

DOCKET NO. 17-9153

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR TONY JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should grant certiorari review of the Florida Supreme Court's decision finding that Petitioner failed to meet his burden of establishing intellectual disability where the lower court properly applied this Court's precedent to disputed facts and found there was no evidence Petitioner had significantly subaverage intellectual functioning or deficits in adaptive behavior in a decision that does not present this Court with an important or unsettled question of constitutional law?

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Jones v. State*, 231 So. 3d 374 (Fla. 2017).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on September 28, 2017. (Pet. App. A). Petitioner filed a motion for rehearing, which was denied by the Florida Supreme Court on December 27, 2017. On March 6, 2018, Petitioner filed an application for extension of time in this Court to file the petition for writ of certiorari. On May 25, 2018, Petitioner filed a petition for writ of certiorari in this court. The petition is timely. See Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c).

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

1. *FACTUAL BACKGROUND.* Petitioner was charged with (1) the first-degree murder of Matilda Nestor, (2) the first-degree murder of Jacob Nestor, (3) the armed robbery of Matilda Nestor, (4) the armed robbery of Jacob Nestor, and (5) the possession of a firearm by a convicted felon. *Jones v. State*, 652 So. 2d 346, 348 (Fla. 1995). The crimes were committed on December 19, 1990. *Id.* Evidence at trial established that Petitioner, who worked for the Nestors, stabbed Mrs. Nestor once to the base of her neck, which severed her aorta, and stabbed Mr. Nestor once in the chest, which entered his heart. *Id.* Mr. Nestor fled to his office, where he removed the knife from his chest, drew his pistol and shot at the Petitioner, striking him in the forehead. *Id.* There was no money or valuables found on the victims, nor in Mrs. Nestor's purse which was next to Petitioner. *Id.* The evidence showed Mr. Nestor's body was rolled over so his valuables could be removed from his pockets. *Id.*

Following a jury trial, Petitioner was convicted on all counts. *Id.* Petitioner's jury recommended a death sentence for the murder of Mrs. Nestor by a 10-2 vote and by unanimous vote for the murder of Mr. Nestor. *Id.* The trial court followed the jury's recommendation and sentenced Petitioner to death. *Id.*

2. *PROCEEDINGS BELOW.* The Florida Supreme Court affirmed Petitioner's convictions and sentences on direct appeal and his case became final when this Court denied his petition for writ of certiorari on October 2, 1995. *Jones v. Florida*, 516 U.S. 875 (1995). On March 27, 1997, Petitioner filed a shell motion for postconviction relief. On March 9, 1999, Jones filed an amended motion for postconviction relief, which was unverified and accompanied by a motion for a competency determination pursuant to *Carter v. State*, 706 So. 2d 873 (Fla. 1997). Dr. Jane Ansley, who evaluated Petitioner for the state, and Dr. Rich Latterner, who evaluated Petitioner for the defense, testified at the evidentiary hearing regarding his competency. The testimony of the experts was conflicting, and the postconviction court found that, although Petitioner has a low IQ: 1) he was not intellectually disabled¹; 2) the tests did not support the find of organic brain damage; 3) Petitioner intentionally did poorly on parts of the tests; and 4) that Petitioner was competent to proceed. *Jones v. State*, 855 So. 2d 611, 615 (Fla. 2003).

After Petitioner was determined to be competent to proceed with postconviction litigation, he filed an amended motion for postconviction relief raising 22 claims, including claims that

¹ Intellectual disability was previously referred to as mental retardation. For purposes of this brief, mental retardation shall be referred to as intellectual disability.

counsel had been ineffective for failing to present a voluntary intoxication defense, for failing to investigate and present mitigation and for failing to litigate his competency to stand trial properly. *Id.* at 614-15, 615 n. 1. In alleging the claims regarding Petitioner's mental state, Petitioner never claimed that he was intellectually disabled, previously known as mental retardation. See generally *id.* The postconviction court ordered a limited evidentiary hearing to address Petitioner's "claims of ineffective assistance of counsel related to a voluntary intoxication defense, mitigation, and [Petitioner]'s pretrial competency." *Jones*, 855 So. 2d at 615. During the evidentiary hearing, Petitioner presented testimony from four mental health experts (Dr. Brad Fisher, Dr. Merry Haber, Dr. Jethro Toomer and Dr. Hyman Eisenstein), none of whom opined that Jones was intellectually disabled. Following the evidentiary hearing, the lower court denied relief on March 8, 2001.

