No. _____

IN THE

Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS, AND ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Question One

Whether failing to apply the Flynn effect to a capital defendant's intelligence quotient scores in cases where the scores were formulated from tests that used older or outdated norms violates the Eighth Amendment, the Fourteenth Amendment, *Atkins v. Virginia*, *Hall v. Florida*, and *Moore v. Texas* by disregarding the relevant medical guidance and creating an unacceptable risk that individuals with intellectual disability will be executed?

Question Two

Whether Florida's requirement that a capital defendant prove his intellectual disability by clear and convincing evidence violates the Fifth Amendment, the Eighth Amendment, the Fourteenth Amendment, *Cooper v. Oklahoma*, *Atkins v. Virginia*, *Hall v. Florida*, and *Moore v. Texas* by creating an unacceptable risk that individuals with intellectual disability will be executed?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Tavares J. Wright, a death-sentenced Florida prisoner, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Secretary, Department of Corrections, and Attorney General, State of Florida, were the appellees in the United States Court of Appeals for the Eleventh Circuit.

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), these are the related cases:

Underlying Trial
Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County
State of Florida vs. Tavares Jerrod Wright, Case No.: CF00-02727A-XX
Judgment Entered: October 12, 2005

Direct Appeal
Florida Supreme Court
Wright v. State, 19 So. 3d 277 (Fla. 2009)
Judgment Entered: September 3, 2009

Postconviction Proceedings
Proceedings Pursuant to Fla. R. Crim. P. 3.851
Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County
State of Florida v. Tavares J. Wright, Case No.: CF00-02727A-XX
Judgment Entered: May 22, 2013

Proceedings Pursuant to Fla. R. Crim. P. 3.203
Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County
State of Florida v. Tavares J. Wright, Case No.: CF00-02727A-XX
Judgment Entered: March 26, 2015

Florida Supreme Court
Wright v. State, 213 So. 3d 881 (Fla. 2017)
Judgment Entered: March 16, 2017 (certiorari granted, judgment vacated, and case remanded by *Wright v. Florida*, 138 S. Ct. 360 (2017))

Florida Supreme Court
Wright v. State, 256 So. 3d 766 (Fla. 2018)
Judgment Entered: September 27, 2018 (rehearing denied by *Wright v. State*, 43 Fla. L. Weekly S551 (Fla. Nov. 1, 2018))

Supreme Court of the United States
Wright v. Florida, 139 S. Ct. 2671 (2019)
Judgment Entered: June 3, 2019

United States District Court for the Middle District of Florida
Tavares J. Wright v. Secretary, Department of Corrections
Case No.: 8:17-cv-974-T-02TGW
Judgment Entered: August 20, 2020

United States Court of Appeals for the Eleventh Circuit
Wright v. Sec'y, Dep't of Corr., 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021).
Judgment Entered: November 15, 2021 (rehearing denied on February 15, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Tavares J. Wright ("Wright") respectfully petitions for a writ of certiorari to review the errors in the judgment of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

OPINIONS BELOW

This is a petition regarding the errors of the Eleventh Circuit in affirming the United States District Court for the Middle District of Florida's ("District Court") denial of Wright's 28 U.S.C. § 2254 petition for a writ of habeas corpus. The opinion at issue is reproduced at Appendix A and is reported at *Wright v. Sec'y, Dep't of Corr.,* 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021).

The unpublished order from the District Court denying Wright's Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody is reproduced at Appendix B.

JURISDICTION

The opinion of the Eleventh Circuit was entered on November 15, 2021. Wright timely filed a Petition for Panel Rehearing and Rehearing En Banc, which was denied on February 15, 2022. Appendix C. Wright timely filed an Application for Sixty (60) Day Extension of Time to File Petition for a Writ of Certiorari on March 3, 2022. Justice Thomas granted an extension to file the Petition to June 15, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

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

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

> "[I]ntellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community …
>
> A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

Fla. Stat. § 921.137(1) and (2).

INTRODUCTION

"No legitimate penological purpose is served by executing a person with intellectual disability." *Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Atkins v. Virginia*, 536 U.S. 304, 317, 320 (2002)). To do so is cruel and unusual punishment in violation of the Eighth Amendment, and the Constitution "places a substantive restriction on the State's power to take the life" of intellectually disabled offenders. *Atkins*, 536 U.S. at 321 (2002) (internal citation omitted).

Atkins allowed the states to develop "appropriate mechanisms" for enforcing the prohibition against executing the intellectually disabled. *Id.* at 317. However, "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719. The legal determination of whether a defendant is intellectually disabled, and therefore ineligible for execution, must be "informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721. This involves consideration of current clinical manuals, which offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore v. Texas,* 137 S. Ct. 1039, 1053 (2017) (citing the DSM-5[1] and AAIDD-11[2]).

This case involves Wright's claim of intellectual disability and the Eleventh Circuit's unconstitutional analysis of that claim. Similar to the question raised in

[1] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) ("DSM-5").

[2] AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) ("AAIDD-11").

Hall, Wright's case presents the question of how intellectual disability must be defined in order to adequately implement the holding of *Atkins*. *Hall,* 572 U.S. at 709. This Petition should be granted, and the Eleventh Circuit's opinion vacated, because the lower courts failed to follow the relevant medical guidance when determining Wright's intellectual disability claim and also required Wright to prove his claim under the unconstitutional and unduly burdensome clear and convincing evidence standard.

STATEMENT OF THE CASE

I. Definitions of Intellectual Disability

Both Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) define intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." Although not identical, the Florida statutory definition generally conforms with the relevant clinical definitions. The American Psychiatric Association, which publishes the DSM-5[3], defines intellectual disability as follows:

> Intellectual Disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and sociological standards for personal independence

[3] The DSM-5 was the current edition of the DSM when the lower state trial court determined Wright's renewed intellectual disability claim in 2015.

> and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.

