THE SUPREME COURT OF ARIZONA

STATE OF ARIZONA *ex rel.* WILLIAM G. MONTGOMERY, MARICOPA COUNTY ATTORNEY,

Petitioner,

v.

HON. MICHAEL W. KEMP, JUDGE OF THE MARICOPA COUNTY SUPERIOR COURT,

Respondent Judge,

APOLINAR ALTAMIRANO,

Defendant/Real Party in Interest

Arizona Supreme Court Case
No. CR-19-0274-PR

Arizona Court of Appeals
No. 1 CA-SA 19-0162

Maricopa County Superior Court
No. CR2015-103569-001 DT

BRIEF OF *AMICI CURIAE* ARIZONA CAPITAL REPRESENTATION PROJECT (ACRP) AND ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) IN SUPPORT OF REAL PARTY IN INTEREST

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The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, *pro bono* consulting services, training, and education. ACRP tracks and monitors all of the capital prosecutions in Arizona.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amici have a particularized interest and informed perspective on the operation of the death penalty in Arizona, as well as the clinical and legal standards governing the resolution of intellectual disability (ID) claims. Their attorneys have consistently participated in the litigation of such claims in state and federal courts (including in this Court), both as counsel for the defendant and as *amici*. *Amici*'s considerable experience in meeting with ID clients further informs their perspective on the issue.

Arguments

I. The original intent of the Eighth Amendment was to apply "evolving standards of decency" to current cases.

In *Weems v. United States*, 217 U.S. 349 (1910), the Supreme Court noted that there was scant authority interpreting the Eighth Amendment.

> The provision received very little debate in Congress. We find from the Congressional Register, p. 225, that Mr. Smith, of South Carolina, "objected to the words 'nor cruel and unusual punishment,' the import of them being too indefinite." Mr. Livermore opposed the adoption of the clause saying:
>
> "The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms 'excessive bail?' Who are to be the judges? What is understood by 'excessive fines?' It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."
>
> The question was put on the clause, and it was agreed to by a considerable majority.

Id. at 368-69. The Founders thus understood "cruel and unusual punishment" was subjective and could be applied to disproportionate punishments as well as to torture. Accordingly, the Court held that a sentence of twelve years at hard labor, which was an appropriate sentence for certain serious offenses, was disproportionate to the crime of falsifying a public and official document. *Id.* at 382. "The basic concept underlying the

Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The *Atkins* court relied on *Weems*. *Id.* at 311.

II. As explained in *Moore v. Texas*, the Eighth Amendment requires that the legal definition and judicial application of the bar on executing the intellectually disabled conform to the clinical definition and process for identifying persons with that condition.

In *Atkins*, 536 U.S. at 306, the Supreme Court held that evolving standards of decency prohibit the execution of defendants with ID, because they "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins* left to the states how to define ID, but noted that the states that already prohibited executing ID persons "generally conform[ed]" their statutory definitions to those set forth by the AAIDD and APA. *Id.* at 317 & n.22. In the years since *Atkins*, the Court has made clear that the legal definition of ID and the clinical definition must be the same. At a general level, that definition includes any person that suffers deficits in intellectual functioning and deficits in adaptive functioning, with onset during the developmental period. American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Health Disorders* 33 (5th ed. 2013) ("DSM-5"); American Association of Intellectual and Developmental Disability, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) ("AAIDD"); *see also Atkins*, 536 U.S. at 308 n.3 (citing prior editions of these authorities); *Hall v. Florida*, 572

U.S. 701 (2014) (consistent with DSM-5 and other clinical authorities, Florida's ID statute unconstitutionally included a strict IQ cutoff, not accounting for standard error of measurement); *Moore v. Texas*, 137 S. Ct. 1039 (2017) *(Moore I)* (adaptive behavior deficits must be measured according to medical standards).

