No. _____

IN THE

Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Does the Florida Supreme Court's adaptive functioning analysis of intellectually disabled individuals, which requires post-conviction defendants to prove they experience current adaptive deficits in prison, and over-emphasizing their adaptive strengths and prison behavior, violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution in direct conflict with the standards for analyzing adaptive functioning set forth in *Moore v. Texas*, 137 S. Ct. 1039 (2017)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Tavares J. Wright, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Tavares J. Wright respectfully petitions for a writ of certiorari to review the errors in the judgment of the Florida Supreme Court ("FSC").

OPINIONS BELOW

The FSC's first opinion following post-conviction proceedings on Wright's intellectual disability claim finding that Wright is not intellectually disabled is reproduced at *Appendix A* and is reported and cited at *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (hereinafter referred to as "*Wright I*"). The FSC's second opinion regarding Wright's intellectual disability claim following a remand from this Court for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017) (hereinafter referred to as "*Moore I*") is reproduced at *Appendi*x *B* and is reported and cited at *Wright v. State*, 256 So. 3d 766 (Fla. 2018) (hereinafter referred to as "*Wright II*").

The unpublished Order Denying Defendant's Renewed Motion for Determination of Intellectual Disability appears at *Appendix C*. The FSC's direct appeal opinion in Wright's case is reproduced at *Appendix D* and reported at *Wright v. State*, 19 So. 3d 277 (Fla. 2009). The unpublished circuit court Sentencing Order appears at *Appendix E*.

JURISDICTION

The opinion of the FSC was entered on September 27, 2018. Wright filed a Motion for Rehearing and for Clarification, which was denied on November 1, 2018. The FSC issued a corrected opinion the same day. On January 2, 2019, Justice Thomas granted an extension of time to file a petition for a writ of certiorari to March 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides: "No person should be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Florida law prohibits the imposition of death sentences on intellectually disabled persons:

> "[I]ntellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

FLA. STAT. § 921.137(1).

STATEMENT OF THE CASE

States' determination of intellectual disability must be informed by the medical community's diagnostic framework. *Moore I*, 137 S. Ct. 1039, 1048 (2017) (citing *Hall v. Florida*, 572 U.S. 701, 721 (2014)). In *Moore I*, this Court redefined the landscape of the intellectual disability adaptive functioning analysis by cautioning state courts against emphasizing adaptive strengths and prison behavior, but did not provide a bright-line rule for where mere emphasis would become over-emphasis. 137 S. Ct. 1039, 1050 (2017). The FSC beseeched this Court for clarity on the issue in its *Wright II* opinion, expressing "the difficult position that the States are placed in due to the Supreme Court's lack of clear guidance on this analysis." 256 So. 3d 766, 776

n.9 (Fla. 2018). The FSC's confusion is clear, as it has twice found Wright is not intellectually disabled by erroneously focusing on perceived adaptive strengths and prison behavior.

Wright, an intellectually disabled man with fetal alcohol syndrome and microcephaly, was sentenced to death on October 12, 2005 in Polk County, Florida for murders he committed when he was nineteen years old. *See Appendix F*. This case involves Wright's claim of intellectual disability and the FSC's opinions issued in *Wright I* on March 16, 2017 and in *Wright II* on September 27, 2018. This Petition should be granted, and the FSC's *Wright II* opinion should be vacated, because it failed to apply the constitutional precedent of this Court, including *Moore I*, in assessing Wright's intellectual and adaptive functioning, even after this Court specifically remanded the case to the FSC for further consideration in light of *Moore I*. *Wright v. Florida*, 138 S. Ct. 360 (2017). Wright's execution is barred by the Fifth, Eighth, and Fourteenth Amendments.

I. The Procedural History of Wright's Case

On November 13, 2004, a jury found Wright guilty of two counts of first-degree murder and carjacking.[1] At the time of trial, Wright's appearance, slower speech, and documented history of difficulties in school indicated intellectual disability was an issue. On September 22, 2005, a special hearing was held prior to sentencing to address whether Wright met the criteria detailed in FLA. STAT. § 921.137 and *Atkins v. Virginia*, 536 U.S. 304 (2002) for barring his execution as an intellectually disabled individual. Several expert witnesses opined that Wright had "borderline intellectual function" with raw IQ scores between 75 and 81. The trial court found that Wright was not mentally retarded[2] because he did not meet Florida's strict requirement of an intelligence

[1] The trial that began on October 18, 2004 was Wright's third trial on the same charges. The first two trials ended in mistrials.

[2] "Intellectual disability" has since replaced "mental retardation" as the appropriate term. FLA. STAT. § 921.137(9).

quotient ("IQ") below 70. Wright was sentenced to death on October 12, 2005, and the FSC affirmed Wright's convictions and sentences on September 3, 2009. Wright filed a post-conviction motion to vacate his convictions and sentences on November 5, 2010, raising seventeen claims including intellectual disability, ineffective assistance of counsel, and cumulative error. After the circuit court denied his claims, Wright filed a notice of appeal to the FSC on June 19, 2013.

While Wright's post-conviction appeal was pending before the FSC, this Court invalidated Florida's rigid rule concerning intellectual disability. *Hall v. Florida*, 572 U.S. 701 (2014). This Court found that Florida's judicially-imposed requirement of an IQ score below 70 failed to account for the standard margin of error, ignored professional consensus, and created a risk that an intellectually disabled person would be executed in violation of the Eighth Amendment. *Id*. As a result, before ruling on Wright's first post-conviction appeal, the FSC relinquished jurisdiction to the circuit court and remanded Wright's case for a determination of intellectual disability under the *Hall* standard. The circuit court held an evidentiary hearing on Wright's intellectual disability claim on January 5-6, 2015 and February 11, 2015. Testimony from nineteen witnesses, including four expert witnesses, was considered along with the entire case file. Citing Wright's prior IQ scores of 76, 80, 81, 75, 82, and 75, the circuit court found that Wright's IQ scores did not demonstrate significant subaverage intellectual functioning under FLA. STAT. § 921.137. *Appendix C* at 5. The circuit court examined Wright's adaptive behavior and concluded that Wright was

arguably intellectually disabled, but his adaptive deficits did not meet Florida's high standard of clear and convincing evidence.[3] *Appendix C* at 11.

Wright appealed and his case was returned to the FSC for consideration of his post-conviction claims. The FSC found that Wright's prior IQ scores did not meet the standard for intellectual disability as, "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized by Florida law." *Wright I*, 213 So. 3d at 897. However, expert testimony established the standard error of measurement ("SEM") of plus or minus approximately five points adopted in *Hall* provided a 95 percent confidence interval that Wright's IQ score falls between 69 and 82. *Id*. While the FSC later conceded the range of Wright's scores "dips just one point beneath the threshold of 70," it concluded Wright did not show significantly subaverage intellectual functioning. *Wright I*, 213 So. 3d at 898. The FSC found that "[f]or this reason alone, Wright does not qualify as intellectual disabled under Florida law." *Id.*

The FSC also found Wright's adaptive functioning disqualified him from a diagnosis of intellectual disability. Citing numerous adaptive strengths in prison, as well as the facts of Wright's crime, the FSC misapplied this Court's express direction on the constitutional requirements of

[3] The defendant bears the burden of proof on each element of the Florida statute by clear and convincing evidence. FLA. STAT. § 921.137(4). Post-conviction counsel argued that Florida's standard was unconstitutional under *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) at all stages, but the FSC found the argument was waived. Only four states, Arizona, Colorado, North Carolina, and Florida currently use the clear and convincing standard. ARIZ. REV. STAT. ANN. § 13-753(G) (2011); COLO. REV. STAT. § 18-1.3-1102 (2012); N.C. GEN. STAT. § 15A-2005(c) (2015); *see also Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (invalidating Delaware's death penalty scheme, including the clear and convincing standard in DEL. CODE ANN. tit. 11, § 4209(d)(3)(b)); *see also* S. 95, 71st General Assembly, 1st Sess. (Colo. 2017) (bill proposed to repeal the death penalty). The federal circuits are split on the constitutionality of clear and convincing evidence for intellectual disability. *See Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (upholding Georgia's beyond a reasonable doubt standard for intellectual disability); *see also Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016) (criticizing Arizona's clear and convincing standard for intellectual disability).

intellectual disability determinations. The final FSC opinion[4] was issued on March 16, 2017. It stated, "NO MOTION FOR REHEARING WILL BE ALLOWED." *Wright I*, 213 So. 3d at 912. This Court published *Moore I*, a case that redefined the constitutional parameters of adaptive functioning, less than two weeks later on March 28, 2017. Despite *Moore I's* clear directives on the analysis of adaptive functioning, the FSC issued its mandate on April 3, 2017.