Petitioner appealed the denial of his first motion for postconviction relief to the Florida Supreme Court, raising five issues. *Id.* Petitioner also filed a petition for writ of habeas corpus. *Id.* at 619. The Florida Supreme Court affirmed the denial of the motion for postconviction relief and denied habeas relief. *Id.*

Thereafter, Petitioner filed a successive motion for postconviction relief claiming to be intellectually disabled and entitled to relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). The circuit court summarily denied Petitioner's successive postconviction motion; however, on May 27, 2005, the Florida Supreme Court remanded for an evidentiary hearing on Petitioner's intellectual disability claim.

3. *THE EVIDENTIARY HEARING.* At the hearing, three witnesses testified: Dr. Hyman Eisenstein on behalf of Petitioner, and Lisa Wiley, a psychological specialist with the Department of Corrections, and Dr. Enrique Suarez on behalf of the State. *Jones v. State*, 966 So. 2d 319, 322 (Fla. 2007). During the case between 1991 and 2005, several doctors including Dr. Eisenstein administered intelligence tests such as the WAIS-R (Wechsler Adult Intelligence Scales) and WAIS-III where Petitioner's IQ scored as follows: 72, 70, 67, 72, and 75. *Id.* at 323. The doctors also administered the MMPI (Minnesota Multiphasic Personality Inventory) and the WRAT (Wide Range Achievement Test). *Id.*

Dr. Eisenstein, a neuropsychologist, testified that he had been involved in Petitioner's case beginning with the trial and had tested and interviewed Petitioner on various occasions in 1991, 1993, and 1999. *Id.* While Dr. Eisenstein admitted that he

had not previously diagnosed Petitioner as intellectually disabled, he nevertheless testified at the hearing that he had a change of opinion because the definition of intellectual disability had changed after the first postconviction hearing. *Id.* Eisenstein testified that the criteria for diagnosing intellectual disability are: 1) an IQ score of below 70; 2) two areas of deficiency in adaptive skills; 3) and onset before age 18. *Id.* Acknowledging that Petitioner's scores were higher than 70, Dr. Eisenstein explained that the applicable diagnostic manual still allowed for an individual to be diagnosed intellectually disabled when the IQ fell in the 70 to 75 range if the other two prongs are met. *Id.* Because he previously gave Petitioner the WAIS IQ test in 1991, 1993 and 1999 and other experts gave the WAIS IQ test in 2003 and 2005, Dr. Eisenstein decided not to test Petitioner's IQ again. Pet. App. A at 2. Dr. Eisenstein further acknowledged that he had previously given Petitioner many other tests, including the MMPI which was relevant to determining whether Petitioner was intellectually disabled. *Id.* at 5. He admitted that all the MMPIs Petitioner received yielded invalid results, but chose to believe that this was not an indication of malingering but possibly "a cry for help." *Id.*

Dr. Eisenstein indicated that he conducted a "retrospective diagnosis" to assess Petitioner's adaptive levels before age 18. *Jones*, 966 So. 2d at 323. He concluded that Petitioner's "adaptive skill levels as an adult were not part of the criteria defining intellectual disability" and disagreed that there were any formal test instruments to determine present or current adaptive functioning; as such, he did no testing. *Id.* at 323-27.

In assessing the third prong, Dr. Eisenstein stated that he had interviewed family members during his previous evaluations and again for postconviction proceedings. Pet. App. A at 3. He admitted that he accepted what was told to him during his various interviews at face value and there was no evidence to support their statements. *Jones*, 966 So. 2d at 328. Dr. Eisenstein also reviewed a discharge summary from Jackson Memorial Hospital, Petitioner's school and prison records, and other academic tests that Petitioner was given over the years. Pet. App. A at 5.

Based on this information, Dr. Eisenstein determined that prior to age 18, Petitioner had:

significant deficits in adaptive functioning in the areas of: (1) communication—family members said Petitioner was not articulate and was a slow learner; (2) academic function—family members said he was mentally slow and needed special schooling, and some school records showed failing grades; (3) self-direction—Petitioner's sister said Petitioner needed her help when he was young and Eisenstein opined that

Petitioner's older, common law wife served as a "mother figure or a caregiver to take care of him"; (4) social interpersonal skills—family members said Petitioner was a loner; and (5) health and safety—family members said Petitioner did not take care of himself as a child, and he had numerous medical concerns that no one addressed.

Jones, 966 So. 2d at 323.

