No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GUILLERMO OCTAVIO ARBELAEZ,

Petitioner,

v.

STATE OF FLORIDA, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

CAPITAL CASE

TODD G. SCHER
Assistant CCRC
Florida Bar No. 0899641
tscher@msn.com
**Counsel of Record*

COURTNEY M. HAMMER
Staff Attorney
Florida Bar No. 1011328
hammerC@ccsr.state.fl.us

Capital Collateral Regional Counsel – South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

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CAPITAL CASE

QUESTIONS PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth and Fourteenth Amendments preclude the execution of individuals with intellectual disability but left to the states the task of developing a mechanism to determine who falls within that category. In response to this directive, the Florida Supreme Court limited *Atkins*'s reach by imposing strict rules for establishing intellectual disability that this Court, in *Hall v. Florida*, 572 U.S. 701 (2014), later repudiated. In *Hall*, this Court found that the Florida Supreme Court had interpreted the state's statute in a manner that precluded courts from considering current medical practices and standards in evaluating the 3-pronged test for intellectual disability, in violation of the Eighth Amendment. Specifically, with regard to the adaptive functioning assessment, this Court made clear that such a determination, like the first prong, was to be informed by prevailing medical standards and practice.

In *Walls v. State*, 213 So. 3d 340 (Fla. 2016), the Florida Supreme Court held that this Court's decision in *Hall* applied retroactively in collateral proceedings. However, following a change in its composition, the Florida Supreme Court *sua sponte* receded from *Walls* and decided that *Hall* announced a new non-watershed rule and was therefore not retroactive. *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, 141 S. Ct. 2676 (2021).

This case presents the following question: whether *Hall*'s holding—that the 3-pronged test for assessing intellectual disability (not just the first prong of the test) must be informed by prevailing medical practice and standards—announced a new

rule of constitutional law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), as the Florida Supreme Court and the Eleventh Circuit Court of Appeals have held, or was instead simply an application of the rule of *Atkins* to particular facts, as Petitioner contends and all other courts of appeals' decisions conclude.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Guillermo Octavio Arbelaez, a death-sentenced individual in the State of Florida, was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent State of Florida, was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

LIST OF DIRECTLY RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following proceedings relate to the case at issue in this Petition:

Underlying Trial:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: March 14, 1991

Direct Appeal:
Florida Supreme Court, Case No. SC60-77668
Arbelaez v. State, 626 So. 2d 169 (Fla. 1993)
Judgment Entered: September 23, 1993
Rehearing Denied: November 17, 1993

Supreme Court of the United States, Case No. 93-8229
Arbelaez v. Florida, 511 U.S. 1115 (1994)
Judgment Entered: May 23, 1994

Initial Postconviction Proceedings:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: October 18, 1996

Florida Supreme Court, Case No. SC60-89375
Arbelaez v. State, 775 So. 2d 909 (Fla. 2000)
Remanded for Evidentiary Hearing: July 13, 2000
Rehearings Denied: October 19, 2000, and January 19, 2001

Initial Postconviction Proceedings on Remand:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgments Entered: September 12, 2002, and September 18, 2002

Florida Supreme Court, Case No. SC02-2284
Arbelaez v. State, 898 So. 2d 25 (Fla. 2005)
Judgment Entered: January 27, 2005
Rehearing Denied: March 18, 2005

State Habeas Proceedings:
Florida Supreme Court, Case No. SC03-1718
Arbelaez v. Sec'y, Fla. Dep't of Corr., 898 So. 2d 25 (Fla. 2005)
Judgment Entered: January 27, 2005

Rehearing Denied: March 18, 2005

All Writs Proceedings:
Florida Supreme Court, Case Nos. SC60-92288
Arbelaez v. Butterworth et al.., 738 So. 2d 326 (Fla. 1999)
Judgment Entered: June 17, 1999

Successive Postconviction Proceedings Pursuant to Fla. R. Crim. P. 3.203 and *Atkins*:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: August 5, 2005

Florida Supreme Court, Case Nos. SC05-1610
Arbelaez v. State, 950 So. 2d 413 (Fla. 2006) (unpublished table decision)
Remanded for Evidentiary Hearing: November 14, 2006
Rehearing Denied: January 29, 2007

Successive Postconviction Proceedings Pursuant to Fla. R. Crim. P. 3.203 and *Atkins* on Remand:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: May 7, 2010

Florida Supreme Court, Case No. SC10-1038
Arbelaez v. State, 72 So. 3d 745 (Fla. 2011) (unpublished table decision)
Judgment Entered: September 19, 2011

Supreme Court of the United States, Case No. 11-9334
Arbelaez v. Florida, 566 U.S. 954 (2012)
Judgment Entered: April 16, 2012

Petition for Extraordinary Relief, for Writ of Prohibition, and for Writ of Mandamus:
Florida Supreme Court, Case No. SC07-2225
Arbelaez v. State, 980 So. 2d 1070 (Fla. 2008) (unpublished table decision)
Judgment Entered: April 3, 2008

Second Successive Postconviction Proceedings:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: May 20, 2011

Florida Supreme Court, Case No. SC11-1207
Arbelaez v. State, 88 So. 3d 146 (Fla. 2012)
Judgment Entered: April 26, 2012

Federal Habeas Proceedings:
United States District Court for the Southern District of Florida, Case No. 12-23304-CIV
Arbelaez v. Sec'y, Fla. Dept. of Corr., 43 F. Supp. 3d 1271 (S.D. Fla. 2014)
Judgment Entered: August 20, 2014
Motion to Alter or Amend Denied: September 17, 2014

United States Court of Appeals for the Eleventh Circuit, Case No. 14-14647
Arbelaez v. Sec'y, Fla. Dep't of Corr., 662 F. App'x 713 (11th Cir. 2016)
Judgment Entered: October 12, 2016
Petition for Rehearing En Banc Denied: December 20, 2016

Supreme Court of the United States, Case No. 16-9288
Arbelaez v. Sec'y, Fla. Dep't of Corr., 583 U.S. 842 (2017)
Judgment Entered: October 2, 2017

Third Successive Postconviction Proceedings Pursuant to *Hall*:
Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida
State of Florida v. Guillermo Octavio Arbelaez, Case No. 88-5546
Judgment Entered: June 18, 2015

Florida Supreme Court, Case No. SC15-1628
Arbelaez v. State, 369 So. 3d 1141 (Fla. 2023)
Judgment Entered: May 25, 2023
Rehearing Denied: August 24, 2023

State Habeas Proceedings:
Florida Supreme Court, Case No. SC18-392
Arbelaez v. Sec'y, Fla. Dep't of Corr., 369 So. 3d 1141 (Fla. 2023)
Judgment Entered: May 25, 2023
Rehearing Denied: August 24, 2023

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Guillermo Octavio Arbelaez respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

CITATIONS TO OPINIONS AND ORDERS BELOW

The opinion of the Florida Supreme Court under review is reported as *Arbelaez v. State*, 369 So. 3d 1141 (Fla. 2023), and attached hereto as "Appendix A." The Florida Supreme Court's order denying Mr. Arbelaez's motion for rehearing is reported as *Arbelaez v. State*, 370 So. 3d 932 (Fla. 2023), and attached hereto as "Appendix B." The state circuit court order summarily denying Mr. Arbelaez's successive motion for postconviction relief is unreported but attached hereto as "Appendix C."

STATEMENT OF JURISDICTION

The Florida Supreme Court issued its opinion on May 25, 2023, and denied Mr. Arbelaez's timely Motion for Rehearing on August 24, 2023. On November 9, 2023, counsel sought an additional 60 days to prepare and file Mr. Arbelaez's Petition for Writ of Certiorari. On November 16, 2023, Justice Thomas extended the time in which to file this Petition by 30 days, up to and including December 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent 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[1]

I. INTRODUCTION

Mr. Arbelaez is intellectually disabled. He was diagnosed as such in accordance with prevailing professional criteria and accepted scientific methodology in the field. At every stage in his postconviction litigation, he has raised concerns about his intellectual functioning, and he has presented sound evidence demonstrating that he is categorically ineligible to be executed under a faithful application of this Court's precedents. Yet because the Florida courts refuse to conduct a scientifically valid, holistic assessment of his intellectual functioning in accordance with clinical norms, Mr. Arbelaez still sits on Death Row. Such a violation of federal constitutional law cries out for this Court's intervention.