Wright filed a petition for a writ of certiorari in this Court on August 10, 2017, in which he presented the following question:

> Did the Florida Supreme Court disregard the diagnostic framework for intellectual disability established in *Moore v. Texas*, 137 S.Ct. 1039, *Hall v. Florida*, 134 S.Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by treating intelligence tests as dispositive of intellectual functioning and requiring proof of adaptive deficits beyond mild intellectual disability in finding that Tavares Wright can be executed in violation of the Fifth, Eighth, and Fourteenth Amendments?

On October 16, 2017, this Court entered an order granting Wright's petition for a writ of certiorari, vacating the judgment, and remanding the case to the FSC in light of *Moore I*. Following supplemental briefing by Wright and the State of Florida, the FSC issued its opinion on remand on September 27, 2018, reaffirming its denial of Wright's intellectual disability claim as unchanged by *Moore I*. *Wright II*, 256 So. 3d at 778. Wright filed a Motion for Rehearing and for Clarification, which was denied on November 1, 2018, and on the same date, the FSC issued a corrected opinion without any substantial changes.

II. The Facts of Wright's Case Show Intellectual Disability

Wright's intellectual disability began in utero when his mother drank heavily, abused drugs, and gained only seven pounds during her pregnancy. He was born with fetal alcohol

[4] The FSC issued an interim opinion on November 23, 2016, stating that evidence of adaptive deficits in one domain was insufficient for a finding of intellectual disability. On reconsideration, the court softened this language in the final opinion issued March 16, 2017.

syndrome and microcephaly; conditions that limited the growth of his brain to two-thirds the size of normal. Wright's appearance immediately reveals organic brain damage in his development. His head is strikingly disproportionate to his body size and he has the flat face and abnormally wide set eyes associated with prenatal exposure to alcohol and cocaine. Wright learned to speak and walk much later than average children, wet his bed until he was 16 years old, and suffered head injuries resulting in loss of consciousness. Wright's mother received social security benefits for Wright's slow learning disability and speech delays. Wright was ostracized for his strange behavior and appearance as a child. He was called "peanut head," "beetlejuice," and "little alien" by his peers. In addition, parental addiction, mental illness, and incarceration prevented any stable home life.

A. Wright's Intellectual Functioning is Significantly Subaverage

Wright suffers from significantly subaverage intellectual functioning. When Wright was ten years old, his struggles in school were exacerbated by moving between school systems, and as a result, he was administered the ***same*** WISC-R IQ test ***three times within a seven-month period***. Wright received scores of 76, 80, and 81. This is not an approved method of administering IQ tests.[5] Not surprisingly, his scores improved due to the practice effect.[6] He received a score of 75

[5] An administration of three IQ tests in one year is contrary to the instructions in the testing manual, as well as established clinical practice. *See* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 38 (11th ed. 2010) (hereinafter referred to as "AAIDD-11") ("[E]stablished clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will lead to an overestimate of the examinee's true intelligence").

[6] Wright's IQ scores may have been artificially inflated by virtue of the practice effect ***and*** the Flynn effect. "The practice effect…suggests that repeated administration of the same…test can artificially inflate an individual's IQ….[I]ncreases in IQ scores over time may be a product of the practice effect rather than true increases in intelligence." Natalie Pifer, The Scientific and the Social in Implementing *Atkins v. Virginia*, 41 Law & Soc. Inquiry 1036, 1039 (2016) (citations omitted). "[T]he Flynn effect suggests that IQ scores need adjusting to account for differences in

when he was tested on the WAIS-R six years later in 1997. In conjunction with this case, he was improperly given the WAIS-III twice during a two-week span in July 2005, earning an 82 and 75. Experts agreed that Wright suffers from significantly subaverage intellectual functioning. The range of scores derived from Wright's first IQ examination taken when he was ten years old was 69 to 82, with a 95 percent confidence interval that Wright would score in that range. Multiple practitioners documented that Wright had below average intellectual functioning in the borderline range.

B. Wright's Adaptive Functioning Has Been Far Below Average Since Childhood

The evidence proves that Wright exhibits severe deficits in adaptive functioning. In post-conviction, Dr. Mary Elizabeth Kasper ("Dr. Kasper"), an expert board-certified by the American Board of Professional Psychology in clinical psychology and neuropsychology, interviewed Wright and ten people who knew Wright over the course of his lifetime.[7] She considered school records, psychological reports, and the Adaptive Behavior Assessment Scales-II ("ABAS-II"), a standardized measure of adaptive behavior. In contrast, the State's expert, psychologist Dr.

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when intelligence tests are normed, since population-wide shifts in average intelligence may also artificially inflate individual test results." *Id*.; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) (hereinafter referred to as "DSM-5") ("Factors that may affect test scores include practice effects and the "Flynn effect"); *see also* AAIDD-11 at 37-8.

[7] Dr. Kasper found that Wright himself was not a reliable source of his own abilities. Her methodology complies with methods of evaluation approved by the American Association on Intellectual and Developmental Disabilities. AAIDD-11 at 51; DSM-5 at 37. For example, Wright told Dr. Kasper he had a regular high school diploma or a GED. In reality, Wright did not obtain a GED, but a special diploma, which was given as mere "recognition" of effort, not academic achievement. Wright also told Dr. Kasper that he was a highly skilled drug dealer and the leader of a gang. However, the collateral sources she spoke with did not agree with Wright's self-assessment. One person told her that Wright would have been given the drug-dealing task of an 11-year-old, who would be easily led and manipulated as to how much money he would be passing. Every person Dr. Kasper interviewed, including people who knew Wright since he was a child, told her that he was not the leader of the gang, except perhaps in his own mind.

Michael Gamache ("Dr. Gamache"), based his expert opinion primarily on an interview with Wright himself. This defies all guidance on assessing adaptive functioning from the medical community. *See* AAIDD-11 at 51 ("[s]elf ratings of individuals…should be interpreted with caution when determining an individual's level of adaptive behavior"); *see also* DSM-5 at 37 (assessing adaptive functioning requires use of knowledgeable informants such as parents, family members, counselors, and teachers as well as additional sources including educational, developmental, medical, and mental health evaluations).

Wright suffers from significant deficits in adaptive behavior under both legal and current scientific standards. These deficits exist across multiple environments and multiple skill areas, including deficits in conceptual, social, and practical skills. *See* DSM-5 at 33 ("deficits in adaptive functioning…result in failure to meet developmental…standards for personal independence" in the conceptual, social, and practical domains). Wright, like many people with mild intellectual disabilities, was found to be capable of learning and making small improvements in adaptive functioning over time. Yet, Dr. Kasper opined that Wright's abilities were still similar to a twelve-year-old child.

