IN THE SUPREME COURT OF FLORIDA

JUAN DAVID RODRIGUEZ,

Appellant,

v. **CASE No. SC15-1795**

STATE OF FLORIDA,

Appellee

_____/

MOTION FOR REHEARING

COMES NOW, Appellant, JUAN DAVID RODRIGUEZ, by and through his undersigned counsel, and herein moves for rehearing from this Court's decision affirming the circuit court's summary denial of Mr. Rodriguez's motion under Fla. R. Crim. P. 3.851. In support thereof, Mr. Rodriguez states:

On April 20, 2017, this Court issued its decision affirming the circuit court's summary denial of Mr. Rodriguez's motion for postconviction relief pursuant to Fla. R. Crim. Pro. 3.851. The opinion indicates, "NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED DETERMINED." *Rodriguez v. State*, Slip. Op. at 20 (Fla. Apr. 20, 2017). This Motion for Rehearing is timely filed pursuant to Fla. R. App. Proc. 9.330(a).[1]

[1] Due to errors in Counsel's copy of the record on appeal, Mr. Rodriguez's citations to the record shall be as follows (PCR3 Vol. xx at xx). That way, Mr. Rodriguez will be able to direct this Court to the volume and transcript page number.

Rehearing is warranted because this Court overlooked factual evidence within the record, misapprehended various points of law, and applied an incorrect standard of review which require relief in this case.

A. Intellectual Disability

1. "Being Informed" by Clinical Standards

Although this Court was correct that "being informed" by medical standards does not mean the latest medical guide governs *Atkins* proceedings, *see Rodriguez v. State*, Slip. Op. at 11 (quoting *Moore v. Texas*, 2017 WL 1136278, slip op. at 10 (March 28, 2017), "being informed" by clinical standards certainly does not license state courts to disregard unified clinical consensus. *See Moore*, 2017 WL 1136278, slip op. at 10. *See also Hall*, 134 S. Ct. at 2000 ("[Medical opinions] do not dictate the Court's decision, yet the Court does not disregard these informed assessments."). Ignoring that basic principle[2] that clinical standards may not be disregarded, this Court's opinion demonstrates that it somehow inferred that state courts may make factual or credibility findings in direct conflict with unified clinical standards. But, a direct conflict with the unified clinical consensus presented at an *Atkins* proceeding

[2] Curiously, this Court quoted *Moore*'s language, which stated "being informed by the medical community does not demand adherence to everything stated in the latest medical guide," but it selectively excluded the qualifying statement that follows—"neither does precedent license disregard of current medical standards." *Cf. Rodriguez v. State*, Slip. Op. at 11, *with Moore v. Texas*, 2017 WL 1136278, slip op. at 10 (March 28, 2017).

and with relevant clinical authority qualifies as disregard for the clinical authority that purportedly informed the presiding judge. *See Moore v. Texas*, 2017 WL 1136278, slip op. at 10-18 (March 28, 2017). This is especially true when the state's expert lacked clinical authority for his methodology.[3]

Atkins itself was clear. In the very sentence where the Court left it "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences" *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (citing *Ford v. Waignwright*, 477 U.S. 399 (1986) (internal quotations omitted) (alterations in original), the Court qualified that statement and also left a cautionary footnote. That qualifying statement that this Court has overlooked is that state courts must employ "appropriate ways to enforce" the Eighth Amendment. *Atkins*, 536 U.S. at 317. The accompanying footnote stated: "The statutory definitions of [intellectual disability within the states] are not identical, but **generally conform to the clinical definitions** set forth in n.3, supra." *Id.* n.22 (emphasis added). Turning to the Court's internal reference to footnote 3, that note cited the definition of intellectual disability as set forth in the AAIDD—formerly known as

[3] *See e.g.*, *Hall*, 134 S. Ct. at 2000 ("**Neither Florida nor its *amici* point to a single medical professional who supports this cutoff**") (emphasis added); *Moore*, Case No. 15-796, Slip. Op. at 13 n.8 ("**But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain [in order to outweigh or negate adaptive deficits], neither Texas nor the dissent identifies any clinical authority permitting [that.]**") (emphasis added).

the AAMR. Thus, as far back as *Atkins*, the Court indicated that clinical authority carries weight or at least cannot be outweighed against the absence of clinical authority, as the definitions and how they are applied must be in general conformity. Put simply, science matters and state courts should "generally conform" to clinical understandings of ID in *Atkins* proceedings.

In *Hall*, the United States Supreme Court showed that "general conformity" with textual definitions is not enough. Indeed, the Supreme Court held that the application of textual definitions must also be in general conformity. *Hall* was monumental in showing that this Court's methodology in diagnosing intellectual disability had the effect of substantially risking intellectually disabled persons would be executed.[4] This Court's bright-line rule from *Cherry* developed as a result of this Court's belief that the plain meaning doctrine trumped the informative value of clinical text. Thus, implicit in the holding that this Court could have interpreted Florida's intellectual disability definition consistently, *see Hall v. Florida*, 134 S.

[4] Similar to the risk this Court took by applying its bright-line IQ cutoff from *Cherry*, this Court's opinion in footnote 6 appears to venture into the same minefield that it just stepped out of. In that footnote, this Court reasoned that the distinction between this case and *Moore v. Texas* is that the textual definition for intellectual disability in *Moore* was controversial whereas Florida's textual definition is not. Constitutionality does not operate in degrees or shades of grey. Application, and therefore methodology, of textual definitions matter, as evidenced by *Hall v. Florida* in which the United States Supreme Court provided that this Court could have applied the statutory definition consistent with clinical standards—and therefore the constitution—had it not used its bright-line rule. *Moore* is not simply about the *Briseno* factors but rather-just like *Hall* and *Atkins*—in that clinical science matters.

Ct. 1986, 1996-99 (2014), the United States Supreme Court acknowledged that legal interpretive methods and doctrines cannot be relied upon if doing so would result in a process that directly conflicts with unified clinical consensus. This Court's opinion, in Mr. Rodriguez's case, suffers from the same flawed interpretation.

In essence, this Court's opinion authorizes Florida courts to permit experts to speak on clinical standards and nothing more. Any discussion on whether clinical standards were complied with or any analysis explaining why clinical authority is to be ignored by the reviewing judge is not required according to this Court's application of *Atkins* to Mr. Rodriguez. The circuit court never addressed how Mr. Rodriguez's evaluation conformed or deviated from clinical standards. It never explained why clinical standards cut against or bolstered the testimony of the State's evaluating expert. It never identified areas where clinical disagreement exists and the impact of that disagreement. Nor did it analyze the impact of clinical information as related to its findings. In fact, Judge Prescott repeatedly stated and indicated throughout the proceeding that clinical authority was irrelevant in an *Atkins* proceeding. *See, e.g.*, (PCR3 Vol. 26 at 334-36) (But the definition [from **the AAIDD and the DSM] they will not be utilized**…**The objection [on relevance] will be sustained**."); (PCR3 Vol. 26 at 259) ("[B]ecause you said [Dr. Tasse's] going to testify to the AAIDD recommendations, [t]hen we don't need his recommendation [.] **They aren't material and relevant**.") (emphasis added). The

State even encouraged the court to take that position. Yet, this Court did not address that. Even if clinical authority is purely informative and not deferential, the circuit court and this Court seemingly overlooked how nothing in the clinical community corroborates anything Dr. Suarez did whereas Dr. Weinstein's evaluation is consistent with and corroborated by clinical authority.

In one powerful sentence, this Court stated "*Hall* looks to the medical community…but does not change credibility determinations in intellectual disability proceedings." *See Rodriguez v. State*, Slip. Op. at 11. The entirety of this Court's opinion relies on that underlying assumption. As this Court stated:

> The language Rodriguez cites in *Hall* does not stand for the proposition that credibility findings are improper when they conflict with medical standards… This Court does not reweigh evidence or second guess a circuit court's credibility determinations. Even if *Hall* increases deference to medical standards as Rodriguez claims, **the circuit court in the prior proceeding weighed the testimony of multiple experts and made its findings based on competent, substantial evidence**.

Rodriguez v. State, Slip. Op. at 11-12 (emphasis added). While this Court acknowledged that Dr. Tasse and Dr. Oakland testified at the postconviction evidentiary hearing, it excluded the fact that both experts were only permitted to testify as proffered evidence because the court did not believe their clinical testimony was relevant to Mr. Rodriguez's *Atkins* proceeding. In fact, the record from the evidentiary hearing contains numerous instances showing that the court did

not rely upon or weigh clinical authority to inform its analysis. Yet, despite the repeated instances demonstrating the circuit court disregarded clinical authority, this Court found no violation of *Atkins* because it reasoned the circuit court's order "weighed the testimony" and made its findings based on competent, substantial evidence. That finding overlooks significant portions of the record that are factual in nature and ignores entirely the circuit court's outright rejection of clinical authority in contravention of *Hall*.

a. IQ Score

It is significant that before Mr. Rodriguez ever presented his diagnosis of ID within the confines of an *Atkins* claim, the Florida courts and the State never disputed Mr. Rodriguez's low IQ indicating he satisfied the first prong of a diagnosis of ID. This Court, in 2005, stated that "**all of the experts who examined Rodriguez concluded that he has low intelligence**." *Rodriguez v. State*, 919 So. 2d 1259, 1266 (Fla. 2005) (emphasis added). This Court also relied upon language from the circuit court stating that there was "**no doubt [Mr. Rodriguez] has a low IQ**." *Id.* (citing state circuit court) (emphasis added). In the circuit court order that originally denied Mr. Rodriguez an evidentiary hearing because it erroneously concluded that this Court's 2005 opinion settled Mr. Rodriguez's *Atkins* challenge, that order stated "**[i]t is beyond dispute that both the trial court and the Florida Supreme Court have determined that based on the evidence, [Mr. Rodriguez] has a low IQ.**" *State v.*

Rodriguez, Order Summary Denial, Case No. F88-18180B (Fla. 11th Cir. Ct. May 1, 2006) (emphasis added). Up until that time, it was clear that the issue of Mr. Rodriguez's low intellectual functioning was not in dispute.

