No. _____

OCTOBER TERM 2020

IN THE SUPREME COURT OF THE UNITED STATES

JUAN DAVID RODRIGUEZ,

Petitioner,

v.

MARK INCH, Secretary,
Florida Department of Corrections

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

This Court's decisions in *Hall v. Florida*, 572 U.S. 701 (2014), *Brumfield v. Cain*, 576 U.S. 305 (2015), *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam), reaffirmed the longstanding principle originally established in *Atkins v. Virginia*, 536 U.S. 304 (2002), that States must be informed by the medical and scientific community's diagnostic manuals and framework in determining whether an individual is intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment. Mr. Rodriguez, who is an intellectually disabled prisoner on Florida's death row, has sought relief pursuant to *Atkins* only to be repeatedly denied throughout his postconviction litigation in both state and federal court. In denying relief, both the state and federal courts have rejected Mr. Rodriguez's claims that he is ineligible for the death penalty under *Atkins*, based upon the determination that Mr. Rodriguez had failed to present evidence establishing that he possesses substandard intellectual functioning along with concurrent adaptive deficits as required under. § 921.137(1), Fla. Stat., and Fla. R. Crim. P. 3.203.

The question presented is:

> **Whether the disregard of medical and scientific consensus and well-established clinical authority when evaluating a claim of intellectual disability constitutes the impermissible denial of a capital defendant's substantive right to a reliable and accurate *Atkins v. Virginia* 536 U.S. 304 (2002), determination under the Eighth and Fourteenth Amendments.**

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Juan David Rodriguez, was the Defendant/Appellant in the state court proceedings and the Petitioner/Appellant in federal proceedings.

The Respondent, Mark Inch, Secretary, Florida Department of Corrections, was the Respondent/Appellee in the federal proceedings. The State of Florida was the Plaintiff/Appellee in the state court proceedings.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying trial:
Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: March 28, 1990

Direct Appeal:
Florida Supreme Court
Rodriguez v. State, 609 So. 2d 493 (Fla. 1993)
Judgement Entered: October 8, 1992

Supreme Court of the United States
Rodriguez v. Florida, 510 U.S. 830 (1993)
Judgement Entered: October 4, 1993

Initial Motion for Postconviction Relief:
Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: November 23, 1999

Florida Supreme Court
Rodriguez v. State,919 So. 2d 1252 (Fla. 2005)
Relinquishment of jurisdiction back to lower court: November 8, 2002

Relinquishment proceedings:
Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: November December 31, 2002

Florida Supreme Court
Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005)
Judgement Entered: May 26, 2005

Successive Motion for Postconviction Relief
Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: June 26, 2006

Florida Supreme Court
Rodriguez v. State, 968 So. 2d 557 (Fla. 2007) (table opinion)
Judgement Entered: October 3, 2007

Remanding summary denial of motion for postconviction *Atkins* relief

Remand proceedings:

Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: December 31, 2010

Florida Supreme Court
Rodriguez v. State, 110 So. 3d 441 (Fla. 2013)
Judgment Entered: January 6, 2103

Second Successive Postconviction Motion (*Hall v. Florida*)

Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: August 24, 2015

Florida Supreme Court
Rodriguez v. State, 219 So. 3d 751 (Fla. 2017)
Judgment Entered: April 20, 2017

United States Supreme Court
Rodriguez v. Florida, 138 S. Ct. 927 (2018)
Denial of Cert: January 22, 2018

Third Successive Postconviction Motion (*Hurst v. Florida*)

Circuit Court of Miami-Dade County, Florida
State of Florida v. Juan David Rodriguez, 88-18180-B
Judgement Entered: January 22, 2016

Florida Supreme Court
Rodriguez v. State, 219 So. 3d 751 (Fla. 2017)
Judgment Entered: April 20, 2017

State Habeas Proceedings (Fla. Chapter 2017-1)

Florida Supreme Court
Rodriguez v. Jones, 2018 WL 1673423 (Fla. April 6, 2018)
Judgement Entered: April 6, 2018

United States Supreme Court
Rodriguez v. Florida, 139 S. Ct. 458 (2018)
Denial of Cert: November 5, 2018

Federal Habeas Proceedings

United States Southern District Court
Rodriguez v. Sec'y, Fla. Dept. of Corr., Case No. 13-cv-62567 (S. D. Fla. Jan. 4,

2016)
Judgment Entered: March 14, 2016

United States Court of Appeals for the Eleventh Circuit
Rodriguez v. Florida Department of Corrections, No.16-11258
Judgement Entered: June 22, 2020

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan David Rodriguez prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit denying relief is reported as *Rodriguez v. State*, 818 F. App'x 945 (11th Cir. 2020), and is attached to this Petition as "Appendix A." The order denying the motion for rehearing en banc is non-published and attached as "Appendix B." The District Court order denying Mr. Rodriguez's habeas petition is non-published but referenced as *Rodriguez v. Sec'y, Fla. Dept. of Corr.*, Order, Case No. 13-24567-CIV (S. D. Fla. Jan. 4, 2016), and attached as "Appendix C." The Florida Supreme Court opinion affirming the state circuit court's summary denial of Mr. Rodriguez's 2017 motion for postconviction relief pursuant to *Hall v. Florida*, 572 U.S. 701 (2014), is reported as *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017), and attached as "Appendix D." The order denying the motion for rehearing is referenced as *Rodriguez v. State*, Order, Case No. SC15-1795 (June 15, 2017), and attached as "Appendix E." The state circuit court order that the Florida Supreme Court opinion references in its 2017 opinion and which provides the factual predicate to Mr. Rodriguez's intellectual disability claim is referenced as *Rodriguez v. State*, Case No. F88-18180B (Fla. 11th Cir. Dec. 31, 2010), and attached as "Appendix F." And, the Florida Supreme Court's 2013 order affirming the state circuit court's denial of Mr. Rodriguez's *Atkins* claim is referenced as *Rodriguez v. State*, 110 So. 3d 411 (2013) (unpublished table decision), and attached as "Appendix G."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the basis of 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on June 22, 2020, and denied Mr. Rodriguez's timely petition for rehearing on July 27, 2020. Pursuant to this Court's directive issued in light of the COVID-19 pandemic that extended the deadline to file any petition for writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court order denying a petition for rehearing, counsel now timely files this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

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

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. Introduction

Mr. Rodriguez is an intellectually disabled prisoner on Florida's death row that has been litigating the fact he is categorically exempt from death for the last twenty-six years. In 2009, Mr. Rodriguez finally received an evidentiary hearing on his

intellectual disability claim under § 921.137(1), Fla. Stat., and Fla. R. Crim. P. 3.203, yet the state circuit court denied him *Atkins v. Virginia*, 536 U.S. 304. (2002) relief. In doing so, the circuit court disregarded clinical authority within the medical and scientific community and determined that Mr. Rodriguez had failed to establish the first two prongs of Florida's intellectual disability definition. As Mr. Rodriguez has continued to litigate his *Atkins'* claims throughout state and federal court, it has been those improper credibility findings, rendered in an unconstitutional fashion contrary to *Atkins*, that have served as the foundational impediment to Mr. Rodriguez obtaining relief on his valid claim that he is intellectually disabled.

B. Procedural History

The Circuit Court for the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, entered the judgments of conviction and sentence at issue in this petition.

Mr. Rodriguez was indicted by a grand jury in Dade County, Florida, on May 3, 1989, and charged with first-degree murder, armed robbery, conspiracy to commit a felony, attempted armed robbery, armed burglary with an assault, aggravated assault, and attempted murder in the first degree. (R. 8-12).

Mr. Rodriguez's jury trial commenced on January 23, 1990, and on January 31, 1990, the jury found Mr. Rodriguez guilty on all counts. (R. 221-227). On March 1, 1990, the jury recommended a death sentence by a vote of twelve-to-zero for the charge of first-degree murder. (R. 239-240). On March 28, 1990, the court followed the jury's recommendation and sentenced Mr. Rodriguez to death. (R. 275-286). On direct appeal to the Florida Supreme Court Mr. Rodriguez's convictions and sentences

were affirmed. *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), *cert. denied*, 510 U.S. 830 (1993).

On September 12, 1994, Mr. Rodriguez filed his initial Motion to Vacate Judgment of Convictions and Sentences pursuant to Fla. R. of Crim. P. 3.850 in the Circuit Court for the Eleventh Judicial Circuit. (PCR. 40-96). Thereafter, Mr. Rodriguez filed three amendments to that motion on October 4, 1995, August 10, 1997, March 13, 1998. (PCR. 140-273; 1862-2054; 2092-2268). Following a limited evidentiary hearing on the issue of ineffective assistance of trial counsel, the circuit court denied Mr. Rodriguez relief. (PCR. 2722-26).

