

No. _____

IN THE

Supreme Court of the United States

MICHAEL DUANE ZACK, III,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

*On Petition for a Writ of Certiorari to the
Supreme Court of Florida*

PETITIONER'S APPENDIX

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APPENDIX A

Supreme Court of Florida

No. SC15-1756

MICHAEL DUANE ZACK, III,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. SC16-1090

MICHAEL DUANE ZACK, III,
Petitioner,

vs.

JULIE L. JONES, etc.,
Respondent.

[June 15, 2017]

PER CURIAM.

Michael Duane Zack, III, appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ

of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm the denial of postconviction relief and deny the habeas petition.

FACTS

On June 25, 1996, Michael Zack was indicted for the sexual assault, robbery, and first-degree murder of Ravonne Smith. We described the facts of the case on direct appeal as follows:

Although the murder of Smith took place on June 13, 1996, the chain of events which culminated in this murder began on June 4, 1996, when Edith Pope (Pope), a bartender in Tallahassee, lent her car to Zack. In the weeks prior, Zack had come to Pope's bar on a regular basis. He generally nursed one or two beers and talked with Pope; she never saw him intoxicated. He told her that he had witnessed his sister murder his mother with an axe. As a result, Pope felt sorry for Zack, and she began to give him odd jobs around the bar. When Zack's girlfriend called the bar on June 4 to advise him that he was being evicted from her apartment, Pope lent Zack her red Honda automobile to pick up his belongings. Zack never returned.

From Tallahassee, Zack drove to Panama City where he met Bobby Chandler (Chandler) at a local pub. Over the next several days, Zack frequented the pub daily and befriended Chandler. Chandler, who owned a construction subcontracting business, hired Zack to work in his construction business. When Chandler discovered that Zack was living out of a car (the red Honda), he invited Zack to live with him temporarily. On the second night at Chandler's, Zack woke up screaming following a nightmare. Chandler heard Zack groan words which sounded like "stop" or "don't." Although Chandler questioned him, Zack would not discuss the nightmare. Two nights later, on June 11, 1996, Zack left Chandler's during the night, stealing a rifle, a handgun, and forty-two dollars from Chandler's wallet. Zack drove to Niceville, and on the morning of June 12, 1996, pawned the guns for \$225.

From Niceville, Zack traveled to Okaloosa County and stopped at yet another bar. At this bar, Zack was sitting alone drinking a beer when he was approached by Laura Rosillo (Rosillo). The two left the bar in the red Honda and drove to the beach, reportedly to use drugs Zack said he possessed. Once on the beach, Zack attacked Rosillo and beat her while they were still in the Honda. He then pulled Rosillo from the car and beat her head against one of the tires. Rosillo's tube top was torn and hanging off her hips. Her spandex pants were pulled down around her right ankle. The evidence suggests she was sexually assaulted; however, the sperm found in Rosillo's body could not be matched to Zack. He then strangled her, dragged her body behind a sand dune, kicked dirt over her face, and departed.

Zack's next stop on this crime-riddled journey was Dirty Joe's bar located near the beach in Pensacola. He arrived there on the afternoon of June 13, 1996, and met the decedent, Ravonne Smith. Throughout the afternoon, Smith, a bar employee, and Zack sat together in the bar talking and playing pool or darts. The bar was not very busy, so Smith spent most of her time with Zack. Both bar employees and patrons testified that Zack did not ingest any significant amount of alcohol and that he did not appear to be intoxicated. In the late afternoon, Smith contacted her friend Russell Williams (Williams) and invited him to the bar because she was lonely. Williams arrived at the bar around 5:30 p.m. Prior to leaving the bar around 7 p.m., Smith called her live-in boyfriend, Danny Schaffer, and told him she was working late. Smith, Williams, and Zack then left the bar and drove to the beach where they shared a marijuana cigarette supplied by Zack. Afterwards, they returned to the bar and Williams departed. Zack and Smith left the bar together sometime around 8 p.m. and eventually arrived at the house Smith shared with her boyfriend.

Forensic evidence indicates that immediately upon entering the house Zack hit Smith with a beer bottle causing shards of glass and blood to spray onto the living room love seat and two drops of blood to spray onto the interior doorframe. Zack pursued Smith down the hall to the master bedroom leaving a trail of blood. Once in the bedroom Zack sexually assaulted Smith as she lay bleeding on the bed. Following the attack Smith managed to escape to the empty guest bedroom across the hall. Zack pursued her and beat her head against the bedroom's wooden floor. Once he incapacitated Smith,

Zack went to the kitchen where he got an oyster knife. He returned to the guest bedroom where Smith lay and stabbed her in the chest four times with the knife. The four wounds were close together in the center of Smith's chest. Zack went back to the kitchen, cleaned the knife, put it away, and washed the blood from his hands. He then went back to the master bedroom, placed Smith's bloody shirt and shorts in her dresser drawer, stole a television, a VCR, and Smith's purse, and placed the stolen items in Smith's car.

During the night, Zack drove Smith's car to the area where the red Honda was parked. He removed the license plate and several personal items from the Honda then moved it to a nearby lot. Zack returned to Panama City in Smith's car and attempted to pawn the television and VCR. Suspecting the merchandise was stolen, the shop owners asked for identification and told Zack they had to check on the merchandise. Zack fled the store and abandoned Smith's car behind a local restaurant. Zack was apprehended after he had spent several days hiding in an empty house.

After he was arrested, Zack confessed to the Smith murder and to the Pope and Chandler thefts. Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder. The comment enraged him, and he attacked her. Zack contended the fight began in the hallway, not immediately upon entering the house. He said he grabbed a knife in self-defense, believing Smith left the master bedroom to get a gun from the guest bedroom.

Zack v. State (Zack I), 753 So. 2d 9, 13-14 (Fla. 2000) (footnotes omitted). A jury found Zack guilty on all counts on September 15, 1997. Id. at 12.

After the penalty phase hearing, the jury recommended a sentence of death by a vote of eleven to one. Id. Following the jury's recommendation, the trial court sentenced Zack to death on November 14, 1997.¹ On direct appeal, Zack

1. The trial judge found the following six aggravators to support the death sentence:

raised twelve issues.² Id. at 16 n.5. We affirmed the convictions and death sentence. Id. at 26. On October 2, 2000, the Supreme Court denied certiorari review. Zack v. Florida, 531 U.S. 858 (2000).

(1) the defendant was convicted of a capital felony while under a sentence of felony probation; (2) the crime was committed in conjunction with a robbery, sexual battery, or burglary; (3) the defendant committed the crime to avoid lawful arrest; (4) the defendant committed the crime for financial gain; (5) the crime was especially heinous, atrocious, [or] cruel; and (6) the crime was committed in a cold, calculated, and premeditated manner.

Zack I, 753 So. 2d at 12-13. The trial court assigned little weight to the following four mitigators:

(1) the defendant committed the crime while under an extreme mental or emotional disturbance; (2) the defendant was acting under extreme duress; (3) the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and (4) nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. Zack's age was not considered a mitigating factor.

Id. at 13.

2. Zack raised the following claims on direct appeal:

(1) the court erred in admitting Williams[v. State, 110 So. 2d 654 (Fla. 1959),] rule evidence; (2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; (3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; (4) the trial court erred in instructing the jury on felony murder based upon a burglary; (5) the sentencing order failed to consider all of the mitigating evidence presented; (6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; (7) the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner; (8) the trial

On October 18, 2002, Zack filed his first amended 3.851 motion in the trial court, raising six claims. While Zack's motion was pending, the Supreme Court decided Atkins v. Virginia, 536 U.S. 304 (2002), which held that the execution of an intellectually disabled person is cruel and unusual punishment in violation of the Eighth Amendment. The trial court denied Zack's rule 3.851 motion on July 14, 2003. Zack raised six issues before this Court on appeal.³ Zack v. State (Zack II), 911 So. 2d 1190 (Fla. 2005). This Court affirmed the trial court's order and noted that the "evidence in this case shows Zack's lowest I.Q. score to be 79." Id.

court erred in using victim impact evidence; (9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; (10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; (11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and (12) the trial court erred in refusing to admit a family photo during the penalty phase.

Zack I, 753 So. 2d at 16 n.5.

3. On postconviction appeal, Zack raised the following issues: (1) trial counsel was ineffective for failing to challenge the DNA evidence presented by the State; (2) counsel was ineffective because he failed to prepare Zack to testify at trial; (3) counsel was ineffective because he made prejudicial remarks to the jury in the opening statement and closing argument; (4) the trial court erred in summarily denying claims raised in his motion for postconviction relief involving Zack's right to a Frye[v. United States], 293 F. 1013 (D.C. Cir. 1923),] hearing and the constitutionality of the death sentence under Atkins; (5) that Florida's capital sentencing scheme is unconstitutional under Ring[v. Arizona], 536 U.S 584 (2002)]; and (6) collateral counsel was ineffective. Zack II, 911 So. 2d at 1197.

at 1201. The Court also denied relief on Zack's petition for writ of habeas corpus, filed on February 12, 2004. Id. at 1203.

Zack filed a successive postconviction motion on December 1, 2004, raising an Atkins claim. The trial court denied the claim without an Atkins hearing, finding that after a review of the expert trial testimony none had found Zack's I.Q. to be near the required statutory figure of 70 in order to establish intellectual disability. This Court affirmed the trial court's denial. In its order, this Court relied on Cherry v. State, 781 So. 2d 1040 (Fla. 2000), and held that "Zack has not provided any new evidence of [intellectual disability] and previous evidence demonstrates that his I.Q. was well above the statutory figure of 70 or below."

On March 4, 2005, Zack filed a second petition for a writ of habeas corpus based upon the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). This Court denied the petition on October 6, 2005. Zack v. Crosby, 918 So. 2d 240 (Fla. 2005).

