No. 18-8653

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

REPLY TO BRIEF IN OPPOSITION

DEATH PENALTY CASE

LISA M. BORT
Counsel of Record
FLORIDA BAR NUMBER 119074
BORT@CCMR.STATE.FL.US

ADRIENNE J. SHEPHERD
FLORIDA BAR NUMBER 1000532
SHEPHERD@CCMR.STATE.FL.US

KARA R. OTTERVANGER
FLORIDA BAR NUMBER 112110
OTTERVANGER@CCMR.STATE.FL.US

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
(813) 558-1600

Counsel for Petitioner

TABLE OF CONTENTS

CONTENTS **PAGE(S)**

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION 1

I. Wright has offered several compelling legal reasons for why this Court should grant certiorari review 1

II. The FSC's determination that Wright failed to establish both significantly subaverage general intellectual functioning ("IQ") and deficits in adaptive functioning is inconsistent with *Hall* and *Moore* and is not supported by competent, substantial evidence 8

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Atkins v. Virginia, 536 U.S. 304 (2002).....2, 6, 15

Brumfield v. Cain, 135 S. Ct. 2269 (2015).....10

Glover v. State, 226 So. 3d 795 (Fla. 2017).....5

Hall v. Florida, 572 U.S. 701 (2014)..... *passim*

Hall v. State, 201 So. 3d 628 (Fla. 2016).....10

Hodges v. State, 55 So. 3d 515 (Fla. 2010).....5

Jones v. State, 966 So. 2d 319 (Fla. 2007).....3, 4, 5

Moore v. Texas, 137 S. Ct. 1039 (2017)..... *passim*

Phillips v. State, 984 So. 2d 503 (Fla. 2008).....5

State of Florida v. Frank Walls, Okaloosa County, Case No. 1987-CF-00856.....6

State of Florida v. Jerry Haliburton, Palm Beach County, Case No. 1982-CF-001893.....6

State of Florida v. Joe Nixon, Leon County, Case No. 1993-CF-02324.....6

State of Florida v. Khadafy Mullens, Pinellas County, Case No. 2008-CF-018029.....6

State of Florida v. Sonny Oats, Marion County, Case No. 1980-CF-00016.....6

State of Florida v. William Thompson, Miami-Dade County, Case No. 1976-CF-03350.....6

United States v. Hardy, 762 F. Supp. 2d 849 (E.D. La. 2010).....12

United States v. Smith, 790 F. Supp. 2d 482 (E.D. La. 2011).....12

Williams v. State, 226 So. 3d 758 (Fla. 2017).....4, 6

Wright v. State, 213 So. 3d 881 (Fla. 2017)..... *passim*

Wright v. State, 256 So. 3d 766 (Fla. 2018)..... *passim*

TABLE OF AUTHORITIES (*cont'd)*

COURT RULES **PAGE(S)**

U.S. Sup. Ct. R. 10 ..... 1, 4

OTHER AUTHORITIES **PAGE(S)**

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) .... *passim*

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010), USER'S GUIDE 12, 15

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH ADDITION (American Psychiatric Association 2013) 10

John H. Blume et. al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393 (2014) 7

Richard Rogers & Scott D. Bender, *Evaluation of Malingering and Deception*, *in* HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY, 109, 125 (Alan M. Goldstein et al. eds., 11th ed. 2003) ...9

REPLY IN SUPPORT OF PETITION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. He replies to the Respondent's Brief in Opposition ("BIO") as Follows:

I. Wright has offered several compelling legal reasons for why this Court should grant certiorari review.

Respondent erroneously argues that Tavares J. Wright ("Wright") has failed to offer a persuasive basis for this Court to grant certiorari review because Wright's claim "is less about the legal analysis than it is a mere disagreement with the factual findings …" BIO at 20. This Court's rules provide a non-exhaustive list of compelling reasons to grant review, including that "a state court … has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10 (c).[1] As such, Wright offers several compelling reasons why

[1] Rule 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. ***The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:***
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) ***a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort*** or of a United States court of appeals;
>
> (c) ***a state court*** or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or ***has decided an important federal question in a way that conflicts with relevant decisions of this Court.***

U.S. Sup. Ct. R. 10 (emphasis added).

this Court should grant review. The Florida Supreme Court's ("FSC") decision in Wright's case directly conflicts with this Court's relevant precedent. *See* Petition for a Writ of Certiorari ("Petition") at 13-35. The FSC decided the issue of Wright's Eighth Amendment right to be free of execution due to his intellectual disability under Florida's erroneous standard that is in direct conflict with this Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). *See* Petition at 13-35.

