IN THE SUPREME COURT OF FLORIDA

MICHAEL DUANE ZACK, III,

Appellant,

v. **CASE NO. SC15-1756**

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S MOTION TO RECALL THE MANDATE

COMES NOW the Appellant, MICHAEL DUANE ZACK, by and through his undersigned counsel, and herein moves the Court to recall the mandate issued by the Court on October 30, 2017, in Case No. SC15-1756, Mr. Zack's appeal from the denial of his successive Rule 3.851 motion challenging his sentence of death. Mr. Zack asks this Court to recall the mandate in order to reconsider this Court's June 15, 2017, opinion affirming the denial of his claim that his sentence of death violates the eighth amendment in light of the United States Supreme Court's order reversing and vacating this Court's opinion in *Wright v. State*, 213 So. 3d 881 (Fla. 2017), and remanding for further proceedings in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017).

The Issue in Michael Zack's Successive Rule 3.851 Appeal

In his appeal from the denial of his 3.851 motion, Mr. Zack raised two interrelated issues: 1) that it was error to summarily deny his claim that he is intellectually disabled and 2) "[t]he circuit court erred in ruling that [his] IQ is too high for an *Atkins* hearing, without considering other evidence under *Hall*." *See Zack v. State*, Case No. SC15-1756, Initial Brief.

Furthermore, it is important to note that Mr. Zack has never been provided "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall v. Florida*, 134 S.Ct. 1986, 2001(2014).

In this Court's opinion affirming the denial of Mr. Zack's successive Rule 3.851 motion, this Court stated:

> The trial court correctly found the significantly subaverage intellectual functioning prong dispositive of Zack's intellectual disability claim based on Zack's scores prior to age 18, which were all over 75. ...The record demonstrates five I.Q. scores for Zack: a score of 92 in 1980 when Zack was 11 years old, and four scores after Zack turned 18 – 84 and 86 in 1997 at 27 years of age, 79 in 2002, and 80 in 2015. While a holistic hearing is required, defendants must still be able to meet the first prong of *Hall*. **Because Zack's current score is well above 75, and there are no scores in his history below 75, it is unlikely that he would ever be able to satisfy the significantly subaverage intellectual functioning prong.**

Zack v. State, __ So. 3d __ (Fla.), 2017 WL 2590703 *4 (emphasis added). And, as to Mr. Zack's second issue, along the same lines this Court stated:

> We find that the trial court's determination that Zack did not satisfy the significantly subaverage intellectual functioning prong is supported by competent, substantial evidence. As previously mentioned, Zack provided several I.Q. scores that were all well outside the standard error of measurement. While Zack argues that *Hall* requires the trial court to consider other evidence, a defendant's scores must first fall within the test's acknowledged and inherent margin of error. *Hall*, 134 S.Ct. at 2001. **Here, all of the scores presented – 92, 84, 86, 79 and 80 – are outside of the test's margin of error and the presentation of evidence regarding the other two prongs do not cure Zack's inability to satisfy the first.**

Zack, 2017 WL 2590703 *5.

Thus, this Court's opinion focused solely on the IQ scores presented, with no other evidence about those scores. In doing so, this Court simply established another bright line for a minimum score that a defendant must meet in order to establish the

first prong of intellectual disability. The Court made clear that the minimum score is a 75 and because Mr. Zack had no scores of 75 or below he could not establish intellectual disability.

The Issue in Tavares Wright's Rule 3.851 Appeal and Petition for Writ of Certiorari to the United States Supreme Court

During his capital trial proceedings, Mr. Wright was provided a "special hearing to specifically address whether [he] met the statutory criteria for mental retardation." *Wright v. State*, 213 So. 3d 881, 893 (Fla. 2017). However, because Mr. Wright's IQ scores were higher than 70, the trial court held that Mr. Wright could not satisfy Florida Statute § 921.137. *Id*.

After Mr. Wright's postconviction proceedings progressed to his appeal of the denial of his Rule 3.851 motion, the United States Supreme Court issued *Hall v. Florida*, 134 S. Ct. 1986 (2014). Mr. Wright requested that this Court relinquish jurisdiction to permit him to file a renewed motion for determination of intellectual disability. *Wright*, 213 So. 3d at 894. Mr. Wright was provided an evidentiary hearing on the issue where he presented witnesses, including experts. However, the circuit court denied the motion. *Id*.

In Mr. Wright's appeal of the issue of intellectual disability this Court held that Mr. Wright had not established that he met the criteria. *Id*. at 896. Specifically as to the first prong – significantly subaverage intelligence - this Court noted that Mr. Wright was allowed to present evidence about his IQ scores, including the standard error of measurement and Flynn effect. *Id*. at 897. This Court also noted that Mr. Wright had taken nine IQ tests and all of his full scale IQ scores were 75 or

above, including a 76, 80, 81, 75, 82. *Id.* Based upon the scores and Mr. Wright's expert's testimony that the score of 82 was valid, this Court held that Mr. Wright did not satisfy the subaverage intellectual functioning prong. *Id*. at 898.

Again, contrary to *Hall*, this Court focused on the number produced by the IQ test in determining the issue of subaverage intellectual functioning. *See Hall*, 134 S.Ct. at 2001 ("[i]ntellectual disability is a condition, not a number").

Mr. Wright filed a petition for writ of certiorari with the United States Supreme Court. Mr. Wright's question presented asked:

> Did the Florida Supreme Court disregard the diagnostic framework for intellectual disability established in *Moore v. Texas*, 137 S.Ct. 1039 (2017), *Hall v. Florida*, 134 S.Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by treating intelligence tests as dispositive of intellectual functioning and requiring proof of adaptive deficits beyond mild intellectual disability in finding that Tavares Wright can be executed in violation of the Fifth, Eighth and Fourteenth Amendments?

See Attachment. In his petition, Mr. Wright addressed two issues relating to a capital defendant's burden in establishing intellectual disability. The first issue concerned this Court's imposition of a "strict numerical threshold" in violation of the standard previously set forth by the United States Supreme Court. *See* Attachment.

After briefing, the United States Supreme Court entered an order granting the petition for writ of certiorari, vacating the judgement of this Court and remanding for further consideration in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017). In its order and in reference to *Moore*, the United States Supreme Court, once again, reversed the bright line this Court imposed for capital defendants' IQ scores in establishing intellectual disability.

The Issue in Bobby Moore's Appeal to the United States Supreme Court

During his state postconviction proceedings, Mr. Moore was given an opportunity to present evidence about his intellectual disability. In fact, the state habeas court, in relying on intellectual disability guides used in the medical community determined that Mr. Moore was intellectually disabled. *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017).

However, the Texas Court of Criminal Appeals (CCA), reversed the habeas court. The CCA held that the habeas court had "erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the CCA in *Ex parte Briseno*, 135 S.W.3d 1(2004). *Moore*, 137 S.Ct. at 1044.

The United States Supreme Court granted certiorari and, after briefing, vacated the CCA's judgement and remanded for further proceedings. *Id*. The United States Supreme Court stated: "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.' That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Moore*, 137 S.Ct. at 1044 (citation omitted).

Notably, the habeas court had considered six IQ scores, however, the CCA rejected several of the IQ scores and focused solely on Moore's IQ scores in 1973 and 1989, which were a 78 and 74, respectively. *Id*. at 1047. "Based on the two scores but not on the lower portion of their ranges, the [CCA] concluded that Moore's scores ranked 'above the intellectually disabled range' (*i.e.*, above 70)." *Id*.

In reviewing the CCA's decision, the United States Supreme Court reiterated: "In *Hall v. Florida*, we held that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70." *Moore*, 137 S.Ct. at 1048. Additionally, the United States Supreme Court held that "the determination of intellectual disability must be informed by the medical community's diagnostic framework." *Id*.