Zack also filed a federal habeas petition that included an Atkins claim. Zack v. Crosby, 607 F. Supp. 2d 1291 (N.D. Fla. 2008). All claims not based on Atkins were dismissed with prejudice as untimely. Id. at 1295. Zack's Atkins claim was denied with prejudice on the merits on March 26, 2009. In its order, the court found that the record refuted Zack's allegation that he is intellectually disabled and held that the record uniformly concluded that Zack's I.Q. was significantly above

the minimum threshold for intellectual disability. The Eleventh Circuit, in an en banc opinion, affirmed the dismissal of many of the claims in the habeas petition as untimely. Zack v. Tucker, 704 F.3d 917 (11th Cir. 2013). The Supreme Court denied certiorari review on October 7, 2013. Zack v. Crews, 134 S. Ct. 156 (2013).

On May 26, 2015, Zack filed a second successive postconviction motion raising a claim of intellectual disability based on Hall v. Florida, 134 S. Ct. 1986 (2014). The trial court summarily denied the motion on July 8, 2015. Zack now appeals from the circuit court's denial of relief, arguing that the court erred in (1) summarily denying Zack an evidentiary hearing on his intellectual disability claim and (2) dismissing Zack's motion on the basis that his I.Q. was too high for an Atkins hearing without considering other evidence as required by Hall.

ANALYSIS

Zack's first claim is based on the trial court's summary denial of his motion pursuant to a rule of law that has now been found unconstitutional under Hall. During the pendency of this case, we determined that Hall applies retroactively as a development of fundamental significance. Walls v. State, 213 So. 3d 340, 346 (Fla. 2016).

A postconviction court's decision on whether to grant an evidentiary hearing on a claim is a pure question of law, reviewed de novo. Mann v. State, 112 So. 3d

1158, 1162 (Fla. 2013). A claim may be summarily denied if it is legally insufficient or positively refuted by the record. Id. at 1161. To prevail on a claim of intellectual disability, a defendant must establish three elements: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifesting prior to age 18. § 921.137, Fla. Stat. (2016); Fla. R. Crim. P. 3.203.

Hall recognizes that intellectual disability “is a condition, not a number.” Hall, 134 S. Ct. at 2001. In a recent opinion, we found that Hall requires courts to consider all three prongs of intellectual disability in tandem and that no single factor should be dispositive of the outcome. See Oats v. State, 181 So. 3d 457, 459 (Fla. 2015). However, Hall also states that a “defendant must be able to present additional evidence of intellectual disability” where “a defendant’s I.Q. test score falls within the test’s acknowledged and inherent margin of error.” Hall, 134 S. Ct. at 2001. Generally, the standard error of measurement is approximately five points. Id. at 1998 (citing to Diagnostic and Statistical Manual of Mental Disorders 28 (rev. 3d ed. 1987)). Thus, an “I.Q. score of 70 is considered to represent a band or zone of 65 to 75.” Id.

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. At the Huff⁴ hearing, Zack presented his full range of scores, as well as evidence of adaptive deficits before age 18. 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. Accordingly, we affirm the trial court's summary denial of Zack's intellectual disability claim.

Zack's second claim is that the trial court erred in dismissing his motion on the basis that his I.Q. was too high for an Atkins hearing without considering other evidence as required by Hall. In reviewing the trial court's determination that Zack is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." State v. Herring, 76 So. 3d 891, 895 (Fla. 2011). We do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses."

4. Huff v. State, 622 So. 2d 982 (Fla. 1993).

Brown v. State, 959 So. 2d 146, 149 (Fla. 2007). However, questions of law are reviewed de novo. Herring, 76 So. 3d at 895.

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. Consequently, we affirm the trial court's determination.

PETITION FOR WRIT OF HABEAS CORPUS

In his petition for habeas corpus relief, Zack asserts that his death sentence is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016). In Hurst v. Florida, the Supreme Court found that a jury must make a specific factual finding with regard to the existence of mitigating or aggravating circumstances supporting a death sentence in order to preserve the Sixth Amendment right to a jury trial. Id. at 622. We have interpreted Hurst v. Florida, an extension of Ring v. Arizona, 536 U.S. 584 (2002), to require a jury to unanimously find each aggravating factor, that

the aggravating factors are sufficient to warrant death, and that the aggravating factors outweigh the mitigation. See Hurst v. State (Hurst), 202 So. 3d 40, 57, 66 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017). However, Zack's first-degree murder conviction and sentence of death were final in 2000, before the Supreme Court decided Ring. Therefore, Zack is not entitled to Hurst relief because Hurst does not apply retroactively to cases that were final before Ring was decided. See Asay v. State, 210 So. 3d 1, 22 (Fla. 2016). Accordingly, we deny relief on this claim.

CONCLUSION

In light of the foregoing, we affirm the trial court's denial of relief on Zack's postconviction motion to vacate his conviction of first-degree murder and sentence of death, and we deny habeas relief.

It is so ordered.

LABARGA, C.J., and QUINCE, J., concur.

CANADY, J., concurs specially with an opinion, in which POLSTON, J., concurs.

PARIENTE, J., concurs in result with an opinion.

LAWSON, J., concurs in result with an opinion.

LEWIS, J., concurs in part and dissents in part.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

CANADY, J., specially concurring.

I concur in the conclusion that Zack's IQ scores justify the denial of his intellectual disability claim. I also agree that Zack is not entitled to Hurst v.

Florida, 136 S. Ct. 616 (2016), postconviction relief and that the habeas petition should therefore be denied. But I would not rely on Asay v. State, 210 So. 3d 1 (Fla. 2016). Instead, I would deny the Hurst claim on two grounds. First, no Hurst error occurred in this case—given the contemporaneous convictions establishing aggravation. See Hurst v. State, 202 So. 3d 40, 77-83 (Fla. 2016) (Canady, J., dissenting). Second, in any event Hurst should not be given retroactive application. See Mosley v. State, 209 So. 3d 1248, 1285-91 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

POLSTON, J., concurs.

PARIENTE, J., concurring in result.

I would not deny retroactive application of Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016), cert. denied, No. 16-998 (U.S. May 22, 2017), to Zack, but because I am bound by this Court’s precedent from Asay v. State, 210 So. 3d 1 (Fla. 2016), I concur in result with the majority’s rejection of Zack’s Hurst claim. I do concur, however, in the majority’s rejection of Zack’s intellectual disability claim and write separately to emphasize that Zack’s range of IQ scores do not approach “the test’s acknowledged and inherent margin of error.” Hall v. Florida, 134 S. Ct. 1986, 2001 (2014). As the majority explained, “[t]he 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.” Majority op. at 10. Thus, because Zack’s lowest I.Q. scores do not fall within the test’s margin of error, it is unnecessary to conduct a “conjunctive and interrelated” assessment of Zack’s evidence of intellectual disability as required by Hall. Cf. Walls v. State, 213 So. 3d 340, 346 (Fla. 2016); Oats v. State, 181 So. 3d 457, 467 (Fla. 2015).

LAWSON, J., concurring in result.

See Okafor v. State, No. SC15-2136, slip op. at 15 (Fla. June 8, 2017)

(Lawson, J., concurring specially).

An Appeal from the Circuit Court in and for Escambia County,
Linda Lee Nobles, Judge - Case No. 171996CF002517XXXAXX
And an Original Proceeding – Habeas Corpus

Robert S. Friedman, Capital Collateral Regional Counsel, and Dawn B. Macready
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for Appellee/Respondent

APPENDIX B

Supreme Court of Florida

THURSDAY, OCTOBER 12, 2017

CASE NOS.: SC15-1756 & SC16-1090

Lower Tribunal No(s).:
171996CF002517XXXAXX

MICHAEL DUANE ZACK, III vs. STATE OF FLORIDA

MICHAEL DUANE ZACK, III vs. JULIE L. JONES, ETC.

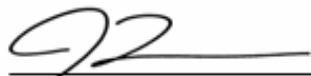
Appellant/Petitioner

Appellee/Respondent

Appellant/Petitioner's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

A True Copy
Test:



John A. Tomasino
Clerk, Supreme Court



cd
Served:

STACY BIGGART
DAWN B. MACREADY
CHARMAINE M. MILLSAPS
HON. LINDA LEE NOBLES, CHIEF JUDGE
HON. PAM CHILDERS, CLERK
JOHN A. MOLCHAN

APPENDIX C

Supreme Court of Florida

TUESDAY, JANUARY 23, 2018

CASE NO.: SC15-1756

Lower Tribunal No(s).:
171996CF002517XXXAXX

MICHAEL DUANE ZACK, III

vs.

STATE OF FLORIDA

Appellant(s)

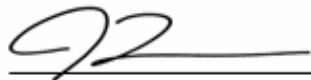
Appellee(s)

Appellant's Motion to Recall the Mandate is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



cd

Served:

STACY BIGGART
DAWN B. MACREADY
CHARMAINE M. MILLSAPS

APPENDIX D

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

RAM CHILDERS
CLERK OF CIRCUIT COURT
ESCAMBIA COUNTY, FL
2015 JUL -8 P 2:41

STATE OF FLORIDA,

APPEALS DIVISION
FILED & RECORDED

vs.

MICHAEL DUANE ZACK, III,

Case No.: 1996 CF 002517A

Defendant.

Div.: "C"

ORDER DENYING "SUCCESSIVE MOTION TO VACATE JUDGMENTS OF
CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO
AMEND"

THIS CAUSE comes before the Court on Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend," filed May 26, 2015. The Court also has before it the State's answer to the motion, filed June 9, 2015. A case management conference was held July 2, 2015, at which the Court heard argument by the State and defense counsel. After due consideration of the motion, answer, record, and relevant legal authority, the Court concludes that Defendant is not entitled to relief.

In his motion, Defendant argues, via counsel, that he is intellectually disabled, and that he is entitled to an evidentiary hearing to determine such disability under the authority of Hall v. Florida, 134 S. Ct. 1986 (2014). In summary, Defendant argues that Hall renders unconstitutional previous findings that Defendant does not meet the criteria for intellectual disability. While acknowledging that Defendant's full scale IQ scores are greater than 70, Defendant argues that "[r]ecords of Zack's psychological testing reveal a well-documented history of significant and severe splits between his verbal and performance IQ scores," which is "indicative of brain

damage." In such cases, Defendant argues, "full-scale IQ may not be a reliable index of actual intellectual functioning." Defendant suggests that he has significant adaptive deficits which render him intellectually disabled despite his IQ scores, and thus ineligible for the death penalty.

