

DOCKET NO. 18-8653

IN THE SUPREME COURT OF THE UNITED STATES

TAVARES J. WRIGHT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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In late 2004, a jury convicted Tavares Wright, Petitioner, of two counts of first-degree murder, two counts of armed kidnapping, two counts of robbery with a firearm, and one count of carjacking with a firearm. Prior to sentencing, Petitioner claimed that he was intellectually disabled and ineligible for the death penalty. After hearing testimony from mental health experts, the trial court found that Petitioner did not meet the first prong of Florida's statutory definition of intellectual disability by establishing that he had "significant subaverage general intellectual functioning" based on Petitioner's performance on standardized intelligence tests administered when he was a child and again as an adult.¹ Petitioner did not challenge this ruling on appeal. See Wright v. State, 19 So. 3d 277 (Fla. 2009).

During his postconviction proceedings, Petitioner again raised claims relating to his alleged intellectual disability. The state postconviction court conducted an evidentiary hearing on Petitioner's claims, and following this Court's decision in Hall v. Florida, 572 U.S. 701 (2014), the Florida Supreme Court remanded the case to the state court to conduct an additional hearing. Following the additional hearing, the postconviction court found that Petitioner failed to establish by clear and

¹ Petitioner's full scale IQ scores ranged from 75-82.

convincing evidence that he was intellectually disabled, and the Florida Supreme Court affirmed the ruling on appeal. Wright v. State, 213 So. 3d 881 (Fla. 2017) (hereafter "Wright I").

Petitioner filed a petition for writ of certiorari and this Court granted certiorari, vacated the judgment, and remanded the case to the Florida Supreme Court for further consideration in light of this Court's recent decision in Moore v. Texas, ___ U.S. ___, 137 S. Ct. 1039 (2017). Wright v. Florida, 138 S. Ct. 360 (2017). On remand, the Florida Supreme Court held that Moore did not affect its prior finding that Wright failed to establish that he was intellectually disabled. Wright v. State, 256 So. 3d 766 (Fla. 2018) (hereafter "Wright II"). Petitioner now seeks certiorari review of Wright II which gives rise to the following question:

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari review of the Florida Supreme Court's fact-based decision that Petitioner failed to establish intellectual disability as a bar to execution where both the state postconviction court and the Florida Supreme Court applied current medical standards when analyzing Petitioner's claim and followed the dictates of this Court's decision in Moore?

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CITATION TO OPINIONS BELOW

On March 16, 2017, the Florida Supreme Court released a revised opinion, following Petitioner's motion for rehearing, and affirmed the postconviction court's rejection of Wright's claim that he was intellectually disabled. Wright v. State, 213 So. 3d 881 (Fla. 2017) ("Wright I"). Petitioner filed a petition for writ of certiorari, and this Court granted certiorari, vacated the judgment, and remanded the case to the Florida Supreme Court for further consideration in light of Moore v. Texas, ___ U.S. ___, 137 S. Ct. 1039 (2017), which was decided approximately two weeks after Wright I. See Wright v. Florida, 138 S. Ct. 360 (2017).

On September 27, 2008, the Florida Supreme Court issued Wright v. State, 256 So. 3d 766 (Fla. 2018) ("Wright II"), and held that Moore did not require a different result because there was substantial, competent evidence to support the postconviction court's finding that Wright failed to establish that he suffered from significant subaverage intellectual functioning and concurrent deficits in adaptive functioning. Petitioner filed a motion for rehearing and for clarification, and on November 1, 2018, the Florida Supreme Court denied the motion and issued a corrected opinion. Petitioner requested from this Court, and was granted, an extension to file the instant

petition until March 31, 2019. Petitioner timely filed his petition on March 28, 2019.

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Petitioner, Tavares J. Wright, was charged on May 11, 2000, in a seven-count indictment with armed carjacking, two counts of armed kidnapping, two counts of robbery with a firearm, and two counts of first-degree premeditated murder. See Wright v. State, 19 So. 3d 277, 283-89 (Fla. 2009) (setting forth the extensive factual history of the multi-day crime spree committed by Wright culminating in the instant murders). A jury convicted Wright on all counts. After Wright knowingly, intelligently, and voluntarily waived the right to have a penalty phase jury, the trial court conducted a penalty phase hearing.

At the sentencing hearing, one of Wright's two retained mental health experts, Dr. Alan Waldman, testified regarding mitigation evidence and opined that Wright might be intellectually disabled.² Wright's counsel thereafter filed a motion to bar the imposition of the death penalty based on Florida statutory law and Atkins v. Virginia, 536 U.S. 304 (2002). Prior to sentencing Wright, the trial court conducted a hearing on his alleged intellectual disability. After hearing testimony from two court-appointed expert witnesses, Drs. William Kremper and Joel Freid, that Wright was not

² Dr. Joseph Sesta, Wright's other mental health expert, testified that Wright had a full-scale IQ of 77 and was not intellectually disabled.

intellectually disabled given his full-scale IQ scores of 82 and 75, the court issued an order finding that Wright did not meet Florida's statutory definition of intellectual disability.

On October 12, 2005, the trial court entered its sentencing order and found four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances. The court imposed a death sentence for each count of first-degree murder and life sentences for each of the five noncapital felonies, all to run consecutively. The court further reiterated that Wright was not intellectually disabled. Wright v. State, 19 So. 3d 277, 290-91 (Fla. 2009). On direct appeal to the Florida Supreme Court, Wright did not challenge the trial court's ruling rejecting his intellectual disability claim. The Florida Supreme Court affirmed Wright's convictions and death sentences. Wright v. State, 19 So. 3d 277 (Fla. 2009).