Mr. Rodriguez appealed to the Florida Supreme Court. During the pendency of that appeal, in October 2002, the Florida Supreme Court temporarily relinquished jurisdiction back to the circuit court for an evidentiary hearing on Mr. Rodriguez's claim dealing with a sentencing order issue. Following that evidentiary hearing, the circuit court again denied Mr. Rodriguez relief. Mr. Rodriguez appealed the denial to the Florida Supreme Court.

During the pendency of Mr. Rodriguez's appeal in the circuit court, the Florida Supreme Court promulgated Fla. R. Crim. P. 3.203, effective October 1, 2004, regarding the procedures to be employed for defendants seeking to raise mental retardation as a bar to their execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Thereafter, on November 30, 2004, Mr. Rodriguez requested that the Florida Supreme Court relinquish jurisdiction to the circuit court for a determination of mental retardation pursuant to the procedural mandates of Fla. R. Crim. P.

3.203(d)(4)(E).

The Motion to Relinquish Jurisdiction remained pending until May 26, 2005, when the Florida Supreme Court issued an opinion affirming the circuit court's denial of Mr. Rodriguez's request for postconviction relief. *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). On the same day, the Florida Supreme Court also entered an order denying Mr. Rodriquez's request to relinquish jurisdiction but without prejudice to Mr. Rodriguez filing a Rule 3.203 motion in the circuit court within sixty days of the appeal becoming final.

Mr. Rodriguez timely filed a Motion for Rehearing, which was denied on January 19, 2006. Thereafter, on March 9, 2006, Mr. Rodriguez filed a Successive Motion to Vacate Sentence of Death/Motion for Determination of Mental Retardation as a Bar to Execution in the circuit court. (PCR2. 41-86). The circuit court summarily denied relief. (PCR2. 125-131). A timely notice of appeal to the Florida Supreme Court was filed on July 20, 2006. (PCR2. 172-173).

On October 3, 2007, the Florida Supreme Court issued an order reversing the summary denial and remanding the case back to the circuit court for an evidentiary hearing pursuant to *Atkins*. An evidentiary hearing was conducted in 2009 and on December 31, 2010, the circuit court entered an order denying Mr. Rodriguez's successive motion for postconviction relief. (PCR2. 3644-97). Mr. Rodriguez timely filed his notice of appeal to the Florida Supreme Court. (PCR2. 3819-21). On February 6, 2013, the Florida Supreme Court issued an order denying relief without hearing oral argument. *Rodriguez v. State*, 110 So. 3d 441 (Fla. 2013).

Following the denial by the Florida Supreme Court, on December 19, 2013 Mr. Rodriguez filed his initial Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. While his petition remained pending in federal court, on May 26, 2015, Mr. Rodriguez subsequently filed a successive motion for postconviction relief in state circuit court pursuant to this Court's decision in *Hall v. Florida*, 572 U.S. 701 (2014). The circuit court summarily denied the motion and Mr. Rodriguez appealed to the Florida Supreme Court. While Mr. Rodriguez's appeal was pending, this Court issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017). Shortly thereafter, on April 20, 2017, the Florida Supreme Court affirmed the denial of relief. *Rodriguez v. State*, 219 So. 3d 751 (Fla. 2017). Thereafter, Mr. Rodriguez filed a Petition For Writ of Certiorari with this Court that was subsequently denied on January 22, 2018. *Rodriguez v. Florida*, 139 S. Ct. 927 (2018).

While Mr. Rodriguez was litigating his successive motion for postconviction relief pursuant to *Hall v. Florida* in state court, on January 4, 2016, the District Court issued its Order Denying Petition For Writ Of Habeas Corpus. *Rodriguez v. Sec'y, Fla. Dept. of Corr.*, Case No. 13-cv-24567 (S. D. Fla. Jan. 4, 2016). The District Court denied Mr. Rodriguez's claim of intellectual disability, finding that the state court adjudication of his *Atkins* claim was not contrary to, or an unreasonable application of, clearly established federal law. The District Court also denied Mr. Rodriguez's argument that the Florida courts' denial of his *Atkins* claim was based on an unreasonable determination of facts in light of the state court record. The District

Court granted a Certificate of Appealability as to two issues: Claim III (ineffective assistance of counsel at penalty phase) and Claim IV (the Florida courts' determination that Mr. Rodriguez is not intellectually disabled was based upon an unreasonable determination of fact in light of the state court record pursuant to AEDPA).

Mr. Rodriguez timely filed a Notice of Appeal and a Motion to Expand the Certificate of Appealability to the Eleventh Circuit Court of Appeals on April 13, 2016. The Eleventh Circuit Court of Appeals granted the motion as to Claim II (the Florida courts' determination that Mr. Rodriguez was not intellectually disabled was contrary to and/or an unreasonable application of clearly established federal law under AEDPA). Oral argument was held August 24, 2017. Thereafter, the Eleventh Circuit Court of Appeals entered its opinion denying Mr. Rodriguez's appeal on June 22, 2020. *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 818 F. App'x 945 (11th Cir. 2020). Mr. Rodriguez timely filed a Motion For Rehearing En Banc on July 13, 2020, which the court subsequently denied two weeks later on July 27, 2020.

This Petition for Writ of Certiorari follows.

RELEVANT FACTUAL BACKGROUND

In this petition, Mr. Rodriguez asks the Court to grant certiorari to review of the decision of the Eleventh Circuit Court of Appeals rejecting his claim that he is ineligible for a sentence of death because he is intellectually disabled. Mr. Rodriguez's death sentence stands in violation of *Atkins v. Virginia* because in adjudicating his intellectual disability claim, the Florida state courts disregarded well-established

clinical authority to ultimately deny Mr. Rodriguez relief.

Mr. Rodriguez presents a brief summary of the pertinent facts below:

1. 2009 *Atkins* Evidentiary Hearing

After repeated attempts had been denied, in 2009, Mr. Rodriguez was finally provided the opportunity to present evidence at an evidentiary hearing to establish he is intellectually disabled under § 921.137(1), Fla. Stat. and Fla. R. Crim. P. 3.203 and thus ineligible for the death penalty. At the evidentiary hearing, postconviction counsel for Mr. Rodriguez presented testimony from three experts and several lay witnesses.

Dr. Weinstein, a forensic neuropsychologist with a specialty in intellectual disability and cross-cultural assessment, testified he administered three tests to determine Mr. Rodriguez's IQ: the Weschler Adult Intelligence Scale (WAIS-III) in Spanish, the Batteria Woodcock Munoz, and the Comprehensive Test of Non-Verbal Intelligence (C-TONI). (PCR3. Vol. 24, at 40). Because Mr. Rodriguez is a Cuban national and there is no version of the WAIS designed specifically for that population, Dr. Weinstein elected to utilize the Mexican WAIS-III, given that the language and culture are most similar to that of Cuba. (PCR3. Vo. 24, 40-41). Dr. Weinstein further explained that it was standard practice in such situations is to then also norm the test against the population that is representative of the issue at hand. (PCR3. Vol. 24, at 45-46). Here, where the legal issue was whether Mr. Rodriguez's IQ testing scores fall within the acceptable range to satisfy the diagnostic criteria for intellectual disability within the state of Florida, the United States norms were proper. (PCR3.

Vol. 24, at 46).[1] Adhering to this accepted practice, Dr. Weinstein normed Mr. Rodriguez's scores from the Mexican WAIS-III against the United States population. (PCR3. Vol. 24, at 45-46).

On the Mexican version of the WAIS-III, Mr. Rodriguez obtained a verbal score of 59-69, a performance score of 55-69, and a full-scale score of 55-65—results which placed Mr. Rodriguez within the mild range of intellectual disability. (PCR3. Vol. 24, at 50-51, 66). Dr. Weinstein explained that Mr. Rodriguez's results on the current administration of the WAIS-III were consistent with other scores obtained from testing over the years where Mr. Rodriguez received scores of 59-69, 53-64 in 2008, 54-63 in 2004, and 52-68 in 2008. (PCR3. Vol. 24, at 66). In addition to the WAIS-III, Dr. Weinstein also administered the Bateria Woodcock Munoz (scored 45-51) and the C-TONI (scored 44), both of which produced scores that were consistent with the WAIS-III and other previous intelligence testing results. (PCR3. Vol. 24, at 50-51). Based upon those results, Dr. Weinstein testified Mr. Rodriguez met the criteria of the first prong of Florida's statutory definition of intellectual disability. (PCR3. Vol. 24, at 51).