II. PROCEDURAL HISTORY

Mr. Arbelaez was indicted by a grand jury in Miami-Dade County, Florida, on April 27, 1988, for the kidnapping and first-degree murder of Julio Rivas. (R. 1-2).

[1] Citations to the state court proceedings in this Petition shall be designated as follows: citations to the trial record shall be designated by "R" followed by the page number; citations to the appellate record from the various postconviction appeals in the Florida Supreme shall be designated as "PCR1," "PCR2," "PCR3," etc. All other citations shall be self-explanatory.

Trial commenced nearly three years later, and on February 19, 1991, the jury found Mr. Arbelaez guilty on both counts. (R. 217-18). A one-day penalty phase subsequently took place on March 4, 1991, and the jury returned an advisory recommendation of death that same day by a vote of eleven to one. (R. 238, 1056). On March 14, 1991, the trial court followed the jury's recommendation and sentenced Mr. Arbelaez to death. (R. 246-54). On direct appeal, the Florida Supreme Court affirmed both the convictions and sentences, including Mr. Arbelaez's sentence of death. *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993), *cert. denied*, 511 U.S. 1115 (1994).

Mr. Arbelaez thereafter sought postconviction relief in state court pursuant to Florida Rule of Criminal Procedure 3.850/3.851. (PCR1-Supp. 28-143, PCR1. 12-124). After the circuit court summarily denied relief, (PCR1. 346-79), the Florida Supreme Court reversed in part and remanded for an evidentiary hearing on his penalty phase ineffective assistance of counsel claim. *Arbelaez v. State*, 775 So. 2d 909, 912, 920 (Fla. 2000). Mr. Arbelaez's penalty phase ineffectiveness claim asserted, *inter alia*, that trial counsel failed to retain a competent mental health expert to investigate and present a wealth of mitigation to his jury and the court, including the fact that he is intellectually disabled with a significantly substandard IQ of 67.[2] *Id.* at 913; (PCR1. 49-54).

An evidentiary hearing was conducted in January 2002,[3] after which the state

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[2] In addition to having an IQ of 67, a composite assessment of Mr. Arbelaez's reasoning skills, including his conceptual, verbal, and language abilities, placed him in the range of a child who is 5 years and 11 months old. (PCR1. 52).

[3] Among the witnesses who testified was Dr. Ruth Latterner, the board-certified neuropsychologist who evaluated Mr. Arbelaez in 1995 and concluded that

circuit court denied relief. (PCR2-Supp. 14-41). The Florida Supreme Court affirmed. *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005).[4]

In the intervening months between the evidentiary hearing and the circuit court's order denying Mr. Arbelaez's postconviction motion, this Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), and held that the Eighth and Fourteenth Amendments to the United States Constitution preclude the execution of individuals with intellectual disability, leaving to the states the task of developing a mechanism to determine who falls within that category.[5] *Id.* at 317. While Mr.

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he suffers from mental retardation and organic brain syndrome, mixed. (PCR2. 700, 739). With respect to intellectual functioning, Dr. Latterner testified that she administered the Wechsler Adult Intelligence Scale (WAIS), which revealed a full-scale IQ of 67, with the breakdown being 66 for the verbal part and 71 for the performance part. (PCR2. 700-02). At that time, a full-scale score of 69 or below was classified as mentally retarded, or educable mentally retarded, which meant that the individual could live independently but still had deficits in cognitive functioning. (PCR2. 702-03).

[4] While the Florida Supreme Court found that "[t]he lack of serious and sustained effort by [trial] counsel to pursue mental health mitigation, despite various red flags indicating [Mr.] Arbelaez's low intelligence and his history of depression, amounted to deficient performance," the court held that Mr. Arbelaez had failed to prove prejudice. *Arbelaez*, 898 So. 2d at 33-38.

[5] Just prior to the circuit court order on the penalty phase ineffective assistance of counsel claim, Mr. Arbelaez filed a supplemental Rule 3.850 motion addressing aspects of *Atkins*, as well as this Court's then-recent decision in *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR2. 211-44). The circuit court denied Mr. Arbelaez's supplemental claims as untimely and procedurally barred. (PCR2. 245-47). On appeal, the Florida Supreme Court held that the lower court did not abuse its discretion in refusing to consider Mr. Arbelaez's supplemental *Ring* and *Atkins* claims given the limited nature of the evidentiary hearing and scope of remand. *Arbelaez*, 898 So. 2d at 42-43. Nonetheless, "[f]or purposes of efficiency," the Florida Supreme Court held that Mr. Arbelaez was not entitled to a jury determination of whether he is intellectually disabled as an element of capital murder under *Ring* and *Atkins*. *Id.* at 43. In regards to Mr. Arbelaez's *Atkins* claim, the court noted that "[t]he procedure for requesting such a determination is provided in Florida Rule of Criminal Procedure

Arbelaez's appeal to the Florida Supreme Court was pending, the court promulgated Florida Rule of Criminal Procedure 3.203, effective October 1, 2004, setting out procedures for defendants seeking to raise intellectual disability as a bar to their execution pursuant to *Atkins*. *See Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So. 2d 563 (Fla. 2004).

On November 30, 2004, Mr. Arbelaez timely filed a motion for postconviction relief regarding his intellectual disability and related legal issues. (PCR3. 5-24). The circuit court summarily denied the motion, (PCR3. 58-64); (Appendix G, at A25), and on appeal, and the Florida Supreme Court remanded for an evidentiary hearing pursuant to Florida Rule of Criminal Procedure 3.203 and *Atkins*. *Arbelaez v. State*, 950 So. 2d 413 (Fla. 2006) (unpublished table decision).

The evidentiary hearing on Mr. Arbelaez's *Atkins* claim was conducted in June and July of 2009. At the hearing, Mr. Arbelaez presented live testimony from both expert and lay witnesses. His experts included (1) Dr. Ricardo Weinstein, a forensic neuropsychologist with a specialty in intellectual disability and cross-cultural assessment who evaluated Mr. Arbelaez in 2007 and diagnosed him as intellectually disabled; (2) Dr. Thomas Oakland, a clinical and forensic psychologist and expert in intellectual disability, particularly in the area of adaptive functioning, and co-author and developer of the ABAS-II[6]; and (3) Dr. Mark Tassé, a clinical psychologist, expert

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3.203," that "Rule 3.203(d)(4)(E) govern[ed] [Mr.] Arbelaez's circumstances," and that Mr. "Arbelaez must pursue his mental retardation claim in accordance with the new rule." *Id.* The court "express[ed] no opinion on the merits of such a claim." *Id.*

[6] The Adaptive Behavior Assessment System-II (ABAS-II) is standardized tool designed to measure adaptive behavior that incorporates the ten skill areas identified

on intellectual disability and autism, and co-author of the American Association on Intellectual and Developmental Disabilities (AAIDD) manual and User's Guide.[7] Mr. Arbelaez also presented several lay witnesses, including: (1) Vicente Soler, his former employer in Miami; (2) Jorge Salazar, a former employer in Miami who also provided a temporary home for Mr. Arbelaez; (3) Martha Arguelles, a member of the Salazar family who knew Mr. Arbelaez in Miami; (4) Amparo Arbelaez, Mr. Arbelaez's sister; (5) Flor Arboleda, Mr. Arbelaez's former teacher in Colombia; and (6) Florida Department of Corrections employees (Jerome Lee, Henry Walker, and John Flaherty) who completed adaptive behavior assessments for the State's expert. Due to their unavailability, Mr. Arbelaez additionally offered the deposition testimony of Katrin Banks, psychological specialist at Union Correctional Institution (UCI) where Mr. Arbelaez is housed; Sandra Martinez, Senior Psychological Specialist at UCI; and Tomas Tabares, Mr. Arbelaez's former neighbor and employer in Miami.

