No. _____

In The Supreme Court Of The United States

ALLEN ROBERTSON,

Petitioner,

v.

DARREL VANNOY, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

I. Whether it violates the Eighth Amendment and this Court's decisions 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 Louisiana state courts relied on evidence of Petitioner's criminal behavior, contrary to the standards of the medical community, in determining that Petitioner Allen Robertson is not intellectually disabled?

II. Whether it violates the Sixth Amendment and this Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), where a member of the jury that convicted Petitioner and sentenced him to death stated that "[m]urders and stuff, it's all done by them niggers," and where the Louisiana state courts denied Petitioner's racial bias claim without comment?

Petitioner Allen Robertson respectfully requests that this Court issue a writ of certiorari to review the decision of the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Allen Robertson, Plaintiff/Appellant

2. Darrel Vannoy, Warden, Louisiana State Penitentiary

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Petitioner Allen Robertson respectfully prays that a Writ of Certiorari issue to review the judgment of the Louisiana Supreme Court entered in this case.

OPINIONS DELIVERED IN THE COURT BELOW

The *Per Curiam* rendered by the Louisiana Supreme Court on April 6, 2018 denying Petitioner's writ to review the district court's denial of post-conviction relief, is attached as Appendix A. The March 31, 2008 *Order* of the Nineteenth Judicial District Court of East Baton Parish, Louisiana, denying Petitioner's application for post-conviction relief is attached as Appendix B.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court issued its denial of Petitioner's writ of review on April 6, 2018 and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review this Petition.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Eighth Amendment to the United States Constitution provides: ". . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

Petitioner Allen Robertson was convicted and sentenced to death for the January 1, 1991 stabbing deaths of Kozuko and Morris Prestenback in 1991 and again in 1995.[1] Louisiana district court Judge Michael Erwin presided over both trials. During the 1995 trial of Allen Robertson, a black male from East Baton Rouge Parish, a white man named Johnny Robin sat on the jury.

Both of Petitioner's trials took place prior to this Court's 2002 decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). During state post-conviction proceedings, counsel raised, among other issues, a claim that Allen is intellectually disabled and thus ineligible for the death penalty under *Atkins* as well as a claim that Petitioner's jury was infected with racial bias. Juror interviews were conducted with the members of Petitioner's 1995 jury before his post-conviction petition was filed. In an interview with post-conviction counsel,[2] Juror Johnny Robin expressed:

[1] After Petitioner's initial trial, the Supreme Court of Louisiana granted a new trial on direct appeal based on a jury issue. *State v. Robertson,* 92-2660 (La. 1/14/94), 630 So.2d 1278.

[2] At the time of Mr. Robin's interview, undersigned counsel was not yet post-conviction counsel.

> My impression of Robertson was that he was trashy. He kept his head down throughout and never looked up. At sentencing his lawyer argued that he grew up in a bad environment and didn't have a father figure. I don't think that matters. Lots of black people don't have fathers – they don't know who their fathers are. That's just them.

Declaration of Johnny Robin at 4. Mr. Robin further stated that "Robertson was just a low life like other black people" and that "[a]ll this crime is committed by them." Affidavit of Alison McCrary. When asked who he meant by "them," Mr. Robin explained:

> You know. People like him [Robertson]. Yeah, you know, pardon my French, but they're all n*ggers. You see it on TV. They took over the neighborhood where the old Japanese woman and her husband lived [the victims]. Northern Baton Rouge is full of them now. I don't know why they commit crimes.

Id. In 2008, the state district court denied all post-conviction relief in an oral ruling. Particular to *Atkins*, Judge Erwin found that "after reviewing the record and having heard the case twice, and seen Mr. Robertson's reactions and heard his answers under questioning by both his attorney and the State and . . . the evidence that has been presented at those trials, . . . it doesn't appear that he falls into the mentally retarded category." February 14, 2008 hearing transcript. The state district court judge denied Petitioner's racial bias claim as procedurally barred (but did not specify which procedural bar applied to the claim). Appendix B. In denying post-conviction relief, Judge Erwin likewise denied an evidentiary hearing. *Id.*

The Supreme Court of Louisiana reversed and remanded Petitioner's case to Judge Erwin to conduct an evidentiary hearing on the issue of whether Allen Robertson is intellectually disabled. The denial of all other claims, including Petitioner's racial bias claim, was affirmed.[3] *See State v. Robertson*, 2008-1116 (La. 09/04/09); 17 So. 3d 960.

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[3]After the remand, Judge Erwin expressed confusion during a status hearing with post-conviction counsel:

> **The Court:** As I understand it the Supreme Court has ordered a hearing to determine whether or not Mr. Robertson is mentally retarded to the extent that he couldn't be executed.
> **Ms. Burns [prosecutor]:** That's correct, your Honor.
> **The Court:** My question is didn't we go through this in the trial?

As ordered by the Supreme Court of Louisiana, an *Atkins* hearing was held in front of Judge Erwin over the course of three settings. Each side presented expert testimony. Petitioner's expert, Dr. Mark Cunningham, and court-appointed expert Dr. Jill Hayes found that Petitioner is a person with intellectual disability. The State's expert and a second court-appointed expert testified that Petitioner does not have intellectual disability.[4] Each expert concluded that Mr. Robertson made his best effort on testing and was not malingering. Two of the four experts who evaluated Mr. Robertson—Dr. Jill Hayes[5] (court-appointed) and Dr. Mark Cunningham[6] (Petitioner's expert)—found that Mr. Robertson meets **all** criteria for a diagnosis of intellectual disability and that both at the time of the offense in 1991 and presently, Mr. Robertson is a person with intellectual disability.