It was not until Mr. Rodriguez's evidentiary hearing in 2008 that all of a sudden Mr. Rodriguez's low IQ was an issue. Then, following the evidentiary hearing pursuant to *Atkins*, the circuit court departed from the multiple findings of other courts that had stated that there was "no doubt [Mr. Rodriguez" has a low IQ" and concluded instead that "there [were] no valid test results to establish that the Defendant's IQ is less than 70." *State v. Rodriguez*, Order, Case No. F88-18180B, at 53 (11th Cir. Ct. Jan. 2011). Because this history affirmatively showing that Mr. Rodriguez has always satisfied the first prong of intellectual disability was glossed over by this Court's opinion, as it was never part of this Court's analysis nor was this language cited to by this Court, this is the first set of facts this Court has overlooked. Put simply, it is exceptionally unlikely that Judge Prescott actually weighed the evidence when every expert who has ever evaluated Mr. Rodriguez obtained a sufficiently low IQ score and Florida courts have always recognized that Mr. Rodriguez has a low IQ. This Court's opinion seems to overlook this history in the record.

In addition, this Court also overlooked portions of the record that demonstrate that both Dr. Suarez and Dr. Weinstein's IQ scores were reliable. As stated by Dr.

Weinstein, consistent IQ scores over time, like Mr. Rodriguez's, strongly indicate that an IQ test score is reliable. (PCR3 Vol. 24 at 65-66) ("[I]t would be unlikely [that] he would retain very similar scores [if he were malingering]. What this tells me [is that] he was attempting to make the best [effort] he could in the test that he took. Obviously, there is [a] difference in scores but they are accounted by the fact that some of the test[s] that are used are different but also accounted by standard error of measurements.").

The proffered testimony of Dr. Tasse, a leading national expert in intellectual disability and professionally associated with the American Association on Intellectual and Developmental Disability ("AAIDD"), explained this clinical reality regarding IQ score consistency as evidence that a current IQ score is reliable. (PCR3 Vol. 26 at 277) (**"**U]sually[,] when a pattern of consistent scores [exists], that's usually a pattern [to] fairly assess[a]person's true IQ or adaptive behavior."). *See also* (PCR3 Vol. 26 at 295). Therefore, according to clinical standards, Mr. Rodriguez's current IQ scores are extraordinarily reliable in light of the sheer difficulty it would take for anyone to obtain or fake the same IQ score range consistently. Nowhere in Judge Prescott's finding of facts did the state court address how consistency over time suggests Mr. Rodriguez's most recent IQ scores are reliable. The circuit court did not consider these portions of the record that corroborate that consistency and tends to show that a current IQ score is reliable;

for, if it had, the circuit court would have never concluded that there were "no valid test results." In affirming the denial of relief, this Court has overlooked the circuit court's disregard for clinical authority by similarly omitting that relevant clinical testimony when evaluating the circuit court's findings.

To be clear, Mr. Rodriguez is not speculating that the circuit court did not consider evidence that consistency over time reveals a test score's reliability. The circuit court stated that it did not view Dr. Tasse's testimony, which explained that consistency is evidence of reliability, as relevant evidence:

> MS. DAY [FOR MR. RODRIGUEZ]: I'm going to be asking Dr. Tasse about his experience and expertise and I'm going to ask him what the AAIDD is, what it's function is, what it does, what, in terms of putting out recommended guidelines for the diagnosis of [intellectual disability], and then, I'm going to ask him to talk about what those guidelines are. I don't think that's improper.
> THE COURT: The **relevance is what**?

(PCR3 Vol. 26 at 257) (emphasis added). After explaining that the AAIDD guidelines are the standard for best professional practices, the state court still did not see the value of informing itself on clinical authority:

> THE COURT: **Why would [knowing what the guidelines are and why they exist] be relevant** if Dr. Weinstein said he performed this?
>
> MS. DAY: We can bring [it] back as rebuttal testimony after Dr. Suarez.
>
> THE COURT: …You said Dr. Suarez was employed by [State]. He employed the same protocol and guidelines.

> MS. DAY: That's the problem. I think once the Court hears Dr. Suarez's testimony, the Court will see that he didn't and therefore I think it will be very helpful for the Court and the record to have Dr. Tasse's testimony to this effect

(PCR3 Vol. 26 at 257-58) (emphasis added). The circuit court proceeded and concluded that clinical authority was immaterial. (PCR3 Vol. 26 at 258) ("**Why would [Dr. Tasse's] recommendation be material**?") (emphasis added); (PCR3 Vol. 26 at 259) ("[B]ecause you said [Dr. Tasse's] going to testify to the AAIDD recommendations, [t]hen we don't need his recommendation [.] **They aren't material and relevant**.") (emphasis added). The court's comments also reflected that it did not think clinical standards had any informative or deferential value:

> **I'll let you proffer it[, meaning Dr. Tasse's testimony]. I don't believe it's appropriate for the Court to take it[, meaning Dr. Tasse's testimony,] into consideration understanding [that] Dr. Tasse, with expertise, is going to be testifying to the protocol of the AAIDD** and then you're going to call into question whether or not Dr. Suarez properly followed the appropriate protocol with AAIDD.

(PCR3 Vol. 26 at 260) (emphasis added). The court's comments here establish that it erred by viewing clinical standards as inappropriate for *Atkins* hearings. Even if clinical standards do not have deferential value, because circuit court's still have an obligation to inform themselves and view the evidence as relevant prior to making any findings, the circuit court clearly committed error here by disregarding them entirely. By omitting this fact from its analysis, this Court has misapprehended or

overlooked the record. This Court's conclusion that competent, substantial evidence supports the findings as to Mr. Rodriguez's IQ could only be reached if these sections of the record, along with the informative or deferential value of clinical authority and similar sections in the record, were overlooked.

b. Language and Cultural Accommodation Reliability

Further evidence that Judge Prescott, overlooked facts and so too did this Court, was the inconsistent rationale for finding Dr. Weinstein's evaluation not reliable. The circuit court order explains:

> The court finds that the results obtained from Dr. Weinstein on the Mexican WAIS III are not reliable. Dr. Weinstein conceded that **IQ tests must be given to a representative example of the population with whom it is intended to be used**. IQ norming, according to Dr. Suarez takes into account a person's culture and level of education**. [Dr. Suarez] stated that if the person is not a member of the population that was used to formulate the norm, the results are meaningless**.

State v. Rodriguez, Order, Case No. F88-18180B, at 53 (11th Cir. Ct. Jan. 2011). (emphasis added). This Court recited that not being part of the representative member of the population was the basis for finding Dr. Weinstein's evaluation not credible. *See Rodriguez v. State*, Slip. Op. at 12. Put contextually, Judge Prescott found Mr. Rodriguez's evaluation not credible because the standardized Spanish-language text from the Mexican version of the WAIS-III was utilized in the

administration of the American WAIS-III for a Cuban.[5] But, Dr. Suarez similarly did not use a Cuban IQ test, as his test was the standardized text from Spain and the scoring method was from Spain. If the basis for deeming Dr. Weinstein's IQ evaluation "not reliable" is that Mr. Rodriguez is not American or Mexican, then implicitly finding Dr. Suarez more reliable reveals an irreconcilable discrepancy because Mr. Rodriguez—a Cuban national—is not from Spain.[6] This is not only a fact overlooked by Judge Prescott's order, but an inconsistency in its rationale. Yet, this inconsistency in Judge Prescott's rationale was omitted in this Court's analysis, revealing that a fact was overlooked.

Interestingly, this Court overlooked other facts related to Dr. Weinstein's IQ score evaluation. Dr. Weinstein attempted to explain that the standardized text of the Mexican WAIS-III permits use of either the American norms or the Mexican norms, but that the Mexican norms are so flawed they could "never provide [someone with any information that would be useful." (PCR3 Vol. 24 at 47-48). Dr. Weinstein described why the Mexican norming option was so flawed, put that flaw into a contextual example, and stated his opinion was supported by clinical consensus. The State, however, objected that reliance on clinical authority was "**bolstering**" and the

[5] Arguably, the only difference between Cardona's evaluation and Mr. Rodriguez's evaluation is that the translation of the American WAIS-III was adopted from the Mexican WAIS-III as opposed to inventing it during the evaluation.

[6] It is undisputed by the parties that Cuba lack a suitable IQ test.

state court viewed reliance on clinical support as "**beyond the scope of the question**." (PCR3 Vol. 24 at 48-49) (emphasis added).

When asked on direct whether there were any scholarly reports for his opinion to utilize the American norming option over the inadequate Mexican norming option, the State objected on the basis that its expert was bolstering its opinion and the testimony was sustained. (PCR3 Vol. 24 at 49). As such, Dr. Weinstein was prohibited by the state court from elaborating on the science and clinical authority supporting his diagnostic method throughout the evidentiary hearing. Thus, if Judge Prescott and the State always viewed clinical authority supporting Dr. Weinstein's methods as nothing more than "bolstering" or "beyond the scope of the question," it is incorrect to conclude—as this Court did— that Judge Prescott "weighed" the testimony of multiple experts. Surely, the circuit court did not consider "irrelevant" evidence when making its findings. In other words, this Court overlooked or omitted facts that demonstrate Judge Prescott viewed clinical authority had no value (e.g. deeming clinical authority as irrelevant or bolstering) in *Atkins* proceedings in accordance with the State's arguments.

