

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

VOLUME III

DEATH PENALTY CASE

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Excerpt from the “Petitioner’s Amended Memorandum of Law in Support of his
Amended Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus,
filed December 17, 2019

**UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division**

TAVARES J. WRIGHT,
Petitioner,

v.

**DEATH PENALTY CASE
CASE NO. 8:17-cv-00974-7DW-TGW**

**MARK S. INCH, SECRETARY, DEPARTMENT OF
CORRECTIONS and ASHLEY MOODY,
ATTORNEY GENERAL, STATE OF FLORIDA,**
Respondents.

**PETITIONER'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF
HIS AMENDED PETITION UNDER 28 U.S.C. § 2254
FOR WRIT OF HABEAS CORPUS**

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INTRODUCTION

The Petitioner, Tavares J. Wright (“Wright”), by and through his undersigned counsel, respectfully submits the following amended memorandum of law in support of his Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus By A Person In State Custody (“Petition”), filed on December 17, 2019. (Doc. 36). Wright is currently incarcerated at Union Correctional Institution in the State of Florida under a sentence of death. The relevant facts were presented in the Petition under each Ground and will be incorporated in the following memorandum in support of a grant of relief. Furthermore, interrelated Grounds will be argued below in concert. This case heavily relies on the correct facts found in the record below to meet its clear and convincing burden; the citations to the record will be in accordance with the Florida Supreme Court’s (“FSC”) record on appeal¹.

PROCEDURAL PREREQUISITES

Wright’s Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Section § 2254(d) of the AEDPA provides that this Court can grant a writ of habeas corpus to a state prisoner on a claim that was “adjudicated on the merits in State court.” Specifically, relief shall be granted if this Court concludes that the adjudication of the claim by the state court “(1) resulted in a decision that was contrary to, or

¹ References to the record on appeal from Wright’s direct appeal will be referred to as R (volume number) / (page number). References to the record on appeal containing the transcript of Wright’s 2005 combined penalty phase / *Spencer* hearing will be referred to as RS (volume number) / (page number). The postconviction record on appeal containing the transcript of Wright’s 2012 evidentiary hearing on his Fla. R. Crim. P. 3.851 motion will be referred to as PC (volume number) / (page number). References to the supplemental record on appeal regarding Wright’s Renewed Motion for Determination of Intellectual Disability and the 2015 hearing on that motion will be referred to as SR (volume number) / (page number).

involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

Under the “contrary to” clause, this Court may grant the writ if the state court arrived at a conclusion opposite to that reached by the United States Supreme Court (“SCOTUS”) on a question of law, or if the state court decided a case differently than SCOTUS has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000). Under the “unreasonable application” clause, this Court may grant the writ if the state court identified the correct governing legal principle² established by SCOTUS, but it unreasonably applied that principle to the facts of the prisoner’s case. *Id.* at 413. In addition, “rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule.” *Id.* at 382.

This Court may also grant the writ if the state court’s decision was based upon an unreasonable determination of the facts in light of the evidence presented. The determination of factual issues made by a state court “shall be presumed to be correct,” and Wright “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). Wright submits to this Court that the limited factual findings by the lower state courts are not only unreasonable but incorrect in light of the evidence presented at trial and in postconviction. *See* 28 U.S.C. § 2254(d). This Court must look at the record below

² In post-conviction cases involving ineffective assistance of counsel claims, the governing SCOTUS case is *Strickland v. Washington*, 466 U.S. 668. There are no procedural bar issues pursuant to *Teague v. Lane*, 489 U.S. 288 (1989).

in determining whether Wright has met the clear and convincing standard.

All of the habeas claims in Wright’s Petition and discussed herein meet the procedural prerequisites and can be considered by this Court. *See* 28 U.S.C. § 2254(c). The state courts had full and fair opportunities to address and resolve the habeas claims, thus Wright has met the exhaustion requirement. *See* 28 U.S.C. § 2254(b); *see also O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Furthermore, the factual and theoretical bases of Wright’s habeas claims were presented in state court and are the same before this Court. *See* 28 U.S.C. § 2254(c); *see Vazquez v. Hillery*, 474 U.S. 254, 257-60 (1986) (Supplementation and clarification of a factual record in federal habeas court is permitted and does not defeat the exhaustion rule of 28 U.S.C. § 2254).

This Court may presume the absence of an independent and adequate state ground for a state court decision when the decision “fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *see also Judd v. Haley*, 250 F. 3d 1308, 1313 (11th Cir. 2001) (citing *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) (“[T]he last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim,” ... “the state court’s decision must rest solidly on state law grounds, and may not be ‘intertwined with an interpretation of federal law,’” ... and “the state procedural rule must be adequate; *i.e.*, it must not be applied in an arbitrary or unprecedented fashion”)).

A petitioner seeking to raise a claim as a federal issue in state court does so by “citing

in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim ‘federal.’” *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). Petitioners are required to fairly present their federal claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). In terms of fair presentment, the petitioner must identify the specific constitutional right that has been violated. *See Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). “[I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the ‘substance’ of such a claim to a state court.” *Id.* at 162. If the state court applies federal law to resolve the claim, the state court must issue a decision that addresses and adjudicates the Petitioner’s actual habeas claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 98, (2011). The claim raised in federal court must then be the “substantial equivalent” of the claim presented in state court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Wright’s habeas grounds have been appropriately federalized and are suitable for this Court’s review.

Wright will demonstrate below, as to each habeas ground, that his conviction and sentence of death are based on state court decisions that are contrary to, or involved an unreasonable application of, clearly established federal law, and/or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *see also Williams*, 529 U.S. 362. Wright will also demonstrate the actual prejudice he suffered as to each ground. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

The facts set out in Wright’s Petition are hereby incorporated into this memorandum.

GROUND ONE

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 on June 30, 2005. R5/743-44. The trial court appointed Drs. William Kremper and Joel Freid to evaluate Wright for mental retardation.³ R5/745. Both experts testified at a special hearing regarding mental retardation on September 22, 2005. R5/749. Neither expert assessed Wright's adaptive behavior. Following that hearing, the trial court found that Wright's IQ-scores did not establish a finding of mental retardation, and that Wright therefore was not mentally retarded for the purposes of capital sentencing. R5/825-29. On October 12, 2005, the trial court sentenced Wright to death on the two counts of first-degree murder and to life imprisonment on the remaining counts. R6/963-83. 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 v. Florida*, 134 S. Ct. 1986 (2014). SR1/1-7. The circuit court agreed to take judicial notice of the record on appeal from direct appeal, as well as the post-conviction record on appeal. The evidentiary hearing on the motion was held on January 5-6, 2015 and February 11, 2015. Dr. Mary Kasper testified for the defense at the 2015 hearing and opined that Wright meets the criteria for both significantly subaverage intellectual functioning and adaptive deficits. SR5/897, 963. Dr. Michael Kindelan testified for the defense at the 2015 hearing and opined that Wright's IQ scores place him in the range of someone with intellectual disability. SR8/ 1386. Dr. Joel Freid testified for the defense at the 2015 hearing and opined

³ "Intellectual disability" has since replaced "mental retardation" as the appropriate term.

that Wright's IQ scores place him in the range of someone with intellectual disability. SR8/1419-20. Dr. Michael Gamache testified for the State at the 2015 hearing and opined that Wright does not meet the criteria for intellectual disability. SR8/1351; SR9/1548-50, 1570, 1575. Numerous lay witnesses testified as to evidence of Wright's adaptive functioning.

On March 26, 2015, the circuit court issued an order concluding that Wright did not meet the legal standard for intellectual disability under Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) and accordingly denied Wright's intellectual disability claim. SR11/1858-70. The FSC affirmed the circuit court's order, finding that Wright "has not even demonstrated by a preponderance of the evidence either of the first two prongs for a determination of intellectual disability." *Wright v. State*, 213 So. 3d 881, 902 (Fla. 2017) ("*Wright I*"). On August 10, 2017, Wright filed a petition for a writ of certiorari to SCOTUS. On October 16, 2017, SCOTUS granted Wright's petition for a writ of certiorari, vacated the FSC's judgment in *Wright I*, and remanded the case to the FSC for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). On September 27, 2018, the FSC issued an opinion finding that *Moore* did not require a different result in Wright's case and reaffirming the circuit court's denial of his intellectual disability claim. *Wright v. State*, 256 So. 3d 766 (Fla. 2018) ("*Wright II*"). The FSC's resolution of this claim in *Wright I* and *Wright II* was an unreasonable application of clearly established federal law, specifically *Atkins v. Virginia*, 536 U.S. 304 (2002) ("*Atkins*"), *Hall v. Florida*, 572 U.S. 701 (2014) ("*Hall*"), *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore*"), and the Eighth and Fourteenth Amendments to the United States Constitution. Further, the FSC made an unreasonable determination of the facts in light of the state court record.

Executing the intellectually disabled is cruel and unusual punishment in violation of the Eighth Amendment. *Atkins*, 536 U.S. 304. In *Atkins*, SCOTUS explained that, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses,” intellectually disabled offenders “do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.” *Id.* at 306. *Atkins* left to the states the task of developing appropriate mechanisms to enforce the constitutional prohibition against executing the intellectually disabled. *Id.* at 317. Florida’s intellectual disability statute states:

(1) ... “[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. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) 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. In *Hall*, SCOTUS explained that “[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but ***it is informed by the medical community's diagnostic framework.***” 572 U.S. at 721 (emphasis added). SCOTUS acknowledged that

[f]or purposes of most IQ tests, the [standard error of measurement (“SEM”)] means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies.

Hall, 572 U.S. at 713. “The SEM reflects the reality that an individual's intellectual functioning

cannot be reduced to a single numerical score.” *Id.* SCOTUS rejected Florida’s then strict IQ score cutoff of 70⁴ as unconstitutional, explaining that by failing to consider the SEM and setting a strict cutoff at 70, Florida went against “unanimous professional consensus.” *Hall*, 572 U.S. at 722. SCOTUS further explained that

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.

The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.

Hall, 572 U.S. at 712 (internal citation omitted). SCOTUS held that “when a defendant’s IQ 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*, 572 U.S. at 723.

Reaffirming the importance of the medical diagnostic framework when evaluating intellectual disability, SCOTUS later stated in *Moore*:

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. Although *Atkins* and *Hall* left to the States “the task of developing appropriate ways to enforce” the restriction on executing the intellectually disabled, States’ discretion, we cautioned, is not “unfettered.” ***Even if “the views of medical experts” do not “dictate” a court’s intellectual-disability determination, we clarified, the determination must be “informed by the medical community’s diagnostic framework.”*** We relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11 ... ***Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But***

⁴ At the time, the FSC held that a defendant could not prove intellectual disability if his IQ scores were above 70. *Cherry v. State*, 959 So. 2d 702 (Fla. 2007).

neither does our precedent license disregard of current medical standards.

Moore, 137 S. Ct. 1039, 1048–49 (2017) (internal citations omitted) (emphasis added). In *Moore*, SCOTUS vacated and remanded the Texas Criminal Court of Appeal’s (“CCA”) determination that a defendant was not intellectually disabled, in part, because the CCA “deviated from prevailing clinical standards” by overemphasizing Moore’s perceived adaptive strengths and highlighting his improved behavior in prison. *Id.* at 1050. SCOTUS explained that the medical community focuses the adaptive functioning inquiry on deficits instead of strengths and cautions against relying on adaptive strengths developed in a controlled setting such as prison. *Id.* The FSC unreasonably applied clearly established federal law when it disregarded the medical diagnostic framework and deviated from prevailing clinical standards by finding that Wright does not meet the criteria for intellectual disability in both the *Wright I* and *Wright II* opinions. The FSC also made an unreasonable determination of the facts in light of the evidence presented by ignoring overwhelming expert and lay witness testimony that supports Wright’s claim and relying on the testimony of a non-credible expert. This memorandum will address these arguments separately as to Prong One (significantly subaverage general intellectual functioning) and Prong Two (deficits in adaptive behavior).⁵

I. Prong One- Significantly Subaverage General Intellectual Functioning (“IQ”)

The FSC unreasonably applied *Atkins* and *Hall* when it determined that Wright does not have significantly subaverage IQ. In *Wright I*, The FSC ignored the medical diagnostic

⁵ Prong three- manifestation during the period from conception to 18- is not disputed. The circuit court found “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.” SR11/ 1865.

framework when it disregarded the SEM, viewed Wright's IQ as a fixed number instead of an imprecise range, and failed to consider the Flynn effect. The AAIDD-11⁶ explains that:

The intent of [the definition of intellectual functioning] is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion for ID. Rather, one needs to use clinical judgment in interpreting the obtained score in reference to the test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used.

AAIDD-11 at 35. The DSM-V⁷ 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-V at 37 (emphasis added). The FSC acknowledged that “IQ scores are best evaluated as a range, taking into account the ... SEM and other factors.” *Wright I*, 213 So. 3d at 897 (citing *Hall*, 134 S. Ct. at 1995-96). The FSC outlined Wright's six full scale IQ scores (76, 80, 81, 75, 82, and 75). *Wright I*, 213 So. 3d at 897. The FSC cited Dr. Kasper's testimony that the range of scores yielded from Wright's first score (76) was the most accurate because it would be free from the practice effect.⁸ *Id.* Upon applying a 95% confidence interval, the range derived from this score is 69

⁶AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) (“AAIDD-11”).

⁷ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH ADDITION (American Psychiatric Association 2013) (“DSM-V”)

⁸ Dr. Kasper testified that Wright's full-scale 76 achieved on the first WISC-R test he was administered by Dr. Michael Kindelan when he was 10 years old in 1991 and his full-scale 75 achieved on the first WAIS-R test he was administered by Dr. Joel Freid when he was 16 years old in 1997 were the best measures of Wright's intelligence because they were given prior to any legal history, were taken in the most standardized conditions, and would be free of the practice effect as they were the first time Wright had taken the WISC-R and WAIS-R. SR5/918.

to 82. *Id.* The FSC disregarded the SEM when it stated that “[e]ven taking the most favorable testimony concerning the application of the SEM to Wright’s scores, at its lowest point, the most favorable range derived from Wright’s scores dips just one point beneath ***the threshold of 70 required for a finding of significantly subaverage general intellectual functioning.***” *Id.* (emphasis added). However, the DSM explicitly states that individuals with intellectual disability have scores falling in the range of 65-75. DSM-V at 37. The FSC’s language makes it clear that the court is still adhering to its unconstitutional 70 IQ cutoff and accordingly failed to recognize that Wright’s range of scores from 69 to 82 indicates that he has significantly subaverage intelligence.

The FSC further gave undue weight to the 82 that Wright achieved in 2005 at the age of 24 years old. The FSC stated that “[m]ost notably ... Dr. Kasper agreed that Wright’s score of 82 in 2005 was valid and free of any practice effect concerns, and she conceded that the score of 82 was within the 95% confidence interval she determined from applying the SEM to Wright’s first IQ exam.” *Wright I*, 213 So. 3d at 898. The FSC then cited Dr. Gamache’s testimony that “Wright’s highest IQ score of 82 was the most accurate representation of his IQ.” *Id.* The FSC inappropriately narrowed its analysis of Wright’s IQ to a single number (82), disregarding that Wright’s true score falls anywhere between 69 and 82. The FSC also disregarded the basic clinical definition of intellectual disability and Florida’s own statutory definition when it gave undue weight to a score that Wright achieved when he was ***24 years***

old. The DSM-V, AAIDD-11, and Fla. Stat. § 921.137 (1) all define intellectual disability as a condition that originates prior to age 18.⁹ See DSM-V at 37; AAIDD-11 at 5.