DSM-5 at 33; Appendix Q (p.515).[4] The American Association on Intellectual Disabilities and Developmental Disabilities, which publishes the AAIDD-11[5], defines intellectual disability as follows:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

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[4] The definition of intellectual disability in the DSM-5 (2013) is substantively identical to the definition in the revised DSM-5-TR published in 2022:

> Intellectual developmental disorder (intellectual disability) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:
>
> Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
>
> Onset of intellectual and adaptive deficits during the developmental period.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH EDITION TEXT REVISION (2022) ("DSM-5-TR") at 38.

[5] The AAIDD-11 was the current edition of the AAIDD manual when the lower state trial court determined Wright's renewed intellectual disability claim in 2015.

AAIDD-11 at 5; Appendix Q (p.523)[6] Pursuant to Fla. Stat. § 921.137(4), Wright must show by clear and convincing evidence that he is intellectually disabled.

II. The Procedural History of Wright's Case

Wright was convicted and subsequently sentenced to death in 2005 following a jury trial for a double homicide that he allegedly committed at nineteen years old with the help of co-defendant Samuel Pitts. Samuel Pitts received a life sentence after a separate trial. Wright's appearance, slower speech, and documented history of difficulty in school indicated that intellectual disability was an issue. Accordingly, Wright's trial counsel filed a "Notice of Intent to Rely Upon § 921.137 Florida Statutes, Barring Imposition of the Death Penalty Due to Mental Retardation" after Wright had been convicted, but before his sentencing. Following a special-set hearing, the trial court found that Wright's IQ scores did not establish a finding of mental retardation[7] because they did not meet Florida's then-current strict requirement of an IQ below 70. Wright was sentenced to death on October 12, 2005. Wright's

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[6] The definition of intellectual disability in the 12th edition of the AAIDD manual published in 2021 extends the age of onset from age 18 to 22, but is otherwise substantively the same:

> [Intellectual disability] is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (12th ed. 2021) ("AAIDD-12") at 13. The AAIDD-12 further states that "[t]he authoritative definition of ID is that of the AAIDD. The definition of ID found in the 12th edition of the AAIDD Manual is the same as that found in the 11th edition, except for the age of onset criterion." *Id.* at 14; Appendix Q (p.549).

[7] "Intellectual disability" has since replaced "mental retardation" as the appropriate term. Fla. Stat. § 921.137(9).

convictions and sentences were affirmed by the Florida Supreme Court ("FSC") on direct appeal. *Wright v. State*, 19 So. 3d 277 (Fla. 2009) ("*Wright I*"); Appendix D.

In 2012, Wright filed an "Amended Motion to Vacate Judgment and Sentence," pursuant to Florida Rule of Criminal Procedure 3.851. The evidentiary hearing on the motion was held on October 16-18, 2012. The trial court issued an order denying the motion, and Wright appealed the trial court's denial to the FSC. While Wright's post-conviction appeal was pending before the FSC, this Court rendered its decision in *Hall v. Florida*, 572 U.S. 701 (2014) invalidating Florida's strict 70 IQ cutoff. This Court specifically held that Florida's rigid rule "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Id.* at 704.

On October 10, 2014, Wright filed a "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203," in which he sought a renewed determination of intellectual disability as a bar to execution in light of *Hall*. Appendix E. As a result, before ruling on Wright's first post-conviction appeal, the FSC relinquished jurisdiction to the trial court and remanded Wright's case for a determination of intellectual disability under the new *Hall* standard. The trial court held an evidentiary hearing on Wright's intellectual disability claim on January 5-6, 2015, and February 11, 2015. The trial court also agreed to take judicial notice of the record on appeal from the direct appeal, as well as the post-conviction record on appeal.

On March 26, 2015, the state trial court rendered an order denying Wright's motion for a renewed determination of intellectual disability and finding that Wright had not shown he was intellectually disabled by clear and convincing evidence. Appendix F. Notably, the trial court concluded that

> "While this Court does not find that the Defendant meets the criteria to be **legally** declared intellectually disabled pursuant to Florida Statute 921.137 (1) and/or Rule 3.203 (b) Fla. R. Crim. P., it is this Courts recommendation that a further proportionality review be performed by the Florida Supreme Court in light of the Defendant's **arguable intellectual disability."**

Appendix F (p.115). (emphasis added). The order further acknowledged that the court had heard testimony concerning the Flynn effect, but the order did not explicitly analyze or mention Wright's Flynn-corrected scores, stating only that Wright's IQ has "been documented to lie between 75 and 82."[8] Appendix F (p.108). The order further acknowledged that a question had been raised concerning the constitutionality of Florida's clear and convincing evidence standard. However, the order found that "Florida Statute 921.137 (4) requires that level of proof" and cited the FSC's assertion in *Herring v. State*, 76 So. 3d 891 (Fla. 2011) that "a defendant must prove each of the three elements by clear and convincing evidence." Appendix F (p.111-12).

Wright appealed, and the FSC affirmed the trial court's order denying Wright's intellectual disability claim and the order denying Wright's other post-conviction claims in a single opinion on March 16, 2017. *Wright v. State*, 213 So. 3d 881 (Fla. 2017) ("*Wright II*"); Appendix G. Notably, the FSC acknowledged that the lower trial

[8] As explained below, Wright's Flynn-corrected scores actually indicate that his true IQ falls well below 75. *See infra* at pp. 16.

court had heard expert testimony concerning the Flynn effect, but the FSC made no attempt to discuss or analyze Wright's actual Flynn-corrected scores. *Wright II*, 213 So. 3d at 897. The FSC did briefly address Wright's argument that Fla. Stat. § 921.137 (4) is facially unconstitutional because the clear and convincing evidence standard creates too high of a risk that Wright will be mistakenly determined to not be intellectually disabled. *Wright II*, 213 So. 3d at 896, n. 3. However, the FSC found that the claim was procedurally barred because it was raised for the first time in the written closing arguments following the 2015 hearing. *Id.*

On March 28, 2017, this Court decided *Moore v. Texas*, 137 S. Ct. 1039 (2017), finding that Texas had deviated from prevailing clinical standards in its intellectual disability analysis. Wright filed a petition for a writ of certiorari to this Court in light of the new *Moore* opinion. On October 16, 2017, this Court granted Wright's petition for a writ of certiorari, vacated the FSC's judgment in *Wright II*, and remanded the case to the FSC for further consideration in light of *Moore*. *Wright v. Florida*, 138 S. Ct. 360 (2017).