Specifically, the United States Supreme Court addressed the CCA's conclusion that Mr. Moore's IQ scores were too high to establish intellectual disability, finding that such a conclusion "**is irreconcilable with *Hall***." Id. at 1049 (emphasis added). The Court held:

> In requiring the CCA to move on to consider Moore's adaptive functioning in light of his IQ evidence, we do not suggest that "the Eighth Amendment turns on the slightest numerical difference in IQ score," *post*, at 1061. ***Hall*** **invalidated Florida's strict IQ cutoff because the cutoff took "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence."** Here, by contrast, we do not end the intellectual-disability inquiry, on way or the other, based on Moore's IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and 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.

Moore, 137 S.Ct. at 1050 (emphasis added).

Mr. Zack's Basis for Asking this Court to Recall the Mandate

In 2007, when Mr. Zack originally litigated his claim that he was intellectually disabled and his execution violated the eighth amendment pursuant to *Atkins v. Virginia*, this Court affirmed the summary denial of Mr. Zack's claim citing to *Cherry v. State*, 959 So.2d 702,712-714 (Fla.2007) (reiterating that the cutoff score

for the first prong of the intellectual disability standard is an IQ of 70 or below). This Court stated: "[b]ecause Zack does not meet the threshold requirement of an IQ of 70 or below, we find no useful purpose would be served in remanding this case to the trial court for another proceeding ...". *See Zack v. State,* Case No. SC05-963, Amended Order, September 20, 2007. What became clear in May, 2014, was that this Court's ruling was erroneous. *See Hall v. Florida*, 134 S.Ct. 1986 (2014).

Thus, Mr. Zack filed a successive Rule 3.851 motion on the basis of *Hall*. Again, Mr. Zack requested "a fair opportunity to show that the Constitution prohibits [his] execution", i.e., an evidentiary hearing. *See Hall,* 134 S.Ct. at 2001. Again, Mr. Zack's claim was summarily denied with the circuit court finding that his IQ scores did not qualify for consideration because none were 75 or below.

Mr. Zack appealed and this Court affirmed, holding that his IQ scores fell outside of "the test's acknowledged and inherent margin of error." *See Zack,* 2017 WL 2590703 *5. However, in light of the United States Supreme Court's opinion in *Moore* and its October 16, 2017, Order granting Mr. Wright's petition for writ of certiorari it is clear that this Court's recent decision affirming the summary denial of Mr. Zack's claim is flawed.

Both Mr. Moore and Mr. Wright had an opportunity to present evidence concerning his scores, including expert testimony about intellectual disability guides "used in the medical community." *See Moore*, 137 S.Ct. at 104; *see also Wright*, 213 So. 3d at 894 ("During the evidentiary hearing for this motion, Wright presented six witnesses and the State presented thirteen witnesses."). Mr. Zack has not had "a fair

opportunity to" present medical evidence relating to his IQ scores in order to establish that he is intellectually disabled. Indeed, in arguing the issue before this Court Mr. Zack relied on medical testimony and "intellectual-disability guides", including the Diagnostic and Statistical Manual, 5th Edition (DSM-5). According to the DSM-V, IQ tests are inherently unreliable, especially when dealing with the lower range of IQ test scores. (DSM-V, at 33), thus, Mr. Zack must be provided the opportunity to present his evidence as it relates to the unreliability of his test scores.

Further, Mr. Zack also set forth critical information that has yet to be considered by any court as it relates to the issue of whether he suffers from intellectual disability:

> Throughout his life, Mr. Zack's IQ test scores have consistently shown severe splits in verbal and performance IQ test scores, present in his age 11 IQ test and indicating a verbal and performance IQ test split of 22 points, indicative of organic brain damage. (DSM-V at37). Records of Zack's psychological testing reveal a well-documented history of significant and severe splits between his verbal and performance IQ scores. These splits range from 10 points to 31 points and have appeared in all of his IQ tests since he was 11 years old. In 1980, when Zack was 11 years old, he was given the Wechsler Intelligence Scale for Children Revised (WISC-R) which reflected a verbal performance discrepancy of 20 points. (T. 1366-1867). Upon review of this information, Dr. James Larson indicated this was a red flag for organic brain damage. (T. 1866). Zack was also given the Bender-Gestalt test at age 11, which showed that he was one to two years behind developmentally. (T. 1867). By this point, Zack was already a year behind in school. (T. 1867). Dr. Larson gave Zack the Wechsler Adult Intelligence Scale Revised (WAIS-R) in 1997 at age 28 and it reflected a 16 point split between verbal and performance IQ. (T. 1868-1869).

See Zack v. State, Case No. SC15-1756, Initial Brief. Mr. Zack must be provided an opportunity to present the import of the extreme splits between his performance and verbal IQs and how that affects his intellectual functioning. This evidence is exactly

the type of evidence called for by the United States Supreme Court: "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Moore*, 137 S.Ct. at 1044 (citations omitted).

The medical community recognizes that when there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ score can be misleading. Indeed, according to the DSM-V, "highly discrepant individual subtest scores may make an overall IQ score invalid." DSM-V, at 37. These circumstances are present in Mr. Zack's case and is an example of why the United States Supreme Court has recognized that IQ is not a number, but a condition. *Hall* 134 S.Ct. at 2001.

Mr. Zack also argued that the DSM contains an admonishment to clinicians to exercise clinical judgment, which requires them to be more than just a reporter of test scores, but to evaluate the extent to which such test scores can be relied on validly in any particular case. *See* DSM-V, at 19. In this case, such an exercise of clinical judgment allowed a qualified psychologist to conclude that Mr. Zack meets the DSM criteria for intellectual disability, despite IQ scores above 70-75. However, Mr. Zack has not had an opportunity to present this evidence.

In light of *Moore v. Texas*, 137 S.Ct. 1039 (2017), and the United States Supreme Court's recent Order in *Wright v. Florida*, Mr. Zack requests that this Court revisit its June 15, 2017, opinion, and reverse and remand for an evidentiary hearing.

WHEREFORE, based on the foregoing, the Appellant, Michael Duane Zack, respectfully moves the Court to recall the mandate issued by the Court on October 30, 2017, and reconsider this Court's June 15, 2017, opinion as it relates to the

summary denial of Mr. Zack's claim that he is entitled to an evidentiary hearing in order to establish that he is intellectually disabled and his death sentence violates the eighth amendment.

I HEREBY CERTIFY that a true copy of the foregoing Appellant's Motion to Recall the Mandate has been furnished by electronic service to Charmaine Millsaps, Assistant Attorney General, at: capapp@myfloridalegal.com on this 6th day of November, 2017.

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No. 17-5575

In the Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Did the Florida Supreme Court disregard the diagnostic framework for intellectual disability established in *Moore v. Texas,* 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by treating intelligence tests as dispositive of intellectual functioning and requiring proof of adaptive deficits beyond mild intellectual disability in finding that Tavares Wright can be executed in violation of the Fifth, Eighth and Fourteenth Amendments?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Tavares Wright respectfully petitions for a writ of certiorari to review the errors in judgement of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court after post-conviction proceedings on intellectual disability appears at Appendix A to the petition and is reported at *Wright v. State*, 213 So.3d 881 (Fla. 2017). The Order Denying Defendant's Renewed Motion for Determination of Intellectual Disability appears at Appendix D to the petition and is unreported. On direct appeal, the opinion of the Florida Supreme Court is reported at *Wright v. State*, 19 So.3d 277 (Fla. 2009). The order of the trial court imposing the death penalty is unreported.

JURISDICTION

The Florida Supreme Court decided the case and disallowed motions for rehearing on March 16, 2017. Its mandate was issued on April 3, 2017. On May 2, 2017, Justice Thomas granted an extension of time to file a petition for certiorari to August 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

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

Florida law prohibits the imposition of death sentences on intellectually disabled persons: "'Intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term 'significantly subaverage general intellectual functioning,' for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term 'adaptive behavior,' for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fla. Stat. Ann. § 921.137.1 (2013).