Dr. Eisenstein acknowledged that Petitioner's aunt told him that Petitioner was a good child at the time of trial and that she changed her version of Petitioner's childhood, now claiming Petitioner was slow at the time of the postconviction proceedings. Pet. App. A at 4 n. 2. Petitioner's sister also claimed to have taken care of Petitioner when he moved to New York to live with his mother at the age of 11; however, she was not living with them at the time. *Jones*, 966 So. 2d at 322. Dr. Eisenstein nevertheless believed there were no substantial discrepancies in the information from the interviews he had conducted. *Id.* at 328.

Dr. Eisenstein admitted that he never saw any school records showing that Petitioner was in special education classes. *Id.* at 322, 328. He insisted that this was because the school records were incomplete. *Id.* When confronted with the fact that Petitioner's third grade teacher had previously testified that Petitioner was a good student and had above average intelligence, Dr. Eisenstein eventually claimed that

Petitioner only did well because his sister helped him. *Id.* at 321, 328. In fact, the decline in Petitioner's school grades coincided with an increase in disciplinary problems and truancy and Petitioner's own statements contracted with his relatives' statements. *Id.* at 328. Even so, Dr. Eisenstein found that "because Petitioner met two prongs of the definition (onset before age 18 and deficiencies in adaptive skills), Petitioner's borderline IQ scores did not invalidate his diagnosis of intellectual disability." *Id.* at 323.

Lisa Wiley testified that she was a psychological specialist for the Department of Corrections for over sixteen years and had known Petitioner since his arrival on death row in 1993. *Id.* She testified that "Petitioner always kept a neat cell and demonstrated polite and appropriate behavior." *Id.* He spoke "rationally, coherently, and logically, and she never thought he was intellectually disabled." *Id.* She regularly with Petitioner who was on psychotropic medications, and helped process his requests for assistance. *Id.* On the occasions when Petitioner chose to speak to Ms. Wiley, Petitioner was able to communicate in a rational, coherent and logical manner, and the language Petitioner used in these conversations was not elementary. *Pet. App. A at 9.*

Additionally, Ms. Wiley stated that Petitioner filed coherent and rational written grievances and requests for assistance, such as not receiving mail and repairing his television. *Id.*; see also *Jones*, 966 So. 2d at 323. Ms. Wiley also identified two grievances Petitioner wrote concerning failures of the inmate bank to have credited money transfers to his account in a timely fashion. *Jones*, 966 So. 2d at 323-24.

Dr. Enrique Suarez, a psychologist, examined Petitioner for the State. *Id.* at 324. He defined the test for intellectual disability as "significantly subaverage intellectual functioning, concurrent deficits in present adaptive functioning, and onset before age 18." *Id.* He disagreed with Dr. Eisenstein that the test for intellectual disability limits the inquiry into adaptive functioning to solely the years before age 18 and that it requires present adaptive functioning. *Id.*

Dr. Suarez stated that "according to the applicable diagnostic manual, the inquiry into adaptive functioning must consider present circumstances because true intellectual disability is lifelong." *Id.* Moreover, "a child deemed intellectually disabled may be experiencing a developmental delay." *Id.* Thus, "a diagnosis of an adult, based solely on a person's adaptive functioning as a child, is invalid." *Id.* He also stated that "the purpose of the onset-before-age-18

requirement is to account for other causes." *Id.*

Dr. Suarez further interviewed Petitioner about the details of his life, "administered several tests, including achievement tests, nonverbal intelligence tests, memory tests, and the Adaptive Behavior Assessment System (ABAS)." *Id.* He also reviewed and considered the "medical, school, prison, and testing records and raw data related to Petitioner, including those of the experts who previously examined Petitioner from the trial to the time of the hearing." *Id.*

As to the first prong, Dr. Suarez found Petitioner's test scores on several tests indicated that he was "purposely not performing his best, and on the MMPI he found that Petitioner was malingering." *Id.* He believed it is necessary to consider the possibility of malingering in a forensic evaluation, as the DSM-IV requires, and that not all psychological tests include malingering or validity checks. Pet. App. A at 6-7. While the MMPI had internal checks of validity, the IQ tests do not. *Id.*

Notably, Dr. Suarez gave Petitioner the MMPI in order to have a measure of validity and to determine whether some other mental condition was interfering with Petitioner's ability to perform optimally on the IQ tests. *Id.* Petitioner was able to read the test, which required a higher reading level, and responded to the questions in a manner that indicated "off-the-

scale malingering and exaggeration". *Id.*

Dr. Suarez did not believe that Petitioner had significantly subaverage intellectual functioning to satisfy the first prong because Petitioner had consistently scored in the borderline range on IQ tests. *Jones*, 966 So. 2d at 329. Further, the collateral information suggested that Petitioner was probably actually functioning in the borderline to low average range. *Id.* at 324. Importantly, as these tests were administered after Petitioner had been shot in the head, his level of intellectual functioning was probably even higher before the wound. *Id.* Dr. Suarez also did not accept Dr. Eisenstein's hypothesis that Petitioner's poor performance on intelligence tests was due to brain damage or "major trauma" and instead believed that the correct interpretation was that Petitioner intentionally suppressed his level of effort. *Id.* at 324, 329.