In *Atkins*, this Court promulgated a federal right for intellectually disabled defendants when it applied the Eighth Amendment in light of "evolving standards of decency"[2] to conclude that the United States Constitution places "a substantive restriction on the State's power to take the life of a mentally retarded[3] offender" and "death is not a suitable punishment for a mentally retarded criminal." 536 U.S. at 321 (internal citation omitted). However, the FSC's analysis of the adaptive functioning prong of intellectual disability in Wright's case - and the cases of other capital defendants - continues to conflict with this Court's direction in *Hall* and *Moore* that state courts must consider the medical community's diagnostic framework and accordingly should not over-emphasize adaptive strengths or prison behavior. *See Hall*, 572 U.S. at 721; *Moore*, 137 S. Ct at 1050; *see also* Petition at 26-35. Further, Florida's erroneous "currentness" requirement[4] for analyzing the adaptive functioning prong of intellectual disability also conflicts with the

[2] As proof that a national consensus had formed against the practice of executing the intellectually disabled, in *Atkins* this Court cited to numerous state statues, including Florida's, as evidence that "our society views mentally retarded offenders as categorically less culpable than the average criminal." 536 U.S. at 314-16.

[3] The term "mentally retarded" has now been replaced by the term "intellectually disabled" in relevant medical literature and law.

[4] Wright argues in his Petition that Florida's requirement 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)" is erroneous and unconstitutional. *See* Petition at 21.

appropriate retrospective analysis used by many other jurisdictions. *See* Petition at 24-26.

Respondent argues that Wright erroneously interprets the FSC's opinion in *Wright v. State*, 256 So. 3d 766 (Fla. 2018) ("*Wright II*") as requiring that post-conviction defendants prove deficits in adaptive behavior while incarcerated. BIO at 32. Respondent's statement mischaracterizes Wright's argument. The FSC did not explicitly state in *Wright v. State*, 213 So. 3d 881 (Fla. 2017) ("*Wright I*") or *Wright II* that defendants are distinctly required to prove current adaptive deficits while residing on death row. However, in *Wright I*, the FSC cited to the rule it promulgated in *Jones v. State*, 966 So. 2d 319, 326 (Fla. 2007) and stated that "there must be current adaptive deficits." 213 So. 3d at 898. The FSC then went on to heavily emphasize Wright's current perceived adaptive ***strengths*** that he has developed as a result of the structured environment of death row. *Id.* at 898-900. In *Wright II,* the FSC again cited to the same improper rule before incorrectly concluding that it had not detrimentally relied on Wright's current adaptive strengths in prison. 256 So. 3d at 773, 777.

Accordingly, Wright does not argue that the FSC promulgated the erroneous "currentness" requirement in its *Wright II* opinion. The FSC promulgated the inaccurate standard in its 2007 decision in *Jones,* 966 So. 2d at 326, and continues to use the standard in its analysis of post-conviction claims even after this Court explained that states must consider current medical standards when determining intellectual disability and should not rely on prison behavior. *See Hall*, 572 U.S. at 721-23; *Moore*, 137 S. Ct. at 1048-49; *see also* Petition at 28-29. Even after *Moore*, the FSC continues to apply its erroneous "currentness" requirement, which is in direct conflict with the medical community's clear and unambiguous stance that only adaptive functioning demonstrated outside of the restrictive confines of the prison environment is relevant to a diagnosis of intellectual disability and also disregards the retrospective analysis relied on by other

jurisdictions. The FSC's flawed approach ignores the applicable, authoritative medical literature and improperly shifts the focus to the perceived adaptive functioning "skills" that defendants have developed in the controlled prison environment. *See e.g. Williams v. State*, 226 So. 3d 758, 771 (Fla. 2017) ("Williams's half-sisters … provided data regarding Williams's adaptive behavior prior to the age of eighteen. Under Florida law, however, adaptive deficits must be current. Thus, the information provided … is insufficient to satisfy the second prong of the intellectual disability test because it does not address Williams's current adaptive behavior.") (citations omitted).