On September 27, 2018, the FSC issued an opinion finding that *Moore* did not require a different result in Wright's case and reaffirmed the trial court's denial of Wright's intellectual disability claim. *Wright v. State*, 256 So. 3d 766 (Fla. 2018) ("*Wright III*"); Appendix H. Notably, once again, the FSC failed to mention any of Wright's Flynn-corrected scores in its analysis in the *Wright III* opinion.

Wright filed an "Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody" and corresponding memorandum of law with

the Middle District Court of Florida on December 17, 2019. Wright detailed the extensive record evidence proving that he meets all three prongs of the intellectual disability test in Ground One of the habeas petition. Appendix I (p.159-240). Wright also argued, in part, that he was entitled to relief under 28 U.SC. § 2254(d)(1) because the FSC had unreasonably applied *Atkins* and *Hall* when it disregarded the medical diagnostic framework by failing to consider the Flynn effect. Appendix J (p.258-62). Wright further argued that Florida's clear and convincing standard for intellectual disability claims violates due process because it imposes a significant risk of an erroneous determination that Wright is not intellectual disabled. Appendix J (p.282-84). The district court issued an order denying Wright's petition for a writ of habeas corpus on August 19, 2020. Appendix B. Notably, the district court made no mention of Wright's Flynn-corrected scores when determining Wright's intellectual disability claim. As to the clear and convincing evidence standard, the district court found that the claim was procedurally because the FSC denied the claim on an independent and adequate state law ground as unpreserved under Florida procedural rules. Appendix B (p. 53-54).

Wright filed a motion requesting a certificate of appealability from the Eleventh Circuit on November 20, 2020. Appendix K. Wright specifically requested an appeal on the issue of his intellectual disability claim and the constitutionality of Florida's clear and convincing evidence standard. Appendix K (p.294-332). The Eleventh Circuit granted an appeal on Wright's intellectual disability claim but did not grant an appeal on Florida's clear and convincing evidence standard. Appendix

L. Oral argument was held before the Eleventh Circuit on July 21, 2021. The Eleventh Circuit issued an opinion denying Wright's appeal on November 15, 2021. Appendix A. Wright filed a timely motion for rehearing, which was denied by an order issued on February 15, 2022. Appendix C. This Court granted an extension to June 15, 2022 to file this current Petition.

III. The Evidence of Wright's Intellectual Disability

It is important to note that Wright has a "mild" level of intellectual disability. However, the term "mild" does not indicate that any person, Wright included, should be excluded from an intellectual disability determination in either the clinical or legal context. This Court has stated that "[m]ild levels of intellectual disability … remain intellectual disabilities, … and States may not execute anyone in "the *entire category* of [intellectually disabled] offenders." *Moore*, 137 S. Ct. at 1051 (internal citations omitted) (emphasis in original). The AAIDD-11 explains that "[a]ll people with ID, including those with higher IQ scores, belong to a single disability group (people with ID)." AAIDD-11 at 152; Appendix Q (p.539).

There is overwhelming evidence in the lower court record that Wright meets the criteria for intellectual disability under both the clinical definition and Fla. Stat. § 921.137.[9]

[9] This Petition will detail the evidence related to the first two prongs of the three-pronged test for intellectual disability- significantly subaverage IQ and deficits in adaptive functioning. The third prong- age of onset- is not at issue in Wright's case. The state trial court found in its order following the 2015 hearing that

> In regard to prong three of Florida Statute 921.137(1) and/or Rule 3.203(b), Fla. R. Crim. P., the Court finds by clear and convincing evidence that the Defendant's intellectual condition (whatever it is classified) has existed his entire life and therefore precedes his 18th birthday.

1. Wright has Significantly Subaverage IQ

The DSM-5 explains that intellectually disabled individuals "have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5)." DSM-5 at 37; Appendix Q (p.519). "Factors that may affect test scores include … the Flynn effect (i.e., overly high scores due to out-of-date test norms)." DSM-5 at 37; Appendix Q (p.519). "Best practices require recognition of a potential Flynn effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37; Appendix Q (p.530). "[I]n cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted." AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, USER'S GUIDE (11th ed. 2012) ("User's Guide") at 23; Appendix Q (p.544).

Wright's IQ has been tested nine times throughout his life. The lower courts considered six full-scale IQ scores that Wright has achieved on different versions of

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Appendix F (p.112). It should be noted that Wright's intellectual disability is likely caused by fetal alcohol syndrome. Wright's mother drank alcohol while pregnant with him. Dr. Alan Waldman ("Dr. Waldman") testified for the defense concerning Wright's fetal alcohol syndrome and microcephaly at Wright's 2005 combined penalty phase and *Spencer* hearing. Dr. Waldman testified that an MRI of Wright's brain showed that he suffers from microcephaly, which is a smaller than usual brain. Microcephaly is a symptom of fetal alcohol syndrome. Dr. Waldman opined that Wright's low intelligence is caused by his fetal alcohol syndrome. Dr. Waldman's report can be found at Appendix R.

the Wechsler intelligence test. *Wright II*, 213 So. 3d at 897; Appendix B (p.49). The chronological six full-scale scores are: **76** (February of 1991, age 10, WISC-R[10]); **80** (4/4/1991, age 10, WISC-R); **81** (9/11/1991, age 10, WISC-R); **75** (8/25/1997, age 16, WAIS-R[11]); **82** (7/15/2005, age 24, WAIS-III[12]); and **75** (7/25/2005, age 24, WAIS-III). These six scores were detailed in a chart entered as Defense Exhibit 1 at the 2015 hearing on Wright's renewed motion for determination of intellectual disability. The chart can be found at Appendix N.