Dr. Weinstein considered and rejected the possibility Mr. Rodriguez had malingered on his intelligence testing. (PCR3. Vol. 24, at 51-52). Dr. Weinstein based this conclusion on the results from several tests he had administered to Mr. Rodriguez designed to gauge whether Mr. Rodriguez was putting forth good effort.

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[1] As further support for this practice, Dr. Weinstein explained how there are serious issues with the Mexican norms for the WAIS-III because "[t]hey simply have too many errors," which result in inaccurate scores not reflective of an individual's actual IQ. (PCR3. Vol. 24, at 47-49).

Mr. Rodriguez's results on two tests—the Test of Memory Malingering (TOMM) and the Rey 15-Item test—showed that he had indeed put forth good effort. (PCR3. Vol. 24, at 52). Dr. Weinstein then drew upon those test results, along with the consistency of the scores Mr. Rodriguez had achieved across the various administrations of the WAIS and other intelligence testing to determine that Mr. Rodriguez was not malingering. (PCR3. Vol. 24, at 65-67).

In addition to subaverage intellectual functioning, Dr. Weinstein testified Mr. Rodriguez also possessed significant deficits in adaptive behavior and that these deficits most likely had existed since birth. (PCR3. Vol. 24, at 74). However, Dr. Weinstein explained that Mr. Rodriguez's incarceration on death row made it difficult to utilize standardized instruments to gauge Mr. Rodriguez's everyday functioning and hamstrung his ability to speak with individuals typically relied upon in the clinical diagnostic setting such as peers, family members, and employers who would normally have the opportunity to observe Mr. Rodriguez's functioning day-to-day. (PCR3. Vol. 24, at 68-69). Given the circumstances, Dr. Weinstein noted a retrospective evaluation was therefore appropriate and what he relied upon in conducting Mr. Rodriguez's evaluation. (PCR3. Vol. 24, 69-70).

Dr. Weinstein assessed Mr. Rodriguez's adaptive behavior through reliance upon multi-sourced information, reviewing interviews conducted with relatives, friends, schoolteachers, and ex-girlfriends who knew Mr. Rodriguez in Cuba, along with interviews of individuals who knew Mr. Rodriguez during his time in Florida. (PCR3. Vol. 24, at 71-72). Dr. Weinstein drew upon this information to develop a

reliable background of Mr. Rodriguez's life beyond just self-reports and evaluations. Based upon these various sources, Dr. Weinstein opined that Mr. Rodriguez exhibited deficits in his communication skills, social and interpersonal skills, and academic skills. (PCR3. Vol. 24, at 74-76, 78-79).

Dr. Weinstein noted Mr. Rodriguez's social limitations throughout his life—how he exhibited poor judgment and an inability to perform any sophisticated work beyond very limited, menial tasks. (PCR3. Vol. 24, at 75). He also noted his poor-to-nonexistent academic skills reflected in his inability to construct proper sentences when speaking, his inability to recite the alphabet, and his limited writing ability. (PCR3. Vol. 24, at 78-79). Despite the fact Mr. Rodriguez exhibited some adaptive strengths in the social skills domain such as getting a license, getting married, and engaging in maladaptive behavior through the sale and trafficking of illegal drugs, Dr. Weinstein testified those behaviors were not relevant in assessing adaptive deficits for purposes of intellectual disability. (PCR3. Vol. 24, at 76-78). Based upon the assessment he conducted adhering to accepted clinical diagnostic practices, Dr. Weinstein opined that Mr. Rodriguez possessed adaptive deficits sufficient to satisfy the second prong of Florida's definition of intellectual disability. (PCR3. Vol. 24, at 79).

Last, relying upon his retrospective evaluation, Dr. Weinstein concluded that Mr. Rodriguez had exhibited adaptive deficits prior to the age of eighteen as required under the law. (PCR3. Vol. 24, at 81). Given that Mr. Rodriguez had met the requirements for all three prongs under Florida's diagnostic framework, Dr.

Weinstein ultimately concluded Mr. Rodriguez satisfied the statutory definition for intellectual disability. (PCR3. Vol. 24, at 81).

Mr. Rodriguez also presented the testimony of Dr. Marc Tassé, a licensed psychologist with a specialization in developmental disability and one of the co-authors of the *User's Guide* to the Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text Rev. 2000) (DSM-IV-TR). (PCR3. Vol. 26, at 269). Dr. Tassé explained that the DSM-IV-TR, (published by the American Psychiatric Association (APA), is the manual for all psychopathology mental disorders. The DSM-IV-TR and the then-current-edition of the American Association on Mental Retardation's (AAMR) [2] diagnostic manual comprised the authorities within the field responsible for advising and defining the most current clinical definition of intellectual disability. (PCR3. Vol. 26, at 267). He further explained that the recommendations regarding the diagnostic criteria within the manual are based upon extensive research from multiple sources and that the manual was authored by an interdisciplinary committee of educators, psychologists, attorneys, and physicians all responsible for reviewing the most current literature and research on the subject. (PCR3. Vol. 26, at 269). Dr. Tassé confirmed that the definitions of intellectual disability contained within both manuals were substantially consistent with the definition for intellectual disability under Florida law, as well as those utilized in other *Atkins*-type hearings in which he had participated throughout the country. (PCR3. Vol. 26, at 272).

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[2] Since the time of the evidentiary hearing in 2009, the AAMR has since been renamed as the American Association on Intellectual and Developmental Disabilities (AAIDD).

Dr. Tassé explained that intellectual disability is a lifelong condition that impacts the affected individual. (PCR3. Vol. 26, at 272-73). The concept of intelligence refers to cognitive ability, such as planning, reasoning, and learning from experience, and it is a fairly stable trait that is consistent over time. (PCR3. Vol. 26, at 273-74). In order to properly assess an individual's intelligence for purposes of diagnosing intellectual disability, the standard practice within the clinical field requires administration of one of the generally accepted intelligence tests by a licensed and trained psychologist. (PCR3. Vol. 26, at 274-75). When conducting such testing, Dr. Tasse testified, clinical judgement in selecting the appropriate tests based upon culture becomes critical. (PCR3. Vol. 26, at 276). And while there are potential risks for malingering on such tests exists, consistent malingering over a period of time is difficult to achieve. (PCR3. Vol. 26, at 276). As. Dr. Tassé explained, where there is a pattern of consistent scores "that's usually a pattern [of a fair] assessment of [a] person's true IQ or adaptive behavior." (PCR3. Vol. 26, at 277).

In order to properly assess adaptive functioning, the generally accepted practice is to utilize multiple sources of information, including interviews of the respondent, family members, parents, teachers, employees, and other sources who can provide information about the individual's everyday behavior, which, along with review of school, medical, and employment records, can provide information about the person's adaptive behaviors. (PCR3. Vol. 26, at 277-78). Because intellectual disability is such a large, diverse condition, Dr. Tassé explained that many individuals who are intellectually disabled can—and most often do—possess adaptive

strengths alongside deficits in behavior. (PCR3. Vol. 26, at 278-79). For this reason, Dr. Tassé stressed that when making a diagnosis of intellectual disability, it is important to understand that it is a functional definition in the DSM which does not include exclusionary criteria. (PCR3. Vol. 26, at 279-80). In other words, if an individual meets the criteria of the clinical definition of intellectual disability, that individual is still intellectually disabled regardless of any adaptive strengths. (PCR3. Vol. 26, at 280. It for this reason that behaviors which are maladaptive, such as stealing, are not relevant to the assessment of adaptive deficits. (PCR3. Vol. 26, at 280-81).

When dealing with individuals like Mr. Rodriguez who were not diagnosed prior to the age of eighteen, Dr. Tassé testified the proper technique within the professional community requires use of a retrospective diagnosis and reliance upon multiple sources of information to validate the convergence of data. (PCR3. Vol. 26, at 282). Where the assessment involves an incarcerated individual, Dr. Tassé testified the need for a retrospective evaluation is even more important since there is only a very narrow range of behavior that an evaluator can choose from to assess adaptive functioning. (PCR3. Vol. 26, at 282-83); *see also User's Guide* at 18-22. For that reason, the standardized tests that have been developed within the field for use as part of the clinical diagnostic framework were not normed or developed for use in prison settings, nor were they developed to rely upon respondents such as prison staff to assess an individual's adaptive functioning. (PCR3. Vol. 26, at 284).