This Court's rules indicate that certiorari review may be granted when there is a conflict in the decisions amongst different jurisdictions on a point of federal law. U.S. Sup. Ct. R. 10.[5] Florida's "currentness" requirement affects all intellectually disabled capital defendants in Florida and also conflicts with the practices of multiple jurisdictions that recognize the importance of a proper adaptive functioning analysis. *See* Petition at 24-26.

Respondent further argues that the correctness of the FSC's ruling on Wright's intellectual disability claim is a factual determination that has no implications beyond the parties involved in the case. BIO at 35. It is clear that the FSC's decision in Wright's case has far-reaching implications for all intellectually disabled capital defendants in Florida. Aside from the continued erroneous application of the "currentness" requirement, the FSC's erroneous emphasis on Wright's perceived adaptive strengths is another example of the FSC's continuous pattern of reliance on adaptive strengths while ignoring adaptive deficits, in turn erroneously finding that defendants are not intellectually disabled. *See Jones*, 966 So. 2d at 323-28 FSC cited numerous adaptive strengths Jones exhibited in prison, including that he followed a daily exercise regimen, self-administered

[5] *See supra* n.1.

medication, managed his inmate financial account, and kept his cell clean, while ignoring significant evidence of Jones's deficits in adaptive functioning);[6] *see also Phillips v. State*, 984 So. 2d 503, 506-12 (Fla. 2008) (FSC dismissed defense expert's testimony that a "retrospective diagnosis" of Phillips's adaptive functioning indicated adaptive deficits before age 18, and instead focused on multiple adaptive strengths, including that Phillips held several jobs before he was incarcerated); *see also Hodges v. State*, 55 So. 3d 515, 527-36 (Fla. 2010) (FSC cited an extensive list of adaptive strengths, including that Hodges occasionally cooked, was able to drive, and engaged in personal grooming). Even after this Court explained in *Moore* that "the medical community focuses the adaptive-functioning inquiry on adaptive ***deficits,***" and emphasizing a defendant's adaptive strengths deviated from prevailing clinical standards, the FSC has continued its flawed analysis. 137 S. Ct. at 1050 (emphasis in original); *see also Glover v. State*, 226 So. 3d 795, 810-811 (Fla. 2017) (FSC listed numerous perceived strengths in adaptive functioning, including that Glover obtained his GED, performed various jobs, made meals, and gave "good life

---

[6] The FSC disregarded testimony regarding deficits in adaptive functioning from Jones's defense expert, neuropsychologist Dr. Eisenstein, at the post-conviction hearing regarding Jones's intellectual disability claim. 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 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. Accordingly, Eisenstein concluded that because Jones met two prongs of the definition (onset before age 18 and deficiencies in adaptive skills), Jones's borderline IQ scores did not invalidate his diagnosis of mental retardation.

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

advice to his daughter," while dismissing Glover's past adaptive deficits as caused by behavioral and psychological issues instead of intellectual disability); *see also Williams*, 226 So. 3d at 768-72 (FSC focused on adaptive strengths and discounted lay witness testimony regarding deficits). This issue is a matter of life or death, and the FSC has clearly asked for guidance.[7] Unless this Court intervenes, the FSC will continue to conduct this same erroneous analysis to wrongly deny claims of intellectual disability in Wright's case and many others.[8]

Defendants with intellectual disability are vulnerable at every stage of the criminal justice system, but the stakes are even higher in capital cases. *See Atkins*, 536 U.S. at 320 (internal citation

---

[7] In *Wright II*, the FSC specifically discussed having inadequate guidance to properly analyze intellectual disability:

> 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.*** *See Moore*, 137 S. Ct. at 1058-60 (Robert, C.J., dissenting). ***We are asked to interpret and follow two clinical manuals that caution people like us from making untrained ID diagnoses.*** DSM-5, at 25 ("Use of DSM-5 to assess for the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised."); *see* AAIDD-11, at 85-89. To make matters worse, those manuals occasionally contradict one another. *Compare* DSM-5, at 38 (maintaining relatedness requirement), *with* AAIDD-11, at 6, 8 (removing relatedness requirement). And although we need not follow everything in the latest clinical guide, *Moore*, 137 S. Ct. at 1049, the failure to do so is a potential ground for reversal, *id.* at 1053. ***This catch-22 that we find ourselves in at times underscores our reliance on expert medical opinions provided below and a postconviction court's corresponding credibility determinations.***