Three of the four experts—Drs. Hayes, Cunningham, and Hoppe—concluded that IQ scores in the range of Allen Robertson's tested scores satisfy the first prong of intellectual disability. Court-appointed expert, Dr. Hayes, determined that "Mr. Robertson's measured IQ scores were all in the Mentally Retarded to Borderline range of intellectual functioning, since all

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> **Ms. Burns:** Well, Judge, that was our position, and the court, upon review, have determined that we have to now, in postconviction [sic], have that hearing and address that matter more fully.
> ...
> **Mr. Trenticosta [defense counsel]:** ...This court ruled that Mr. Robertson is not mentally retarded.
> **The Court:** I understand that. Because we – I heard it twice; two different times, and two different cases that he wasn't mentally retarded. So, I didn't – I just kind of took them at their word. So, what did the supreme court decide?
> **Mr. Degravelles [defense counsel]:** The Supreme Court decided that there should be an evidentiary hearing.
> **The Court:** Why, John? I mean, we're going to have it. I'm just curious. I haven't read the decision.

1/22/10 Hearing Transcript.

[4] The experts were: two court-appointed experts, Drs. Jill Hayes and Curtis Vincent; one defense expert, Dr. Mark Cunningham; and one prosecution expert, Dr. Donald Hoppe. Petitioner also presented testimony from Dr. Frank Gresham, who testified regarding adaptive deficits.

[5] Court-appointed expert Dr. Jill Hayes, who was qualified as an expert in clinical and forensic psychology and mental retardation and intellectual disability, testified that "Mr. Robertson met the criteria related to intellectual functioning...and that his deficits occurred prior to the age of eighteen and continued until the time of the crime."

[6] Dr. Cunningham concluded that "[b]oth currently and in 1991, Mr. Robertson meets the diagnostic criteria as a person with Mental Retardation". Report of Dr. Mark Cunningham at 38; *see also* 11/13/13 *Atkins* Hearing Transcript at 128.

scores ranged from 67 to 76 (± 5 points to include the SEM)"[7]—Report of Dr. Jill Hayes at 45—and concluded that:

> Mr. Robertson's intelligence would be considered "approximately two standard deviations below the population mean, as outlined by the AAMR/AAIDD and the APA. Taken together, in my opinion, to a reasonable degree of psychological and neuropsychological certainty, Mr. Robertson fulfills the intellectual criterion for a diagnosis of mental retardation as defined by the AAMR/AAIDD and the APA.

Id. at 47. Dr. Mark Cunningham, Petitioner's expert, evaluated Mr. Robertson for intellectual disability and likewise concluded that "[i]t is my opinion that he [Allen Robertson] does meet the first definition—the first criteria of that definition [for intellectual disability]."[8] 11/13/13 *Atkins* Hearing Transcript at 128.

The State's expert, Dr. Hoppe, testified on cross-examination that a hard and fast cut off score is not psychometrically justifiable (4/06/16 *Atkins* Hearing Transcript at 113); that the I.Q. cut off for prong one is "very squishy" (*id.* at 114-115); that he did not believe there is a cutoff line for I.Q. scores (*id.* at 116); that it was not impossible for a person with an I.Q. score of **79** to be intellectually disabled (*id.* at 117); and that an IQ of 75 would "more likely than not" satisfy the intellectual functioning criterion for intellectual disability (*id.*).

The fourth expert, Dr. Vincent, testified on cross-examination that, considering the SEM, an IQ of 70-75 meets prong one— 4/23/14 *Atkins* Hearing Transcript at 43—and further testified that authoritative texts advise that a "hard and fast IQ cutoff score" is not advised and that a "fixed point cutoff for intellectual disability is not psychometrically justifiable." *Id.* at 43 – 45.

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[7] Both Dr. Hayes and Dr. Cunningham determined that Mr. Robertson's IQ scores were all approximately two standard deviations below the mean, as discussed by the AAIDD and the APA, regardless of the Flynn Effect. The Flynn Effect results in inflated IQ scores due to out-of-date test norms. *See* DSM-V, at 37; *see also* AAIDD 11th ed., at 37.

[8] Dr. Cunningham also noted that Mr. Robertson's IQ scores must be interpreted in light of the Standard Error of Measurement (SEM). He explained that "[t]he SEM reflects the inherent inaccuracy of any test instrument. In other words, though the precision of an exact IQ measurement would simplify diagnostic eligibility, this is beyond the psychometric properties of the test." Report of Dr. Mark Cunningham at 7-8.