Three experts have opined that Wright meets the criteria for significantly subaverage IQ.[13] Defense expert Dr. Mary Kasper ("Dr. Kasper") testified at length concerning Wright's IQ scores at both the 2012 and 2015 post-conviction evidentiary hearings in the state trial court. Dr. Kasper testified that the **76** (age 10) and **75** (age 16) that Wright achieved were the best measures of Wright's intelligence because they were given prior to Wright's legal history in this case, were taken in the most standardized conditions, and were the first times he was given the WISC-R and the WAIS-R.

The full-scale 80 and 81 that Wright scored on his second and third administration of the WISC-R in 1991 are not reliable indicators of his intelligence because they are undoubtedly inflated by the practice effect since Wright took the

[10] Wechsler Intelligence Scale for Children-Revised

[11] Wechsler Adult Intelligence Scale- Revised

[12] Wechsler Adult Intelligence Scale- Third Edition

[13] A more detailed summary of the expert testimony concerning Wright's significantly subaverage IQ can be found in Wright's habeas petition at Appendix I (p.164-80).

same test three times within a year. "Established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence." AAIDD-11 at 38; *see also* User's Guide at 23; Appendix Q (p.531;544). Wright took his second WISC-R (80) only two months after his first WISC-R (76). Wright then took this third WISC-R (81) only seven months after his second WISC-R (80). Dr. Kasper testified that she was concerned about the validity of the 80 and 81, because the increased scores could be the result of the practice effect. These scores are not reliable indicators of Wright's IQ, and should be given very little, if any, evidentiary weight.

The full-scale 82 and 75 that Wright scored in 2005 are also not reliable indicators of Wright's true IQ because they are not compatible with the clinical definition of intellectual disability. The AAIDD-11 defines intellectual disability as a condition that originates prior to age 18. AAIDD-11 at 5; Appendix Q (p.523). Wright was 24 when he achieved these two scores. These scores are far less reliable than the 76 and 75 Wright achieved before he was 18 and should accordingly be given far less weight.[14]

Dr. Michael Kindelan ("Dr. Kindelan"), the doctor who administered the first WISC-R to Wright in 1991, testified at the 2015 hearing that applying the test-specific standard error of measurement to Wright's score of 76 using a 95 percent confidence interval equals a range of scores from **69 to 82**. Dr. Kindelan opined that

[14] Wright acknowledges that the AAIDD-12 raises the age of onset from 18 to 22. AAIDD-12 at 13; Appendix Q (p.548). However, the 82 and 75 that Wright scored in 2005 were at the age of 24, which still falls outside the age of onset under both the AAIDD-11 (age 18) and AAIDD-12 (age 22). These scores should accordingly be given far less weight than Wright's pre-2005 scores.

this places Wright in the range of scores for someone who is intellectually disabled. Dr. Joel Freid, the doctor who administered the WAIS-R to Wright in 1997, opined at the 2015 hearing that Wright's IQ scores place him in the range of scores of someone who is intellectually disabled, and that Wright meets the criteria for significantly subaverage IQ.[15]

Dr. Kasper testified concerning the Flynn effect at both the 2012 and 2015 hearings. The AAIDD-11 explains that

> Flynn's research as well as that of others found that IQ scores have been increasing from one generation to the next in the United States as well as in all other developed countries for which IQ data are available. This increase in IQ scores over time was called the *Flynn Effect* … the Flynn Effect refers to the observation that every restandardization sample for a major intelligence test from 1932 through 1978 resulted in a mean IQ that tended to increase over time …
>
> Because Flynn reported that mean IQ increases about 0.33 points per year, some investigators have suggested that any obtained IQ score should be adjusted 0.33 points for each year the test was administered after the standardization was completed …
>
> ***[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score.***

AAIDD-11 at 37 (internal citations omitted) (emphasis added); Appendix Q (p.530). The User's Guide states that

> ***The Flynn Effect effects any interpretation of IQ scores based on outdated norms.*** Both the 11th edition of the manual and this User's Guide recommend that in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted.

[15] Dr. Freid's 1997 report can be found at Appendix S.

User's Guide at 23 (internal citation omitted) (emphasis added); Appendix Q (p.544).

The American Association on Intellectual and Developmental Disabilities, The Death Penalty and Intellectual Disability (Edward A. Polloway ed., 2015) ("The Death Penalty and ID"), which is published by the AAIDD, also states that

> [I]n cases where current or historical IQ test scores are impacted by norm obsolescence (i.e., Flynn effect), and the scores are to be used as part of the diagnosis of ID in *Atkins* or other high stakes decisions, the global scores impacted by outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence.

Death Penalty and ID at 165.[16] Appendix Q (p.583). Wright's case is a particularly striking example of how the Flynn effect can artificially inflate a person's score when that person takes an IQ test several years after that test is normed on the population. Wright took the WISC-R for the first time at age 10 in 1991 and scored a full-scale 76. Dr. Kasper testified that the WISC-R was normed in 1972, 19 years before Wright took the test. When adjusted for the Flynn effect, Wright's full-scale 76 drops **6 points down to a <u>70.</u>** Wright took the WAIS-R at age 16 in 1997 and scored a full-scale 75. Dr. Kasper testified that the WAIS-R was normed in 1978, 19 years before Wright took the test. When adjusted for the Flynn effect, Wright's full-scale 75 drops **6 points down to a <u>69.</u>** This **70** and **69** are the most accurate and reliable indicators of Wright's true IQ. Dr. Kasper opined at both the 2012 and 2015 evidentiary hearings that Wright has significantly subaverage IQ.

[16] A more thorough discussion of the scientific basis for the Flynn effect and its effect on the interpretation of IQ scores can be found in Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY, 155-169 (Edward A. Polloway ed., 2015), which can be found in Appendix Q (p.573-587).