STATEMENT OF THE CASE

Tavares J. Wright, an intellectually disabled man with fetal alcohol syndrome and microcephaly, was sentenced to death on October 12, 2005 in Polk County, Florida for murders he committed when he was nineteen years old. His convictions and sentences were upheld by the Florida Supreme Court on March 16, 2017, less than two weeks before this Court issued an opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017). This petition should be granted and the opinion of the Florida Supreme Court ("FSC") should be vacated because it failed to apply the constitutional precedents of this Court, including *Moore,* in assessing Wright's intellectual and adaptive functioning. Wright's execution is barred by the Fifth, Eighth, and Fourteenth Amendments.

I. The Procedural History of Wright's Case

A jury found Wright guilty of two counts of first degree murder and carjacking on November 13, 2004.[1] Appendix ("App.") A at 1. Wright's appearance, slower speech, and documented history of difficulties in school indicated intellectual disability was an issue. On September 22, 2005, before sentencing at the trial level, a special hearing was held to address whether Wright met the criteria for mental retardation barring the imposition of the death penalty in Fla. Stat. Ann. § 921.137 and *Atkins v. Virginia*, 536 U.S. 304 (2002). Several expert witnesses opined Wright had "borderline intellectual function" with raw IQ scores between 75 and 81. App. A at 12-13. The trial court found that Wright was *not* mentally retarded because he did not meet Florida's strict requirement of an IQ below 70. *Id.* Wright was sentenced to death

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

on October 12, 2005 and the Florida Supreme Court ("FSC") affirmed Wright's convictions and sentences on September 3, 2009. *Id.* at 14. Wright filed a motion to vacate his convictions and sentences on November 5, 2010, raising seventeen claims including intellectual disability, ineffective assistance of counsel, and cumulative error. *Id.* at 15. After the post-conviction court denied his claims, Wright filed a notice of appeal to the FSC on June 19, 2013. *Id.*

While Wright's post-conviction appeal was pending before the FSC, the United States Supreme Court invalidated Florida's rigid rule on intellectual disability. *Hall v. Florida*, 134 S. Ct. 1986 (2014). This Court found that Florida's judicially-imposed requirement of an IQ score below 70 failed to account for the standard margin of error, ignored professional consensus, and created a risk that an intellectually disabled person would be executed in violation of the Eighth Amendment. *Id.* Before ruling on Wright's first post-conviction appeal, the FSC relinquished jurisdiction and remanded Wright's case for a determination of intellectual disability under the *Hall* standard. App. A at 15. The post-conviction court held an evidentiary hearing on Wright's intellectual disability claim on January 5-6, 2015 and February 11, 2015. App. D at 1. Testimony from nineteen witnesses, including four expert witnesses, was considered along with the entire case file. *Id.* at 2. Citing Wright's prior IQ scores of 76, 80, 81, 75, 82, and 75, the post-conviction court found that Wright's IQ scores did not demonstrate significant subaverage intellectual functioning under Fla. Stat. Ann. § 921.137.1. *Id.* at 5. The post-conviction court examined Wright's adaptive behavior and concluded that Wright was "arguably intellectually

disabled," but his adaptive deficits did not meet Florida's high standard of clear and convincing evidence.[2] *Id.* at 8.

Wright appealed and his case was returned to the FSC for consideration of his post-conviction claims. App. A. The FSC found that Wright's prior IQ scores did not meet the standard for intellectual disability as, "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized by Florida law." *Id.* at 22. Expert testimony established the standard error of measurement ("SEM") of plus or minus approximately 5 points adopted in *Hall* provided a 95 percent confidence interval that Wright's IQ score falls between 69 and 82. *Id.* While the FSC conceded the range of Wright's scores merely "dips just one point beneath the threshold of 70," it concluded Wright did not show significantly subaverage intellectual functioning. *Id.* "For this reason alone," stated the FSC, "Wright does not qualify as intellectual disabled." *Id.* at 24.

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

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[2]The defendant bears the burden of proof on each element of the Florida statute by clear and convincing evidence. Fla. Stat. Ann. § 921.137.4. Post-conviction counsel argued that Florida's standard was unconstitutional under *Cooper v. Oklahoma*, 116 S. Ct. 1373 (1996) at all stages, but the FSC found the argument was waived. Only four states, Arizona, Colorado, North Carolina, and Florida currently use the clear and convincing standard. Ariz. Rev. Stat. Ann. § 13-753(G) (2011); Colo Rev. Stat. § 18-1.3-1102 (2012); N.C. Gen. Stat. § 15A-2005(c) (2015). *See Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (invalidating Delaware's death penalty scheme, including the clear and convincing standard in Del Code Ann. Tit. 11, § 4209 (d)(3)(b)). *See also* S. 95, 71st General Assembly, 1st Sess. (Colo 2017) (bill proposed to repeal the death penalty). The federal circuits are split on the constitutionality of clear and convincing evidence for intellectual disability. *See Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (upholding Georgia's beyond a reasonable doubt standard for intellectual disability); *Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016) (criticizing Arizona's clear and convincing standard for intellectual disability).

requirements of intellectual disability determinations. The final FSC opinion[3] was issued on March 16, 2017. It stated, "NO MOTION FOR REHEARING WILL BE ALLOWED." App. A at 56. This Court published *Moore*, a case that redefined the constitutional parameters of adaptive functioning, less than two weeks later, on March 28, 2017. Despite *Moore's* clear directives on the analysis of adaptive functioning, the FSC issued its erroneous and unconstitutional mandate on April 3, 2017. The FSC failed to consider the defining precedent on intellectual disability when it decided Wright's case.

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

Wright's intellectual disability began in utero when his mother drank heavily, abused drugs, and gained only seven pounds during her pregnancy. SR 1/122; SR6/.[4] He was born with fetal alcohol syndrome and microcephaly, conditions that limited the growth of his brain to two thirds the size of normal. SR3/384; SR6/1103-4. Wright's appearance immediately reveals organic brain damage in his development. His head is strikingly disproportionate to his body size and he has the flat face and abnormally wide set eyes associated with prenatal exposure to alcohol and cocaine. SR3/369-70. Wright was ostracized for his strange behavior and appearance as a child. He was called "peanut head," "beetlejuice," and "little alien," by his peers. SR1/123. Parental addiction, mental illness, and incarceration prevented any stable home life. SR3/515-16. Wright learned to speak and walk much later than average children, wet his bed until he was 16 years old, and suffered a "remarkable" number of serial head injuries

[3]The FSC issued an interim opinion on November 23, 2016, stating that evidence of adaptive deficits in one domain were insufficient for a finding of intellectual disability. App. C at 28-29. On reconsideration, the court softened this language in the final opinion issued March 16, 2017. *See* App. A at 29; App. C at 28-29.

[4]References are to volume and page numbers of the Post-Conviction Appeal ("PC") transmitted to the FSC on September 12, 2013 and the Supplemental Record on Appeal ("SR") transmitted to the FSC on April 10, 2015.

resulting in loss of consciousness. *Id*; SR4/639-645. Wright's mother received social security benefits for Wright's slow learning disability and speech delays. SR1/124-5.

A. Wright's Intellectual Functioning (IQ) is Significantly Subaverage

Wright suffers from significantly subaverage intellectual functioning. When Wright was ten years old, his struggles in school were exacerbated by moving between school systems, and he was administered the same WISC-R IQ test three times within a seven month period. SR9/1461, 1467. Wright received scores of 76, 80 and 81. *Id.* This is not an approved method of administering IQ tests.[5] Not surprisingly, his scores improved as he practiced.[6] He received a score of 75 when he was tested on the WAIS-R six years later in 1997. *Id.* In conjunction with this case, he was given the WAIS-III twice in two weeks in July, 2005, earning a 75 and an 82. *Id.* Experts agreed that Wright suffers from significantly subaverage intellectual functioning and found a 95 percent confidence interval that Wright's IQ is the range is 69 to 81. SR6/934-37; SR8/1386, 1414. In total, eight experts documented that Wright had below average intellectual functioning in the borderline range. *Id.*; SR2/189, 315-350; SR3/351-70; SR5/897; SR8/1419.