Codifying this three-pronged definition, however, is not enough. Courts and fact-finders must not administer that definition, or require other showings, inconsistently with the medical/clinical practices for identifying ID persons. The Eighth Amendment does not permit the states to leave a disconnect between the category of people who the medical community's standards would identify as ID, but the individual state courts' standards would not. *See Hall*, 572 U.S. at 704 (finding Florida's statute created "an unacceptable risk that persons with intellectual disability [would] be executed").

In *Hall*, the Court made clear that a state court's ID determination should be "informed by the medical community's diagnostic framework." 572 U.S. at 721. This means, among other things, that courts must consider the standard error inherent in IQ tests when assessing whether the scores are "within the clinically established range for intellectual-functioning deficits." *Moore I*, 137 S. Ct. at 1050; *see also Hall*, 572 U.S. at 723.

Further, adopting "a fixed numerical [IQ score] cutoff" is "inconsistent with established clinical definitions." *In re Lewis*, 417 P.3d 756, 760 (Cal. 2018) (citing *Hall*, 572 U.S. at 722-23). Courts must not take "an IQ score as final and conclusive evidence

of a defendant's intellectual capacity, when experts in the field would consider other evidence, including evidence and testimony regarding adaptive functioning deficits. *Hall*, 572 U.S. at 712; *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (recognizing that scores of 75 and higher may be "entirely consistent" with ID and that "an IQ test result cannot be assessed in a vacuum"); DSM-5 at 37 (ID is a condition, not a number).

In *Moore I*, the Court reiterated *Hall*'s mandate in the context of assessing adaptive behavior deficits. As with all aspects of the diagnosis, states cannot disregard current clinical and medical standards in assessing adaptive behavior. 137 S. Ct. at 1052.

Adaptive behavior is "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." AAIDD at 43.[1] Adaptive behavior is "multidimensional."[2] *Id.* at 44. The adaptive behavior diagnostic prong is met if a person has a significant limitation in any one of the three areas—conceptual, social, or practical. *Id.* at 43. It is not necessary that the person have a limitation in all three, nor should a clinician or fact-finder require a balancing of an individual's deficits against their strengths. Adaptive behavior must be determined

[1] *Atkins, Hall*, and both *Moore* cases consistently refer to and rely on the DSM and AAIDD as the preeminent sources for clinical ID standards.

[2] Conceptual skills include "language and literacy; money, time, and number concepts; and self-direction." *Id.* Social skills include "interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized." *Id.* Practical skills include "activities of daily living (personal care), occupational skills, healthcare, travel/ transportation, schedules/routines, safety, use of money, use of the telephone." *Id.*

based on the "individual's typical performance and not their best or assumed ability or maximum performance." *Id.* at 47. The assessment must focus on the presence of deficits in at least one domain.

In *Moore I*, the Court confirmed that, consistent with prevailing clinical standards, the focus of the adaptive functioning inquiry should be an individual's adaptive deficits—not adaptive strengths. 137 S. Ct at 1050-51. States are bound by this clinical admonition. *Id.* at 1050 (courts may not "deviate[ ] from prevailing clinical standards" and must, as the medical community does, "focus[ ]the adaptive-functioning inquiry on adaptive deficits," not alleged "adaptive strengths").

The Court soundly rejected Texas' *Briseno* factors—factors which could exclude a capital defendant from the legal definition of ID, even if he otherwise meets the clinical definition. *Moore I*, 137 S. Ct. at 1046 (citing *Ex parte Moore*, 470 S.W.3d 481, 489 (Tex. Crim. App. 2015)). The Texas system sought to identify "the 'consensus of *Texas citizens*' on who 'should be exempted from the death penalty.'" *Id.* at 1051 (quoting *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004)) (emphasis in original). By excluding individuals with ID from the legal protections of *Atkins* and its progeny, the Texas law violated the Eighth Amendment.

Likewise, the Ohio Supreme Court recently found that its own ID standard was inconsistent with *Hall* and *Moore*, because it required "a finding of significant limitations in two or more adaptive skills," when "the current diagnostic standards require significant deficits in *any* of the three adaptive-skill sets." *State v. Ford*, 2019-Ohio-4539,

¶¶ 19, 95 (2019) (relying on *Moore* and the DSM-5). It declined to "tweak" its outdated standard, and instead overruled it, directing the trial court to follow a standard consistent with the medical consensus. *Id.* at ¶¶ 96-97, 100.