The FSC further disregarded the medical diagnostic framework by failing to consider the Flynn effect¹⁰ when analyzing Wright's IQ scores. The Flynn effect is accepted in the scientific community. The DSM-V recognizes that "factors that may affect test scores include ... the Flynn effect (i.e., overly high scores due to out-of-date test norms)." DSM-V at 37. The Flynn effect refers to the statistical upward drift of IQ scores over time. Mean IQ scores on a given test increase about 0.33 points per year from the date the test is normed. AAIDD-11 at 37. Both the AAIDD-11 and its associated 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 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. The AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY (Edward A. Polloway ed., 2015) ("The Death Penalty and ID") further explains that:

A consensus among the professional and scientific community of intelligence and ID scholars has emerged. This consensus is that given the high-stakes nature of *Atkins* ID cases and their tendency to artificially focus on specific

⁹ Wright does not argue that courts should never consider scores achieved after the age of 18 when determining intellectual disability as a legal matter. However, Wright's scores achieved before age 18 are likely the most reliable indicator of his intelligence because they adhere to the clinical definition of intellectual disability. With this in mind, Wright also argues that his scores of 80 and 81 achieved on the second and third administrations of the WISC-R he took in 1991 are not valid scores and should not be considered because they are products of the practice effect.

¹⁰ The Flynn effect is also referred to as "test-norm obsolescence."

“bright line” cutoff scores, *a Flynn effect correction to a person’s scores in this setting is now considered best or standard practice.*

The Death Penalty and ID at 161 (emphasis in original). Dr. Kasper testified that Wright’s first full-scale 1991 score of 76 equals **70** when corrected for the Flynn effect. PC12/1963. She further testified that Wright’s full-scale 1997 score of 75 equals **69** when corrected for the Flynn effect. PC12/1969-70. Both scores clearly fall in the significantly subaverage range. The FSC further failed to consider the application of the Flynn effect to the range of Wright’s scores from his first 1991 test. When applying the Flynn effect to the range of Wright’s scores from the first 1991 test (69 to 82), Wright’s true score falls in the range from 63 to 76, clearly placing Wright in the significantly subaverage range and satisfying the first prong of intellectual disability.

In *Wright II*, the FSC found that “*Moore* does not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination; thus, Wright’s claim fails again.” 256 So. 3d at 770. The FSC stated that it did not need to alter its determination of Prong One because it went on to consider Wright’s adaptive functioning in its *Wright I* opinion as directed by *Hall* and *Moore*. *Wright II*, 256 So. 3d at 772. The fact that the FSC considered Wright’s adaptive functioning in its *Wright I* opinion does not alter the fact that the FSC unreasonably applied *Hall* by disregarding the SEM and failing to consider the Flynn effect. Additionally, the FSC again misconstrued IQ as a single number instead of a range in its *Wright II* opinion when it still focused on Wright’s score of 82 and completely failed to explicitly mention any of Wright’s other scores. *Wright II*, 256 So. 3d at 772.

The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not have significantly subaverage IQ and relied on

Dr. Gamache's non-credible and unsupported testimony. There is clear and convincing evidence that Wright has significantly subaverage IQ. He scored a full-scale 76 with a range of 69 to 82 on a WISC-R¹¹ administered when he was ten years old. SR8/1385-86. He later scored a full-scale 75 with a range of 69.08 to 80.92 on a WAIS-R¹² administered when he was sixteen years old. SR8/1410-14. Wright's full-scale score of 75 at 16 years old clearly indicates that he has significantly subaverage intelligence. Further, Wright's Flynn-corrected scores for the 1991 and 1997 tests (70 and 69) also indicate he has significantly subaverage intelligence. Additionally, applying the Flynn effect to the range of Wright's scores from his first 1991 test yields a range of 63 to 76, which is clearly significantly subaverage and clearly satisfies the first prong of intellectual disability.

Dr. Kasper opined that Wright suffers from significantly subaverage intellectual functioning. SR5/897. Dr. Kindelan and Dr. Freid both testified that Wright's IQ scores place him in the range of scores of someone who is intellectually disabled. SR8/1386, 1419-20. However, the FSC chose to improperly rely on Dr. Gamache's unreliable testimony that Wright does not have subaverage IQ and was likely malingering on all his IQ tests. Further, in *Wright I* and *Wright II*, the FSC failed to even mention if it considered Dr. Freid and Dr. Kindelan's testimony concerning Wright's intellectual functioning. The FSC relied on Dr. Gamache's testimony that:

he had concerns that Wright had malingered or not offered a full effort on all of his IQ tests. [Dr. Gamache] reached this conclusion because in administering an IQ test to Wright, he also administered a Validity Indicator Profile test, which indicated that Wright did not expend a full effort. From this experience, Dr. Gamache determined that Wright may have been malingering on all of his

¹¹ Wechsler Intelligence Scale for Children-Revised

¹² Wechsler Adult Intelligence Scale-Revised

previous IQ exams because Wright had never been given a validity test during previous IQ exam administrations. Dr. Gamache explained that although Wright's previous evaluators did not detect any malingering, subjective judgment regarding validity of IQ examinations is notoriously poor.

Wright I, 213 So. 3d at 898. Dr. Gamache's opinion that Wright was malingering is unfounded.

The User's Guide raises concern about using tests to assess malingering in intellectually disabled individuals:

Clinicians who similarly attempt to use specific "malingering" tests in individuals with ID must use considerable caution because of two factors: (1) the lack of a research base supporting the accuracy of such tests for persons with ID; and (2) the documented misuse of common malingering tests even when the test manual explicitly precludes use with individuals with ID. [These tests] have not, for the most part, been normed for persons with ID. In addition, recent studies have documented unacceptable error rates (i.e., false positive for malingering) when used with persons with IQ scores from 50 to 78.

User's Guide at 24. Dr. Kasper testified that the Validity Indicator Profile ("VIP") that Dr. Gamache administered was not an appropriate measure of malingering for individuals being considering for a diagnosis of intellectual disability because the VIP manual states that the test misclassifies intellectually disabled individuals 80 percent of the time. SR6/1107. Further, Drs. Kindelan and Freid (the doctors who administered Wright's first 1991 test and his 1997 test) testified that they had no concerns about the validity of either test. SR8/1381-82, 1412-13. Dr. Kindelan also testified that he is unaware of any validity test that is appropriate for a ten-year-old. SR8/1380. The range of scores for the 1991 test that Dr. Kindelan administered was 69 to 82, and Wright has scored within that range for all six of his full-scale scores. Dr. Kindelan testified that it would be nearly impossible for an individual to score as consistently as Wright by malingering. SR8/1387. Therefore, it is clear that Wright was not malingering, and his range

of IQ scores places him squarely in the range of significantly subaverage intellectual functioning.

II. Prong Two- Deficits in Adaptive Behavior

The FSC unreasonably applied *Atkins*, *Hall*, and *Moore* when it found that Wright does not suffer from sufficient adaptive deficits to satisfy Prong Two. In *Wright I*, the FSC concluded that Wright “cannot demonstrate by even a preponderance of the evidence that he suffers from concurrent deficits in adaptive functioning, the second prong of a finding of intellectual disability.” 213 So. 3d at 898. In reaching this conclusion, the FSC disregarded the medical diagnostic framework and prevailing clinical standards by: requiring that Wright prove that he has deficits in more than one adaptive category; focusing on Wright’s adaptive strengths while ignoring his adaptive deficits; relying too heavily on Wright’s adaptive improvements made in the controlled prison environment as proof that he is not deficient; and considering the underlying facts of Wright’s alleged crime as evidence that he does not have adaptive deficits.

In *Wright I*, the FSC improperly stated that “not even Wright’s expert, Dr. Kasper, could establish that Wright has concurrent deficits in adaptive functioning. Rather, Dr. Kasper could only conclude that Wright currently has some deficits in the subcategory of conceptual skills, but not in the other categories of practical skills or social skills.” *Wright I*, 213 So. 3d at 900. The FSC further incorrectly stated that “Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong. This is insufficient for a finding of intellectual disability in the context of this case...” *Id.* The DSM-

V explains that “adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical.” DSM- V at 37. The DSM-V also explains that:

The *conceptual (academic) domain* involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The *social domain* involves awareness of others’ thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. 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, among others.

DSM-V at 37. The AAIDD-11 further describes the domains as:

Conceptual skills: language; reading and writing; and money, time, and number concepts

Social skills: interpersonal skills, social responsibility, self-esteem, gullibility naïveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving

Practical skills: activities of daily living (personal care), occupational skills, use of money, safety, travel/transportation, schedules/routines, and use of the telephone

AAIDD-11 at 44. 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 (emphasis added). Dr. Kasper assessed Wright’s adaptive behavior by interviewing Wright, interviewing several witnesses who know Wright as a child and adult, and administering two ABAS-II¹³ tests- one to correspond with the 1997 WAIS-R administered to Wright when he was 16 years old and one to assess his current functioning. PC11/1894-95; SR6/957. Although Wright is

¹³ Adaptive Behavior Assessment System – Second Edition

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. SR6/959-61. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. SR6/963. The FSC acknowledged that the first ABAS-II indicated that Wright showed deficits in two categories, but then relied on the second administration of the ABAS-II corresponding with Wright's current functioning to conclude that "Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong." *Wright I*, 213 So. 3d at 900. The FSC further stated in *Wright II* that "only one domain is at issue here: the conceptual. Both experts testified at the renewed ID determination hearing—including Wright's own expert—that Wright has no deficits in the social and practical domains that rise to the level of an ID determination."¹⁴ *Wright II*, 256 So. 3d at 774. The FSC's reliance on the results of the second ABAS-II is particularly problematic as the test corresponds with Wright's current functioning in prison, showing that the FSC inappropriately relied on Wright's improved behavior in the controlled setting of prison.¹⁵ See DSM-V at 38 ("Adaptive functioning may be difficult to assess in a controlled setting [such as] prisons [or] detention centers.").

¹⁴ The FSC misconstrues Dr. Kasper's testimony. Dr. Kasper did not testify that Wright has no deficits in the social domain. She testified that Wright showed deficits in both the social and conceptual domains on the ABAS-II corresponding with his functioning at 16 years old. However, he showed improvement on the ABAS-II corresponding with his current functioning and accordingly only showed conceptual deficits on that test. SR6/959-64.

¹⁵ Wright does not argue that current adaptive functioning or adaptive functioning in the prison environment should never be considered when determining intellectual disability. However, the FSC relied too heavily on the adaptive improvements that Wright made in prison while

The FSC further over-emphasized expert and lay-witness testimony of Wright's perceived adaptive strengths while practically disregarding the extensive evidence of Wright's deficits in all three categories of adaptive behavior. The FSC exacerbated its error by also relying too heavily on Wright's prison behavior in its analysis. The FSC based its ruling in *Wright I* on a litany of adaptive strengths that Dr. Gamache testified to after primarily basing his opinion on a single interview with Wright while he was imprisoned. *See Wright I*, 213 So. 3d at 899-900. However, the AAIDD-11 explains that:

“Within an individual, limitations often coexist with strengths.” This means that people with ID are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others. Individuals may have capabilities and strengths that are independent of their ID (e.g., strengths in social or physical capabilities, some adaptive skill areas, or one aspect of an adaptive skill in which they otherwise show an overall limitation) ...

The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance ... [Intellectually disabled individuals] typically demonstrate both strengths and limitations in adaptive behavior. ***Thus, in the process of diagnosing ID, significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills.***

AAIDD-11 at 7, 47 (emphasis added). The AAIDD-11 and its User's Guide caution against relying only on information obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User's Guide at 20. The DSM-V states that “[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.” DSM-V at 38. The User's Guide states that “[intellectual disability] is not based on

disregarding the overwhelming evidence of the adaptive deficits he suffered prior to age 18 and prior to incarceration. *See infra* pp. 20-22.

the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'" User's Guide at 20.

Despite the clinical community's clear guidance, the FSC still impermissibly relied on Wright's adaptive strengths and behavior in prison to determine that he does not have sufficient adaptive deficits. The FSC conceded that Dr. Gamache acknowledged Wright had "some deficits in reading and writing skills...and some deficits in self-direction and the ability to formulate goals or objectives" in the conceptual skills category. *Wright I*, 213 So. 3d at 899. However, the FSC failed to explicitly consider numerous adaptive deficits such as the fact that Wright was exempt from taking standardized tests because he was classified as learning disabled, had several independent education plans in his school records, failed to understand rules of simple games like Uno, could not complete his schoolwork even though he was in special classes, could not constructively participate in a Bible study group in jail, and was unable to effectively communicate with his attorneys or understand what they told him. See PC11/ 1921-23, SR7/ 1205, 1212; PC11/ 1796-98; SR4/ 710-11, 722; SR5/ 751-64, 789-90. The FSC improperly relied on Dr. Gamache's testimony that Wright exhibited **sixteen** strengths in conceptual skills, many of them developed in prison. The FSC found, in part, that Wright "fully communicates with other prisoners and prison staff;" "knows the allocated time for prison activities;" "manages his prison canteen fund and pays attention to his monthly statements;" and "knows the difference between legal mail and regular mail in the prison system." *Id.*

Further, the FSC failed to explicitly consider any of Wright's social deficits, ignoring evidence that Wright lacked friends as a child and was bullied throughout school for being

“slow”, was often excluded from team sports as a child because he could not understand the rules, and was manipulated by other jail inmates because he was a follower and wanted to fit in. *See* RS2/286; RS3/335, 340-41, 351; PC10/1762, 1791-92, 1839. The FSC instead relied on Dr. Gamache’s testimony that Wright exhibited **six** social strengths, including testimony that Wright “has counseled [prison] pen pals on how to deal with difficult situations” and “appears to have adapted well to life on death row, as exhibited by his lack of disciplinary write-ups and ability to ask correctional staff for help.” *Id.* The FSC incorrectly characterized Dr. Gamache’s testimony that Wright “has counseled [prison] pen pals on how to deal with difficult situations” as an adaptive strength because Wright has actually received help from other inmates in order to effectively communicate with his prison pen pals.¹⁶

With regard to practical skills, the FSC conceded that Wright “did not have a driver’s license because he could not pass the written portion” of the exam. *Id.* at 900. However, the FSC offset this deficit by explaining that Wright knew how to drive a car. *Id.* The FSC further relied on Dr. Gamache’s testimony of **three** adaptive strengths in practical skills, including that Wright “cares for his health [in prison] by showering and grooming daily, as well as by engaging in self-care and health-oriented activities.” Finally, the FSC listed **ten** perceived adaptive strengths that Wright’s family members testified to, including that Wright wrote his cousin birthday cards from prison and was always clean when his aunt saw him. *Id.* at 901.

Some of the strengths the FSC cited to are indisputably things that an intellectual disabled person may be capable of doing by themselves or with the assistance of others. The

¹⁶ Death Row Inmate Richard Shere testified that he has given Wright advice on how to keep conversations going with his pen pals and has drafted portions of letters to pen pals for Wright to copy. SR5/ 857.

FSC cited to the fact that Wright “knew how to use public transportation in his community,” was employed at a grocery store, and has the capacity to learn. *Wright I*, 213 So. 3d at 900-01. Dr. Kasper testified that intellectually disabled individuals are able to hold down jobs, have romantic relationships, have children, buy things at the store, take public transportation, and even have driver’s licenses. SR6/ 940-42. There are government agencies that assist intellectually disabled individuals with job training, job placement, and how to use the public bus system. SR6/ 939. Some individuals are able to work with the help of job coaches who provide the supports needed to continue employment. SR6/ 952-54. Wright’s cousin, Carlton Barnaby, provided support for Wright that was virtually identical to what a job coach would do. SR6/ 954-55; *see infra* pp. 25-26.