Dr. Cunningham testified that Mr. Robertson "shows pervasive deficits across all areas" and found that Mr. Robertson's greatest weaknesses are in "functional academic skills, social interpersonal skills, home living, use of community resources, self-direction, work, and health." 11/14/13 *Atkins* Hearing Transcript at 56. Dr. Hayes likewise concluded that Mr. Robertson has significant weaknesses in adaptive functioning. In particular, she identified that his greatest weaknesses are in functional academics, which was supported by Mr. Robertson's school records, and in employment, which was supported by Mr. Robertson's vocational rehabilitation report. 11/21/14 *Atkins* Hearing Transcript at 66. Additionally, Dr. Curtis Vincent administered the Adaptive Behavior Assessment System-II ("ABAS-II") to Mr. Robertson, his nephew and his mother, and reported that "all three measures of adaptive functioning retrospective to age 17 fell within the ID/MR [intellectually disabled] range, i.e., two or more standard deviations below the mean." Report of Dr. Curtis Vincent at 31. Further, the State's expert, testified that Mr. Robertson "absolutely" has weaknesses in reading and math computation. 4/05/16 *Atkins* Hearing Transcript at 6.

The experts confirmed that weaknesses in adaptive functioning coexist with strengths. *Id.* at 44 (Testimony of Dr. Mark Cunningham) ("There are no exclusionary criteria [for intellectual disability] . . . And, in fact, the definition even assumes strengths"); *see also* 4/21/14 *Atkins* Hearing Transcript at 9 (Dr. Hayes testifying that persons with mild intellectual disability can have strengths and outwardly appear no different to most people); *see also* 4/04/16 *Atkins* Hearing Transcript at 135 (Testimony of Dr. Donald Hoppe) (Dr. Hoppe testifying that it is possible for persons with intellectual disability to have normal grammar, vocabulary, and syntax); *see also* 4/23/14 *Atkins* Hearing Transcript at 11 (Dr. Hoppe testifying that adaptive

functioning of persons with mild intellectual disability can improve and that weaknesses can coexist with strengths).

On cross-examination, court-appointed expert Dr. Curtis Vincent, who found Petitioner was not intellectually disabled, testified that, in evaluating adaptive functioning, strengths must be assessed as well as weaknesses:

> **Q:** And mental retardation or intellectual disability is defined by deficits?
> **A:** It's defined by both. Most commonly it's referred to what the – one measures the abilities of the individuals, and it's the typical abilities when you're looking at adaptive functioning, but both have to be assessed, both deficits and strengths.

Id. at 42. Dr. Vincent further testified, when asked whether intellectual disability was a condition characterized by deficits, that:

> **A:** I don't see it that way, no. If we're measuring deficits, deficits and all skills exist on a continuum. So we—the cutoff being approximately seventy for I.D. they're – that individual is not only going to have deficits that's—that was discussed considerably in the AAIDD manuals. The individual has strengths and has deficits as well. So it's not possible to simply look at deficits.

4/04/16 *Atkins* Hearing Transcript at 16.

During its direct examinations, the State focused on the facts of the crime and Petitioner's criminal history—4/04/2016 *Atkins* Hearing Transcript at 44 (asking Dr. Vincent, "And you look, certainly, at the person's history, their prior behavior, and their actions at the time of the crime; did you not in this case?" who responds, "Yes. We're always look for inconsistencies; we're looking for corroborations, yes.)—and walked through the facts of the murders several times, first with the court-appointed expert:

> **Q:** Did – according to his testimony and that of the police officer, was he aware that there was a police officer following him?
> **A:** Yes.
> **Q:** And at some point did he manage to hit the accelerator, floor it and flee?
> **A:** Yes.
> **Q:** Did he take the valuables; the watch, the wallet, and the money from the car, nevertheless?

A: He took the wallet and the money. Honestly, I don't recall if he took the watch with him or not.
Q: The butcher knife was left, though?
A: Yes.
Q: And as he fled, he did – talking about his ability with math – he did know that there were two hundred and sixty dollars that he'd taken from this victim that he just killed?
A: That's correct.
Q: And also, when he was trapped in that yard, he tried to calm down Mr. Weir, who pulled a shotgun on him; did he not?
A: Yes, he did.
Q: And he attempted to secure his release by offering a certain amount of money, as well, to Mr. Weir?
A: Yes.
Q: And did this impress you as terms of his – certainly, quick adaptability after just committing a murder, to try to calm down another person for results of preservation to escape?
A: Those are certainly adaptive skills, yes.

Id. at 46-47 (Testimony of Dr. Vincent). And then again with its own expert:

Q: And certainly, if a crime had occurred in 1991, the person's actions at that time, at the age of twenty-three would certainly be, I would presume in your mind, very valid as opposed to something twenty-three years later or twenty-four years later when the person is in their mid-forties?
A: I think that would be worth looking at for sure, yes.
. . . .
Q: And would you want to interview, you would want to know the facts of the cases, is what you're telling me?
A: Correct.
Q: And would you want to know if there were prior occasions of such criminal behavior, particularly if they involved premeditation, preplanning, acting alone, and involving gullible or vulnerable victims?
A: Well, prior criminal acts would also be well documented examples of an individual's adaption, to use the word loosely, to his culture or his context.

Id. at 82-83 (Testimony of Dr. Hoppe).[9]

[9] The State continued questioning its expert about the facts of the crime:
Q: And at the time of the events, did the defendant have the wherewithal to take valuables, as well as the murder weapon, from the house?
A: He did those things from which we can assume there was wherewithal to make those decisions.
Q: And fleeing after being seen by a police officer. Of course, as consciousness of guilt, as we say, does that also indicate to you the mind working and functioning, trying to survive?
A: Absolutely.
Q: And if at the time of being close to being caught, you take – you leave the murder weapon, but take valuables; that a conscious decision at that point as well?