For all of these reasons, as this Court's Rephrased Issue 1 implies, any determination of "adaptability" under A.R.S. § 13-753(K) must comply with *Moore* and the clinical diagnostic standards. Rather than tweak an outdated standard, this Court should rule that trial courts hereinafter must adhere to clinical standards, even when clinical standards conflict with statutory definitions.

III. Arizona's adaptive behavior standards and the resultant practices in capital cases are inconsistent with medical consensus and the Eighth Amendment.

Arizona defines adaptive behavior as "the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." A.R.S. § 13-753(K)(1). Like Texas, Arizona has defined this diagnostic prong in a manner that excludes many who would otherwise satisfy the clinical definition of ID and should not be subject to the death penalty. This Court recognized that Arizona's standard differs from the well-established clinical definitions. *State v. Grell (Grell II)*, 212 Ariz. 516, 529 ¶ 62 (2006). Rather than focus on the appropriate inquiry of whether a person has adaptive deficits in one of the three relevant, broader domains, Arizona analyzes proof of two specific instances of behavior: independence and social responsibility. *Id.* at 528-29 ¶ 59. *Grell II* specifically rejected the definitions and guidance of the APA and the DSM, one of the primary

diagnostic manuals for ID. *Id.*; *see also State v. Escalante-Orozco*, 241 Ariz. 254, 267 ¶ 16 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135 (2018) (Arizona's definition of significant deficits in adaptive behavior "differs from a clinical definition."). Deviating from clinical definitions and best practices in this way is inconsistent with *Hall*, the *Moore* cases, and the Eighth Amendment. *Hall*, 572 U.S. at 712 (Florida statute violated the Eighth Amendment by "disregard[ing] established medical practice"); *Moore I*, 137 S. Ct. at 1051 (Texas court's ID evaluation "departed from clinical practice.").

In *Escalante-Orozco*, 241 Ariz. at 267 ¶¶ 11-15, this Court modified its interpretation of ID to account for *Hall*'s requirement that a state take into account an IQ test's margin of error. It failed, however, to account for the requirement that its ID definition conform to clinical standards, not lay standards. *Id.* at 267-68 ¶¶ 16-17. For this reason, this Court must abrogate *Grell II* and *Escalante-Orozco* and interpret A.R.S. § 13-753 consistently with the Supreme Court's mandates.

Other courts have recognized these problems, and this Court does not have to write on a blank slate to fix them. In *Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016), decided before *Moore I*, Judge Reinhardt explained in his concurring opinion (and part III-C-2 of the court's opinion) some of the constitutional infirmities in Arizona's ID law and its application. Judge Reinhardt identified "a clear national consensus in favor of using the clinical definition of adaptive behavior" and noted that Arizona is one of only a small minority of states to deviate from that definition. 813 F.3d at 1206

(Reinhardt, J., concurring). He concluded that this Court's interpretation of Arizona's adaptive behavior statute is a "clear" constitutional violation because it "defines adaptive behavior more narrowly than the clinical definition." *Id.*; *see also Williams v. Cahill*, 232 Ariz. 221, 234-35 ¶¶ 49, 53 (App. 2013) (Eckerstrom, J., dissenting) (*Grell II* "deviates substantially from the clinical definition" of ID, and thus "runs afoul of the Eighth Amendment to the United States Constitution."). This Court must now reach this same conclusion.

IV. Following clinical standards to implement *Atkins*'s categorical ban is especially important for those with mild ID, or in what could be considered "close" cases. Arizona's current standards do not protect these persons.

The Supreme Court rightly imposed a categorical ban on the execution of ID persons, rather than leave the matter to judges and jurors in individual cases, because the vast majority of people with ID involved in the criminal justice system are not readily identifiable to a lay person. Clinical assessment is essential. DSM-5 at 37.