2. Wright has Deficits in Adaptive Functioning

The DSM-5 explains that "adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical." DSM-5 at 37; Appendix Q (p.519). The AAIDD-11 states that "significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean of … one of the … three types of adaptive behavior…" AAIDD-11 at 43; Appendix Q (p.532). "Significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-11 at 47; Appendix Q (p.536). "[S]trengths and limitations in adaptive skills should be documented within the context of community and cultural environments typical of the person's age peers and tied to the person's need for individualized supports." AAIDD-11 at 45; Appendix Q (p.534). The DSM-5 states that adaptive deficits are shown when at least one of the three domains of adaptive functioning "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community." DSM-5 at 38; Appendix Q (p.520).

The adaptive deficits suffered by individuals such as Wright who are mildly intellectually disabled are often subtle, and these individuals do not typically display deficits in all three domains of adaptive functioning:

> Comparatively, the limitations in individuals with ID at the upper end of the spectrum are more subtle, more difficult to detect, and often context-specific. Most individuals with ID at the upper end of the spectrum do not experience problems in the practical skills measured by adaptive behavior scales, such as dressing oneself or using the

> telephone. However, they typically display significant deficits in adaptive skills in the social and conceptual domains.

The Death Penalty and ID at 26; Appendix Q (p.562). Although he is only required to prove adaptive deficits in one category, Wright suffers from deficits in adaptive functioning in all three categories- conceptual, social, and practical. Numerous lay witnesses- Wright's family, childhood friends, and trial attorneys- testified to the extensive evidence of Wright's adaptive deficits.[17] Dr. Kasper also testified concerning Wright's adaptive deficits.[18]

"The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5 AT 37; Appendix Q (p.519). Wright's school records reflect that he was classified as both emotionally handicapped and specific learning disabled. Wright was exempt from taking standardized tests. Wright's records also reflect that he had Independent Education Plans in school, which are used for students with disabilities to provide feedback and set specific goals. Wright also did not receive a traditional high school diploma, but instead was awarded a special diploma that was a recognition of effort and would have been specifically tailored to his disability.

Cynthia Wright McClain ("McClain"), Wright's maternal aunt, testified that she knew Wright all his life and observed him until he was about 13 or 14 years old.

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[17] A more detailed summary of the lay witness testimony of Wright's adaptive deficits can be found in Wright's habeas petition at Appendix I (p.202-38).

[18] A more detailed summary of Dr. Kasper's testimony concerning Wright's adaptive deficits can be in Wright's habeas petition at Appendix I (p.183-93).

Wright was "slow", and his mother received social security benefits for him because he was in "ESE" classes and had learning problems. McClain observed Wright have difficulty as a child concentrating on one task, which affected his schoolwork and frustrated him. Carlton Barnaby ("Carlton"), Wright's maternal first cousin, testified that he and Wright attended the same elementary, middle, and high school together. Wright was in SLD (slow learning disability classes). Wright's reading and writing in school were poor, and Carlton helped him with spelling, grammar, and punctuation.

Marian Barnaby ("Marian"), Wright's maternal aunt, described Wright as a slow learner-he had problems with his speech, and he was not able to learn as well as Marian's own children. Wright was in slow classes at school because of his learning problems. Wright also started walking later than Marian's own children. Toya Long Ford ("Ford"), Wright's childhood friend, testified that she and Wright "pretty much grew up together." Ford explained the difficulty she had communicating with Wright when they played together as children. If Ford wanted to talk to Wright, she would have to ask him yes-or-no questions because he could not hold a full conversation and had trouble understanding what she was trying to ask him. Ford would have to use simpler words and repeat herself when speaking to Wright. Wright would sometimes act like he understood when he really did not. Wright and Ford went to the same middle school but did not have any mutual classes. Wright would tell Ford that he did not know how to do his homework. Ford frequently helped Wright with his homework and would have to do his homework for him at times because he did not

comprehend it. Wright's schoolwork was significantly easier than Fords' because he was in special classes, but he still did not seem to understand it.

Wright's attorneys also testified concerning the difficulty that they had communicating with Wright during their representation. Attorney Byron Hileman ("Hileman") testified that he and Wright never engaged in a detailed discussion that led Hileman to believe that Wright actually comprehended what Hileman was talking about. During their discussions, Wright would go off on unrelated tangents. Hileman frequently had to repeat himself multiple times because Wright did not seem to understand. Attorney David Carmichael ("Carmichael") explained that Wright had developed a "certain patina", which would make a person think he understood something when he really did not. For a long time, Carmichael thought Wright understood him because he would laugh, smile, and make appropriate comments or gestures. However, Carmichael later concluded that Wright did not really understand what his attorneys were talking about. For example, Carmichael would hear Hileman explain to Wright what was going to happen next during the trial, and Wright would nod and smile. Carmichael would then speak with Wright in the holding cell, and Wright would not really understand.

Wright's attorneys also testified that Wright exhibited a lack of judgment in fully understanding his circumstances. Hileman recalled attempting to explain to Wright that it was in his best interest to take a "life and avoidance plea" for the homicide charges because Wright already had more than one life sentence in other cases. Wright seemed unable to "process that information because his responses were

non sequiturs [and] … didn't really address the issue that [Hileman] was trying to get [Wright] to consider." Wright was not interested in the offer despite there being little downside since Wright already had a life sentence on other charges. Wright was never able to provide Carmichael with a reason for rejecting the life offer.

Wright also could not actively assist Hileman with his case. Wright did not even appear to be listening to the testimony during his trial. He would respond when Hileman asked him a question, but then he would go back to "doodling" on a notepad that Hileman gave him. Although Wright understood on a superficial level what the State's witnesses would testify to, he was not able to assess the weight of the evidence or the consequences of the presentation of the evidence in a realistic way

"The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others." DSM-5 at 37; Appendix Q (p.519). McClain testified that Wright was a "follower," and other children picked on Wright because he was "slower" than them. Ford testified that other children took advantage of Wright and picked on him because he was an easy target and would not fight back. Wright did not have many friends and would do "whatever they wanted him to do" to make friends with the other children. Carlton testified that with the exception of one friend, Carlton did not know Wright to have friendships with other children, and Wright was picked on by his peers. Wright did not know how to handle peer pressure and had difficulty expressing his feelings.