256 So. 3d at 776 n.9 (emphasis added).

[8] The vulnerable capital defendants, known to the undersigned, who are currently raising intellectual disability claims include, but are not limited to: *State of Florida v. Joe Nixon*, Leon County, Case No. 1993-CF-02324; *State of Florida v. Sonny Oats*, Marion County, Case No. 1980-CF-00016; *State of Florida v. Frank Walls*, Okaloosa County, Case No. 1987-CF-00856; *State of Florida v. Jerry Haliburton*, Palm Beach County, Case No. 1982-CF-001893; *State of Florida v. Khadafy Mullens*, Pinellas County, Case No. 2008-CF-018029; and *State of Florida v. William Thompson*, Miami-Dade County, Case No. 1976-CF-03350. This list is likely not exhaustive.

omitted) (explaining that an intellectually disabled defendant's reduced capacity increases the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also* John H. Blume et. al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of A Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393 (2014) ("Blume").[9] This Court has cautioned state courts against emphasizing adaptive strengths and prison behavior. *Moore*, 137 S. Ct. at 1050. Although this Court has not provided a bright-line rule for where mere emphasis becomes over-emphasis, it seems clear that an analysis like that done by the FSC in Wright's case – not once but twice – wherein the court looked almost ***exclusively*** at perceived adaptive strengths, many of which were demonstrated while incarcerated, deviates from what this Court would consider a proper analysis of adaptive functioning.

Furthermore, the FSC has sought clarity from this Court regarding the proper analysis, expressing "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; *see also supra* n.6. The FSC's confusion is clear, as it has twice found that Wright is not intellectually disabled by erroneously focusing on both perceived strengths in adaptive functioning and Wright's prison behavior. This Court must intervene and clarify the parameters of the adaptive functioning analysis so that the FSC does not continue to make the same deadly mistake.

---

[9] The article examines capital cases decided by state courts since the *Atkins* decision and analyzes a number of issues, including success rates of intellectual disability claims and potential reasons that meritorious cases may lose. The article notes that through 2013, 24 cases had been litigated in Florida, and "the claimant lost in every single one of those cases." Blume at 413. One possible explanation is that Florida utilized a strict IQ cutoff of 70, which was overturned by this Court in 2014 in *Hall,* as a procedural obstacle intended to make it more difficult for intellectually disabled defendants to prevail. *Id.* at 399. The FSC repeated this trend in Wright's case by continuing to utilize its erroneous "currentness" requirement as a procedural obstacle to attempt to prevent Wright and other capital defendants from proving deficits in adaptive functioning.

II. The FSC's determination that Wright failed to establish both significantly subaverage general intellectual functioning ("IQ") and deficits in adaptive functioning is inconsistent with *Hall* and *Moore* and is not supported by competent, substantial evidence.

Respondent's arguments concerning the merits of Wright's intellectual disability claim indicate a clear misunderstanding of both the nature of intellectual disability and this Court's direction concerning its legal determination. Respondent makes no compelling argument for why this Court should uphold the FSC's erroneous determination that Wright does not have significantly subaverage IQ. Respondent noted that Dr. Joseph Sesta ("Dr. Sesta"), one of the two mental health experts who testified during Wright's 2005 penalty phase hearing, testified that Wright had a full-scale IQ of 77 and was not intellectually disabled. BIO at 3 n.2. Respondent's emphasis on Dr. Sesta's testimony ignores the fact that Wright has two qualifying IQ scores of 75. Further, at the time of Wright's 2005 penalty phase trial, this Court had not yet decided *Hall*, which abrogated the strict 70-IQ cutoff, and thus his two scores of 75 were not dispositive. However, this Court's precedent in *Hall* mandates that the entire range of Wright's scores be considered. 672 U.S. at 723.