In rebuttal, the State presented two expert witnesses: (1) Dr. Enrique Suarez, a neuropsychologist who evaluated Mr. Arbelaez in 2008; and (2) Dr. Sonia Ruiz, a clinical psychologist who evaluated Mr. Arbelaez in 2001 and testified at the prior

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by the DSM-IV-TR (communication, community use, functional academics, home living, health and safety, leisure, self-care, self-direction, social behaviors, and work) and the three domains identified by the American Association on Intellectual and Developmental Disabilities (AAIDD) (conceptual, social, and practical). (PCR4-T. 489-94).

[7] The AAIDD is the leading professional association concerned with understanding, defining, and classifying intellectual disability. The AAIDD Manual is widely regarded as the foremost authoritative source amongst clinicians engaged in the diagnosis, classification, or planning of supports for individuals with intellectual disability.

evidentiary hearing on his penalty phase ineffectiveness claim. The State also called Lisa Wiley, a psychological specialist at UCI.

The evidence presented at the Mr. Arbelaez's hearing addressed all three prongs of the intellectual disability standard: (1) significantly sub-average intellectual functioning; (2) concurrent deficits in adaptive functioning; and (3) onset before the age of 18.

Dr. Ricardo Weinstein administered the Mexican version of the Weschler Adult Intelligence Scale-III (WAIS-III), which is "essentially identical to the U.S. version, except that the instructions and items are translated into Spanish"[8]—Mr. Arbelaez's native language.[9] Mr. Arbelaez obtained a verbal score of 66, a performance score of 69, and a full-scale score of 65. (PCR4-T. 171). This result placed him well within the range of IQ scores consistent with a diagnosis of mild intellectual disability. (PCR4-T. 171). Dr. Weinstein testified that this score is consistent with the results obtained by the State's psychologist, Dr. Enrique Suarez, who obtained a full-scale score of 68. (PCR4-T. 200-01). It is also consistent with the results obtained by Dr. Ruth Latterner, who administered the WAIS-R to Mr. Arbelaez in 1995 and obtained a full-scale IQ score of 67. (PCR2. 700-02).

In order to score the Mexican WAIS-III, Dr. Weinstein utilized the United States norms. Because IQ is a relative construct, Dr. Weinstein explained that it is

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[8] Stephen Greenspan & J. Gregory Olley, *Variability of IQ Test Scores*, *in* THE DEATH PENALTY AND INTELLECTUAL DISABILITY 141, 146 (Edward A. Polloway ed., 2015).

[9] Mr. Arbelaez is from Medellin, Colombia.

necessary to use the norms of the population to which the subject of the IQ test is being compared:

> You always use norms that are reflecting the population you want to compare the individual to. The referral question or the issue is whether Mr. Arbelaez is mentally retarded in relationship to other individuals in the United States that are subjected to the protection or lack of protection of what is known as the Atkins[] decision. Therefore, you always would compare Mr. Arbelaez to the U.S. population.

(PCR4-T. 165). Moreover, while "[t]he technical manual [of the Mexican WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms," the Mexican norms are viewed as unreliable in clinical practice. Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used With the Mexican WAIS-III in Capital Cases*, 34 Psychol. Intell. & Dev. Disabilities 2, 2 (2008); (PCR4. 3093). "Because subjects with ID were excluded from the Mexican norms, and because of acknowledged problems in comprising a sample representative of the Mexican population," the test publishers themselves cautioned against their use in diagnosing intellectual disability and even went so far as to disseminate notices recommending that practitioners use the United States norms instead. Suen & Greenspan, *supra*, at 2; Greenspan & Olley, *supra* n.8, at 146. Given these issues and other documented errors evincing their flawed scientific validity,[10] use of the Mexican norms would

[10] The researchers who uncovered the errors with the Mexican norms explained that the problems include: (1) poor or uninterpretable reliability; (2) the lack of a meaningful reference population; (3) the lack of score normalization; (4) the lack of representation of certain groups; (5) the use of incorrect statistics and calculations; and (6) inappropriate use of the true score confidence interval method. *See* Suen & Greenspan, *supra*, at 2-5.

likely result in professional ethics violations within the clinical community. Suen & Greenspan, *supra*, at 3; (PCR4. 3094-96). As Dr. Weinstein explained, there were "very serious problems with the norming procedures and norming results of the WAIS in Mexico" and thus there was scientific support for his use of the United States norms. (PCR4-T. 168-70).

Dr. Weinstein also administered several tests to determine if Mr. Arbelaez was malingering, including the Test of Memory Malingering (TOMM), the Rey 15-Item Test, and the Computerized Assessment of Response Bias (CARB). (PCR4-T. 173). Mr. Arbelaez "did very well on all three [of these] tests" and "scored above the cut-off point," which "suggest[ed] that he was making a good effort in the test that he was asked to perform." (PCR4-T. 173-74).

In contrast to Dr. Weinstein, the State's expert, Dr. Enrique Suarez, administered the Spanish version of the WAIS-III to Mr. Arbelaez when he evaluated him in 2008. (PCR4-T. 893). When Dr. Suarez scored Mr. Arbelaez's test, he utilized the Spanish norms and yielded a full-scale IQ score of 68. (PCR4-T. 992-93). Dr. Suarez, however, opined that Mr. Arbelaez was malingering and deemed this score invalid based on his administration of the Dot Counting Test, the Validity Indicator Profile (VIP), the Minnesota Multiphasic Personality Inventory – Second Edition (MMPI-II), and a "spelling test" of his own design where he reviewed letters and grievances allegedly written by Mr. Arbelaez in prison. (PCR4-T. 893, 995-1000). This artificial test was not standardized, statistically validated, peer reviewed, or

published. (PCR4-T. 1025-26). Dr. Suarez did not administer any academic achievement testing.

With regard to the Dot Counting Test, Dr. Suarez conceded that the test is only as valid as it is accurately timed and that the timing of the test is only as accurate as the quickness of the test administrator's reflexes to halt the stopwatch. (PCR4-T, 1022-23). When Dr. Weinstein testified that he reviewed the videotape of Dr. Suarez's evaluation of Mr. Arbelaez and administration of this test, he observed a discrepancy between the time shown by the video chronometer and the time Dr. Suarez recorded. (PCR4-T. 206-07). These inaccuracies made it "very hard" to determine whether Mr. Arbelaez was putting forth good effort or if the failure was attributable to the examiner. (PCR4-T. 208-09). Dr. Weinstein therefore opined that Dr. Suarez's malingering assessment on this test was clinically inappropriate. More importantly, the Dot Counting Test's reliability and validity when used with intellectually disabled persons is also viewed as "highly suspect" in the professional field. Denis W. Keyes & David Freedman, *Retrospective Diagnosis and Malingering*, *in* The Death Penalty and Intellectual Disability 263, 271 (Edward A. Polloway ed., 2015).

As for Dr. Suarez's use of the Validity Indicator Profile, Dr. Thomas Oakland testified that the VIP "does not detect malingering among persons with [ID]." (PCR4-T. 483). Like the Dot Counting Testing, the clinical community views use of the VIP with intellectually disabled persons as "highly suspect." Keyes & Freedman, *supra*, at 271. Indeed, the author of the VIP has specifically warned against its use to

determine whether a person with intellectual disability has put forth good effort in cognitive testing. *See* Frederick, R.I., Validity Indicator Profile Manual (1997).