The conceptual skills category displayed Wright's most serious deficits, including documented academic, reading, writing, counting, and reasoning problems. DSM-5 at 34. Wright's school records from New York and Florida showed he was classified as both emotionally handicapped and specific learning disabled. Accordingly, he was exempt from taking standardized tests. Both of his school psychological reports note that he has deficits in functional academic skills. There are several Independent Education Plans ("IEPs") in Wright's school records, which are used for students with disabilities to provide feedback and set specific goals. The IEPs were individualized plans designed to identify teaching methods that could assuage Wright's adaptive

deficits. Multiple witnesses reported that Wright had problems reading. He has difficulty understanding complex directions and learning the rules of simple games like Uno. As a teenager, Wright lived with a relative who reported her many difficulties teaching Wright how to count.

At the post-conviction evidentiary hearing, several inmate witnesses testified about Wright's lack of adaptive conceptual skills in prison. They described him as someone who was slow, immature, a follower, and easily manipulated. He cannot understand spiritual concepts such as forgiveness and prayer. He had difficulty following the rules, and made the same mistakes over and over again without seeming to learn. Fellow inmate Richard Shere ("Shere") confirmed that Wright's academic deficits still exist, as he has problems reading, writing, and filling out forms. Shere and several other inmates on death row have assisted Wright in these areas. Fellow inmate Dahrol James explained how Wright's deficits affected him in prison Bible study. Most participants would take turns reading aloud, but the other inmates always had to read to Wright. In the prayer circle, each person in the circle would take turns praying about topics like their current situation or their families. When it was Wright's turn, he just talked, as opposed to praying like the other men.

Wright's trial attorneys offered testimony about the communication and comprehension challenges they faced in their representation. Trial attorney David Carmichael ("Carmichael") explained that Wright's case was the most difficult of the fifty homicide cases he has handled because Wright's limitations required repeating concepts over and over. Carmichael initially thought Wright understood him because he would smile, laugh, or make appropriate gestures, but it was apparent from later conversations that Wright had adopted a social patina and seemed

incapable of grasping what his attorneys were telling him.[8] Experienced trial attorney Byron Hileman ("Hileman") testified that during trial, Wright was "not watching aspects of the trial that were dynamically important to the case with any real seeming understanding" and doodled on a pad instead of taking notes. After two mistrials, Wright's attorneys attempted to create the opportunity for a life in avoidance plea. Wright was unable to process the concept. Despite there being no downside to accepting a plea to a life sentence (Wright already had more than one life sentence) and a large upside (Wright was facing a death sentence), Wright was not interested. To this day, Hileman is not sure Wright understood his precarious situation because Wright never gave an explanation that made any sense and his responses were non-sequiturs.

Wright's deficits in social skills are evidenced by his problems with spoken communication, including leisure activities, getting along with others, having friends, recognizing emotions, helping people, and having manners. *See* DSM-5 at 34. Poor communication abilities have caused complications throughout Wright's life. As a young child, Wright had speech therapy for his communication deficits. Wright's IEPs indicate that he had problems interacting and communicating with others and controlling his behavior. When Wright was younger, he did not get along with others and he did not have any friends other than his cousin, Carlton. He was bullied

[8] Wright also exhibits acquiescence bias, a phenomenon that is commonly seen with intellectually disabled individuals. With acquiescence bias, people agree to things that they do not understand because it makes them look smarter. As Dr. Kasper explained:

> It doesn't make you look smart when you say, "Hey, I really have no idea what you're talking about and I don't know what's going on here."
>
> It actually makes you look smarter to smile, and to be calm, and to say, "Yes, that's what I meant," "Yes, that's what I did," "Yes, that's what I know," and "Yes, I understand you."

She testified that she personally observed this with Wright.

and called names. He got into fights and he was constantly in trouble. As an adult, other inmates have to explain concepts to Wright repeatedly in different ways because he cannot comprehend. As is common for intellectually disabled individuals, Wright sometimes acts as if he understands, but he actually does not. For example, when Dr. Kasper asked Wright about his Hebrew Israelite religion and the feast of unleavened bread, he was unable to explain it to her.[9] When Dr. Kasper asked Wright what he thought the post-conviction hearings on his intellectual functioning were about, he responded, confused by psychological terminology he'd heard hundreds of times over half of a decade,[10] that the hearings were about "Flynndom" and "getting found innocent."

Wright's practical skills, involving activities of daily living such as feeding himself, dressing himself, personal hygiene, occupational skills, transportation, and routines, have also been below average since childhood. Wright's cousin, Carlton, testified that he looked out for Wright and provided much-needed support throughout his late teenage years, helping Wright with his schoolwork and hygiene, driving him around, and assuming the role of a job coach when they worked together at the Albertson's warehouse for six months. Wright's work at Albertson's was far from an "independent" endeavor as Carlton supported Wright by helping him fill out the job application, providing daily transportation, and working closely with Wright to help supervise his work. Wright was unable to drive himself to work because he did not have a driver's license due to the fact that he could not pass the written portion of the driver's test. One inmate who knew Wright from boot camp in 2000 explained that Wright adapted more slowly than other boys to boot camp because he was unable to understand the drill instructor's directions and expectations. Consequently, Wright was transferred out of the boot camp program. Carlton discussed Wright's

[9] *See supra* n.8.
[10] *See supra* n.7.

habit of mimicking and noticed that when Wright came out of boot camp, he kept saying "yes ma'am, no, ma'am" to the point that it was strange. Dr. Kasper interviewed inmates who called Wright a "push button" because they could tell him to do something that was commonly known to be inappropriate and Wright would just go ahead and do it, even though he should have known that he would get in trouble for it later on.

Dr. Kasper used the ABAS-II, a standardized, quantitative test, to measure Wright's adaptive functioning. As with IQ tests, the mean score on the ABAS-II is 100, and two standard deviations below the mean is 70. The ABAS-II also takes into account the SEM. The ABAS-II tests the three categories of conceptual skills, social skills, and practical skills, and includes a general composite score. Dr. Kasper administered two separate ABAS-II's in this case: one when Wright was 16 years old in 1997 (when he received a score of 75 on the WAIS-R), and one to assess Wright's current functioning. Dr. Kasper found that Wright suffered from significant deficits in both the conceptual skills category and the social skills category at both age 16 and presently, as well as the general adaptive composite at both age 16 and presently. Although Wright's composite scores improved slightly over the years, most of which he has spent in prison, from a range of 62-68 at age 16 to a current range of 65-71, he continues to demonstrate significant deficits in adaptive functioning.[11]

REASONS FOR GRANTING THE WRIT

The FSC disregarded this Court's standards in *Moore I*, *Hall*, and *Atkins* by erroneously analyzing the first two prongs of Wright's intellectual disability claim with an incorrect application

[11] Dr. Kasper testified that intellectually disabled individuals thrive in structured environments and that death row is the "ultimate group home." This accounts for potential improvements since Wright has been on death row.

of Florida's facially-correct statute.[12] As to the first prong, significantly subaverage intellectual functioning, the FSC erroneously reinstated a strict numerical threshold in violation of *Hall* by viewing Wright's IQ as a single number subject to a clear and convincing standard, rather than an imprecise range. *Hall*, 572 U.S. at 723 ("Intellectual disability is a condition, not a number … [and c]ourts must recognize, as does the medical community, that the IQ test is imprecise.")