Respondent also argues that the FSC complied with this Court's standards in *Hall* and *Moore* when deciding the IQ prong of the intellectual disability analysis because it "did not rely on outdated clinical standards or ignore the SEM range when analyzing Wright's intellectual functioning." BIO at 26. Wright does not merely argue that the FSC relied on outdated clinical standards or ignored the SEM when erroneously finding that he does not have significantly subaverage IQ. Wright instead argues that the FSC violated *Hall* by functionally reinstating a strict numerical cutoff and viewing IQ as a single number, rather than an imprecise range. *See* Petition at 16-19. This Court recognized in *Hall* that "an individual's intellectual functioning cannot be reduced to a single numerical score." 672 U.S. at 713; *see also* AMERICAN ASSOCIATION ON

INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 38 (11th ed. 2010) at 35 ("AAIDD-11") ("… [measures] of intelligence need to be interpreted within a broader context than a single IQ score."). Despite this, both Respondent and the FSC place undue emphasis on the highest scores Wright has achieved while failing to consider the full range and context of Wright's scores.

In its *Wright II* opinion, the FSC chose to focus on Wright's highest score of 82 instead of recognizing that he has scored a 75 on ***two*** separate tests, and therefore has two scores that place him within the medically and legally recognized range for intellectual disability. *See Wright II*, 256 So. 3d at 772; *see also* Petition at 19. Respondent and the FSC also fail to recognize that all of Wright's scores, particularly the score of 82 achieved when he was twenty-four years old and had already taken multiple IQ tests, could have been artificially inflated due to both the practice effect and Flynn effect. *See* Petition at 7-8, 19. Respondent also argues that the State's expert, Dr. Michael Gamache ("Dr. Gamache"), expressed "valid" concerns that Wright had malingered to fake a lower IQ on his tests, and that his score of 82 was the most accurate reflection of Wright's intelligence. BIO at 29. However, Dr. Gamache inappropriately evaluated Wright's alleged malingering with the Validity Indicator Profile ("VIP"), an invalid instrument for assessing malingering in intellectually disabled individuals. *See* Richard Rogers & Scott D. Bender, *Evaluation of Malingering and Deception*, *in* HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY, 109, 125 (Alan M. Goldstein et al. eds., 11th ed. 2003) ("[T]he VIP should not be used to evaluate patients with mental retardation … [as] almost all (95.0%) of these participants produced invalid profiles."); *see also* Petition at 18-19.

The FSC's finding that Wright does not have significantly subaverage IQ is not supported by competent, substantial evidence due to Wright's two qualifying IQ scores of 75. Respondent

argues that the FSC correctly stated that "[n]either *Hall* nor *Moore* requires a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range." BIO at 27-28 (quoting *Wright II*, 256 So. 3d at 772). However, this Court has never indicated that a finding of significantly subaverage IQ is prohibited simply because a defendant has scores that fall outside the range for intellectual disability. Notably, this Court has stated that an "IQ test result of 75 [is] squarely in the range of potential intellectual disability." *Brumfield v. Cain*, 135 S. Ct. 2269, 2279 (2015). Further, this Court has previously reversed the FSC's judgment that a Florida capital defendant was not intellectually disabled when he exhibited a similar range of scores to Wright. *Hall*, 572 U.S. at 707 (Hall's IQ scores ranged from 71 to 80). On remand, based on the essential guidance this Court rendered, the FSC found that Hall was intellectually disabled and therefore ineligible to be executed. *Hall v. State*, 201 So. 3d 628, 629 (Fla. 2016). Similarly, Wright's higher IQ scores do not preclude him from proving that he has significantly subaverage IQ or is intellectually disabled. Furthermore, the determination of Wright's intellectual disability claim must be informed by relevant clinical standards and should be an interrelated assessment of all factors. *See* Petition at 19-20. Wright's severe adaptive deficits render his intellectual functioning much lower than his numerical scores indicate because

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH ADDITION (American Psychiatric Association 2013) at 37.