The State responds that the motion is untimely because Hall is not retroactive and because the Florida Supreme Court's determination that Defendant is not intellectually disabled is the "law of the case." The State further asserts that the motion is without merit.

Retroactivity

The 11th Circuit United States Court of Appeals has, on at least two occasions, opined that Hall is not to be applied retroactively. In the case of In re Henry, 757 F.3d 1151 (11th Cir. 2014), the Court held that "the rule announced by the Supreme Court in Hall has not been made retroactive." Id. at 1161. Following Henry, the 11th Circuit, in In re Hill, 777 F.3d 1214 (11th Cir. 2015), again held that Hall was not retroactive.

However, as observed by defense counsel, the United States Supreme Court, in the recent case of Haliburton v. Florida, 135 S. Ct. 178 (2014), remanded an intellectual disability claim to the Supreme Court of Florida for further consideration of Haliburton's case "in light of Hall."¹

¹ The Supreme Court of Florida had held, in an unpublished disposition, with regard to Haliburton:

Jerry Leon Haliburton, a prisoner under sentence of death, appeals the denial of a motion to vacate his death sentence on the ground that he is mentally retarded. . . . On September 19, 2006, relying on Adkins [sic] v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), Haliburton filed his second successive postconviction motion under Florida Rules of Criminal Procedure 3.851 and 3.203, seeking to vacate his death sentence on the ground that he is mentally retarded. On March 13, 2012, the trial court summarily denied Haliburton's motion because he failed to demonstrate that his IQ was 70 or below. We affirm. To prove mental retardation, a defendant must demonstrate "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Cherry v. State, 959 So. 2d 702, 711 (Fla. 2007) (quoting § 921.137(1), Fla. Stat.

Subsequently, the Florida Supreme Court remanded the case to the trial court "for an evidentiary hearing under Florida Rule of Criminal Procedure 3.203." Haliburton v. State, 163 So. 3d 509 (Table), 2015 WL 710683 (Fla. 2015). Consequently, this Court concludes that the Supreme Court of Florida has, at least implicitly, given Hall retroactive application.

Merits

Even if Hall is retroactively applied, the Court finds that it does not entitle Defendant to relief.² Most recently, in May 2015, Defendant was determined by Dr. Hyman Eisenstein to have a full scale IQ of 80. Dr. Eisenstein's report includes a table of previous IQ test results, showing full scale IQ scores of 92, 84, 86, 79, and 80. Indeed, in a previous opinion, the Supreme Court of Florida observed, "The evidence in this case shows Zack's lowest IQ score to be 79." Zack v. State, 911 So. 2d 1190, 1201 (Fla. 2005).

Defendant argues that Hall should be given a more expansive interpretation for those

(2002)). To satisfy the requirement of "significantly subaverage general intellectual functioning," the defendant must establish that he has an IQ of 70 or below. In Turner v. State, 46 So. 3d 568, 2010 WL 3802538 (Fla. 2010)(table), this Court stated that "[b]ecause the expert reports conclusively rebutted the first-prong of Turner's Atkins claim, the trial court did not err in summarily denying Turner's claim that he was mentally retarded." Haliburton scored 74 on the IQ test administered by his expert and submitted to the trial court as part of this claim. Haliburton has never scored 70 or below on any standardized intelligence test recognized under section 921.137(1), Florida Statutes (2006). Therefore, the trial court did not err in summarily denying Haliburton's claim. Haliburton also contends that this Court should overrule its decision in Cherry v. State, 959 So. 2d 702 (Fla. 2007), because it is unconstitutional. This Court has repeatedly rejected Haliburton's argument that imposing a bright-line cutoff IQ score of 70 for finding a defendant to be mentally retarded and ineligible to be executed is unconstitutional.

Haliburton v. State, 123 So. 3d 1146 (Fla. 2013)(Table), reh'g denied (Sept. 24, 2013), cert. granted, judgment vacated, 135 S. Ct. 178, 190 L. Ed. 2d 8 (2014) and order vacated on reconsideration, 163 So. 3d 509 (Fla. 2015).

2 Because the Court finds no merit in Defendant's claim, the Court does not address the State's argument regarding the "law of the case."

individuals with IQ scores higher than 75 because such scores may be misleading and not indicative of the true measure of an individual's abilities in cases such as Defendant's. However, that is not the holding of Hall. As observed by the Henry Court, "Hall squarely holds that it is 'the Court's independent assessment that an individual with an IQ test score '**between 70 and 75 or lower**' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning. . . . The Supreme Court never said that a petitioner who could only establish an IQ score of, say, 78 would be entitled anyway to make up the difference with other evidence of deficiencies.'" Henry at 1162 (emphasis added).

Defendant's IQ scores do not place him within the range of concern contemplated in the Hall decision. Consequently, the Court finds that, even if applied retroactively, Hall does not entitle Defendant to the relief he seeks.

Accordingly, it is hereby,

ORDERED and ADJUDGED that the "Successive Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" is **DENIED**. Defendant has thirty (30) days from the rendition of this order in which to file an appeal, should he so choose.

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida, this 8th day of July, 2015.


LINDA L. NOBLES
CIRCUIT JUDGE

LLN/ krw

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing order has been furnished by e-service (*unless otherwise indicated*) to:

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on this 8th day of July, 2015.

PAM CHILDERS

Clerk of the Circuit Court
IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR THE COUNTY OF ESCAMBIA, FLORIDA

Deputy Clerk

[Handwritten Signature]

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

MICHAEL DUANE ZACK, III,
Appellant,

CASE NO.: SC15-1756
Lower Tribunal No(s).:
171996CF002517XXXAXX

v.

STATE OF FLORIDA,
Appellee.

and

MICHAEL DUANE ZACK, III,

CASE NO.: SC16-1090
Lower Tribunal No(s).:
171996CF002517XXXAXX

v.

JULIE L. JONES, ETC.
Respondent.

_____/

APPELLANT'S MOTION FOR REHEARING

Appellant, MICHAEL DUANE ZACK, III, pursuant to Fla. R. App. P. 9.330, respectfully moves this Court to reconsider its opinion denying Mr. Zack's appeal and petition for writ of habeas corpus. Rehearing is appropriate because this Court has overlooked or misapprehended points of fact from the record. All other claims for relief previously presented to the Court are specifically argued again and no claim previously raised is hereby abandoned.

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I. This Court has misapprehended *Hall v. Florida* to have shifted the cutoff for IQ scores in intellectual disability claims from 70 to 75, and therefore overlooked all evidence of Mr. Zack’s intellectual disability.

This Court relied solely on Mr. Zack’s IQ scores in ruling that the trial court correctly found the significantly subaverage intellectual functioning prong dispositive of Mr. Zack’s intellectual disability claim. Specifically, this Court determined that Mr. Zack did not satisfy the first prong of intellectual disability, significantly subaverage intelligence, because his IQ scores were outside the standard error of measurement. This Court further held that since Mr. Zack’s test scores were outside of the test’s margin of error, the presentation any of evidence regarding the other two prongs, deficits in adaptive skills and the onset before age 18, did not cure his inability to satisfy the first prong.

Such a finding is directly contrary to *Hall*, which holds: “Florida’s rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant’s abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.” *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

Intellectual disability “is a condition, not a number.” *Hall*, 134 S. Ct. at 2001. *Hall* contains a broader holding which requires that the court consider all evidence

of intellectual disability before making their determination. An IQ score is not dispositive and “the defendant must be able to present additional evidence” of his condition. *Hall* at 1989. This Court appears to have misapprehended *Hall* to have established a new cutoff IQ score of 75. *Hall* did not simply shift the cutoff from 70 to 75, and *Hall* prohibits this Court from relying on IQ score alone and must look to other factors, such as his significant adaptive deficits.

The United States Supreme Court specifically stated in *Hall*:

This Court has held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. **This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.**

Hall v. Florida, 134 S. Ct. at 1990. (emphasis added).

A new rigid rule, simply shifting the cutoff from 70 to 75, likewise cannot withstand constitutional scrutiny. Mr. Zack has been on death row for 20 years and has never had a hearing under *Atkins* to properly evaluate his claim because the trial court and this Court continue to insist on evaluating his claim under a rigid rule deemed unconstitutional by the United States Supreme Court. This Court’s determination that Mr. Zack is not entitled to an evidentiary hearing based solely on his IQ scores, and without any consideration of additional evidence, goes against the holding in *Hall*.

Additionally, as this Court subsequently recognized on remand in *Hall v. State*, “the definition that matters most is the one used by mental health professionals in making” the intellectual disability determination. *Hall v. State*, 201 So. 3d 628, 637 (Fla. 2016), citing *Hall v. Florida*, 134 S. Ct. at 1993. And, “[a]s such, courts cannot disregard the informed assessments of the experts.” *Id.*, citing *Hall v. Florida*, 134 S. Ct. at 2000. However, in Mr. Zack’s case, this Court appears to be doing the very thing they cautioned against – disregarding the informed assessment of a qualified mental health expert who has diagnosed Mr. Zack with intellectual disability.

Mr. Zack has thus far been precluded from presenting any evidence of his intellectual disability, including such testimony by a mental health professional who evaluated him and subsequently diagnosed him with intellectual disability, as well as testimony by family members and individuals who knew Mr. Zack as a child, adolescent and young adult, and observed significant deficits in his adaptive skills.

As noted in *Hall*, “[p]ersons facing [this] most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” *Hall*, 134 S. Ct. at 2001. Accordingly, Mr. Zack should be given the opportunity for a full *Atkins* hearing to present his intellectual disability claim.

II. The Court’s opinion overlooked and/or misapprehended that Mr. Zack’s intellectual disability determination is subject to his Sixth Amendment right to a jury trial pursuant to *Hurst v. Florida* and *Hurst v. State*.