If Dr. Weinstein had the opportunity to explain the situation he was in when asked to evaluate a Cuban national, he would have relied upon the clinical authority that discusses the sheer impossibility of being able to find a perfect fit for someone like Mr. Rodriguez. The AAIDD, for instance, has recognized that when assessing

members of cultural and linguistic minorities from underdeveloped countries or communities, like Cuba, all available cognitive and adaptive functioning tests may be an "imperfect fit." *See* Ruth, Richard, *Intellectual Disability and the Death Penalty: Consideration of Cultural and Linguistic Factors* 238. It states that "[i]f available tests of cognitive and adaptive abilities are imperfect fits with the client's cultural and linguistic background, the field's expectations is that practitioners will state the limitations and address the specifics of how they may have affected test findings. *Id.* at 239. The AAIDD also provides that these sorts of "[a]ssessments should address cognitive and adaptive functioning within the client's culture of origin and also how well the client is acculturate and functioning compared to age and/or education peers in the mainstream U.S. culture, to the extent possible." *Id.* at 238 (emphasis added). The clinical profession's ethics rules similarly holds this stance:

> Psychologists use assessment instruments whose validity and reliability have been established for use with member of the population tested. **When such validity or reliability has not been established [for a member of that population], psychologists describe the strengths and limitations of test results and interpretation.**

Standard 9.02, Use of Assessments, Ethical Principles of Psychologists and Code of Conduct: including 2010 Amendments" (American Psychological Association (2010)) (emphasis added). The record shows that Dr. Weinstein did exactly this. The

circuit court, therefore, ignored the informative value of clinical authority with regard to the challenges of accommodating a Cuban national.

The only thing Dr. Weinstein could do to alert the circuit court that his methodology was in fact reliable was explain that there is no issue with the Mexican WAIS-III. He explained throughout the hearing that the Mexican WAIS-III's only issue is that one of its norming options—the option he did not use—is so flawed that the other norming option should be employed instead. Clinical authority actually corroborates everything Dr. Weinstein said. *See* Suen, H.K. & Greenspan, Stephen, *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*, (2008) ("**The technical manual [of the Mexican WAIS-III] offers two sets of norms, the original U.S. norms and [the] Mexican norms**.") (emphasis added). As stated throughout the course of this litigation, "the test publishers of the Mexican WAIS-III sent notices that the Mexican norms for the test should not be used and that **the U.S. norms[, which have always been an available norm-ing option,] should be used in its place.**" Suen, & Greenspan, *Linguistic Sensitivity*, at 2 (emphasis added); Greenspan, S. & Olley, J. Gregory, *The Death Penalty and Intellectual Disability: Variability of IQ Test Scores*, at 145. This clinical authority was not discussed in the circuit court's order even though it was part of the record. Thus, the circuit court's omission of this information, along with its statements throughout the entire

proceeding that clinical standards are irrelevant, reveal that it did not defer or find informative clinical standards when it relied on Dr. Weinstein's accommodations for Mr. Rodriguez as an unreliable evaluation.[7] Consequently, as the circuit court's finding on this issue is both logically irreconcilable (i.e. Mr. Rodriguez is no more Spanish than he is Mexican) and contrary to anything resembling scientific information, the circuit court's findings lack competent, substantial evidence, as the sheer quantity and quality of information that contradicts its findings and lack of authority supporting its findings reveal that the circuit court's findings amount to fiction. *See e.g.*, *Hall*, 134 S. Ct. at 2000 ("**Neither Florida nor its *amici* point to a single medical professional who supports this cutoff**") (emphasis added); *Moore*, Case No. 15-796, Slip. Op. at 13 n.8 ("**But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain [in order to outweigh or negate adaptive deficits], neither Texas nor the dissent identifies any clinical authority permitting [that.]**") (emphasis added). Certainly, *Atkins* requires more than a logically inconsistent finding that is in direct conflict with clinical authority. Put simply, both this Court and the circuit court overlooked the record, which includes clinical authority, and misapprehended points of fact and law.

[7] Dr. Tasse also explained that there are substantial difficulties and obstacles in diagnosing persons like Mr. Rodriguez, who requires language and cultural accommodations. (PCR3 Vol. 26 at 297).

c. Malingering

The circuit court order relied upon the so-called "malingering" tests performed by the State's psychologist in support of its conclusion that prong one was not satisfied. *State v. Rodriguez*, Order, Case No. F88-18180B, at 53 (11th Cir. Ct. Jan. 2011). Dr. Suarez administered the Validity Indicator Profile test ("VIP"), the Dot Counting Test, and the Minnesota Multiphasic Personality Inventory test ("MMPI"). As an initial matter for its informative (and deferential) value, the unified chorus of clinicians who developed the diagnostic framework for ID understand that the use of the Dot Counting Test, the VIP, and the MMPI should be viewed with skepticism when administered on ID persons.

> **[T]he Dot Counting Test, the VIP, and the MMPI**… have shown some usefulness in determining feigned performances in research settings, often with psychology students asked to feign a specific type of illness or condition, but the use of the original normative data for these tests is inaccurate because the standardization sampling representation typically did not include a group of people with ID. **Reviews of these tests [in intellectually disabled persons] have indicated that their reliability and validity are highly suspect**.

Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271 (internal citations omitted) (emphasis added). In fact, the use of instruments like the Dot Counting Test, the VIP and the MMPI have tendencies to produce false-negatives and false-positives, meaning these tests identified people as intellectually disabled when they were not

and identified those with intellectual disabilities as malingerers. Keyes, D. & Freedman, D., *The Death Penalty and Intellectual Disability: Retrospective Diagnosis and Malingering*, at 271.

Despite that Dr. Suarez's so-called "malingering" or effort tests are not only clinically unsupported but clinically discouraged in order to avoid compromising the reliability of the intellectual functioning evaluation, Mr. Rodriguez did his best to advise the state court of this. Dr. Weinstein explained that instruments designed to test malingering for mental illness, like the ones Dr. Suarez utilized, are clinically viewed with skepticism when those instruments are used on ID persons, but the State objected "to him referring to and then providing the substance" of that clinical authority. (PCR3 Vol. 25 at 242). The state court sustained the objection, *see id.*, which further reveals its unwillingness to inform itself as to unified professional consensus when deciding Mr. Rodriguez's *Atkins* claim. Certainly, as a matter of law, *Atkins* claims cannot be evaluated in a vacuum devoid of and in direct conflict with clinical authority. But, Mr. Rodriguez's claim was evaluated that way, as Mr. Rodriguez was precluded from relying on clinical authority to show that the so-called malingering tests are not only unreliable but clinically advised against. This information was, of course, excluded from the circuit court's order, indicating that it was not informed by that clinical authority. Further, this Court did not address this information, suggesting that it overlooked relevant portions of the record and points

of law. If this Court had considered the circuit court's blatant disregard for clinical authority, it would have certainly concluded that the circuit court ignored the informative or deferential value of clinical authority. Additionally, this Court would have realized that the circuit court never had competent, substantial evidence to support its findings that Mr. Rodriguez malingered.

There are other factual matters that undercut this Court's conclusion that competent, substantial evidence supports the lower court's finding of malingering and that were not referenced in this Court's opinion thereby revealing that relevant portions of the record were overlooked. With regard to the Dot Counting Test, Dr. Suarez conceded that the test's accuracy is directly impacted by the accuracy of the hand recording the time. (PCR3 Vol. 30 at 836-37). In his testimony, Dr. Weinstein explained that his review of the videotape recording of Dr. Suarez's evaluation demonstrates that the recording of the time taken for the test was not accurate based on a chronometer that appears in the video. (PCR3 Vol. 24 at 81-83). Due to Dr. Suarez's pattern of inaccurate recording times, it resulted in Mr. Rodriguez scoring one point above the cutoff point. If timed correctly, according to Dr. Weinstein, Mr. Rodriguez would have scored two points below the cutoff thereby passing the test. Consequently, the Dot Counting test administered by Dr. Suarez had other issues aside from clinical authority discouraging its usage, meaning it cannot be relied upon for the proposition that Mr. Rodriguez was putting forth something less than good

effort. Additional difficulties with the other tests that Dr. Suarez administered are present as well. Aside from the fact that clinical authority discourages the use of the VIP, and it tends to conclude that people with intellectual disability are malingering when there is no reason to malinger, the test manual itself states that the test should not be used for people who might be intellectually disabled. Dr. Weinstein alerted the Florida courts as to this. *See, e.g.*, (PCR3 Vol. 24 at 118-120). This further supports that Dr. Suarez's malingering test selection was novel and controversial.