As to the second prong, deficits in adaptive behavior, the FSC erroneously focused on Wright's adaptive improvements made in the structured prison environment and emphasized his perceived adaptive strengths over his extensive adaptive deficits in violation of *Moore I*.[13] This Court clearly cautioned against both overemphasizing adaptive strengths and relying on improved behavior in prison when determining adaptive functioning. *See Moore I*, 137 S. Ct. at 1050. However, this Court has not issued a clear ruling on where courts should draw the line. *Wright I*, 256 So. 3d at 777-78 ("Again, it is difficult to conclude where the Supreme Court drew the line for reliance on prison conduct as our only guidance is a single sentence 'caution[ing] against reliance on adaptive strengths' developed in prison."). Lacking that necessary guidance, the FSC has made the same mistake in both *Wright* decisions that the Texas Criminal Court of Appeals ("CCA") made in *Moore I* and *II.* The FSC beseeched this Court for guidance in its *Wright II* opinion,[14] and it is imperative for this Court to intervene and clarify the appropriate analysis so that Florida will not wrongly execute intellectually disabled defendants such as Wright based on its misunderstanding of the adaptive functioning analysis.

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[12] The third prong, onset before the age of 18, is not disputed in Wright's case.

[13] The FSC's opinion also conflicts with this Court's holding in *Moore v. Texa*s, 139 S. Ct. 666 (2019) (hereinafter referred to as "*Moore II"*). *See infra* pp. 15.

[14] "At this point, we feel the need to express the difficult position that the States are placed in due to the Supreme Court's lack of clear guidance on this analysis." *Wright II*, 256 So. 3d at 776 n.9.

This Court explained that intellectual disability determinations must be "informed by the medical community's diagnostic framework" when it vacated and remanded the CCA's decision in *Moore I.* 137 S. Ct. at 1048. The decision was vacated, in part, because the CCA deviated from prevailing clinical standards on intellectual disability by overemphasizing Moore's alleged adaptive strengths and highlighting his improved behavior in prison. *Id.* at 1050. The *Moore I* dissent noted that a "problem with the Court's approach is the lack of guidance it offers to States seeking to enforce the holding of *Atkins."* 137 S. Ct. at 1058 (ROBERTS, C.J., dissenting). "The line between the permissible—consideration [of strengths and prison behavior], maybe even emphasis—and the forbidden—'overemphasis'—is not only thin, but totally undefined by today's decision." *Id.* at 1059 (ROBERTS, C.J., dissenting).

The CCA subsequently reconsidered the matter and again found that Moore was not intellectually disabled. *Ex parte Moore*, 548 S.W.3d 552, 573 (Tex. Crim. App. 2018). On appeal from that decision, this Court found that the CCA conducted the same erroneous analysis as it did in *Moore I* when it determined Moore was not intellectually disabled by, in part, emphasizing Moore's perceived capacity to communicate, read, and write, and "[relying] heavily upon adaptive improvements made in prison." *Moore II*, 139 S. Ct. at 671. This Court reversed the CCA's determination and found "Moore has shown he is a person with intellectual disability." *Id*. at 672. However, once again, this Court did not articulate or clarify "how courts should enforce the requirements of *Atkins*." *Id*. at 672 (ROBERTS, C.J., concurring).

Similar to the CCA, the FSC disregarded this Court's standards established in *Moore I*, *Hall*, and *Atkin*s by focusing on Wright's adaptive improvements made in the structured prison environment and emphasizing his perceived adaptive strengths over his extensive adaptive deficits. The FSC's clear misunderstanding of the adaptive functioning analysis has resulted in an erroneous

standard. Consequently, Florida is at risk of executing intellectually disabled individuals like Wright based on an improper standard, and this Court must intervene by clarifying the appropriate analysis. Wright has significantly subaverage intellectual and adaptive functioning that manifested prior to age 18. Therefore, executing him would violate Florida law, this Court's precedent, as well as his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. This Court should grant this Petition, issue a bright-line standard for the adaptive functioning analysis, and find that Wright is a person with intellectual disability.

I. The FSC Erred in Finding that Wright's IQ is Not Significantly Subaverage Under the *Moore I*, *Hall*, and *Atkins* Standards by Reinstating a Strict Numerical Threshold and Relying on an Expert With Completely Unconventional Methods for Calculating IQ.

Florida's statute regarding intellectual disability correctly states that significantly subaverage IQ "means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." FLA. STAT. § 921.137(1). However, IQ scores are "imprecise" and cannot be final and conclusive evidence of intellectual disability. *Hall*, 572 U.S. at 723. In fact, IQ scores should be considered as a range due to the SEM, and other reasons that cause an individual's score to fluctuate such as the practice effect from earlier tests, the subjective judgment in scoring, or an individual simply guessing answers correctly. *See id*. at 712, 722-24. The SEM in IQ scores is generally considered to be approximately plus or minus five points; accordingly, based on solely factoring in the SEM, the range of IQ for establishing intellectual disability can be between 65 and 75. *See id*. at 723. As "intellectual disability is a condition, not a number," the analysis of multiple scores is "a complicated endeavor." *Id.* at 714*; see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (Louisiana state trial court finding 75 IQ was not "subaverage intelligence" was unreasonable); *see also Moore I*, 137 S. Ct. at 1053 (Texas appellate court finding of sufficient

intellectual capacity with average IQ of 70.66 overruled). In *Wright I and II*, the FSC incorrectly applied Florida's facially-correct statute by re-adhering to a narrow interpretation of significantly subaverage IQ as a single dispositive number rather than an imprecise range when it found that Wright does not have significantly subaverage IQ. *Wright I*, 213 So. 3d at 897-98; *Wright II*, 256 So. 3d at 772.

The range of scores derived from Wright's first IQ examination taken when he was ten years old was 69 to 82, with a 95 percent confidence interval that Wright would score in that range. Multiple practitioners documented that Wright had below average intellectual functioning in the borderline range. Acknowledging Wright's numerous IQ scores and the holdings of *Atkins* and *Hall*, the post-conviction circuit court found, "while the Defendant's I.Q. scores do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage general intellectual functioning, they do fall within the test's acknowledged and inherent margin of error." *Appendix C* at 5.

Nonetheless, in *Wright I*, the FSC determined that Wright's prior IQ scores did not meet the standard for intellectual disability as, "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized by Florida law." *Wright I*, 213 So. 3d at 897. While the FSC conceded that the range of Wright's scores, "dips just one point beneath the threshold of 70," the FSC concluded that Wright did not show significantly subaverage intellectual functioning by clear and convincing evidence. *Id*. at 897-98. The FSC further held that "[f]or this reason alone, Wright does not qualify as intellectually disabled under Florida law." *Id.* at 898. With this statement, the FSC violated *Hall* and the Eighth Amendment by functionally reinstating the strict numerical IQ cutoff and viewing IQ as a single number, subject to a clear and convincing standard of proof, rather than an imprecise range.

The FSC relied, in part, on State expert Dr. Gamache's testimony concerning Wright's IQ, including that Wright was potentially malingering on his IQ tests. *Wright I*, 213 So. 3d at 898. However, Dr. Gamache's method of establishing IQ did not comply with the holdings of this Court or meet the accepted standards of the medical community. *Moore I*, 137 S. Ct. at 1048-49; *see also Hall*, 572 U.S. at 721-22 (intellectual disability determinations must be informed by current medical standards). Notably, Dr. Gamache admitted that he did not use the DSM-5 or AAIDD-11's standards for evaluating IQ when estimating Wright's IQ. Instead, Dr. Gamache used an online resource called "Online Statistics Education: An Interactive Multimedia Course of Study" which is a "resource for learning and teaching introductory statistics" rather than an established source for diagnosing intellectual deficits in Wright's case.[15] Inexplicably, the FSC ignored expert testimony based on professional consensus in favor of an IQ determination calculated on the internet.