With regards to adaptive functioning, Dr. Suarez found Petitioner in his interview to be "articulate and noted Petitioner's vocabulary, internally consistent sentences, detailed and insightful narration, and his understanding of concepts." *Id.* at 324. On the ABAS that he administered to the staff at the Department of Corrections who were familiar with Petitioner, his "adaptive functioning scores reflected a score of average, although all three staffers rated [Petitioner's]

social skills as borderline or below average." *Id.* Petitioner's history of traveling independently, being employed, supporting himself through legal and illegal means and having relationships with women indicated a level of functioning inconsistent with being intellectually disabled. *Id.* at 325. Petitioner evidenced an ability to care for himself medically and an awareness of his needs at a level that was inconsistent with intellectual disability. *Id.* at 324. The information that Petitioner provided was confirmed by a review of his medical chart at the jail. *Id.*

In analyzing if Petitioner met the third prong, Dr. Suarez stated that Petitioner "did not have failing grades until junior high when his failing grades matched his poor conduct and effort." *Id.* at 324-25. Additionally, "for an eleven-year-old to stowaway on an airline 'takes a tremendous amount of sophistication.'" *Id.* at 325. Petitioner's "demonstrated abilities, communication skills, and evident high degree of thought and daily functioning did not support a diagnosis of intellectual disability." *Id.* In sum, the information reviewed and the tests and interviews he conducted led Dr. Suarez to opine that Petitioner was not intellectually disabled.

Following the evidentiary hearing, the lower court denied Petitioner's motion, finding no credible evidence that Petitioner satisfied any of the three elements of intellectual

disability. Pet. App. A at 11-12. Petitioner again appealed the denial of his motion to the Florida Supreme Court. On May 24, 2007, the Florida Supreme Court affirmed the denial of the second successive motion for postconviction relief, agreeing that Petitioner failed to prove any of the elements of intellectual disability. *Jones v. State*, 966 So. 2d at 330.

4. *FEDERAL HABEAS PROCEEDINGS.* On November 6, 2007, Petitioner filed a federal habeas petition in the Southern District of Florida, raising 26 claims, including claims that he was intellectually disabled. *Jones v. McNeil*, 776 F. Supp. 2d 1323, 1338 n. 7 (S.D. Fla. 2011). On March 7, 2011, the district court denied the petition, finding the intellectual disability claims meritless. *Id.* at 1371-75. Petitioner attempted to appeal the denial but was denied leave to do so. He sought certiorari, insisting that his intellectual disability claims were meritorious, which was denied. *Jones v. Florida Dep't of Corr.*, 568 U.S. 873 (2012).

5. *THE FOURTH SUCCESSIVE POSTCONVICTION MOTION.* After two other filed postconviction motions regarding separate issues of retroactivity and clemency proceedings were denied and affirmed on appeal, Petitioner filed his fourth successive motion for postconviction relief on May 26, 2015, asserting that *Hall v. Florida*, 134 S. Ct. 1986 (2014), was a fundamental change in law

that should be applied retroactively, and further required the States to define intellectual disability and construe any definition of retardation in accordance with the views of the American Association of Intellectual and Developmental Disabilities (AAIDD). See Pet. App. C. The postconviction court held a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993).² *Id.*

At the *Huff* hearing, Petitioner presented the postconviction court with witnesses and exhibit lists. (PCR4 200-03)³ He then argued that *Hall* had to be retroactive because a different defendant had his case reversed and remanded for reconsideration in light of *Hall*. Further, he contended that *Hall* prohibited denying intellectual disability claims based solely on IQ scores and *Hall* therefore created a new class of individuals who were not subject to the death penalty. (PCR4 203-08)

Petitioner admitted that the postconviction court allowed him to present evidence on the other elements of intellectual disability and that evidence had been considered and rejected at

² In *Huff v. State*, the Florida Supreme Court held that in death penalty cases, a postconviction court must hold a hearing to determine whether an evidentiary hearing is required and to hear legal argument relating to the motion for postconviction relief.