James Blake ("Blake"), Wright's childhood friend, testified that other children in the neighborhood made fun of Wright by calling him slow. Wright did not engage in serious conversations. The other children in the neighborhood did not want to pick Wright for their football team because he did not understand the rules of the game. Jerry Hopkins ("Hopkins"), Wright's childhood friend, testified that other children picked on Wright because he was a slow learner, and he could hardly read or spell. Hopkins described Wright as a follower who was easily influenced by other people. He did not fit in with the other children, but he would do things to try and fit in. Additionally, inmates who were incarcerated in jail with Wright while he was awaiting trial testified that he was easily manipulated by other jail inmates because he was a follower and wanted to fit in. Wright was frequently taken advantage of by the other inmates.

"The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." DSM-5 at 37; Appendix Q (p.519). Carlton testified that he gave Wright rides because he did not have a driver's license. Wright was unable to pass the written portion of the driver's license exam. Carlton also acted as a job coach for Wright when they worked together at the Albertson's Warehouse; Wright and Carlton were hired together, and they always worked the same shift. Carlton drove Wright to and from each work shift. Carlton regularly helped Wright with the time clock until Wright was able to do it on his own. They stayed together and were within sight of one

another during the entire shift. Carlton and Wright worked as selectors, which consisted of remaining stationary, putting stickers on boxes they grabbed from nearby, and placing them on a belt where the boxes would go to another section of the warehouse. Carlton and the other workers looked out for Wright and instructed him on how to do his job. Wright could not have done this job without someone helping him, at least at first. Wright did not have a bank account, so Carlton drove Wright to a store to cash his checks from the job. Carlton helped Wright cash his checks, and he showed him where to sign his name on the checks.

Dr. Kasper also assessed Wright's adaptive behavior by interviewing Wright, interviewing several witnesses who knew Wright as a child and adult, and administering two ABAS-II[19] tests- one to correspond with the 1997 WAIS-R administered to Wright when he was 16 years old and one to assess his then-current (2014) functioning. Although Wright is only required to prove deficits in one category, the first administration of the ABAS-II corresponding with Wright's functioning at 16 years old indicated that he has deficits in two categories- conceptual and social. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. Dr. Kasper found that Wright suffers from deficits in adaptive behavior under both the statutory rule and the clinical definitions.

[19] Adaptive Behavior Assessment System – Second Edition

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit decided an important federal question in a way that conflicts with this Court's relevant decisions in *Atkins*, *Hall*, and *Moore*.

Capital defendants have a federal constitutional right under the Eighth Amendment not to be executed if they are intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* allowed the states to develop "appropriate mechanisms" for enforcing the prohibition against executing the intellectually disabled. *Id.* at 317. However, "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall,* 572 U.S. at 719. Even if the views of medical experts do not dictate a court's intellectual disability determination, the determination must be "informed by the medical community's diagnostic framework." *Moore v. Texas*, 137 S. Ct. 1039, 1048 (quoting *Hall*, 572 U.S. at 721). This Court intervened previously in *Hall* and *Moore* to provide the states guidance on how to define intellectually disability to ensure that the *Atkins* holding was adequately implemented. Wright respectfully requests that this Court intervene again to ensure that he and other intellectually disabled defendants are not subjected to an unconstitutional death sentence because the lower courts refuse to follow the relevant medical guidance when determining whether defendants have significantly subaverage IQ.

This Court has painstakingly endeavored to create Eighth Amendment safeguards to prevent the execution of the intellectually disabled. In *Atkins, Hall,* and *Moore,* this Court created those safeguards by relying heavily on the medical

community and medical authorities to determine the diagnostic framework for intellectual disability. "The clinical definitions of intellectual disability … were a fundamental premise of *Atkins*." *Hall*, 572 U.S. at 720. In *Hall*, this Court explained that

> [i]t is [this] Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.

Hall, 572 U.S. at 721-22. This Court relied on the most recent versions of the leading diagnostic manuals- the DMS-5 and AAIDD-11- when finding that Florida's strict 70-IQ cutoff was invalid because it "disregarde[d] established medical practice." *Id.* at 712. This Court held that Florida's strict 70-IQ cutoff was unconstitutional because it "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 704. This Court again relied on these same diagnostic manuals in *Moore* when finding that the non-clinical *Briseno*[20] factors previously employed by Texas to analyze intellectual disability claims were invalid. *Moore*, 137 S. Ct. at 1049-53. This Court found in *Moore* that the *Briseno* factors "creat[ed] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1044 (citing *Hall*, 572 U.S. at 704).

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

Wright argued on appeal to the Eleventh Circuit that he was entitled to relief under 28 U.S.C. § 2254(d)(1) because the FSC unreasonably applied this Court's direction in *Hall* that the legal determination of intellectual disability is "informed by the medical community's diagnostic framework" by failing to consider Wright's Flynn-corrected scores. Appendix M (p.386-87). The Eleventh Circuit found that it was obligated as a later panel to follow its previous precedent concerning the Flynn effect in *Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019) and *Ledford v. Warden*, 818 F.3d 600 (11th Cir. 2016). Appendix A (p.13-14).

The Eleventh Circuit found in *Ledford* and *Raulerson* that a district court may, but "is not required to apply a Flynn effect reduction to an individual's IQ score in a death penalty case." *Ledford*, 818 F.3d at 640; *see also Raulerson*, 928 F.3d at 1008. The Eleventh Circuit reached this decision, in part, because it found that, "there is no consensus about the Flynn effect among [medical] experts or among the courts." *Raulerson*, 928 F.3d at 1008 (citing *Ledford*, 818 F.3d at 635-37). Wright argued on appeal that there is a general consensus in the medical community that the Flynn effect should be applied when a test with older norms is used. Appendix M (p.369-70). The most recent and current clinical manuals support applying the Flynn effect, especially in cases like Wright's where a test with significantly older norms was used.