The FSC also relied on Dr. Gamache's testimony that Wright was "malingering" on every IQ test, even those administered in 1991 and 1997, based on a Validity Indicator Profile ("VIP") test he administered decades later in 2014. *Wright I*, 213 So. 3d at 898. Yet, according to the instructions in the VIP test manual, the VIP is ***not*** a valid instrument for assessing malingering among the intellectually disabled. Instead, the Victoria Symptom Validity Test is frequently used

[15] The surprising testimony of Dr. Michael Gamache was:

> Q: Do you have any authority for evaluating IQ scores in this way?
> A: I do.
> Q: Okay. And what is that?
> A: I'll give you some references. First reference I'll give you is Online Statistics Education, A Multimedia Course of Study by David Lane.
> Q: Is there anything in the DSM-5 or the AAID [sic] definition about evaluating IQ scores the way you did on this chart?
> A: They don't address that.

for assessing malingering among the intellectually disabled because it has a dramatically lower misclassification rate.

The FSC repeated its error in *Wright II* when it gave excessive weight to Wright's highest score, an 82 achieved in 2005. *See* 256 So. 3d at 772. Wright has taken a total of nine IQ tests in his lifetime, starting when he was ten years old, and scored the 82 when he was twenty-four years old. *Wright I*, 213 So. 3d at 897. As a result, Wright's score of 82 could certainly have been produced by the practice effect and the true score should be arguably lower due to the Flynn effect.[16] Wright's full-scale IQ scores have ranged from 75 to 82, placing him within the borderline intellectual disability range once adjusted for the SEM. Despite this, the FSC chose to focus on Wright's highest score achieved after being tested multiple times, which was likely inflated due to the practice effect, instead of recognizing that IQ is an imprecise range.

Further, the fact that Wright may have scored at the upper end of the borderline range does not preclude him from proving he is intellectually disabled. Any perceived weakness in the evidence as to the IQ prong is counteracted by the extensive evidence of Wright's deficits in the adaptive functioning prong:

> [T]he Supreme Court [in *Hall*] has now recognized [that] because these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of other prongs. (holding that this is a "conjunctive and interrelated assessment" and relying on the DSM–5, which provides as an example that "a person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score").

Oats v. State, 181 So. 3d 457, 467–68 (Fla. 2015) (citing *Hall*, 572 U.S. at 723) (internal citations omitted). Wright's full-scale scores unadjusted for the SEM may range from 75 to 82, but his severe adaptive deficits render him comparable to individuals with IQ scores under 70 once those

[16] *See supra* n.6.

scores are adjusted for the SEM. The FSC claims that it followed *Moore I*'s instructions by considering the range of Wright's IQ scores and then proceeding on to also examine Wright's adaptive functioning. *Wright II*, 256 So. 3d at 772. However, not only did the FSC use an incorrect analysis to find that Wright does not have significantly subaverage IQ, but the FSC again erred when considering his adaptive functioning.

II. The FSC's Requirement that Post-Conviction Defendants Prove Current Adaptive Deficits while Incarcerated Disregards *Atkins v. Virginia's* Reasoning for Excluding Intellectually Disabled Defendants from the Death Penalty, Misconstrues the Related Medical Diagnostic Framework, and is at Odds with the Trends of Other Jurisdictions.

Florida's statutory adaptive functioning standard is facially correct. Section 921.137 of the Florida Statutes states that "intellectual disability means significantly subaverage general intellectual functioning ***existing concurrently with deficits in adaptive behavior*** and manifested during the period from conception to age 18" (emphasis added). To show he is intellectually disabled, a Florida defendant must prove: "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of the condition before age 18." *Jones v. State*, 966 So. 2d 319, 325 (Fla. 2007) (internal citation omitted). The FSC has explained that:

> The definition in section 921.137 [of the Florida Statutes] and Florida Rule of Criminal Procedure 3.203 states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which this Court has interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, ***and that there must be current adaptive deficits.***

Dufour v. State, 69 So. 3d 235, 248 (Fla. 2011), *as revised on denial of reh'g* (Aug. 25, 2011) (citing *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007)) (emphasis added). Florida's requirement that defendants prove "current adaptive deficits" is permissible when applied to defendants prior to sentencing. However, the erroneous analysis in Wright's case occurred, in part, because the FSC

interprets the "concurrently" statutory language to mean that post-conviction capital defendants must prove they experience current adaptive deficits ***in the prison environment***. As was the case in *Jones* and *Dufour*, requiring that a capital defendant prove his current adaptive deficits during the time of his post-conviction proceedings once he has already been incarcerated on death row (hereinafter referred to as the "currentness" requirement) disregards the reasoning behind this Court's decision in *Atkins* and other death penalty jurisprudence.[17] In *Atkins*, this Court explained that "death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution." 536 U.S. at 318.

First, there is a serious question about whether either justification underpinning the death penalty--"retribution and deterrence of capital crimes by prospective offenders"--applies to or is effective in cases involving intellectually disabled defendants. *Id.* at 318-19. The death penalty is confined to a narrow category of the most serious crimes, and "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. Further, it is unlikely that the penalty will deter intellectually disabled defendants because it is less likely that they "can

[17] This is not the first time the FSC has construed its facially proper statute in an improper way:

> On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*. Florida's statute defines intellectual disability for purposes of an *Atkins* proceeding as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Fla. Stat. § 921.137(1) (2013) … But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.

Hall v. Florida, 572 U.S. 701, 711–12 (2014) (citing *Cherry v. State*, 959 So. 2d 702, 712–713 (Fla. 2007) (*per curiam*).

process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

Second, an intellectually disabled defendant's reduced mental capacity increases the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Intellectually disabled defendants also tend to be less capable of giving meaningful assistance to their counsel, are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse. *See id.* at 320-21. It is clear that the rationale for excluding intellectually disabled defendants from the death penalty is based upon the defendant's mental impairments at the time of the homicide and during their criminal trials and sentencing hearings. A defendant's adaptive functioning while incarcerated in a controlled environment for ten, twenty, or even thirty years may have little or nothing to do with their capabilities when the homicide occurred. *See infra* pp. 26-27, 32-33. To be clear, this Petition does not argue that a defendant's incarcerated adaptive deficits should never be considered. Evidence of a defendant's adaptive deficits in prison may provide compelling evidence in addition to evidence of pre-incarceration deficits because:

> Certainly a person's level of adaptive functioning in the present might provide some information about his abilities during the developmental period as, all things being equal, a person without limitations in the present is less likely to have had limitations before, and a person with limitations today is more likely to have had them during the developmental period.

United States v. Hardy, 762 F. Supp. 2d 849, 881 (E.D. La. 2010). However, Florida's standard incorrectly requires that post-conviction capital defendants prove they have "current adaptive deficits" in prison. *See Moore I*, 137 S. Ct. 1039 at 1050 (holding that the fact that the CCA stressed Moore's improved behavior in prison deviated from prevailing clinical standards concerning adaptive functioning); *see also Moore II*, 139 S. Ct. 666 at 671 (holding that the CCA's heavy

reliance on Moore's adaptive improvements deviated from the Supreme Court's caution against relying on prison-based development).

Further, the FSC's erroneous "currentness" requirement shows a clear misunderstanding of how to apply the medical community's diagnostic framework for determining adaptive functioning. *See Moore I*, 137 S. Ct. at 1048 (holding that the intellectual disability determination must be informed by the medical community's diagnostic framework). The FSC cited to the explanations of the adaptive functioning prong contained within the AAIDD-11 and DSM-5 to dismiss Wright's challenge to the erroneous standard explained in *Dufour*, explaining that both sources state that current adaptive deficits are the focus of the inquiry.[18] *Wright II*, 256 So. 3d at 773 n.4. However, the FSC ignores the distinction between diagnosing an individual as intellectually disabled for medical purposes as opposed to diagnosing them for legal purposes:

> Unlike in a medical, educational, or social services context, the law is concerned with what was rather than what is. The point of an *Atkins* hearing is to determine whether a person was mentally retarded at the time of the crime and therefore ineligible for the death penalty, not whether a person is currently mentally retarded and therefore in need of special services.
> . . .
> So, while the [American Psychological Association] speaks of "concurrent deficits or limitations in present adaptive functioning," and while some courts appear to have interpreted this language as directing consideration of how a person functions today rather than how he did at the time of the crime, it is clear that the assessment of mental retardation for purposes of *Atkins* looks backwards—past even the time of the crime and back into the developmental period.