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[5]An administration of three IQ tests in one year is contrary to the instructions in the testing manual, as well as established clinical practice. *See* SR5/913; AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 38 (11th ed. 2010) [hereinafter "AAIDD-11"] ("[E]stablished clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will lead to an overestimate of the examinee's true intelligence").

[6]Wright's IQ scores may have been artificially inflated by virtue of the Flynn effect and the practice effect. "The practice effect... suggests that repeated administration of the same...test can artificially inflate an individual's IQ....increases in IQ scores over time may be a product of the practice effect rather than true increases in intelligence." Natalie Pifer, The Scientific and the Social in Implementing *Atkins v. Virginia*, 41 Law & Soc. Inquiry 1036, 1039 (2016) (citations omitted). "[T]he Flynn effect suggests that IQ scores need adjusting to account for differences in when intelligence tests are normed, since population-wide shifts in average intelligence may also artificially inflate individual test results." *Id. See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

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

Wright's adaptive functioning is well below average, even when compared to other death row inmates. Dr. Mary Elizabeth Kasper interviewed Wright and ten people who knew Wright over the course of his lifetime.[7] SR1/20. She considered school records, psychological reports and the Adaptive Behavior Assessment Scales-II ("ABAS-II"), a standardized measure of adaptive behavior. SR1/18-25. In contrast, the government's expert, Dr. Michael Gamache, based his expert opinion on an interview with Wright himself. SR9/1578. This defies all guidance on assessing adaptive functioning from the medical community. AMERICAN ASSOCIATION OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 51 (11th ed. 2010) (hereinafter "AAIDD-11") ("[s]elf ratings of individuals...should be interpreted with caution when determining an individual's level of adaptive behavior"). *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) (hereinafter "DSM-5") (assessing adaptive functioning requires use of knowledgeable informants such as parents, family members, counselors, and teachers as well as additional sources including educational, developmental, medical and mental health evaluations).

DISORDERS 37 (5th ed. 2013) (hereinafter "DSM-5") ("Factors that may affect test scores include practice effects and the "Flynn effect"); AAIDD-11 at 37-8.

[7]Dr. Kasper found that Wright himself was not a reliable source of his own abilities. This complies with methods of evaluation approved by the American Association on Intellectual and Developmental Disabilities. AAIDD-11 at 51. *See* DSM-5 at 37. For example, Wright told Kasper he had a regular high school diploma or a GED. SR6/948-49; PC11/1911-12. In reality, Wright did not obtain a GED, but a special diploma, which was given as mere "recognition" of effort, not academic achievement. *Id.* Wright also told Dr. Kasper that he was a highly skilled drug dealer and the leader of a gang. PC11/1914-15. However, the collateral sources she spoke with did not agree with Wright's self-assessment. *Id.* One person told her that Wright would have been given the drug-dealing task of an 11-year-old, who would be easily led and manipulated as to how much money he would be passing. PC11/1915. Every person Dr. Kasper interviewed, including people who knew Wright since he was a child, told her that he was not the leader of the gang, except perhaps in his own mind. PC11/1915.

Wright suffers from significant deficits in adaptive behavior under both legal and current scientific standards. These deficits exist across multiple environments and multiple skill areas, including subaverage conceptual, social, and practical skills. *See* DSM-5 at 33 ("deficits in adaptive functioning...result in failure to meet developmental...standards for personal independence" in the conceptual, social, and practical domains). Wright, like many people with mild intellectual disabilities, was found to be capable of learning and making small improvements in adaptive functioning over time. SR6/942-43; SR9/1621. Yet, Dr. Kasper opined that Wright's abilities were similar to a twelve year-old child. SR10/1661.

The conceptual skills category displayed Wright's most serious deficits, including documented academic, reading, writing, counting and reasoning problems. DSM-5 at 34; SR/317. Wright's school records from New York and Florida showed he was classified as both emotionally handicapped and specific learning disabled ("SLD"). PC11/1924. He was exempt from taking standardized tests. PC11/1923. Both of his school psychological reports note that he has deficits in functional academic skills. PC11/1929. There are several Independent Education Plans ("IEPs") in Wright's school records, which are used for students with disabilities to provide feedback and set specific goals. PC11/1924-25. The IEPs were individualized plans designed to identify teaching methods that could assuage Wright's adaptive deficits. PC11/1929. Multiple witnesses reported that Wright had problems reading. SR6/966. He has difficulty understanding complex directions and learning the rules of simple games like Uno. *Id.* As a teenager, Wright lived with a relative who reported her many difficulties teaching Wright how to count. PC11/1920-21.

Several inmate witnesses testified about Wright's lack of adaptive conceptual skills in prison. PC10/1683-1706, 1733-1810; PC11/1756-85, 1787-1812, 1836-55. They described him

as someone who was slow, immature, a follower, and easily manipulated. *Id.* He cannot understand spiritual concepts such as forgiveness and prayer. *Id.* He had difficulty following the rules, and made the same mistakes over and over again without seeming to learn. *Id.* Fellow inmate Richard Shere confirmed that Wright's academic deficits still exist, as he has problems reading, writing, and filling out forms. SR5/841-78. Shere and several other inmates on death row have assisted Wright in these areas. *Id.* Dahrol James explained how Wright's deficits affected him in prison Bible study. PC11/1796-98. Most participants would take turns reading out loud, but the other inmates always had to read to Wright. *Id.* In the prayer circle, each person in the circle would take turns praying about things such as their current situation or their families. PC11/1797. When it got to be Wright's turn, he just talked, as opposed to praying like the other men. PC11/1798.

Wright's trial attorneys offered testimony about the communication and comprehension challenges they faced in their representation. David Carmichael explained that Wright's case was the most difficult of the 50 homicide cases he has handled because Wright's limitations required repeating concepts over and over. SR5/762. Carmichael thought Wright understood him because he would smile, laugh or make appropriate gestures, but it was apparent from later conversations that Wright had adopted a social patina and seemed incapable of grasping what his attorneys were telling him.[8] SR5/752-53. Experienced trial attorney Byron Hileman testified

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[8]Wright also demonstrates something called acquiescence bias, a phenomenon that is commonly seen with intellectually disabled individuals. With acquiescence bias, people agree to things that they do not understand because it makes them look smarter. SR9/1612-13. As Dr. Kasper explained:

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

that during trial, Wright was "not watching aspects of the trial that were dynamically important to the case with any real seeming understanding" and doodled on a pad instead of taking notes. PC13/2239; SR4/721-22. After two mistrials, Wright's attorneys attempted to create the opportunity for a life in avoidance plea. SR 5/756-58. Wright was unable to process the concept. *Id*; SR4/712-714. Despite there being no downside to accepting life in avoidance (Wright already had more than one life sentence) and a large upside (Wright was facing a death sentence), Wright was not interested. SR5/758. To this day, Hileman is not sure Wright understood his precarious situation because he never gave an explanation that made any sense and his responses were *non sequiturs*. SR4/712.

Wright's deficits in social skills are evidenced by his problems with spoken communication including leisure, getting along with others, having friends, recognizing emotions, helping people, and having manners. DSM-5 at 34. Poor communication abilities have caused complications throughout Wright's life. As a young child Wright had speech therapy for his communication deficits. SR2/622. Wright's IEPs indicate that he has problems interacting and communicating with others and controlling his behavior. SR4/637; PC11/1929. When Wright was younger, he did not get along with others and he did not have any friends other than his cousin Carlton. SR6/980. He was bullied and called names. *Id.* He got into fights, and he was constantly in trouble. *Id.* Inmates have to explain things to him over and over in different ways because he does not understand. SR2/206-07; SR6/965-68. As is common for intellectually disabled individuals, Wright sometimes acts as if he understands things when he actually does not. For example, when Dr. Kasper asked Wright about his Hebrew Israelite

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Id. She personally observed this with Wright. *Id.*

religion and the feast of unleavened bread he was unable to explain it to her.[9] SR6/ 968-69. When Dr. Kasper asked Wright what he thought the post-conviction hearings on his intellectual functioning were about, he responded, confused by psychological terminology he'd heard hundreds of times over half of a decade,[10] that the hearings were about "Flynndom" and "getting found innocent." SR10/1653-54.