³ "PCR4" refers to the postconviction record and cites to the transcript of the *Huff* hearing held on June 18, 2015.

the 2006 hearing. (PCR4 207) He stated that if a new evidentiary hearing was granted, he would recall Dr. Eisenstein to testify regarding the evaluation conducted prior to the first evidentiary hearing and call a Dr. Wu who had begun but did not complete an evaluation of Petitioner. (PCR4. 210) He also proposed presenting testimony from individuals who authored chapters in a book concerning their views on how intellectual disability should be evaluated in death penalty cases. (PCR4. 210) The State responded that Petitioner already presented all the evidence *Hall* required and his intellectual disability claim had been rejected. (PCR4. 226-27)

On June 18, 2015, the lower court entered its written order denying the claim. See Pet. App. C. It determined that *Hall* did not create any new rights and merely required that a Petitioner whose IQ fell within the standard error of measure of 70 be permitted to present evidence of the other two elements of intellectual disability. *Id.* Because Petitioner was permitted to present such evidence and it was already determined that Petitioner did not prove these other elements, the lower court found *Hall* to be inapplicable to Petitioner. *Id.*

On July 6, 2015, Petitioner filed a motion for rehearing which the postconviction court denied on July 15, 2015. (PCR4. 184-85) Petitioner appealed the matter to the Florida Supreme

Court on August 17, 2015.

6. *THE RULING BELOW.* On September 28, 2017, the Florida Supreme Court denied Petitioner's fourth postconviction motion, affirming the lower court's summary denial of the *Hall* claim. Citing to *Hall*, 134 S. Ct. at 1990, the court opined:

[W]hen assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must take into account the standard error of measurement of IQ tests. *Id.* at 2001. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

...

When the trial court considered Jones's first successive motion for postconviction relief and intellectual disability claim in 2006, it permitted Jones to present evidence regarding all three prongs of the intellectual disability standard.

...

Jones is not entitled to a new hearing in order to present additional evidence of intellectual disability because he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard in 2006, and *Hall* does not change the fact that Jones failed to establish that he meets the second or third prong. As we have recently reiterated, "If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Wright v. State*, 213 So. 3d 881, 895 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016);

...

Jones also asserts that the trial court in 2006 and

this Court in 2007 improperly concluded that he did not meet the adaptive deficits prong because those determinations were based on reports from corrections officers or other observations of his functioning in prison, which are not valid indicators of adaptive behavior. This claim is procedurally barred and meritless. We rejected this argument in 2007, finding that the conclusion that Jones did not meet the adaptive deficits prong was not solely based on observations of Jones's functioning in prison. *Jones*, 966 So.2d at 327-28. *Hall* does not disturb the previous finding that Jones failed to establish that he has concurrent adaptive deficits, and Jones is not entitled to relitigate this claim.

Jones v. State, 231 So. 3d 374, 376 (Fla. 2017), *reh'g denied*, No. SC15-1549, 2017 WL 6604265 (Fla. Dec. 27, 2017).

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

REASONS FOR DENYING THE WRIT

There is no basis for certiorari review of the Florida Supreme Court's decision finding that Petitioner failed to meet his burden of establishing intellectual disability as the lower court properly applied this Court's precedent to the disputed facts and found that there was no evidence Petitioner has significantly subaverage intellectual functioning or deficits in adaptive behavior.

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

subaverage intellectual functioning or concurrent deficits in his adaptive behavior and manifesting prior to age 18.

As a preliminary matter, there is no conflict between the Florida Supreme Court decision and a decision of this Court or that of any other state supreme court regarding the denial of relief. A determination of whether the state courts below properly rejected Petitioner's successive intellectual disability claim is wholly dependent on the facts of the case and of significance to no one other than the parties to this litigation. As such, this Court should decline to exercise certiorari jurisdiction over this case. See *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

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

definitive procedural or substantive guides for determining when a person" is intellectually disabled.

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

The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

§ 921.137(1), Fla. Stat. (2016).

In *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014), this Court noted that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." This Court stated that Florida's

statutory definition of intellectual disability, on its face, was consistent with the views of the medical community; however, the Court's narrow interpretation of the statute, foreclosing further evidentiary development when a defendant had an IQ score above 70, was unconstitutional. *Id.* at 1999-2001.

Respondent submits that the Florida Supreme Court correctly followed this Court's precedent and the relevant clinical standards when analyzing Petitioner's claim. As such, certiorari review of this factual dispute is inappropriate. Petitioner argues that *Hall* requires states to conform their legal definition of intellectual disability to the views of the scientific community. Further he argues that the Florida courts ignored clinical standards by accepting Dr. Suarez's analysis on all three prongs, which allegedly "disregarded the standards of the psychological community" and therefore should not have been deemed "competent evidence that [Petitioner] is not [intellectually disabled]". Petition at 16.