Dr. Oakland, a psychologist and the author and co-creator of the Adaptive

Behavior Assessment System (ABAS), also testified at the 2009 hearing. Consistent with Dr. Tassé, Dr. Oakland testified that the DSM-IV-TR was the primary diagnostic manual utilized within the field of clinical psychology and additional fields such as social work to diagnose disorders. (PCR3. Vol. 26, at 334-35). He further explained that the DSM-IV-TR, utilizing an earlier definition of adaptive behavior, identified ten adaptive skills areas with a diagnosis of intellectual disability requiring significant limitations in at least two. (PCR3. Vol. 26, at 340). Comparatively, Dr. Oakland explained that the AAIDD classifies adaptive behavior into three broad domains: practical, social, and conceptual. (PCR3. Vol. 26, at 339). Like Dr. Tassé, Dr. Oakland testified that under both the DSM-IV-TR and the AAIDD manual, the diagnostic criteria are functional such that a person could have a number of strengths within the identified skill areas/domains, yet still fulfill the criteria set forth in the intellectual disability definition. (PCR3. Vol. 27, at 423-24). Dr. Oakland then explained that the ABAS is one of the primary instruments utilized by clinicians to properly assess an individual's skill areas within those domains to determine adaptive functioning. (PCR3. Vol. 26, at 341).

In creating the instrument, Dr. Oakland explained that one of the essential steps in establishing its reliability was the process of norming the test to ensure an accurate assessment of an individual's adaptive functioning relative to the population against which it is being compared. (PCR3. Vol. 26, at 343-44). During this process, the ABAS was not normed against incarcerated individuals due to the small sample size relative to the population and the fact that no scales widely used within the

clinical practice of psychology included such individuals. (PCR3. Vol. 26, at 346-47). When assessing adults raising an *Atkins* defense, Dr. Oakland testified that clinicians should use the ABAS in conjunction with a retrospective evaluation of behavior prior to the age of eighteen. (PCR3. Vol. 26, at 350-51).

Dr. Oakland further explained that when drafting the ABAS, formalized protocols were created for administration of the instrument. (PCR 3. Vol. 26, at 345). Individuals selected to rate a subject's behaviors listed within each of the domains should only do so if they have seen the behaviors in question displayed over an extended period of time and in a variety of settings. (PCR3. Vol. 26, at 357-60). Thus, selection of respondents to fill out the ABAS forms is highly important and dictates the overall validity of the results obtained by the clinician. (PCR3. Vol. 26, at 360-62). For those reasons, it is imperative that clinicians first speak with the respondents at length to gauge the extent of their knowledge about the test-subject and their exposure to the subject's every-day-behavior. (PCR3. Vol. 26, at 362). In situations where the subject is on death row, Dr. Oakland testified that this requirement becomes even more critical. (PCR3. Vol. 26, at 372).

In Mr. Rodriguez's case, Dr. Oakland reviewed ABAS questionnaires that the State's expert, Dr. Suarez, provided to several prison guards and employees to assess Mr. Rodriguez's adaptive functioning. From his review, Dr. Oakland found several of the questionnaires invalid due to the high number of guesses. (PCR3. Vol. 27, at 394-97, 399, 401-07). Under such circumstances, Dr. Oakland explained that the ABAS questionnaires were not reliable reflections of Mr. Rodriguez's adaptive functioning.

(PCR3. Vol. 27, at 407, 412).

In addition to the three expert witnesses, Mr. Rodriguez also presented testimony from several prison guards and Department of Corrections employees, as well as two individuals who knew him prior to his incarceration. The prison guards' testimony was consistent in confirming that they had been instructed to fill out ABAS questionnaires by Dr. Suarez and that while they all had the opportunity to observe Mr. Rodriguez's behavior daily as part of their duties to varying degrees, many of the responses they provided on the forms were, for the most part, conjecture or "guesses" and not based on personal knowledge. (PCR3. Vol. 28, at 529-33; 575-78; 583-84; 601-02). The two additional DOC employees that testified, "psychological specialists" Lisa Wiley and Jennifer Sagle (both with no clinical training in assessing intellectual disability), said they did not believe Mr. Rodriguez to be intellectually disabled but that his behavior during their interactions with him had been wildly inappropriate, with Mr. Rodriguez exposing himself on several occasions and masturbating openly in front of them. (PCR3. Vol. 22, at 27, 63). Last, the two lay witnesses who knew Mr. Rodriguez prior to his incarceration confirmed that he had struggled during his life with everyday tasks, routinely requiring assistance with simple things such as ordering meals and managing money. (PCR3. Vol. 22, at 151-52; Vol. 23, at 216-18). In sum, all of the lay witnesses that Mr. Rodriguez called to testify confirmed that his ability to comport himself in completing routine, day-to-day tasks was compromised to varying degrees.

In rebuttal, the State presented testimony from Dr. Suarez and one lay

witnesses. The State's expert Dr. Suarez, a psychologist and non-board-certified neuropsychologist (PCR3. Vol. 29, at 793), testified Mr. Rodriguez failed to meet the statutory criteria for intellectual disability under Florida law. (PCR3. Vol. 29, at 792). In evaluating Mr. Rodriguez's IQ, Dr. Suarez opted to utilize the Spanish WAIS-III because he believed it was more "in line with the culture and background of someone who lived in Cuba." (PCR3. Vol. 29, 736-37, 751). And contrary to Dr. Weinstein, Dr. Suarez elected to utilize the Spanish norms for the test, not those developed with the United States population. (PCR3. Vol. 29, at 737). Dr. Suarez explained that his reasoning for doing so was because of "Norm Reference Testing," which requires that the norm developed for the particular test administered be utilized. (PCR3. Vol. 29, at 738-39). Additionally, Dr. Suarez cited purported concerns with the Mexican WAIS-III norms, which constitute an "over representation of more educated people that they define as people with ninth grade level [education] or above," and "[b]ecause of that, the test [has] a tendency . . . to underestimate people in lower ranges of IQ." (PCR3. Vol. 29, at 751).

On the WAIS-III Dr. Suarez administered, Mr. Rodriguez obtained a full-scale score of 60, with a verbal score of 70, and a non-verbal score of 58.3. (PCR3. Vol. 29, at 739). Dr. Suarez noted, however, that one of Mr. Rodriguez's scores on the verbal testing was in the high range while the rest were low to extremely low, thus raising concerns to him about the validity of the testing. (PCR3. Vol. 29, at 739-40). Ultimately, Dr. Suarez discounted the IQ scores Mr. Rodriguez received on his administration of the WAIS-III, as well as all prior testing, on the basis that he

believed Mr. Rodriguez was malingering to feign exaggeratedly low scores. (PCR3. Vol. 29, at 757-58). Dr. Suarez based this opinion on his administration of three tests to Mr. Rodriguez—the Dot Counting Test, the Validity Indicator Profile Test (VIP), and the Minnesota Multiphasic Personality Inventory-II (MMPI-II)—which he averred showed Mr. Rodriguez was not putting forth full effort, or in some cases, misrepresenting answers. (PCR3. Vol. 29, 740-50).

With respect to adaptive functioning, Dr. Suarez opined that records he reviewed all supported the opinion that Mr. Rodriguez did not suffer from any significant adaptive deficits. (PCR3. Vol. 29, at 790). Dr. Suarez arrived at this conclusion after reviewing documents from Mr. Rodriguez's past and current incarceration. (PCR3. Vol. 29, at 700-01, 709). He noted that these records indicated Mr. Rodriguez had self-reported on different occasions to prison officials and/or law enforcement that he had been employed at various times as a carpenter, a restaurant manager, an electrician, a roofer, a painter, a taxi driver, and a narcotics trafficker. (PCR3. Vol. 29, at 710-13, 716-19). Dr. Suarez also pointed to the fact Mr. Rodriguez had been capable at various times of owning and financing several luxury cars and expensive jewelry, as well as the fact that he had traveled internationally and even purchased a home.[3] (PCR3. Vol. 29, at 721-22, 765, 770). The ability to engage in these behaviors, according to Dr. Suarez, ruled out any questions as to deficits in Mr. Rodriguez's communication, interpersonal, and conceptual skills.[4]

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[3] Dr. Suarez testified that the corroboration of this information came from "depositions of some of the witnesses," as well as Mr. Rodriguez's statement in a police report. (PCR3. Vol. 29, at 722).

[4] In addition to these areas of perceived adaptive strengths, Dr. Suarez

Regarding the third prong of Florida's definition of intellectual disability, Dr. Suarez opined that Mr. Rodriguez did not experience onset of any significant limitations in his adaptive behavior prior to the age of eighteen. (PCR3. Vol. 29, at 790-91). Based upon his determination that there was an absence of evidence establishing any of the three prongs, Dr. Suarez ultimately opined that Mr. Rodriguez was not intellectually disabled. (PCR3. Vol. 29, at 792).