Indeed, 85% of people with ID suffer the "mild" form, in which life-long intellectual and adaptive behavior deficits co-exist with relative strengths.[3] John H.

[3] The terms "mild," "moderate," and "severe" refer to various severity levels related to adaptive functioning, not IQ scores. DSM-5 at 33. A person with moderately severe deficits, for example, would need "[o]ngoing assistance on a daily basis . . . to complete conceptual tasks of day-to-day life," "caretakers must assist the person with life decisions," and while the person can care for individual practical needs, "considerable support is needed." DSM-5 at 35. A person with severe deficits, for example, would need "extensive supports," might have "quite limited" spoken language abilities, and require "support for all activities of daily living." DSM-5 at 36. These levels of severity are not necessarily readily discernible and require clinical assessment. DSM-5 at 37. At

Blume et. al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 694, 696 (2009). The presence of adaptive strengths, which can be learned through imitation and repetition, does not make a person any less ID. People with mild ID might *appear* superficially "normal" while masking limitations in engaging in abstract thinking, learning from experience, controlling impulses, and foreseeing the consequences of actions—all factors relevant to avoiding criminal conduct.

A U.S. Department of Education study[4] focused on the experiences and outcomes of young adults with disabilities who received special education services in seventh grade or above. Of those with ID, 76.2% had been employed outside the home after high school and 25.9% had been employed outside the home for over 12 months. 25.1% were currently or recently employed in food service and 11.2% had office and administrative support jobs. 36.3% lived independently; 42% had a savings account; 39.2% had a driver's license or learner's permit; and 62.1% were registered to vote.

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any rate, a person with deficits that might be termed "mild" still experiences significant deficits.

[4] U.S. Department of Education, *The Post-High School Outcomes of Young Adults With Disabilities up to 8 Years After High School: A Report From the National Longitudinal Transition Study*-2, at 2, 55, 60, 64, 114, 123, 136 at 2, 55, 60, 64, 114, 123, 136 (2011), available at https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf (last visited Jan. 11, 2020).

Clinicians have observed that those with mild ID are uniquely burdened by their limited functioning because, *inter alia*, their relative strengths may cause their disability to go undiagnosed:

> In some ways, it may seem counterintuitive to consider the challenges of individuals with intellectual disability with higher IQs as being equal to or sometimes greater than those with intellectual disability at lower IQs. However, several factors aggravate their challenges: Expectations for performance are higher for people with intellectual disability with higher IQs than those with lower IQs, the tasks given to them are more demanding because of the higher expectations, and a failure to meet those expectations is frequently met by others blaming the individual or the individual blaming him- or herself. Moreover, many individuals with intellectual disability with higher IQs attempt to hide their disability or attempt to pass as normal or try to appear intellectually capable and, thus, miss out on or even reject accommodations that might have been available if their disability had been declared or identified. In addition, the impact of intellectual disability may be increased by the lack of access to needed mental health care, medical care, nutrition, and relationship and parenting assistance.

Martha E. Snell and Ruth Luckasson, *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 Intellectual & Developmental Disabilities 220, 222 (2009).

Atkins recognized that people with mild deficits are less morally culpable for their roles in even serious crimes. Mildly ID people have "persistent developmental challenges in the use of abstract thought and complex judgment." Daniel J. Reschly, *Documenting the Developmental Origins of Mild Mental Retardation*, 16 Applied Neuropsychology 124, 133 (2009). While they "understand basic concepts of right and wrong…[they are] impaired in their ability to understand moral principles and exercise

abstract reasoning and judgment, in decisions about lawful and unlawful behaviors." *Id.*; *see also* Tom Gummpel, *Social Competence and Social Skills Training for Persons with Mental Retardation: An Expansion of a Behavioral Paradigm*, 29 Educ. & Training in Mental Retardation & Developmental Disabilities 194, 195 (1994). They are less able than adults with average functioning to learn from experience, engage in logical reasoning, and control their impulses. *Atkins*, 536 U.S. at 318. They struggle to adapt to changing demands, make good decisions, and engage in meaningful planning for the future. Karen L. Salekin, et al., *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. Mental Health Research in Intellectual Disabilities 97, 99 (2010).