Wright filed a motion for postconviction relief in state court and raised numerous ineffective assistance of counsel claims, including an allegation that his trial counsel was ineffective when litigating Wright's intellectual disability claim at trial. The state postconviction court granted Wright an evidentiary hearing on his claim, and ultimately denied his motion. Wright appealed this ruling to the Florida Supreme Court, and while the appeal was pending, this Court issued its

decision in Hill v. Florida, 572 U.S. 701 (2014). Wright thereafter requested that the Florida Supreme Court relinquish jurisdiction so that he could again litigate a renewed motion to bar the imposition of the death penalty based on Wright's alleged intellectual disability. Over the State's objection that the issue of Wright's alleged intellectual disability was procedurally barred,³ the Florida Supreme Court relinquished jurisdiction and Wright returned to the trial court and presented further evidence in support of his intellectual disability claim.

The postconviction court conducted the intellectual disability hearing in early 2015 and heard testimony from lay witnesses, Wright's two trial attorneys, and mental health experts. After hearing the testimony and reviewing the entire record, including Wright's extensive trial testimony, the court issued an order denying Wright's renewed motion to bar the imposition of the death penalty. The postconviction court made specific findings that Wright failed to prove the elements of an intellectual disability claim as his IQ scores, ranging between 75 and 82, did not demonstrate that he had significant

³ As noted, Wright raised the issue of intellectual disability in 2005 at the time of his trial and was found not to be intellectually disabled. Wright did not challenge that ruling on direct appeal. As such, under Florida law his renewed motion was procedurally barred. See Hill v. State, 921 So. 2d 579, 584 (Fla.), cert. denied, 546 U.S. 1219 (2006).

subaverage general intellectual functioning and Wright failed to establish that he currently suffers from deficits in his adaptive behavior.⁴

On appeal, the Florida Supreme Court agreed that Wright failed to meet his burden of proof on the elements of his intellectual disability claim. The court specifically noted that, although Florida statutory law provides for a clear and convincing burden of proof, see § 921.137(4), Fla. Stat. (2013), Wright failed to even establish his claim by the lesser preponderance of the evidence standard. Wright I, 213 So. 3d at 896-97 & n.3 (Fla. 2017).

⁴ The postconviction court correctly observed that Florida Statutes, section 921.137(1) defines intellectual disability as significant subaverage general intellectual functioning existing concurrently with "deficits in adaptive behavior," whereas the United States Supreme Court, Florida Supreme Court, and clinical definitions have defined intellectual disability as requiring "significant" limitations in adaptive behavior. See Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002) (setting forth definitions from the American Association of Mental Retardation and the American Psychiatric Association both requiring "significant" or "substantial" limitations in adaptive behavior); Phillips v. State, 984 So. 2d 503, 511 (Fla. 2008) ("To be diagnosed mentally retarded, Phillips must show 'significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.'" (quoting Rodriguez v. State, 919 So. 2d at 1252, 1266 (Fla. 2005))); American Association on Intellectual and Developmental Disabilities (AAIDD - 11th ed.) (defining intellectual disability as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills, that originates before age 18").

In rejecting Wright's intellectual disability claim, the Florida Supreme Court noted that Wright failed to establish that he had significantly subaverage general intellectual functioning or that he suffers from concurrent deficits in his adaptive functioning. The Florida Supreme Court recognized that in Hall, this Court "invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70," and determined that "IQ scores are best evaluated as a range, taking into account the standard error of measurement (SEM) and other factors that can affect the accuracy of the score." Wright I, 213 So. 3d at 895-97 (quoting extensively from Hall).

The court noted that Wright had taken nine IQ tests, seven of which were non-abbreviated tests, and had scored 75 or above on all of them, including a full scale of 82. Id. (stating that "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized under Florida law"). Even after adjusting Wright's scores to account for the SEM as required by Hall, the court found that Wright had failed to demonstrate by a preponderance of the evidence that he suffered from significantly subaverage general intellectual functioning. The court noted that even the defense expert acknowledged that Wright's full scale score of 82 "was valid and free of any practice effect concerns." Id. at 897-98. Like the

postconviction court who heard the differing opinions of the mental health experts, the Florida Supreme Court credited the State expert's opinion that Wright's range of IQ scores established that he did not suffer from significantly subaverage intellectual functioning. The State's expert, Dr. Gamache, had concerns regarding Wright malingering on his IQ tests and not putting forth full effort, and opined that IQ tests are performance-based and "one can malingering and fake a low IQ, [but] one cannot fake a higher IQ." Wright I, 213 So. 3d at 898. Thus, given Wright's consistent scores above the threshold for a determination of intellectual disability, even when factoring in the SEM as required by Hall, the Florida Supreme Court found that Wright had failed to carry his burden of proof regarding the subaverage intellectual functioning prong. Id.

In addition to failing to establish that Wright suffered from significantly subaverage intellectual functioning, the Florida Supreme Court also determined that Wright failed to establish that he had current deficits in his adaptive functioning. In making this determination, the court stated that the experts' and lay witnesses' testimony at the evidentiary hearing, and the resulting credibility determinations, along with Wright's own actions and testimony at trial, all refuted his claim of deficits in adaptive functioning. The court

thoroughly examined the testimony from the State's mental health expert who opined that Wright did not have sufficient deficits in any of the three accepted broad categories of adaptive functioning: conceptual skills, social/interpersonal skills, and practical skills.⁵ Wright I, 213 So. 3d at 899-900.