Following the evidentiary hearing, the circuit court issued and order denying relief on December 31, 2010. (PCR3. Vol. 20, at 3644-97). The court determined that Mr. Rodriguez failed to establish he was intellectually disabled where he had not presented clear and convincing evidence as to prong 1 (the IQ component) and prong 2 (the adaptive deficits component), and there was nothing to suggest an onset of any deficits before the age of eighteen. The court reached this determination based upon its factual findings that the results from Dr. Weinstein's IQ testing were not reliable and that there were no valid test results establishing Mr. Rodriguez's IQ was less than 70 where he had malingered on the WAS-III administered by Dr. Suarez that had produced a full-scale score of 60. (PCR3. Vol. 20, at 3695-96). The court further determined that, notwithstanding the issues with the IQ scores, there was also absolutely no evidence Mr. Rodriguez exhibited deficits in his adaptive behavior or that they manifested before the age of 18. (PCR3. Vol. 20, at 3696). The court's order

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testified he was also basing his opinion as to Mr. Rodriguez's lack of adaptive deficits on Mr. Rodriguez's involvement in "criminal activity of home invasions, stealing from other drug dealers, and this kind of thing." (PCR3. Vol. 29, at 723). Like other areas, he had obtained this information from police reports. (PCR3. Vol. 29, at 723).

provided no further analysis as to what it was relying upon to determine that any of the prongs had not been established and did not address the clinical authority relied upon by Mr. Rodriguez. *See State v. Rodriguez*, Order, Case No. F88-18180B at 52-53 (Fla. 11th Cir. Dec. 31, 2010).

2. Subsequent State Court Postconviction Proceedings

On appeal to the Florida Supreme Court, Mr. Rodriguez argued the circuit court erred in failing to consider accepted practices within the medical and scientific community when rendering its assessment of the evidence. Specifically, Mr. Rodriguez averred that the court's findings were contrary to diagnostic criteria for testing intellectual functioning and assessing adaptive behavior in violation of this Court's holding in *Atkins*. The Florida Supreme Court issued a one-page order denying Mr. Rodriguez's claim. Without further detail, the court determined that there was no evidence Mr. Rodriguez had ever established a reliable IQ score of 70 or below, nor was there evidence he exhibits adaptive deficits. *Rodriguez v. State*, Order, Case No. SC11-202 (Feb. 6, 2013). Given those determinations, the Florida Supreme Court concluded that the circuit court's findings were supported by competent substantial evidence and affirmed its finding that Mr. Rodriguez is not intellectually disabled. *Id.*

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD REVIEW THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE IT STANDS IN STARK CONTRAST TO THIS COURT'S PRECEDENT AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. RODRIGUEZ'S SENTENCE OF DEATH IS UNCONSITUTIONAL WHERE EVIDENCE

ESTABLISHING HE IS INTELLECTUALLY DISABLED HAS BEEN IMPERMISSIBLY DISCOUNTED IN CONTRAVENTION OF WELL-ESTABLISHED CLILNICAL DIAGNOSITIC PRACTICES IN VIOLATION OF *ATKINS V. VIRGINIA* AND HIS RIGHT TO A RELIABLE AND ACCURATE DETERMINATION AS TO WHETHER HE IS INTELLECTUALLY DISABLED AND THUS INELIGIBLE FOR THE DEATH PENALTY.

A. Introduction

The issue presented in this case concerns the constitutionality of the denial of a capital defendant's intellectual disability claim where it is predicated upon disregard for well-established clinical practices such that it amounts to an unreasonable application of *Atkins*. Mr. Rodriguez's IQ and adaptive deficits, when properly evaluated under prevailing clinical and medical standards, establish that he is intellectually disabled and ineligible for death pursuant to *Atkins*. The Florida courts' dismissal of his consistent scoring on IQ testing over time—placing him below the requisite threshold for sub-average intellectual functioning—and their rejection of evidence of adaptive deficits in favor of focusing on his adaptive strengths, is in direct contravention of well-established clinical diagnostic practices and this Court's edict since *Atkins* that science must inform a state court's determination of intellectual disability. The Florida courts' failure to permit widely accepted diagnostic criteria to inform their determination of Mr. Rodriguez's *Atkins* claim denied Mr. Rodriguez his substantive his right to a fair opportunity to show the Constitution prohibits his execution under the Eighth Amendment. *See Hall v. Florida*, 572 U.S. 701, 724 (2014).

In affirming the denial of habeas relief, the Eleventh Circuit rejected Mr.

Rodriguez's *Atkins* claims on the basis he was incapable of establishing an unreasonable application of clearly established federal where this Court's holding in *Atkins* had not required state courts to "defer to scientific understandings" in any specific way. *Rodriguez v. Sec'y*, 818 F. App'x. 945, 960 (11th Cir. 2020). The Eleventh Circuit panel reasoned that this Court's decisions in *Hall v. Florida*, 572 U.S. 701 (2014); *Brumfield v. Cain*, 576 U.S. 305 (2015); and *Moore v. Texas*, 137 S. Ct. 1039 (2017)—and this Court's recognition in those cases that states must be guided by clinical authority in rendering *Atkins* determinations—could not support a finding the Florida Supreme Court had unreasonably applied clearly established federal law where the decisions in those cases had yet to be decided at the time Mr. Rodriguez's *Atkins* was denied in the Florida state courts. *Id.* (citing *Shoop v. Hill*, 139 S. Ct. 504, 507 (2019); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The Eleventh Circuit further determined that Mr. Rodriguez had also failed to rebut the Florida Supreme Court's factual determinations that he is not intellectually disabled by clear and convincing evidence where the evidence in the record supported the findings and reasonable minds reviewing the record could agree with the decision to trust Dr. Suarez's judgment instead of Dr. Weinstein's. *Id.* Because the Eleventh Circuit's consideration of Mr. Rodriguez's intellectual disability claims cannot withstand scrutiny under this Court's well-established *Atkins* jurisprudence, certiorari to the Eleventh Circuit Court of Appeals is warranted.

B. Unreasonable application of clearly established federal law under *Atkins v. Virginia*

In finding that Mr. Rodriguez could not establish an unreasonable application

of clearly established federal law under § 2254(d)(1), the Eleventh Circuit improperly ignored that the understanding that clinical authority should inform state courts consideration of *Atkins* claims emanated from this Court's decision in *Atkins v. Virginia,* 536 U.S. 304 (2002), and was, for purposes of AEDPA, clearly established federal law at the time of the Florida Supreme Court's denial of Mr. Rodriguez's *Atkins* claim. This Court's decision in *Atkins* declared a rule of general application for evaluating a myriad of factual contexts. *See Chaidez v. United States,* 568 U.S. 342, 348 (2013); *see also Hill v. Humphrey,* 662 F.3d 1335, 1379 (11th Cir. 2011) (Wilson, J., dissenting) (recognizing *Atkins* announced a general standard). While *Atkins* did not define how intellectual disability was to be evaluated, this Court's holding in *Atkins* did make clear that state statutory definitions of intellectual disability "generally conform[ed] to the clinical definitions." *Atkins,* 536 U.S. at 317, n.22. And while this Court's decision in *Atkins* gave states discretion to craft the procedures for determining intellectual disability, it never gave courts unfettered authority to disregard the medical community's diagnostic framework when defining the full scope of this constitutional protection. *See Hall,* 572 U.S. at 719; *Moore,* 137 S. Ct. at 1048-49, 1052-53; and *Brumfield,* 576 U.S. at 309. This precept is rooted in this Court's original pronouncement in *Atkins* that the execution of the intellectually disabled under the Eighth Amendment was unconstitutional and no longer tolerable where it failed to reflect "evolving standards of decency" and the reality that a consensus existed within state legislatures and courts against imposition of such a harsh penalty against those individuals. *Atkins,* 536 U.S. at 321. *Atkins,* at its base,

stood for the recognition that these standards change over time and that courts are required to consider them when determining the issue of intellectually disability and its bar against imposition of the death penalty.