Wright's practical skills, involving activities of daily living such as feeding, dressing, personal hygiene, occupational skills, transportation, and routines, were below average. Wright's cousin Carlton testified about how he looked out for Wright and provided much-needed supports throughout his late teenage years, helping Wright with his schoolwork and hygiene, driving him around, and assuming the role of a job coach when they worked together at the Albertson's warehouse for six months. SR4/655-702. Wright's work at Albertson's was far from an "independent" endeavor as Wright's cousin Carlton supported Wright by helping him fill out the job application, providing daily transportation, and working closely with Wright to help supervise his work. SR4/668-76. Wright, after all, did not have a driver's license because he could not pass the written portion of the driver's test. SR9/1574. One inmate who knew Wright from boot camp in 2000 explained that Wright adapted more slowly than other boys to boot camp because he was not able to understand the drill instructor's directions and expectations. SR2/217. Wright was transferred out of the boot camp program. SR2/219. Carlton discussed Wright's habit of mimicking and noticed that when Wright came out of boot camp, he kept saying "yes ma'am, no, ma'am" to the point that it was strange. PC11/1915-16. Dr. Kasper interviewed inmates who called Wright a "push button" because they could tell him to do something and he just did it, even if he got in trouble for it later on. SR6/970-71.

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[9]*See supra* note 8.
[10]*See supra* note 6.

Dr. Kasper used the ABAS-II, a standardized, quantitative test, to measure Wright's adaptive functioning. SR1/119. As with IQ tests, the mean score on the ABAS-II is 100, and two standard deviations below the mean is 70. SR6/961. The ABAS-II also takes into account the SEM. SR6/958. The ABAS-II tests the three categories of conceptual skills, social skills, and practical skills, and includes a general composite score. SR6/958-61. Dr. Kasper administered two separate ABAS-II's in this case: one when Wright was 16 years old in 1997, and one to assess Wright's current functioning. SR6/958-65. Although Wright's composite scores improved slightly over the years, from a range of 62-68 at age 16 to a current range of 65-71, Wright continues to demonstrate significant deficits in his adaptive functioning.[11] *Id.*

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court disregarded the diagnostic framework for intellectual disability established in *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002) by treating intelligence tests as dispositive of intellectual disability and requiring proof of adaptive deficits beyond mild intellectual disability. Wright has significantly subaverage intellectual and adaptive functioning. Executing him would violate this Court's precedent and the Fifth, Eighth and Fourteenth Amendments.

Florida law creates an insurmountable gauntlet for capital defendants with intellectual disabilities, violating procedural due process protections and cruel and unusual punishment standards of the Fifth, Eighth, and Fourteenth Amendments. The FSC erred in treating IQ scores as dispositive of death eligibility and deviating from current medical standards in assessing adaptive functioning. Further, the FSC decided Wright's case without the benefit of the newest

[11]Intellectually disabled people thrive in structured environments. Death row is the "ultimate group home." SR6/972. This may account for Wright's improvements since he has been on death row. SR6/972-973.

standards of adaptive functioning set forth in *Moore*. The Court should grant this petition and vacate the decision of the FSC to protect an intellectually disabled man from illegal execution.[12]

The Eighth Amendment bars execution of intellectually disabled people. *Atkins*, 536 U.S. at 320. Relating the diminished culpability of the intellectually disabled to the penological philosophy of death penalty, the *Atkins* Court found execution of intellectually disabled people served no purpose. *Id.* at 318-320. Diminished intellectual capacity, with its resultant difficulties in understanding information, inability to learn from experience, ineptitude in logical reasoning, and impossibility of controlling impulses, makes an intellectually disabled person less morally culpable and less amenable to deterrence. *Id.* If the death penalty does not serve penological aims, it is nothing more than, "the purposeless and needless imposition of pain and suffering." *Id.* at 319 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). Exempting the intellectually disabled from capital punishment also protects the integrity of the trial process. *Hall,* 134 S. Ct. at 1993. The intellectually disabled face a heightened risk of wrongful execution because they give false confessions, are poor witnesses, and are less able to give meaningful assistance to counsel. *Id.*

Florida law protects intellectually disabled people from execution if they are found to have significantly subaverage general intellectual functioning (IQ), existing concurrently with deficits in adaptive behavior, manifested in the period between conception and age 18.[13] Fla. Stat. Ann. § 921.137.1 (2013). "Significantly subaverage general intellectual functioning" is

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[12]On a petition for certiorari, this Court reviews legal issues *de novo*. *Arizona v. Fulimante*, 499 U.S. 279, 287 (1991). An ultimate issue, such as intellectual disability barring the imposition of the death penalty, is a legal question requiring independent federal determination. *See Moore*, 137 S. Ct. 1039; *Hall*, 134 S.Ct. 1986; *Miller v. Fenton,* 474 U.S. 104 (1985). *See also Chambers v. Florida,* 309 U.S. 227, 228–229 (1940).

defined as "two or more standard deviations from the mean score on a standardized intelligence test." *Id.* Florida law defines, "adaptive behavior," as "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.* As discussed in *Hall*, the Florida statute could be interpreted consistently with *Atkins*. *Hall*, 134 S. Ct. at 1994. Yet Florida courts have historically botched the analysis by taking IQ scores as final conclusive evidence of intellectual disability and by barring full and fair consideration of evidence of adaptive functioning. *See Cherry v. State*, 959 So.2d 702 (Fla. 2007), *abrogated by Hall*, 134 S. Ct. at 1994.

Hall corrected Florida's Eighth Amendment violations by establishing IQ as an imprecise range with a standard error of measurement ("SEM") and insisting that courts consider the professional consensus of the medical community in evaluating intellectual disability. *Hall*, 134 S. Ct. at 1994-1995; 2000-2001 (citing the DSM-5 and the AIDD-11). In *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the Court found an IQ score of 75 was not dispositive of intellectual capability. As in *Hall* and in concert with the unanimous consensus of the medical community, the flaws and imprecision in IQ test scores make them a poor vehicle for diagnosis. *See Hall*, 134 S. Ct. at 2000. Low IQ scores should lead to a full, multifactored consideration of adaptive functioning to reduce the risk of executing intellectual disabled people in violation of the Eighth Amendment. *Brumfield*, 135 S. Ct. at 2278.

On March 23, 2017, *Moore v. Texas*, 137 S. Ct. 1039 (2017), authoritatively revisited the standard for evaluating adaptive functioning and intellectual disability. Bobby Moore, a man with mild intellectual disability, an IQ of 70.66, the ability to survive on the streets, play pool

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[13]As in *Hall* and *Moore*, Florida's interpretation and application of the first two criteria are at issue in Wright's case. The post-conviction court found that Wright's "intellectual condition (whatever it is classified) has existed his entire life and therefore precedes his 18th birthday." App. D at 8. This finding was uncontested before the FSC.

and mow lawns for money, was given a sentence of death in Texas. In overruling the death penalty in Moore's case, this Court forged explicit standards for assessing adaptive functioning. *Id.* at 1050-51. First, adaptive strengths and behavior in controlled environments like prison should not be overemphasized by courts considering intellectual disability claims. Second, consistent with scientific consensus, deficits in one of three domains are sufficient for a finding of intellectual disability. Third, childhood trauma and learning disabilities should be considered as risk factors, rather than alternative explanations, for adaptive deficits in intellectual disability determinations. These are the exact errors in the FSC's analysis of Wright's case. When the FSC's mandate issued on April 3, 2017 it completely ignored *Moore's* standards. Due process protects Wright's opportunity for a full and fair hearing of his intellectual disability claim under *Moore* as certainly as the Eighth Amendment precludes his execution as cruel and unusual punishment. *See Hall*, 134 S. Ct. at 2001 ("[t]he death penalty is the gravest sentence our society may impose"); *Furman v. Georgia*, 408 U.S. 238, 251 (1972) ("no punishment could be invented with so many inherent defects").