Based in part on all of the above, decision makers often harbor and, consciously or unconsciously, rely on improper stereotypes about people with ID**.** Because ID individuals with mild deficits often do not behave the way laypeople expect, they are especially vulnerable to exclusion from the constitutional protections of *Atkins*.

The stereotypes of individuals with ID "held by judges, juries, and (some) experts are…more appropriate to moderate or severe ID, where behavioral and physical characteristics are obvious and limitations are fairly global." Stephen Greenspan, *Homicide Defendants with Intellectual Disabilities: Issues in Diagnosis in Capital Cases*, 19 Exceptionality 219, 220 (2011). "In fact, many jurors believe that a person with [ID] looks like someone with Down syndrome or has other facial indicia of his disability, even though this is rarely the case." Andrea D. Lyon, *But He Doesn't Look Retarded:*

Capital Jury Selection for the Mentally Retarded Client Not Excluded After Atkins v. Virginia, 57 DePaul L. Rev. 701, 712 (2008) (citing Michael L. Perlin, *Life is in Mirrors, Death Disappears: Giving Life to* Atkins, 33 N.M. L. Rev. 315, 334-35 (2003)). As explained above, a person with mild ID is perfectly capable of possessing relative adaptive strengths and using them, sometimes to the effect of masking other symptoms. *See* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009).

For all of these reasons, it is important to bear in mind that the clinical diagnosis of deficits in adaptive functioning "focuses on the individual's typical performance," often assessed using a standardized diagnostic test, rather than the individual's "best or assumed ability or maximum performance." AAIDD at 47. And, the medical community has firmly established that "[w]ithin an individual, limitations often coexist with strengths." *Id.* at 1. *See also Moore I*, 137 S. Ct. at 1039, 1043, 1050; *Moore v. Texas (Moore II)*, 139 S. Ct. 666, 670 (2019) (on remand after *Moore I*, Texas again applied an unconstitutional standard for judging the defendant's adaptive behavior, relying too much "upon Moore's apparent adaptive *strengths*.") (emphasis in original); *Brumfield*, 135 S. Ct. at 2281 ("'[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.'") (quoting AAMR).

Here, Arizona's standard for evaluating adaptive behavior deficits—whether a person is able to "meet society's expectations of him"—is, like the unconstitutional

Briseno factors, unscientific and not rooted in clinical diagnostic criteria. Furthermore, it invites the decision maker to rely on stereotypes to conclude that a defendant possesses strengths that rule out an ID diagnosis.[5] The states are not free to evaluate a defendant's ID on the basis of arbitrary and unscientific criteria. *See Hall*, 572 U.S. at 720 (confirming that the clinical definition of ID is "a fundamental premise of *Atkins*"); *Moore I*, 137 S. Ct. at 1050 (citing *Ex parte Moore*, 470 S.W.3d at 522-23, 526-27) (state court improperly relied on perceived "strengths," including that Moore lived on the streets and mowed lawns and played pool for money). In order to prevent the determination of whether a person has ID on the basis of lay stereotypes, such determinations must be made in accordance with clinical guidelines, which offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians[.]" *Moore I*, 137 S. Ct. at 1052.

V. The record overwhelmingly supports Respondent's conclusion that Altamirano established his ID, particularly his reliance on the clinical standards outlined by Altamirano's expert witnesses, and his rejection of Sergio Martinez's conclusions.