Dr. Gamache opined that, in regard to conceptual skills, Wright had some deficits in reading and writing, but these were attributable to other factors like lack of education, a learning disability, and a low socioeconomic status. Wright I, 213 So. 3d at 899. However, Dr. Gamache opined that Wright did not have deficits in the area of conceptual skills consistent with the level necessary for a finding of intellectual disability. Dr. Gamache based this conclusion on observations made of Wright, including that Wright:

(1) rewrites draft blog entries in his own words; (2) fully communicates with other prisoners and prison staff; (3) listens to others and takes advice, as evidenced by his brief period requesting Kosher meals; (4) understands numbers and time; (5) knows the time allocated for prison activities; (6) manages his prison canteen fund and pays attention to his monthly statements; (7) managed his own funds as an adolescent to buy necessities; (8) conducted basic transactions before he was incarcerated; (9) was attentive to time

⁵ Dr. Gamache, as well as the defense's mental health expert, Dr. Mary Kasper, both noted that the American Psychiatric Association's Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the American Association of Intellectual and Developmental Disabilities (AAIDD-11) clinical manual categorized adaptive behavior into these three broad categories.

and number issues during the examination; (10) identifies his attorneys by name and estimates the amount of time they have represented him; (11) knows the difference between legal mail and regular mail in the prison system; (12) understands that he needs his attorneys because he has no legal training; (13) is receptive to the suggestions of his attorneys; (14) wants his attorneys to prove that he did not commit the crimes for which he was convicted; (15) knows that he was sentenced to death and understands the reasoning for his sentence; and (16) has performed some work on his case.

Id.

Both the State's expert and the defense's expert agreed that Wright does not have concurrent deficits in the other two categories of practical skills or social skills. Wright I, 213 So. 3d at 899-901. The defense's expert, Dr. Mary Kasper, opined that Wright was intellectually disabled given his IQ scores and current deficits in a single area, conceptual skills. In determining that Wright had deficits in his conceptual skills, Dr. Kasper relied extensively on her administration of the Adaptive Behavior and Assessment Scales (ABAS-II) which she personally filled out based on interviews she conducted with numerous people who knew Wright at various times during his life. Dr. Kasper acknowledged on cross-examination, however, that her opinion was based on an improper administration of the

ABAS-II.⁶ Id. at 900 (gratuitously characterizing Dr. Kasper's administration of the ABAS-II as, "at best, unorthodox" and causing the Florida Supreme Court to give "great pause" to the validity of her testing).

In addition to the differing mental health experts' opinions on Wright's alleged deficits in adaptive functioning, the state courts also looked at other evidence when concluding that Wright did not have deficits in his adaptive functioning. The Florida Supreme Court considered the lay witnesses' testimony from the evidentiary hearings, as well as Wright's own statements and conduct at trial. The Florida Supreme Court noted:

Moreover, we need not limit ourselves to expert testimony alone to conclude that Wright does not have concurrent deficits in adaptive functioning. Wright gave extensive testimony during trial, where he told a coherent narrative of his version of the events. He testified at length and was not generally aided by leading questions. Furthermore, following his testimony, he endured a strong cross-examination by the State in which he demonstrated a clear

⁶ Dr. Gamache explained that Dr. Kasper's administration of the ABAS-II test was improper because she personally compiled numerous people's responses into a single test result. Dr. Kasper acknowledged that her retrospective approach of speaking to numerous people and filling out the ABAS-II results herself was "much more difficult" than the normal administration of the test to a single individual or caretaker. Additionally, Dr. Gamache explained that the ABAS-II test was not scientifically valid for these purposes as peer-reviewed literature explained that the test is very susceptible to misrepresentation as the person answering the test questions can very easily make it look like the subject is impaired.

understanding and unwavering invocation of his Fifth Amendment right against self-incrimination with regard to certain uncharged offenses he was repeatedly questioned about. Moreover, the record demonstrates multiple times that Wright assessed the performance of his counsel across all three of his trials, sometimes expressing dissatisfaction with their inability to elicit certain evidence that had been elicited during a previous trial. In addition, during an extensive colloquy, the trial court judge questioned Wright concerning his waiver of an advisory penalty phase jury and Wright appeared to understand all of the ramifications of such a waiver, a waiver we affirmed on direct appeal. Thus, competent, substantial evidence supports the postconviction court's determination that Wright's testimony during trial and interactions with the trial court refute his alleged deficits in adaptive functioning.

Furthermore, competent, substantial evidence supports the postconviction court's determination that the facts underlying Wright's convictions refute deficits in adaptive functioning. First, the trial court found that Wright committed the murder in a cold, calculated, and premeditated manner. See Phillips, 984 So. 2d at 512 ("The actions required to satisfy the CCP aggravator are not indicative of mental retardation."). Specifically, the trial court found, and we affirmed, the findings that Wright had killed his victims execution style. Second, the complexity of the crime spree reflects someone who is likely not intellectually disabled. In addition, the State presented testimony from Aaron Silas, who drove the car during the Longfellow Boulevard drive-by shooting and testified that Wright instructed him to turn the car around after spotting his victim, someone Wright previously knew.

The State also placed into evidence a transcript of a taped interview with a detective who interviewed Wright following his arrest and presented the detective as a witness. The interview is inconsistent with an intellectually disabled defendant. Wright admitted to running away from the police because he had marijuana in his possession, to discarding the marijuana, and to knowing that possession of marijuana

was a crime. Wright was also questioned during the interview about the box of bullets he was carrying, to which he responded, "I think they was .380 bullets," and that he was holding the bullets for a friend. Then, when informed a .380 caliber handgun was found nearby, Wright denied knowledge of the gun. Furthermore, while it was the detective's practice to inquire about mental illnesses when he suspected it may be a concern, he did not feel the need to ask Wright whether he had been diagnosed with any mental illnesses.