With regard to the MMPI, Dr. Weinstein explained that this test is inappropriate for people who may be intellectually disabled. As an initial matter, the MMPI is not a malingering or effort test. But what makes Dr. Suarez's administration of the MMPI exceptionally unsuitable is that the MMPI requires a certain level of reading comprehension not commonly found in intellectually disabled persons. Without testing the level of reading comprehension, a clinician cannot administer the test. Unquestionably, Dr. Suarez did not administer any academic achievement testing to Mr. Rodriguez. Thus, Dr. Weinstein's unrefuted data, which established that Mr. Rodriguez's reading and writing abilities were very low, rendered Dr. Suarez's use of the MMPI inappropriate.[8]

[8] Effort and attention are often confused by inexperienced clinicians as malingering. With regard to the MMPI, the sheer volume of questions that an ID person would have to answer to complete the test, which is 500 yes/no questions, turns an ID person's best efforts into frustration or resignation by answering all of the questions without reading or understanding the questions. Keyes, D. &

Interestingly, the circuit court order did not address any of this clinical information. For a court that presumably "weighed" clinical authority but ultimately came out in favor of an evaluation that directly contradicted everything that the clinical authority recommends, it is odd that the lower court did not even discuss its disagreement with that that clinical authority. Further, it is unconvincing that the circuit court actually weighed the evidence when it continuously deemed clinical authority as irrelevant pursuant to the State's assertions that it was meaningless in an *Atkins* proceeding. Given the sheer quantity and quality of testimony and clinical authority revealing that Dr. Suarez's evaluation was a work of fiction over science, this Court cannot conclude that the findings were based on competent, substantial evidence. While adherence to everything in the latest clinical guide is not necessary, findings in favor of a methodology that directly conflict with clinical standards (i.e. Dr. Suarez's) over another evaluating expert's methodology that does not have those issues (i.e. Dr. Weinstein) reveals that the lower court never "weighed" the relevant evidence adequately. By this Court omitting the issues with Dr. Suarez's evaluation, this Court overlooked relevant facts that have an outcome determinative effect on whether the malingering finding was inappropriate. Even if it is not what this Court

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Freedman, D., *The Death Penalty and Intellectual Disability*: Retrospective *Diagnosis and Malingering* 272. For this reason, ID persons are extremely susceptible to this sort of frustration when taking the MMPI. *Id.*

intended when it omitted these facts, it creates the appearance of the selective exclusion of facts.

Relevant to the issue of malingering, this Court similarly excluded the portions of the record that discussed how consistency over time indicates that a current IQ score in the same range is extraordinarily reliable. As discussed earlier in this motion, consistency over time means that when a new IQ score evaluation falls in the same range, the new score is reliable. Dr. Tasse testified to this clinical reality. Dr. Weinstein testified to this clinical reality. That was not discussed by this Court or the lower court. Because consistency shows that a new IQ score is reliable, consistency can be relied upon to show that malingering did not occur, according to Dr. Weinstein and Dr. Tasse. *See, e.g.*, (PCR3 Vol. 24 at 64-66).

This, along with other facts,[9] was a fact that this Court overlooked in affirming the lower court's finding that Mr. Rodriguez malingered. Had this Court considered this consistency and all of the errors exhibited by Dr. Suarez, it surely would have not concluded that competent, substantial evidence supported the finding that Mr. Rodriguez malingered. For that reason, this Court not only excluded these facts from the opinion but also overlooked (and therefore disregarded) the mountain of evidence outweighing any indication that Dr. Suarez's controversial methods of

[9] The record also discusses Dr. Weinstein's methodology for testing whether Mr. Rodriguez put forth his best effort, as "malingering" cannot adequately be tested in intellectually disabled persons.

d. Adaptive Functioning

In Florida, a defendant must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Id.* (emphasis added). This text is consistent with clinical standards. However, this Court has consistently applied that definition illogically.

The nonclinical diagnostic method applied this Court and the state circuit court, as to prong two, is best exemplified by the decision *Jones v. State*, 966 So. 2d 319 (2007). To be clear, *Jones* does not comport with clinical authority, as it required clinicians to employ a diagnostic framework discouraged in general practice. Accordingly, *Jones* and its progeny violate *Atkins* so greatly by operating in direct conflict with clinical standards that it precluded Mr. Rodriguez from showing that he is in fact intellectually disabled.

One example of this nonclinical approach as to prong two is *Jones*' seeming prohibition on the consideration of retrospective information. In *Jones*, this Court held against the inclusion or reliance on retrospective analyses for prong two by reasoning that the plain meaning doctrine, and not clinical authority, should govern its interpretation. In relevant part:

> As explained below, **we find that the plain language of the statute precludes the defense expert's**

> **interpretation** [that a purely retrospective evaluation is sufficient for a diagnosis of intellectual disability in incarcerated persons.] The first step in determining the meaning of a statute is to examine its plain language. When the language is clear and unambiguous, as it is here, we have no need to resort to rules of statutory construction to determine the legislature's intent. Further Words must be given their plain meaning and statutes should be construed to give them their full effect.
>
> Both Florida law and our rule state that the exception to the death penalty applies to a defendant who 'is mentally retarded' or 'has mental retardation.' Thus, the question is whether a defendant 'is' mentally retarded, not whether he was.
>
> * * *
>
> **[T]he legal definition however, states that the intellectual functioning component must 'exist concurrently with' the deficient adaptive behavior.** The word 'concurrent' means 'operating or occurring at the same time.' Jones's analysis would requires us to ignore the plain meaning of the phrase 'existing concurrently with' that links the first two components of the definition.

Jones v. State, 966 So. 2d 319, 326-28 (Fla. 2007) (internal citations omitted) (emphasis added). The effect of employing such a strict legal interpretive method over deferring to clinical understandings of clinical text had an effect that violated *Atkins* because Florida's criteria for intellectual disability warped into something resembling stereotyping rather than actual science. *See Moore v. Texas*, 2017 WL 1136278, slip op. at 15-18 (indicating departure from clinical standards and precedent operating in direct conflict with those standards has the effect of relying and promoting outdated stereotypes). As explained by the AAIDD:

> **Given that defendants are incarcerated at the time of**

> **the evaluation, current adaptive community functioning cannot be measured.** As is pointed out in the 11tth edition (Schalock et al., 2010) and the *User's Guide* (Schalock et. al., 2012), adaptive behavior is typical functioning in one's community. It is about independent functioning, which cannot be known for a defendant in an *Atkins* case whose freedom is severely limited.

Olley, Gregory J., Intellectual Disability and the Death Penalty: Adaptive Behavior Instruments 187-88 (2015). Thus, an assessment that is purely concurrent would always be insufficient to establish intellectual disability, as clinical professionals understand that with incarcerated individuals "current adaptive community functioning cannot be measured" because prisons do not qualify as a "community" according to the clinical terminology. *Id.* (emphasis added). Because purely concurrent assessments in prison settings create an impossible standard that no clinician could ethically apply, clinicians utilize a more holistic approach by looking into the subject's history. *See* AAIDD User's Guide, at 46 ("It is sometimes necessary to assess the previous functioning of the individual in those situations where a diagnosis of ID becomes relevant. A retrospective diagnosis may be required, for example when clinicians are involved in determining… sentencing eligibility questions).

Because it is well-established that a purely concurrent assessment would never establish prong two in a prison setting due to the fact that inmates lack sufficient personal independence, the Court—in a similar vein—acknowledged that

prison behavior should not be relied upon in an *Atkins* proceeding.[10]

This Court, in *Hall v. State*, acknowledged that the circuit court applied *Jones* too narrowly by excluding retrospective information as part of its analysis into whether prong two was satisfied. Implicit in that legal holding, therefore, is a factual acknowledgment that Florida courts and litigants interpreted *Jones* to exclude reliance on retrospective proof of deficits. This is exactly what happened to Mr. Rodriguez. At the very least, the legal holding in *Hall v. State* reveals that, as a factual matter, Florida courts afforded little weight—if any—to retrospective proof of deficits.

Although this Court stated that the lower court "considered evidence from family and friends" to support its reasoning that present adaptive functioning was

[10] In *Moore*, the Court explained that "[c]linicians [] caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *See Moore*, Case No. 15-796, Slip. Op. at 13. For that proposition, the Court relied on the DSM-5. That parenthetical read as follows "Adaptive functioning may be difficult in a controlled setting (e.g., prisons, detention centers); if possible corroborative information reflecting functioning outside those settings should be obtained." (emphasis added). Put simply, the DSM-5 parenthetical provides that, to the extent that incarceration establishes a controlled environment, any information showing deficits prior to incarceration should be obtained for its corroborative effect. The Court also cited to the AAIDD-11 User's Guide for the proposition that clinicians are entirely counseled against reliance on prison behavior altogether, which implies that a purely retrospective assessment is necessary in at least some cases. *See also* AAIDD User's Guide, at 46 ("It is sometimes necessary to assess the previous functioning of the individual in those situations where a diagnosis of ID becomes relevant. A retrospective diagnosis may be required, for example when clinicians are involved in determining… sentencing eligibility questions,") (emphasis added).

not entirely relied upon by the circuit court when making its prong two analysis, the record is at odds with this Court's interpretation. First, the circuit court order does not rely on retrospective information for deficits (i.e. pre-incarceration behavior) nor did it address present-day adaptive deficits (i.e. during incarceration behavior). This is because it failed to discuss or consider any of the evidence put forward by Mr. Rodriguez that deficits existed prior to and during his incarceration. For instance, Mr. Rodriguez's present-day deficits in poor reading comprehension levels, his poor arithmetic skills, his sexual inappropriateness, his poor communication skills, and his deficits in his social/interpersonal skill, according to Dr. Weinstein, were never addressed by the circuit court. If the circuit court or this Court addressed the present-day deficits in adaptive functioning, it would have realized that prison officials documented Mr. Rodriguez's deficits in adaptive functioning before Dr. Weinstein identified them as such.

With regard to the retrospective information that Dr. Weinstein relied upon, he stated:

> I learned that Mr. Rodriguez has had very serious problems functioning since he was a young child**. That he had some delay in acquiring what we call development milsteone[s], what age you walk, what age you talk.** He had problems relating to other kids, as developing. He was not able to learn in school in spite of very vaunt efforts… [H]e wasn't able to learn he was sent to a program not for kids but kids who couldn't learn in early teens, late puberty, but he still couldn't learn.