Further, with regard to Dr. Suarez's use of the MMPI-II to assess malingering, Dr. Oakland testified that the MMPI is actually "a measure of pathology of a psychological nature," meaning "problems that people have. Depression, for example." (PCR4-T. 483-84). Dr. Oakland also explained that "an eighth grade reading level is required" of the individual being evaluated. (PCR4-T. 484). Therefore, the MMPI is a clinically inappropriate test for intellectually disabled persons because it requires a "reading level [that] is too high" and its "concepts are too advanced." (PCR4-T. 484). Dr. Weinstein corroborated Dr. Oakland on this point,[11] and clinicians who developed the diagnostic framework for intellectual disability have also stressed that the MMPI's use with intellectually disabled persons is fundamentally inappropriate.[12] Dr. Suarez was well aware of Mr. Arbelaez's low reading level from

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[11] Dr. Weinstein further explained that the MMPI is inappropriate for intellectually disabled persons because the test requires subjects to answer 567 yes-or-no questions, and one cannot expect an intellectually disabled individual "for the most part to be able to sit down and pay attention for 567 items of responses." (PCR4-T. 174-75, 281). "And [an] MMPI requires a minimum level of reading comprehension, which most individuals with mental retardation never achieve." (PCR4-T. 175).

[12] *See* Keyes & Freedman, *supra*, at 271-72 ("Although held in significant esteem among many clinical psychologists, [the MMPI] has nevertheless been determined to be of little to no use in identifying malingering of ID . . . [E]ffort and attention are often confused with malingering . . . In addition, testing that makes little sense to a person may lead the person to answer as quickly as possible to get finished. For instance, a person whose reading ability is lower than the MMPI requires, or just faced with the prospect of having to answer over 500 yes/no questions, may simply fill out the answer sheet to get done with the test, without reading, understanding, or caring about what the questions are asking. People with ID are particularly susceptible to this sort of frustration because of their cognitive

his scores on the Batteria Woodcock Munoz that Dr. Weinstein previously administered,[13] yet he knowingly administered a test for which Mr. Arbelaez was not a suitable subject in contravention of clinical norms.

The State's other rebuttal expert, Dr. Sonia Ruiz, testified about her assessment of Mr. Arbelaez's IQ in 2001 and administration of the Raven Progressive Matrices, an IQ test authored in 1930. (PCR4-T. 1115, 1128). Even though the WAIS and the Stanford-Binet are the only accepted tests for determining intellectual disability in *Atkins* proceedings, Dr. Ruiz's assessment indicated that Mr. Arbelaez had a "[b]orderline level of intelligence, around 70 to 75 IQ." (PCR4-T. 1117). However, Dr. Ruiz deemed this score invalid based on her use of the MMPI as a malingering test, (PCR4-T. 1117-18), which is inherently problematic for the reasons discussed above and her knowledge of Mr. Arbelaez's reading level.

To further assess Mr. Arbelaez's intellectual functioning and specifically his adaptive behavior, Dr. Weinstein interviewed Mr. Arbelaez's mother, three sisters, three brothers, one brother-in-law, school teachers, and two priests—all of whom knew Mr. Arbelaez prior to the age of eighteen. (PCR4-T. 172). Dr. Weinstein testified that the "best sources" of information regarding adaptive functioning in an *Atkins* situation are "relatives, including parents, siblings, aunts, uncles. Especially in communities in Latin America where there's a lot more interaction in families.

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impairment and adaptive deficits.").

[13] On the Batteria Woodcock Munoz, Mr. Arbelaez obtained a full-scale score of 59, which showed that his reading abilities are in the third-grade level. (PCR4-T. 172-73, 177).

Teachers. And as they develop and grow older, it would be employers." (PCR4-T. 179-80). Dr. Weinstein's interviews with these individuals in Colombia consistently showed that:

> [Mr. Arbelaez] was different. That he was shy. He was withdrawn. He could not control his moods. He would throw tantrums. He was slow in learning. He did not - - was not able to achieve academically. It took him a long time to learn about how to take care of himself physically, his personal hygiene. He could not participate in organized sports because he did not know or understand the rules of the games, particularly soccer. He would do strange and unusual things.
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> * * *
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> He could not manage money. When he worked with his brothers selling sodas and beers in the stadium, the brothers had to help him with the management of the money. He was always a very hard worker . . . [but his work] was always very limited.

(PCR4-T. 181).

In addition to performing the structured interviews conducted with the people who knew Mr. Arbelaez in Colombia, Dr. Weinstein administered the ABAS-II, which is an instrument designed to assess adaptive behavior in persons between ages 5 and 89. As Dr. Oakland, the developer of the instrument, testified, the ABAS is not an instrument designed or suitable for use in prison settings, "[p]articularly death row" because it is such a highly restrictive environment. (PCR4-T. 547-48). Dr. Weinstein therefore administered the ABAS-II to Mr. Arbelaez's mother and to Flor Arboleda, his sixth-grade teacher. Because Dr. Weinstein conducted a retrospective administration of the ABAS-II, it only constituted one facet of evaluation of Mr. Arbelaez's adaptive functioning. (PCR4-T. 183).

Dr. Weinstein also interviewed several people who knew Mr. Arbelaez during his time in Miami, including an employer who told Dr. Weinstein that:

> Mr. Arbelaez was a very hard working individual. That he was very responsible in his job. That he had very severe limitations in what he could do. He had a lot of problems understanding and comprehending some instructions and some other issues.
>
> For instance, . . . just about every week he would want to know why is it that he was not getting his full pay, even though he was explained repeatedly that there were taxes being withheld. He just couldn't understand that concept. He wanted to know why he was not paid all the money that he had earned.

(PCR4-T. 184-85).

Dr. Weinstein additionally reviewed a number of materials to acquire more information regarding Mr. Arbelaez's adaptive functioning, including the trial testimony of Miami Police Department officers, testimony of Mr. Arbelaez, penalty phase transcripts, school and medical records from Colombia, medical records from Miami-Dade County Jail, and records from the Florida Department of Corrections. (PCR4-T. 186, 189-90).

In conjunction with this record review, Dr. Weinstein also evaluated Mr. Arbelaez himself and determined that he currently demonstrated adaptive deficits. As Dr. Weinstein stated:

> [Mr. Arbelaez] has functioning adaptive deficits and functional academic deficits. His academics and his ability to apply academics are within the third grade level at best. That is a functional, and that's a very specific issue that would prevent him from functioning independently without some support.
>
> He has had some physical problems, mental problems, and he has some problems adapting to the environment. I guess primarily those would be the two things that I was able to observe.

* * *

> He knows enough English to communicate his needs, but that wouldn't indicate, you know, if he knows how to say or to understand, sit down, put your hands in the back. You know, go this place or go that place.
>
> But that doesn't make it - - you know, he's not fluent or he's not able to communicate fluently in English.

(PCR4-T. 194-95).

Dr. Weinstein further noted that from Mr. Arbelaez's prison records, he learned about Mr. Arbelaez's epilepsy and the daily reminders he receives to take his medication. Dr. Weinstein explained that Mr. Arbelaez throws "tantrums" like a four-year-old child because he sometimes refuses to take his epilepsy medication for illogical reasons like the color of the pill, who hands it to him, and what time it is delivered to his cell. (PCR4-T. 267-71). This behavior indicates that Mr. Arbelaez does not "have a full understanding that he needs to take the medications for the purpose of controlling a very dangerous condition." (PCR4-T. 329-30). Dr. Weinstein also relied on Mr. Arbelaez's prison medical records in testifying that Mr. Arbelaez had to be isolated because of suicidal behaviors. (PCR4-T. 268). Both his struggles with medication and need for isolation reflect a continued inability to control his emotions, which would prevent him from functioning independently without some support. (PCR4-T. 321).

Mr. Arbelaez also presented several lay witnesses to testify concerning his adaptive functioning during childhood and early adulthood. Two of Mr. Arbelaez's previous employers testified regarding his limited abilities at work, and two

psychological specialists from UCI testified to their interactions with Mr. Arbelaez in the prison environment. (PCR4-T. 786-93, 810-15, 448-50; PCR4. 5722-79).