Finally, the lay witness testimony from people who know Wright does not dissuade us from concluding that Wright cannot demonstrate concurrent deficits even by a preponderance of the evidence. Although Wright's witnesses testified to general issues, they all ultimately made concessions that suggest Wright lacks concurrent deficits in adaptive functioning. For instance, Wright's cousin conceded that Wright: (1) had a fast-paced job selecting items for shelving at a grocery store that Wright eventually learned to do on his own, albeit not fluidly; (2) has improved somewhat with regard to grammar and punctuation; (3) writes him cards from prison for the holidays and his birthday; (4) reads the Bible; (5) occasionally calls him on the phone; and (6) has the capacity to learn. Similarly, Wright's aunt conceded that Wright: (1) did not appear to have problems understanding her; (2) did not appear to have problems getting along with other people; (3) was always clean when she saw him; and (4) sent her cards and letters from jail on holidays like Mother's Day, Christmas, Thanksgiving, Easter, and sometimes her birthday.

Furthermore, the State presented the testimony of Samuel Pitts's sisters, Sandra Allen, Darletha Jones, and Vontrese Anderson, the latter of whom Wright dated for two to three weeks. All three testified that they had known Wright, Wright never had trouble understanding them, and they never had trouble understanding him. All three also testified to having observed Wright ride the city bus to varying degrees. Vontrese also testified that Wright would follow her around after they had ended their relationship, and that even though he was advised by law enforcement to

end that activity, he would continue to follow her anyway. She believed Wright knew he was not supposed to follow her, but chose to follow her regardless. Vontrese added that Wright had memorized her phone number and that she received five or fewer jail calls from Wright, but she did not answer them, and that she had received a letter from the jail that appeared to be written by Wright.

Wright I, 213 So. 3d at 900-02 (footnote omitted). Thus, because the Florida Supreme Court agreed with the postconviction court that Wright failed to establish by a preponderance of the evidence the first two prongs for a determination of intellectual disability, the court determined that Wright was not categorially ineligible for execution.

Following the release of the Florida Supreme Court's opinion on November 23, 2016, Wright moved for rehearing. On March 16, 2017, the Florida Supreme Court granted the motion for rehearing and issued its revised opinion. Wright v. State, 213 So. 3d 881 (Fla. 2017). On April 3, 2017, the Florida Supreme Court issued its mandate. Petitioner filed a petition for writ of certiorari with this Court, and on October 16, 2017, this Court granted certiorari, vacated the judgment, and remanded the case to the Florida Supreme Court for further consideration in light of this Court's recent decision in Moore v. Texas, ___ U.S. ___, 137 S. Ct. 1039 (2017). Wright v. Florida, 138 S. Ct. 360 (2017).

On remand, the Florida Supreme Court found that Moore did not alter its prior decision that Wright failed to establish intellectual disability. Wright v. State, 256 So. 3d 766 (Fla. 2018) (Wright II). The court held that Wright did not establish significant subaverage general intellectual functioning as evidenced by his range of IQ scores and noted that Moore did “not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination.” Id. at 770-72 (“As it pertains to the intelligence prong of the ID test, Moore generally embodies a simple affirmation of the principles announced in Hall. Following Hall, the Supreme Court again stated that when a defendant establishes an IQ score range -adjusted for the SEM - ‘at or below 70,’ then a court must

⁷ In separate concurring opinions, numerous justices expressed the opinion that the consideration of Wright’s adaptive functioning was unnecessary in the instant case because Wright’s range of IQ scores, even when adjusted for the SEM, did not establish a claim of intellectual disability. In Justice Labarga’s concurring opinion, joined by Chief Justice Canady and Justice Polston, Justice Labarga noted that Moore did not alter the general proposition that “where a defendant has failed to establish any one of the three prongs of intellectual disability determination by clear and convincing evidence, ‘the defendant will not be found to be intellectually disabled.’” See id. at 778-79 (Labarga, J., concurring) (quoting Williams v. State, 226 So. 3d 758, 768 (Fla. 2017), cert. denied, 138 S. Ct. 2574, 201 L. Ed. 2d 297 (2018)); id. at 779-80 (Lawson, J., concurring) (stating that Moore only addressed adaptive behavior because the defendant had met his burden of establishing the first prong related to general intellectual functioning, whereas in the instant case, Wright’s failure to establish significantly subaverage general intelligence ends the inquiry).

'move on to consider [the defendant's] adaptive functioning.'") (quoting Moore, 137 S. Ct. at 1049). As the court discussed at length in Wright I and Wright II, Petitioner's IQ scores ranged from a low of 75 to a high score of 82, and even when adjusted for the SEM as required by Hall and Moore, there was competent, substantial evidence to support the lower court's finding that Wright failed to satisfy his burden of establishing significantly subaverage intelligence. Specifically, the court noted that "[n]either Hall nor Moore require a significantly subaverage finding when [only] one of many IQ scores falls into the ID range." Wright II, 256 So. 3d at 772 (emphasis added).

In addition to concluding that Moore did not affect its prior determination that Wright failed to establish significant subaverage intellectual functioning, the Wright II court also determined that Moore did not alter its finding with regard to Wright's alleged deficits in adaptive functioning. The court observed that Florida's statutory definition of intellectual disability requires a defendant to establish significantly subaverage intellectual functioning "existing concurrently with deficits in adaptive behavior." § 921.137, Fla. Stat. (2017). The court recognized that Florida's statutory definitions were similar to the current medical consensus regarding intellectual disability. Wright II, 256 So. 3d at 770-71 & n.2 (citing the

definitions contained in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013) (hereinafter DSM-5), and the American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 5 (11th ed. 2010) (hereinafter AAIDD-11). The court noted that the current medical standards divide adaptive functioning into three broad categories: conceptual, social, and practical. Id. at 773 (citing DSM-5 at 37; AAIDD-11 at 43).