This Court's subsequent decisions in *Hall*, *Moore*, and *Brumfield* stood for nothing less than the acknowledgement that clinical consensus is, and since *Atkins* has been, relevant and must inform courts when evaluating defendants' intellectual disability claims. *Hall*, 572 U.S. at 710. As this Court noted in *Hall*, the clinical definitions of intellectual disability "were a fundamental premise of *Atkins*," and "*Atkins* . . . provide[s] substantial guidance on the definition of intellectual disability." *Id.* at 721. Thus, as this Court has repeatedly recognized, courts are not permitted "leave to diminish the force of the medical community's consensus." *Moore*, 137 S. Ct. at 1044. These decisions did not introduce novel or previously unannounced legal principles; rather, they signified the continued embrace of the understanding that this Court's Eighth Amendment jurisprudence and review of intellectual disability claims are guided and informed by the evolving standards of decency that mark the progress of a maturing society. *Atkins*, 536 U.S. at 321 (holding that in light of "evolving standards of decency," executing the intellectually disabled violates the Eighth Amendment's ban on cruel and unusual punishment); *see also Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

These same principles held true and were as equally applicable to Mr. Rodriguez's postconviction proceedings in the Florida courts when he was litigating his *Atkins* claims from 2004-2013. Despite this fact, when the Florida state courts'

evaluated Mr. Rodriguez's claim for *Atkins* relief, they refused to permit clinical authority to inform their findings as to whether he had established the requisite criteria under § 921.137(1), Fla. Stat., and Fla. R. Crim. P. 3.203. In doing so, the Florida courts rejected evidence presented by Mr. Rodriguez that was supported by clinical authority establishing he possesses subaverage intellectual functioning and significant deficits in his adaptive behavior.[5]

In denying relief, the Eleventh Circuit, like the Florida state courts below, refused to acknowledge that the understanding that state courts should informed by clinical authority when assessing intellectual disability claims originated with this Court's decision in *Atkins*. While the Eleventh Circuit noted this Court had referenced in *Atkins* the fact the state statutory definitions and the clinical definition of intellectual disability were, at the time, consistent with one another, it ignored the underlying premise in that reference—that state statutory definitions should continue to be informed by clinical authority when assessing intellectual disability. *Id.* at 960 (citing *Shoop v. Hill*, 139 S. Ct. 504, 507 (2019) (citing *Atkins*, 536 U.S. at 308 n.3, 371 n.22)). Rather than do so, the Eleventh Circuit discounted this Court's reference to clinical authority as nothing more than mere footnotes that "did not 'clearly establish' states had to defer to scientific understandings. 28 U.S.C. § 2254(d)(1)." *Id.*

To be clear, Mr. Rodriguez has never asserted clearly established federal case

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[5] No merits ruling on Florida's third prong of the definition of intellectual disability, regarding onset prior to the age of eighteen, was ever provided by either the postconviction circuit court or the Florida Supreme Court. *See* § 921.137(1), Fla. Stat.

law mandates state courts "*defer to scientific understandings*," only that this Court's decision in *Atkins* established state courts were not free to disregard science and clinical practices entirely as was done in Mr. Rodriguez's case. No Supreme Court jurisprudence supports the view that *Atkins* determinations rendered in outright rejection of clinical authority are permissible as a matter of law—a point this Court's decisions in *Hall*, *Moore*, and *Brumfield* reiterated in scenarios where state courts had failed to provide capital defendants with adequate protections to ensure that those who are intellectually disabled not face execution. That understanding, that state courts should continue to inform themselves of clinical authority, did not somehow lie dormant in the time period between *Atkins* and this Court's subsequent decisions in *Hall*, *Brumfield* and *Moore*. Contrary to the Eleventh Circuit's view, the understanding that state court determinations of *Atkins* claims should be guided and informed by clinical authority is, and has always been since the time of *Atkins*, a guiding principle in state law intellectual disability determinations under the Eighth and Fourteenth Amendments.

To the extent the Eleventh Circuit relies upon this Court's decision in *Shoop v. Hill*, 139 S. Ct. 504 (2019), to support its determination that Mr. Rodriguez is incapable of establishing an unreasonable application of clearly established federal law, that reliance is also unavailing. *Shoop* is not dispositive of Mr. Rodriguez's *Atkins* claim. *Shoop* concerned the re-litigation bar of 28 U.S.C. § 2254(d)(1) and the manner in which the Sixth Circuit Court of Appeals improperly granted relief under § 2254(d)(1) where the record reflected that the *Atkins* portion of the petitioner's

habeas petition had not focused on that provision. This Court reversed the grant of relief based upon its determination that the Sixth Circuit had inadequately explained how the Ohio state court practices had violated the clearly established federal law of *Atkins* under § 2254(d)(1). *Shoop*, 139 S. Ct. at 508 ("Although the Court of Appeals asserted that the holding in *Moore* was 'merely an application of what was clearly established by *Atkins*,' the court did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.'" (citation omitted)).

This Court's reasoning in *Shoop* was premised on adherence to the pleading requirements under AEDPA and the limitations on granting habeas relief under § 2254(d). In addressing these restrictions, this Court noted that while the petitioner "argued at one point in time that certain unidentified 'procedures' used by the state courts in making the relevant decisions 'violated clearly established federal law of *Ford/Panetti/Atkins*,' the petition plainly did not encompass his current argument that the Ohio Court of Appeals unreasonably applied clearly established law under *Atkins* by overemphasizing adaptive strengths and improperly considering his prison behavior." *Id.* at 508 n.2 (citation omitted). And this Court further noted that in the absence of such argument, the Sixth Circuit's reliance upon the express language in *Moore* (regardless of whether the court's opinion directly cited it as authority) to support its finding that the decision below was an unreasonable application of clearly established federal law was in error. *Id.* at 507-08. Thus, while this Court reversed the granting of *Atkins* relief based upon the determination that the Sixth Circuit

improperly relied upon *Moore* as clearly established federal law under § 2254(d)(1), it did so, in part, because the petitioner failed to assert argument in his prior pleadings below that the state court's improper assessment of adaptive functioning valuing adaptive strengths over deficits was contrary to or an unreasonable application of law under § 2254(d)(1).

The factual and procedural scenario in Mr. Rodriguez's case is entirely different. Mr. Rodriguez has consistently pled throughout his state and federal court litigation that the Florida courts improperly assessed the evidence of his IQ and adaptive functioning in contravention of well-established clinical authority and therefore rendered determinations which were contrary to or an unreasonable application of *Atkins*. At his 2009 *Atkins* hearing, Mr. Rodriguez presented evidence establishing that established clinical practice supported both the IQ and adaptive behavior assessments performed in his case and that those assessments provided consistent, credible evidence that he was intellectually disabled under *Atkins*. He further presented argument in the Florida Supreme Court that the circuit court's denial of his intellectual disability claim was contrary to or an unreasonable application of the clearly established law under *Atkins* where it failed to account for well-established clinical authority.[6] Likewise, Mr. Rodriguez consistently advanced claims in his federal habeas litigation that the Florida state courts' failure to permit clinical authority to inform their assessment of the evidence establishing he is

[6] *See* Initial Br. of Appellant, *Rodriguez v. State*, 110 So. 3d 441 (2013) (unpublished table decision) (No. SC11-202); Initial Br. of Appellant, *Rodriguez v. State*, 219 So. 3d 751 (2017) (No. SC15-1795).

intellectually disabled was contrary to or an unreasonable application of clearly established federal law under *Atkins*.[7] And, both the District Court and the Eleventh Circuit analyzed Mr. Rodriguez's claims under both 28 U.S.C. § 2254(d)(1) and 28 U.S.C. § 2254(d)(2).[8] Thus, contrary to the Eleventh Circuit's view, the scenario presented to this Court in *Shoop* is in stark contrast to Mr. Rodriguez's where the re-litigation bar under AEDPA is not at issue—as it was contained in his original habeas petition—and he has consistently advanced his claim under § 2254(d)(1) that the Florida state courts' denial of his intellectual disability claim was an unreasonable application of clearly established federal law under *Atkins*.

Additionally, it also bears noting that on remand from this Court's decision in *Shoop v. Hill*, the Sixth Circuit granted Hill relief, holding that:

> [T]he Ohio courts' legal conclusions [had] breach[ed] the most basic tenets of *Atkins*, and . . . their factual findings cannot be sustained on this record. *Atkins*, on its most basic level, forbids the execution of persons who are intellectually disabled.

Hill v. Anderson, 960 F.3d 260, 281 (6th Cir. 2020), *vacated*, 964 F.3d 590 (6th Cir. 2020). The Sixth Circuit further held that "'the Ohio courts [had] failed to grapple

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[7] *See* Pet. for Writ of Habeas Corpus, *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, No. 13-24567 (S.D. Fla. Dec. 19, 2013), ECF No 1. (citing § 2254(d)(1)); Pet'r's Reply to Resp't's Resp. to Pet. for Writ of Habeas Corpus, *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, No. 13-24567 (S.D. Fla. Aug. 21, 2014), ECF No. 27 (citing § 2254(d)(1)); Initial Br. of Pet'r-Appellant, *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, No. 16-11258-P (11th Cir. May 11, 2017); Reply Br. of Pet'r., *Rodriguez v. Sec'y, Fla. Dept' of Corr.*, No. 16-11258-P (11th Cir. May 31, 2017).