United States v. Hardy, 762 F. Supp. 2d at 881. The FSC also misconstrues the sections of the AAIDD-11 and DSM-5 that it cites in its opinion. The FSC is correct that the AAIDD-11 states that "[c]urrently, adaptive behavior is defined and measured on the basis of the individual's typical

[18] Wright is not challenging the FSC's "concurrent adaptive deficit requirement" detailed in *Dufour* to the extent that it requires subaverage intellectual functioning and adaptive deficits to exist at the same time. Wright challenges the requirement that an intellectually disabled defendant must prove he exhibits current adaptive deficits during the time of his post-conviction proceedings.

present functioning." *Wright II*, 256 So. 3d at 773 n.4; AAIDD-11 at 54. However, in the same section, the manual goes on to explain that:

> [t]here is a growing need for research at the intersection of ID determination and forensic science, especially in relation to measurement of adaptive behavior of individuals living in prisons and for whom it is challenging to assess their typical present adaptive functioning to meet societal demands in the community. Many professionals rely on a ***retrospective assessment*** approach to measure the adaptive behavior of these individuals.

AAIDD-11 at 55 (emphasis added). The FSC goes on to cite the DSM-5 for the proposition that "[the second prong] is met when at least one domain of adaptive functioning…is sufficiently impaired that ongoing support is needed." *Wright II*, 256 So. 3d at 774 n.4; DSM-5 at 38. However, that exact same sentence in the DSM-5 proceeds to explain that "[the second prong] is met when at least one domain of adaptive functioning…is sufficiently impaired that ongoing support is needed ***in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community."*** DSM-5 at 38 (emphasis added). The DSM-5 further states that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., ***prisons***, detention centers)." *Id.* (emphasis added). To reiterate, this Petition does not argue that present or current functioning should never be considered in the post-conviction context. However, the FSC's requirement that adaptive deficits be proved during the time of post-conviction proceedings after the defendant has been incarcerated for a number of years reflects a clear misunderstanding of both the AAIDD-11 and DSM-5's explanations that while present functioning often determines the need for ongoing social services, it should be considered with extreme caution in the prison environment.

Finally, Florida's "currentness" requirement is at odds with the practices and trends of other jurisdictions. *See Moore I*, 137 S. Ct. at 1049. Several jurisdictions across the nation recognize the importance of a retrospective adaptive functioning analysis. *See Smith v. Ryan*, 813

F.3d 1175, 1196 (9th Cir. 2016), *as corrected* (Feb. 17, 2016) (defendant was unable to meet the social standards of his age and cultural group "both before the age of eighteen and at the time of the crime"); *Pizzuto v. State*, 146 Idaho 720, 731 (2008) ("The issue in *Atkins v. Virginia* is not whether the offender is currently mentally retarded. The issue is whether the offender was mentally retarded when he or she committed the murder and whether such mental retardation began prior to the offender's eighteenth birthday."); *U.S. v. Hardy*, 762 F. Supp. 2d 849, 881 (E.D. La. 2010) ("[I]t is clear that the assessment of mental retardation for purposes of *Atkins* looks backwards---past even the time of the crime and back into the developmental period."); *Anderson v. State*, 357 Ark. 180, 216 (Ark. 2004) (ARK. CODE. ANN. § 5-4-618 requires the defendant to prove mental retardation at the time of committing the offense); *Bowling v. Com.*, 163 S.W.3d 361, 376 (Ky. 2005), *abrogated on other grounds by Woodall v. Commonwealth*, 2017-SC-000171-MR, 2018 WL 2979581 (Ky. June 14, 2018) *and Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018) ("If diminished personal culpability is the rationale for not executing a mentally retarded offender, logic dictates that the diminished culpability exist at the time of the offense, not necessarily at the time of the execution."); *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 753 (Mo. 2015) ("Section 565.030.6 [of the Missouri Statutes], like the analysis [in] *Atkins*, considers intellectual disability as an immutable characteristic which manifests at or shortly following birth and, therefore, is necessarily present at the time the defendant committed the crime."); *Coleman v. State*, 341 S.W.3d 221, 233 (Tenn. 2011) (TENN. CODE. ANN. § 39-13-203 requires the defendant to prove intellectual disability at the time of the offense). The common theme between all of these jurisdictions is that the defendant must satisfy the requirements to be diagnosed as intellectually disabled ***at the time of the crime.*** As Wright's adaptive deficits manifested prior to the age of 18

and continued to be present through the time of the crime, the FSC erred in finding that Wright is not intellectually disabled.

III. The FSC Continued its Trend of Misapplying the Standards of *Moore I*, *Hall*, and *Atkins* by Relying Too Heavily on Wright's Adaptive Improvements Made in Prison and Emphasizing his Perceived Adaptive Strengths Over his Adaptive Weaknesses.

This Court directed the FSC to reconsider its *Wright I* opinion in light of *Moore I. Wright v. Florida*, 138 S. Ct. 360 (2017). Rather than properly following this Court's mandate, the FSC instead issued an opinion continuing to disregard this Court's standards in *Hall* and *Moore I*, and simply asserted that its determination was correct the first time.

This is not the first time the FSC has disregarded this Court's reasoning concerning intellectual disability determinations by conducting an analysis that is at odds with the related medical diagnostic framework. In *Hall*, this Court rejected Florida's strict bright-line rule requiring an IQ of 70 or below when analyzing intellectual disability, explaining that the medical community's "clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." 572 U.S. 701, 720 (2014). This Court further explained that, while *Atkins* left the states the task of developing appropriate ways to enforce its new constitutional restriction, it did not give the states unfettered discretion to define the full scope of the constitutional protection. *Hall*, 572 U.S. at 719. The legal determination of intellectual disability is distinct from a medical diagnosis, but ***it must be informed by the medical community's diagnostic framework.*** *Id.* at 721. It is clear that the medical community does not contemplate or condone assessing adaptive functioning in the isolated and structured vacuum of the prison environment:

> Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture. This means that the standards against which the individuals' functioning are compared are typical community-based environments, ***not environments that are isolated*** or segregated by ability. Typical community environments include homes,

> neighborhoods, schools, businesses and other environments in which people of similar age ordinarily live, play, work, and interact.

AAIDD-11 at 7 (emphasis added). In *Hall v. State*, the FSC recognized that "[e]valuating the adaptive behavior of an individual who has spent much of his adult life incarcerated can be difficult." 201 So. 3d 628, 636 (Fla. 2016). The FSC cited to expert testimony in Hall's case that:

> [P]rison represents clearly the antithesis of the environment in which adaptive behavior can be displayed. The assumption in the assessment of adaptive behavior is that a person has considerable degrees of freedom and opportunity to decide what he or she will do with his or her time and how they will progress. And within a prison setting the people of course are highly restricted as to the behaviors that they can display, and therefore we are not going to get an accurate assessment of adaptive behavior by ... acquiring information on prison related behaviors.

Hall v. State, 201 So. 3d at 636. When finding Hall was intellectually disabled, the FSC further explained that the "United States Supreme Court was clear that this State is not free "to define intellectual disability as [it] wish[es]." *Id.* at 638. Despite this recognition in *Hall v. State*, the FSC has continued to place emphasis on Wright's adaptive strengths developed in prison. *See infra* pp. 29-35.