Recognizing this Court's recent ruling in *Oats v. Jones*, __ So. 3d __, 2017 WL 2291288 (Fla. May 25, 2017), Mr. Zack submits that this Court has overlooked the principles set forth by the United State Supreme Court in *Hurst v. Florida* and by this Court in *Hurst v. State*, which require that Mr. Zack's intellectual disability determination is subject to his Sixth Amendment right to a jury trial.

In *Oats*, this Court held: “Although *Atkins* held that the imposition of the death penalty against intellectually disabled individuals is unconstitutional, the United States Supreme Court left for the states ‘the task of developing appropriate ways to enforce the constitutional restriction’ established in *Atkins*. *Oats v. Jones*, __ So. 3d __, 2017 WL 2291288 at *2 (Fla. May 25, 2017), citing *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). As a result, the Florida Legislature enacted section 921.137, Florida Statutes, barring the execution of intellectually disabled defendants, and this Court adopted Florida Rule of Criminal Procedure 3.202 to provide a procedure for implementing *Atkins*. See §921.137(2), Fla. Stat. (2001).

However, the Florida Legislature's designation of the trial judge, rather than the jury, as the factfinder for intellectual disability determinations cannot trump an individual's Sixth Amendment right to a jury trial. *Oats* was wrongly decided in much the same way that *Bottoson v. Moore* was wrongly decided. See *Bottoson v. Moore*, 833 So. 2d 693 (2002), abrogated by *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Bottoson*, this Court declined to grant relief under *Ring v. Arizona*, 536

U.S. 584 (2002), because “the United States Supreme Court repeatedly has reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century...” *Bottoson*, 833 So. 2d at 695. Fourteen years later the United States Supreme Court abrogated this decision in *Hurst v. Florida*, holding Florida’s capital sentencing scheme unconstitutional, as violative of the Sixth Amendment right to a jury trial. Simply because the United States Supreme Court left it up to the states to implement a capital sentencing scheme, does not guarantee that it will be constitutionally sound. Nor does it give the states the power to trample on an individual’s right to a jury trial as guaranteed by the Sixth Amendment.

Under §921.137(2), Florida Statutes, “[a] sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined . . . that the defendant is intellectually disabled.” Section 921.137(4) provides that when a defendant raises intellectual disability as a bar to a death sentence and the judge finds that “the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of that determination.” Thus, Florida law provides that an intellectually disabled defendant is not eligible for a death sentence.

Hurst v. Florida, 136 S. Ct. at 622, held that the Sixth Amendment guarantees that all facts that are statutorily necessary before a judge is authorized to impose

death are subject to the capital defendant's constitutional right to a jury trial. As a result, the Florida Supreme Court in *Hurst v. State*, 202 So. 3d at 53, held that "the jury—not the judge—must be the finder of every fact, and thus every element necessary for the imposition of the death penalty." The Court further concluded that in Florida, "the penalty phase jury must be unanimous in making the critical findings **and recommendation** that are necessary **before a sentence of death may be considered by the judge or imposed.**" *Perry v. State*, 210 So. 3d 630, 634 (Fla. 2016) (quoting *Hurst v. State*, 202 So. 3d at 59) (emphasis added).

Whether a defendant is intellectually disabled is a question of fact as the Florida Supreme Court's decision in *Oats v. State*, 181 So. 3d 457 (Fla. 2015), made clear. There, the Court explained:

In reviewing the circuit court's determination that Oats is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). We "do [] not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007).

Oats v. State, 181 So. 3d at 456-66.

Hurst v. State applies to the determination of fact, i.e. the defendant's intellectual disability, which must be addressed and resolved before a death sentence can be imposed when properly raised by the defense under §921.137. The question

of whether Mr. Zack is intellectually disabled is subject to the Sixth Amendment right to a jury trial under *Hurst v. Florida*.

III. The Court’s opinion overlooked and/or misapprehended Mr. Zack’s right to retroactive application of the *Hurst* decisions because his conviction was final after *Apprendi v. New Jersey* was decided.

Rehearing is appropriate because this Court’s opinion overlooked and/or misapprehended, among other things, Mr. Zack’s right to retroactive application of the *Hurst* decisions because his conviction was final after *Apprendi v. New Jersey* was decided. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court “held that any fact that ‘expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict’ is an ‘element’ that must be submitted to a jury.” *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016) (quoting *Apprendi*, 530 U.S. at 494). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court “concluded that Arizona’s capital sentencing scheme violated *Apprendi*’s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death.” *Hurst v. Florida*, 136 S. Ct. at 621 (citing *Ring*, 536 U.S. at 591-93, 597). In *Hurst v. Florida*, the Supreme Court held, “The analysis the *Ring* Court applied to Arizona’s sentencing scheme applies equally to Florida’s.” 136 S. Ct. at 621-22.

Hurst v. Florida overruled the Supreme Court’s prior decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), as “irreconcilable **with *Apprendi***” (emphasis added), explaining:

Spaziano and *Hildwin* summarized earlier precedent to conclude that “the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.” *Hildwin*, 490 U.S., at 640-41, 109 S. Ct. 2055. **Their conclusion was wrong, and irreconcilable with *Apprendi*.** Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision—*Walton [v. Arizona]*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 [(1990)]—could not “survive the reasoning of *Apprendi*.” 536 U.S., at 603, 122 S. Ct. 2428. *Walton*, for its part, was a mere application of *Hildwin*’s holding to Arizona’s capital sentencing scheme. 497 U.S., at 648, 110 S. Ct. 3047.

Hurst v. Florida, 136 S. Ct. at 623 (emphasis added).

Mr. Zack’s death sentence became final on October 2, 2000, when the Supreme Court denied certiorari review. *Zack v. Florida*, 531 U.S. 858 (2000). This was **after** the Supreme Court decided *Apprendi*, the decision upon which both *Ring* and *Hurst v. Florida* are based. “Because Florida’s capital sentencing statute has essentially been unconstitutional since [*Apprendi* in 2000], fairness strongly favors applying *Hurst*, retroactively to that time.” *Mosley v. State*, 209 So. 3d 1248, 1280 (Fla. 2016). Neither *Mosley v. State* nor *Asay v. State*, 210 So. 3d 1 (Fla. 2016), addresses the fact that *Apprendi*, not *Ring*, is the foundation of *Hurst v. Florida*. The Court did not address this critical aspect of Mr. Zack’s petition for writ of habeas corpus in denying him the right that *Apprendi* recognized.

IV. The Court’s opinion overlooked and/or misapprehended Mr. Zack’s right to retroactive application of *Hurst v. Florida* and *Hurst v. State* under federal law.

A. *Hurst v. Florida*

Failing to apply *Hurst v. Florida* to Mr. Zack’s death sentence violates the Eighth Amendment. As the several members of this Court noted, failing to apply retroactivity uniformly to those whose cases became final both before and after *Ring v. Arizona* cannot withstand constitutional scrutiny. See *Asay*, 210 So. 3d at 31 (Lewis, J., concurring in result) (“As Justice Perry noted in his dissent, there is no salient difference between June 23 and June 24, 2002 – the days before and after the case named *Ring* arrived ... However, that is where the majority opinion draws its determinative, albeit arbitrary line. As a result, Florida will treat similarly situated defendants differently – here, the difference between life and death – for potentially the simple reason of one’s docket delay. Vindication of these constitutional rights cannot be reduced to either fatal or fortuitous accidents of timing.”); *Id.* at 32 (Pariente, J., concurring in part and dissenting in part) (“For these reasons, I conclude that *Hurst* should apply to all defendants who were sentenced to death under Florida’s prior, unconstitutional capital sentencing scheme. The majority’s conclusion results in an unintended arbitrariness as to who receives relief depending on when the defendant was sentenced or, in some cases, resentenced.”); *Id.* at 37 (Perry, J., dissenting) (“In my opinion, the line drawn by the majority is arbitrary and cannot withstand scrutiny under the Eighth Amendment because it creates an arbitrary application of law to two groups of similarly situated persons.”).

Thus, as recognized by three justices of this Court, treating Mr. Zack differently than those individuals whose cases became final after *Ring*, and depriving him of the benefit of *Hurst v. Florida*, based solely on when his conviction and sentence became final violates the Eighth Amendment.

B. *Hurst v. State*

In addition to the retroactive application of *Hurst v. Florida*, Mr. Zack has a separate right to retroactive application of *Hurst v. State* pursuant to the Eighth Amendment and the Florida Constitution.

In *Hurst v. State*, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now requires jury “unanimity in a recommendation of death in order for death to be considered and imposed.” 202 So.3d at 61. Quoting the United States Supreme Court, *Hurst v. State* noted, “the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’” *Id.* Then, from a review of the capital sentencing laws throughout the United States, *Hurst v. State* found that a national consensus reflecting society’s evolving standards of decency was apparent:

The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the Court in *Hurst v. State* concluded:

the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63.

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). “This is because ‘[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.’ *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the “near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.” *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death can

receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor of a life sentence, cannot be executed under the Eighth Amendment. Mr. Zack is within the protected class. At his penalty phase, one juror voted in favor of the imposition of a life sentence. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment.

Under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), and under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), this Court's ruling in *Hurst v. State* must be applied retroactively. It is not constitutionally permissible to execute a defendant who is within a class that society's evolving standards of decency has concluded to be ineligible for a death sentence. In *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), this Court found retroactivity must be accorded to an Eighth Amendment decision when it "places beyond the State of Florida the power to impose a certain sentence" against a category or subgroup of people. Here, the *State of Florida* under *Hurst v. State* cannot carry out a death sentence on capital defendants who had one or more of their jurors at their capital trial vote in favor of a life sentence and against recommending a death sentence. Because one juror at Mr. Zack's penalty phase formally voted *against* the imposition of a death sentence, Mr. Zack's sentence of death stands in violation of the Eighth Amendment and the Florida Constitution.

WHEREFORE, Mr. Zack respectfully requests this Court to grant rehearing and reconsider the opinion of June 15, 2017, denying Mr. Zack's appeal and petition for writ of habeas corpus.

Respectfully submitted, this 30th day of June, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day June 30, 2017, via electronic service to Charmaine Millsaps, Assistant Attorney General, at Charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com and by U.S. Mail to Appellant, Michael Duane Zack, III, DOC No. 124439, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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APPENDIX F

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.