In contrast to Dr. Weinstein, the State's experts, Dr. Suarez and Dr. Ruiz, did not speak with anyone in Colombia or Miami who knew Mr. Arbelaez prior to his incarceration. Instead, Dr. Suarez and Dr. Ruiz largely relied upon Mr. Arbelaez's self-reported history and perceived adaptive strengths to assess his level of functioning. While Dr. Suarez did administer the ABAS-II as part of his assessment, like Dr. Weinstein, he did so only with three prison staff members at UCI.[14] Dr. Suarez conceded that he did not interview the respondents concerning the frequency and length of their contact with Mr. Arbelaez on a daily basis prior to administering the instrument. (PCR4-T. 1036).

On May 7, 2010, the circuit court issued its order denying *Atkins* relief. (PCR4. 6388-6405); (Appendix E, at A6). In concluding that Mr. Arbelaez has "no valid IQ score below 70," the court found Dr. Weinstein's "use of the United States norms, rather than those intended for the Mexican WAIS, to be problematic" and that "[h]is

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[14] Dr. Suarez's administration of the ABAS-II to corrections officers contravenes medical standards and practices. *See* Sheri Lynn Johnson et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1150 (2018) ("Correctional officers are inappropriate respondents for adaptive behavior scales. . . . [B]oth the [American Psychiatric Association] and the AAIDD are clear that adaptive behavior in an institutional setting is of very limited probative value because the environment is so highly controlled that it does not predict behavior in the community—which is the basis for adaptive functioning. Moreover, standardized adaptive functioning instruments preclude reliance on informants who must 'guess' about a large number of items, and correctional officers would have no basis for answering many of the questions on adaptive functioning scales.").

use of norming data other than that intended for the test given invalidate[d] the results." (PCR4. 6403-04). Consequently, the court deemed Mr. Arbelaez's IQ score of 65 "not credible." (PCR4. 6403). And while the court noted that Mr. Arbelaez "went to great lengths to discredit the testing methods of Dr. Suarez in determining that [Mr. Arbelaez] was malingering" when he obtained a full-scale IQ score of 68, the court declined to engage in any further discussion on the matter because "it [was] Defendant's burden to prove his IQ is under 70." (PCR4. 6403).

In regards to the adaptive functioning prong, the court found that there was no "proof presented that [Mr. Arbelaez] has present deficits in adaptive functioning" because Dr. Weinstein "made no attempt to obtain any information regarding [Mr.] Arbelaez's current adaptive behavior" and "wholly relied on the use of a retrospective diagnosis, focusing on adaptive behavior prior to the crime in 1988." (PCR4. 6404). As a result, the court found this "reliance solely on a retrospective evaluation . . . not in compliance with the Florida Supreme Court's holdings in *Phillips* [*v. State*, 984 So. 2d 511 (Fla. 2008),] and *Jones* [*v.* State, 966 So. 2d 319 (Fla. 2007),] that found this type of evaluation is not sufficient to prove deficits in current adaptive behavior," concluding that Mr. Arbelaez failed to meet his burden. (PCR4. 6404). Because the court found that Mr. Arbelaez did not prove the first two prongs, it found it "unnecessary to address the third element's requirement of onset before age 18." (PCR4. 6404).

In a one-paragraph opinion, the Florida Supreme Court affirmed the circuit court's denial of relief because "Arbelaez did not prove that he has concurrent deficits

in adaptive behavior as required by section 921.137(1), Florida Statutes (2004), and Florida Rule of Criminal Procedure 3.203(b)." *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011) (unpublished table decision), *cert. denied*, 566 U.S. 954 (2012). The Florida Supreme Court did not address any other prongs of Mr. Arbelaez's intellectual disability claim.

On November 23, 2010, Mr. Arbelaez filed a successive motion for postconviction premised on this Court's decision in *Porter v. McCollum*, 558 U.S. 30 (2009). The circuit court issued an order summarily denying relief on May 20, 2011, and the Florida Supreme Court thereafter affirmed. *Arbelaez v. State*, 88 So. 3d 146 (Fla. 2012).

On September 11, 2012, Mr. Arbelaez timely filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. On August 20, 2014, the district court entered an order denying all of Mr. Arbelaez's grounds for relief but granted a certificate of appealability (COA) as to the claims of ineffective assistance of counsel at the sentencing phase of trial. The Eleventh Circuit Court of Appeals granted Mr. Arbelaez's request to expand the COA on two issues regarding the state courts' determination that he is not intellectually disabled. The court of appeals later affirmed the district court's order in *Arbelaez v. Sec'y, Fla. Dep't of Corr.*, 662 F. App'x 713 (11th Cir. 2016), *cert. denied*, 583 U.S. 842 (2017).

While Mr. Arbelaez's appeal remained pending in the Eleventh Circuit, this Court issued its opinion in *Hall v. Florida* holding that the Florida Supreme Court's interpretation of the state's intellectual disability statute failed to be informed by

prevailing medical standards and practices in assessing intellectual disability, notably the first two prongs of the test for intellectual disability. 572 U.S. 701, 710 (2014) ("In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.")

In light of this Court's decision in *Hall*, Mr. Arbelaez timely filed the underlying successive motion for postconviction relief at issue alleging, *inter alia*, that *Hall* repudiated the Florida Supreme Court's post-*Atkins* jurisprudence in a variety of ways, including not just its specific recognition that the standard error of measure be analyzed when looking at the IQ score obtained by a particular individual, but also its more general mandate that "statutes must give way to the scientific community's expertise, and not the other way around." (PCR6. 51).

On June 18, 2015, the circuit court summarily denied Mr. Arbelaez's motion, finding that:

> *Hall v. Florida* . . . [did] not create a new right. The effect of the opinion is that courts must consider the statistical error margin in determining IQ. *It has no effect on the individuals who were previously found not to be mentally retarded, now called intellectually disabled, due to a lack of deficits in adaptive functioning.*
>
> Defendant does not have deficits in adaptive functioning. *Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011). He is not intellectually disabled. *Hall* does not apply.

(Appendix C, at A4) (emphasis added).

Mr. Arbelaez appealed to the Florida Supreme Court. After initial briefing was completed, this Court decided *Hurst v. Florida*, 577 U.S. 92 (2016), and both parties filed supplemental briefing addressing the impact of that decision on Mr. Arbelaez's

case.[15] The Florida Supreme Court also issued opinions directly relevant to Mr. Arbelaez's intellectual disability claim during that timeframe, including *Oats v. State*, 181 So. 3d 457 (Fla. 2015) (recognizing that the intellectual disability framework is inherently "interdependent" under *Hall v. Florida* and that an intellectual disability finding may still be warranted even "if one of the prongs is relatively less strong"), and *Cardona v. State*, 185 So. 3d 514 (Fla. 2016) (holding that cultural and language accommodations are permissible in IQ testing and do not inherently render resulting scores unreliable).

In September 2016, the Florida Supreme Court issued *Hall v. State*, 201 So. 3d 628 (Fla. 2016), its decision on remand from this Court's opinion in *Hall v. Florida*. In *Hall v. State*, the Florida Supreme Court recognized this Court's clear directive that:

> [W]hen determining whether an individual meets the criteria to be considered intellectually disabled, *the definition that matters most is the one used by mental health professionals in making this determination in all contexts*, including those "far beyond the confines of the death penalty." As such, courts cannot disregard the informed assessments of experts.

201 So. 3d at 637 (quoting *Hall v. Florida*, 572 U.S. at 710, 721) (internal citations omitted) (emphasis added). In concert with this principle, the court expressly held that retrospective evaluations of capital defendants' adaptive functioning are *not*

[15] Mr. Arbelaez later filed a state habeas petition in 2018 addressing various changes to Florida's death penalty jurisprudence and capital sentencing statute in light of *Hurst*. In rendering its decision on the appeal at issue in this Petition, the court also denied Mr. Arbelaez habeas relief. *Arbelaez v. State*, 369 So. 3d 1141 (Fla. 2023).

confined to the period of incarceration and that it "would be illogical" to limit an intellectual disability assessment in that manner. *Id.* at 635-36. Mr. Arbelaez subsequently filed supplemental briefing in the Florida Supreme Court addressing *Hall v. State* and the flawed rejection of his intellectual disability claim.