In addition to erroneously requiring proof of current adaptive deficits in prison, the FSC disregarded the medical diagnostic framework by emphasizing adaptive strengths to offset weaknesses in Wright's case. Courts should take a holistic approach when determining intellectual disability, considering all aspects of an individual's functioning:

> Intellectual disability refers to a particular state of functioning that begins in childhood, ***is multidimensional***, and is affected positively by individualized supports … Thus, a comprehensive and correct understanding of the ID construct requires a multidimensional and ecological approach that reflects the interaction of the individual and his or her environment.

AAIDD-11 at 19 (emphasis added); *see also Oats v. State*, 181 So. 3d at 467 (FSC cites to *Hall* to explain that courts must consider all three prongs while determining intellectual disability, as opposed to relying on one factor as dispositive). However, accepted medical literature clearly

states that an individual's strengths should not be used to offset their weaknesses when determining intellectual disability:

> [Individuals] with ID are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their ID
> …
> [and they] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing ID, ***significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills.***

AAIDD-11 at 7, 47 (emphasis added). Despite the medical community's clear guidance, the FSC continues to erroneously emphasize adaptive strengths. *See infra* pp. 29-35; *see also Glover v. State*, 226 So. 3d 795, 810-811 (Fla. 2017) (FSC listed numerous perceived strengths, including that Glover obtained his GED, performed various jobs, made meals, and gave "good life advice to his daughter," while dismissing Glover's past deficits as caused by behavioral and psychological issues instead of intellectual disability).

In *Jones v. State*, while promulgating its erroneous "currentness" requirement, the FSC relied heavily on Jones' adaptive strengths in prison and past adaptive strengths prior to the murders in order to determine he was not intellectually disabled. 966 So. 2d 319, 328 (Fla. 2007).[19] The FSC acknowledged the post-conviction expert testimony describing Jones' past adaptive deficits, but dismissed that evidence as lacking credibility.[20] This Court explained in the

[19] The FSC explained that, while in prison, Jones followed a daily exercise regimen, self-administered his medication, wrote requests to see doctors, managed his inmate financial account, kept his cell clean, and visited the prison library twice a week. *Jones*, 966 So. 2d at 328. The FSC further explained that, before he committed the murders, Jones traveled alone, lived in several states, held several jobs, and lived with a common law wife for several years. *Id.*

[20] *Jones* defense expert Dr. Eisenstein determined that:

> *before age 18* Jones had significant deficits in adaptive functioning in the areas of (1) communication—family members said Jones was not articulate and was a slow learner; (2) academic function—family members said he was mentally slow and

subsequent *Hall* and *Moore I* decisions that the intellectual disability determination must be informed by current medical standards. *Moore I*, 137 S. Ct. at 1048-49; *Hall*, 572 U.S. 701 at 721-23. Even after this explanation, the FSC continued to analyze adaptive functioning in a manner blatantly disregarding medical consensus in Wright's case.

Although the FSC claims in *Wright II* that it considered *Moore I*, the FSC ignores major points articulated in *Moore I*. This Court recognized the importance of the diagnostic framework in *Moore I* when it overturned the CCA's decision, in part, because its analysis of Moore's adaptive functioning deviated from prevailing clinical standards. *Moore I*, 137 S. Ct. at 1050. This Court explained that the CCA overemphasized Moore's perceived adaptive strengths and offset Moore's considerable adaptive deficits by those strengths. *Id.* The CCA's analysis was erroneous because the medical community ***focuses*** the adaptive-functioning inquiry on adaptive ***deficits***. *Id.* (internal citations omitted). This Court further explained that the CCA erred in emphasizing Moore's improved behavior in prison because clinicians caution against reliance on adaptive strengths developed in a controlled setting. *Id.* The FSC mirrored the CCA's errors, and its own previous errors, when it once again disregarded the medical community's diagnostic framework in *Wright II* and consequently found that he is not intellectually disabled.

In *Wright I*, the FSC over-emphasized expert and lay-witness testimony of Wright's perceived adaptive strengths while practically disregarding the extensive evidence of Wright's

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> needed special schooling, and some school records showed failing grades; (3) self-direction—Jones's sister said Jones needed her help when he was young and Eisenstein opined that Jones's older, common law wife served as a "mother figure or a caregiver to take care of him"; (4) social interpersonal skills—family members said Jones was a loner; and (5) health and safety—family members said Jones did not take care of himself as a child, and he had numerous medical concerns that no one addressed.

Jones v. State, 966 So. 2d at 323 (emphasis in original).

deficits in all three categories of adaptive behavior. The FSC exacerbated its error by also relying heavily on Wright's prison behavior. The FSC based its ruling on a litany of adaptive strengths that State's expert Dr. Gamache testified to after primarily basing his opinion on a single interview with Wright. *See Wright I*, 213 So. 3d at 899-900. It should also be noted that Dr. Gamache's method was contrary to accepted scientific methods of assessing adaptive functioning. *See* AAIDD-11 at 51; DSM-5 at 37; *see also supra* n.7.

The FSC conceded that Dr. Gamache acknowledged Wright had "some deficits in reading and writing skills…and some deficits in self-direction and the ability to formulate goals or objectives" in the conceptual skills category. *Wright I*, 213 So. 3d at 899. However, the FSC failed to explicitly consider numerous adaptive deficits such as Wright being exempt from taking standardized tests because he was classified as learning disabled, having several IEP's in his school records, failing to understand rules of simple games like Uno, having problems reading and writing prison forms, and could not constructively participate in prison Bible study. *See supra* pp. 9-11. The FSC relied on Dr. Gamache's testimony that Wright exhibited ***sixteen*** strengths in conceptual skills, many of them developed in prison. The FSC found, in part, that Wright "fully communicates with other prisoners and prison staff;" "knows the allocated time for prison activities;" "manages his prison canteen fund and pays attention to his monthly statements;" and "knows the difference between legal mail and regular mail in the prison system." *Id.*

Further, the FSC failed to explicitly consider any of Wright's social deficits, ignoring evidence that Wright had documented speech delays, lacked friends, and could not play sports because he misunderstood the rules. *See supra* pp. 11-12. The FSC instead relied on Dr. Gamache's testimony that Wright exhibited ***six*** social strengths, including testimony that Wright "has counseled [prison] pen pals on how to deal with difficult situations" and "appears to have adapted

well to life on death row, as exhibited by his lack of disciplinary write-ups and ability to ask correctional staff for help." *Id.* With regard to practical skills, the FSC conceded that Wright "did not have a driver's license because he could not pass the written portion" of the exam. *Id.* at 900. However, the FSC offset this deficit by explaining that Wright knew how to drive a car. *Id.* The FSC further relied on Dr. Gamache's testimony of ***three*** adaptive strengths in practical skills, including that Wright "cares for his health [in prison] by showering and grooming daily, as well as by engaging in self-care and health-oriented activities." *Id.* Finally, the FSC listed ***ten*** perceived adaptive strengths that Wright's family members testified to, including that Wright wrote his cousin birthday cards from prison and was always clean when his aunt saw him. *Id.* at 901. The FSC's reliance on adaptive strengths in *Wright I* contravenes the explicit holding of *Moore I* and scientific consensus. *See* 137 S. Ct. at 1050.