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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 at 37). 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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ATTACHMENT

Please date stamp and return

17-5575
No. _____

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

Supreme Court, U.S.
FILED

AUG 10 2017

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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

All parties appear in the caption of the case on the cover page.

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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

¹The 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

²The 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 opinion³ 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

³The 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.

⁴References 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.

⁵An 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").

⁶Wright'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.

⁷Dr. 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

⁸Wright 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

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 "Flynnndom" 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.

⁹See *supra* note 8.

¹⁰See *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

¹¹Intellectually 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

¹²On 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

¹³As 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

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.

¹⁵The 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.

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 "Flynnndom" 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*." *Moore*, 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.

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). Committing 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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8/10/17

Dated

APPENDIX G

In the Supreme Court of Florida

MICHAEL DUANE ZACK,

Appellant,

v.

CASE NO. SC15-1756

STATE OF FLORIDA,

Appellee.

_____/

STATE'S RESPONSE TO MOTION TO RECALL MANDATE

On November 6, 2017, Zack, represented by Capital Collateral Regional Counsel - North, filed a motion to recall the mandate in this capital case. The motion asserted that the mandate should be recalled in light of the United States Supreme Court remanding the case of *Wright v. State*, 213 So.3d 881 (Fla. 2017), to this Court for reconsideration of the intellectual disability claim in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017). See *Wright v. Florida*, 2017 WL 348076 (Oct. 16, 2017) (granting writ, vacating judgment, and remanding to the Florida Supreme Court).

In this case, this Court previously affirmed the trial court's denial of the claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014), because "Zack provided several IQ scores that were all well outside the standard error of measurement." *Zack v. State*, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017). This Court explained that for *Hall* to apply and require an evidentiary hearing, "a defendant's scores must first fall within the test's acknowledged and inherent margin of error." *Id.* Here, as this Court noted, "all of the scores presented — 92,

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84, 86, 79, and 80 — are outside of the test's margin of error.” *Id.* This Court observed that “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.” *Id.* In other words, this Court concluded that Zack failed the first prong of the test for intellectual disability.

Moore does not alter this Court’s observations or conclusions in any manner. All of this Court’s reasoning in its original opinion remains valid in the wake of *Moore*. Furthermore, Zack’s case is different from either *Moore* or *Wright*. Both *Moore* and *Wright* focused on the second prong of the test for intellectual disability which is adaptive functioning. Indeed, the *Moore* Court explicitly noted that the third prong of onset was not at issue in that case. In contrast, in this case, the focus is on the first and third prongs of the test. Because the focus in this case is the other prongs, not the second prong as in the cases of *Wright* and *Moore*, neither *Wright* nor *Moore* supply a basis for reconsideration of this Court’s prior decision in this case, much less recalling the mandate.

Regarding the first prong of the test for intellectual disability, which is current intellectual functioning, Zack’s current IQ score is 80 based on an IQ test taken in 2015. Indeed, all of Zack’s IQ scores are above 75, meaning he necessarily fails the first prong.

Regarding the third prong of the test, which is onset of the disability as a minor, Zack’s IQ when he was a teenager was 92. Zack’s claim of intellectual disability is totally negated by this one score. Under this Court’s recent decision in *State v. Morrison*, __ So.3d __, 2017 WL 5494615, SC15-1880 (Fla. November 16, 2017), the third prong alone is determinative. Furthermore, the onset prong is often the most reliable evidence of intellectual disability because it is generated

at a time when there is no incentive to slant the evidence, as the Pennsylvania Supreme Court has explained. Zack necessarily fails the third prong as well.

This Court properly affirmed the trial court's summary denial of the intellectual disability claim and that affirmance is not affected by the decision in *Moore*. *Moore* does not impact this Court's prior decision in this case in any manner and therefore, the motion to recall should be denied.

Penalty phase

At the penalty phase, Dr. Larson, who was called by the defense, testified that Zack's IQ was a full scale of 92. (T. X. 1866-1867). According to Dr. Larson, Zack's performance score was 104 and his verbal score was 84. (T. X. 1867). Dr. Mings, a neuropsychologist, who was called by the State, testified at the penalty phase that Zack had a full scale IQ of 86. (T. XI 1890).

Direct appeal

The Florida Supreme Court affirmed the convictions and death sentence. *Zack v. State*, 753 So.2d 9 (Fla. 2000). The United States Supreme Court denied certiorari review on October 2, 2000. *Zack v. Florida*, 531 U.S. 858, 121 S.Ct. 143, 148 L.Ed.2d 94 (2000).

Initial postconviction motion

On October 18, 2002, Zack filed his first amended 3.850 motion raising six claims in the state trial court. While Zack's collateral motion was pending in state court, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of a mentally retarded person is cruel and unusual punishment in violation of the Eighth Amendment.

During the postconviction proceedings, Brett Turner, Ph.D. conducted a neuropsychological evaluation for collateral defense counsel. Dr. Turner performed his own WAIS-III IQ test in 2002, which showed Zack had a full scale IQ of 79. (PC II 253). However, the Dr. Turner's written report also refers to a prior IQ test, performed in 1980, when Zack was eleven years old, showing his full scale IQ score of 92. (PC II 241-256 at 245).

In June 2003, the trial court denied Zack's rule 3.850 postconviction motion, and the Florida Supreme Court affirmed that ruling on appeal. *Zack v. State*, 911 So.2d 1190 (Fla. 2005). The Florida Supreme Court noted that the "evidence in this case shows Zack's lowest IQ score to be 79." *Zack*, 911 So.2d at 1201. The Florida Supreme Court directed Zack to file a motion pursuant to Florida Rule of Criminal Procedure 3.203 raising the *Atkins* claim. *Zack*, 911 So.2d at 1202.

Successive postconviction motion proceedings

On December 1, 2004, Zack filed a successive motion raising an *Atkins* claim. The state trial court denied the *Atkins* claim without an evidentiary hearing. The state trial court found: "A review of the expert trial testimony on this issue shows that not one expert found Defendant's IQ to be near the statutory figure, 70, which would be required to establish mental retardation. Because Defendant is not mentally retarded as defined by Fla. Stat. 921.137, he is not entitled to the Eighth Amendment protections afforded mentally retarded persons who may face the Death Penalty."

The Florida Supreme Court's first decision regarding intellectual disability

The Florida Supreme Court affirmed the denial of the *Atkins* claim. The Florida Supreme Court's order provides:

Michael Duane Zack, III, a prisoner under sentence of death, appeals the circuit court's denial of his successive motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. Zack requests that we allow him an opportunity to file a successive motion for postconviction relief based on a claim of mental retardation, pursuant to Florida Rule of Criminal Procedure 3.203 and *Atkins v. Virginia*, 536 U.S. 304 (2002).

Zack asserts that the circuit court erred by dismissing his successive motion for postconviction relief with prejudice instead of holding it in abeyance until the proceedings before us on his initial motion for postconviction relief were final. Zack also asserts that he has produced sufficient evidence for a claim of mental retardation.

In its order dismissing Zack's successive motion for postconviction relief, which raised a mental retardation claim, the circuit court properly recognized that it lacked jurisdiction to entertain the motion because Zack's initial motion for postconviction relief raised a similar claim of mental retardation under *Atkins*, and the appeal on the denial of this motion was pending in this Court. However, the circuit court erred by considering the merits of the motion and dismissing the motion with prejudice because it lacked the jurisdiction to do so. See *Parks v. State*, 816 So. 2d 219 (Fla. 1st DCA 2005). However, we find that although the circuit court erred in dismissing Zack's successive motion for postconviction relief with prejudice, this error was harmless because Zack had an opportunity to present an *Atkins* claim in his initial postconviction motion and it was found to be without merit. The circuit court's determination was affirmed by this Court. See *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). Zack has not provided any new evidence of mental retardation and previous evidence demonstrates that his IQ was well above the statutory required figure of 70 or below. See *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000) (accepting expert testimony that in order to be found mentally retarded, an individual must score 70 or below on an IQ test). Accordingly, we affirm the circuit court's denial of postconviction relief.

Zack v. State, SC05-963 (Fla. Sept. 20, 2007).

Federal habeas proceedings

Zack then filed a federal habeas petition which raised an *Atkins* claim. *Zack v. Crosby*, 607 F.Supp.2d 1291 (N.D. Fla. Nov. 17, 2008). The federal district court found most of the claims in the petition to be untimely but rejected the *Atkins* claim on the merits. *Zack v. Crosby*, 3:05cv369-RH Doc. #36. The district court found:

Mr. Zack has failed to put forward any evidence to establish that he satisfies the first prong of an *Atkins* claim. At trial, Mr. Zack's own expert, Dr. Larson, testified that Mr. Zack's IQ was 84 based on the Wechsler Intelligence Scale. (R. at tab QQ at 1854, 1868). Dr. Larson also reviewed Mr. Zack's score from the Wechsler Intelligence Scale for Children that was

administered when Mr. Zack was about 12 years old. *Id.* at 1865-67. That score reflected an IQ of 92. *Id.* The state's expert, Dr. Ming, testified that Mr. Zack's IQ was 86, determining that the improvement was due to the practice effect. *Id.* at 1978-79, 1986. During the postconviction proceedings, Mr. Zack arranged another examination—administered after *Atkins*—which found that Mr. Zack's IQ was 79. (R. at tab CC, page 13 of Neuropsychological Evaluation.)

(Doc. #36 at 10). The district court observed that the “record developed at trial refutes Mr. Zack’s allegation that he is mentally retarded.” (Doc. #36 at 12). The district court concluded: “As the record already makes clear, four Wechsler Intelligence Scale tests have uniformly concluded that Mr. Zack’s IQ is significantly above the minimum threshold for mental retardation.” (Doc. #36 at 11).

The Eleventh Circuit, in an en banc opinion, affirmed the dismissal of many of the claims in the habeas petition as untimely. *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013) (en banc). Zack did not appeal the denial of his intellectual disability claim to the Eleventh Circuit. The United States Supreme Court denied certiorari review of the federal habeas petition on October 7, 2013. *Zack v. Crews*, 134 S.Ct. 156 (2013).