In *Wright II*, the FSC stated that it did not “overemphasize Wright’s adaptive strengths to an extent that ran afoul of *Moore*” because it did not engage in the “arbitrary offsetting of deficits against unconnected strengths in which the CCA engaged.” *Wright II*, 256 So. 3d at 776 (citing *Moore*, 137 S. Ct at 1050). The FSC concluded that “the overemphasis issue, as identified by the Supreme Court in *Moore*, is not present here because [the FSC] did not arbitrarily offset deficits with unconnected strengths; instead, [the FSC] simply relied on expert testimony with regard to connected adaptive deficits and the postconviction court’s credibility determinations.” *Wright II*, 256 So. 3d at 777 (internal citation omitted). The FSC further concluded that it “did not detrimentally rely on strengths that Wright developed in prison ... [t]he only portion of [*Wright I*] that touched on prison conduct was [the] recitation of Dr. Gamache’s findings.” *Id.* As an initial matter, the FSC cannot say that it relied on the post-conviction court’s credibility findings concerning witness testimony because *the post-*

conviction court did not make any explicit credibility findings in its order denying Wright's claim. Further, while SCOTUS did explain in *Moore* that the CCA engaged in an “arbitrary offsetting of deficits against unconnected strengths” in Moore’s case, *Moore*’s prohibition against overemphasis on adaptive strengths should not be narrowly interpreted to only situations where deficits are offset in such a way. *Moore*, 137 S. Ct. at 1050. In finding that the CCA had overemphasized Moore’s perceived adaptive strengths, SCOTUS explained:

Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, see *supra*, at 1045; App. to Pet. for Cert. 180a–202a. See 470 S.W.3d, at 522–524, 526–527. ***But the medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD–11, at 47 (“significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills”);*** DSM–5, at 33, 38 (inquiry should focus on “[d]eficits in adaptive functioning”; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see *Brumfield*, 576 U.S., at —, 135 S.Ct., at 2281 (“[I]ntellectually disabled persons may have ‘strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.’ ” (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)))

Moore, 137 S. Ct. at 1050. Instead of focusing its analysis on Wright’s adaptive deficits in each category, as directed by clinical standards, the FSC focused on Wright’s adaptive strengths, and used them to offset his significant adaptive deficits. The AAIDD-11 explains that intellectually disabled individuals may exhibit strengths in “one aspect of an adaptive skill in which they otherwise show an overall limitation.” AAIDD-11 at 7. The FSC need not offset Wright’s adaptive deficits with unrelated adaptive strengths to deviate from prevailing clinical standards. The FSC deviated from prevailing clinical standards when it listed **thirty-five** alleged adaptive strengths in *Wright I* while completely ignoring Wright’s substantial evidence of adaptive deficits. 213 So. 3d at 899-901. Further, the FSC cannot claim that it did not

detrimentally rely on Wright's adaptive strengths exhibited in prison when it listed at least **nine** examples of prison behavior that Dr. Gamache testified to and failed to specifically analyze the lay-witness testimony of Wright's adaptive deficits prior to incarceration. *Wright I*, 213 So. 3d at 899-900.

In *Wright I*, the FSC further deviated from prevailing clinical standards when it relied on the facts of Wright's alleged crimes and Wright's statements during a custodial interview with a detective to refute deficits in adaptive functioning. *Wright I*, 213 So. 3d at 901. Evidence of one's past criminal behavior, however, is not indicative of adaptive behavior:

Other sources of information frequently presented in *Atkins* hearings are the **facts of the specific crime or the defendant's past criminal behavior**. Schalock et al. (2010, 2012) have taken the clear position that past criminal behavior is not an indicator of one's level of adaptive functioning and that "the diagnosis of ID is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning'" (2012, p. 20). This position is supported by the definition of adaptive functioning that requires examination of typical behavior in one's community. As noted earlier, isolated examples of relative strengths are expected. It is difficult to prove that specific examples of criminal behavior are typical or representative of one's overall adaptive functioning. Further, Schalock and colleagues (2010, 2012) have noted that research shows that *maladaptive behavior* (e.g. criminal behavior) is not the same as *impaired adaptive behavior*.

The Death Penalty and ID at 196-97. The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not suffer from sufficient adaptive deficits for a determination of intellectual disability and relied on non-credible expert and lay witness testimony. Clear and convincing evidence proves that Wright suffered from adaptive deficits prior to age 18 **and** after his incarceration. Several family members and childhood friends testified as to Wright's adaptive deficits while growing up. 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. RS2/278-79. McClain testified that Wright was “slow”, and his mother received social security benefits for him because he was in “ESE” classes and had learning problems. RS2/285. McClain observed Wright have difficulty as a child concentrating on one task, which affected his schoolwork. RS2/289.

Carlton Barnaby (“Carlton”), Wright’s maternal first cousin, testified that he knew Wright all his life, and they spent significant time together growing up. RS3/329; SR4/ 655; 659. Wright and Carlton attended the same elementary, middle, and high school together. SR4/ 663. Wright was in SLD (slow learning disability classes). SR4/ 663. Wright’s reading and writing in school were poor, and Carlton helped him with spelling, grammar, and punctuation. SR4/ 664-64. Carlton testified that he helped care for Wright when they were children- Carlton provided Wright with toothpaste and deodorant, coached him on proper hygiene, and combed Wright’s hair. SR4/ 660-61. Carlton also cared for Wright as they grew older. Carlton gave Wright rides because he did not have a driver’s license. SR4/ 662. 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. SR4/ 670. Carlton picked Wright up in the morning at the same time for each shift and drove him to work. SR4/ 670-71. Carlton also drove Wright home when their shift was over. SR4/ 671. Carlton regularly helped Wright with the time clock until Wright was able to do it on his own. SR4/ 674-75. Wright and Carlton stayed together and were within sight of one another during the entire shift. SR4/ 671. They went on breaks together, which they knew to take because an announcement was made, and everyone would leave at the same time. SR4/ 671-72. Carlton and the other workers would look out for Wright and instruct him on how to do his job. SR4/ 673-74. Wright could not have

done this job without someone helping him, at least at first. SR4/ 674. Carlton and Wright were paid by check through the temp agency, and Carlton would drive Wright to the temp agency to pick up his paycheck. SR4/ 675. Wright did not have a bank account, so Carlton would drive Wright to a store to cash his check. SR4/ 675. Carlton helped Wright cash his checks, and he showed him where to sign his name on the checks. SR4/ 675-76.

Marian Barnaby (“Marian”), Wright’s maternal aunt, testified that Wright spent almost every weekend at her house as a child. SR4/ 635-36. Marian described Wright as a slow learner. SR4/ 637. As a young child, he had problems with his speech, and he was not able to learn as well as her own children. SR4 637. Wright was in slow classes at school because of his learning problems. SR4/ 639. His slow learning problems continued throughout his years in school. SR4/ 640. Wright also started walking later than Marian’s own children. SR4/ 638. Wright’s mother received a disability check for his slow learning and disability. SR4/ 639.

Toya Long Ford (“Ford”), Wright’s childhood friend, testified that she and Wright “pretty much grew up together.” SR7/ 1201. Ford and Wright were unable to have long or elaborate conversations because Wright would have trouble understanding what Ford was saying. SR7/ 1202-03. Even though Wright had easier schoolwork since he was in special classes, Ford would often do Wright’s homework for him because he could not understand it. SR7/ 1205, 1212. Wright would often come to Ford’s house to get food. SR7/ 1209. Ford’s mother would not let Wright cook because of his short attention span. SR/ 1214. Ford’s mother also had to remind Wright to brush his teeth, wash his face, and tie his shoes. SR7/ 1207.

James Blake (“Blake”), another childhood friend of Wright, testified that he met Wright in boot camp in 1997. PC10/1734, 54. Wright did not fit in with the other boys in boot camp.

PC10/1735. He adapted more slowly to boot camp than the rest of the boys, and he was not able to obey the drill instructors' orders because he did not understand them. PC10/1735. After boot camp, Blake saw Wright again on the street in Lakeland around 1998. PC10/1738, 1741. The other children made fun of Wright by calling him slow and telling him that he was born premature. PC10/1740-43. Wright did not engage in serious conversations. PC10/1745. Wright played football with Blake three or four times, but the other children did not want to pick Wright for their team because he did not understand the rules of the game. PC10/1743-44, 1753. Blake recalled several times when a team would decide that it was better to play with one less person than to pick Wright. PC10/1744-45.

Jerry Hopkins ("Hopkins"), Wright's childhood friend, testified that he grew up in Polk County with Wright and knew Wright from the time they were both 13 to 18 years old. PC11/1758-61. They lived within walking distance of one another. PC11/1760. They played basketball together, rode the same bus, and attended middle school, high school, and boot camp together. PC11/1760. The other children picked on Wright because he was a slow learner, and he could hardly read or spell. PC11/1762. Hopkins recalled that if you told Wright something only one time, he would not remember it. PC11/1762. Wright also did not comprehend a lot of things people told him. PC11/1763. Hopkins described Wright as a follower who was easily influenced by other people. PC11/1763. He did not fit in with the other children, but he would do things to try and fit in. PC11/1763-64. Hopkins saw Wright again in 2001-2005 when they were both at the Polk County Jail. PC11/1764-65. The other inmates manipulated Wright. PC11/1765. For example, they convinced him to steal a piece of pizza from a guard. PC11/1765-66. Wright asked the other inmates to write letters for him. PC11/1766. Hopkins would

write poems for Wright, and Wright would copy them to send out. PC11/ 1766. Hopkins did not know of Wright *ever* writing anything on his own. PC11/ 1766.

Wright's attorneys 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. SR4/ 710-11. During their discussions, Wright would go off on unrelated tangents. SR4/ 711. Hileman frequently had to repeat himself multiple times because Wright did not seem to understand. SR4/ 722. Attorney David Carmichael ("Carmichael") explained that Wright had developed a "social patina", which would make a person think he understood something when he really did not. SR5/ 752. For a long time, Carmichael thought Wright understood him because he would laugh, smile, and make appropriate comments or gestures. SR5/ 752. However, Carmichael later concluded that Wright did not really understand what his attorneys were talking about. SR5/ 753. For example, Carmichael would hear Hileman explain to Wright what was going to happen next during the trial, and Wright would nod and smile. SR5/ 753. Carmichael would then speak with Wright in the holding cell, and Wright would not really understand. SR5/ 753.

Wright's attorneys also testified that Wright exhibited a lack of judgment in fully understanding his circumstances. SR4/ 714. Hileman recalled attempting to explain to Wright that it was in his best interest to take a "life and avoidance plea" because Wright already had more than one life sentence. SR4/ 712. 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." SR4/ 712. Despite there being little or no

downside to accepting a life in avoidance offer (given the fact that Wright already had more than one life sentence) and a very large upside (given the fact that Wright was facing the death penalty), Wright was not interested in the offer. SR4/ 713. Carmichael stated that Wright was never able to provide him with a reason for rejecting the life offer. SR5/ 761. Wright also could not really actively assist Hileman with his case. SR4/ 718. Wright did not even appear to be listening to the testimony during his trial. SR4/ 721. He would respond when Hileman asked him a question, but then he would go back to “doodling” on a notepad that Hileman gave him. SR4/ 722. 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. SR4/ 715. Wright did not write Hileman any notes during trial and did not provide any suggestions about questions to ask the witnesses. SR4/ 722. Carmichael explained that getting Wright to behave properly and groom himself for trial was akin to dealing with a six-year-old. SR5/ 768. Carmichael explained:

I mean, we had to emphasize – it’s like dealing with my six-year-old, you know, “Comb your hair before we go out.” “Why?” You know, but eventually, you know, he would comply. And, like I said, you – once you got him on the task – and given these were six-week blocks, you know, he could do fairly well. But it was something where you constantly early on had to tell him why it was important ...

SR5/ 768. Wright was eventually able to adapt himself to acceptable courtroom behavior, in part, because his attorneys got him engaged in doing some activity during trial. SR5/ 767. For example, they gave him a coloring book and coloring pencils, and he drew pictures and colored. SR5/ 767. They were also allowed to have Investigator Bolin sit at counsel table with Wright during trial. SR5/ 772. Carmichael explained why:

Well, she would – part of the problem for [Wright] was that he has seemed to have very little control over his reactions to things, and, again, I analogize it to my six-year-old or even younger, and we actually asked for and got leave from the court to have Ms. Bolin sit at the table simply because we were concerned about his ability to control himself.

SR5/ 772. Additionally, several individuals who were previously incarcerated with Wright testified concerning his behavior in the jail. Dennis Day (“Day”) testified that Wright did not understand the rules of card games and would mess up and anger his card partner. PC10/ 1687-88. Wright engaged in abnormal behavior- he sang and rapped constantly at abnormal times, often early in the morning or when everyone was asleep. PC10/ 1689. He turned on all the showers and made a lot of noise at strange hours. PC10/ 1686. He carried on conversations with himself, which would cause everybody to look at him. PC10/ 1686. Dahrol James (“James”) was housed in Max Dorm at the Polk County Jail with Wright. PC11/ 1788. They were roommates for six to eight weeks in 2002 to 2004. PC11/ 1789, 1808. James led a Bible study group and a prayer circle in Max Dorm, which Wright participated in. PC11/ 1796-97. When the Bible study group got together, the participants would take turns reading out loud, but the other inmates always had to read to Wright. PC11/ 1796-97. 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 was Wright’s turn, he talked instead of prayed, and he did not talk about anything that was relevant to the prayer circle. PC11/ 1797-98. James also testified that Wright was a follower and easily influenced by the other inmates. PC11/ 1791. Other inmates took advantage of Wright by putting razors (contraband) in his cell because he would allow them to. PC11/ 1792. Wright got nothing in exchange for keeping the razor blades, except the feeling that he was fitting in. PC11/ 1792-93. The inmates would also convince

Wright to steal bread from the food cart and give it to them without taking anything for himself. PC11/ 1791-92.

Shenard Dumas (“Dumas”) and Wright were housed together for approximately eight months in the Max Dorm at the Polk County Jail. PC11/ 1846-47. Dumas described Wright as childish and ignorant. PC11/ 1838. He would turn on all the showers in the dorm, run around naked, and play. PC11/ 1840. None of the other inmates acted that way. PC11/ 1840. Dumas also described Wright as a follower. PC11/ 1839. He would do whatever the crowd did in order to fit in with the other inmates. PC11/ 1839. The other inmates picked on Wright, provoked him, and antagonized him for their own entertainment. PC11/ 1839.

Richard Shere (“Shere”), an inmate on Death Row, testified that he has known Wright for four years and has lived very close to him- either in the cell next to him or a couple of cells down from him. SR5/ 842. Shere began drafting pleadings for Wright’s non-capital cases when Wright asked him to look at his cases to see if he had any claims. SR5/ 848. Wright did not come up with anything on his own or present Shere with any claims he wanted to raise. SR5/ 848. Shere drafted Wright’s pleadings for him and gave them to Wright to copy in his own handwriting. SR5/ 848-49. Wright copied what Shere wrote verbatim, even any errors Shere made in the original draft. SR5/ 849. Shere checked Wright’s copy for errors and would have him make changes. SR5/ 849-50. Shere would then give Wright scrap paper with instructions on how to address the envelope and write the letter to the clerk for the pleadings, and Wright would copy what was on the scrap paper. SR5/ 850. Shere made all the decisions regarding which court to file the pleadings in. SR5/ 850-51. Shere also spent hundreds of hours repeatedly trying to explain the legal issues to Wright, but Wright never understood. SR5/ 851-52. For

example, despite Shere trying to explain the concept, Wright was not able to understand his *Miranda*¹⁷ rights completely, or that there were constitutional issues that could be raised under *Miranda*. SR5/ 871. Shere likened his attempts to explain legal concepts to Wright to “beating [his] head against a wall.” SR5/ 854-55.