[8] *See* Order Den. Pet. for Writ of Habeas Corpus at 16-21, 71-86, *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, No. 13-24567 (S.D. Fla. Jan. 4, 2016), ECF No. 35; *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 818 F. App'x 945, 960-62 (11th Cir. 2020).

with the evidence in the record indicating that Hill's perceived strengths were actually weaknesses.'"[9] *Id.* (quoting *Hill v. Anderson*, 881 F.3d 483, 495 (6th Cir. 2018), *vacated sub nom. Shoop v. Hill*, 139 S. Ct. 504 (2019)). Such is the scenario in Mr. Rodriguez's case. As Mr. Rodriguez has stated all along throughout the litigation of his claim for *Atkins* relief, the Florida courts' legal conclusions regarding both his subaverage intellectual functioning and his adaptive deficits flout the most basic tenets of *Atkins* in the manner which they rejected well-established clinical authority. The Florida courts' failure to meaningfully grapple with clinical authority when evaluating the evidence in the record establishing Mr. Rodriguez's subaverage intellectual functioning and adaptive deficits runs contrary to the very foundation of *Atkins*.

Contrary to the Eleventh Circuit's opinion, the Florida state courts unreasonably applied *Atkins* in denying Mr. Rodriguez relief. The Florida courts' failure to permit clinical authority to inform their evaluation of Mr. Rodriguez's intellectual disability claim resulted in the improper discounting of credible evidence establishing that he possesses subaverage intellectual functioning and adaptive deficits and that the onset of those deficits occurred prior to age eighteen. That failure to view science as relevant under *Atkins* is the misapplication of clearly established

[9] While the panel's opinion in *Hill* has since been vacated on the granting for rehearing en banc and is currently stayed pending en banc panel review, *Hill v. Anderson*, 964 F. 3d 590 (6th Cir. 2020), the Sixth Circuit's decision nonetheless remains relevant in Mr. Rodriguez's case in the manner which it evidences the lack of consensus amongst lower courts on this issue, thus warranting this Court's review on certiorari.

law in this case. Because the Eleventh Circuit's assessment of Mr. Rodriguez's claim is contrary to this Court's clearly established jurisprudence pursuant to *Atkins*, Mr. Rodriguez submits that this matter is worthy of certiorari review.

C. Unreasonable determinations fact under 28 U.S.C. § 2254(d)(2)

The Eleventh Circuit panel also determined that Mr. Rodriguez failed to rebut by clear and convincing evidence the presumption of correctness due the Florida Supreme Court's factual determinations under § 2254(d)(2). *Rodriguez*, 818 F. App'x at 961. As it did with its analysis under § 2254(d)(1), the Eleventh Circuit eschewed clinical authority in determining that the evidence in the state court record supported the finding Mr. Rodriguez is not intellectually disabled and that "'[r]easonable minds reviewing the record' could agree with the decision to trust Dr. Suarez's judgment instead of Dr. Weinstein's." *Id.* (alteration in original) (citation omitted). The Eleventh Circuit's opinion, however, improperly ignored that this case does not involve a credibility determination by the Florida courts between the evidence produced by two scientifically valid methods. The evidence presented at Mr. Rodriguez's 2009 *Atkins* hearing established that Dr. Suarez's evaluation and opinions were entirely unsupported by clinical authority and that Dr. Weinstein's testing and evaluation—which adhered to accepted clinical practices—produced accurate and reliable evidence establishing Mr. Rodriguez is intellectually disabled.

1. Subaverage intellectual functioning

Contrary to the Eleventh Circuit opinion, Dr. Weinstein's use of the Mexican WAIS-III was not "questionable because of cultural differences between Mexico and Cuba." *Rodriguez*, 818 F. App'x. at 961. At the time of Mr. Rodriguez's 2009 *Atkins*

hearing use it was generally understood that cultural accommodations were necessary when assessing individuals from varying cultural and linguistic backgrounds and underdeveloped countries or communities.[10] Under AAIDD guidelines, this required clinicians to attempt to assess an individual's cognitive and adaptive functioning within that person's culture of origin to the best extent possible. In instances where an individual from one culture or background was being evaluated against their acculturation to another culture or society, AAIDD guidelines also required clinicians to make appropriate cross-culture accommodations when selecting norming standards to evaluate the results. In Mr. Rodriguez's case, to account for these factors, Dr. Weinstein elected to utilize the Mexican WAIS-III consistent with accepted practices under both the AAIDD and APA. *See* Ruth, *supra,* at 238. (2015).

Similarly, Dr. Weinstein's utilization of the U.S. norms to score the results of Mr. Rodriguez's IQ testing also adhered to well-established clinical practices. Because Mr. Rodriguez was being evaluated to determine whether he was intellectually disabled under Florida law, that meant clinical authority required utilizing the U.S. norms to compare Mr. Rodriguez's WAIS-III test results to the other individuals representative of the population within the U.S. (PCR3. Vol. 24, p. 45-46). This application of the U.S. norming alternative to the Mexican WAIS-III was supported by clinical authority where there existed a wealth of issues with the Mexican norms,[11]

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[10] *See* Richard Ruth, *Consideration of Cultural and Linguistic Factors, in* Intellectual Disability and the Death Penalty 238 (Edward A. Polloway ed., 2015).

[11] *See* Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why U.S. Norms Should Be Used with*

including poor reliability, a lack of score normalization and meaningful reference population, exclusion of certain groups from the standardization sample, use of incorrect statistics and calculations, and incorrect application of the true score confidence interval method.[12] These issues led to a concern within the clinical field that use of the Mexican norms with the WAIS-III produced results which were riddled with so many errors they were essentially uninterpretable and meaningless. A point which Dr. Weinstein actually explained to the circuit court during the 2009 *Atkins* hearing. (PCR3. Vol. 24, at 48-49).

Clinical authority also widely dismissed the use of the validity testing relied upon by Dr. Suarez. The tests relied upon Dr. Suarez—the VIP, the Dot Counting Test, and the MMPI—were not appropriate for individuals with intellectual disabilities and were all actively discouraged by clinicians as being "highly suspect" when administered to assess whether an individual is faking an intellectual disability.[13] The testing manual for the VIP specifically stated it should not be used

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the Mexican WAIS-III in Capital Cases, 34 Psychol. Intell. & Dev. Disabilities 2 (2008); *see also* Stephen Greenspan & J. Gregory Olley, *Variability of IQ Test Scores*, *in* The Death Penalty and Intellectual Disability 145 (Edward A. Polloway ed., 2015; *see also, e.g.*, Pedro Sánchez Escobedo & Liz Hollingsworth, *Annotations on the Use of the Mexican Norms for the WAIS-III*, 16 APPLIED NEUROPSYCHOLOGY 223, 226 (2009) (discussing how "[i]t is a recognized fact that the Mexican norms are not to be used with special populations, such as people with major disabilities, those who are incarcerated, adults with brain damage, etc." and how "individuals with obvious [ID] . . . may be better assessed using the specialized American norms rather than the Mexican Norms").

[12] *See* Suen and Greenspan, *Serious Problems with the Mexican Norms for the WAIS-III when Assessing Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 214, 214-22 (2009).

[13] *See* Denis Keyes, & David Freedman, *The Death Retrospective Diagnosis and Malingering*, in The Death Penalty and Intellectual Disability 271 (Edward A.

for people who may be intellectually disabled.[14] The MMPI, which is an instrument typically administered by clinicians to diagnose for mental health disorders, was not designed to test for malingering or effort. And the Dot Counting Test, which is dependent on the recording of response times, is highly susceptible to inaccurate results.