Throughout his career, Sergio Martinez has been a journeyman psychologist for the State in various proceedings. After failing the New Mexico exam for licensing psychologists three times, *see* 3/14/19 RT 22-23, Dr. Martinez moved to Arizona and

[5] For this reason, "[w]hen [clinicians] assess adaptive behavior for the purpose of making or ruling out a diagnosis of [ID], the use of standardized adaptive behavior scales is often central since they provide an objective metric with which to determine whether or not the individual's limitations are significantly below the average of the general population." Tassé at 121.

now picks up government contracts on wide-ranging topics. A cursory WestLaw search reveals that he conducts evaluations in competency proceedings, *e.g.*, *Cotner v. Liwski*, 243 Ariz. 188 (App. 2017); sexually violent persons cases, *e.g.*, *In re Commitment of Conn*, 207 Ariz. 257 (App. 2007); and parental termination cases, *e.g.*, *Maria A. v. ADES*, 2 CA-JV 2009-0104, 2010 WL 1223977 (mem., March 30, 2010). In Arizona, he has conducted 10 ID evaluations—he has never determined a defendant was ID. *See* 3/14/19 RT 20-21.

In 2016, the Ninth Circuit rejected Dr. Martinez's findings and conclusions as unsupported by the factual record in a capital case that involved a gruesome murder. *Smith*, 813 F.3d at 1183. Dr. Martinez concluded that Rule 11 reports (related to incompetency, not intellectual functioning) proved that the defendant "probably functions in the average range of intelligence." Those cursory reports and evaluations did not even include IQ or other cognitive testing. *Id.* at 1188-89. Dr. Martinez also concluded, inconsistent with all of the authority explained above, that the defendant's "ability to date women" (despite his five brief marriages that often involved violence) proved his adaptive strengths. *Id.* at 1195. Altamirano pointed these facts out in his own case to highlight the unreasonableness of Dr. Martinez's conclusions.[6] *See* 3/14/19 RT 17-20.

[6] The State attempted to rehabilitate Dr. Martinez, arguing that, in *Smith*, the Ninth Circuit focused its criticisms on the Arizona courts, not Dr. Martinez. *See* 3/14/19 RT 140-41. The Ninth Circuit, however, was tasked with assessing the reasonableness of

Similarly, in *Williams*, 232 Ariz. at 226 ¶ 15, 227-28 ¶ 21, Dr. Martinez testified that a defendant could not prove the "age of onset" of his ID, because he could not produce evidence of childhood IQ testing and his school records did not reflect poor academic performance (because his inner-city Chicago schools focused on social promotion). Dr. Martinez took no social history from any witnesses, yet concluded "'no evidence' demonstrates Williams had the intellectual and adaptive behavior deficits required by § 13–753 'prior to the age of eighteen.'" *Id.* at 227-28 ¶ 21. On the other hand, Dr. Ricardo Weinstein spoke with 17 witnesses to learn the defendant's comprehensive social history. *Id.* at 228 ¶¶ 22-23. The court of appeals adopted the trial court's conclusion (based on Dr. Martinez's testimony) that such social histories are "suspect." *Id.* ¶¶ 23-24. Three years later, the Ninth Circuit resoundingly rejected the age-of-onset analysis preferred by Dr. Martinez because it would inevitably exclude many of the people that *Atkins* intended to protect. *Smith*, 813 F.3d at 1186. Judge Eckerstrom's dissent in *Williams* presaged many of the concerns expressed by the *Smith* majority. *Williams*, 232 Ariz. at 234-42 ¶¶ 47-77 (Eckerstrom, J., dissenting). Notably, despite its appellate victory, the State, on its own initiative, in "the interests of justice," dismissed the death notice just before jury selection began. *State v. Williams*, 2 CA-CR 2014-0358, 2016 WL2619283, n.2 (mem., May 6, 2016).

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the superior court ruling, which necessarily relied on Dr. Martinez's opinions and conclusions.

In Altamirano's case, Dr. Weinstein, a nationally recognized ID scholar and neuropsychologist who specializes in ID determinations, explained why Dr. Martinez was wrong to ignore social histories as unreliably biased. *See* 5/23/19 RT 19-20, 22-25; Trial Court Order at 19. Respondent rightly relied on these social history witnesses, implicitly rejecting Dr. Martinez's flawed methodology. Altamirano's other expert, Dr. Greenspan, is well recognized as a preeminent national scholar on ID. He was a listed advisor to the ID section of the DSM-5, and is the most-cited authority in that manual. He is also the most cited authority in the other major diagnostic manual, the AAIDD. Reasonably so, "[h]is testimony carrie[d] considerable weight with the Court." Trial Court Order at 3.