> **He exhibited social limitations. He exhibited very poor judgment… would ride horses backwards, not follow instructions in terms of things that he needed to bring [to the home from the market].**

(PCR3 Vol. 24 at 74-75) (emphasis added). Dr. Weinstein also relied upon Mr. Rodriguez's poor academic functioning skills and work skills:

> Now the academic [functioning] was basically none, insufficient. They were very deficient. I learned when he was working, when he came to the United States, we first did the history of his life. He went and joined the merchant marines. In the merchant marines, his ability was very limited in what he did. He was working as basically an assistant to [the] engineer. **His whole task was to fetch tools or pieces or parts that has been told [to me]…[G]iven his ability to work and perform sophisticated task[s] is very limited, he did construction in roofing and painting**.

(PCR3 Vol. 24 at 75-76) (emphasis added). Other retrospective information was also included, as Dr. Weinstein relied on everything.

To the extent any adaptive functioning evaluation was made, retrospective (i.e. pre-incarceration behavior) or otherwise, the circuit court solely relied upon what it perceived as an adaptive strength, not deficits. Although seemingly clever to legal minds, by relying upon a defendant's alleged adaptive deficit and thereafter re-framing that example as an adaptive strength, the lower court inadvertently revealed that it did not review whether deficits existed retrospectively or in the present. Specifically, the circuit court referenced that Mr. Rodriguez was a Merchant Marine as a Cuban citizen, but did not return to the ship in order to pursue a woman. While

the state circuit court acknowledged that this was evidence of Mr. Rodriguez's poor judgement, it characterized that poor judgment as nothing more than the result of falling in love or perceiving oneself to be in love. By merely isolating an alleged example of a deficit and re-framing it as nothing more than indicative of poor judgment, the state court attempted to normalize deficit behavior, which *Atkins* does not permit because that would be nonclinical. *See, e.g.*, *Brumfield v. Cain*, 576 U.S., at __ (slip op., at 15) (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'"). *See also Moore*, Case No. 1S5-796, Slip. Op. at 15. Thus, an act that would appear clever to legal minds uninformed as to how intellectual disability is diagnosed is actually an embarrassing blunder to anyone that understands that prong two focuses on deficits, not strengths or perceived "normal" behavior. Consequently, the circuit court never evaluated prong two adequately, which is to say that it never evaluated prong two at all, by hinging the entirety of its prong two analysis on perceived strengths.

The State's questioning of Dr. Weinstein on the subject of adaptive strengths reveals that the State encouraged the circuit court to emphasize adaptive strengths.

> Q [BY STATE]: What is at issue is present adaptive behavior, right?

> A: Yes, no it's not present adaptive behavior. **No, it's present adaptive behavior deficit, not present adaptive behavior. It's deficit**…
>
> Q: According to you?
>
> A: According to [the] definition.
>
> Q: Once again, Judge Prescott will be the judge of that.

(PCR3 Vol. 24 at 169) (emphasis added). The examples of this improper legal strategy are abundant within the record.[11] Even Dr. Suarez relied on perceived adaptive strengths to weigh or negate the existence of the deficits Mr. Rodriguez exhibits. For example, the following occurred during the *Atkins* hearing:

> Q [BY THE STATE]: [T]he fact that he bought a Mercedes and he goes to Esserman and buys a car for $27,000.00 and financed it, would that be significant [to prong two]?
>
> A: Yes, it is. It reflects a lot of, again, awareness of financing, awareness of taking on a responsibility, actually following through and doing it.

[11] Dr. Weinstein explained that adaptive strengths cannot be looked at or part of the evaluation when determining whether someone has deficits in adaptive functioning because the question is one of deficits, not overall functioning. For that same reason, maladaptive behavior, which is inherently a deficit cannot be relied upon, according to Dr. Weinstein and clinical authority. *See also* (PCR3 Vol. 26 at 373) (showing Dr. Tasse attempted to explain that maladaptive behavior, such as criminal conduct, cannot be relied upon); (PCR3 Vol. 26 294) ("criminal acts are applications of adaptive behavior deficit… Breaking laws and breaking rules are deficit behavior").

(PCR3 Vol. 29, at 770). Thus, Dr. Suarez's deficits in adaptive functioning evaluation relied on and emphasized an assumption that intellectually disabled persons cannot sign for the purchase of an automobile. Such emphasis on perceived adaptive strengths was not an isolated event, however. For instance, after assuming that Mr. Rodriguez's self-reported account that he was a taxi driver, the following exchange occurred during Dr. Suarez's testimony:

> Q: What kind of skills would a taxi driver need to have to accomplish [his] task?
>
> A: Obviously, communication skills. You have to be organized and you have to know the layout of the city, you have to be familiar with routes, and you would have to be familiar with money to collect the fees and make change.

(PCR3 Vol. 29, at 713). Again, Dr. Suarez relied on an assumption that intellectually disabled persons cannot do certain tasks. This diagnostic approach is abundant throughout the record by Dr. Suarez. Although a layman's logic might not detect that this sort of testimony was improper, it is absolutely an unscientific diagnostic method to experienced clinicians because clinicians focus on adaptive deficits not perceived strengths in adaptive functioning. Dr. Tasse's testimony explained this.

> Mental retardation is really [a] large and diverse condition. There are people, the vast majority of people with mental retardation are high functioning. The group that we refer to as mild mental retardation, that's about 85 percent of the people with mild mental retardation. They look like you and me…Some people may have skills with employment, putting things together. People with mild mental retardation, it's an assumption they will have strengths with their deficit.

(PCR3 Vol. 26 at 279-80). Thus, according to clinical standards, perceived adaptive strengths are irrelevant to the diagnosis of intellectual disability. *See* (PCR3 Vol. 26 at 279-80) ("Even if they have, for example, a small business. Even if they can do other things that sometimes contradict the misconception that we have of what mental retardation should be or look like. Once the condition is met, the person qualifies for [the diagnosis of intellectual disability.]"). Taking the clinical testimony presented before Judge Prescott, and the innovative methods implemented by Dr. Suarez, the record shows that Dr. Suarez's conclusion was so unscientific in nature that it lacked any reliability.

This Court's opinion in *Jones* appears to have authorized emphasis on perceived adaptive strengths over any discussion of deficits. Nearly a decade ago, this Court relied upon perceived strengths observed in Victor Jones during his incarceration:

> In prison, Jones follows a daily exercise regimen of his own devising and uses improvised equipment to gain, according to Jones, the benefits of health and stress relief. He understands his various medical problems, the related medication, and self-administers it on schedule. He writes requests to see doctors, specifically defining his medical problems, and suggests changes in diet or medication. He manages the finances of his inmate account, including obtaining appropriate documentation, following up on money transfers from foreign countries, and filing grievances when he finds a discrepancy in the account. He keeps himself and his cell clean and orderly and visits the prison library twice a week

Jones v. State, 966 So. 2d 319, 328 (Fla. 2007). That same opinion also relied upon perceived strengths prior to Victor Jones' incarceration:

> [I]n the "outside world" as a young adult from age 18 to 29 (before he committed the murders), Jones traveled alone, lived in several states, and supported himself through various jobs. He had girlfriends at various times and for several years lived with a "common law wife," as he correctly termed her.

Jones, 966 So. 2d at 328. Thus, as early as *Jones*, this Court authorized state courts to negate the existence of deficits by weighing strengths. Unfortunately, *Jones* was not an anomaly in Florida. One of the seminal cases that the circuit court relied upon to analyze the adaptive functioning prong in Mr. Rodriguez's case similarly relied upon this nonclinical diagnostic approach of relying upon strengths over deficits.

> Phillips purchased a new car for his mother and a typewriter for his sister. He spent a lot of time with his nieces and nephews, and "was real good with them." Phillips often kept the children overnight, took them for ice cream, and would give them rides when needed. In addition to driving, Phillips cooked and went grocery shopping, skills that are indicative of the ability to cope with life's common demands.

Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008).

As stated earlier, the circuit court only reviewed perceived adaptive strengths. Thus, its second prong analysis was evaluated inadequately. This Court even now continues to implement and authorize reliance on adaptive strengths over deficits in adaptive functioning. *See Rodriguez v. State*, Slip. Op. at 16 ("Rodriguez's friends

familiar with him before age 18 testified that he had good hygiene, could care for himself, and could drive."). At the very least, this methodology of relying on strengths so tainted the weight that should have been afforded to retrospective and present-day deficits that Mr. Rodriguez was improperly denied evidentiary development.[12]

Given that context, and the lack of any written analysis regarding Mr. Rodriguez's deficits in adaptive functioning, retrospective or present-day, this Court has gravely overlooked the record. Further, this Court has overlooked its own precedent, the underlying assumptions within the circuit court order, and the context in which Mr. Rodriguez's adaptive deficits were evaluated. This Court's opinion must, therefore, be revised.

Compounding the reliability of this Court's order and the determination of intellectual disability in this case, this Court not only overlooked facts in the record but also invented information refuted by the record. For instance, this Court stated the circuit court "considered evidence from family and friends." *See Rodriguez v. State*, Slip. Op. at 15. If that were true, this Court would have to explain two discrepancies with the circuit court's order and that statement. The first discrepancy is how is the statement "there is absolutely no evidence that [Mr. Rodriguez] exhibits

[12] It is not Mr. Rodriguez's fault that his evaluation was always consistent with clinical standards whereas Dr. Suarez's evaluation was not even based on outdated standards.

deficits in his adaptive behavior" consistent with this Court's assertion that the circuit court "evaluated long-term evidence, including testimony of Rodriguez's friends who knew him as a child [and] Dr. Weinstein's testimony regarding behavior [observed by friends and family]." Those two statements appear at odds given that the information that Dr. Weinstein relied upon from Mr. Rodriguez's past includes a history of academic challenges, impulsivity, an ability behave like other children his age, sexual inappropriateness, and a history of selling cars for less than what he purchased them for as a "business." Put simply, if retrospective information was relied upon by the circuit court, as this Court presumed, how was the circuit court able to state there was "absolutely no evidence" of deficits despite that retrospective information?