The State routinely objected to questions about intellectual disability being a disorder characterized by deficits—*See, e.g., id.* at 14-15 (State's objection that legal analysis is different from clinical analysis and takes into consideration facts of the crime, strengths, and maladaptive behavior)—and likewise objected to questions about the irrelevance of criminal behavior:

> **Q:** A diagnosis of intellectual disability is not based on a person's street-smarts?
> **A:** Well, actually, street-smarts, if you're referring to adaptive skills, it is based on that.
> **Q:** Street-smarts should not be used to infer a level of adaptive behavior?
> **A:** What do you mean by "street-smarts"?
> **Q:** Past criminal behavior.
>
> **Ms. Burns [prosecutor]:** Objection, again, your Honor. *State v. Dunn.*
>
> **Ms. Carbia [defense counsel]:** You Honor, Dr. Vincent has already testified that the medical community's opinions inform a diagnosis of intellectual disability.
>
> **Ms. Burns:** But what she's asking for, your Honor, is an absolute conclusion on his part, so that is incorrect.
>
> **The Court:** Sustained.
>
> **Ms. Carbia:** I'll rephrase, your Honor.
>
> **Ms. Carbia:**
> **Q:** It is the opinion of the medical community that past criminal behavior should not be used to infer a level of adaptive behavior?
> A: I would not say that all of the medical community would concur with that statement. The American Psychological Association would; the American Psychiatric Association would, so if that's what you're including, then, yes.
> **Q:** Thank you.
> **A:** The medical community is very, very broad.
> **Q:** Sure. And the American Psychiatric Association is the body that puts out the S.S.M.?
> **A:** Yes.

. . . .

A: That's [sic] certainly sounds like a conscious, deliberate decision.

. . . .

Q: Okay. And the incident where he was trapped in a yard and tried to, according to the testimony of Ms. Carlos Weir, tried to calm her husband down. The fact that he could try to reason, the fact that he was like a negotiator; would that be important to you?
A: That was a very interesting exchange, as I understood it. There was a fairly high level of reasoning involved that, including, I believe, a statement that he was being pursued by a white man –
Q: Yes.
A: -- because he was negotiating this with an African-American man, like himself. I believe there was some offer of money involved in it. It certainly suggested high level negotiating skills.

4/04/16 *Atkins* Hearing Transcript at 94-96 (Testimony of Dr. Hoppe).

Q: And the American Association on Intellectual and Developmental Disabilities is also a part a part of the medical community?
A: Yes.
Q: And it is their opinion that past criminal behavior is—should not be used to access [sic- assess] adaptive function?
A: Correct.

4/04/2016 *Atkins* Hearing Transcript at 21-23. The State's expert agreed, on cross-examination, that the AAIDD guidelines instruct "do not use past criminal behavior or verbal behavior to infer a level of adaptive behavior." *Id.* at 136.

At the close of the State expert's testimony, the court handed him an affidavit submitted into the record by undersigned counsel, in which Petitioner waived his presence at the evidentiary hearing. After asking the State's expert to read the affidavit aloud, the judge asked: "What does that mean to you?" 4/05/16 *Atkins* Hearing Transcript at 27. The State's expert answered, "It means that he was judged competent to understand his rights and to make a waiver of his rights through that—he made an informative [sic] decision based upon what is written in the law, in a very sophisticated language I would add." *Id.* at 27-28. At that point, the State marked and submitted the affidavit into evidence. *Id.* at 29.

On rebuttal, undersigned counsel called expert Dr. Mark Cunningham back to the stand, who testified regarding the difference between intellectual disability and legal competence:

Q: Is there a difference between legal competence and intellectual disability?
A: Yes, sir, there is.
Q: Can you describe briefly what that is?
A: There are many – or with some regularity, persons with no [sic] retardation or intellectual disability come before the courts. They have committed crimes and [in] many, if not most instances, they are deemed to be competent to stand trial even though they're a person with mental retardation. . . .

Id. at 59. The state district court interjected, stating:

The Court: Let me interrupt you. From someone who has been doing this for twenty-six years, it's never happened in my court, so I don't believe that either.
Mr. Clements: Excuse me your honor, I'm not—I didn't hear what you said.

> **The Court:** I said I've been doing this for twenty-six years. That situation has—or scenario has never come up in my court. I don't think it applies.

Id. at 59-60.

Barely two weeks after the conclusion of the hearing, Judge Erwin denied Petitioner's *Atkins* claim, again noting that Allen was "very active in his two trials with his lawyers" and further basing his denial on "the video tapes that I watched of his [Petitioner's] confession and the video tape that was not admitted into evidence during the trial." 4/22/16 Hearing Transcript at 3. Petitioner filed a writ to the Supreme Court of Louisiana on September 20, 2016.

After this Court's decisions in *Moore v. Texas*, 137 S. Ct. 1039 (2017) and *Pena-Rodriguez*, 137 S. Ct. 855 (2017), Petitioner filed a supplement to his writ application, giving the court notice of these pertinent decisions, asking the court to apply *Moore* to Petitioner's *Atkins* claim, and requesting that the court reopen and remand Petitioner's juror bias claim in light of *Pena-Rodriguez*.