The DSM-5 states that that the Flynn effect may cause "overly high scores due to out-of-date norms." DSM-5 at 37; Appendix Q (p.519). The AAIDD-11 states that "[b]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or

interpretation of an IQ score." AAIDD-11 at 37; Appendix Q (p.530). The User's Guide to the AAIDD-11 states that the "Flynn effect effects any interpretation of IQ scores based on outdated norms" and further states that "in cases in which a test with aging norms is used as part of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of norms is warranted." User's Guide at 23; Appendix Q (p.544).

The recently published AAIDD-12 and DSM-5-TR also state that the Flynn effect should be accounted for when tests with older norms are used. The AAIDD-12, published in 2020, states that [c]urrent best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction of the full-scale IQ score of 0.3 points per year since the test e-norms were collected is warranted." AAIDD-12 at 42; Appendix Q (p.554). The DSM-5-TR, published in 2022, states that "Factors that may affect test scores include … the "Flynn effect" (i.e., overly high scores due to out-of-date test norms)." DSM-5-TR at 42.[21]

[21] There is support in the medical community for applying the Flynn effect beyond the clinical manuals, particularly in death penalty cases, although there is not a unanimous consensus amongst experts. *Compare* Leigh D. Hagan et al., *Adjusting IQ Scores for the Flynn Effect: Consistent With the Standard of Practice?*, 39 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 619, 623 (2008) (concluding, in part, that "[p]sychologists cannot conclude that adjusting scores [for the Flynn effect] is the generally accepted practice in evaluations for special education, parental rights termination, disability, or any other purpose."); Leigh D. Hagan, et al., *IQ Scores Should Not Be Adjusted for the Flynn Effect in Capital Punishment Cases*, JOURNAL OF PSYCHOEDUCATIONAL ASSESSMENT 474, 474 (2010) (concluding "that the practice of altering an obtained IQ score based on the [Flynn effect] is insufficiently supported by scholarly literature or legal authority") *with* Jack M. Fletcher, et al., *IQ Scores Should Be Corrected for the Flynn Effect in High-Stakes Decisions,* JOURNAL OF PSYCHOEDUCATIONAL ASSESSMENT 469, 470, 472 (2010) (disagreeing with Hagan's argument that correcting for the Flynn effect is not a standard of practice, noting that the AAIDD-11 explicitly recommends correcting IQ scores for the Flynn effect, and concluding that "IQ test scores should be corrected for any high-stakes decision … including capital offense cases."); Mark D. Cunningham & Marc J. Tasse, *Looking to Science Rather Than Convention in Adjusting IQ Scores When Death is at Issue*, 41 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 413, 417 (2010) ("[P]rofessional guidelines propagated by the [AAIDD] … recommended that professionals should consider the obsolescence of test norms when interpreting historical IQ scores."); Cecil R. Reynolds, et

The Eleventh Circuit found that the inclusion of the Flynn effect in the most recent APA and AAIDD clinical manuals was not sufficient evidence of a general medical consensus. Appendix A (p.13-14). The Eleventh Circuit specifically stated that "Wright contends that there is now a general consensus in the clinical manuals that Flynn adjustments are the best practice—but he also acknowledges that not every expert in the field of intellectual disability holds the same opinion." Appendix A (p.13). The Eleventh Circuit appears to construe this Court's precedent to require that every single medical expert agree on the application of the Flynn effect before the courts may be required to consider it, but *Hall* and *Moore* do not set such a stringent standard,[22] and the Eleventh Circuit interprets this Court's precedent in those cases too narrowly.

Failure to apply the Flynn effect in death penalty cases, especially in cases like Wright's where a defendant achieved scores on a test that used much older norms,

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al., *Failure to Apply the Flynn Correction in Death Penalty Litigation: Standard Practice of Today Maybe, but Certainly Malpractice of Tomorrow*, JOURNAL OF PSYCHOEDUCATIONAL ASSESSMENT 477, 480 (2010) (concluding that "[a]s a generally accepted scientific theory that could potentially make the difference between a constitutional and unconstitutional execution, the [Flynn effect] must be applied in the legal context."); Frank M. Gresham and & Daniel J. Reschly, *Standard of Practice and Flynn Effect Testimony in Death Penalty Cases*, 49 INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 131,138 (June 2011) ("Application of the Flynn Effect … is supported by science and should be implemented by professional psychologists."); Lisa Trahan, et al., *The Flynn Effect: A Meta- analysis*, PSYCHOLOGICAL BULLETIN, Sept. 2014 at 24 (explaining that "[t]he present findings, which demonstrate the pervasiveness and stability of the Flynn effect across multiple tests and many decades, support the feasibility of correcting IQ according to the interval between norming and administration of the test"). *See* Appendix O.

[22] Wright acknowledges this Court's finding in *Hall* that Florida's 70-IQ cutoff went "against the unanimous professional consensus." *Hall*, 572 U.S. at 722. However, this Court did not state in *Hall* that every expert in the field of intellectual disability must agree on a particular issue before the courts should consider it. This Court specifically found in *Hall* and *Moore* that the legal determination of intellectual disability must be informed by the medical diagnostic framework, and the manuals published by the AAIDD and APA dictate the medical diagnostic framework.

"creates an unacceptable risk that persons with intellectual disability will be executed" in violation of *Atkins* and the Eighth Amendment because IQ scores that are artificially inflated by outdated testing norms are not the most accurate or reliable indicator of a person's true intellectual functioning. *Hall*, 572 U.S. at 704; *Moore*, 137 S. Ct. at 1044.