As to the first prong of Florida's intellectual disability test, Petitioner blanketly asserts that Dr. Suarez reviewed five prior WAIS IQ evaluations and determined that Petitioner did not meet this prong "based on the now-unconstitutional bright line cutoff of 70". Petition at 16-17. In fact, the 2017 Florida Supreme Court opinion mentions that Petitioner "would likely now

meet the first prong." *Jones* 231 So. 3d 374, at 376. That said, the court still considered that the tests were conducted after Petitioner's gunshot wound to the head and to the failure of other prongs to find that Petitioner failed to prove he has intellectual disability under the clear and convincing evidence standard. Additionally, based on the test results and his records review, Dr. Suarez opined that Petitioner had malingered during his evaluations and that his IQ scores were therefore unreliable. Based on the evidence before it, the postconviction court found that all the results were generally higher than the threshold for intellectual disability. However, the postconviction court did not end its analysis at the first prong, even though it found that the scores were above the Intellectual Disability threshold; instead in line with the requirements stated in *Hall*, it continued to consider Petitioner's adaptive behavior.

Petitioner's assertion that *Hall* requires states to conform the legal definition of intellectual disability to the views of the scientific community is contrary to the express language of *Hall* itself. In *Hall*, this Court expressly stated that the work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." 134 S. Ct. at

2000. Instead, this Court stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993.

Thus, Petitioner's assertion that *Hall* requires Florida to adopt the American Association on Intellectual Disabilities (AAIDD) definition of intellectual disability and to interpret the definition so adopted in conformance with that organization's views is incorrect. The holding of *Hall* was limited to a determination that it was unconstitutional for Florida to refuse to allow defendants to present evidence of their alleged deficits of adaptive behavior when his or her IQ scores were above 70 but within the standard error of measure of 70. *Hall*, 134 S. Ct. at 2001. In *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017), this Court clarified that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide."

Furthermore, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), shows that Petitioner's suggestion that this Court adopted a nationwide standard for intellectual disability based on the views of the medical community is false. In *Brumfield*, this Court held that the Louisiana trial court violated 28 U.S.C. § 2254(d)(2) by not affording the inmate a hearing on his intellectual disability claim where the IQ scores he presented

were "entirely consistent with intellectual disability" and the record raised questions about his "impairment . . . in adaptive skills." *Id.* Thus, *Brumfield* announced a procedural requirement that Louisiana afford an inmate an evidentiary hearing on an intellectual disability claim where there is some "reasonable doubt" as to his or her intellectual disability. *Id.* at 2281. In finding that the state court acted unreasonably, this Court did not apply a nationwide standard for intellectual disability, but rather relied on Louisiana law defining and analyzing intellectual disability. *Id.* at 2278-79.

In any event, Petitioner herein received a full hearing on his intellectual disability claim in which he was afforded an opportunity to present evidence on all three prongs of the test. Dr. Eisenstein testified that because he gave Petitioner the WAIS IQ tests in 1991, 1993 and 1999 and other experts had given the WAIS IQ tests in 2003 and 2005, he decided not to test Petitioner's IQ again. *Jones*, 966 So. 2d at 323. Dr. Eisenstein chose to believe that the results from MMPI, which was certainly relevant to the determination of whether Petitioner was intellectually disabled, were invalid and not an indication of malingering. In fact, Dr. Eisenstein did not believe that Petitioner could malingering. He did not consider administering the MMPI because it tested personality and psychopathology and

because he believed it was inappropriate for intellectually disabled individuals.

On the other hand, the State's expert, Dr. Suarez gave the MMPI, the TONI and the other malingering tests, in addition to reviewing the raw data and reports from every doctor that conducted intellectual testing on Petitioner. He stated that most of the intelligence tests do not have validity testing, and therefore the MMPI was crucial to determine whether Petitioner was intentionally malingering and found that to be the case. On these tests, Dr. Suarez obtained an odd range of subset scores that made the result questionable and incredible. Dr. Suarez administered the validity tests because both the DSM and the National Academy of Neuropsychology required validity testing in forensic evaluations, whereas Dr. Eisenstein did not conduct such validity testing. Whereas Dr. Eisenstein attributed the results to organic brain damage and head trauma, Dr. Suarez indicated that these tests was specifically designed not to be affected by brain damage. The Florida courts accepted Dr. Suarez's belief that the correct interpretation of the test results was that Petitioner intentionally suppressed his level of effort. *Jones*, 966 So. 2d at 330.