In its decision, the state supreme court held that as shown by the crime, Mr. Robertson is "capable of pre-meditation, problem-solving skills, and negotiation." *See* Appendix A. The court walked through the crime:

> Robertson, the sole perpetrator, was acquainted with the victims and twice entered their residence undetected. He stole a television and sold it for $20 before returning a second time. After Roberson killed both victims, he stole a watch, cash, and car keys and successfully drove the victim's vehicle while eluding an off-duty police officer. He also counted the stolen money and negotiated with witnesses to avoid arrest.

Id. The Supreme Court of Louisiana's decision did not address Petitioner's writ supplement, nor did it mention *Moore* or *Pena-Rodriguez*.

REASONS FOR GRANTING THE PETITION

I. The Louisiana Courts Improperly Considered Petitioner's Criminal Behavior in its Determination that Petitioner is Not Intellectually Disabled

Pursuant to *Atkins*, *Hall*, and *Moore*, the Eighth Amendment bars the execution of persons who are intellectually disabled ("ID") according to current medical standards. "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originates before age 18." AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) ("AAIDD Manual").[10]

While this Court allowed the States to develop appropriate ways to enforce the Eighth Amendment protection against the execution of the intellectually disabled, as set out in *Atkins*, 536 U.S. at 348, this Court has since clarified that the States do not have "unfettered discretion." *Hall,* 134 S. Ct. at 1999; *See also Moore*, 137 S. Ct. at 1052. Specifically, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Moore*, 137 S. Ct. at 1052. This Court's review of Petitioner's case is necessary to ensure the prevention of the unconstitutional execution of Petitioner who is intellectually disabled under current medical standards.

The 2010 edition of the AAIDD Manual provides an explicit instruction: "[d]o not use past criminal behavior or verbal behavior to infer level of adaptive behavior or about having ID." AAIDD Manual at 102.[11] The *AAIDD User's Guide: Intellectual Disability: Definition,*

[1010] The Louisiana Code of Criminal Procedure Article 905.5.1.H(1) defines Intellectual Disability as, "a disability characterized by all of the following deficits, the onset of which must occur during the developmental period: (a) Deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgement, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing. (b) Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility; and that, without ongoing support, limit functioning in one or more activities of daily life including, without limitation, communication, social participation, and independent living, across multiple environments such as home, school, work and community." This definition is almost *ver batim* to the definition provided in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2012). *See also: Atkins*, 536 U.S. at 308 n. 3; *Hall*, 134 S. Ct. at 1994; *Moore,* 137 S. Ct. at 1045.

[11] In each of *Atkins*, *Hall*, and *Moore*, this Court relied on the most recent publications of the AAIDD to define relevant medical standards. See *Moore*, 137 S. Ct. at 1048 and 1053. (At the time of *Atkins*, the AAIDD was the

Classification, and Systems of Support (2012) ("AAIDD User's Guide") reiterated the instruction not to use criminal behavior to infer adaptive behavior, and established that "[t]he diagnosis of ID is not based on the person's 'street smarts', behavior in jail or prison, or criminal adaptive functioning." *AAIDD User's Guide* at 20. In 2015, the AAIDD published *The Death Penalty and Intellectual Disability,* in which two studies by Schalock et al. (2010 and 2012) are cited to support the position "that past criminal behavior is not an indicator of one's level of adaptive functioning[.]" *The Death Penalty and Intellectual Disability* at 196 (Edward A. Polloway, ed., 2015)("The Death Penalty and Intellectual Disability").

The medical rationalization behind this position is multifaceted.[12] First, intellectual disability is diagnosed by the presence of deficits in adaptive functioning, which are evaluated by examining the typical behavior of the individual within their community. *See: AAIDD Manual* at 47 (noting that typical behavior is more significant than what the individual can or could do); *see also: The Death Penalty and Intellectual Disability*, at 196. Persons with intellectual disability may exhibit strengths; and the concern is that consideration of a single incident, specifically the crime, may distract from the individual's typical behavior and level of ability.[13] "Intellectual disability is not diagnosed by focusing on abilities or strengths, but instead by identifying deficits in adaptive functioning. The focus on the crime—one event—may come at the expense of other, more typical life events that provide a more accurate assessment of an individual's adaptive functioning." *Brief of Amici Curiae American Psychological Association, et al. in Support of Petitioner, Moore v Texas*, 2016 U.S. S. Ct. Briefs LEXIS 2882, 35 (2016) (No. 15-797).

American Association on Mental Retardation ("AAMR"), and the current Manual was the 10th edition, published in 2002.)

[12] *See: Brumfield v. Cain*, 854 F. Supp. 2d 392, 394 (M.D. La., 2009).

[13] Notably, criminal or 'maladaptive behavior' is different from 'impaired adaptive behavior.' *See: The Death Penalty and Intellectual Disability* at 197, *see also* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports,* 79 (10th ed. 2002)("AAMR Manual").