The FSC ignored the foregoing overwhelming lay witness testimony of Wright’s adaptive deficits and instead relied on Dr. Gamache’s non-credible testimony and the testimony of lay witnesses who testified that they barely knew Wright. Dr. Gamache testified that he based his assessment of Wright’s adaptive functioning on an interview with Wright and summaries of lay-witness interviews conducted by the State Attorney’s Office. SR9/ 1521-24; 1596-97. The AAIDD-11 and its User’s Guide caution against relying only on information obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User’s Guide at 20. Dr. Kasper testified that this is because intellectually disabled individuals are not the best reporters of their abilities and may even overestimate their abilities. SR6/ 947-49. Further, Dr. Gamache incorrectly emphasized Wright’s behavioral improvements made in prison. Dr. Kasper testified that intellectually disabled people typically do better in structured environments, and death row is like the “ultimate group home” in that it is a structured situation. SR6/972. The FSC also stated that State lay-witnesses Sandra Allen, Darletha Jones, and Vontrese Anderson testified that they did not have trouble communicating with Wright. *Wright I*, 213 So. 3d at 901. However, these three witnesses also testified that they did not know Wright very well and did not have frequent personal interactions with him. See SR7/1153-55, 1161, 1175, 1182. Attorneys Hileman and

¹⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Carmichael testified that they spent hundreds of hours conversing with Wright face-to-face, and they struggled to effectively communicate with him. See SR4/708-12; SR5/748-54, 64, 89-90. Further, Wright's childhood friend Toya Ford also stated that she had difficulty communicating with Wright. SR7/1202-03; 1214-15. The overwhelming lay witness evidence clearly establishes that Wright suffers from adaptive deficits. Further, Wright's scores on both administrations of the ABAS-II indicate that he has adaptive deficits in at least one category.

The FSC unreasonably applied SCOTUS precedent and also made an unreasonable determination of the evidence in light of the facts when it affirmed the post-conviction court's order finding that Wright is not intellectually disabled. If the FSC had not ignored the medical community's diagnostic framework, it would have found that there is clear and convincing evidence that Wright meets the criteria for intellectual disability- both the clinical and statutory definition. Wright exhibits significantly subaverage intellectual functioning and deficits in adaptive behavior that manifested prior to age 18. Accordingly, Wright's death sentence must be vacated, as he is intellectually disabled.

GROUND TWO

Fla. Stat. § 921.137(4) requires Wright to prove by clear and convincing evidence that he is intellectually disabled. Wright argued in his written closing arguments to the circuit court regarding the Renewed Motion for Determination of Intellectual Disability that requiring proof of intellectual disability by clear and convincing evidence violates his due process rights under the Florida and Federal Constitutions because it "imposes a significant risk of an erroneous determination" that Wright is not intellectually disabled, the "consequences of an erroneous determination . . . are dire," and the majority of jurisdictions require proof only by a

preponderance of the evidence. See *Cooper v. Oklahoma*, 517 U.S. 348, 359-64 (1996); SR10/1715-17. The State addressed the argument in its Rebuttal Closing Argument, making no mention of a procedural bar. SR11/1834-35. The circuit court addressed the issue on the merits and denied relief, citing *Herring*, in which this Court stated that “a defendant must prove each of the three elements by clear and convincing evidence.” *Herring v. State*, 76 So. 3d 891, 895 (Fla. 2011). Despite the State having had a full and fair opportunity to address Petitioner’s argument, and despite the circuit court having addressed the issue on the merits, the FSC unreasonably declined to address the issue on the merits, 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”, and further finding that Wright failed to establish even by a preponderance of the evidence that he was of significantly subaverage intellectual functioning or that he suffered from concurrent deficits in adaptive functioning. *Wright I*, 213 So. 3d at 895-902.

Despite this precise issue being raised in several cases, the FSC has never squarely addressed whether the clear and convincing standard is unconstitutional, and instead disposed of the cases on other grounds, as it did in Wright’s case. See, e.g., *Dufour v. State*, 69 So. 3d 235 (Fla. 2011); *Snelgrove v. State*, 107 So. 3d 242 (Fla. 2012). In *Cooper*, SCOTUS held that the “clear and convincing evidence” standard of proof with regard to competency to stand trial violated a defendant’s due process rights. *Cooper*, 517 U.S. at 359-64. The *Cooper* standard provides guidance in assessing the proper burden the defense is required to establish to prohibit the execution of the intellectually disabled. Because of the reduced capacity of intellectually disabled offenders, there is a “risk ‘that the death penalty will be imposed in spite of factors

which may call for a less severe penalty.’” *Atkins*, 536 U.S. at 321 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). These risks include the fact that defendants who are intellectually disabled “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 321. Similarly, in *Cooper*, the Court explained the constitutional importance of ensuring that a defendant is competent to stand trial:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty to doing so.

Cooper, 517 U.S. at 1376. Executing an intellectually disabled defendant and trying an incompetent defendant encompass the same risks: limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. Because the interests of the defendant are more substantial and the interests of the State more modest when dealing with eligibility for the death penalty, imposing a standard of clear and convincing evidence violates due process. Additionally, because the deficits suffered by mildly intellectually disabled individuals are often subtle and would never be clear and convincing, “requiring the defendant to prove [intellectual disability] by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is [not intellectually disabled].” *Cooper*, 517 U.S. at 363.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX K

Excerpt from the “Application for a Certificate of Appealability,”
filed November 20, 2020

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**TAVARES J. WRIGHT,
Petitioner/Appellant,**

Appeal Number: 20-13966-P

v.

**District Court Docket Number:
8:17-cv-00974-7DW-TGW**

**SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,
Respondents/Appellees.**

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Aguero, John K. (Assistant State Attorney)

Ahmed, Raheela (Former Assistant Capital Collateral Regional Counsel)

Ake, Stephen D. (Assistant Attorney General, Counsel for the Respondents/Appellees)

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Byron, Jr., Hileman P. (Attorney for Petitioner/Appellant at Trial and on Direct Appeal)

Canady, Honorable Charles T. (Florida Supreme Court Justice)

Carmichael, David (Attorney for Petitioner/Appellant at Trial)

Deliberato, Maria (Former Acting Capital Collateral Regional Counsel-Middle Region)

Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

Felker, James (Deceased Victim)

Green, David (Deceased Victim)

Inch, Mark S. (Secretary, Florida Department of Corrections)

Jacobsen, Honorable Donald G. (Circuit Court Judge, Tenth Judicial Circuit, in and for Polk County)

Jennings, Bill (Former Capital Collateral Regional Counsel-Middle Region)

Jung, Honorable William F. (United States District Court Judge, Middle District of Florida)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

Lawson, Honorable Alan (Former Florida Supreme Court Justice)

Lewis, Honorable R. Fred (Former Florida Supreme Court Justice)

Moody, Ashley (Attorney General, State of Florida)

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Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

Polston, Honorable Ricky (Florida Supreme Court Justice)

Prince, Honorable Richard (Senior Circuit Court Judge, Tenth Judicial Circuit, in
and for Polk County)

Quince, Honorable Peggy A. (Former Florida Supreme Court Justice)

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Venable, Donna (Former Assistant Capital Collateral Regional Counsel)

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Waters, John C. (Former Assistant State Attorney)

Wallace, Paul R. (Assistant State Attorney)

There are no corporations involved in this case.

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Petitioner/Appellant, Tavares J. Wright (“Wright”), by and through undersigned counsel, moves this Court to issue a certificate of appealability pursuant 28 U.S.C. § 2253 and 11th Cir. R. 22-1, and states as follows:

On May 11, 2000, Wright was charged by indictment with one count of carjacking, two counts of kidnapping, two counts of robbery, and two counts of first-degree murder. R2/341.¹ On November 13, 2004, a jury found Wright guilty of all

¹ Record citations will refer to two different records on appeal. Transcripts of Wright’s guilt phase proceedings, subsequent combined penalty phase/*Spencer* proceedings, and the 2005 special set hearing on mental retardation are contained in the record on appeal for Wright’s direct appeal in Florida Supreme Court Case No.: SC05-2212. References to Wright’s guilt phase proceedings and special set hearing are cited as: R (volume number) / (page number) because they can be found in the initial direct appeal record. References to Wright’s combined penalty phase/*Spencer* hearing are cited as RS (volume number) / (page number), as the transcript of these proceedings is in a supplemental record to the direct appeal record. Transcripts of Wright’s 2012 post-conviction evidentiary hearing on his Fla. R. Crim. P. 3.851 motion and the 2015 hearing on his Renewed Motion for Determination of Intellectual Disability are contained in the record on appeal for Wright’s post-conviction appeal in Florida Supreme Court Case No.: SC13-1213. References to Wright’s 2012 hearing are cited as PC (volume number) / (page number) because they can be found in the initial post-conviction record. References to Wright’s 2015 hearing are cited as SR (volume number) / (page number), as the transcript of these proceedings can be found in a supplemental record to the post-conviction appeal record.

charges.² R4/707-15. A combined penalty phase and *Spencer*³ hearing was held on May 10-11, 2005. RS1-6/128-533. Wright's appearance, slower speech, and documented history of difficulties in school indicated 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" on June 30, 2005.⁴ R5/743-44. A special-set hearing regarding mental retardation was held on September 22, 2005. R5/748-833. At the hearing, the trial court made an oral finding that Wright's IQ-scores did not establish a finding of mental retardation, and that Wright therefore was not mentally retarded for the purposes of capital sentencing. R5/825-29. On October 12, 2005, the trial court sentenced Wright to death on the two counts of first-degree murder and to life imprisonment on the remaining counts. R6/963-83. The 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*").

² The trial that began on October 18, 2004 was Wright's third trial on the same charges. The first two trials ended in mistrials.

³ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

⁴ "Intellectual disability" has since replaced "mental retardation" as the appropriate term. FLA. STAT. § 921.137(9).

On March 9, 2012, Wright filed an “Amended Motion to Vacate Judgment and Sentence,” pursuant to Florida Rule of Criminal Procedure 3.851, raising several claims of ineffective assistance of counsel. PC8/1245-1318. The evidentiary hearing on the motion was held on October 16-18, 2012. PC10-13/1671-2313. On May 23, 2013, the trial court issued an order denying the motion. PC16/2688-2778. 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 v. Florida*, 134 S. Ct. 1986 (2014). SR1/1-7. The trial court agreed to take judicial notice of the record on appeal from the direct appeal, as well as the post-conviction record on appeal. The evidentiary hearing on the motion was held on January 5-6, 2015 and February 11, 2015. SR4-8/622-1459. On March 26, 2015, the trial court issued an order concluding that Wright did not meet the legal standard for intellectual disability under Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) and accordingly denied Wright’s intellectual disability claim. SR11/1858-70. The FSC affirmed the trial court’s May 23, 2013 order denying Wright relief on his ineffective assistance of counsel claims and March 26, 2016 order denying Wright relief on his intellectual disability claim in a single opinion. *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (“*Wright II*”).

On August 10, 2017, Wright filed a petition for a writ of certiorari to the United States Supreme Court (“SCOTUS”). On October 16, 2017, SCOTUS 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 v. Texas*, 137 S. Ct. 1039 (2017). *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 reaffirming the trial court’s denial of Wright’s intellectual disability claim. *Wright v. State*, 256 So. 3d 766 (Fla. 2018) (“*Wright III*”).

Wright filed an “Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody” and amended memorandum of law on December 17, 2019. Doc 36; Doc. 38. The United States District Court for the Middle District of Florida-Tampa Division (“district court”) issued an order denying Wright’s petition for a writ of habeas corpus on August 19, 2020. Doc. 48; Appendix A. Judgement was entered on August 20, 2020. Doc. 49. Wright filed a “Motion to Alter or Amend Judgment” on September 16, 2020. Doc. 50. The motion was denied on September 20, 2020. Doc. 51. A notice of appeal from the district court’s order denying relief was timely filed on October 19, 2020. Doc. 52. The district court declined to issue a certificate of appealability (“COA”) in its order denying relief. Doc. 48 at *56. The district court also denied the request Wright made for a COA in

his “Motion to Alter or Amend Judgment” in its order denying the motion. Doc.50 at *6; Doc. 51 at *4. A COA is a prerequisite to an appeal in this cause. See 28 U.S.C. § 2253. Accordingly, Wright timely files this application for a COA.

THE STANDARD FOR GRANTING A COA

The standard for issuing a COA is extremely low. A COA should be issued if the petitioner makes “a substantial showing of the denial of a constitutional right.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); see also 28 U.S.C. § 2253. “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327 (internal citation omitted). Thus, “[t]he COA inquiry asks only if the District Court’s decision [is] debatable.” *Id.* at 348. An applicant need not prove that the appeal will succeed. *Id.* at 337.

It is also appropriate for this Court to take into account the severity of the sentence when deciding whether to issue a COA in a capital case. See *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (In capital cases, “nature of the penalty is a proper consideration . . .”); see also *Graves v. Cockrell*, 351 F. 3d 143, 150 (5th Cir. 2003) (“Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination.”).

Appellate review is especially warranted when an applicant, like Wright, has been sentenced to death.

Wright seeks a COA regarding Grounds One, Two, Five, and Six of his amended habeas petition. Each ground is debatable among jurists of reason and will be discussed in turn below.

GROUND ONE

WRIGHT IS INTELLECTUALLY DISABLED, AND HIS EXECUTION IS BARRED BY THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE STATE COURT'S RESOLUTION OF WRIGHT'S CLAIM WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, INCLUDING *ATKINS V. VIRGINIA*, 536 U.S. 304 (2000), *HALL V. FLORIDA*, 572 U.S. 701 (2014), AND *MOORE V. TEXAS*, 137 S. CT. 1039 (2017). FURTHER, THE STATE COURT MADE AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE STATE COURT RECORD.

Wright alleged in Ground One of his amended habeas petition and memorandum of law that he is ineligible for execution as an intellectually disabled person and that the FSC's resolution of this claim in its *Wright II* and *Wright III* opinions was an unreasonable application of clearly established federal law. Doc. 36 at *9-91; Doc. 38 at *5-33. This ground was addressed at pages 17-31 of the district court's order denying relief. Doc. 48. Wright has made a substantial showing that he is an intellectually disabled person who has been sentenced to death in violation of the Eighth Amendment to the United States Constitution. *Atkins v. Virginia*, 536

U.S. 304 (2002). Reasonable jurists could disagree with the district court’s resolution of Wright’s intellectual disability claim. *Miller-El*, 537 U.S. at 327.

A. Reasonable jurists could debate whether Wright is intellectually disabled.

In *Atkins*, SCOTUS held that executing the intellectually disabled is cruel and unusual punishment in violation of the Eighth Amendment. *Atkins*, 536 U.S. 304. *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 v. Florida*, 572 U.S. 701, 719 (2014). 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-V⁵ and AAIDD-11⁶). Courts may not disregard current medical standards on intellectual disability. *Moore*, 137 S. Ct. at 1049.

⁵AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (“DSM-V”).

It is important to note that Wright has a “mild” level of intellectual disability. However, the term “mild” does not indicate that a person should be excluded from an intellectual disability determination in either the clinical or legal context. *Moore* states that “[m]ild levels of intellectual disability ... remain intellectual disabilities, ... and States may not execute anyone in “the *entire category* of [intellectually disabled] offenders.” 137 S. Ct. at 1051 (internal citations omitted) (emphasis in original).

The three-prong test for intellectual disability includes: (1) significantly subaverage intellectual functioning (“IQ”); (2) significant deficits in adaptive functioning, and; (3) onset of these deficits during the developmental period (before age 18). *Hall*, 572 U.S. at 710; AAIDD-11 at 5; DSM-V at 33. The district court begins its analysis of the evidence by finding that Wright is not intellectually disabled because the trial record indicates that he testified coherently in his defense and effectively withstood cross examination. Doc. 48 at *23-25. The district court gives great weight to this evidence, stating that “[n]o one can read Petitioner’s direct and cross examination and rightly say this man is so bereft of mind that the eighth amendment bars this punishment.” Doc. 48 at *25. However, the fact that Wright

⁶ AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) (“AAIDD-11”).

was generally able to coherently testify at trial does not preclude him from proving he is intellectually disabled. Wright is a mildly intellectually disabled person and can reasonably be expected to exhibit coherent communication.