Generally accepted clinical practices required that prior to the administration of any malingering instrument research should first be conducted to determine its appropriateness for use with a particular individual. Prior to determining the suitability of any tests for Mr. Rodriguez, however, Dr. Suarez failed to administer any form of academic achievement testing. He failed to do so, despite having access to Dr. Weinstein's test data indicating that Mr. Rodriguez's reading and writing ability were very low. In the absence of any information determining the suitability of specific validity instruments, Dr. Suarez then elected to rely upon tests such as the MMPI and VIP, despite their inappropriateness for someone with Mr. Rodriguez's limited education and poor reading comprehension

In the absence of any credible evidence that Mr. Rodriguez did not put forth good effort, the only valid conclusion should have been that Mr. Rodriguez possesses subaverage intellectual functioning. Mr. Rodriguez had produced consistent IQ scores over the course of several administrations of testing, with ranges of 59-69, 53-64, 54-63, and 52-68—all of which placed him well within the 70-or-below threshold cutoff for subaverage intellectual functioning. Those results were further corroborated by

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Polloway ed., 2015)

[14] Richard I. Frederick, *Validity Indicator Profile Manual* (1997).

both experts that testified at the 2009 *Atkins* hearing, with Dr. Weinstein's testing producing a full-scale score of 55-65 and Dr. Suarez's testing producing a full-scale score of 60. (PCR3. Vol. 24, at 50-51; Vol. 29, at 739-40).[15] Thus, at every turn where Mr. Rodriguez had been tested, there was evidence of consistent IQ scores placing Mr. Rodriguez below the threshold scoring cutoff for intellectual disability—a fact which Dr. Tasse explained established a corroboration of the scores and general support for their validity. (PCR3. Vol. 26 at 277).

In the face of the clinically backed evidence establishing Mr. Rodriguez suffers from subaverage intellectual functioning, no reasonable jurist could agree with the Florida courts' decision to discount that evidence. In agreeing with the Florida state courts' decision to trust Dr. Suarez's judgment, the Eleventh Circuit ignored that the only framework the Florida courts could utilize to support the finding that "there is no evidence . . . [Mr.] Rodriguez has ever had a reliable IQ score of 70 or below," *Rodriguez v. State*, 110 So. 3d 441 (2013) (unpublished table decision), is one that discards clinical authority in violation of *Atkins*. After excluding the unreliable and clinically unsupported information presented by Dr. Suarez's intellectual functioning evaluation (i.e. his malingering tests), the record establishes that there is clear and convincing evidence that Mr. Rodriguez has reliable scores establishing his low IQ consistent with a diagnosis of intellectual disability

2. Adaptive deficits

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[15] Dr. Weinstein further testified that he had also considered the possibility Mr. Rodriguez was malingering and rejected it based upon the results from the TOMM and Rey 15 item test. (PCR3. Vol. 24, at 52).

As it did with the IQ prong, the Eleventh Circuit opinion also improperly discounted clinical authority in assessing the adaptive behavior prong of Mr. Rodriguez's *Atkins* claim. Like the Florida courts below, the Eleventh Circuit opted instead to discount the evidence of Mr. Rodriguez's deficits in adaptive functioning in favor of reliance upon evidence of perceived strengths in direct contravention of well-established clinical authority. *See Moore*, 137 S. Ct. at 1050. (emphasizing that "the medical community focuses the adaptive-functioning inquiry on adaptive deficits."). This outright dismissal of clinical authority amounted to an unreasonable application of *Atkins*.

In finding that Mr. Rodriguez had failed to rebut the Florida state court findings by clear and convincing evidence, the Eleventh Circuit ignored the overwhelming evidence establishing Mr. Rodriguez possesses significant deficits in his adaptive functioning. Mr. Rodriguez's academic functioning and social skills are extremely limited and have been throughout his life. As a child Mr. Rodriguez suffered from delays in milestone developments and relating to other children his own age. (PCR3. Vol. 24, 74-75). He struggled with academics and had difficulty keeping up in school and as an early teenager, eventually being placed in classes for children who "couldn't learn." (PCR3. Vol. 24, at 75). He would often exhibit poor judgement and routinely have difficulty following the most basic of instructions. (PCR3. Vol. 24, at 75). As an adult Mr. Rodriguez continues to suffer from deficits in his social skills and regulating his behavior, often times addressing people inappropriately and engaging in sexually inappropriate behavior by gratuitously

exposing himself to others. (PCR3. Vol. 24, at 79-80). And his academic functioning remains extremely limited, with Mr. Rodriguez functioning at a sixth-grade level struggling with the ability to read and write, performing simple arithmetic, and engaging in basic problem solving. (PCR3. Vol. 24 at 78-80).

Despite establishing Mr. Rodriguez suffers from these significant deficits in his adaptive functioning, the Eleventh Circuit brushed that evidence aside, deferring instead to the Florida court's decision to credit the testimony from Dr. Suarez. The Eleventh Circuit ignored that Dr. Suarez's assessment lacked adherence to basic diagnostic criteria. The court ignored that Dr. Suarez failed to conduct a holistic review of Mr. Rodriguez's adaptive functioning, reviewing the broadest set of data possible and looking for consistency and convergence over time.[16] The Court failed to account for Dr. Suarez's failure to obtain corroborative information from collateral sources or interview anyone who knew Mr. Rodriguez prior to his incarceration, instead relying upon interviews with Florida Department of Corrections employees. *See Moore*, 137 S. Ct. at 1050 (noting that both the AAIDD-11 User's Guide and the DSM-5 instruct against relying on behavior in jail or prison). And the Eleventh Circuit discounted Dr. Suarez's improper reliance upon evidence of perceived adaptive strengths in contravention of clinical and constitutional standards. *See Moore*, 137 S. Ct. at 1052.

In contrast to Dr. Suarez, Dr. Weinstein's evaluation adhered to clinical

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[16] *See* AAIDD User's Guide, supra, at 46 ("It is sometimes necessary to assess the previous functioning of the individual in those situations where a diagnosis of ID become relevant. A retrospective diagnosis may be required, for example, when clinicians are involved in determining...sentencing eligibility questions.").

standards. It consisted of interviews with individuals who knew Mr. Rodriguez throughout his life and reviewed as many sources of corroborating information as possible. Consistent with established clinical practices, Dr. Weinstein's assessment acknowledged the clinical reality that adaptive functioning cannot be measured in a prison setting as the standardized diagnostic instruments are not normed for prison populations. (PCR3. Vol. 26, p. 283-84). For this reason, Dr. Weinstein considered both present-day functioning and whether deficits existed prior to Mr. Rodriguez's incarceration. *See* Keyes & Freedman, *supra*, at 263-74. Dr. Weinstein's holistic approach focused on obtaining family background and educational information and review of records of Mr. Rodriguez's functioning throughout his life. This approach enabled Dr. Weinstein to gather a more comprehensive collection of information regarding Mr. Rodriguez's behavior beyond just the restrictive prison setting.

Faced with evidence of these two vastly different assessments of Mr. Rodriguez's adaptive behavior, the Florida courts' election to disregard clinical authority and credit Dr. Suarez's testimony over Dr. Weinstein's was not reasonable. In finding that the court was bound to respect that determination, the Eleventh Circuit ignored that clinical authority must inform state courts' factual determinations of intellectual disability claims. The Eleventh Circuit failed to acknowledge that this Court has made clear that while courts are not required to adhere to "everything stated in the latest medical guide," they are not free to "disregard...current medical standards." *Moore*, 137 S. Ct. at 1049. The requisite findings for determining intellectual disability, including credibility determinations,

must be informed by the medical community's diagnostic framework. *Id.* Contrary to the Eleventh Circuit's opinion, the Florida courts' factual determinations regarding Mr. Rodriguez's adaptive functioning are inconsistent with this Court's decision in *Atkins* and cannot be sustained on the basis of the record below.

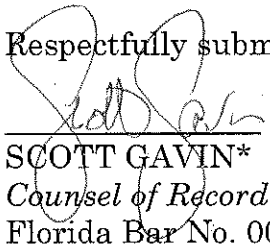
D. Conclusion

Given the record in Mr. Rodriguez's case, no reasonable juror would have been compelled to conclude Mr. Rodriguez failed to established evidence his is intellectually disabled. While AEDPA affords a presumption of correctness to state court factual determinations, *see Jackson v. Virginia,* 443 U.S. 3007 (1979), that presumption is not insurmountable. Even under the enhanced deference afforded state court credibility determinations under AEDPA that does not imply abandonment or abdication of judicial review. *Brumfield v. Cain,* 576 U.S. at 314, (citing *Miller-El v. Cockrell,* 537 U.S. 322, 349 (2003)). This Court's decision in *Atkins* never supported the resolution of credibility determinations in favor of methodologies that contradict clinical consensus. Had the Florida courts properly engaged with the evidence in the record establishing Mr. Rodriguez's subaverage intellectual functioning and adaptive deficits, they would have arrived at only one conclusion: Mr. Rodriguez is intellectually disabled and therefore categorically exempt from capital punishment. Because the opinion of the Eleventh Circuit panel does not comport with Supreme Court jurisprudence and misguidedly encourages state courts to disregard clinical authority, Mr. Rodriguez submits that this matter is worthy of certiorari review.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari to review the Eleventh Circuit Court of Appeals' decision affirming the District Court's denial of habeas corpus.

Respectfully submitted,



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