The second discrepancy is more straightforward. If the circuit court did rely upon retrospective information when analyzing prong two, then why is its prong two analysis entirely written in present tense thereby suggesting present-day information was its focus. Of course, this Court might be tempted to rely upon the circuit court's reliance on the merchant marine example; however, as explained earlier, that does not qualify as a deficits analysis. It is a strength analysis, which is contrary to clinical and constitutional standards. The opinion must, therefore, be revised.

In sum, the circuit court relied on strengths not deficits pursuant to *Jones* and contrary to the Eighth Amendment and clinical standards. Further, the circuit court

did not adequately review deficits, retrospective or present-day, because it emphasized perceived adaptive strengths in violation of the Eighth Amendment and contrary to clinical standards. In addition, this Court overlooked multiple facts that were not part of the circuit court's opinion in order to conclude that the circuit court considered and weighed the evidence of deficits. Finally, this Court's opinion could only be reached by overlooking points of fact in the record (e.g. the circuit court's dismissive approach to the relevance of clinical standards in *Atkins* proceedings) and points of law (e.g. *Atkins* required general conformity with clinical understandings of ID and *Hall* similarly stands for that proposition).[13]

e. Credibility Findings in *Atkins* Proceedings

This Court stated "*Hall* looks to the medical community…but does not change credibility determinations in intellectual disability proceedings." *See Rodriguez v. State*, Slip. Op. at 11. The assumption carious throughout the opinion. For that proposition, this Court relied on *Nixon v. State*, 2 So. 3d 137 (Fla. 2009).

First, *Nixon* cannot support the circuit court's credibility findings in this case. *Nixon*'s principle that appellate court's "do not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses" and that

[13] In addition this Court overlooked the fact that Dr. Suarez based his adaptive functioning evaluation on the self-reported account of Mr. Rodriguez even though clinical authority explains that self-reported evaluations should be afforded little to not weight. *See, e.g.*, (PCR3 Vol. 26 at 307).

competent, substantial evidence must support the findings stems from cases like *Tibbs*. This Court has consistently stated that "the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inference therefrom have been resolved in favor of [the finding] on appeal, there is substantial, competent evidence to support [that finding]." *E.g.*, *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981). *See also Hodges v. State*, 55 So. 3d 515, 527 (Fla. 2010) (quoting *Tibbs*, 397 So. 2d at 1123).[14] The record is abundant with statements directly showing and rulings indicating that Judge Prescott afforded zero informative or deferential value to current clinical standards. At the very least, those clinical standards had to be viewed as informative, not irrelevant. *Hall*, 134 S. Ct. at 2000 ("[Medical opinions] do not dictate the Court's decision, yet the Court does not disregard these informed assessments."). *But see, e.g.*, (PCR3 Vol. 26 at 257-58) ("**Why would [knowing what the guidelines are and why they exist] be relevant**") (emphasis added).

Thus, any and all findings in Mr. Rodriguez's case cannot be said to have been supported by competent, substantial evidence, as the circuit court refused to educate itself adequately on clinical standards.

Second, *Nixon* and the competent, substantial evidence standard does not permit courts to rule in favor of make-believe over science. This is not a case in

[14] This language was omitted from the Court's opinion, which if applied properly would have benefited Mr. Rodriguez. Accordingly, this Court overlooked points of law in affirming the lower court's credibility findings.

which experts both used prevailing professional standards bur reached different conclusions. This case is about science against fabrication. There is nothing within the clinical profession to support Dr. Suarez's diagnostic methods at all. As evidence, this Court merely has to examine the table of authorities of everything the State has filed before this Court. Indeed, even assuming that all conflicts and reasonable inferences were resolved in favor of Dr. Suarez's evaluation, the only thing supporting the notion that Dr. Suarez's evaluation was not contrary to science is his own nonclinical testimony. Thus, there is nothing corroborating Dr. Suarez's controversial methodology. Rather, the clinical authority corroborates everything Dr. Weinstein did. Further, the dismissive attitude towards clinical standards expressed by Judge Prescott both in his rulings and on-record statements reveals that the circuit court's findings were uninformed by clinical standards. At what point can a credibility finding ever be deemed not supported by competent, substantial evidence if everything presented in the record corroborated the methodology of Dr. Weinstein and proved that Dr. Suarez's approach was clinically controversial? Accordingly, points of fact were likely overlooked by this Court that are informative as to whether competent, substantial evidence supported the circuit court's findings. Surely, make-believe cannot satisfy the standards of competent, substantial evidence nor can it trump science.

Third, the application of *Nixon* to Mr. Rodriguez in this manner was unconstitutional under the Eighth Amendment, *Atkins*, and its progeny. As stated earlier, because this case is not one involving clinically appropriate methods, but one of science versus fabrication, this Court applied *Nixon* in such a way that it violates *Atkins* in this case. State courts must both have textual definitions that are in general conformity with clinical understandings of intellectual disability, *Hall*, 134 S. Ct. at 2000 (discussing *Atkins*' requirement for general conformity), and apply those textual definitions with general conformity to clinical standards because of their informative (or deferential) effect. *Id.* ("[Medical opinions] do not dictate the Court's decision, yet the Court does not disregard these informed assessments."). To conclude that competent, substantial evidence supports the findings of the circuit court in this case, even after all reasonable inferences are drawn in its favor, contravenes that basic principle of *Atkins*—science matters. By affirming the circuit court's credibility findings as consistent with competent, substantial evidence, the science that should have informed Mr. Rodriguez's *Atkins* determination took a back seat to gut feelings. *Atkins* and death row inmates are entitled to more than an unscientific hunch that clinical standards do not quite add up.

The impact of this Court's opinion is that the term "being informed" meant permitting Mr. Rodriguez was entitled to present proffered scientific evidence that was deemed irrelevant. As such, Mr. Rodriguez's *Atkins* proceeding lacks reliability.

Put contextually, a state court judge now could dispose of an *Atkins* claim by finding an expert more credible even though his standardized malingering tests lack clinical value, his adaptive functioning evaluation relies on adaptive strengths and insensitive stereotypes, and his methodology is in direct conflict with what unified professional consensus advises in that situation. This is not legal hyperbole or reliance on a litany of horribles to illuminate a looming slippery slope. This is what this Court actually permitted in this very case. It is a fact that Mr. Rodriguez's IQ scores were viewed as "not reliable" even though the State's malingering tests defied scientific standards and were administered questionably. It is a fact that the State's argument and its expert relied on diagnostic methods that emphasized adaptive strengths which therefore resembled stereotyping over actual science. It is also a fact that the State's evaluation employs methods that clinicians expressly and uniformly prohibit. And, it is a fact that the judge presiding over the evidentiary hearing repeatedly stated on the record that he did not see the relevance of clinical standards in an *Atkins* proceeding, indicating that his evaluation was not guided by clinical standards even though there was expert testimony notifying him on the authority. Interestingly, these and other facts that cut against the credibility findings were never featured in the circuit court's order which found the State's expert more reliable, in the circuit court's summary denial, nor in this Court's opinion. Accordingly, it

appears this Court may have misapprehended its application of *Nixon* to Mr. Rodriguez's case when viewed against *Atkins*, *Hall*, and the Eighth Amendment.[15]

2. Erroneous Standard of Review Which Determined Whether Mr. Rodriguez Earned Evidentiary Development

This Court also erred by sidestepping the lower court's misapplication of Fla. R. Crim. P. 3.851(f)(5)(B). Under Rule 3.851(f)(5)(B), state courts may deny a successive postconviction motion without an evidentiary hearing only "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Whether a Rule 3.851 evidentiary hearing is granted "depends on the written materials before the court; therefore, for all intents and purposes, a state court's ruling constitutes a pure question of law and is subject to *de novo* review." *Tompkins v. State*, 944 So. 2d 1072, 1080-81 (Fla. 2008) (relying upon *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008)). "In reviewing a trial court's summary denial of postconviction relief, **this Court must accept the defendant's allegations as true** to the extent that they are not conclusively refuted by the record." *Tompkins v. State*, 944 So. 2d 1072, 1080-81 (Fla. 2008) (relying upon *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)) (emphasis added). In addition, "this Court is guided by the principle that courts are encouraged to **liberally view the allegations to allow evidentiary**

[15] In the alternative, if this is a straight-forward application of *Nixon* and the competent, substantial evidence standard, that precedent may be unconstitutional under the Eighth and Fourteenth Amendments as applied to *Atkins* claims in Florida.

hearings on timely raised claims that commonly require a hearing." *See Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009) (relying upon *Amendments to Fla. Rules of Crim. Pro. 3.851*, 797 So. 2d 1213, 1219-20 (Fla. 2001)) (emphasis added).

This Court acknowledged that the issue before it was whether "the circuit court erred in refusing to grant an evidentiary hearing on [Mr. Rodriguez's] intellectual disability claim." Slip. Op. at 8. As part of its analysis this Court concluded that *Hall* merely required state courts to be informed of clinical standards but did not obligate deference to those standards. *See id.* at 9 ("To determine whether summary denial was appropriate, this Court must determine whether *Hall* requires increased deference to the standards of the medical community."). In reaching its conclusion, this Court found that "the circuit court below considered the entire record" before determining that Mr. Rodriguez "received the full benefit of the protection provided by *Atkins* and *Hall* in prior proceedings." *Id.* at 9.