Further, while Wright's ability to testify is certainly relevant to the question of whether he can aid in his own defense, it is not the most clinically relevant evidence of whether he is intellectually disabled. Wright's habeas pleadings outlined profound evidence of Wright's intellectual disability for all three prongs of the test, and reasonable jurists could debate whether Wright meets each prong. Reasonable jurists could also debate whether the FSC unreasonably applied clearly established federal law when analyzing prongs one and two.

1. Wright has significantly subaverage IQ.

"The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." *Hall*, 572 U.S. at 712 (internal citations omitted). IQ scores should be interpreted "in reference to the [IQ] test's standard error of measurement, the assessment instrument's strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used." AAIDD-11 at 35.

Wright's IQ has been tested nine times throughout his life. The FSC and district court detailed six full-scale IQ scores that Wright has achieved on different

versions of the Wechsler intelligence test. *Wright II*, 213 So. 3d at 897; Doc. 48 at *28. The six chronological full-scale scores are: **76** (February of 1991, age 10, WISC-R⁷); **80** (4/4/1991, age 10, WISC-R); **81** (9/11/1991, age 10, WISC-R); **75** (8/25/1997, age 16, WAIS-R⁸); **82** (7/15/2005, age 24, WAIS-III⁹); and, **75** (7/25/2005, age 24, WAIS-III).

These scores should not be given equal evidentiary weight when determining Wright's true IQ. The two scores that most reliably indicate Wright's IQ are the **76** he achieved at age 10 on the first WISC-R (and first IQ test) he was administered and the **75** he achieved at age 16 on his only administration of the WAIS-R. 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. Dr. Kasper testified that these two scores were the best measures of Wright's intelligence because they were given prior to any legal history, were taken in the most standardized conditions, and were the first times he was given the WISC-R and the WAIS-R. SR5/918. Dr. Kasper also testified that she spoke with the two doctors who

⁷ Wechsler Intelligence Scale for Children-Revised

⁸ Wechsler Adult Intelligence Scale- Revised

⁹ Wechsler Adult Intelligence Scale- Third Edition

administered both tests- Drs. Michael Kindelan and Dr. Joel Freid- and neither had concerns about the scores' validity. SR5/918-19.

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 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. 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. SR5/913. 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 less reliable indicators of Wright's true IQ because they are not completely compatible with the clinical definition of intellectual disability. The DSM-V and AAIDD-11 define intellectual disability as a condition that originates prior to age 18. *See* DSM-V at 37; AAIDD-11 at 5. Wright was 24 when he achieved these two scores. These scores are less reliable than the 76 and 75 Wright achieved before he was 18 and should accordingly be given less weight.

Three experts have opined that Wright meets the criteria for significantly subaverage IQ. Dr. Michael Kindelan (“Dr. Kindelan”), the doctor who administered the first WISC-R to Wright in 1991, testified 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**. SR8/1386. Dr. Kindelan opined that this places Wright in the range of someone who is intellectually disabled. SR8/1386. Dr. Kasper also testified that, after applying the Flynn effect, Wright’s corrected full-scale IQ score from the first 1991 test equals **70**, and his corrected full-scale IQ score from the 1997 test equals **69**.¹⁰ PC12/1963, 1969-70. Dr. Kasper opined at both the 2012 and 2015 evidentiary hearings that Wright has significantly subaverage IQ. PC12/1984; SR8/897. Dr. Joel Freid (“Dr. Freid”) opined at the 2015 hearing that

¹⁰ The Flynn effect refers to the statistical upward drift of IQ scores over time that occurs from the year a test is normed to the year a person actually takes the test. Clinical manuals confirm the importance of considering the Flynn effect, especially when a test is taken many years after it was normed. The DSM-V 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-V at 37. Mean IQ scores on a given test increase about 0.33 points per year from the date the test is normed. AAIDD-11 at 37. Both the AAIDD-11 and its associated 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 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.

Wright's IQ scores place him in the range of scores of someone who is intellectually disabled. SR8/1419.

Despite this evidence, the district court found that Wright does not meet the criteria for prong one, stating that “[e]ven if one factored in the SEM ... Petitioner is still over 70 on each [IQ test] save two, as he scored 75 on two of them. The data simply shows, no matter how it is viewed, tests almost universally over 70 and some over 80.” Doc. 48 at *28-29. However, the fact that Wright's full-scale IQ scores (without adjusting for the Flynn effect) sit at 70 or above does not preclude Wright from meeting the criteria for prong one. The DSM-V 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-V at 37 (emphasis added). The district court further points to the fact that Wright's highest score is an 82, and that Dr. Kasper testified that it was “valid and free of any practice effect concerns.” Doc. 48 at *28 (citing *Wright II*, 213 So. 3d at 897). However, the district court fails to acknowledge Dr. Kasper's testimony that the two scores that most reliably indicate Wright's intelligence are his **76** (1991) and **75** (1997). *See supra* at p. 10.

Wright has significantly subaverage IQ because his two most reliable full-scale scores (76 and 75) fall squarely within the significantly subaverage range when

corrected for the Flynn effect (70 and 69). Further, even if this Court chooses not to apply the Flynn effect, Wright's score of 75 still falls within the clinical range. Further still, any perceived weakness in the evidence as to the IQ prong is counteracted by the extensive evidence of Wright's deficits in the adaptive functioning prong. *See infra* at pp. 15-22. The DSM-V explains that "a person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score." DSM-V at 37. Reasonable jurists could debate whether Wright meets the criteria for significantly subaverage IQ.

2. Wright suffers from significant deficits in adaptive functioning.

The DSM-V explains that "adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical." DSM-V at 37. 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. "[T]he medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Moore*, 137 S. Ct. at 1050 (citations omitted). "Significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-11 at 47; *Moore*, 137 S. Ct. at 1050. "[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.

The district court places undue emphasis on perceived adaptive strengths, while failing to fully acknowledge the significant lay witness testimony of Wright's adaptive deficits. The district court gives great weight to the fact that Wright coherently testified at trial and at other points in the record as evidence that he is not intellectually disabled. Doc. 48 at *23-26. The district court also cites, in part, to the fact that Wright capably drove the victims' car and, in the district court's words, "managed a marijuana sales business," as evidence that Wright is not intellectually disabled. Doc. 48 at *26.

However, these perceived adaptive strengths do not refute that Wright suffers from significant adaptive deficits. While Wright's trial testimony is certainly relevant, it is not the most clinically compatible evidence of his adaptive functioning. Further, any evidence of criminal activity has very little clinical value when determining if Wright has significant adaptive deficits.¹¹ There is significant

¹¹ The User's Guide states: "Do not use past criminal behavior ... to infer [the] level of adaptive behavior ... The diagnosis of ID is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'" User's Guide at 20.

evidence of Wright's adaptive functioning before age 18 and in the context of his school, neighborhood, and employment environments, and this evidence should be given far more weight.

Wright's school records reflect that he was classified as both emotionally handicapped and specific learning disabled. PC11/1924. Wright was exempt from taking standardized tests. PC11/1923. Wright's records also reflect that he had Independent Education Plans ("IEPs") in school, which are used for students with disabilities to provide feedback and set specific goals. PC11/1924-25. 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. PC11/1913-14.

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. RS2/278-79. McClain testified that Wright was "slow", and his mother received social security benefits for him because he was in "ESE" classes and had learning problems. RS2/285. McClain observed Wright have difficulty as a child concentrating on one task, which affected his schoolwork. RS2/289.

Carlton Barnaby ("Carlton"), Wright's maternal first cousin, testified that he knew Wright all his life. RS3/329; SR4/655; 659. Wright and Carlton attended the same elementary, middle, and high school together. SR4/663. Wright was in SLD

(slow learning disability classes). SR4/663. Wright's reading and writing in school were poor, and Carlton helped him with spelling, grammar, and punctuation. SR4/664-64. Carlton helped care for Wright when they were children- Carlton provided Wright with toothpaste and deodorant, coached him on proper hygiene, and combed Wright's hair. SR4/660-61. Carlton also cared for Wright as they grew older. Carlton gave Wright rides because he did not have a driver's license. SR4/662. 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. SR4/670. Carlton drove Wright to and from each work shift. SR4/670-71. Carlton regularly helped Wright with the time clock until Wright was able to do it on his own. SR4/674-75. Wright and Carlton stayed together and were within sight of one another during the entire shift. SR4/671. They went on breaks together, which they knew to take because an announcement was made, and everyone would leave at the same time. SR4/671-72. Carlton and the other workers looked out for Wright and instructed him on how to do his job. SR4/673-74. Wright could not have done this job without someone helping him, at least at first. SR4/674. Wright did not have a bank account, so Carlton drove Wright to a store to cash his checks from the job. SR4/675. Carlton helped Wright cash his checks, and he showed him where to sign his name on the checks. SR4/675-76.

Marian Barnaby (“Marian”), Wright’s maternal aunt, testified that Wright spent almost every weekend at her house as a child. SR4/635-36. Marian described Wright as a slow learner. SR4/637. As a young child, he had problems with his speech, and he was not able to learn as well as her own children. SR4/637. Wright was in slow classes at school because of his learning problems. SR4/639. Wright also started walking later than Marian’s own children. SR4/638. Wright’s mother received a disability check for his slow learning and disability. SR4/639.

Toya Long Ford (“Ford”), Wright’s childhood friend, testified that she and Wright “pretty much grew up together.” SR7/1201. Ford and Wright were unable to have long or elaborate conversations because Wright would have trouble understanding what Ford was saying. SR7/1202-03. Even though Wright had easier schoolwork since he was in special classes, Ford would often do Wright’s homework for him because he could not understand it. SR7/1205, 1212. Wright would often come to Ford’s house to get food. SR7/1209. Ford’s mother would not let Wright cook because of his short attention span. SR/1214. Ford’s mother also had to remind Wright to brush his teeth, wash his face, and tie his shoes. SR7/1207.

James Blake (“Blake”), another childhood friend of Wright, testified that he met Wright in boot camp in 1997. PC10/1734, 54. Wright did not fit in with the other boys in boot camp. PC10/1735. He adapted more slowly to boot camp than the rest of the boys, and he was not able to obey the drill instructors’ orders because he did

not understand them. PC10/1735. After boot camp, Blake saw Wright again on the street in Lakeland around 1998. PC10/1738, 1741. The other children made fun of Wright by calling him slow and telling him that he was born premature. PC10/1740-43. Wright did not engage in serious conversations. PC10/1745. Wright played football with Blake three or four times, but the other children did not want to pick Wright for their team because he did not understand the rules of the game. PC10/1743-44, 1753.

Jerry Hopkins (“Hopkins”), Wright’s childhood friend, testified that he grew up in Polk County with Wright and knew Wright from the time they were both 13 to 18 years old. PC11/1758-61. They played basketball together, rode the same bus, and attended middle school, high school, and boot camp together. PC11/1760. The other children picked on Wright because he was a slow learner, and he could hardly read or spell. PC11/1762. Wright also did not comprehend a lot of things people told him. PC11/1763. Hopkins recalled that if you told Wright something only one time, he would not remember it. PC11/1762. Hopkins described Wright as a follower who was easily influenced by other people. PC11/1763. He did not fit in with the other children, but he would do things to try and fit in. PC11/1763-64.

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. SR4/710-11. During their discussions, Wright would go off on unrelated tangents. SR4/711. Hileman frequently had to repeat himself multiple times because Wright did not seem to understand. SR4/722. Attorney David Carmichael (“Carmichael”) explained that Wright had developed a “social patina”, which would make a person think he understood something when he really did not. SR5/752. For a long time, Carmichael thought Wright understood him because he would laugh, smile, and make appropriate comments or gestures. SR5/752. However, Carmichael later concluded that Wright did not really understand what his attorneys were talking about. SR5/753. For example, Carmichael would hear Hileman explain to Wright what was going to happen next during the trial, and Wright would nod and smile. SR5/753. Carmichael would then speak with Wright in the holding cell, and Wright would not really understand. SR5/753.

Wright’s attorneys also testified that Wright exhibited a lack of judgment in fully understanding his circumstances. SR4/714. Hileman recalled attempting to explain to Wright that it was in his best interest to take a “life and avoidance plea” because Wright already had more than one life sentence. SR4/712. 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.” SR4/712. Wright was not interested in the offer despite there being little

downside since Wright already had a life sentence on other charges. SR4/713. Wright was never able to provide Carmichael with a reason for rejecting the life offer. SR5/761. Wright also could not really actively assist Hileman with his case. SR4/718. Wright did not even appear to be listening to the testimony during his trial. SR4/721. He would respond when Hileman asked him a question, but then he would go back to “doodling” on a notepad that Hileman gave him. SR4/722. 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. SR4/715. Carmichael explained that getting Wright to behave properly and groom himself for trial was akin to dealing with a six-year-old. SR5/768. Carmichael explained:

I mean, we had to emphasize – it’s like dealing with my six-year-old, you know, “Comb your hair before we go out.” “Why?” You know, but eventually, you know, he would comply. And, like I said, you – once you got him on the task – and given these were six-week blocks, you know, he could do fairly well. But it was something where you constantly early on had to tell him why it was important ...

SR5/768. Wright was eventually able to adapt himself to acceptable courtroom behavior, in part, because his attorneys got him engaged in doing activities during trial. SR5/767. For example, they gave him a coloring book and coloring pencils, and he drew pictures and colored. SR5/767.

Additionally, inmates who were incarcerated in jail with Wright while he was awaiting trial testified that he was easily manipulated, was frequently taken advantage of by the other inmates, and had trouble constructively participating in activities with the other inmates; these activities included playing cards and a Bible study group. Doc. 36 at *56-59.

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-II¹² tests- one to correspond with the 1997 WAIS-R administered to Wright when he was 16 years old and one to assess his current functioning. PC11/1894-95; SR6/957. 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. SR6/959-61. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. SR6/963.

The district court states that the only adaptive functioning category in dispute in Wright's case is conceptual skills, and finds it "noteworthy that even Petitioner's expert agreed that Petitioner did not have current deficits in the social and practical

¹² Adaptive Behavior Assessment System – Second Edition

skills domains.” Doc. 48 at *31. However, Dr. Kasper testified that Wright actually suffered from adaptive deficits in both the conceptual **and** social categories as evidenced by his scores on the first administration of the ABAS-II corresponding with Wright’s functioning at sixteen years old. SR6/959-61. Dr. Kasper then testified that Wright showed improvement on the second administration of the ABAS-II corresponding with Wright’s current functioning while imprisoned on death row—only scoring low enough in the conceptual category. SR6/963. However, Wright is only required to prove significant adaptive deficits in one category to meet prong two. Reasonable jurists could debate whether Wright has significant adaptive deficits.

3. Wright’s intellectual disability manifested before age 18.

The trial court found “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.” SR11/1865. 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. SR3/379-80. Microcephaly is a

symptom of fetal alcohol syndrome. SR3/379-80. Dr. Waldman opined that Wright's low intelligence is caused by his fetal alcohol syndrome. SR3/386.

Dr. Kasper also opined that Wright meets the criteria for prong three, as his intellectual disability began prior to 18 years old. PC12/1994. Dr. Kasper testified that Wright has been diagnosed with fetal alcohol syndrome, which is known to cause defects in intellectual capacity. PC12/1995. Wright's mother also received Social Security benefits for Wright's disability when he was a child. PC12/1998-99. Wright was classified as emotionally handicapped and specific learning disabled in school, was exempt from taking standardized tests, and earned a special diploma. PC12/1911, 1923-25. Wright also achieved two scores before he was 18 years old that indicate significantly subaverage IQ: the full-scale score of 76 (1991, age 10) and the full-scale score of 75 (1997, age 16). PC11/1894; PC12/1959-70; SR5/897, 918; SR6/932-37.