Third successive postconviction motion

On May 26, 2015, Zack, now represented by Dawn Macready of CCRC - North, filed a third successive postconviction motion raising a claim of intellectual disability based on *Hall v. Florida*, 134 S.Ct. 1986 (2014).¹ (PC Vol. I 109-126). On June 9, 2015, the State filed an answer. (PC Vol. I 182-193). On July 2, 2015,

¹ Zack was represented by R. Glenn Arnold in the initial postconviction proceedings in the state trial court. Zack was then represented by Linda McDermott on appeal in the Florida Supreme Court and in federal court. On January 25, 2015, the trial court permitted McDermott to withdraw and appointed CCRC-North as counsel of record.

the trial court conducted a *Huff* hearing on the motion. (PC Vol. I 194-195; Vol. II 205-219).

The trial court summarily denied the successive postconviction motion raising the *Hall* claim. (PC Vol. II 220-224). The trial court first addressed the retroactivity of *Hall*, relying on *Haliburton v. State*, 163 So.3d 509 (Fla. 2015)(unpublished), concluded that the Florida Supreme Court “implicitly” treated *Hall* as retroactive. (PC Vol. II 221-222). Alternatively, the trial court addressed the merits of the claim, concluding Zack was not entitled to any relief. (PC Vol. II 222-223). The trial court noted that most recently Zack was determined by Dr. Eisenstien to have a full scale IQ of 80. (PC Vol. II 222). The trial court noted the various IQ scores as 79, 80, 84, 86, and 92 with the lowest one being 79. (PC Vol. II 222). Zack argued, based on his history of significant difference between his verbal IQ scores and his performance IQ scores, his IQ scores may not be indicative of his true abilities and that *Hall* should be given a “more expansive interpretation” to cover such types of IQ scores. (PC Vol. II 220, 222, 223). But the trial court rejected that expansion of *Hall* because that was “not the holding of *Hall*.” (PC Vol. II 223). Rather, as the trial court observed, “*Hall* squarely holds” that individuals with IQ scores “**between 70 and 75 or lower**” are entitled to present additional evidence in support of a claim of intellectual disability. (PC Vol. II 223 emphasis in original). The trial court noted that the Supreme Court in *Hall* never said a petitioner with an IQ of 78 would be entitled in “anyway to make up the difference with other evidence of deficiencies.” (PC Vol. II 223). The trial court concluded that Zack’s IQ scores did “not place him within the range of concern contemplated in the *Hall* decision.” (PC Vol. II 223). The trial court summarily denied the successive motion. (PC Vol. II 223).

Appeal of third successive motion

Zack appealed the trial court's denial of his *Hall* claim to the Florida Supreme Court. On June 15, 2017, this Florida Supreme Court affirmed the trial court's summary denial of the *Hall* claim. This Florida Supreme Court concluded:

Zack's first claim is based on the trial court's summary denial of his motion pursuant to a rule of law that has now been found unconstitutional under *Hall*. During the pendency of this case, we determined that *Hall* applies retroactively as a development of fundamental significance. *Walls v. State*, 213 So.3d 340, 346 (Fla. 2016).

A postconviction court's decision on whether to grant an evidentiary hearing on a claim is a pure question of law, reviewed *de novo*. *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013). A claim may be summarily denied if it is legally insufficient or positively refuted by the record. *Id.* at 1161. To prevail on a claim of intellectual disability, a defendant must establish three elements: (1) significantly subaverage general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) manifesting prior to age 18. § 921.137, Fla. Stat. (2016); Fla. R. Crim. P. 3.203.

Hall recognizes that intellectual disability “is a condition, not a number.” *Hall*, 134 S.Ct. at 2001. In a recent opinion, we found that *Hall* requires courts to consider all three prongs of intellectual disability in tandem and that no single factor should be dispositive of the outcome. *See Oats v. State*, 181 So.3d 457, 459 (Fla. 2015). However, *Hall* also states that a “defendant must be able to present additional evidence of intellectual disability” where “a defendant's I.Q. test score falls within the test's acknowledged and inherent margin of error.” *Hall*, 134 S.Ct. at 2001. Generally, the standard error of measurement is approximately five points. *Id.* at 1998 (citing to Diagnostic and Statistical Manual of Mental Disorders 28 (rev. 3d ed. 1987)). Thus, an “I.Q. score of 70 is considered to represent a band or zone of 65 to 75.” *Id.*

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. At the *Huff* hearing, Zack presented his full range of scores, as well as evidence of adaptive deficits before age 18. 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. Accordingly, we affirm the trial court's summary denial of Zack's intellectual disability claim.

Zack's second claim is that the trial court erred in dismissing his motion on the basis that his I.Q. was too high for an *Atkins* hearing without

considering other evidence as required by *Hall*. In reviewing the trial court's determination that Zack is not intellectually disabled, "this Court examines the record for whether competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So.3d 891, 895 (Fla. 2011). We do not "reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So.2d 146, 149 (Fla. 2007). However, questions of law are reviewed *de novo*. *Herring*, 76 So.3d at 895.

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. Consequently, we affirm the trial court's determination.

Zack v. State, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017).

On June 30, 2017, Zack filed a motion for hearing. On October 12, 2017, the Florida Supreme Court denied the rehearing.

On October 30, 2017, the Florida Supreme Court issued the mandate in this case. On November 6, 2017, Zack filed the current motion to recall the mandate. The motion asserted that the mandate should be recalled in light of the United States Supreme Court remanding the case of *Wright* to this Court for reconsideration in light of *Moore*. This is the State's response to the motion to recall the mandate.

Merits

Zack asserts that this Court should recall the mandate in light of the United States Supreme Court remanding *Wright* to this Court for reconsideration in light of the recent decision in *Moore v. Texas*. But Zack's case is different from either *Moore* or *Wright*. Both *Moore* and *Wright* focused on the second prong of adaptive functioning. But in this case the focus is on the first and third prongs. All of Zack's IQ scores are above 75, meaning he necessarily fails the first prong of the test for intellectual disability. And Zack's IQ when he was a teenager was 92 meaning he also necessarily fails the third prong of the test as well. Because the focus of *Moore* and *Wright* are different than the focus in this case, neither *Moore* nor *Wright* supply as basis for this Court to reconsider its earlier decision rejecting the intellectual disability claim. Therefore, the motion to recall should be denied.

Motions to recall mandates

Appellate courts have the discretion to recall their mandates within 120 days of issuing the mandate. § 43.44, Fla. Stat. (2017) (providing: "A mandate may not be recalled more than 120 days after it has been issued."). But the practice should be limited to "rare and extraordinary" cases. *Cf. Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (holding that the federal appellate court abused its discretion in recalling the mandate in a federal habeas capital case and explaining that while federal court of appeals have the discretion to recalls mandates, the appellate court abuses its discretion unless it acts to avoid a miscarriage of justice such as a strong showing of actual innocence and observing that such a practice is limited to the "most rare and extraordinary case"). Florida appellate courts should hesitate to exercise their discretion widely on pain of motions to recall mandates becoming routine and amounting to second motions for rehearings in violation of the rules. Fla. R. App. P. 9.330(b) (providing: "A party shall not file more than 1

motion for rehearing or for clarification of decision and 1 motion for certification with respect to a particular decision.”). Here, Zack previously filed a motion for rehearing which this Court denied before filing the current motion to recall the mandate.

Neither *Hall* nor *Moore* apply to cases, such as this, where **all** the IQ scores are over 75. Three of Hall’s IQ scores were below 75 and one of Moore’s two valid IQ scores was below 75. Zack’s scores were 92, 84, 86, 79, and 80. As the federal district court observed, all the IQ scores are “significantly” above the threshold for intellectual disability. Nor does either *Hall* nor *Moore* apply to cases, such as this, where the third prong of onset, alone and definitively, establishes the defendant is not intellectually disabled. The third prong was not at issue in either *Hall* or *Moore*. Furthermore, as will be explained in more detail, the holding in *Moore* is unique to Texas and does not apply to Florida. So, a motion to recall the mandate is not a proper vehicle to assert a claim when the new case relied upon in the motion does not apply at all.

Moore v. Texas

The motion asserts *Moore v. Texas*, 137 S.Ct. 1039 (2017), as the basis for recalling the mandate. In *Moore*, the United States Supreme Court held that the additional factors used by Texas courts to determine intellectual disability, which were an “invention” of court that were not “aligned” with the medical community’s views, created an unacceptable risk that a person with intellectual disabilities will be executed in violation of the Eighth Amendment. Moore was sentenced to death but argued in postconviction that he was intellectually disabled and therefore exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The state postconviction court held an evidentiary hearing in 2014 and then made factual

findings and determined that Moore was intellectually disabled using the current clinical standards. *Moore*, 137 S.Ct. at 1045-46.

But a Texas appellate court reversed using the additional factors from the earlier case of *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The Texas appellate Court suggested other cause for Moore's adaptive deficits rather than intellectual disability such as abusive childhood, undiagnosed learning disorders, multiple elementary-school transfers, racially motivated harassment and violence at school, and a history of academic failure, drug abuse, and absenteeism. *Id.* at 1047. The United States Supreme Court reversed and remanded.

Texas had adopted the 1992 edition of the American Association on Mental Retardation (AAMR) manual's definition of intellectual disability as the legal standard for determining intellectual disability, but Texas courts also looked at "seven evidentiary factors" that were not part of the clinical definition from *Ex parte Briseno*. *Moore*, 137 S.Ct. at 1046. The additional *Briseno* factors were: 1) did those who knew the person best during the developmental stage — his family, friends, teachers, employers, authorities — think he was mentally retarded at that time, and, if so, act in accordance with that determination; 2) has the person formulated plans and carried them through or is his conduct impulsive; 3) does his conduct show leadership or does it show that he is led around by others; 4) is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable; 5) does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject; 6) can the person hide facts or lie effectively in his own or others' interests; and 7) putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose. *Id.* at 1046, n.6. The *Briseno* Court did not cite to any authority, medical or judicial, as the source for these factors. *Id.* at

1046. The additional *Briseno* factors were in the Supreme Court's words, "wholly nonclinical." *Id.* at 1053. The Supreme Court also noted that no state legislature had adopted the *Briseno* factors or any similar factors. *Id.* at 1052. The Court noted that Texas itself does not follow *Briseno* in other contexts, such as assessing students for intellectual disabilities. *Id.* The Court characterized the *Briseno* factors as an "outlier." *Id.* The Court found that the state trial court's use of the *Briseno* factors deviated from current clinical standards and from the older clinical standards as well. *Id.* at 1050. The Court concluded that both by "design and in operation, the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051.