In denying relief, this Court failed to adhere to its own standard of review of summarily denied claims in successive postconviction motions. This Court's opinion does reflect any consideration that Mr. Rodriguez's allegations in his successive motion were assumed as true and that the record was liberally construed in his favor. *See Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009) (relying upon *Amendments to Fla. Rules of Crim. Pro. 3.851*, 797 So. 2d 1213, 1219-20 (Fla. 2001)); *Tompkins v. State*, 944 So. 2d 1072, 1080-81 (Fla. 2008). The question

before this Court was whether "the motion, files, and records in [this] case conclusively show[ed] that [Mr. Rodriguez] is entitled to no relief" after assuming the allegations in the successive motion to vacate were true and all facts were liberally construed in his favor.

Mr. Rodriguez's claim in his Rule 3.851 successive motion was that the evidence presented at his previous *Atkins* evidentiary hearing in postconviction had been improperly discounted by the circuit court in contravention of *Hall*. The allegations in his claim were based on the argument that the circuit court had improperly discounted relevant clinical standards within the medical community when reaching its determination that Mr. Rodriguez was not entitled to relief pursuant to Florida law. Based upon those improper findings, Mr. Rodriguez argued he was entitled to an evidentiary hearing in order to present evidence to establish the court's improper departure from clinical standards pursuant to *Hall* and to further substantiate that he did in fact meet the criteria for intellectual disability under the appropriate and current methodologies within the medical community. Those allegations were required to be accepted as true by the circuit court. And in review of Mr. Rodriguez's motion in order to determine his eligibility for evidentiary development, the court was required to review the record to determine the extent to which they were, or were not, conclusively refuted by the record. The circuit court's order summarily denying relief failed to properly apply that standard, failing to

afford Mr. Rodriguez's claim the proper standard of deference, taking his allegations in successive motion as true, and in failing to acknowledge the extent to which the record in postconviction did not conclusively refute his allegations. To the extent that this Court relied upon those determinations when conducting its *de novo* review of Mr. Rodriguez's summary denial, its findings are in error and it has overlooked the record in postconviction.

The record demonstrates that Judge Prescott repeatedly viewed clinical authority as irrelevant in making his *Atkins* determination for Mr. Rodriguez. This blatant disregard was shown by direct statements. The sentiment that clinical standards were irrelevant at Mr. Rodriguez's prior hearings was also shown by various rulings by Judge Prescott. For example:

> BY MS. SPUDEAS [FOR MR. RODRIGUEZ]:
>
> Q: What is that?
>
> A: This is the American Association of Intellectual and Disability in Association. Before[,] it was called the Ammerican Association of Mental Retardation.
>
> Q: Do you know what the DSM four is?
>
> A: Yes.
>
> Q What is that?

A: Diagnostic Statistical Manual for mental disorder is [the] primary diagnostic manual person[s] in clinical practice use in order to diagnose disorder[s]…

Q: Does it have clinical issues with diagnosing mental retardation also?

A: It does.

Q: And you considered these the leading authorities?

A: I do.

Q: On [the] diagnoses of mental retardation?

A: Yes.

Q: Are you familiar with the clinical –

THE COURT: You're asking him if he believes it to be [the] authority or authority in the field.

THE WITNESS: It being –

BY MS. SPUDEAS [FOR MR. RODRIGUEZ]:

Q: With these two, the AAIDD and DSM, are the authority in the field of diagnosing mental retardation?

A: They are the authority.

Q: Are you familiar with the description in mental retardation in AAIDD?

MR. RUBIN [FOR THE STATE]: Objection.

THE COURT: What's the relevance?

BY MS. SPUDEAS [FOR MR. RODRIGUEZ]: We're here to determine mental retardation of Mr. Rodriguez.

THE COURT: Definition will be that that's defined at statute and interpreted by [the] Florida Supreme Court and [the] State of Florida.

MS. SPUDEAS [FOR MR. RODRIGUEZ]: And, of course, determination of expert[s] that have evaluated him, including Dr. Suarez and all that follow [the] guidelines, those[--meaning the AAIDD and DSM--] are the guidelines.

THE COURT: But the definition [from the AAIDD and the DSM] they will not be utilized…The objection will be sustained.

(PCR3 Vol. 26 at 334-36) (emphasis added). That is direct evidence that Judge Prescott (1) ruled clinical authority not relevant, (2) explained that his opinion would be narrowly focused on Florida's definition of intellectual disability, as interpreted by the Florida Supreme Court, and (3) clinical authority would "not be utilized." Yet, this Court stated that the previous circuit court "considered the entire record"

before it when reviewing whether the successive motion's allegations were conclusively refuted by the record.

Even if it is true that *Hall* did not require circuit court's to entirely defer to clinical standards and merely required courts to be informed by those clinical standards, the record shows that Judge Prescott refused to inform himself, or consider as part of his determination, the prevailing clinical standards. Thus, assuming as true this Court's holding that *Hall* merely requires state court's to be informed by clinical standards and nothing more, the record cannot refute the allegations and conclusions made in Mr. Rodriguez's successive motion. Put another way, Mr. Rodriguez was entitled to evidentiary development because the "written motion, files, and records" in Mr. Rodriguez's case do not "conclusively show that [Mr. Rodriguez] is entitled to no relief" after "accept[ing Mr. Rodriguez's] allegations in his successive motion [that his prior *Atkins* proceeding was inadequately conducted] as true." *See Tompkins*, 944 So. 2d, at 1080-81. When clinical standards are viewed as irrelevant by the judge purportedly conducting an *Atkins* proceeding, it is unlikely that those clinical standards were considered when making factual findings or credibility findings. But, in this case, Judge Prescott not only stated that clinical standards were not relevant, and not only ruled clinical standards as irrelevant, he stated on the record that clinical standards would "not be utilized." (PCR3 Vol. 26 at 336).

Further calling into question this Court's *de novo* review, the record reveals that Dr. Suarez's testimony and methodology not only deviated from accepted clinical norm but also conflicted with the unified opinions of Dr. Weinstein, Dr. Tasse, Dr. Oakland, and external clinical authority. Thus, even assuming that *Hall* only requires state courts to be informed of clinical standards, Mr. Rodriguez was entitled to evidentiary development because the successive motion argued, with allegations that were not refuted by the record, that Dr. Suarez's evaluation was unreliable whereas Dr. Weinstein's was consistent with clinical practice. This Court ignored facts in the record that revealed Dr. Suarez's evaluation was unscientific and facts in the record that Dr. Weinstein's evaluation was corroborated by clinical authority.

Consequently, an incorrect standard of review was applied by affirming the summary denial of the successive motion because *de novo* review obligated this Court "to liberally view the allegations [in the successive motion]," *see Davis*, 26 So. 3d at 526 (Fla. 2009), and assume them as true to the extent the record does not refute those allegations. *See Tompkins*, 944 So. 2d at 1080-81. Here, the record shows Judge Prescott, in the prior proceeding, viewed clinical authority as wholly irrelevant and that that clinical understanding "would not be utilized." (PCR3 Vol. 26 at 336). The record also shows that in prior proceedings clinical authority was contravened by Dr. Suarez's evaluation and adhered to by Dr. Weinstein. Repeated

instances throughout the record from the evidentiary hearing and order denying postconviction relief demonstrate that the circuit court not only deviated from prevailing clinical authority but wholly discounted it to irrelevance in reaching its determination of Mr. Rodriguez's claim under *Atkins*.

The record, when viewed in its entirety, establishes that not only did the files, records, and motions not conclusively refute his claim for relief pursuant to *Atkins* but rather, provided ample support for Mr. Rodriguez's argument that the circuit court's findings were in direct conflict with the United States Supreme Court direction in *Hall* that determinations of intellectual disability must be informed by the clinical standards within the medical community. *See Hall*, 134 S. Ct. at 2000 ("[Medical opinions] do not dictate the Court's decision, yet the Court does not disregard these informed assessments.").

Because the "motion, files, and records in [this] case," when liberally construed in Mr. Rodriguez's favor and with his allegations in the successive motion assumed as true, do not conclusively refute that Mr. Rodriguez is entitled to no relief, the circuit court's summary denial of his successive motion was improper. *See State v. Rodriguez*, Order, Case No. F88-18180B (Fla. 11tth Cir. Ct. Aug. 24, 2015) at 2-3 (concluding that *Hall* is limited to the margin of error and that *Atkins* and *Hall* were complied with because of the "thorough and detailed findings" by Judge Prescott). Further, to the extent that this Court has affirmed that finding on appeal,

it has done so in error as it has overlooked facts within the record and misapprehended points of law. Mr. Rodriguez is entitled to evidentiary development and relief thereafter.