As summarized above, lay witnesses Cynthia Wright McClain, Jerry Hopkins, Carlton Barnaby, Marian Barnaby, and Toya Long Ford testified that as a child: Wright was in special classes; Wright was picked on by other children because he was slower than them; Wright had difficulty communicating with others and understanding them; Wright struggled significantly with his schoolwork; and Wright could not care for all his daily living needs (such as grooming) without assistance or coaching. *See supra* at pp. 16-21. The State offered no testimony from Dr. Gamache

or any other witness to show that Wright's intellectual impairment did not manifest during the period from conception to age 18.

The district court makes no finding on whether Wright meets the criteria for prong three. Reasonable jurists could debate whether Wright's intellectual disability manifested before age 18.

B. Reasonable jurists could debate whether the FSC's resolution of Wright's intellectual disability claim in its *Wright II* and *Wright III* opinions was an unreasonable application of clearly established law.

The District Court states that the FSC correctly followed *Atkins*, *Hall*, and *Moore* when determining that Wright is not intellectually disabled. Doc. 48 at *27. However, the *Wright II* and *Wright III* opinions indicate otherwise.

As to prong one, the FSC unreasonably applied *Hall* when it found that Wright does not have significantly subaverage IQ. *Hall* states that “[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.” 572 U.S. at 721. *Hall* states that “[f]or purposes of most IQ tests, the [standard error of measurement (“SEM”)] means that an individual's score is best understood as a range of scores on either side of the recorded score.” *Hall*, 572 U.S. at 713. “The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.” *Id.* *Hall* rejected Florida's then strict IQ score cutoff of 70 as unconstitutional,

explaining that by failing to consider the SEM and setting a strict cutoff at 70, Florida went against “unanimous professional consensus.” *Hall*, 572 U.S. at 722.

In *Wright II*, The FSC ignored the medical diagnostic framework when it disregarded the SEM, viewed Wright’s IQ as a fixed number instead of an imprecise range, and failed to consider the Flynn effect. The FSC acknowledged that “IQ scores are best evaluated as a range, taking into account the ... SEM and other factors.” *Wright II*, 213 So. 3d at 897 (citing *Hall*, 134 S. Ct. at 1995-96). The FSC outlined Wright’s six full-scale IQ scores (76, 80, 81, 75, 82, and 75). *Wright II*, 213 So. 3d at 897. The FSC cited Dr. Kasper’s testimony that the range of scores yielded from Wright’s first score (76) was the most accurate because it would be free from the practice effect. *Id.* Upon applying a 95% confidence interval, the range derived from this score is 69 to 82. *Id.* The FSC disregarded the SEM when it stated that “[e]ven taking the most favorable testimony concerning the application of the SEM to Wright’s scores, at its lowest point, the most favorable range derived from Wright’s scores dips just one point beneath ***the threshold of 70 required for a finding of significantly subaverage general intellectual functioning.***” *Id.* (emphasis added). However, the DSM explicitly states that individuals with intellectual disability have scores falling in the range of 65-75. DSM-V at 37. The FSC’s language makes it clear that the court is still adhering to its unconstitutional

70 IQ cutoff and accordingly failed to recognize that Wright's scores indicate he has significantly subaverage IQ.

The FSC further gave undue weight to the 82 that Wright achieved in 2005 at the age of 24 years old. The FSC cited Dr. Gamache's testimony that "Wright's highest IQ score of 82 was the most accurate representation of his IQ." *Id.* The FSC inappropriately narrowed its analysis of Wright's IQ to a single number (82), disregarding that Wright's true score falls anywhere between 69 and 82. The FSC also disregarded the basic clinical definition of intellectual disability when it gave undue weight to a score that Wright achieved when he was **24 years old**. See DSM-V at 37; AAIDD-11 at 5. The FSC again misconstrued IQ as a single number instead of a range in its *Wright III* opinion when it still focused on Wright's score of 82 and completely failed to explicitly mention any of Wright's other scores. *Wright III*, 256 So. 3d at 772.

The FSC further disregarded the medical diagnostic framework by failing to consider how the Flynn effect affects Wright's IQ scores. The DSM-V, AAIDD-11, and the User's Guide to the AAIDD-11 indicate that the Flynn effect should be considered when a test with "aging norms" is used. DMS-V at 37; AAIDD-11 at 37; User's Guide at 23; see *supra* at p.12, footnote 10. However, it appears that the FSC failed to consider Dr. Kasper's testimony that, because many of Wright's tests were taken several years after the tests were normed, Wright's true score on those tests is

actually much lower than his non-corrected scores indicate. Dr. Kasper testified that the WISC-R that Wright took in 1991 was actually normed in 1972. PC12/1962-63. Accordingly, Wright's full-scale 76, when adjusted for the Flynn effect, is actually **70**. PC12/1963. Dr. Kasper further testified that the WAIS-R that Wright took in 1997 was actually normed in 1978. PC12/1969-70. Accordingly, Wright's full-scale 75, when adjusted for the Flynn effect, is actually **69**. PC12/1969-70.

The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not have significantly subaverage IQ and relied on Dr. Gamache's non-credible testimony. There is clear and convincing evidence that Wright has significantly subaverage IQ. He scored a full-scale 76 with a range of 69 to 82 on the WISC-R at age 10. SR8/1385-86. He later scored a full-scale 75 on the WAIS-R at age 16. SR8/1410-14. Further, Wright's Flynn-corrected scores for the 1991 and 1997 tests (70 and 69) also indicate he has significantly subaverage IQ.

Dr. Kasper opined that Wright suffers from significantly subaverage IQ. SR5/897. Dr. Kindelan and Dr. Freid both testified that Wright's IQ scores place him in the range of scores of someone who is intellectually disabled. SR8/1386, 1419-20. However, the FSC improperly relied on Dr. Gamache's unreliable testimony that Wright does not have subaverage IQ and was likely malingering on all his IQ tests. The FSC relied on Dr. Gamache's unfounded testimony that Wright

may have been malingering on all his IQ tests because Wright's results on the Validity Indicator Profile Test that Dr. Gamache administered to Wright in 2014 indicated Wright did not expend a full effort on the WAIS-IV Dr. Gamache administered in 2014.¹³ *Wright II*, 213 So. 3d at 898. The district court also gives undue weight to Dr. Gamache's testimony that Wright may have malingered on his IQ tests, stating that "[t]he record that Petitioner suffers no qualifying ID is strengthened by the indication in this record that Petitioner may have been malingering in some tests. The State expert expressed these concerns and the Florida Supreme Court was reasonable in considering the likelihood of malingering when reviewing this record." Doc. 48 at *29. However, Dr. Gamache's opinion that Wright was malingering on all his tests is unfounded. Drs. Kindelan and Freid (the doctors who administered Wright's first 1991 test and his 1997 test) testified that they had no concerns about the validity of either test. SR8/1381-82, 1412-13. The range of scores for the 1991 test that Dr. Kindelan administered was 69 to 82, and Wright has scored within that range for all six of his full-scale scores, even when they are corrected for the Flynn effect. Dr. Kindelan testified that it would be nearly

¹³ Wright scored a full-scale 65 on a WAIS-IV administered by Dr. Gamache in 2014. This score was rendered invalid by a non-standardized administration and was not considered by Wright's defense experts or the FSC as part of the determination of whether Wright has significantly subaverage IQ.

impossible for an individual to score as consistently as Wright by malingering. SR8/1387. Reasonable jurists could debate whether the FSC unreasonably applied *Hall* and made an unreasonable determination of the facts in light of the state court record when determining that Wright does not meet prong one because he does not have significantly subaverage IQ.

As to prong two, the FSC unreasonably applied *Hall* and *Moore* when it found that Wright does not suffer from significant adaptive deficits. In *Moore*, SCOTUS found that the Texas Court of Criminal Appeals (“CCA”) had inappropriately deviated from prevailing clinical standards in its adaptive functioning analysis by overemphasizing Moore’s perceived adaptive strengths and stressing Moore’s improved behavior in prison. 137 S. Ct. at 1050. The FSC committed the same mistakes when analyzing Wright’s adaptive functioning.

In *Wright II*, the FSC concluded that Wright “cannot demonstrate by even a preponderance of the evidence that he suffers from concurrent deficits in adaptive functioning, the second prong of a finding of intellectual disability.” 213 So. 3d at 898. In reaching this conclusion, the FSC disregarded the medical diagnostic framework and prevailing clinical standards by: requiring that Wright prove that he has deficits in more than one adaptive category; focusing on Wright’s adaptive strengths while ignoring his adaptive deficits; relying too heavily on Wright’s adaptive improvements made in the controlled prison environment as proof that he

is not deficient; and considering the underlying facts of Wright's alleged crime as evidence that he does not have adaptive deficits.

The FSC improperly stated that "Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong. This is insufficient for a finding of intellectual disability in the context of this case..." *Wright II*, 213 So. 3d at 898. However, Wright is only required to prove significant adaptive deficits in one category of adaptive functioning. AAIDD-11 at 43. Dr. Kasper assessed Wright's adaptive behavior by interviewing Wright, interviewing several witnesses who knew Wright as a child and adult, and administering two ABAS-II tests- one to correspond with the 1997 WAIS-R administered to Wright when he was 16 years old and one to assess his current functioning. PC11/1894-95; SR6/957. 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. SR6/959-61. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. SR6/963. The FSC acknowledged that the first ABAS-II indicated that Wright showed deficits in two categories, but then relied on the second administration of the ABAS-II corresponding with Wright's current functioning to conclude that "Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills

sub-component of the adaptive skills prong.” *Wright II*, 213 So. 3d at 900. The FSC’s reliance on the results of the second ABAS-II is particularly problematic as the test corresponds with Wright’s current functioning in prison, showing that the FSC inappropriately relied on Wright’s improved behavior in the controlled setting of prison.¹⁴ See DSM-V at 38 (“Adaptive functioning may be difficult to assess in a controlled setting [such as] prisons [or] detention centers.”); see also *Moore*, 137 S. Ct. at 1050.

The FSC further over-emphasized expert and lay-witness testimony of Wright’s perceived adaptive strengths while practically disregarding the extensive evidence of Wright’s deficits in all three categories of adaptive behavior. The FSC exacerbated its error by relying too heavily on Wright’s prison behavior in its analysis. See *Moore*, 137 S. Ct. at 1050. The FSC based its ruling in *Wright II* on a litany of adaptive strengths that Dr. Gamache testified to after primarily basing his opinion on a single interview with Wright while he was imprisoned. See *Wright II*, 213 So. 3d at 899-900. However, the AAIDD-11 explains that “[w]ithin an individual, limitations often coexist with strengths ... [and] significant limitations in

¹⁴ Wright does not argue that current adaptive functioning or adaptive functioning in the prison environment should never be considered when determining intellectual disability. However, the FSC relied too heavily on the adaptive improvements that Wright made in prison while disregarding the overwhelming evidence of the adaptive deficits he suffered prior to age 18 and prior to incarceration.

conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills.” AAIDD-11 at 7, 47 (emphasis added). The AAIDD-11 and its User’s Guide also caution against relying only on information obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User’s Guide at 20. The DSM-V states that “[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.” DSM-V at 38.

Despite the clinical community’s clear guidance, the FSC still impermissibly relied on Wright’s adaptive strengths and behavior in prison to determine that he does not have significant adaptive deficits. The FSC acknowledged that Dr. Gamache testified Wright had “some deficits in reading and writing skills...and some deficits in self-direction and the ability to formulate goals or objectives” in the conceptual skills category. *Wright I*, 213 So. 3d at 899. However, the FSC failed to explicitly consider numerous adaptive deficits such as the fact that Wright was exempt from taking standardized tests because he was classified as learning disabled, had several independent education plans in his school records, failed to understand rules of simple games like Uno, could not complete his schoolwork even though he was in special classes, could not constructively participate in a Bible study group in jail, and was unable to effectively communicate with his attorneys or understand

what they told him. *See* PC11/1921-23, SR7/1205, 1212; PC11/1796-98; SR4/710-11, 722; SR5/751-64, 789-90. The FSC improperly relied on Dr. Gamache’s testimony that Wright exhibited **sixteen** strengths in conceptual skills, many of them developed in prison. The FSC found, in part, that Wright “fully communicates with other prisoners and prison staff;” “knows the allocated time for prison activities;” “manages his prison canteen fund and pays attention to his monthly statements;” and “knows the difference between legal mail and regular mail in the prison system.” *Id.*

Further, the FSC failed to sufficiently consider evidence of Wright’s social deficits, ignoring evidence that Wright lacked friends as a child and was bullied throughout school for being “slow”, was often excluded from team sports as a child because he could not understand the rules, and was manipulated by other jail inmates because he was a follower and wanted to fit in. *See* RS2/286; RS3/335, 340-41, 351; PC10/1762, 1791-92, 1839. The FSC instead relied on Dr. Gamache’s testimony that Wright exhibited **six** social strengths, including testimony that Wright “has counseled [prison] pen pals on how to deal with difficult situations” and “appears to have adapted well to life on death row, as exhibited by his lack of disciplinary write-ups and ability to ask correctional staff for help.” *Id.*

With regard to practical skills, the FSC conceded that Wright “did not have a driver’s license because he could not pass the written portion” of the exam. *Id.* at 900. However, the FSC offset this deficit by explaining that Wright knew how to

drive a car. *Id.* The FSC further relied on Dr. Gamache’s testimony of **three** adaptive strengths in practical skills, including that Wright “cares for his health [in prison] by showering and grooming daily, as well as by engaging in self-care and health-oriented activities.” Finally, the FSC listed **ten** perceived adaptive strengths that Wright’s family members testified to, including that Wright wrote his cousin birthday cards from prison and was always clean when his aunt saw him. *Id.* at 901.

In *Wright III*, the FSC stated that it did not “overemphasize Wright’s adaptive strengths to an extent that ran afoul of *Moore*” because it did not engage in the “arbitrary offsetting of deficits against unconnected strengths in which the CCA engaged.” *Wright III*, 256 So. 3d at 776 (citing *Moore*, 137 S. Ct at 1050). The FSC concluded that “the overemphasis issue, as identified by the Supreme Court in *Moore*, is not present here because [the FSC] did not arbitrarily offset deficits with unconnected strengths; instead, [the FSC] simply relied on expert testimony with regard to connected adaptive deficits and the postconviction court’s credibility determinations.” *Wright III*, 256 So. 3d at 777 (internal citation omitted). The FSC further concluded that it “did not detrimentally rely on strengths that Wright developed in prison ... [t]he only portion of [*Wright II*] that touched on prison conduct was [the] recitation of Dr. Gamache’s findings.” *Id.* As an initial matter, the FSC cannot say that it relied on the post-conviction court’s credibility findings concerning witness testimony because ***the post-conviction court did not make any***

explicit credibility findings in its order denying Wright’s claim. Further, while SCOTUS did explain in *Moore* that the CCA engaged in an “arbitrary offsetting of deficits against unconnected strengths” in Moore’s case, *Moore*’s prohibition against overemphasis on adaptive strengths should not be narrowly interpreted to only situations where deficits are offset in such a way. *Moore*, 137 S. Ct. at 1050. In finding that the CCA had overemphasized Moore’s perceived adaptive strengths, SCOTUS explained:

Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, [b]ut the medical community focuses the adaptive-functioning inquiry on adaptive deficits.