The *Moore* Court explained that, while the views of medical experts do not "dictate" a definition of intellectual disability determination, any definition must be "informed" by the medical community's definition and a State's definition may not "disregard" the medical definition. *Moore*, 137 S.Ct. at 1048-49. And, while States have "some flexibility" in the definition, they do not have "unfettered discretion," and the "medical community's current standards supply one constraint on States' leeway." *Id.* at 1052-53.

The majority specifically noted that the third prong of onset was "not at issue." *Moore*, 137 S.Ct. at 1045, n.3 (stating the "third element is not at issue here"). So, the third prong of onset before 18 years of age was not discussed by the *Moore* Court.

The Texas appellate Court found only two of Moore's IQ scores to be valid, a 78 and a 74, but then improperly discounted the lower end of the standard error of measurement range associated with those scores. *Moore*, 137 S.Ct. at 1047. The High Court noted that Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79. *Id.* at 1049. The High Court explained that "*Hall* instructs that, where an IQ score is close to, but above, 70, courts must

account for the test's "standard error of measurement." *Moore*, 137 S.Ct. at 1049. The majority explained that "**because** the lower end of Moore's score range falls at or below 70," the Texas court "**had** to move on to consider Moore's adaptive functioning." *Id.* at 1049 (citing *Hall*, 134 S.Ct. at 2001) (emphasis added). The *Moore* Court stated that "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." *Id.* at 1050 (emphasis added).

The Court then addressed the adaptive functioning prong at some length faulting the Texas appellate court for emphasizing Moore's adaptive strength rather than his adaptive *deficits* as the clinical community does. *Moore*, 137 S.Ct. at 1050 (emphasis in original) (citing AAIDD-11, at 47; DSM-5, at 33, 38; and AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)). The High Court noted that the Texas appellate court had stressed Moore's improved behavior in prison but clinicians caution against reliance on adaptive strengths developed in a controlled setting, such as prison. *Id.* at 1050. The High Court also criticized the Texas appellate court using child abuse to discount the adaptive functioning as backwards because clinicians rely on risk factors such a child abuse as support for a finding of intellectual disability further, not to counter it. *Id.* at 1051. The High Court explored the other ways the Texas appellate court "departed from clinical practice" such as its treatment of other mental health conditions, such as a personality disorder, explaining that the existence of mental health conditions is "not evidence that a person does not also have intellectual disability." *Id.*

Chief Justice Roberts in his dissenting opinion observed that the Court unanimously agreed that the *Briseno* factors were an "unacceptable" method of

enforcing the guarantee of *Atkins*, and that the state trial court erred in using them to analyze adaptive deficits. *Moore*, 137 S.Ct. at 1053 (Roberts, C.J., dissenting). The dissent agreed that the *Briseno* factors were “incompatible” with the Eighth Amendment. *Id.* at 1060.

The dissent disagreed with the majority about the first prong, not the second adaptive functioning prong. *Id.* at 1060-61. The dissent, after discounting several IQ tests as being unreliable for various reasons, noted that the remaining valid IQ scores of 78 and 74 were not sufficient to establish the first prong.

The dissent also took issue with the majority basing its decision solely on what it deems to be medical consensus about intellectual disability. *Id.* at 1054. The dissent stated that while clinicians, not judges, should determine clinical standards, judges, not clinicians, should determine legal standards of the Eighth Amendment. *Id.* The dissent noted that the American Association on Intellectual and Developmental Disabilities (AAIDD)’s current definition of intellectual disability no longer included the requirement that adaptive deficits be related to intellectual functioning but the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders still required that the adaptive deficits be related. *Id.* at 1055 citing DSM-5, 38 (5th ed. 2013). The dissent would have relied on legislative definitions, as is standard in Eighth Amendment analysis, not medical definitions. *Id.* at 1058-60.

The dissent also noted that the Court previously in *Hall* reached no consensus when multiple IQ scores are involved. The majority in *Hall* had only noted that “the analysis of multiple IQ scores jointly is a complicated endeavor.” *Moore*, 137 S.Ct. at 1061, n.1 (quoting *Hall*, 134 S.Ct. at 1995)).

Moore's holding does not apply to Florida

Moore does not apply to Florida. Florida does not use the *Briseno* factors or anything equivalent to those factors. Florida, unlike Texas, limits its definition to the statute which was based on the clinical definition. The problem in *Moore* was that the Texas state courts had created additional factors to determine intellectual disability that were not based on any clinical considerations. But that problem does not exist in Florida. Florida courts have not added factors that are not in the statutory test for intellectual disability and the statute itself is based on the clinical definition.

Under Florida's test for intellectual disability, a defendant must demonstrate “(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen.” *Glover v. State*, 226 So.3d 795, 808 (Fla. 2017) (citing *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016); Fla. R. Crim. P. 3.203; and § 921.137(1), Fla. Stat. (2013)). Florida does not use any additional factors, much less the non-clinical *Briseno* factors, in either its caselaw or statute. Florida’s definition of intellectual disability is “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.” *Jones v. State*, __ So.3d __, 42 Fla. L. Weekly S830, 2017 WL 429637042 (Fla. Sept. 28, 2017) (citing § 921.137(1), Fla. Stat. (2015)). “Significantly subaverage general intellectual functioning” is defined as “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.” *Id.* Adaptive behavior “means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.” *Id.*

This Court's definition is based exclusively on the statute and the statute is based exclusively on clinical factors including those used by the Agency for Persons with Disabilities. In contrast, Texas used different factors for determining intellectual disability in the death penalty than in other contexts. Florida does not. Florida's statutory definition of intellectual disability in the death penalty context cross-references Florida's statutory definitions for other purposes. For these reasons, the basic holding of *Moore* does not apply to Florida.

Bright-line cut-off after *Hall* and *Moore*

Opposing counsel argues in the motion to recall that this Court improperly established a bright-line rule. But it was not this Court that established the current bright-line rule, it was the United States Supreme Court in *Hall* that established the current bright-line rule. *Hall* merely adjusted the bright-line rule to include the statistical error of measurement (SEM). The United States Supreme Court did not abolish the bright-line rule in *Hall*. Rather, the *Hall* Court increased the cut-off from 70 to 75 to account for the SEM. The bright-line went from 70 to 75 under *Hall* in recognition of the fact that an IQ score of 75 could actually be an IQ of 70 due to the SEM. Indeed, the *Hall* Court was generous in creating a default cut-off of 75.²

Moore did not modify *Hall* regarding the cut-off. To the contrary, the *Moore* Court wrote that “*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement.” *Moore*, 137 S.Ct. at 1049. The *Moore* Court highlighted that it is only when the IQ scores are

² A court should not automatically employ a statistical error of measurement of ± 5 . Most IQ tests have more detailed SEM that are less than five points. For example, the SEM at 95% confidence interval for the WAIS-IV is 2 or 3 points, not 5 points. If the actual SEM for a particular test IQ is available, it should be used rather than the *Hall* ± 5 point default SEM.

“close to” 70 that a court even needs to treat the IQ score as range including the SEM.

Opposing counsel asserts that because intellectual disability is a condition not a number, all capital defendants are entitled to an evidentiary hearing to explore the other prongs of the test for intellectual disability. Under this view, even a capital defendant with an IQ score of 160, which is considered genius level, would be entitled to an evidentiary hearing to explore his adaptive functioning. This assertion is simply contrary to the United States Supreme Court’s own reading of their earlier opinion in *Hall*. The IQ score must be close to 70 for *Hall* or *Moore* to apply.

Neither *Hall* nor *Moore* require evidentiary hearing for defendants whose scores are all above 75. The *Hall* Court stated that this “Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *Hall*, 134 S.Ct. at 2001. Other courts have read *Hall* as only requiring evidentiary hearings when at least one of the IQ score is within the SEM. *United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) (reading *Hall* as requiring lower courts to consider evidence of adaptive functioning if even one valid IQ test score falls to 70 or below considering the SEM). Opposing counsel cites no case taking the position that defendants with multiple scores all above 75 are entitled to an evidentiary hearing. A capital defendant who does not have a single score within the SEM range is not entitled to an evidentiary hearing to explore the other prongs because he necessarily is not intellectually disabled. Contrary to opposing counsel’s argument, there is still a bright-line cut-off regarding the first prong after *Hall* and *Moore* and *Zack* fails to meet it.

Multiple IQ scores

The United States Supreme Court has observed that “the analysis of multiple IQ scores jointly is a complicated endeavor.” *Hall*, 134 S.Ct. at 1995. This case, in this Court’s words, involves “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.” *Zack v. State*, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017). This case involves numerous IQ scores taken at different ages over a span of three decades and using different IQ tests, not a single IQ score. Here there are five IQ scores, not the two scores found valid in *Moore*. *Hall* involved IQ scores of 71, 72, 73, and 80, all but one of which was within the SEM. But all five of Zack scores are outside the SEM.

Multiple IQ scores using different tests over a span of years including scores from youth are a more accurate indicator of actual IQ than the SEM. *Hall*, 134 S.Ct. at 2011 & n.13 (Alito, J., dissenting) (noting the “well-accepted view is that multiple consistent scores establish a much higher degree of confidence”). The SEM is important in cases with only one or two IQ scores, it is not as important in cases with numerous IQ scores such as this one.

Zack’s five IQ scores were 92, 84, 86, 79, and 80. The average of the five scores is 84.2 and the mean is 85.5. Zack’s IQ is approximately 85, which is 10 points above the cut-off of 75. Zack’s cumulative IQ score establishes that he is not intellectual disabled.