B. *Hurst v. Florida* and Eighth Amendment Arbitrariness

Rehearing and clarification is appropriate because this Court's opinion overlooked and/or misapprehended, among other things, Mr. Rodriguez's right to *Hurst* retroactivity under federal law. In ruling that *Hurst* does not apply retroactively to Mr. Rodriguez, the only explanation this Court provided was that the Court had previously ruled, in *Asay v. State*, 41 Fla. L. Weekly S646 (Fla. Dec. 22, 2016), that *Hurst* does not apply retroactively to defendants whose sentences became final on direct appeal before the decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

That explanation did not address Mr. Rodriguez's federal right to *Hurst* retroactivity not only because Asay's retroactivity holding was based purely on state law,[16] but also because federal law does not countenance the problematic concept of "partial retroactivity," where a new constitutional rule is applied to some but not all collateral cases. As a matter of federal law, Mr. Rodriguez's right to *Hurst*

[16] In *Asay*, the Court reviewed the retroactivity of Hurst under the state retroactivity doctrine announced in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). The "partial retroactivity" concept endorsed in *Asay*—a departure from traditional notions of retroactivity analysis as binary—was a creature of the Court's *Witt* analysis. The federal Constitution does not tolerate "partial retroactivity," which runs afoul of the Eighth and Fourteenth Amendments because it leads to arbitrary results.

retroactivity does not turn on when his sentence became final in relation to *Ring* or any other case that preceded *Hurst*.

The United States Constitution requires that *Hurst*, and this Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), be applied retroactively to Florida defendants because those decisions announced substantive rules. Where a constitutional rule is substantive, the Supremacy Clause of the federal Constitution requires a state post-conviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) ("Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). This federal-law requirement applies even where a state supreme court is applying a state retroactivity doctrine. *See id.*

Mr. Rodriguez's federal right to *Hurst* retroactivity, even in a state proceeding, is highlighted by the United States Supreme Court's recent decision in *Montgomery*. In that case, a Louisiana defendant initiated a state post-conviction proceeding seeking retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding imposition of mandatory sentences of life without parole on juveniles violates Eighth Amendment). The Louisiana Supreme Court—in contrast to what this Court did in *Falcon v. State*, 162 So. 3d 954 (Fla. 2015)—held that *Miller* was not retroactive under its state retroactivity doctrines. *Montgomery*, 136

S. Ct. at 727. The United States Supreme Court granted a writ of certiorari and reversed, holding that, notwithstanding the state court's determinations under its state retroactivity doctrines, the *Miller* rule was substantive and therefore the federal Constitution required it to be applied retroactively on state post-conviction review. *Id.* at 732-34. This was because although Miller had a procedural component, the Miller rule was substantive because the procedural component effectuated the substantive right.

The *Hurst* decisions similarly announced substantive rules that, under the federal Constitution, may not be denied to Florida defendants on state retroactivity grounds. In *Hurst v. State*, this Court announced two substantive rules. First, the Court held that the Sixth Amendment requires that a jury decide whether the aggravating factors have been proven beyond a reasonable doubt, whether they are sufficient to impose the death penalty under the circumstances, and whether they are outweighed by the mitigation. *See Hurst v. State*, 202 So. 3d at 44. Such findings are manifestly substantive.[17] *See Montgomery*, 136 S. Ct. at 734 (holding that decision whether a particular juvenile is or is not a person "whose crimes reflect the transient

[17] Such arbitrariness is particularly stark in light of the fact that the Supreme Court made clear in *Ring* that its decision flowed directly from *Apprendi*. *See Ring*, 536 U.S. at 588-89. And in Hurst, the Court repeatedly stated that Florida's scheme was incompatible with "Apprendi's rule," of which *Ring* was an application. 136 S. Ct. at 621. This Court has also acknowledged that Ring was an application of *Apprendi*.

immaturity of youth" is substantive, not procedural). Indeed, the United States Supreme Court has consistently applied proof-beyond-a-reasonable-doubt rules retroactively to all defendants. *See, e.g.*, *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972).

The decision in *Schiro v. Summerlin*, 542 U.S. 348364 (2004) is inapposite in the *Hurst* retroactivity context. In *Schiro* the Supreme Court applied the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989) and determined that *Ring* was not retroactive on federal habeas review because the finding that the jury rather than the judge make findings as to whether the defendant had had a prior violent felony aggravator was procedural rather than substantive. *Schiro* is unlike Florida's statutory situation, which require the jury not only to determine the existence of the aggravators but also the sufficiency of the aggravators to merit a death sentence. Moreover *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right and the Supreme Court has always held such decisions to be substantive. *See Powell v. Delaware*, WL 724546 at 3 (Del. December 15, 2016).

Second, this Court held that the Eighth Amendment requires the jury's factfinding during the penalty phase to be unanimous. The Court explained that the unanimity rule is required to implement the constitutional mandate that the death penalty be reserved for a narrow class of the worst offenders, and assures that the

determination "expresses the values of the community as they currently relate to the imposition of the death penalty." *Hurst v. State*, 202 So. 3d at 60-61 ("By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of the society reflected in [the majority of death penalty] states and with federal law."). As this Court made clear, the function of the unanimity rule is to ensure that Florida's overall capital system complies with the Eighth Amendment. *See id.* at 61-62. That makes the rule substantive for purposes of federal retroactivity law, *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule"), which is true even though the rule's subject concerns the method by which a jury makes decisions, *see Montgomery*, 136 S. Ct. at 735 (noting that existence of state flexibility in determining method by which to enforce constitutional rule does not convert substantive rule to procedural one).

The United States Supreme Court's decision in *Welch* further illustrates the substantive nature of *Hurst*. *Welch* addressed the retroactivity of the constitutional rule announced in *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015). In *Johnson*, the Court held that the residual clause of the federal Armed Career Criminal Act ("ACCA"), which allowed for a sentencing increase where the defendant had three or more prior convictions for any felony that "involves conduct

that presents a serious risk of physical injury to another," was unconstitutional under the Fifth and Fourteenth Amendment's void-for-vagueness doctrine. *Id*. at 2556. In *Welch*, the Court ruled that *Johnson* must be retroactive because it announced a substantive rule, rather than a procedural rule, given that the invalidation of the ACCA's residual clause "affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Welch*, 136 S. Ct. at 1265. The *Welch* Court explained in this context that its determination of whether a constitutional rule is substantive "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but whether "the new rule itself has a procedural function or a substantive function—that is whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or class of persons that the law punishes." *Id.* at 1266. The Court observed that, "[a]fter Johnson, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence." *Id.* "*Johnson* establishes, in other words, that even the use of impeccable factfinding procedures could not legitimate a sentence based on that clause. It follows that *Johnson* is a substantive decision." *Id*. (internal quotation omitted).

The *Hurst* decisions announced substantive rules under the reasoning of *Welch*. In holding that the Sixth Amendment requires each element of a Florida death

sentence to be found beyond a reasonable doubt, and that jury unanimity is required to ensure that Florida's overall capital system complies with the Eighth Amendment by narrowing the class of death-eligible defendants to those "convicted of the most aggravated and the least mitigated of murders," *Hurst v. State,* 202 So. 3d at 50, the Court announced rules that certain murders "beyond the State's power to punish," *Welch,* 136 S. Ct. at 1265. After *Hurst,* individuals engaging in the same conduct will no longer be subject to the unconstitutional capital sentencing scheme that did not import the beyond-a-reasonable-doubt standard and allowed nonunanimous recommendations to support a death sentence. The unconstitutional scheme was invalidated by *Hurst*, "so it can no longer mandate or authorize any sentence," and "[e]ven the use of impeccable factfinding procedures could not legitimate' a sentence based on" Florida's prior capital sentencing scheme. *Id.* This Court stated that the "unanimous finding of aggravating factors and the fact that are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment." *Hurst,* 202 So. 3d at 60 (emphasis added). This language mirrors Welch's explanation of a substantive rule. *See Welch,* 136 S. Ct. at 1264-65 (a substantive rule "alters . . . the class of persons that the law punishes."). Mr. Rodriguez's entitlement to *Hurst* retroactivity does not turn on when his sentence became final in relation to *Ring* or any other case that preceded *Hurst*. The United

States Constitution does not tolerate the concept of "partial retroactivity," whereby similarly-situated defendants are arbitrarily granted or denied the ability to seek *Hurst* relief based on when their sentences were finalized. The concept of partial retroactivity has no basis in this Court's or the United States Supreme Court's precedent, will lead to arbitrary and unfair results, and is violative of the Eighth and Fourteenth Amendments. The arbitrariness inherent in making *Hurst* only partially retroactive based on the date *Ring* was decided is illustrated by, among other things, the denial of *Hurst* retroactivity to individuals whose death sentences became final on direct appeal shortly before *Ring*, while at the same time granting *Hurst* retroactivity to other individuals who arrived on death row perhaps decades earlier but were granted new penalty phases on other grounds and then resentenced to death after *Ring*. In addition, although not directly relevant here, making *Hurst* only partially retroactive to post-*Ring* sentences would violate the United States Constitution by arbitrarily denying *Hurst* access to defendants who were sentenced between the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring*. This Court's order denying *Hurst* relief on retroactivity grounds did not address any of the foregoing concepts or recognize Petitioner's right to *Hurst* retroactivity under federal law. In that regard, this Court also violated Mr. Rodriguez's due process rights under the federal Constitution by not recognizing and adhering to the constitutional retroactivity "floor" that has been established by the applicable

decisions of the United States Supreme Court. Although states may grant broader retrospective relief when reviewing their own state convictions, *see Danforth v. Minnesota*, 552 U.S. 264, 277, 280-82 (2008), states may not grant "partial retroactivity" that denies relief to a subset of their state convictions where federal retroactivity law requires that a constitutional rule be retroactively applied generally.

CONCLUSION

For the aforementioned reasons, a revised opinion is proper given that this Court's opinion overlooked points of fact and misapprehended points of fact and law.

Respectfully Submitted,

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CERTIFICATES OF SERVICE AND FONT

I certify that a true copy of the foregoing motion was electronically served to all counsel of record on May 5, 2017. I further certify that this motion was typed in Times New Roman 14 point font.

/s/ Rachel Day
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