Respondent further argues that the FSC followed this Court's precedent in *Hall* and *Moore*

by considering evidence of Wright's adaptive deficits despite finding that he does not have significantly subaverage IQ. BIO at 30. However, the FSC's analysis of Wright's adaptive functioning violates both *Hall* and *Moore*. *See* Petition at 26-35. The FSC overemphasizes Wright's perceived adaptive strengths, including his behavior in the controlled setting of death row, while completely disregarding the significant evidence of Wright's severe deficits in the conceptual, social, and practical categories of adaptive functioning. *See* Petition at 8-13. Both Respondent and the FSC mischaracterize the evidence in Wright's case by stating that the only category of adaptive functioning at issue is the conceptual category. BIO at 17; *Wright I*, 213 So. 3d at 900. However, evidence of Wright's deficits exists in all three categories of adaptive functioning. *See* Petition at 8-13. Further, even if Wright could only prove deficits existed in one area of adaptive functioning, he would still satisfy the adaptive functioning prong of intellectual disability. *See* AAIDD-11 at 43 ("[S]ignificant limitations in adaptive behavior are operations defined as performance that is approximately two standard deviations below the mean of …***one*** of the following three types of adaptive behavior: conceptual, social, or practical.") (emphasis added).

Respondent makes no compelling argument to support this Court upholding the FSC's clear departure from medical standards when analyzing Wright's adaptive functioning. Respondent argues that the FSC did not improperly overemphasize Wright's adaptive improvements made in prison. BIO at 30-32. In fact, Respondent cites to the FSC's recitation of Dr. Gamache's testimony concerning an extensive list of prison behaviors as evidence that Wright does not suffer from sufficient adaptive deficits in the conceptual skills area. BIO at 9-10 (citing *Wright I*, 213 So. 3d at 899). Unlike the medical community and courts in other jurisdictions, Respondent and the FSC fail to recognize that a defendant's behavior in the structured and controlled prison environment is an inaccurate and inappropriate measure of adaptive functioning:

> 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). Further,

> ***[a]daptive behavior is supposed to be assessed in a "real community" where the person has to make his own choices, as opposed to a structured prison setting, where much of the inmate's daily life is scheduled by the institutional staff*** … [and an] institutional environment of any kind necessarily provides 'hidden supports' whereby the inmates are told when to get up, when to eat, when to bathe, and their movements are highly restricted.' *Hardy,* 762 F. Supp. 2d at 900.

United States v. Smith, 790 F. Supp. 2d 482, 517 (E.D. La. 2011) (citing *U.S. v. Hardy*, 762 F. Supp. 2d 849, 900 (E.D. La. 2010) (emphasis added). Moreover, the medical community espouses an inquiry into what an individual "***typically does***, rather than what the individual can do or could do." AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010), USER'S GUIDE ("AAIDD-11, User's Guide") at 18 (emphasis in original). The FSC's finding that Wright does not have sufficient adaptive behavioral deficits is not supported by competent substantial evidence.

Respondent further argues that the FSC did not overemphasis Wright's perceived adaptive strengths or offset his adaptive deficits with evidence of his adaptive strengths. BIO at 34-35. This assertion is clearly refuted by the fact that the FSC recited ***thirty-five*** different adaptive behaviors that the FSC perceived as strengths, but failed to explicitly consider the substantial evidence of Wright's deficits in all three categories of adaptive functioning.[10] Respondent cites the FSC's

[10] The FSC conceded that Dr. Gamache testified that Wright had some deficits in the conceptual skills category, but dismissed the evidence of Wright's deficits in the social category and only

conclusion that the overemphasis issue identified in *Moore* is not present in Wright's case because the FSC simply relied on expert testimony regarding adaptive strengths and deficits that were connected and did not arbitrarily offset deficits with unconnected strengths. BIO at 34-35 (quoting *Wright II*, 256 So. 3d at 777). The FSC's conclusion misinterprets this Court's direction in *Moore*. The FSC appears to erroneously believe that it may offset deficits in adaptive functioning with adaptive strengths as long as the strengths and deficits are related and fall into the same category, but may not do so when the deficits and strengths are unconnected. *See Wright II*, 256 So. 3d at 777. This Court admonished the Texas Court of Criminal Appeals for offsetting Moore's deficits with unconnected strengths, but did not explicitly state that deficits may be offset by strengths if both fall within the same category. *Moore*, 137 S. Ct. at 1050 n.8. This Court instead referred to the fact that "the medical community focuses the adaptive-functioning inquiry on adaptive ***deficits***." *Moore*, 137 S. Ct. at 1050 (internal citations omitted) (emphasis in original). Further, the medical community does not allow limitations in adaptive skills to be outweighed by potential strengths:

> The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance. Thus, what the person typically does, rather than what the individual can do or could do, is assessed when evaluating the individual's adaptive behavior … Individuals with an ID 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 47. Therefore, the FSC erred when it offset Wright's conceptual adaptive deficits with his perceived conceptual strengths, regardless of the fact that the behaviors belong to the same category.