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

IQ scores are "imprecise" and cannot be final and conclusive evidence of intellectual disability. *Hall*, 134 S. Ct. at 2001. An IQ score should be considered as a range due to the SEM, which accounts for variations such as practice from earlier tests, the subjective judgment in scoring, or simple lucky guessing. *Id.* at 1995-96. The SEM in IQ scores is generally considered to be approximately plus or minus five points, so that the range of IQ for establishing intellectual disability can be between 65 and 75. *Id.* at 1995. The analysis of multiple scores is "a complicated endeavor" as "intellectual disability is condition, not a number." *Id. See*

Brumfield, 135 S. Ct. at 2278 (Louisiana state trial court finding 75 IQ was not "subaverage intelligence" was unreasonable); *Moore*, 137 S. Ct. at 1053 (Texas appellate court finding of sufficient intellectual capacity with average IQ of 70.66 overruled). IQ tests can also be flawed or administered in a flawed manner. *Hall,* 134 S. Ct. at 1995-96, 1998 ("Atkins itself acknowledges the inherent error in IQ testing"). When Florida denies legitimate intellectual disability claims by people with borderline IQ scores, it also denies "the basic dignity the Constitution protects." *Id.* at 2001.

In Wright's case, the IQ scores used as evidence of significant subaverage intellectual functioning were undisputed. Experts agreed that Wright suffers from significantly subaverage intellectual functioning and found a 95 percent confidence interval that Wright's IQ is in the range of 69 to 81. SR6/934-37; SR8/1386, 1414. In total, eight experts documented that Wright had below average intellectual functioning in the borderline range. *Id.*; SR2/189, 315-350; SR3/351-70; SR5/897; SR8/1419.

Acknowledging Wright's numerous IQ scores and the holdings of *Atkins*, *Hall*, and *Moore*, the post-conviction court found, "while the Defendant's I.Q. scores do not demonstrate (by clear and convincing evidence) that the Defendant has significant subaverage intellectual functioning, they do fall within the test's acknowledged and inherent margin of error." App. D at 5. Nonetheless, the FSC determined that Wright's prior IQ scores did not meet the standard for intellectual disability as, "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized by Florida law." App. A at 22. While the FSC conceded the range of Wright's scores, "dips just one point beneath the threshold of 70," it concluded that Wright did not show significantly subaverage intellectual functioning by the clear and convincing standard. *Id.* "For this reason alone," stated the FSC, "Wright does not qualify

as disabled under Florida law." *Id.* at 24. With this statement, the FSC violated this Court's exhortation in *Hall* by functionally reinstating the strict numerical cutoff that violates the Eighth Amendment -- viewing IQ as single number, subject to a clear and convincing standard of proof,[14] rather than an imprecise range.

The FSC relied on an expert whose method of establishing IQ did not meet with accepted standards of the medical and diagnostic community, comply with the holdings of this Court, or consider the SEM as critical to interpreting IQ tests. *See Moore*, 137 S. Ct. at 1049 ("courts *must* account for the test's standard error of measurement") (emphasis added); *Brumfield*, 135 S. Ct. at 2277-78 (IQ cannot be assessed in a "vacuum" and "reliance on IQ tests must be tempered with attention to possible error in measurement."); *Hall*, 134 S. Ct. at 1995 (the SEM is "one of the most important concepts in measurement theory") (internal quotations omitted); SR8/1345 (State's expert Dr. Michael Gamache admits the SEM is important). Dr. Gamache openly admitted he did not use standards for evaluating IQ in the DSM-5 or the AAIDD-11 to arrive at an estimate of Wright's IQ. SR8/1359. Instead, Dr. Gamache used an online resource called "Online Statistics Education: An Interactive Multimedia Course of Study" which is a "resource for learning and teaching introductory statistics" rather than an established source for diagnosing intellectual deficits in Wright's case. SR8/1357-59.[15] The FSC ignored expert testimony based

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[14]*See supra* note 2. The enigma of whether or not *any* mildly intellectually disabled person might *ever* be able to prove disability by clear and convincing evidence awaits determination in the future.

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

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

SR8/1358-59.

on professional consensus in favor of an IQ determination calculated on the internet. This violates the Eighth Amendment. *Moore*, 137 S. Ct. 1039, 1048-49 (summarizing *Hall* in holding that Florida violated the Eighth Amendment by disregarding "established medical practice."); *Hall*, 134 S. Ct. at 1995.

The FSC also relied on Dr. Gamache's testimony that Wright was "malingering" on every IQ test, even those administered in 1991 and 1997, based on a Validity Indicator Profile ("VIP") test he administered decades later, in 2014. App. A. at 23. Yet, according to the instructions in the VIP test manual, the VIP is not a valid instrument for assessing malingering among the intellectually disabled. SR6/1049, 1107-08. The Victoria Symptom Validity Test is frequently used for assessing malingering among the intellectually disabled because it has a dramatically lower misclassification rate. SR6/1108-09.

By viewing Wright's IQ scores as dispositive and relying on Dr. Gamache's unconventional methods of evaluating IQ, which radically depart from any established medical consensus, the FSC repeated the errors corrected in *Moore, Hall* and *Atkins*. Even under the less stringent standard of *habeas corpus* review, "[t]o conclude, that...[a] reported IQ score of 75 somehow demonstrated that...[the defendant] could not possess subaverage intelligence...reflected an unreasonable determination of the facts" that warranted this Court to reverse in *Brumfield*. 135 S. Ct. at 2278. *See Moore* at 1049 ("Moore's score of 74, adjusted for the standard error of measurement yields a range of 69-79"). The facts of *Moore* and *Brumfield* are practically indistinguishable from Wright's case. The FSC applied a facially constitutional statute in a patently unconstitutional manner setting the bar to execution so high that people with mild intellectual deficits and IQ scores in the borderline range are practically certain to be executed. The FSC concluded that Wright, who was found "arguably intellectually disabled" by

the post-conviction court, could be legally executed in Florida. *See* Natalie Pifer, The Scientific and the Social in Implementing *Atkins v. Virginia*, 41 Law & Soc. Inquiry 1036, 1042 (2016) ("The proliferation of scientific rhetoric in the capital context suggests that law invokes science to reveal with certainty absolute truths about executability...ignor[ing] the probabilistic, subjective, and sometimes imperfect reality of scientific evidence"). Courts may not "narrow" the test-specific SEM without violating the constitution. *Moore*, 137 S. Ct. at 1049. Wright's intellectual functioning and IQ is squarely in the range of intellectual disability and he should be barred from execution under the Fifth, Eighth and Fourteenth Amendments.

II. The FSC Failed to Apply the Standards Recently Announced in *Moore* and Previous Binding Supreme Court Precedent in Holding that Wright Lacks Deficits in Adaptive Functioning

The FSC's analysis of Wright's adaptive functioning deviated from current medical and constitutional standards and created a virtual impossibility that Wright could prove intellectual disability. *See* Fla. Stat. Ann. § 921.137.1. The FSC contravened the *Moore* holding by focusing exclusively on Wright's adaptive strengths in the controlled setting of prison. The FSC also required adaptive deficits across more than one domain of adaptive functioning. Under *Moore*, the FSC cannot use evidence of childhood trauma and learning disabilities as alternative explanations for intellectual disability when they are actually *risk factors* for intellectual disability. The FSC cannot supplant expert analysis with its own inexpert evaluation of Wright's adaptive behavior from interview transcripts and the circumstances of Wright's crime to establish Wright's eligibility for execution. The FSC issued its mandate, sealing its erroneous analysis, two weeks after *Moore*. As a result, Wright may be executed in spite of his proven intellectual disabilities and in violation of the Fifth, Eighth and Fourteenth Amendments.