Not long after its decision in *Hall v. State*, the Florida Supreme Court issued *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and held that this Court's decision in *Hall v. Florida* applied retroactively in collateral proceedings.

In March 2017, this Court issued its decision in *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), reaffirming its holding in *Hall v. Florida* that courts cannot "disregard . . . current medical standards" when conducting intellectual disability determinations. *Id.* at 13. Specific to the adaptive functioning inquiry, this Court noted that "the medical community focuses . . . on adaptive deficits" and *not* perceived strengths and lay stereotypes. *Id.* at 15-16.

Mr. Arbelaez thereafter sought leave from the Florida Supreme Court to file supplemental briefing concerning *Moore*'s impact on his case, noting that his underlying Rule 3.851 motion was about far more than *Hall*'s repudiation of prior jurisprudence disallowing an individual with an IQ score above 70 from pursuing relief under *Atkins* and Florida's intellectual disability statute. Rather, he explained that his motion also extended to seeking a reassessment of the adaptive deficits prong:

> *Moore* not only stands for the proposition that circuit courts must be informed by current prevailing standards but also demands that a court's determination be—at a bare minimum—clinically supported. What clinical support did the court latch onto? Whatever that illusory

> support was, the circuit court reached its finding even though Mr. Arbelaez attempted to advise it on what the prevailing clinical standards were (and are). Where a court clings to nonclinical standards, it is tantamount to not adequately informing itself thereby violating *Atkins*, *Hall v. Florida*, and *Moore*. *See Moore*, Slip Op. at 18 ("By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out[, which was wholly nonclinical,] the CCA failed to adequately inform itself of the 'medical community's diagnostic framework.'"). Had the circuit court given any presumption of correctness to unified professional consensus instead of clinging to a nonclinical standard that it perceived as binding legal precedent, Mr. Arbelaez would have satisfied his initial burden. [The Florida Supreme] Court made no finding on the first prong of intellectual disability; therefore, Mr. Arbelaez cannot speculate as to what standard this Court had in mind when it reviewed the *Atkins* claim in 2011. *See Arbelaez v. State*, 72 So. 3d 745 (Fla. 2011) (affirming the denial of relief on prong two).
>
> * * *
>
> [] Mr. Arbelaez cannot speculate [about] what clinical support was relied upon for this Court's [2011] affirmance as to prong two. Nonetheless, because the 2010 circuit court order has now been unveiled for what it was—a diagnostic framework based on gut feelings and stereotypes rather than science and clinical authority—this Court's affirmance was similarly made in error. This is because, in light of *Hall v. Florida*, *Hall v. State*, and *Moore*, this Court can see that the unscientific diagnostic framework promoted by [the State] tainted the circuit court's ability to evaluate Mr. Arbelaez's claim properly. Alternatively, the circuit court decided in conformity with this Court's precedent, which *Hall v. Florida* and *Moore* have revealed as inconsistent with the Eighth Amendment.

Mot. for Supp. Briefing in Light of *Moore v. Texas*, at 8, 30. Without a response from the State, the Florida Supreme Court denied Mr. Arbelaez's request for supplemental briefing on *Moore*'s impact on his pending appeal.

The Florida Supreme Court took no further action on Mr. Arbelaez's case for the next six years.

During that timeframe, the Florida Supreme Court underwent significant changes in its composition and *sua sponte* revisited the retroactivity of *Hall* in

Phillips v. State, 299 So. 3d 1013 (Fla. 2020). On May 25, 2023, the Florida Supreme Court issued its opinion in Mr. Arbelaez's case affirming the circuit court's summary denial of relief, holding:

> Arbelaez is not entitled to postconviction relief based on his intellectual disability claim. As this Court stated in *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla. 2020), *Hall* does not apply retroactively.

Arbelaez v. State, 369 So. 3d 1141 (Fla. 2023). Justice Labarga dissented "[i]n light of [his] dissent in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (receding from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and holding that *Hall v. Florida*, 572 U.S. 701 (2014), does not apply retroactively)." *Arbelaez*, 369 So. 3d at 1142 (Labarga, J., dissenting).

Mr. Arbelaez timely filed a motion for rehearing on June 9, 2023, arguing that the Florida Supreme Court's reliance on *Phillips* was inapposite because:

> *Phillips* says nothing about how *Hall*'s holding affects a court's re-evaluation of the adaptive deficits prong of the test for intellectual disability—the only prong [the Florida Supreme Court] addressed when it determined that Mr. Arbelaez was not intellectually disabled. Moreover, *Phillips* made it clear that it was not addressing the *Moore* aspect to his case because he could not establish the first prong due to his IQ scores, all of which were manifestly higher than those obtained by Mr. Arbelaez.

Appellant's Mot. for Reh'g, at 8.

The Florida Supreme Court denied Mr. Arbelaez's motion for rehearing on August 24, 2023. *Arbelaez v. State*, 370 So. 3d 932 (Fla. 2023). While Justice Labarga concurred that Mr. Arbelaez had not established a basis for the court to grant rehearing, he wrote separately to stress his continued "belief that *Hall v. Florida*, 572 U.S. 701 (2014), applies retroactively." *Arbelaez v. State*, 370 So. 3d at 932.

This Petition follows.

REASONS FOR GRANTING THE WRIT

This Petition presents a question of great importance for this Court regarding a state court's duty to give retroactive effect to a federal constitutional holding—an area of the law that remains complicated and unclear to many lower courts. For years, the Florida Supreme Court erroneously disregarded the core tenets of *Atkins v. Virginia,* 536 U.S. 304 (2002), and its progeny, in intellectual disability cases based on a flawed understanding of the impact of these rulings, directly undermining this Court's Eighth Amendment jurisprudence. Although this Court may have been confident that the constitutional infirmities in how Florida courts analyzed intellectual disability cases would be rectified in light of its decision in *Hall v. Florida,* 572 U.S. 701 (2014), this was not what happened. Rather, it has assiduously evaded the core tenets of *Hall* by concluding that it announced a "new rule" not to be applied retroactively to cases like Mr. Arbelaez's, in which relief was denied prior to *Hall* based on a refusal by Florida courts to apply well-established medical standards and practices to the assessment of the first 2 prongs of the test for intellectual disability. Mr. Arbelaez's case serves as the appropriate vehicle for this Court to intervene.

Granting certiorari review in this case would not constitute error correction; rather, it would provide the Court with the opportunity to avoid repeated meritorious demands for error correction stemming from the unconstitutional adjudication of intellectual disability claims. While the Florida Supreme Court's decision below is most certainly wrong, its most fundamental vice is the incentive structure it creates

that is inimical to the sound administration of justice as a whole. If on each occasion when this Court corrects a state's reading of the federal constitution—as it did in *Hall*, *Moore I*, and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*)—and the state benefits from an overly expansive determination that the rule this Court announced was "new," states will have an incentive to err in the direction of denying constitutional rights and death row inmates are deprived of a "fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724.

I. THE FLORIDA SUPREME COURT'S REFUSAL TO APPLY *HALL* TO CASES ON COLLATERAL REVIEW DEFIES THIS COURT'S PRECEDENT

Under federal law, *Hall* followed the settled rule of *Akins* and therefore applies to cases on direct review and collateral review alike. As this Court reiterated in *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013):

> *Teague* . . . made clear that a case does *not* "announce a new rule, [when] it '[is] merely an application of the principle that governed'" a prior decision to a different set of facts. As JUSTICE KENNEDY has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be in the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 (1992) (concurring in judgment); *see also Williams v. Taylor*, 529 U.S. 362, 391 (2000). Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was mean to address, we will rarely state a new rule for *Teague* purposes.

568 U.S. at 347-48 (alterations in original) (first internal citation omitted). The Supremacy Clause requires state courts, no less than federal courts, to apply settled federal rules to cases adjudicating federal claims on collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989), if an intervening decision applies a new rule, "a person whose conviction is already final may not benefit from the decision" on collateral review unless an exception applies. *Chaidez*, 568 U.S. at 347; *see also Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). By contrast, if an intervening decision applies an "old" or "settled" rule, the decision "applies both on direct and collateral review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Chaidez*, 568 U.S. at 347.