Moore, 137 S. Ct. at 1050 (internal citations omitted). Instead of focusing its analysis on Wright’s adaptive deficits in each category, as directed by clinical standards, the FSC focused on Wright’s adaptive strengths, and used them to offset his significant adaptive deficits. The AAIDD-11 explains that intellectually disabled individuals may exhibit strengths in “one aspect of an adaptive skill in which they otherwise show an overall limitation.” AAIDD-11 at 7. The FSC need not offset Wright’s adaptive deficits with unrelated adaptive strengths to deviate from prevailing clinical standards. The FSC deviated from prevailing clinical standards when it listed ***thirty-five*** alleged adaptive strengths in *Wright II* while practically ignoring Wright’s substantial evidence of adaptive deficits. 213 So. 3d at 899-901. Further, the FSC

cannot claim that it did not detrimentally rely on Wright's adaptive strengths exhibited in prison when it listed at least **nine** examples of prison behavior that Dr. Gamache testified to and failed to sufficiently analyze the lay-witness testimony of Wright's adaptive deficits prior to incarceration. *Wright II*, 213 So. 3d at 899-900.

Some of the strengths the FSC cited to are also indisputably things that a mildly intellectually disabled person, like Wright, may be capable of doing by themselves or with the assistance of others. The FSC cited to the fact that Wright "knew how to use public transportation in his community," was employed at a grocery store, and has the capacity to learn. *Wright I*, 213 So. 3d at 900-01. However, Dr. Kasper testified that intellectually disabled individuals can have jobs, have romantic relationships, have children, buy things at the store, take public transportation, and even have driver's licenses. SR6/940-42. Some individuals are able to work with the help of job coaches who provide the supports needed to continue employment. SR6/952-54. Wright's cousin, Carlton, provided support for Wright for his job at the Alberton's Warehouse that was virtually identical to what a job coach would do. SR6/954-55; *see infra* pp. 25-26.

In *Wright II*, the FSC further deviated from prevailing clinical standards when it relied on the facts of Wright's alleged crimes and Wright's statements during a custodial interview with a detective to refute deficits in adaptive functioning. *Wright II*, 213 So. 3d at 901. Evidence of one's past criminal behavior, however, is not

indicative of adaptive behavior. User's Guide at 20.

The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not suffer from significant adaptive deficits and relied on non-credible expert and lay witness testimony. Clear and convincing evidence proves that Wright suffered from adaptive deficits prior to age 18 *and* after his incarceration. Wright's scores on both ABAS-II tests indicate he has significant adaptive deficits. Further, Wright's family and childhood friends, jail inmates he was incarcerated with while awaiting trial, and his trial attorneys testified to the profound evidence of his adaptive deficits. *See supra* at pp. 16-21. Instead of adequately considering this relevant and reliable evidence, the FSC relied on Dr. Gamache's non-credible testimony and the testimony of lay witnesses who testified that they barely knew Wright. Dr. Gamache testified that he based his assessment of Wright's adaptive functioning on an interview with Wright and summaries of lay-witness interviews conducted by the State Attorney's Office. SR9/1521-24; 1596-97. The AAIDD-11 and its User's Guide caution against relying only on information obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User's Guide at 20. Dr. Gamache also inappropriately emphasized Wright's behavioral improvements made in prison. *See supra* at pp. 33-34.

The FSC also stated that lay-witnesses Sandra Allen, Darletha Jones, and Vontrese Anderson testified that they did not have trouble communicating with

Wright. *Wright II*, 213 So. 3d at 901. However, these three witnesses also testified that they did not know Wright very well and did not have frequent personal interactions with him. See SR7/1153-55, 1161, 1175, 1182. Attorneys Hileman and Carmichael testified that they spent hundreds of hours conversing with Wright face-to-face, and they struggled to effectively communicate with him. See SR4/708-12; SR5/748-54, 64, 89-90. Further, Wright's childhood friend Toya Ford also stated that she had difficulty communicating with Wright. SR7/1202-03; 1214-15.

Reasonable jurists could debate whether the FSC unreasonably applied *Hall* and *Moore* and made an unreasonable determination of the facts in light of the state court record when finding that Wright does not suffer sufficient adaptive deficits to satisfy the criteria for prong two.

The district court's ruling on Ground One is debatable among jurists of reason. Reasonable jurists could disagree with the district court's resolution of this constitutional claim and/or reasonable jurists could conclude the issue presented in this claim is adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND TWO

FLA. STAT. § 921.137(4) IS UNCONSTITUTIONAL AND VIOLATES WRIGHT’S DUE PROCESS RIGHTS AS PROTECTED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE STATE COURT’S RESOLUTION OF WRIGHT’S CLAIM WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW. FURTHER, IN MANY RESPECTS, THE STATE COURT MADE AN UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE STATE COURT RECORD.

Wright argued in Ground Two of his amended habeas petition and memorandum of law that Fla. Stat. § 921.137(4) violates due process because it requires Wright to prove by clear and convincing evidence that he is intellectually disabled. Doc. 36 at *91-93; Doc. 38 at *33-35. The district court addressed this claim at pages 32-34 of its order. Florida’s stringent evidentiary standard creates an unnecessary risk that Wright will be executed as an intellectually disabled person in violation of his due process rights. *Atkins*, 536 U.S. 304. Reasonable jurists could disagree with the district court’s resolution of this claim. *Miller-El*, 537 U.S. at 327.

SCOTUS held in *Cooper v. Oklahoma* that the clear and convincing evidence standard of proof with regard to competency to stand trial violated a defendant’s due process rights. 517 U.S. 348, 359-64 (1996). The *Cooper* standard provides guidance in assessing the proper burden of proof for a defendant’s intellectual disability claim. Due to the reduced capacity of intellectually disabled offenders, there is a risk “that the death penalty will be imposed in spite of factors which may call for a less severe

penalty.” *Atkins*, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Executing an intellectually disabled defendant and trying an incompetent defendant encompass similar risks: limited ability to consult with counsel, capacity to testify relevantly, and ability to fully understand the proceedings. Because the interests of the defendant are more substantial and the interests of the State more modest when dealing with eligibility for the death penalty, imposing the clear and convincing standard violates due process. Additionally, because the deficits suffered by mildly intellectually disabled individuals are often subtle, requiring the defendant to prove intellectual disability by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is not intellectually disabled. *Cooper*, 517 U.S. at 363 (“requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent”).

The district court states that this claim is unexhausted and procedurally barred because it was denied under an independent and adequate state law ground as unpreserved under Florida procedural rules. Doc. 48 at *32. The claim was first raised during Wright’s written closing arguments to the circuit court on his Renewed Motion for Determination of Intellectual Disability. SR10/1715-17. The State addressed the claim in its rebuttal closing argument, making no mention of a procedural bar. SR11/1834-35. The circuit court addressed the issue in its order

denying relief, stating that “Florida Statute 921.137 (4) requires that level of proof” and citing 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.” SR11/1864-65. Despite the State having had a full and fair opportunity to address this claim, and despite the circuit 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 fact that Wright’s claim was dismissed on a state procedural ground does not preclude federal habeas review because the failure to consider this claim will 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)). Requiring that capital defendants prove they are intellectually disabled by the heightened clear and convincing standard creates an unconstitutional risk that intellectually disabled defendants will be executed in violation of *Atkins*. This Court should consider the claim to avoid a miscarriage of justice.

The district court also states that

this ground is almost certainly foreclosed by the Eleventh Circuit’s holding in *Raulerson v. Warden*, 928 F.3d 987, 1001–04 (11th Cir. 2019). The *Raulerson* court held that the Georgia capital sentencing

statute did not violate due process by requiring the capital defendant to prove beyond a reasonable doubt his intellectual disability. The Georgia beyond a reasonable doubt standard of proof is greater than Florida's clear and convincing standard. Petitioner's claim cannot survive *Raulerson* and is without merit until the Eleventh Circuit or Supreme Court changes that ruling.

Doc. 48 *33. Wright acknowledges this Court's ruling in *Raulerson*, and respectfully requests that this Court reconsider the issue. "In *Cooper*, 517 U.S. at 363 ... the Supreme Court reiterated that where a constitutional right is at issue, a state may not place a heightened burden on the defendant if doing so "imposes a significant risk of an erroneous determination."'" *Raulerson*, 928 F.3d at 1013 (Jordan, J., dissenting) (internal citation omitted). 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. Doc. 38 at *35. 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. Since the deficits suffered by mildly intellectually disabled individuals 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.

The District Court further states that this claim fails because Wright cannot prove that he is intellectually disabled by even a preponderance of the evidence. Doc.

48 at *33. However, as argued in Ground One, the evidence proves that Wright is intellectually disabled even under the clear and convincing standard.

The district court's ruling on Ground Two is debatable among jurists of reason. Reasonable jurists could disagree with the district court's resolution of this constitutional claim and/or reasonable jurists could conclude the issue presented in this claim is adequate to deserve encouragement to proceed further. This Court should grant a COA.

GROUND FIVE AND SIX

WRIGHT RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO IMPEACH STATE WITNESSES WESLEY DURANT AND BYRON ROBINSON. THE STATE COURT'S RESOLUTION OF WRIGHT'S CLAIMS WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, INCLUDING *STRICKLAND V. WASHINGTON*, 366 U.S. 668 (1984). FURTHER, IN MANY RESPECTS, THE STATE COURT MADE AN UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE STATE COURT RECORD.

Wright alleged in Grounds Five and Six of his amended habeas petition and memorandum of law that he received prejudicial ineffective assistance of counsel when trial counsel failed to impeach state witnesses Wesley Durant ("Durant") and Byron Robinson ("Robinson") by failing to call several witnesses who could impeach Durant and Robinson's testimony that Wright confessed the double homicide to them in jail. Doc. 36 at *130-31; Doc. 38 at *48-54. The district court

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX L

United States Court of Appeals for the Eleventh Circuit
February 4, 2021 Order Granting an Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13966-P

TAVARES J WRIGHT,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

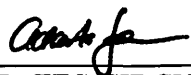
Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Pursuant to the standard set forth in *Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017), Mr. Wright's motion for a certificate of appealability is granted in part and denied in part. Mr. Wright is granted a COA on the following issue only:

Whether Mr. Wright is intellectually disabled and therefore ineligible for the death penalty under the Eighth Amendment.

Mr. Wright's motion to proceed in forma pauperis on appeal is granted.


UNITED STATES CIRCUIT JUDGE

No. _____

IN THE
Supreme Court of the United States

TAVARES J. WRIGHT,

Petitioner,

v.

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

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

APPENDIX M

“Principal Brief of Appellant,” filed March 15, 2021

Appeal No. 20-13966-P

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

TAVARES J. WRIGHT,
Petitioner/Appellant,

v.

**SECRETARY, DEPARTMENT
OF CORRECTIONS, et al.,**
Respondents/Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
District Court No.: 8:17-cv-00974-7DW-TGW**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

In compliance with 11th Cir. R. 26.1-1, counsel for Petitioner/Appellant hereby certifies that the following persons, partnerships, or firms may have an interest in the outcome of this case:

Aguero, John K. (Assistant State Attorney)

Ahmed, Raheela (Former Assistant Capital Collateral Regional Counsel)

Ake, Stephen D. (Senior Assistant Attorney General, Counsel for the Respondents/Appellees)

Blanco, Katherine V. (Former Assistant State Attorney)

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Bort, Lisa M. (Assistant Capital Collateral Regional Counsel, Attorney for Petitioner/Appellant)

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Canady, Honorable Charles T. (Florida Supreme Court Justice)

Carmichael, David (Attorney for Petitioner/Appellant at Trial)

Deliberato, Maria (Former Acting Capital Collateral Regional Counsel-Middle Region)

Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

Felker, James (Deceased Victim)

Green, David (Deceased Victim)

Inch, Mark S. (Secretary, Florida Department of Corrections)

Jacobsen, Honorable Donald G. (Circuit Court Judge, Tenth Judicial Circuit, in and for Polk County)

Jennings, Bill (Former Capital Collateral Regional Counsel-Middle Region)

Jung, Honorable William F. (United States District Court Judge, Middle District of Florida)

Labarga, Honorable Jorge (Florida Supreme Court Justice)

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Perry, Honorable James E.C. (Former Florida Supreme Court Justice)

Pinkard, Eric (Capital Collateral Regional Counsel-Middle Region)

Tavares J. Wright v. Secretary, Department of Corrections, et al.
Appeal No. 20-13966-P

Polston, Honorable Ricky (Florida Supreme Court Justice)

Prince, Honorable Richard (Senior Circuit Court Judge, Tenth Judicial Circuit, in
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Quince, Honorable Peggy A. (Former Florida Supreme Court Justice)

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Viggiano, Jr., James Vincent (Former Capital Collateral Regional Counsel-Middle
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Waters, John C. (Former Assistant State Attorney)

Wallace, Paul R. (Assistant State Attorney)

There are no corporations involved in this case.

STATEMENT REGARDING ORAL ARGUMENT

This is a capital case. The resolution of the issues presented may determine whether Tavares J. Wright (“Wright”) lives or dies. A complete understanding of the complex factual, legal, and procedural history of this case is critical to the proper disposition of this appeal. Accordingly, undersigned counsel for the Petitioner/Appellant respectfully requests the opportunity to present oral argument pursuant to Fed. R. App. P. 34 and 11th Cir. R. 34-3(c).

PRELIMINARY STATEMENT

Documents from the district court record not included in this brief’s Appendix will be cited as Doc. [#]. The state court appellate records including the transcripts of hearings and other evidence relevant to Wright’s intellectual disability claim were filed by the Respondents in paper format with the district court as an appendix to the Respondents’ Response to Amended Petition for Writ of Habeas Corpus and Memorandum of Law. The Respondents electronically filed a Master Index of Exhibits for the state court appellate records filed with the district court. Appendix D. Citations to the state court appellate records will conform with the Master Index of Exhibits and appear as: [exhibit number]/[page number(s)]. This brief’s Appendix will be cited as: [Appendix] (page number(s)).

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**STATEMENT OF SUBJECT-MATTER AND APPELLATE
JURISDICTION**

This is an appeal from a final order dated August 19, 2020, by the United States District Court, Middle District of Florida, Tampa Division (“district court”) denying Wright’s Amended Petition under 28 U.S.C. § 2254 For Writ of Habeas Corpus. Appendix F. This Court has jurisdiction pursuant to 28 U.S.C. § 2241, § 2253, § 2254, and § 1291. This brief is timely filed pursuant to this Court’s February 4, 2021 order.

STATEMENT OF THE ISSUES

- I. Whether Wright is intellectually disabled and therefore ineligible for the death penalty under the Eighth Amendment.

STATEMENT OF THE CASE

**(i) The Course of the Proceedings and Dispositions in the Courts
Below**

Petitioner/Appellant, Tavares J. Wright, is currently incarcerated under a sentence of death at the Union Correctional Institution in Raiford, Florida. On May 11, 2000, Wright was charged by indictment with one count of carjacking, two counts of kidnapping, two counts of robbery, and two counts of first-degree murder. A2/341. On November 13, 2004, a jury found Wright guilty of all charges.¹ A4/707-

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

15. A combined penalty phase and *Spencer*² hearing was held on May 10-11, 2005. A37-A40/128-533. Wright's appearance, slower speech, and documented history of difficulties in school indicated 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" on June 30, 2005.³ A5/743-44. A special-set hearing regarding mental retardation was held on September 22, 2005. A5/748-833. At the hearing, the trial court made an oral finding that Wright's IQ-scores did not establish a finding of mental retardation, and that Wright therefore was not mentally retarded for the purposes of capital sentencing. A5/825-29. On October 12, 2005, the trial court sentenced Wright to death on the two counts of first-degree murder and to life imprisonment on the remaining counts. A6/963-83. The 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 K.

On March 7, 2012, Wright filed an "Amended Motion to Vacate Judgment and Sentence," pursuant to Florida Rule of Criminal Procedure 3.851. B8/1245-1318; Appendix L. The evidentiary hearing on the motion was held on October 16-

² *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

³ "Intellectual disability" has since replaced "mental retardation" as the appropriate term. FLA. STAT. § 921.137(9).