In addressing Wright's adaptive functioning, the court correctly noted that "only one domain is at issue here: the conceptual. Both experts testified at the renewed ID determination hearing - including Wright's own expert - that Wright has no deficits in the social and practical domains that rise to the level of an ID determination." Wright II, 256 So. 3d at 774 (quoting Wright I, 213 So. 3d at 900). The court proceeded to analyze Wright's adaptive functioning in light of this Court's pronouncements in Moore:

The record in this case demonstrates that the postconviction court and the medical experts below relied on current medical standards. Even the State's expert, Dr. Gamache, used current medical expertise to inform his testimony. Moreover, the postconviction court demonstrated a willingness to engage with the clinical manuals and understand how they fit together with the case law. Unlike Moore, this Court did not reject the postconviction court's reliance on current medical standards. Compare Moore, 137 S. Ct. at 1045-

47, with Wright, 213 So. 3d at 899-902. Instead, we accepted the findings and affirmed the postconviction court's determination that Wright does not qualify as an ID defendant who cannot be executed. Wright, 213 So. 3d at 902. In doing so, current medical understanding served as the basis for the rejection of Wright's claim, which differentiates this case from Moore where the CCA relied on outdated medical standards and lay perceptions of ID. See Moore, 137 S. Ct. at 1050-51. Furthermore, we did not rely on ID risk factors as a foundation to counter an ID determination. See generally Wright, 213 So. 3d at 899-902; see Moore, 137 S. Ct. at 1051. Therefore, the only remaining basis from Moore that could even remotely entitle Wright to relief was an alleged overemphasis on adaptive strengths and improper focus on prison conduct. Moore, 137 S. Ct. at 1050.

Wright II, 256 So. 3d at 775-76.

Although the Florida Supreme Court noted the difficulty in discerning where "Moore drew the tenuous line of 'overemphasis' on adaptive strengths," id. at 776, the court found that it had not overemphasized Wright's strengths in violation of Moore or current medical standards. While the court recognized that it had discussed Wright's strengths and behavior in prison in Wright I, "the crux" of its decision focused on the competing testimony of the mental health experts rather than a focus on Wright's behavior in prison. Wright II, 256 So. 3d at 777 (noting that "[b]oth experts agreed that Wright does not have sufficient deficits in the practical or social domains"). Notably, the court did not "detrimentally rely on strengths that Wright developed in prison" to justify its decision that Wright

did not have deficits in the conceptual domain, but rather, relied on the lower court's factual findings and credibility determinations when comparing the competing testimony from the medical experts. Id. at 777-78. In making this determination, the court relied on Wright's adaptive behavior prior to his incarceration, as well as the facts of the crime and Wright's extensive testimony and statements made during his trial proceedings. Id. at 778. The court concluded by noting that Wright's position was "less about Moore than it is a mere reassertion that his expert, Dr. Kasper, was more reliable than the State's, Dr. Gamache;" a contention that was not supported by the lower court's factual findings. Id.; see also id. at 782-83 (Pariente, J., concurring).

REASONS FOR DENYING THE WRIT

There is no basis for certiorari review of the Florida Supreme Court's fact-based decision finding that Wright failed to meet his burden of proof of establishing intellectual disability as the court correctly applied this Court's precedent to the disputed facts and found that Wright did not have significantly subaverage intellectual functioning and deficits in his adaptive behavior.

Wright claims in his petition that the Florida Supreme Court "disregarded this Court's standards in Moore I, Hall, and Atkins by erroneously analyzing the first two prongs of Wright's intellectual disability claim." Petition at 13. Contrary to Petitioner's assertion, the Florida Supreme Court reviewed the record and properly analyzed Petitioner's claim in accordance with current medical standards and this Court's precedent and determined that there was credible evidence to support the postconviction court's finding that Wright failed to establish significantly subaverage intellectual functioning and deficits in his adaptive behavior. As the Florida Supreme Court has repeatedly noted, Wright's claim is less about the legal analysis than it is a mere disagreement with the factual findings and credibility determinations made by the postconviction court when weighing the experts' and lay witnesses' testimony, as well as the facts of the underlying crime and Wright's testimony and involvement at the trial. See

Wright I, 213 So. 3d at 898-99; Wright II, 256 So. 3d at 778, 782-83. As such, Wright has failed to offer any persuasive basis for this Court to grant certiorari review.

This Court has noted that certiorari review is limited to those situations where there is a conflict in the law or where an important, unsettled federal constitutional question is presented. Rockford Life Insurance Co. v. Illinois Dep't of Revenue, 482 U.S. 182, 184 n.3 (1987) (cases that have not divided the courts or presented important, unsettled questions of federal law usually do not merit certiorari review). Furthermore, this Court does not grant certiorari for the purposes of reviewing evidence or reassessing factual disputes. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 178 (1924) (stating that Court will not grant writ to review evidence or the inferences drawn from it). The instant petition does not satisfy any of the requirements for certiorari review and should therefore be denied. See Sup. Ct. R. 10.

After this Court vacated Wright I and remanded the case to the Florida Supreme Court for reconsideration in light of Moore v. Texas, 581 U.S. ___, 137 S. Ct. 1039 (2017), the Florida Supreme Court reengaged in a detailed analysis of Wright's

intellectual disability claim and concluded that Moore did not require the court to change its original conclusion. While recognizing that Moore focused primarily on the adaptive behavior prong of an intellectual disability claim, the Florida Supreme Court found that Wright failed to carry his burden of establishing intellectual disability under Florida law because he did not establish: (1) significantly subaverage intellectual functioning (2) existing concurrently with deficits in adaptive behavior. In reaching this conclusion, the court properly analyzed Wright's claim under this Court's precedent and found that competent, substantial evidence supported the postconviction court's findings rejecting Wright's intellectual disability claim.