Petitioner next asserts that the Florida Supreme Court erred in defending its 2007 findings concerning adaptive

functioning because its previous findings are "deeply flawed, as it endorses a non-clinical diagnostic methodology...." Petition at 17-18. However, as the opinion mentions, findings in the prison setting were not the only facts that Dr. Suarez relied upon in determining that Petitioner was not intellectual disabled. Petitioner simply disagrees with the state postconviction court's credibility determinations in finding that Petitioner failed to satisfy the last two prongs of the intellectual disability test. However, this Court does not "redetermine credibility of witnesses whose demeanor has been observed by the state trial court" but not by this Court. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (citing *United States v. Oregon Medical Society*, 343 U.S. 326 (1952)).

Petitioner further alleges that the Florida Supreme Court's analysis deviated from this Court's precedent and prevailing medical standards by inappropriately focusing on Petitioner's "prison behavior and perceived adaptive strengths" and "refus[ing] to reconsider its 2007 adaptive functioning determination. Petition at 27, 29. Contrary to Petitioner's assertions, both the state postconviction court and the Florida Supreme Court extensively analyzed all the evidence and testimony available in the record and properly concluded that Petitioner failed to establish that he had concurrent deficits

in his adaptive behavior. The Florida Supreme Court's analysis of this aspect of Petitioner's intellectual disability claim was consistent with this Court's pronouncements in *Moore*, and prevailing clinical standards.

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

Here, the state postconviction court considered evidence concerning Petitioner's long-term adaptive functioning, including Dr. Eisenstein's testimony from information received from Petitioner's family members and former teachers who knew him when he was young, and from the school and prison records. Dr. Eisenstein admitted that he made no attempt to evaluate Petitioner's level of adaptive functioning concurrently with his evaluation of Petitioner's intelligence as he did not believe there were any "formal test instruments" to determine adaptive functioning.

In contrast, Dr. Suarez not only analyzed the evidence stemming from possible adaptive functioning deficits prior to age 18, but also his current adaptive skill levels according to the requirements of the DSM-IV and because he understood intellectual disability to be lifelong. Dr. Suarez interviewed Petitioner about his life history to the present, administered several tests, including achievement tests, nonverbal intelligence tests, memory tests, and the Adaptive Behavior Assessment System (ABAS). Dr. Suarez also examined and considered the medical, school, prison, and testing records and raw data related to Petitioner, including those of the experts who previously examined Petitioner from the trial to the time of the hearing. Therefore, it is clear, that contrary to current

medical standards, Dr. Eisenstein concluded that Petitioner's adaptive skill levels as an adult were not part of the criteria defining intellectual disability.

Further, Petitioner misinterprets *Moore* to suggest that the Florida courts in this case ignored the current guidelines from the medical community in finding that Petitioner was not intellectually disabled. In *Moore*, this Court applied *Hall* in concluding that the Texas Court of Appeals had deviated from prevailing clinical standards in several ways in determining that the defendant failed to prove significant impairment in adaptive functioning. *Moore*, 137 S. Ct. 1039 (2017). First, the Texas court found that the defendant's adaptive strengths "constituted evidence adequate to overcome considerable objective evidence of Moore's adaptive deficits," whereas "the medical community focuses the adaptive functioning-inquiry on adaptive deficits." *Id.* at 1050.

Additionally, the Texas court, contrary to the medical community, concluded that the Moore's academic failure and childhood abuse and suffering "detracted from a determination that his intellectual and adaptive deficits were related", as well as requiring the defendant to prove that his adaptive deficits were not related to a personality disorder. *Id.* at 1051. Finally, the Texas court further diverged from prevailing

clinical standards by applying "nonclinical" factors derived from case law in determining that Moore failed to prove deficits in adaptive behavior. *Id.* at 1051-52.

Unlike Moore, the Florida courts relied on current definitions of intellectual disability which are consistent with the DSM-5 and the AAIDD-11. Rather than overemphasizing adaptive strengths or Petitioner's adaptive functioning in a prison setting, the Florida courts considered Petitioner's alleged deficits in adaptive behavior and found that he failed to establish the existence of any.

It is important to recognize that, contrary to what Petitioner seems to suggest, this Court in Moore did not **prohibit** the consideration of an inmate's adaptive strengths. The problem in Moore was not that adaptive strengths were considered at all; rather the Texas court **overemphasized** the defendant's adaptive strengths and, contrary to "clinical authority" proceeded to **arbitrarily** offset the defendant's demonstrated adaptive deficits against "**unconnected strengths.**" *Id.* at 1050 n.8 (emphasis added). In contrast here, the Florida courts did not arbitrarily offset Petitioner's alleged adaptive deficits against "unconnected strengths."

