who testified concerning behavior he considered demonstrated deficits in adaptive functioning.

Petitioner contends that the state court improperly relied on adaptive strengths in concluding that he failed to establish the second prong of the intellectual disability test, and that this rendered the state court unable to review prong three of the test. While this Court recently cautioned in *Moore* that a court should not overemphasize an individual's adaptive strengths, and should not rely on strengths developed in a controlled setting like prison, *Moore*, 137 S. Ct. at 1050, the Florida Supreme Court's analysis did not overemphasize Petitioner's adaptive strengths or his behavior while in prison. Although the State's expert Dr. Suarez administered a standard test of adaptive functioning to prison personnel in order to get as much information as possible, he did not base his opinion solely on this information and the court's analysis did not focus on it. Petitioner's expert Dr. Weinstein admitted that he made no attempt to evaluate Petitioner's level of adaptive functioning concurrently with his evaluation of Petitioner's intelligence. Since Dr. Weinstein was the only witness Rodriguez presented in an attempt to show that Petitioner had concurrent

deficits in adaptive behavior, a finding that Petitioner did not present evidence on this issue is fully supported by the record. Petitioner suggests that the fact that he had such deficits should be presumed because he allegedly had deficits in adaptive functioning in childhood, and his adaptive functioning cannot have changed because adaptive functioning is constant without early intervention, which never occurred.

According to Petitioner's witnesses, Petitioner had deficits in adaptive functioning because he was incapable of learning, carrying on a coherent conversation, engaging in appropriate social relationships, and managing his money. All of the evidence related to Petitioner's adult functioning, however, showed that he had been able to learn a second language, manage his finances, write letters, maintain numerous personal relationships, and act as a leader among inmates. Among other things, Petitioner had operated a tow truck, managed a restaurant, financed home and car purchases, and negotiated drug deals. Even Dr. Weinstein admitted that there was nothing Petition could not do. In supporting Petitioner's bid to be exempt from execution, Dr. Weinstein took the untenable position that eight- to eleven-year-old children are able to make their own international travel arrangements, engage in business deals, and finance houses and cars. Thus, an evaluation of Petitioner's

present functioning showed that he no longer exhibited the alleged adaptive functioning deficits that should have been present had he manifested such deficits before age 18.

In *Moore*, this Court applied *Hall* in concluding that the Texas court had deviated from prevailing clinical standards in several ways in determining that the defendant failed to prove significant impairment in adaptive functioning. First, the Texas court found that the defendant's adaptive strengths "constituted evidence adequate to overcome considerable objective evidence of Moore's adaptive deficits," whereas "the medical community focuses the adaptive functioning-inquiry on adaptive deficits." *Id*. at 1050. Additionally, the Texas court, contrary to the medical community, concluded that the defendant's academic failure and childhood abuse and suffering detracted from a determination that his intellectual and adaptive deficits were related, as well as required the defendant to prove that his adaptive deficits were not related to a personality disorder. *Id*. at 1051. Finally, the Texas court further diverged from prevailing clinical standards by applying "nonclinical" factors derived from case law in determining that the defendant failed to prove deficits in adaptive behavior. *Id*. at 1051-52.

Unlike the situation in *Moore*, the Florida courts relied on current definitions of intellectual disability which are

consistent with the DSM-5 and the AAIDD-11. Rather than overemphasizing adaptive strengths or Petitioner's adaptive functioning in a prison setting, the Florida courts considered Petitioner's alleged deficits in adaptive behavior and found that he had failed to establish the existence of any. Contrary to Petitioner's assertion that the Florida Supreme Court found that *Moore* is not applicable in Florida, the court's opinion instead distinguished *Moore* from the instant case, correctly noting that "[u]nlike the defendant in *Moore*, [Petitioner's] intellectual disability was evaluated under "'the generally accepted, uncontroversial intellectual-disability diagnostic definition,'" and that the court "follows the same three-part standard." (Pet. App. A, pg. 11).

It is important to recognize that, contrary to what Petitioner seems to suggest, this Court in *Moore* did not **prohibit** the consideration of an inmate's adaptive strengths. The problem in *Moore* was not that adaptive strengths were considered at all; the problem was that the Texas court **overemphasized** the defendant's adaptive strengths and, contrary to "clinical authority" proceeded to **arbitrarily** offset the defendant's demonstrated adaptive deficits against "**unconnected strengths**." *Moore*, 137 U.S. at 1051 n.8 (emphasis added). In this case, by contrast, the Florida courts did not arbitrarily

offset Petitioner's alleged adaptive deficits against "unconnected strengths."

Finally, Petitioner's suggestion that the order in *Wright v. Florida*, 2017 WL 3480760 (2017), shows that Florida ignores clinical authority when evaluating claims of intellectual disability is incorrect. The entire text of the order in *Wright* is:

> On petition for writ of certiorari to the Supreme Court of Florida. Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Florida for further consideration in light of *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039, 197 S.Ed.2d 416 (2017).

Id. As this Court has recognized, such language does not establish that a constitutional violation has occurred. *Parker v. Randolph*, 442 U.S. 62, 76 n.8 (1979), *abrogated on other grounds by Cruz v. New York*, 481 U.S. 186 (1987). Instead of relying on the language of the order, Petitioner seeks to infer a holding from the pleadings and record in *Wright*. This Court, however, has held that doing so is improper. *United States v. Mitchell*, 271 U.S. 9, 14 (1926). Thus, Petitioner's contention that *Wright* establishes that this Court's precedent requires the adoption of any particular definition of intellectual disability should be rejected.

The Florida Supreme Court's analysis in this case was consistent with prevailing clinical standards and was based upon a proper credibility determination given the existence of conflicting evidence. The question Petitioner presents does not offer any new ruling which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. Petitioner does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established constitutional principles to the Florida Supreme Court's decision. As Petitioner does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been furnished by mail to Rachel L. Day, Law Office of the Capital Collateral Regional Counsel – South, 1 East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, on this 15th day of December, 2017. All parties required to be served have been served.

/s/ Candance M. Sabella
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