Consequently, in the context of decisions that apply settled rules, the concept of retroactivity is wholly irrelevant. When an intervening decision of this Court merely applies "settled precedents" in a new factual context, "no real question" arises "as to whether the later decision should apply retrospectively." *Yates v. Aiken*, 484 U.S. 211, 216 n.3 (1988) (quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)). Rather, it is "a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.* (quoting *Johnson*, 457 U.S. at 549). Notwithstanding these fundamental principles, and no matter how wrong it was in denying intellectual disability claims prior to *Hall*, the Florida Supreme Court has categorically excluded a class of death row inmates—like Mr. Arbelaez—from seeking review of their intellectual disability claims under the rubric set out in *Hall* by simply ruling that *Hall* announced a "new rule" and was not retroactive.

II. *HALL* DID NOT ANNOUNCE A NEW RULE

As the Supremacy Clause mandates, states may only benefit from *Teague*'s retroactivity doctrine in cases of new rules. *See Stringer v. Black*, 503 U.S. 222, 227-28 (1991). For that reason, courts dealing with *Teague* issues have long devoted a great deal of effort in deciding whether a particular rule was "new." *See* 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 25.5 (7th ed. 2019).

In stark contrast, the Florida Supreme Court's opinion in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), which blanketly served as the basis for the decision below, ignored any discussion of whether the rule announced in *Hall* was new. Instead, it focused entirely on whether it was procedural. In failing to address whether the rule of *Hall* was new at the outset of its *Teague* analysis, the Florida Supreme Court wrongly concluded that *Hall* was non-retroactive.

The *Phillips* opinion itself recognized that *Hall* represents only "an evolutionary refinement of the procedure necessary to comply with *Atkins*. [*Hall*] merely clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty." 299 So. 3d at 1021. As the Florida Supreme Court in *Phillips* further explained:

> *Hall merely more precisely defined the procedure that is to be followed in certain cases to determine whether a person facing the death penalty is intellectually disabled. Hall* is merely an application of *Atkins*. *Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability.

Id. at 1020 (internal citation omitted) (emphasis added).

Atkins and *Hall* squarely fit into the *Chaidez* framework: *Atkins* was a "rule of 'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts'"; and "all . . . [this Court did in *Hall* was] apply a general standard to the kind of factual circumstances it was meant to address . . . ." *Chaidez*, 568 U.S. at 348. Such decisions "will rarely state a new rule for *Teague* purposes." *Id.*

In *Hall*, this Court stated with unambiguous precision the issue it decided: "The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." 572 U.S. at 709. In answering that question, this Court corrected a decision where the Florida Supreme Court had

> misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of "approximately 70." . . . Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of the sentencing court's inquiry into adaptive functioning.

Id. at 724 (internal citation omitted). Critically, the Court further clarified that "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 710.

To correct a misconception about the facts that support a claim under an established rule of federal constitutional law is not to make new law but rather to safeguard compliance with the preexisting rule. That is exactly what this Court said in *Hall*: "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 720-21.

Atkins set forth the rule later applied in *Hall*, and its ruling was not limited to the evaluation of the first prong of the test for intellectual disability (the IQ prong). To be sure, the *Atkins* Court closely tracked the clinical definition of intellectual disability and specifically stated "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309, n.5 (citation omitted). But *Atkins* addressed more than just the first prong: it also noted that "*clinical definitions* of [intellectual disability] require not only subaverage intellectual functioning, *but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18*." *Id.* at 318 (emphasis added). This concept was later echoed in *Hall*, where this Court noted that "the medical community accepts that all of this evidence [concerning a defendant's past medical, familial, and behavioral circumstances] can be probative of intellectual disability []." *Hall*, 572 U.S. at 714.

In its opinion in Mr. Arbelaez's case, the Florida Supreme Court heeded neither the ruling in *Atkins* nor the ruling in *Hall* in evaluating the first *and* second prongs of the test for intellectual disability, as this Court's subsequent decision in *Moore I* makes clear. In *Moore*, this Court recognized that if a court "deviate[s] from prevailing clinical standards [or] from the older clinical standards [it] claimed to apply" when determining a death-sentenced prisoner's death eligibility under *Atkins*, that court violates the Eighth Amendment. *Id.* at 15; *see also id.* at 20-21 ("By rejecting the habeas court's application of medical guidance . . . the [reviewing court]

failed adequately to inform itself of the 'medical community's diagnostic framework.'" (quoting *Hall*, 572 U.S. at 721)).

By categorically determining that *Hall* announced a new rule not retroactively applicable to cases like Mr. Arbelaez's, the Florida Supreme Court has effectively exempted itself from adherence to this Court's Eighth Amendment jurisprudence. Its failure to be informed by the "medical community's diagnostic framework," leading it to wrongly conclude that Mr. Arbelaez had failed to establish either the first or second prong of the *Atkins* test for intellectual disability, will be shielded from any judicial review absent this Court's intervention.

Even a cursory analysis of Mr. Arbelaez's intellectual disability claim under *Hall* reveals how the Florida courts mistakenly rejected it. For example, the state trial court rejected the first prong, determining that Mr. Arbelaez's IQ score of 65 on the Mexican WAIS-III testing instrument was unreliable because Dr. Weinstein normed the results against a United States population as opposed to a Mexican population. (PCR4. 6403) ("The court finds Dr. Weinstein's determination of Defendant's IQ to be 65 is not credible. His use of norming data other than that intended for the test given invalidates the results. Therefore, Defendant has failed to prove the first element that his IQ is under 70 . . ."). However, *Hall* mandates that a proper assessment of a defendant's intellectual functioning be informed by medical standards and practices; those standards and practices specifically contravene the Florida court's disregard for how Dr. Weinstein normed the Mexican WAIS-III he administered to Mr. Arbelaez. The Mexican WAIS-III's instruction manual

specifically and explicitly authorizes a practitioner to norm the results against a United States population as an alternate method for achieving a reliable result. *See* Hoi K. Suen & Stephen Greenspan, *Linguistic Sensitivity Does Not Require One to Use Grossly Deficient Norms: Why US Norms Should Be Used With the Mexican WAIS-III in Capital Cases*, 34 Psychol. Intell. & Dev. Disabilities 2, 2 (2008) ("The technical manual [for the Mexican WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms."); *see also* Greenspan & Olley*, supra* n.8, at 146 (discussing how the norming issues with the Mexican WAIS "caused the test publisher to send out notices steering purchasers away from using the Mexican norms and urging them to use the U.S. norms").[16]

Furthermore, as to the adaptive functioning prong, the state trial court determined that Mr. Arbelaez had not met his burden because the testimony he presented consisted only of a retrospective evaluation of his adaptive functioning rather than a "concurrent" one. (PCR4. 6404). The state trial court determined that a retrospective evaluation of adaptive functioning "is not in compliance" with the Florida Supreme Court's pre-*Hall* jurisprudence, and that Mr. Arbelaez "made no effort whatsoever to present any evidence to show that he had present adaptive behavior deficits occurring contemporaneously with the determination of his IQ." (PCR4. 6404). The Florida Supreme Court agreed, concluding that Mr. Arbelaez had

[16] The Florida Supreme Court has never addressed the first prong of Mr. Arbelaez's intellectual disability claim, choosing instead to affirm the denial of relief on the basis of its determination that he had not established "that he has concurrent deficits in adaptive behavior." *Arbelaez*, 72 So. 3d at 745.

not demonstrated "that he has concurrent deficits in adaptive behavior." *Arbelaez*, 72 So. 3d at 745.