This Court held in Atkins v. Virginia, 536 U.S. 304, 317 (2002), that the Eighth Amendment's prohibition against cruel and unusual punishment bars the execution of an intellectually disabled defendant, but left to the States "the task of developing appropriate ways" to identify intellectually disabled defendants and to enforce this constitutional protection. Under Florida law, a defendant claiming intellectual disability must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and

manifested during the period from conception to age 18.⁸ See § 921.137(1), Fla. Stat. (2013).

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.

Id. In Petitioner's case, both the postconviction court and the Florida Supreme Court followed this Court's precedent and current clinical standards in determining that Wright failed to establish that he had significantly subaverage general intellectual functioning or current deficits in his adaptive behavior.

A. The Florida Supreme Court's determination that Wright failed to establish significantly subaverage general intellectual functioning is consistent with Hall and Moore and based on substantial, competent evidence.

In Hall v. Florida, 572 U.S. 701, 710 (2014), this Court noted that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing

⁸ The third prong is not at issue in Wright's case.

circumstances), and onset of these deficits during the developmental period.” This Court stated that Florida’s statutory definition of intellectual disability, on its face, was consistent with the views of the medical community, but the Florida Supreme Court’s narrow interpretation of the statute, foreclosing further evidentiary development when a defendant had an IQ score above 70, was unconstitutional and ran afoul of Atkins. Id. at 719-20. By applying a strict IQ test score of 70, the Florida Supreme Court disregarded established medical practice by failing to account for a standard error of measurement (SEM) on the test and by failing to recognize that IQ scores are imprecise and cannot be reduced to a single numerical score. Id. at 711-12.

In Wright I, the Florida Supreme Court followed Hall and noted that IQ scores are best evaluated as a range, taking into account the SEM and other factors that can affect the accuracy of the score. Wright I, 213 So. 3d at 896-98. In affirming the postconviction court’s order finding that Wright failed to establish this prong, the court noted that “the postconviction court considered expert testimony regarding Wright’s IQ scores, how the SEM applies to those scores, how the practice effect applies to those scores, how the Flynn effect applies to those scores, and how Wright’s effort may have affected the validity

of those scores.” Id. at 897 (footnote omitted). After a detailed analysis, the court concluded that Wright failed to establish this prong by even a preponderance of the evidence.⁹ Shortly after Wright I was decided, this Court issued its decision in Moore v. Texas, U.S. ____, 137 S. Ct. 1039 (2017), and vacated Wright I and remanded to the Florida Supreme Court for further consideration in light of Moore.

In Moore, the state habeas court determined that Moore was intellectually disabled based on an average IQ score of 70.66 and adaptive deficits, but the Texas Court of Criminal Appeals (CCA) reversed the decision because the lower court relied on current intellectual disability guidelines “rather than the 1992 guidelines adopted by the CCA in Ex parte Briseno, 135 S.W.3d 1 (2004).” Moore, 137 S. Ct. at 1044. Employing the Briseno analysis, the CCA found five of Moore’s IQ scores unreliable and only considered valid his scores of 74 and 78. Id. at 1047. Notably, when looking at these two scores, the CCA discounted the lower end of the SEM range associated with these scores due to Moore’s academic behavior and performance when taking the tests and concluded that his scores ranked above the

⁹ While the postconviction court found that Wright failed to meet this standard by clear and convincing evidence as required by Florida law, the Florida Supreme Court further held that Wright had failed to establish it even by a preponderance of the evidence. Id.

intellectually disabled range. Id. This Court reversed and concluded that the CCA's analysis of Moore's intellectual functioning was irreconcilable with Hall because the CCA had not accounted for the SEM and had deviated from prevailing clinical standards by relying on outdated guidelines. Moore, 137 S. Ct. at 1049-50 (reiterating its holding in Hall that courts must "consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits").

Unlike the situation in Moore, in Wright's case, the Florida Supreme Court did not rely on outdated clinical standards or ignore the SEM range when analyzing Wright's intellectual functioning. The court specifically followed this Court's mandate in Hall and allowed Wright to present evidence regarding his adaptive functioning even though his numerous IQ scores were all 75 or above.¹⁰ The court recognized this Court's pronouncements in Hall that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning," and "[i]ntellectual disability is a condition, not

¹⁰ Wright was administered three Wechsler Intelligence Scale for Children - Revised (WISC-R) tests at age 10 and scored (76, 80, and 81), the Wechsler Adult Intelligence Scale - Revised (WAIS-R) at age 16½ (75), and the Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) when he was 24 years old (82 & 75).

a number." Wright I, 213 So. 3d at 895-96 (quoting Hall, 572 U.S. at 722-23); Wright II, 256 So. 3d at 771-72 (finding that both the postconviction court and the Florida Supreme Court followed Hall and Moore's instructions and allowed Wright to offer evidence of adaptive functioning because his range of IQ scores, when adjusted for the SEM, dipped 1 point beneath 70).

In recognizing that IQ scores should be read as a range, the Florida Supreme Court correctly found that almost all of Wright's scores were outside the range for a finding of intellectual disability, even when factoring the two SEMs of plus or minus five points. Here, Wright's lowest IQ score of 75 dipped one point into the intellectually disabled range only when applying two SEMs to his scores, "an approach that finds no support in Atkins or anywhere else." Hall, 572 U.S. at 740 (J. Alito, dissenting). However, Wright had numerous other IQ scores outside the intellectually disabled range, even when factoring in two SEMs, including full scale scores of 80, 81, and 82. In fact, even the defense's expert recognized that Wright's IQ score of 82 was "valid and free of any practice effect concerns." Wright I, 213 So. 3d at 898. As the court correctly stated in Wright II, "[n]either Hall nor Moore requires a significantly subaverage intelligence finding when one of many

IQ scores falls into the ID range." Wright II, 256 So. 3d at 772.