Against these national experts who follow clinical standards for determining ID, Dr. Martinez stood alone in his idiosyncratic methodology. Respondent acted well within his discretion, based not only on the experts' qualification but especially on the content of their testimony, in finding Dr. Martinez's testimony less compelling.

VI. ID defendants have an increased risk of being convicted for premeditated murder than those who are not disabled.

Not only Roosevelt Williams's case but another Pima County, that of Anthony Lewis, are concrete examples of cases where a defendant was charged with premeditated murder and a death notice was filed, and after the State dismissed the death notice and the case was tried to a jury as a noncapital case, the jury failed to find the defendant premeditated the murder. As stated above, Williams was convicted of

two counts of second-degree murder. Lewis was convicted of felony-murder, but the jury unanimously rejected the premeditation theory. *State v. Lewis*, 236 Ariz. 336, 344 ¶ 29 (App. 2014). These cases reflect the danger in ID under-inclusivity in two ways.

First, low intellectual functioning is associated with impulsive conduct. *Smith*, 813 F.3d at 1192 (citing *Atkins*, 536 U.S. at 318; *State v. Grell (Grell III)*, 231 Ariz. 153, 156-58 ¶¶ 13-22 (2013)). Inferences that can be drawn from evidence may support a finding of premeditation, *see State v. Thompson*, 204 Ariz. 471, 476 ¶ 17 (2003) (citations omitted), but those inferences may be improper if the defendant has ID. Such persons also have greater difficulty in handling themselves in police interrogation or testifying in trial. *See Atkins*, 536 U.S. at 307 & n.2 (comparing Atkins' co-defendant's testimony as "more coherent and credible than Atkins'," and noting that Atkins' statement to police was inconsistent with his testimony whereas the co-defendant invoked). This is similar to the Court's recognition in *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012), that one of the "hallmark features" of youth is incompetence in dealing with police and lawyers and potentially being charged with a greater offense as a result.

In Williams's and Lewis's cases, the objective evidence permitted a jury to infer premeditation. Lewis entered the victim's house and left a message on her answering machine stating such, and after being arrested for burglary, he was released on his promise to appear for court, with a condition of release that he not return to the victim's home. 236 Ariz. at 340 ¶ 3. The next morning, he procured gasoline and then went to the victim's home and poured it on her and set her on fire. *Id.* ¶ 4. In his defense, Lewis

presented expert evidence that he had a character trait for impulsivity based on his ID. And in *Williams*, 2016 WL 2619283, ¶¶ 2-3, although no evidence was presented about what led to the victims' deaths, Williams lied about their whereabouts to a neighbor for several days and was attempting to cover up the smell of their bodies while he emptied their bank accounts and pawned their property.

Second, in the event that the State pursues the death penalty, the defendant's trial attorneys are tasked with convincing a jury not to impose the ultimate penalty. This Court "ha[s] recognized that death-qualification is appropriate in Arizona," *State v. Jones*, 197 Ariz. 290, 302 ¶ 24 (2000). Because jurors who are opposed to the death penalty are also more likely to be receptive to defense arguments, dismissal of such jurors during death-qualification increases the likelihood of a conviction for capital murder. William J. Bowers, *Still Singularly Agonizing: Laws Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 62-64 (2003) (empirical study of capital jurors finding that death-qualified jurors are disproportionately "pro-conviction" and the death qualification process itself prejudices jurors towards conviction). The Eighth Amendment does not countenance this result. *See Atkins*, 536 U.S. at 320 (noting the particular risk that an ID person will be subject to wrongful conviction as well as wrongful execution).

Conclusion

For the reasons above, this Court should affirm the trial court order finding Mr. Altamirano intellectually disabled and should find that, in light of *Moore I* and *Moore II*, the Eighth Amendment requires this Court to define adaptive behavior deficits in a manner consistent with the clinical and medical community.

DATED (electronically filed): January 13, 2020.

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