Petitioner nevertheless contends that the state courts improperly relied on adaptive strengths in concluding that he

failed to establish the second prong of the intellectual disability test, and that this rendered the state court unable to review prong three of the test. While this Court recently cautioned in *Moore* that a court should not overemphasize an individual's adaptive strengths, and should not rely on strengths developed in a controlled setting like prison. The Florida Supreme Court's analysis did not overemphasize Petitioner's adaptive strengths or his behavior while in prison. *Id.* at 1050 Although Dr. Suarez administered a standard test of adaptive functioning to prison personnel to get as much information as possible, he did not base his opinion solely on this information and the court's analysis did not focus on it.

Additionally, since Dr. Eisenstein was the only witness Petitioner presented in an attempt to show that Petitioner had concurrent deficits in adaptive behavior, given that Dr. Eisenstein indicated he did no such testing, a finding that Petitioner did not present evidence on this issue is fully supported by the record. According to the evidence on this prong, Petitioner's concurrent adaptive behavior demonstrated that he engaged in appropriate social relationships, managed his money, wrote grievances, administered his own medications and understood all his medical problems, communicated issues in his living quarters, and acted as a leader among inmates. Among

these factors, Petitioner was able to support himself as a young adult, despite dropping out of school at a young age, was able to maintain employment, provide for his girlfriends, and travel and live in several states alone.

In assessing the third prong, the court considered that Dr. Eisenstein took every piece of information that was told to him at face value and that he blanketly believed there were no substantial discrepancies in the interviews he conducted with Petitioner's sisters and aunt. Contrary to Petitioner's assertion that no credibility findings were made, some of Dr. Eisenstein's testimony was found to be incredible as he conceded that these three witnesses' testimonies changed significantly from what was said at their first interviews. In supporting Petitioner's bid to be exempt from execution, Dr. Eisenstein also took the untenable position that young children can make their own travel arrangements to explain how he traveled to New York and find his family.

Further, Dr. Eisenstein insisted that the lack of a diagnosis of intellectual disability on the school records was because they must have been incomplete; he would not accept other theories. To that end, Dr. Eisenstein also ignored the fact that Petitioner's third grade teacher testified that Petitioner was a good student and had above average

intelligence. Instead, Dr. Eisenstein merely claimed that Petitioner only did well because his sister helped him. Dr. Eisenstein also recognized that the decline in Petitioner's school grades coincided with an increase in disciplinary problems and truancy. Therefore, Petitioner was unable to present competent substantial evidence to show intellectual disability was onset prior to age 18.

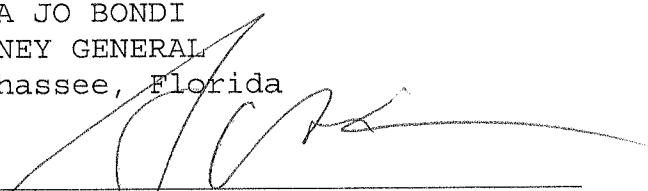
The Florida Supreme Court's analysis in this case was consistent with prevailing clinical standards and based upon a proper credibility determination given the existence of conflicting evidence. The question Petitioner presents does not offer any new ruling which comes within the parameters of Rule 10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

CONCLUSION

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

Respectfully submitted,

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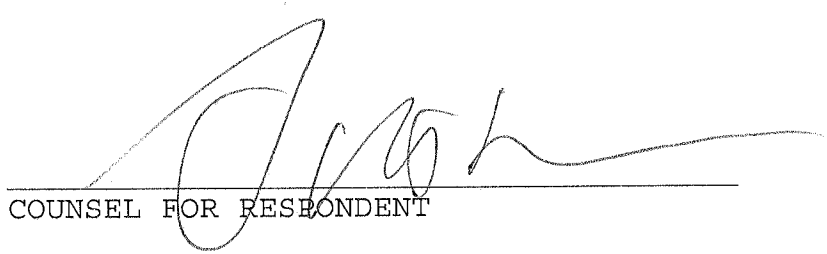
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2nd day of July, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to: William Hennis, Special Assistant Capital Collateral Regional Counsel, Capital Collateral Regional Counsel-South 1 East Broward Boulevard, Suite 444 Fort Lauderdale, Florida 33301.



COUNSEL FOR RESPONDENT