Opposing counsel asserts that the difference between the performance scores and the verbal scores makes the IQ tests unreliable but this argument does not account for the multiple scores.

First prong of subaverage intellectual functioning

Under Florida's three-prong test for intellectual disability, a defendant must demonstrate "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Glover v. State*, 226 So.3d 795, 808 (Fla. 2017) (citing *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016); Fla. R. Crim. P. 3.203; and § 921.137(1), Fla. Stat. (2013)).

Zack fails the first prong of significantly subaverage general intellectual functioning. Zack's current IQ score as established by an IQ test taken in 2015 is 80, which is five points above the cut-off established in *Hall* of 75.

As this Court noted in its original opinion, the scores here are "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." *Zack v. State*, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017). Zack's scores were 92, 84, 86, 79, and 80. Considering the scores individually, none of the five scores are close to the *Hall* cut-off of 75. None of the five scores is within the SEM of ± 5 points. Even the lowest score of 79 is four points above the cut-off of 75. Not a single one of the five IQ tests taken over a 35 year period from 1980 until 2015 establish intellectual disability.

And considering the scores cumulatively results in an IQ of approximately 85, which is 10 points higher than the *Hall* cut-off of 75. For this reason **alone**, Zack does not qualify as intellectually disabled under Florida law. *Wright v. State*, 213 So.3d 881, 898 (Fla. 2017) (holding that Wright failed to prove that he is of subaverage intellectual functioning and for "this reason **alone**, Wright does not qualify as intellectually disabled under Florida law") (emphasis added). Zack fails the first prong.

Third prong of onset

The third prong of the test for intellectual disability requires onset of the condition before 18 years of age. *Glover v. State*, 226 So.3d 795, 808 (Fla. 2017) (noting the third prong of Florida test for intellectual disability is “manifestation of the condition before age eighteen”); see also DSM-V at 33 (requiring “[o]nset of intellectual and adaptive deficits during the developmental period”); AAIDD 2010 Manual at 1 (“This disability originates before 18.”). Neither *Hall* nor *Moore* apply to cases such as this where the third prong of onset definitively establishes that the capital defendant is not intellectually disabled. *Moore* explicitly stated that the third prong of onset was not at issue in that case but it is the determinative issue in this case.

The onset prong is often the most reliable evidence of intellectual disability because it is generated at a time when there is no incentive to slant the evidence. And IQ scores are often the most objective measure of intellectual ability unlike the highly subjective adaptive functioning prong. In *Commonwealth v. Hackett*, 99 A.3d 11 (Penn. 2014), the Pennsylvania Supreme Court held that the evidence did not support a finding of intellectual disability. The trial court had found the capital defendant was intellectually disabled and reduced his sentence to life. The Pennsylvania Supreme Court reversed because the trial court’s finding was not supported by the record. The Pennsylvania trial court held an evidentiary hearing on the claim. Hackett had an IQ score of 80 when he was eight years old and an IQ score of 85 when he was fifteen years old. *Id.* at 16. The Court explained that it was a “relevant consideration” that capital defendants, who were never clinically diagnosed with intellectual disability before *Atkins v. Virginia*, 536 U.S. 304 (2002), have a “powerful incentive to malingering and to slant evidence” making the third prong often crucial. *Id.* at 33.

Chief Justice Castille in his concurrence, observed that capital defendants, who scored well above the cut-off range on multiple IQ tests in their youth and were never diagnosed with intellectual disability before the murder, were raising *Atkins* claims based “upon slanted, exaggerated, or simply false evidence.” *Hackett*, 99 A.3d at 38 (Castille, C.J., concurring). He noted these claims of intellectual disability were being raised “against a backdrop” of testing occurring during the defendant’s youth revealing no such disability and at a time when there “was no *Atkins*-based incentive to slant the facts.” *Id.* The Chief Justice of the Pennsylvania Supreme Court expressed the opinion that those particular intellectual disability claims should be viewed with “a very high degree of skepticism.” *Id.* He noted that the definition of intellectual disability in both the DSM-IV and the DSM-V requires the onset of intellectual disability prior to age 18. *Id.* He noted that *Atkins* was “strictly limited” to those who suffered from intellectual disability manifesting before the age of 18.

As this Court observed in its opinion in this case involves “a score of 92 in 1980 when Zack was 11 years old . . .” *Zack v. State*, 42 Fla. L. Weekly D1301 (Fla. June 15, 2017). According to Zack’s own expert presented at the penalty phase, Dr. Larson, Zack’s full scale IQ when he was 12 years-old was 92. (T. X. 1866-1867). Zack’s full scale IQ as a teenager was 92, which is in the low normal range of intellectual ability. This prong alone totally and definitively negates any claim of intellectual disability.

In *State v. Morrison*, __ So.3d __, 2017 WL 5494615, SC15-1880 (Fla. November 16, 2017), this Court recently rejected an intellectual disability claim based on the third prong. *Morrison* raised a claim that he was intellectually disabled in the postconviction proceedings prior to *Hall* or *Moore* but the trial court denied the intellectual disability claim after *Hall*. *Morrison*, 2017 WL 5494615 at *3. The trial court held an evidentiary hearing on the intellectual

disability claim at which Morrison was permitted to present evidence as to all three prongs. *Id.* at *3, *13. The trial court discussed *Hall* in its final order and denied the claim based on the third prong. *Id.* at *13. The trial court found that he failed to prove the third prong because Morrison's IQ score in 1976 when he was eight-years old was 78. *Id.* On appeal, this Court explained the three prong test for intellectual disability and noted that "if the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled" *Id.* at *13 (citing *Snelgrove v. State*, 217 So.3d 992, 1002 (Fla. 2017)). This Court then stated that defendant must "demonstrate that his intellectual deficiencies manifested while he was in the developmental stage — that is, before he reached adulthood." *Id.* at *13. This Court agreed with the trial court that "Morrison did not prove manifestation of significantly subaverage general intellectual functioning prior to age 18." *Id.* Justice Pariente was the sole dissent expressing the view that the trial court should conduct an second evidentiary hearing to do a "holistic" review in an abundance of "caution" because "despite the IQ score of 78, Morrison showed signs of intellectual disability before the age of eighteen." *Morrison*, 2017 WL 5494615 at *14; *see also Jones v. State*, 42 Fla. L. Weekly S830, 2017 WL 4296370 at *2 (Fla. Sept. 28, 2017) (stating *Hall* does not change the fact that Jones failed to establish that he meets the second or third prong).

Here, as in *Morrison*, Zack failed to establish the onset prong. But, here, unlike Morrison, whose IQ score as a child was 78, Zack's IQ score as a child was 92. Zack's IQ score when he was young is 14 points higher than Morrison's score was when he was young.

Zack fails the onset prong of the test for intellectual disability. Zack fails the third prong, in addition to failing the first prong. Zack is not intellectual disabled.

Brain damage

Zack asserts that difference between his performance scores and his verbal scores on some of the IQ tests is an indicator of brain damage. Motion to recall at 8. But the Eighth Amendment prohibition established in *Atkins* is limited to capital defendants who are intellectually disabled. It does not extend to other types of disabilities, such as brain damage. The United States Supreme Court in *Hall* did **not** expand the Eighth Amendment prohibition on executions to any other form of mental impairment. And the United States Supreme Court in *Moore* had nothing to say on the subject of brain damage. *Atkins* is still limited to intellectual disability in the wake of *Hall* and *Moore*. Neither *Hall* nor *Moore* extended *Atkins* to defendants whose performance scores are higher than their verbal scores. The Eighth Amendment's prohibition on executions extends to intellectual disabilities only.

Under Florida's constitution, courts are required to interpret the State's cruel and unusual punishment provision in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So.3d 938, 947 (Fla. 2014) (noting that, under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Under this conformity clause, this Court may not independently expand the holding of *Atkins* or *Hall* to include other forms of disabilities, such as brain damage.

Moreover, this Court has repeatedly rejected attempts to expand *Atkins* beyond intellectual disabilities. *Frances v. State*, 143 So.3d 340, 358 (Fla. 2014) (noting "this Court has previously rejected defendants' attempts to extend *Atkins* to mental impairments that are not mental retardation" citing *Henyard v. State*, 992 So.2d 120 (Fla. 2008); and *Schoenwetter v. State*, 46 So.3d 535, 563 (Fla. 2010)); *Muhammad v. State*, 132 So.3d 176, 207 (Fla. 2013) (rejecting an argument that

Atkins should be extended to mental illness citing *Simmons v. State*, 105 So.3d 475, 511 (Fla. 2012)); *Johnston v. State*, 27 So.3d 11, 26 (Fla. 2010) (rejecting an attempt to extend *Atkins* to mental illness and neurological impairments citing *Lawrence v. State*, 969 So.2d 294, 300, n.9 (Fla. 2007); and *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007)). Zack has been making this same argument since the original postconviction proceedings. *Zack v. State*, 911 So.2d 1190, 1196 (Fla. 2005) (noting such a claim was raised in the original postconviction motion).

Zack's brain damage, even assuming it exists, does not entitle him to a life sentence. Brain damage is merely a mitigator, not a prohibition to the death penalty. And brain damage as mitigation was already considered by this Court as part of its proportionality review in the direct appeal. *Zack v. State*, 911 So.2d 1190, 1202 (Fla. 2005) ("As stated in our opinion on direct appeal, this Court reviewed the evidence of Zack's brain damage and his mental age in considering mitigation.").

Because Zack fails to meet either the first or third prong of the test for intellectual disability on the existing record, the trial court properly summarily denied the third successive postconviction motion and this Court properly affirmed that summary denial.

Accordingly, because *Moore* does not apply to Florida or this particular case, the motion to recall the mandate should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S RESPONSE TO MOTION TO RECALL MANDATE has been furnished via e-portal to Dawn B. Macready, Assistant Capital Collateral Regional Counsel, 175 Salem Court, Tallahassee, FL 32301, email: Dawn.Macready@ccrc-north.org this 17th day of November, 2017.

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