Next, there is a concern that the facts of a crime are not known in sufficient detail as to the sequence of events and level of involvement of other individuals. The court, and in turn the experts conducting an evaluation, may lack information, for example, concerning whether the defendant's behavior was coached by another individual. *See*: Symposium, *Atkins v. Virginia: A Dozen Years Later – A Report Card: Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a Scientific State Decisis*, 23 Wm. & Mary Bill of Rts. J. 415, 422 (2014). Furthermore, where there is insufficient information, there is a danger that signs of intellectual disability may have a surface appearance of competence. For example, while evading police and avoiding capture can exhibit raw physical skills, at other times those acts are just as consistent with primal survival instincts as they are with callous, cold-blooded calculation. *Brumfield v. Cain*, 854 F. Supp. 2d 392, 399 (M.D. La., 2009). As in Mr. Robertson's case, "robberies may become homicidal when the script goes awry and the perpetrator panics." *The Death Penalty and Intellectual Disability* at 228. Medical standards require that professionals conduct interviews to clarify the level of adaptive functioning displayed by the defendant in any given setting. To do so in relation to a criminal incident may place the evaluator in an inappropriate role. Symposium, *Atkins v. Virginia: A Dozen Years Later – A Report Card: Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a Scientific State Decisis*, 23 Wm. & Mary Bill of Rts. J. 415, 478 (2014). Finally, there is insufficient research on norming criminal behavior for determining whether individuals with intellectual disability are capable of, for example, carrying out robberies. *The Death Penalty and Intellectual Disability* at 228.

In Petitioner's case, the Louisiana Supreme Court found that the facts of the crime are indicative of Mr. Robertson being "capable of pre-meditation, problem-solving skills, and negotiation." *See* Appendix A. Specifically, the court laid out the following facts as evidence

considered: "Robertson, the sole perpetrator, was acquainted with the victims and twice entered their residence undetected. He stole a television and sold it for $20 before returning a second time. After Roberson killed both victims, he stole a watch, cash, and car keys and successfully drove the victim's vehicle while eluding an off-duty police officer. He also counted the stolen money and negotiated with witnesses to avoid arrest." *Id.*[14] Petitioner's case is not the first instance in which the Supreme Court of Louisiana considered a defendant's criminal behavior in deciding the question of intellectual disability. *See, e.g., State v. Dunn*, 01-1635, 41 So.3d 454, 471 (La. 5/11/10),[15] *State v. Scott*, 921 So.2d 904, 959 (La. 1/19/06),[16] and *State v. Brown*, 907 So.2d 1, 32 (La. 4/12/05).[17]

This Court has previously noted that, although the facts of the crime may go toward evidence of adaptive skills, the AAMR provides that people with intellectual disability may have strengths in adaptive areas where they are otherwise limited. *Brumfield v. Cain*, 135 S. Ct. 2269, 2281. The Louisiana courts' reliance on the crime in Petitioner's case is erroneous for two reasons: the medical community's standards opposes the consideration of the facts of the crime in assessing intellectual disability; and the determination of intellectual disability depends on the presence of deficits, not the finding of strengths. "[E]ven a clear ability to function in the criminal context is irrelevant if the offender can identify an adaptive deficit in either

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[14] Notably, the residence that Mr. Robertson entered that night was unlocked, *see* Appendix A, so Mr. Robertson did not exhibit any skills of being able to break in silently. The victims were apparently killed the second time Mr. Robertson entered the property, when they awoke disturbed, *id.*, at 270, so Mr. Robertson was in fact detected. Mr. Robertson fled the scene in the victims' car, uprooting and driving over a chain-link fence, and ran a stop sign, finally drawing the attention of an off-duty police officer. *Id.* Mr. Robertson "abandoned the car and escaped on foot," *id.*, which shows that he was a faster runner than the police officer, but from which we should infer no more than "a primal survival instinct[][.]" *See Brumfield v. Cain*, 854 F. Supp, 2d at 399.

[15] In *State v. Dunn*, the Supreme Court of Louisiana stated that, "[i]t is important to consider the defendant's behavior during the planning and commission of the instant crime as it relates to his adaptive skills functioning." *State v. Dunn*, 41 So.3d at 472. This is exactly contrary to the position of the medical community as evidenced by the 10th Edition of the AAIDD Manual released in the same year as the *Dunn* decision.

[16] The Supreme Court of Louisiana noted that behavior during and following the commission of the crime "can be relevant to the determination of mental retardation". *State v. Scott*, 921 So.2d at 959.

[17] In *State v. Brown*, the Supreme Court of Louisiana noted the unique facts of the defendant's behavior following the commission of the crime. *State v. Brown*, 97 So. 2d at 32.

communication, social participation, or independent living." Symposium, *Atkins v. Virginia: A Dozen Years Later – A Report Card: Scientizing Culpability: The Implications of Hall v. Florida and the Possibility of a Scientific State Decisis*, 23 Wm. & Mary Bill of Rts. J. 415, 422 (2014).

The Louisiana Supreme Court credited the State experts', relying on Mr. Robertson's criminal behavior to support their conclusion that he is not intellectually disabled. *See* Appendix A. "Prosecution experts always assert that criminal behavior is a positive indicator of adaptive functioning. This assertion is incorrect and in direct contradiction to the standards promulgated by AAIDD." Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings,* 38 Champion 44, 50 (2014).[18] Reliance on facts of the crime is directly contrary to current medical standards. *See* AAIDD Manual at 102; *see also AAIDD User's Guide* at 20. The opinions of experts that do not follow the current standards of the medical community in performing an evaluation and providing their opinion should not be given weight.[19] The guidelines concerning diagnosing intellectual disability specifically instruct not to use criminal behavior to infer adaptive behavior, *AAIDD Manual* at 102, therefore, the opinions of experts who disregard this should not be credited with evidentiary weight when the court makes an intellectual disability determination.[20] "Courts cannot bypass the Supreme Court's clear

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[18] *See also* John Matthew Fabian, William W. Thompson, IV, & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More Than Just a Score: Understanding and Utilizing Forensic Psychology and Neuropsychological Evaluations in Atkins Intellectual Disability, Mental Retardation Cases*, 59 Clev. St. L. Rev. 399, 427 (noting that "experts are not equipped to dissect the behavioral context of a defendant's alleged crimes when considering adaptive versus antisocial functioning.").