Moore carefully explained the constitutional standards that apply to an analysis of

adaptive functioning. 137 S. Ct. at 1050-53. Adjudications of intellectual disability must be informed by the scientific consensus of medical experts. *Id.* at 1048-49. *See Hall*, 134 S. Ct. at 1994. The current diagnostic criteria for intellectual disability requires, "onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains." *Moore*, 137 S. Ct. at 1050; DSM-5 at 33. Deficits in one of three domains of conceptual, social, and practical behavior are sufficient for a finding of intellectual disability. *Id*; AAIDD-11 at 43; DSM-5 at 33 (deficits *in one of three domains* is sufficient) (emphasis added). Conceptual skills include language, reading, writing, time, money, and numbers, problem-solving, and judgement in novel situations. AAIDD-11 at 44; DSM-5 at 37. Social skills involve interpersonal skills, gullibility, social judgement, empathy, and friendship. *Id.* Finally, practical skills include activities of daily living and occupational skills, among others. *Id.*

Moore is this Court's most comprehensive consideration of adaptive functioning to date. It explains that adaptive strengths are not the gravamen of adaptive functioning analysis because, "the medical community focusses the adaptive functioning inquiry on adaptive *deficits*." *Moore*, 137 S. Ct. at 1050 (emphasis in original). *See* AAIDD-11 at 47 (significant limitations in adaptive skills are not outweighed by potential strengths in some adaptive skills); DSM-5 (inquiry should focus on deficits, not strengths); *Brumfield*, 135 S. Ct. at 2280-81 (intellectually disabled persons may have strengths in one aspect of an adaptive skill in which they show an overall limitation). Deficits in adaptive behavior, "limit functioning in one or more activities of daily life, such as communication, social participation, and independent living across multiple environments" and result in "failure to meet developmental and sociological standards for personal independence and social responsibility." DSM-5 at 33. Adaptive deficits exist on their

own terms and should not be balanced against adaptive strengths. *Moore* at 1050. In this case, the FSC erred in failing to consider *Moore*'s definitive standard in its deeply flawed analysis of Wright's adaptive functioning. *See* App. A at 24-34.

A. Wright Suffers From Severe Childhood and Adult Adaptive Deficits

Overwhelming evidence in the post-conviction record demonstrates Wright's adaptive behavior deficits from before age 18. *See* DSM-5 at 38 (the criteria for intellectual disability are met when one of the three domains "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community"). Wright suffered from fetal alcohol syndrome, had microcephaly in a brain two-thirds the size of average, wet his bed until he was 16 years old, repeated the first grade, had documented learning disabilities through all phases of his primary and secondary education, was enrolled in slow learning classes, and received social security benefits for his childhood intellectual disabilities. SR3/384; SR6/1103-4; SR1/124-25; PC11/1924; PC11/1929. In childhood conceptual skills, Wright had problems reading and learning to count, understanding complex directions and rules of simple games like Uno. SR6/966; PC11/1920-21. Wright's functioning within the social domain was severely impaired. Wright had documented speech delays, lacked friends, could not play sports because he misunderstood the rules, and was constantly in trouble. SR4/622; SR4/637; SR6/980; PC11/1929. Practical skills were also below average, as shown by Wright's need for assistance with hygiene and food, as well as his inability to pass a written drivers test. SR4/655-702. Wright's composite scores of adaptive functioning, measured by the ABAS-II at age 16 were in a range of 62-68, well below the average of 100. SR6/970-71.

Wright's current adaptive deficits were well established in the post-conviction record. One medical expert opined that Wright was functioning at a twelve year old level while in prison. SR10/1161. All of the experts who interviewed Wright found some deficits, especially in the conceptual skills category. *See supra* Section II.B. When Dr. Kasper asked Wright what he thought the post-conviction hearings on his intellectual functioning were about, he responded that they were about "Flynndom" and "getting found innocent." SR10/1653-54. Inmates and attorneys complained that they had to repeatedly explain things to Wright, because he had difficulty understanding. SR2/206-07; SR4/712; SR5/762. Wright constantly received help from other inmates in managing his canteen account, drafting letters to pen pals, and preparing and filing grievances. SR2/199-223. Wright's composite scores of adaptive functioning, measured by the ABAS-II when he was tested in prison were still significantly below average from 65-71 on a 100 point scale. SR6/958-65.

B. The FSC Failed to Apply the Recent Holding of *Moore* by Relying on and Improperly Balancing Adaptive Strengths and Requiring Adaptive Deficits in Excess of What Scientific Consensus Defines as Mild Intellectual Disability in Analyzing Wright's Adaptive Functioning

The *Moore* opinion is a prescient catalogue of the FSC's errors in assessing Wright's adaptive functioning. Relying on the testimony of the State's expert, Dr. Gamache, opining on Wright's current, adult functioning while confined to death row, the FSC found sixteen strengths in conceptual skills, six strengths in social skills, and three strengths in practical skills that foreclosed ANY finding of adaptive deficits, save Wright's failure to pass the written test required for a Florida driver's license. App. A at 26-29. Yet, Dr. Gamache based his assessment of Wright's adaptive functioning on an interview with Wright himself. This is contrary to accepted scientific methods of assessing adaptive functioning. AAIDD-11 at 51. *See* DSM-5 at 37. *See also supra* note 7. Further, in analyzing Wright's adaptive functioning, the FSC made

no mention of Wright's demonstrated learning disabilities, motor delays, difficulties learning to read and to count, fetal alcohol syndrome or microcephaly.

The FSC's reliance on adaptive strengths, rather than deficits, contravenes the explicit holding of *Moore* and scientific consensus. "The medical community focuses the adaptive functioning inquiry on *deficits*." *Moor*e, 137 S. Ct. at 1050 (emphasis in original). Intellectually disabled people may have strengths in certain domains. *See Brumfield*, 135 S. Ct. at 2281; AAIDD-11 at 47; DSM-5 at 38 (inquiry should focus on deficits, not strengths). Eighty nine percent of people with intellectual disabilities fall into the "mild" category, which includes an IQ in the range of 55 to 70. Gary Siperstein & Melissa Collins, Intellectual Disability, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 21 (Edward Polloway ed. 2015) (hereinafter "Death and ID"). A person with mild intellectual disability would be expected to learn to read up to a sixth grade level and have the adaptive functioning of a 12 year old child. *Id.* at 26 ("the limitations in individuals with ID at the upper end of the spectrum are more subtle, more difficult to detect, and often context-specific"). *See* DSM-5 at 34-36; SR9/1622-25. Intellectually disabled adults can acquire social and vocational skills adequate for minimal self-support including working at a job. AAIDD-11 at 47; DSM-5 at 34. *See Moore*, 137 S. Ct. at 1050 (Bobby Moore played pool, mowed lawns for money and developed skills in prison). In *Moore*, this Court interprets the Constitution in conjunction with medical consensus to find that the existence of some adaptive skills and even some adaptive strengths do not preclude a finding of intellectual disability. *Id.*; *Brumfield*, 135 S. Ct. at 2280-81.