This Court has noted the difficulty of determining an accurate indicator of intellectual functioning when there are multiple differing IQ scores. See Hall, 572 U.S. at 713-14 (noting that analyzing multiple IQ scores is a "complicated endeavor"); see also Moore I, 137 S. Ct. at 1060-61, n.1 (Roberts, C.J., dissenting) (noting that "Hall reached no holding as to the evaluation of IQ when an Atkins claimant presents multiple scores"). In this case, the State's expert, Dr. Gamache, acknowledged that although each test has its own individual SEM, given Wright's consistent scores in the 75-82 range on numerous administrations of IQ tests, this range represents an accurate indicator of Wright's true intelligence.¹¹ Dr. Gamache's testimony is clearly supported by the clinical community and was properly relied upon by the postconviction court and the Florida Supreme Court. See Hall, 572 U.S. at 742 & n.13 (J. Alito, dissenting) (noting the "well-accepted view . . . that multiple consistent scores establish a much higher degree

¹¹ Petitioner claims that Dr. Gamache's "method of establishing" IQ scores did not comply with this Court's holdings or meet the accepted standards of the medical community, but Dr. Gamache did not "establish" Wright's IQ scores. Dr. Gamache simply discussed the unique fact that Wright had multiple IQ scores obtained on numerous prior Wechsler IQ tests and indicated that neither the AAIDD nor the DSM-V give direction to clinicians with respect to interpreting multiple administrations of IQ tests.

of confidence" than the application of the SEM to a single test score) (citations to multiple authorities omitted).

In addition to relying on Wright's multiple IQ scores of 75 or above, the Florida Supreme Court also recognized that there were valid concerns over Wright's efforts on his IQ tests. Dr. Gamache administered a Validity Indicator Profile (VIP) test to Wright and concluded that Wright did not expend full effort when taking his IQ test, and expressed concern over Wright's potential malingering on *all* of his prior IQ tests.¹² Wright I, 213 So. 3d at 898. Dr. Gamache testified that Wright could malingering and fake a low IQ, but he could not fake smart and his score of 82 was the most accurate reflection of his intelligence.

Given the evidence in the record, including the competing expert testimony, the Florida Supreme Court properly determined that there was competent, substantial evidence supporting the postconviction court's finding that Wright failed to establish

¹² Wright asserts in his petition that Dr. Gamache improperly relied on a Validity Indicator Profile (VIP) test to opine that Wright may have been malingering and claims that this test is not a valid instrument for assessing malingering in intellectually disabled individuals. Petition at 18-19. However, Dr. Gamache addressed these concerns and noted that the VIP test was appropriate in this case; in fact, it was the "ideal instrument for that purpose," and noted that published peer-reviewed articles supported its use. Petitioner further ignores the fact that the VIP test was not the sole basis for Dr. Gamache's opinion that Wright was malingering.

significantly subaverage intellectual functioning. Even given this finding, both the postconviction court and the Florida Supreme Court followed this Court's precedent in Hall and Moore and considered Wright's alleged deficits in adaptive behavior.

B. The Florida Supreme Court's determination that Wright failed to establish deficits in his adaptive behavior was consistent with this Court's pronouncements in Moore and with prevailing clinical standards.

In addition to finding that Petitioner failed to establish significantly subaverage intellectual functioning, the Florida Supreme Court also affirmed the postconviction court's order based on Wright's failure to establish that he has current deficits in his adaptive behavior.¹³ In making this finding, the court extensively discussed this Court's Moore decision and concluded that the "evidence of Wright's abilities, the [competing] expert testimony, relevance of the evidence, and case posture all distinguish this case from Moore." Wright II, 256 So. 3d at 777. Contrary to Petitioner's assertions, the court did not require that postconviction defendants prove adaptive deficits while incarcerated, nor did the court

¹³ The court properly relied on Florida statutory law as requiring a showing of current deficits in adaptive behavior and noted that current clinical definitions are similar to Florida's statutory definition. Wright II, 256 So. 3d at 773; see also Hall, 572 U.S. at 711 (noting that the defining characteristic of intellectual disability has long been recognized as "the existence of concurrent deficits in intellectual and adaptive functioning").

overemphasize Wright's improvements while incarcerated. Rather, the court took a holistic approach when viewing Wright's intellectual disability claim and determined that competent, substantial evidence supported the postconviction court's finding that Wright failed to establish current deficits in his intellectual and adaptive functioning.

In the instant case, both the defense's expert and the State's expert testified that they analyzed Wright's adaptive functioning based on current clinical standards and reviewed the three broad categories outlined in the DSM-5 and the AAIDD-11 clinical manual: conceptual skills, social/interpersonal skills, and practical skills. However, as the Florida Supreme Court properly stated at the outset of its Wright II opinion, the only issue in this case surrounding Wright's current adaptive behavior was the question of his alleged deficits in the conceptual skills area. Id. at 773-74. The basis for this conclusion was the fact that both the State's expert, Dr. Gamache, and the defense's expert, Dr. Kasper, agreed that Wright did not have current deficits in the social and practical skills domains. Id.; see also Wright I, 213 So. 3d at 900 ("Even without the testimony of Dr. Gamache, not even Wright's expert, Dr. Kasper, could establish that Wright has concurrent deficits in adaptive functioning. Rather Dr. Kasper could only conclude

that Wright currently has some deficits in the subcategory of conceptual skills."). Unlike the defense's expert, the State's expert testified that Wright did not have any deficits in the three categories, including in the category of conceptual skills, sufficient to render an intellectual disability diagnosis. Both the state postconviction court and the Florida Supreme Court credited the State's expert's testimony and found that Wright had not established current deficits in his adaptive behavior.¹⁴