---

mentioned that Wright did not have a driver's license when discussing the practical category. *Wright I*, 213 So. 3d at 899.

The FSC's discussion of lay witness testimony regarding Wright's other perceived adaptive strengths, which Respondent cites as support in its BIO, also indicates a clear misunderstanding of the nature of intellectual disability and an inability to follow prevailing clinical standards. BIO at 11-14. For example, the FSC stated that Wright had a job where he shelved items at a grocery store that he eventually learned to do without supervision. BIO at 13 (quoting *Wright I*, 213 So. 3d at 901). The FSC fails to recognize that intellectually disabled individuals may be able to improve and thrive with appropriate support systems and the FSC appears to believe the incorrect stereotype that "these [intellectually disabled] individuals never have friends, jobs, spouses, or children or are good citizens." AAIDD-11 at 151. In fact, Wright was only able to work at the store because his cousin Carlton helped him fill out the application and supervised him closely. Carlton also drove him to work daily because Wright did not have a driver's license due to being unable to pass the written portion of the driver's test.[11]

The Respondent further notes that the FSC points to the fact that Wright dated Vontrese Anderson ("Anderson") for two to three weeks and followed her around even after their relationship ended. BIO at 13-14 (quoting *Wright I*, 213 So. 3d at 901-02). However, the fact that Wright dated Anderson for a few weeks does not mean that he fully understood the nature of their relationship, and is, therefore, not intellectually disabled. Intellectually disabled individuals with higher IQ scores may exhibit a "cloak of competence," allowing them to sometimes pass as "normal." AAIDD-11 at 160. These individuals also have a desire to please and may not understand the nuances of complex social situations. AAIDD-11 at 160-61. Wright may not have comprehended the exact nature of his relationship with Anderson, but may have cooperated so that

[11] The FSC conceded that Wright did not have a driver's license, but then erroneously offset that severe practical deficit by stating that Wright knew how to drive a car. *Wright I*, 213 So. 3d at 900.

he did not appear different from those around him. Further, the fact that Wright followed Anderson after their relationship ended, and did not stop once law enforcement advised him to, indicates that he did not understand the appropriate behavior for that social situation.

Furthermore, Respondent also cites to the FSC's improper determination that the underlying facts of Wright's convictions refute his adaptive functioning deficits. BIO at 12 (quoting *Wright I*, 213 So. 3d at 900). However, the medical community states that clinicians should "not use past criminal behavior … to infer [a] level of adaptive behavior" and that the "diagnosis of [intellectual disability] is not based on the person's street smarts, behavior in jail or prison, or criminal adaptive functioning." AAIDD-11, User's Guide at 20.

The FSC has demonstrated a fundamental misunderstanding of the proper analysis of intellectual disability in *Wright I* and *Wright II* and erred in finding that Wright is not intellectually disabled. Further, Respondent offers no compelling reason for this Court to uphold the FSC's decisions, which are not supported by competent, substantial evidence. Wright is one of many individuals that the FSC has misclassified with its erroneous adaptive functioning analysis, in turn sentencing these intellectually disabled individuals to death despite this Court's clear prohibition against the practice. Therefore, the outcome of Wright's case will have a profound effect on all intellectually disabled capital defendants in Florida. This Court must intervene, clarify the framework for the adaptive functioning analysis, and prevent Florida from continuing to execute intellectually disabled individuals in direct conflict with the constitutional rights this Court proclaimed in *Atkins, Hall,* and *Moore*.

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,

/s/ Lisa M. Bort
Lisa M. Bort
Assistant CCRC
Counsel of Record

/s/ Adrienne J. Shepherd
Adrienne J. Shepherd
Assistant CCRC

/s/ Kara R. Ottervanger
Kara R. Ottervanger
Assistant CCRC

Law Office of the Capital Collateral
Regional Counsel-Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
bort@ccmr.state.fl.us
shepherd@ccmr.state.fl.us
ottervanger@ccmr.state.fl.us
support@ccmr.state.fl.us
(813) 558-1600

Counsel for Petitioner

May 13, 2019
Dated