[19] "It is not necessary to resolve differences between experts where one expert applies methodology that does not generally conform to the clinical definitions." John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 689, 713 (2009).

[20] The Eleventh Circuit found that a State's expert's "predominant focus" on the defendant's crime indicated that the expert did not recognize that the criteria for diagnosing intellectual disability required a showing of deficits rather than strengths, as both may be present within an individual with intellectual disability. *Holladay v. Allen*, 555 F.3d 1346,1363 (11th Cir., 2009). The Sixth Circuit found that the Ohio State court was erroneous in relying on the defendant's crimes to discount his weakness of being easily led. *Hill v. Anderson*, 881 F.3d 483, 496 (6th Cir., 2018). "Under prevailing medical standards, however, Hill's prior criminal behavior should not be given weight in this analysis." *Id.* "[A]s Dr. Greenspan noted, because there are few studies showing normative behavior during

instruction not to 'disregard established medical practice,' *Hall*, 134 S. Ct. at 1995, by relying on experts who have done just that." *Hill v. Anderson*, 881 F.3d 483, 498 (6th Cir., 2018).

Petitioner respectfully requests that this Court grant *certiorari*, vacate the decision of the Supreme Court of Louisiana, and remand his case for further proceedings not inconsistent with this Court's precedent.

II. Petitioner's right to a fair and impartial jury was violated by a juror's racial animus towards Mr. Robertson

In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), this Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule[21] give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 137 S. Ct. at 869. "A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* In the instant case, racial animus infected Mr. Robertson's conviction and death sentence in violation of his Sixth Amendment rights. Petitioner respectfully requests that this Court remand his jury misconduct

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commission of a crime, courts must be wary of drawing conclusions from those actions alone." *Brumfield v. Cain*, 854 F. Supp. 2d 392, 394 (M.D. La., 2009). Ultimately, the District Court in Brumfield decided that while it would consider the facts of the crime, it would not give such evidence much weight, because of "the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business." *Brumfield v. Cain*, 854 F. Supp. 2d 392, 395-6 (M.D. La., 2009) See also *Id.* at 401.

[21] The no-impeachment rule, also called the "jury shield law", codified in Louisiana law as C.E. 606(B), states:

> **B. Inquiry into validity of verdict or indictment.** -- Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

La. C.E. 606(B) (2017).

claim for consideration in light of *Pena-Rodriguez*.[22]

Juror Johnny Robin, who served on Petitioner's 1995 capital murder trial, stated:

> My impression of Robertson was that he was trashy. He kept his head down throughout and never looked up. At sentencing his lawyer argued that he grew up in a bad environment and didn't have a father figure. I don't think that matters. Lots of black people don't have fathers – they don't know who their fathers are. That's just them.

Declaration of Johnny Robin at 4. Mr. Robin made further comments, including:

> Robertson was just a low life like other black people. He [Robertson] was in trouble with the cops his whole life. He and his family were poor and lived in poverty. We [the jurors] knew Robertson was trashy because of the evidence we heard. That's all we could say about him.
>
> A lot of violence is coming to Baton Rouge now that so many people have moved here from New Orleans. A lot of people in Baton Rouge are moving to the suburbs like in Zachary to put their children in better schools and to get away from the poor neighborhoods. All this crime is committed by them.

and:

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[22] This Court has held that a new constitutional rule will apply retroactively to cases on collateral review in two circumstances—where when a new constitutional rule is (1) a substantive rule or (2) a "watershed" rule of criminal procedure. *See Teague v. Lane*, 489 U.S. 288, 311 (1989); *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (1992) (Supreme Court of Louisiana adopting *Teague* standard for all cases on collateral review in state court proceedings); *see also Saffle v. Parks*, 494 U.S. 484, 494-495 (1990). The *Pena-Rodriguez* decision announced a "watershed" rule, one which implicates the fundamental fairness and accuracy of a criminal proceeding and must meet two requirements: 1) it must be necessary to prevent an impermissibly large risk of an inaccurate conviction and 2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *See Saffle*, 494 U.S. at 495; *see also Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)). *Pena-Rodriguez* satisfies both requirements.

First, unaddressed racial bias in the jury system, "would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 883 (2017). Second, *Pena-Rodriguez* changes the bedrock procedural elements necessary to the fairness of a proceeding by requiring a trial court to consider juror statements in cases where a juror relied on racial stereotypes or animus to convict a defendant. Before *Pena-Rodriguez*, racial bias was not recognized as a constitutionally-required exception to the jury shield law. Forty-two jurisdictions follow the Federal Rules for juror statements, and only eleven of those jurisdictions had previously recognized an exception for racial bias. *See Pena-Rodriguez*, 137 S. Ct. at 865. Specifically, Louisiana, which follows the current Federal Rules of Evidence Rule 606(b), did not allow for a racial bias exception. *See* La. C.E. art. 606(B). Consequently, *Pena-Rodriguez* has effected "a profound and sweeping change" by requiring trial courts to consider jurors' statements in cases where juror racial bias is alleged. *Whorton*, 549 U.S. at 421. *Pena-Rodriguez* constitutes a watershed rule that must be applied retroactively.