Petitioner erroneously interprets the Florida Supreme Court's Wright II decision as requiring that postconviction defendants prove deficits in adaptive behavior while incarcerated. This is simply a misconstruing of the court's opinion. While the court certainly considered Wright's adaptive behavior in prison based on the testimony from the evidentiary hearings,¹⁵ the court also relied on Wright's pre-incarceration

¹⁴ Dr. Kasper's opinions on Wright's adaptive behavior were not credible. Dr. Kasper based her analysis on an ABAS test she administered in an admittedly improper manner. See Wright I, 213 So. 3d at 900 (gratuitously characterizing Dr. Kasper's use of the ABAS-II as, "at best, unorthodox" and causing the Florida Supreme Court to give "great pause" to the validity of her testing).

¹⁵ Because Wright was only 19 years old when he committed the instant murders, the vast majority of his adult life has been in a confined environment. As noted by the Wright II court, this obviously places clinicians and the courts in a difficult position when this Court in Moore cautions against overemphasizing adaptive strengths developed in a controlled

behavior, including: the experts' testimony regarding Wright's behavior with family and friends, numerous lay witnesses' testimony, Wright's work history at a fast-paced job, the facts of the crime, Wright's statements during police interrogations and Wright's extensive testimony at trial, including his "enduring a strong cross-examination by the State in which he demonstrated a clear understanding and unwavering invocation of his Fifth Amendment right against self-incrimination with regard to certain uncharged offenses he was repeatedly questioned about." Wright I 213 So. 3d at 898-902; Wright II, 256 So. 3d at 773-78.

In addition to expressing concern regarding evaluating a defendant's behavior while in a controlled environment, this Court in Moore also cautioned against overemphasizing adaptive strengths rather than focusing on adaptive deficits. This Court faulted the Texas CCA for utilizing these strengths to "overcome the considerable objective evidence of Moore's adaptive deficits." Moore, 137 S. Ct. at 1050; see also Moore v. Texas, 139 S. Ct. 666, 670-71 (2019) (Moore II) (reversing the Texas CCA again after determining that its analysis was inconsistent environment. See Wright II, 256 So. 3d at 777-78 & n.10; AAIDD-11 at 54-55 (recognizing that more research needs to be conducted in the forensic setting when measuring the "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").

with Moore I because it again focused less on adaptive deficits than Moore's apparent adaptive strengths). Unlike the situation in Moore I or Moore II, the Florida Supreme Court did not overemphasize Wright's adaptive strengths to offset any deficits. As the court stated:

In Moore, the habeas court relied on the expert testimony, based on current medical standards, which established that the defendant had adaptive deficits in all three domains. 137 S. Ct. at 1047. The CCA rejected those findings, making its own findings—based on outdated standards and the “wholly nonclinical Briseno factors”—to conclude that the defendant's strengths outweighed the significant deficits apparent in the record. Id. at 1047-48, 1053. Conversely, here, the postconviction court relied on contemporary expert medical testimony, weighed the evidence, made credibility determinations, and concluded that Wright does not have adaptive deficits in the conceptual domain. Instead of rejecting the lower court's findings to make our own, we accepted the findings and recited the competent, substantial evidence that supported them. Wright, 213 So. 3d at 899-902. Furthermore, much of the evidence that the opinion detailed was directly relevant to the conceptual domain. See id. **To a large extent, Dr. Gamache's findings with regard to conceptual skills related to Wright's ability to read and write, understand numbers and time, comprehend his current legal circumstances, and conduct monetary transactions prior to incarceration.** Id. at 899. These findings all directly impact and are connected with adaptive functioning within the conceptual domain. See DSM-5, at 37 (identifying “memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations” as hallmarks of the conceptual domain). To the contrary, the CCA used completely unrelated adaptive strengths, such as living on the streets, mowing lawns for money, and playing pool, to outweigh the extensive evidence of adaptive deficits in all three domains. Moore, 137 S. Ct. at 1045-47. **Accordingly, we conclude that the**

overemphasis issue, as identified by the Supreme Court in Moore, is not present here because we did not arbitrarily offset deficits with unconnected strengths, see id. at 1050 n.8; instead, we simply relied on expert testimony with regard to connected adaptive deficits and the postconviction court's credibility determinations.

Wright II, 256 So. 3d at 777 (emphasis added).

The Florida Supreme Court's analysis of Wright's intellectual disability claim was the result of a fact-specific review and credibility determinations which were decided adversely to Wright. Both the postconviction court and the Florida Supreme Court utilized prevailing clinical standards when analyzing Petitioner's claim and the courts' analysis was entirely consistent with this Court's precedent. The correctness of the Florida Supreme Court's ruling on this claim is a factual determination which has no implications beyond the parties involved in this case, thus, mandating the denial of certiorari review. See United States v. Johnston, 268 U.S. 220, 227 (1925) (noting that the Court does "not grant a certiorari to review evidence and discuss specific facts"). This Court is "consistent in not granting certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Mem'l Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393

(1923)). Clearly, a review of the Florida Supreme Court's decision demonstrates that the court based its decision on a proper credibility determination based on conflicting evidence and competent, substantial evidence supports the court's conclusion that Wright failed to establish that he has current deficits in his intellectual and adaptive functioning. Because Wright has failed to demonstrate any basis for this Court to exercise its certiorari jurisdiction, the instant petition should be denied.

CONCLUSION

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

Respectfully submitted,

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