These conclusions are, of course, squarely at odds with *Hall* and with the Florida Supreme Court's post-*Hall* jurisprudence.[17] Prior to *Hall* and grappling with the consequences of *Atkins*, the Florida Supreme Court issued a series of decisions which interpreted (improperly as it turned out) the "concurrent" language to mean that a retrospective determination of a defendant's adaptive functioning prior to age 18 "was insufficient to satisfy the second prong of the intellectual disability prong." *Hall v. State*, 201 So. 3d 628, 635 (Fla. 2016) (citing, *inter alia*, *Phillips v. State*, 984 So. 2d 503 (Fla. 2008); *Jones v. State*, 966 So. 2d 319 (Fla. 2007)). Rather, a defendant's adaptive functioning deficits must, the Florida Supreme Court held at the time, focus on a defendant's current behavior, that is, as an adult. *Hall*, 201 So. 3d at 635-36. The Florida Supreme Court's decision in *Phillips*, along with its predecessor case holding the same thing, *Jones*, provided the backdrop for subsequent decisions (including its 2011 decision in Mr. Arbelaez's case) condoning the limitation on evidence tending to support the adaptive deficit prong to that of "adult" deficits only.

Hall re-focused the analysis by holding that courts must examine and rely on what "experts in the field would consider" when diagnosing intellectual disability. 572 U.S. at 712. The state courts' conclusions in Mr. Arbelaez's case—that he did not

[17] They are also at odds with the factual record, which establishes that Mr. Arbelaez *did* present evidence of his adaptive deficits post-age 18. *See, e.g.*, (PCR4-T. 184-85; 186; 189-90; 267-71; 329-30; 786-93; 810-15).

meet prong 2 because he did not present sufficient evidence regarding deficits as an adult—flies in the face of *Hall*'s explicit language:

> For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below **the inquiry would consider factors indicating whether the person has deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing**.

Id. at 714 (emphasis added).

The *Hall* Court went on to observe that, because of the refusal by the Florida Supreme Court to allow a defendant to claim intellectual disability if he had a full-scale IQ score of anything higher than 70, courts had also found themselves precluded from considering "even substantial and weighty" evidence of a defendant's "failure or inability to adapt to his social and cultural environment, *including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances*." *Id*. at 712 (emphasis added). "This is so even though the medical community accepts that *all of this evidence* can be probative of intellectual disability, including for individuals who have an IQ test score above 70." *Id*. at 714 (emphasis added). The *Hall* Court ultimately struck as unconstitutional the 70 IQ cut-off imposed by the Florida Supreme Court and held that "the law requires that [a capital defendant] have the opportunity to present evidence of his intellectual disability, *including deficits in adaptive functioning over his lifetime*." *Id*. at 724 (emphasis added).

Following the remand from this Court in *Hall*, the Florida Supreme Court issued a follow-up opinion recognizing that courts had been reading its earlier

Phillips decision too narrowly. *Hall v. State*, 201 So. 3d 628, 636 (Fla. 2016) ("[W]e reject the trial court's narrow reading of *Phillips* and the State's argument that mental health experts may only evaluate a prisoner's adaptive functioning during his or her incarceration."). Freddie Hall's death sentence was ultimately vacated. *Id.* at 638.

It cannot be meaningfully disputed that under *Hall*'s correct application of *Atkins*, Mr. Arbelaez met his burden of establishing his ineligibility to be executed due to his intellectual disability. However, rather than provide Mr. Arbelaez with a "fair opportunity to show that the Constitution prohibits [his] execution" under the correct standards, *Hall*, 572 U.S. at 724, the Florida Supreme Court closed the courthouse doors to him by its whimsical determination—reached without even requesting or considering briefing from the parties—that *Hall* set forth a "new rule" not retroactively applicable to him.

Certiorari to review the Florida Supreme Court's misconception of *Hall* is all the more imperative because the Eleventh Circuit offers no redress for intellectually disabled Florida inmates who are denied relief on that basis. Notwithstanding the clear instruction of *Chaidez*, the Eleventh Circuit hastily classified the *Hall* rule as new within weeks of its issuance. *See In re Henry*, 757 F.3d 1151, 1158-59 (11th Cir. 2014) ("For the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because . . . [n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff.") (internal citations omitted); *but see id.* at 1165

(Martin, J., dissenting) (questioning whether the rule of *Hall* was new); *see also Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311-13 (11th Cir. 2015) (reaffirming *Henry*); *In re Bowles*, 935 F.3d 1210, 1219 (11th Cir. 2019) (reaffirming *Kilgore* and *Henry*: "*Hall* did announce a new rule of constitutional law").

The Eleventh Circuit is alone is this position. In decisions both favoring and adverse to capital defendants asserting intellectual disability as a bar to execution, courts in the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have determined that *Hall* did not set forth a new rule. *See, e.g.*, *Smith v. Sharp*, 935 F.3d 1064, 1083-85 (10th Cir. 2019) (holding that *Hall* is not "new" under *Teague*); *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014) (stating that *Hall* "clarified the minimum *Atkins* standard under the U.S. Constitution"); *see also Smith v. Ryan*, 813 F.3d 1175, 1181 (9th Cir. 2016) (applying *Hall* to state appellate decision of 2008); *Williams v. Mitchell*, 792 F.3d 606, 619 (6th Cir. 2015) (applying *Hall* to state appellate decision of 2008); *Fulks v. Watson*, 4 F.4th 586, 592 (7th Cir. 2021) (denying relief because the claim being asserted under *Hall* could have been asserted under *Atkins*); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014), *cert. denied*, 574 U.S. 1057 (2014) (same).

Adding an error of its own to that of the Eleventh Circuit, the Florida Supreme Court refuses to even address the question. As noted above, its terse discussion of federal law in *Phillips* lacked any consideration of whether the *Hall* rule was new within the meaning of *Teague*, and the opinion below simply relies on *Phillips*. *Arbelaez v. State*, 369 So. 3d 1141 (Fla. 2023). Although this Court has long said that it reviews state court judgments not opinions, *e.g.*, *Williams v. Norris*, 25 U.S. 117,

120 (1827), an erroneous judgment on a federal question that is predicated on an opinion misconceiving the issue presents a particularly appropriate vehicle for review.

The meaning of "intellectually disabled" is the same as it was the day this Court decided *Atkins*, yet Mr. Arbelaez has yet to have his claim judged under the correct standard because of the Florida Supreme Court's disregard of federal constitutional law that this Court corrected in *Hall* and further applied in *Moore*.

The Florida Supreme Court cannot pick and choose which federal law it will implement. On the contrary, "[s]tates are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). In *Yates v. Aiken*, this Court rejected the argument that a state may provide a forum for adjudicating federal constitutional claims on collateral review but then "refuse to apply" a decision of this Court involving a settled rule. 484 U.S. at 217. Florida, having opened its collateral review proceedings to federal constitutional claims, must at least meet federal requirements when applying settled federal rights on collateral review. *See id.*; *Danforth*, 552 U.S. at 288.

"Mild levels of intellectual disability . . . nevertheless remain intellectual disabilities, and the State of Florida "may not execute anyone in 'the entire category of [intellectually disabled] offenders.'" *Moore I,* 581 U.S. at 18. The necessary effect of

the decision below was to deny Mr. Arbelaez the federal right announced in *Atkins* and affirmed in *Hall*.[18] That decision is subject to this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

/s/ Todd G. Scher
TODD G. SCHER
Assistant CCRC-South
Florida Bar No. 0899641
tscher@msn.com
**Counsel of Record*

COURTNEY M. HAMMER
Staff Attorney
Florida Bar No. 1011328
hammerC@ccsr.state.fl.us

Capital Collateral Regional Counsel – South
110 S.E. 6th Street, Suite 701
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

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[18] *See* Margaret S. Russell et al., *Intellectual Disability and the Death Penalty: Florida's Wrongs Should Be Made Right*, 45 NOVA L. REV. 1, 33 (2020) (discussing how "denying Florida's death-sentenced population the benefit of scientific advancements in the diagnosis of intellectual disability promulgated by [this Court] in *Hall* violates the promise of *Atkins* and the Eighth Amendment")