Reliance on strengths is inappropriate because intellectually disabled individuals may have strengths in certain domains. *See Brumfield*, 135 S. Ct. at 2281; AAIDD-11 at 47; DSM-5 at 38 (inquiry should focus on deficits, not strengths). Eighty-nine percent of individuals with intellectual disabilities fall into the mild category, which includes an IQ in the range of 55 to 70. *See* Gary Siperstein & Melissa Collins, Intellectual Disability, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 21 (Edward Polloway ed. 2015). A person with mild intellectual disability would be expected to learn to read up to a sixth-grade level and have the adaptive functioning of a 12-year-old child. *Id*. at 26 (the limitations in individuals with intellectual disability at the upper end of the spectrum are more subtle, more difficult to detect, and often context-specific); *see also* DSM-5 at 34-36. Intellectually disabled adults can acquire social and vocational skills adequate for minimal self-support including working at a job. AAIDD-11 at 47; DSM-5 at 34; *see also Moore I*, 137 S. Ct. at 1050 (Moore played pool, mowed lawns for money,

and also developed skills in prison). In *Moore I*, this Court interpreted the United States Constitution in conjunction with medical consensus to find that the existence of some adaptive skills and even some adaptive strengths ***do not*** preclude a finding of intellectual disability. *Moore I*, 137 S. Ct. at 1050; *see also Brumfield*, 135 S. Ct. at 2280-81. Nevertheless, the FSC ignored the practical reality that mildly intellectually disabled individuals will usually have ***some*** ability to function at home, at school, and undoubtedly, on Florida's death row. AAIDD-11 at 47; DSM-5 at 38.

Further, current clinical standards do not condone a "balancing approach" when analyzing adaptive functioning. *See* AAIDD-11 at 47 (significant limitations in adaptive skills are not outweighed by potential strengths in some adaptive skills); AAIDD-11 User's Guide at 20; DSM-5 at 38. When conducting this analysis, limitations in conceptual, social, or practical adaptive skills are ***not*** to be offset by adaptive strengths. *See Moore I,* 137 S. Ct. at 1050. Consequently, by balancing Wright's perceived adaptive strengths against his adaptive deficits to find that his deficits were weak or irrelevant, the FSC condemned an intellectually disabled man to death.

The FSC further violated this Court's standards and professional consensus by focusing on Wright's adaptive behavior in prison. *See Moore I*, 137 S. Ct. at 1051; AAIDD-11 User's Guide at 20; DSM-5 at 38. Clinicians warn against assessing adaptive strengths in controlled settings such as prisons and detention centers, and state that corroborative information reflecting adaptive functioning outside of the controlled setting should be obtained. DSM-5 at 38; *see also* AAIDD-11 at 47. As a death row inmate, Wright's self-determination and personal independence are dramatically curtailed. Accordingly, Wright's adaptive functioning may have improved in prison because of his limited freedom. Therefore, the FSC violated the holding of *Moore I* and scientific consensus by failing to find Wright was intellectually disabled based, in part, on perceived

strengths in adaptive skills performed in a controlled environment with assistance from other inmates. *Wright I*, 213 So. 3d at 899-901.

Despite this Court's explicit instructions that the FSC consider this Court's opinion in *Moore I* on remand, the FSC showed the same blatant disregard for this Court's precedent and the medical community's diagnostic framework in its *Wright II* opinion. *Wright*, 138 S. Ct. 360. As an initial matter, the FSC incorrectly concludes that *Moore I* does not call Florida's analysis of adaptive functioning into question because Florida does not maintain a relatedness requirement between the first two prongs of intellectual disability or rely on *Briseno*[21] for the point of law this Court rejected in *Moore I*. *Wright II*, 256 So. 3d at 775. However, the FSC's analysis is clearly affected by *Moore I* for multiple reasons, including the fact that its consideration of Wright's adaptive functioning deviated from prevailing clinical standards for the separate reason that its "currentness" requirement forces incarcerated defendants to prove that they currently experience adaptive deficits in the controlled prison environment. *See Moore I*, 137 S. Ct. at 1050; AAIDD-11 at 54-55; DSM-5 at 38.

In *Wright II*, the FSC asserts that the record demonstrates that the post-conviction court and medical experts did rely on current medical standards. This assertion is clearly refuted by the fact that the State's expert, Dr. Gamache, upon whom the FSC relied in forming its opinion, erroneously based his assessment of Wright's adaptive functioning primarily on an interview with Wright himself and analyzed Wright's IQ with both an invalid instrument for assessing malingering in intellectually disabled individuals and a non-traditional online test. *See supra* pp. 17-18.

[21] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

The FSC further asserts that its prior opinion merely ***discussed*** some of Wright's adaptive strengths and prison behavior, whereas *Moore I* and related medical literature only caution against ***overemphasis*** on that type of evidence. *Wright II*, 256 So.3d at 777. The FSC cannot reasonably claim that it has only ***discussed*** and has not ***overemphasized*** Wright's adaptive strengths when it listed ***thirty-five*** alleged adaptive strengths in *Wright I* while completely ignoring Wright's substantial evidence of adaptive deficits. 213 So. 3d at 899-901. Notably, in *Wright II*, the FSC made no explicit mention of Wright's extensive adaptive deficits and failed to thoroughly explain why these deficits are not sufficient to warrant a determination of intellectual disability. 256 So. 3d at 773-78.

The fact that the FSC even considered Wright's perceived adaptive strengths developed in prison is further problematic for reasons other than *Moore I's* caution against considering prison behavior. The FSC concludes that it did not improperly rely on Wright's prison conduct because the only portion of *Wright I* discussing such conduct is the recitation of Dr. Gamache's findings, and the FSC claims to rely on the post-conviction circuit court's credibility determinations on the expert medical testimony. *Wright II*, 256 So. 3d at 778. However, the post-conviction circuit court ***made no explicit credibility findings*** on the expert testimony. *See Appendix C*. Regardless of that fact, the FSC noted extensive testimony from Dr. Gamache concerning Wright's adaptive functioning in prison. *Wright I*, 213 So. 3d at 899-900. The length and detail of the FSC's list of Wright's prison conduct is difficult to square with this Court's caution against relying on prison-based development. *Moore II*, 139 S. Ct. at 671.

The FSC also attempts to justify its erroneous analysis by explaining that it also considered evidence of Wright's behavior prior to his sentencing, including the fact that he worked at a "fast-paced shelving job at a grocery store" and "gave extensive testimony at his trial." *Wright II*, 256

So.3d at 778; *Wright I*, 213 So. 3d at 901. However, this only solidifies that the FSC does not understand the proper analysis because the FSC is only providing more examples of perceived adaptive strengths. In addition, the FSC appears to be basing this improper analysis, in part, on incorrect stereotypes of intellectually disabled individuals, and further fails to recognize that Wright's attorneys would have helped him to prepare his testimony. *See* AAIDD-11 at 151 (criticizing the "incorrect stereotypes" that intellectually disabled individuals "never have friends, jobs, spouses, or children"); *see also Moore II*, 139 S. Ct. at 671 (explaining that the CCA acknowledged that Moore had a lawyer to coach his testimony in his various proceedings).

Just as the CCA erred twice in overemphasizing adaptive strengths and prison behavior in Moore's case, the FSC also repeated its identical errors in Wright's case. Wright is intellectually disabled and at risk of being executed in violation of Florida Law, this Court's precedent, and the Fifth, Eighth, and Fourteenth Amendments to the United State Constitution, solely due to the fact that the FSC cannot or will not properly apply this Court's precedent. If the FSC had applied a holistic analysis as contemplated by the medical community and required by this Court's precedent in *Atkins*, *Hall*, and *Moore I*, it would have found Wright is intellectually disabled by accurately accounting for his adaptive deficits and disregarding his perceived adaptive strengths, especially since most of Wright's perceived adaptive strengths revolved around prison behavior. Instead, the FSC has condemned an intellectually disabled man to death based on its erroneous belief that the adaptive functioning analysis must account for current adaptive strengths in prison. This Court must clarify the parameters of the adaptive functioning analysis required by *Moore I* and *II* so that the FSC and other courts do not continue to repeat this fatal mistake.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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