> You know. People like him [Robertson]. Yeah, you know, pardon my French, but they're all n*ggers. You see it on TV. They took over the neighborhood where the old Japanese woman and her husband lived [the victims]. Northern Baton Rouge is full of them now. I don't know why they commit crimes.

Affidavit of Alison McCrary at 2-3. Mr. Robin made further troubling statements:

> I paid for my children to go to Catholic schools so they wouldn't have to be around the violence and poor schools in Baton Rouge. Baton Rouge schools are becoming a lot like New Orleans public schools. They're becoming all black.

Affidavit of Alison McCrary at 2. Mr. Robin further stated:

> Robertson was just a low life like other black people. He [Robertson] was in trouble with the cops his whole life. He and his family were poor and lived in poverty. We [the jurors] knew Robertson was trashy because of the evidence we heard. That's all we could say about him.
>
> A lot of violence is coming to Baton Rouge now that so many people have moved here from New Orleans. A lot of people in Baton Rouge are moving to the suburbs like in Zachary to put their children in better schools and to get away from the poor neighborhoods. All this crime is committed by them.

Id. When asked what he meant when he referred to "them," Mr. Robin explained:

> You know. People like him [Robertson]. Yeah, you know, pardon my French, but they're all n*ggers. You see it on TV. They took over the neighborhood where the old Japanese woman and her husband lived [the victims]. Northern Baton Rouge is full of them now. I don't know why they commit crimes.

Id. Later in the conversation, Mr. Robin said:

> [A]ll of this violence is caused by young black people. Murders and stuff, it's all done by them n*ggers.

Id. at 3. Neither the state district court nor the Louisiana Supreme Court ever considered Mr. Robin's racial bias.

Juror Robin's comments regarding Petitioner specifically and African-Americans in general are a clear indication that he held racial animus towards African-Americans during his time as a juror in Petitioner's trial. Juror Robins' statements are similar to those made in another capital case. *See Tharpe v. Sellers*, 138 S. Ct. 545 (2018). In that case, following conviction, a

juror signed an affidavit indicating his views that "'there are two types of black people: 1. Black folks and 2. N*ggers'; that Tharpe, 'who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did'; that 'some of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason'; and that, 'after studying the Bible, I have wondered if black people even have souls.'" *See id.* at 546. This Court reversed the Eleventh Circuit's denial of a certificate of appealability, concluding that the juror affidavit "presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict."[23] *Id.* at 546.

Here, not only did Mr. Robin's inclusion on the jury violate Petitioner's substantive due process rights because his guilt and sentence were determined by a racist person, but Petitioner's right to an impartial jury and right to challenge for cause those persons who could not be impartial were violated by Mr. Robin's failure to disclose his bias on *voir dire*, bias which would have made him ineligible to serve as a juror. *See Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); see also Wainwright v. Witt*, 469 U.S. 412, 424 (1988) (reaffirming the standard for challenges for cause as whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."); *Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that a defendant is entitled to voir dire on racial prejudice); *see also McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). "*Voir dire* examination serves to protect that right by exposing possible biases, both known and

[23] Further, the Fifth Circuit recently granted a Certificate of Appealability based in part on multiple jurors' opposition to interracial relationships. *See Thomas v. Davis*, 17-70002 (5th Cir. 2018).

unknown, on the part of potential jurors . . . . The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.").

As in *Tharpe*, Mr. Robin formed his racist opinions long before he sat on Mr. Robertson's jury and brought them into the jury box and deliberation room with him. Because "the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it' it necessarily must be inferred from surrounding facts and circumstances." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 588 (1984); *Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001) ("the presence of actual bias can be revealed by a juror's express admission of that fact, but more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."). Mr. Robin's racial bias has resulted in the unreliability of the jury's guilty verdict and resulting death sentence in Petitioner's case. There can be no way to guarantee that Mr. Robin's prejudices did not infect other areas of the jury deliberation process. However, the mere presence of one juror who is biased against the defendant is a structural defect. *Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999); *Edwards v. Balisok*, 520 U.S. 641, 647 (1997); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

Neither the state district court nor the Louisiana Supreme Court considered Petitioner's racial bias claim. *Pena-Rodriguez* now makes it possible for the district court to consider the evidence in support of Mr. Robertson's juror misconduct claim. In light of *Pena-Rodriguez,* the Louisiana Supreme Court's denial is clearly in error. Petitioner respectfully requests that this

Court remand his racial bias claim for reconsideration in a manner not inconsistent with this Court's precedent.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's petition and issue a writ of certiorari to review the decision of the Louisiana Supreme Court. Alternatively, this Court should grant the writ and remand this case back to the Louisiana Supreme Court for a merits review of the Petitioner's *Atkins* and *Pena-Rodriguez* claims in a manner consistent with this Court's jurisprudence.

Respectfully submitted,

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No. _____

In The Supreme Court Of The United States

ALLEN ROBERTSON,

Petitioner,

v.

DARREL VANNOY, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 5th th day of July, 2018 upon Assistant District Attorney Dylan Alge, of the East Baton Rouge Parish District Attorney's Office, 222 St. Louis Street, Baton Rouge, Louisiana, 70801. All persons required to be served have been served.

Respectfully submitted,

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