Current clinical standards do not condone a "balancing approach" to establishing adaptive functioning. *See* AAIDD-11 at 47 (significant limitations in adaptive skills are not outweighed by potential strengths in some adaptive skills); AAIDD-11 User's Guide at 20;

DSM-5 at 38. Limitations in conceptual, social, or practical adaptive skills are NOT outweighed by adaptive strengths. *Moore*, 137 S. Ct. at 1050. By balancing perceived adaptive strengths against deficits to find that Wright's deficits were weak or irrelevant, the FSC condemned an intellectually disabled man to death. The FSC also ignored the practical reality that mildly intellectually disabled people will almost always have some ability to function at home, at school, or perhaps even on Florida's death row. AAIDD-11 at 47; DSM-5 at 38. Nonetheless, the FSC routinely approves capital punishment for intellectually disabled inmates when they demonstrate a minimal ability to function in one domain. *See, e.g., Salazar v. State*, 188 So.3d 799 (2016) (holding that a defendant with IQ scores of 67 and 72 failed to show adaptive deficits by clear and convincing evidence because he passed a drivers tests and paid taxes); *Rogers v. State*, 2017 WL 563213 (Fla. 2017) (holding that a defendant with an IQ of 69 is death eligible because of adaptive strengths); *Rodriguez v. State*, No. SC15-1795 (Slip Op. April 20, 2017) (holding that a defendant with an IQ of 64 is properly subject to death penalty).

Focusing almost exclusively on adult adaptive behavior in prison further violates professional consensus and the standards set forth by this Court. *Moore*, 137 S. Ct. at 1051; AAIDD-11 User's Guide at 20. *See* DSM-5 at 38. Clinicians warn against assessing adaptive strengths in controlled settings such as prisons and detention centers, and corroborative information reflecting functioning outside the controlled setting should be obtained. *Id. See* AAIDD-11 at 47. As a death row inmate, Wright's self-determination and personal independence are dramatically curtailed. Wright's adaptive functioning may have improved in prison because of his limited freedom. SR6/942-43. The FSC violated the holding of *Moore* and scientific consensus by diagnosing Wright as fully intellectually capable based on skills performed in a controlled environment with assistance from other inmates. App. A. at 27-28.

The FSC held that Florida law only permits consideration of "current" adaptive deficits. App. A at 24 (citing *Dufour v. State*, 69 So.3d 235, 248 (Fla. 2011)).[16] Our national constitutional standards were newly explained in *Hall* and *Moore*, both decided subsequent to *Dufour*. The definition of intellectual disability, presupposing onset during the developmental period or before age 18, should necessitate some consideration of Wright's childhood adaptive functioning. *See* Fla. Stat. Ann. § 921.137.1; DSM-5 at 33. Failing to consider Wright's adaptive functioning in childhood contradicts both Florida's statute and the consensus of the medical community. Wright's failures in school, qualification for social security benefits, SLD and ESE classes, and composite scores of adaptive functioning, measured by the ABAS-II at age 16 in a range of 62-68 are all more probative of Wright's true adaptive functioning than his prison behavior. Because Wright has lived in prison since age nineteen, his childhood behavior is the only available evidence of his true adaptive functioning outside of prison. The FSC's flawed analysis in Wright's case accomplished a miraculous cure for intellectual disability caused by a decade on death row. This is a classic example of backwards legal engineering. By looking solely to adult adaptive behavior in prison and ignoring childhood indicators of intellectual disability, the FSC supplants uninformed legal judgement for expert medical judgement and sets an unreasonably high standard for demonstrating adaptive deficits.

The vast majority of intellectually disabled people are mildly intellectually disabled.

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[16] *Dufour* is another deeply flawed and outdated analysis which fails to support the FSC's conclusions. Decided in 2011 before *Hall* and *Moore*, the FSC applied Florida's rigid numerical threshold for determining that Mr. Dufour's IQ scores of 67, 62, and 74 did not meet the standard for intellectual disability. *Dufour*, 69 So.3d at 246 (Fla. 2011). Although the FSC continued to consider Mr. Dufour's adaptive functioning after establishing that his IQ disqualified him for a finding of intellectual disability, the FSC concluded that Mr. Dufour's deficits resulted from "deplorable" home conditions, childhood physical abuse, childhood sexual abuse, and drug use rather than intellectual disability. *Id.* at 248-49. *Moore* has focused a bright floodlight on this type of discriminatory reasoning, finding that childhood trauma and intellectual disability are intimately related. *Moore*, 137 S. Ct. at 1051.

Death and ID at 21. Mild intellectual disability is intellectual disability. DSM 5 at 33. The medical community permits a diagnosis of intellectual disability with deficits in only one of the three domains of conceptual, social, or practical skills, or in all three. AAIDD-11 at 43; DSM-5 at 33; Death and ID at 26 ("most individuals with ID at the upper end of the spectrum do not experience problems in the practical skills....such as dressing oneself or using the phone"). Yet, in Wright's case, the FSC requires significant adaptive deficits across all domains of adaptive functioning. App A. at 26-28. This unreasonably high standard could only be satisfied by a profoundly intellectually disabled person. *See* DSM-5 at 33-36. Florida's standard violates *Moore, Hall and Atkins.* Florida's standard also creates a substantial risk that Wright and others with mild intellectual disabilities will be executed.

More egregiously, the FSC ignored constitutional standards by holding that Wright's trouble reading and writing were attributable to a lack of education, poverty, "neighborhood culture" and a learning disability, rather than a deficit in conceptual or academic adaptive functioning. *Moore*'s holding is clear. Scientific consensus has concluded that poverty, childhood trauma, and learning disabilities are viewed as *risk factors* for intellectual disability rather than evidence of its nonexistence. *Moore*, 137 S. Ct. at 1051 (emphasis in original); AAIDD at 59. Poverty, trauma, and lack of education are ubiquitous on death row, after all, "it is the poor, the sick, the ignorant, [and] the powerless" who are executed. *Furman*, 408 U.S. at 251. *See* Robert J. Smith, Sophie Cull, & Zoe Robinson, The Failure of Mitigation, 65 HASTINGS L.J. 1221, 1256 (2014) (in a study of 100 recently executed death row inmates, the overwhelming majority suffered from intellectual impairments, were barely into adulthood, wrestled with severe mental illness, or endured profound childhood trauma, all of which are characterized by significant intellectual and psychological deficits). If poverty, trauma, and

learning disabilities preclude a finding of deficits in social, practical, and conceptual skills, the entire inquiry on adaptive functioning, as well as the prohibition on executing the intellectual disabled in *Atkins* would be meaningless.

Finally, the FSC based its erroneous decision on factors which have no bearing on the medical standards in the DSM-5 and AAIDD-11 or the precedent of this Court. The FSC noted that it read and considered Wright's trial testimony, interviews, and the details of Wright's crime in finding he lacked deficits. Reliance on isolated examples of Wright's behavior is not appropriate in assessing adaptive functioning, as adaptive functioning focuses on a person's typical performance, as opposed to his maximum performance. SR6/937; SR9/1616; AAIDD at 47 ("adaptive behavior focuses on *typical performance* and *not their best* or *assumed ability* or maximum performance") (emphasis added). It is unclear how Wright prepared for his testimony or interviews. Wright's crimes all involved accomplices. Since adaptive behavior is what a person can do on his own without coaching or assistance, transcripts and details of crimes with codefendants cannot be a reliable gauge of adaptive functioning.

Every state may establish a process for identifying and excluding the intellectually disabled from death eligibility. Yet Florida cannot nullify *Moore*, *Hall*, *Atkins* and the protections of the Fifth, Eighth and Fourteenth Amendments. *See Hall*, 134 S. Ct. at 1999 ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality"). The Constitution and this Court require that states incorporate current medical standards in assessing adaptive functioning. *Moore* at 1048-49; *Hall* at 1999. The FSC has repeatedly disregarded established medical practice and strained the limits of reasonableness by rejecting clinical expertise and basing its intellectual disability

determinations on its own inexpert analysis. *Id.* *See*, e.g. *VanTran v. Colson*, 764 F.3d 594, 608 (6th Cir. 2014). Comitting a crime, fleeing, and testifying at trial would not outweigh the significant deficits reflected in Wright's background and history. *Brumfield*, 135 S. Ct. at 2280-81. The circumstances of a crime and a defendant's role in it have little or no bearing on an assessment of adaptive functioning. *See* Death and ID at 194-95; *Van Tran*, 764 F.3d at 608. *See also Atkins* at 319-320 (cold calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders).

CONCLUSION

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

Respectfully submitted,

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