Wright's case is a perfect example of why applying the Flynn effect is so important in death penalty cases. After applying the Flynn effect to Wright's two most reliable full-scale IQ scores- 76 (1991 WISC-R, age 10) and 75 (1997 WAIS-R, age 16)- **Wright's true IQ drops 6 points**- **70** (age 10) and **69** (age 16). Applying the Flynn effect to capital defendants' scores ensures that courts make this life-or-death decision based on the most accurate and reliable evidence of a person's true IQ.

II. Wright was required to prove he is intellectually disabled under Florida's clear and convincing evidence standard, which violates Due Process and the Eighth Amendment.

Florida's clear and convincing evidence standard violates the Due Process Clause. The states' power to regulate procedural burdens is subject to proscription under the Due Process Clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (citing *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). This Court held in *Cooper v. Oklahoma* that Oklahoma's clear and convincing evidence standard for competency to stand trial violated a defendant's due process rights and did not "reasonably accommodate the opposing interests of the State and the defendant." 517 U.S. 348, 355-56, 359-64 (1996). "A heightened

standard does not decrease the risk of error, but simply reallocates that risk between the parties." *Cooper*, 517 U.S. at 366 (internal citation omitted). There is no sound basis in intellectual disability cases for allocating to criminal defendants the large share of the risk which accompanies a clear and convincing evidence standard. *See id.* Intellectually disabled defendants' fundamental constitutional right not to executed far outweighs any interest the State may have in imposing a death sentence on capital defendants.[23] *See id.* at 367.

Further, contemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Florida is not necessary to vindicate the State's interest in deterrence of capital crimes by prospective offenders. *See id.* at 360. Florida is the only state that requires capital defendants prove they are intellectually disabled by clear and convincing evidence.[24] Florida is an extreme outlier in this case.

This Court also indicated in *Cooper* that where a constitutional right is at issue, like the right to be competent to stand trial, a state may not place a heightened evidentiary burden on a defendant if doing so "imposes a significant risk of an erroneous determination." 517 U.S. 348, 363 (1996). Capital defendants have a

[23] This Court explained in *Atkins* that the two recognized justifications for the State to impose the death penalty- "retribution and deterrence of capital crimes by prospective offenders"- do not apply to intellectually disabled offenders because their cognitive deficiencies make them less morally culpable and less likely to be able to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 319-20.

[24] Georgia requires proof beyond a reasonable doubt for intellectual disability claims. *See* Ga. Code Ann. § 17-7-131 (2017). All other states that specify an evidence standard require a preponderance of the evidence. A table detailing the states' evidentiary standards for intellectual disability can be found at Appendix P.

constitutional right under *Atkins* not to be executed if they are intellectually disabled. Requiring capital defendants to prove they are intellectually disabled by clear and convincing evidence imposes a significant risk of an erroneous determination that they are not intellectually disabled. This risk is especially high due to the fact that "[t]hose with ID who have higher IQ scores comprise about 80 to 90% of all individuals diagnosed with ID." AAIDD-11 at 151; Appendix Q (p.538). The Death Penalty and ID explains that:

> Within the diagnosis of intellectual disability (ID), there is immense variation in both cognitive functioning and adaptive behaviors, with the majority of individuals with ID functioning at the upper end of the disability range. In 1992, the American Association on Mental Retardation (AAMR) estimated that 89% of people with ID fell within the mild category … It is these individuals – at the upper end of the ID spectrum … [that] are the most difficult to diagnose and the least immediately recognizable as having ID.

Id. at 21; Appendix Q (p.557) In contrast with other individuals with more significant disabilities, "individuals with mild intellectual disability represent 100% of the cases in which the answer to the question 'Does this individual have an intellectual disability?' is actually in doubt." *Id.* at 21 (internal citation omitted); Appendix Q (p.557). Since the deficits suffered by mildly intellectually disabled individuals like Wright are often subtle, there is a heightened risk that the courts will erroneously interpret this as indicating that a defendant is not intellectually disabled under the clear and convincing standard. For these same reasons, Florida's clear and convincing evidence standard also violates the Eighth Amendment because it "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall,* 572 U.S. at 704; *Moore*, 137 S. Ct. at 1044.

The lower courts were given a full and fair opportunity in Wright's case to address the constitutionality of the clear and convincing evidence standard and chose not to. The claim was first raised during Wright's written closing arguments to the lower state trial court following the 2015 hearing on his renewed motion for determination of intellectual disability. The State addressed the claim in its rebuttal closing argument, making no mention of a procedural bar. The trial court addressed the issue in its order denying relief. *See supra* at pp. 8.

Despite the State having had a full and fair opportunity to address this claim, and despite the trial court having addressed the issue in its order, the FSC declined to consider the claim, finding that "the claim is procedurally barred because Wright raised this claim for the first time in his written closing remarks during the supplemental postconviction evidentiary hearing." *Wright II*, 213 So. 3d at 896, n.3.

The District Court also denied the claim, finding, in part, that it was procedurally barred because the FSC had dismissed it based on an "adequate and independent state law ground" as unpreserved under Florida procedural rules. Appendix B (p.53). Wright requested an appeal from the Eleventh Circuit on the issue, arguing that the fact that Wright's claim was dismissed on a state procedural ground did not preclude federal habeas review because the failure to consider the claim would result in a fundamental miscarriage of justice. *See Thompson v. Sec'y for Dept. of Corr.*, 517 F.3d 1279, 1282 (11th Cir. 2008) (citing *Coleman v. Thompson,* 501 U.S. 722 (1991)); Appendix K (p.328-31). The Eleventh Circuit refused to address the issue. Wright respectfully requests that this Court make a different choice to prevent

a fundamental miscarriage of justice. This Court should find that Florida's clear and convincing evidence standard for intellectual disability claims is unconstitutional.

CONCLUSION

"If the States were to have complete autonomy to define intellectual disability as they wished, [this] Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 572 U.S. at 720-21. Wright respectfully requests that this Court intervene to ensure that *Atkins* does not become a nullity in his case. For all the reasons above, this Court should grant the petition for a writ of certiorari and order further briefing, or vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

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