18, 2012. B10-13/1671-2313. On May 22, 2013, the trial court issued an order denying the motion. B16/2688-2778; Appendix M. 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 v. Florida*, 134 S. Ct. 1986 (2014). B17/1-7; Appendix N. The trial court agreed to take judicial notice of the record on appeal from the direct appeal, as well as the post-conviction record on appeal. The evidentiary hearing on the motion was held on January 5-6, 2015 and February 11, 2015. B20-B26/622-1672. On March 26, 2015, the trial court issued an order concluding that Wright did not meet the legal standard for intellectual disability under Fla. Stat. § 921.137(1) and Fla. R. Crim. P. 3.203(b) and accordingly denied Wright’s intellectual disability claim. B27/1858-70; Appendix O. The FSC affirmed the trial court’s May 22, 2013 order denying Wright’s Fla. Rule Crim. P. 3.851 claims and March 26, 2016 order denying Wright’s intellectual disability claim in a single opinion. *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (“*Wright II*”); Appendix P.

On August 10, 2017, Wright filed a petition for a writ of certiorari to the United States Supreme Court (“SCOTUS”). On October 16, 2017, SCOTUS 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 v.*

Texas, 137 S. Ct. 1039 (2017). *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 reaffirming the trial court’s denial of Wright’s intellectual disability claim. *Wright v. State*, 256 So. 3d 766 (Fla. 2018) (“*Wright III*”); Appendix Q.

Wright filed an “Amended Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody” and amended memorandum of law with the district court on December 17, 2019. Appendix B; Doc. 38. The district court issued an order denying Wright’s petition for a writ of habeas corpus on August 19, 2020. Appendix F. Judgment was entered on August 20, 2020. Appendix G. Wright filed a “Motion to Alter or Amend Judgment” on September 16, 2020. Appendix H. The motion was denied on September 20, 2020. Appendix I. A notice of appeal from the district court’s order denying relief was timely filed on October 19, 2020. Appendix J. The district court declined to issue a certificate of appealability (“COA”). Wright filed a motion requesting a COA with this Court on November 20, 2020. This Court granted Wright an appeal on the issue of his intellectual disability in its February 4, 2021 order.

This timely principal brief follows, in which undersigned counsel alleges that the district court clearly erred in finding that Wright is not intellectually disabled under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2000). The

district court also erred in finding that the Florida Supreme Court did not unreasonably apply clearly established federal law pursuant to *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017) when determining that Wright does not meet the legal definition of intellectual disability.

(ii) Statement of the Facts

The expert and lay-witness testimony concerning the evidence of Wright's intellectual disability that has been developed in the state trial court is detailed below under each appropriate section of the three-prong test for intellectual disability.

STANDARD OF REVIEW

Petitions for Writs of Habeas Corpus filed by state prisoners are governed by 28 U.S.C. § 2254. When reviewing a district court's denial of habeas relief, this Court reviews questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error. *Reaves v. Sec'y, Florida Dept. of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal citation omitted). A court's determination as to whether a person is intellectually disabled is a finding of fact. *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 632 (11th Cir. 2016) (internal citation omitted). This Court reviews for clear error a district court's finding that a person is not intellectually disabled. *Id.*

SUMMARY OF THE ARGUMENT

Wright is an intellectually disabled person who is ineligible for the death penalty under the Eighth Amendment and *Atkins*. The district court clearly erred when it found that Wright cannot prove by clear and convincing evidence that he is intellectually disabled. The district court also erred when finding that Wright was not entitled to relief under 28 U.S.C. § 2254(d)(1) and (2) because the FSC did not unreasonably apply clearly established federal law pursuant to *Hall* and *Moore* and did not make an unreasonable determination of the facts in light of the state court record when finding that Wright is not intellectually disabled.

ARGUMENTS AND CITATIONS OF AUTHORITY

ISSUE I

WRIGHT IS INTELLECTUALLY DISABLED, AND HIS EXECUTION IS BARRED BY THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION. THE STATE COURTS' RESOLUTION OF WRIGHT'S CLAIM WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, INCLUDING *ATKINS V. VIRGINIA*, 536 U.S. 304 (2000), *HALL V. FLORIDA*, 572 U.S. 701 (2014), AND *MOORE V. TEXAS*, 137 S. CT. 1039 (2017). FURTHER, THE STATE COURTS MADE AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE STATE COURT RECORD.

Wright alleged in Ground One of his amended habeas petition and memorandum of law that he is ineligible for execution as an intellectually disabled person and that the FSC's resolution of this claim in its *Wright II* and *Wright III*

opinions was an unreasonable application of clearly established federal law. Appendix B (p. 18-99); Doc. 38 at *5-33. This ground was addressed at pages 17-31 of the district court's order denying relief. Appendix F (p. 556-70).

A. The state court record proves by clear and convincing evidence that Wright is intellectually disabled and therefore ineligible for execution under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002).

In *Atkins*, the United States Supreme Court (“SCOTUS”) held that executing the intellectually disabled is cruel and unusual punishment in violation of the Eighth Amendment. *Atkins*, 536 U.S. 304. *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 v. Florida*, 572 U.S. 701, 719 (2014). 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-V⁴ and AAIDD-11⁵).

⁴AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (“DSM-V”).

⁵ AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION,

Courts may not disregard current medical standards on intellectual disability. *Moore*, 137 S. Ct. at 1049.

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. SCOTUS 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. “Those with ID who have higher IQ scores comprise about 80 to 90% of all individuals diagnosed with ID.” AAIDD-11 at 15. 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.

CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) (“AAIDD-11”).

AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE DEATH PENALTY AND INTELLECTUAL DISABILITY (Edward A. Polloway ed., 2015) at 26.

Fla. Stat. § 921.137(1) defines 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.” This definition follows the three-prong test identified by SCOTUS and the relevant clinical manuals: (1) significantly subaverage intellectual functioning (“IQ”); (2) significant deficits in adaptive functioning, and; (3) onset of these deficits during the developmental period (before age 18). *Hall*, 572 U.S. at 710; AAIDD-11 at 5; DSM-V at 33. Under Florida law, Wright must prove that he is intellectually disabled by clear and convincing evidence.

The district court clearly erred when it found that Wright is not intellectually disabled. The district court ignored overwhelming evidence available in the state court record and outlined in Wright’s habeas pleadings proving that Wright meets all three prongs of the intellectual disability determination. The district court instead began its analysis of the evidence by finding that Wright is not intellectually disabled primarily based on the court’s incorrect assumption that Wright’s coherent trial testimony proves he is not intellectually disabled.

The district court states that the record of Wright’s trial shows that Wright is not intellectually disabled because he was able to coherently testify in his defense and effectively withstood cross examination. Appendix F (p. 562-64). The district court cites to evidence in the record that Wright understood the questions asked and responded concisely, portrayed a chronological version of facts that exculpated him of the murders, did not stray from the defense theme, and was able to identify and refuse to answer questions concerning the Mendoza/Winter Haven carjacking, for which Wright was suspected to be involved in but had not been charged with at the time of trial. Appendix F (p. 563-64) The district court gave great weight to this evidence, concluding that “[n]o one can read Petitioner’s direct and cross examination and rightly say this man is so bereft of mind that the eighth amendment bars this punishment.” Appendix F (p. 564).

The district court’s analysis of Wright’s coherent trial testimony as evidence that he is not intellectually disabled is similar to one of the *Briseno*⁶ factors the Texas courts previously used when determining intellectual disability claims before SCOTUS found that the *Briseno* analysis was invalid. In *Moore*, SCOTUS conclusively rejected the Texas courts’ use of the unscientific *Briseno* factors. SCOTUS stated that the factors were not aligned with the medical community's standards, created an unacceptable risk that persons with intellectual disability

⁶ *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

would be executed, and could not be used to restrict the qualification of a person as intellectually disabled. *See Moore*, 137 S. Ct. at 1044. While not specifically discussed in the *Moore* opinion, one of the repudiated *Briseno* factors states: "Does [the defendant] respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?" *Ex parte Briseno*, 135 S.W. 3d at 8. The repudiated *Briseno* factor bears striking resemblance to the district court's findings that Wright "ably and clearly testified in his defense;" that Wright was "coherent" and "clear;" that Wright understood the attorneys' questions on both direct and cross examination and that his answers were "responsive, concise, and lucid;" and that Wright portrayed an "entire and complete version of the facts." Appendix F (p. 563-64).

Further, the district court's reliance on Wright's trial testimony as evidence that he is not intellectually disabled is at complete odds with both the medical diagnostic framework for intellectual disability and prevailing clinical standards for how to consider a person's adaptive functioning. *See Hall*, 572 U.S. at 721; *Moore*, 137 S. Ct. at 1049. Similar to the *Briseno* factors, the significant weight that the district court gave to Wright's trial testimony is an analysis of the evidence that is not aligned with the medical community's assessment of intellectual disability.

The AAIDD-11 defines adaptive functioning as "the collection of conceptual, social, and practical skills that have been learned and ***are performed by people in***

their everyday lives.” AAIDD-11 at 43 (emphasis added). The AAIDD-11 further states that “strengths 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. The DSM-V 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-V at 38 (emphasis added). Wright’s performance during the unique circumstances of a homicide trial is clearly not an example of how Wright functioned on an ongoing basis at school, at work, at home, or in the community. The district court erred by focusing on Wright’s coherent trial testimony to find that he is not intellectually disabled while ignoring extensive evidence of adaptive deficits in how Wright functioned at school, work, and home during the developmental period and before he was incarcerated for this case. *See infra* at pp. 28-36.

Additionally, Wright’s ability to testify is an adaptive strength that the district court may not use to restrict Wright’s qualification as a person with intellectual disability. The medical community focuses the adaptive-functioning inquiry on ***adaptive deficits.*** *Moore*, 137 S. Ct. at 1050 (emphasis added); *see also* AAIDD–11 at 45, 47 (“the assessment of adaptive behavior is based on the person’s typical (not

maximum) performance”; “significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills”). Wright’s coherent trial testimony does not constitute evidence adequate to overcome the considerable objective evidence of Wright’s adaptive deficits. The district court erred when placing undue emphasis on this perceived adaptive strength.

The record proves by clear and convincing evidence that Wright is an intellectually disabled person who is ineligible for the death penalty under the Eighth Amendment. The evidence in the state court record as to each element of the three-prong test is detailed below.

1. Wright has significantly subaverage IQ.

A court’s determination of whether a defendant suffers from significantly subaverage IQ must be “informed by the medical community’s diagnostic framework.” *Hall*, 572 U.S. at 721. IQ scores should be interpreted “in reference to the [IQ] test’s standard error of measurement, the assessment instrument’s strengths and limitations, and other factors such as practice effects, fatigue effects, and age of norms used.” AAIDD-11 at 35. There is clear and convincing evidence that Wright suffers from significantly subaverage IQ. The district court clearly erred when it found that Wright does not have significantly subaverage IQ.

Wright’s IQ has been tested nine times throughout his life. The FSC and district court detailed six full-scale IQ scores that Wright has achieved on different

versions of the Wechsler intelligence test. *Wright II*, 213 So. 3d at 897; Appendix F (p. 567). The six full-scale scores, in chronological order, are: **76** (February of 1991, age 10, WISC-R⁷); **80** (4/4/1991, age 10, WISC-R); **81** (9/11/1991, age 10, WISC-R); **75** (8/25/1997, age 16, WAIS-R⁸); **82** (7/15/2005, age 24, WAIS-III⁹); and **75** (7/25/2005, age 24, WAIS-III).¹⁰ These six scores were detailed in a chart entered

⁷ Wechsler Intelligence Scale for Children-Revised

⁸ Wechsler Adult Intelligence Scale- Revised

⁹ Wechsler Adult Intelligence Scale- Third Edition

¹⁰ Wright has taken three additional IQ tests throughout his life, but the results of these tests cannot be included as part of the determination of whether he has subaverage IQ for the purposes of capital sentencing. Wright was administered the Weschler Abbreviated Scale of Intelligence (“WASI”) two separate times- the first in 2001 and the second in 2004. However, scores on abbreviated IQ tests may not be considered in this context. Fla. Stat. § 921.137(1) states that significantly subaverage IQ “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 Agency for Persons with Disabilities specifies that the two tests used to evaluate a capital defendant’s IQ shall be the “Stanford-Binet Intelligence Scale” or the “Wechsler Intelligence Scale.” Fla. Admin. Code. r. 65G-4.011(1)(a). The rule does not specify that any abbreviated screening test, such as the WASI, may be used. Wright also scored a full-scale 65 on a WAIS-IV that State’s expert Dr. Michael Gamache (“Dr. Gamache”) administered in 2014 while Wright was incarcerated on death row. B24/1360. Dr. Gamache testified that there was evidence that Wright malingered on the test, rendering the lower score. B24/1334-35. Defense experts Dr. Michael Kindelan (“Dr. Kindelan”) and Dr. Joel Freid (“Dr. Freid”) testified that Dr. Gamache administered the test to Wright using a non-standardized “testing the limits” procedure, which would frustrate and fatigue the test-taker. B24/1375-77; 1401-02. Regardless, the experts and courts have not relied on the score to determine whether Wright has significantly subaverage IQ, and Wright does not argue that it should be considered.

as Defense Exhibit 1 at the 2015 hearing on Wright's motion for determination of intellectual disability. The chart can be found at Appendix R.

These six scores should not be given equal evidentiary weight when determining whether Wright has significantly subaverage IQ. Four of these scores are not reliable indicators of Wright's IQ because they were either artificially inflated by the practice effect or Wright achieved them after the developmental stage (after age 18). When considering Wright's IQ, this Court should give the greatest weight to the **76** that Wright achieved at age 10 on the first WISC-R (and first IQ test) he was administered and the **75** that Wright achieved at age 16 on his only administration of the WAIS-R. These two scores most reliably indicate Wright's true IQ.

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.¹¹ Dr. Kasper testified that the **76** (age 10) and **75** (age 16) 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. B21/918-19. Dr. Kasper also testified that she spoke with the two doctors who administered both

¹¹ A more detailed summary of Dr. Kasper's testimony as to prong one can be found in Wright's habeas petition at Appendix B (p. 23-29).

tests- Drs. Michael Kindelan and Dr. Joel Freid- and neither had concerns about the scores' validity. B21/918-19. Dr. Freid, the doctor who administered the WAIS-R to Wright in 1997, testified that he would indicate in his report if he thought Wright was malingering, and no such notation appears in his 1997 report.¹² B24/1412-13.

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 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. 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. B21/913-15. 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 DSM-V and AAIDD-11 define intellectual

¹² Dr. Freid's report is at Appendix S.

disability as a condition that originates prior to age 18. *See* DSM-V at 37; AAIDD-11 at 5. 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.

Three experts have opined that Wright meets the criteria for significantly subaverage IQ. Dr. Kindelan, the doctor who administered the first WISC-R to Wright in 1991, testified 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**. B24/1385-86. Dr. Kindelan opined that this places Wright in the range of scores for someone who is intellectually disabled.¹³ B24/1386. Dr. Kasper also testified that, after applying the Flynn effect, Wright's corrected full-scale IQ score from the first 1991 test equals **70**, and his corrected full-scale IQ score from the 1997 test equals **69**. B12/1963, 1969-70. Dr. Kasper opined at both the 2012 and 2015 evidentiary hearings that Wright has significantly subaverage IQ. B12/1984; B21/897. Dr. Freid 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 prong one. B24/1419-20.¹⁴

¹³ A more detailed summary of Dr. Kindelan's testimony can be found in Wright's habeas petition at Appendix B (p. 33-36).

¹⁴ A more detailed summary of Dr. Freid's testimony can be found in Wright's habeas petition at Appendix B (p. 36-39).

Despite this evidence, the district court found that Wright does not meet the criteria for prong one, stating that “[e]ven if one factored in the SEM ... Petitioner is still over 70 on each [IQ test] save two, as he scored 75 on two of them. The data simply shows, no matter how it is viewed, tests almost universally over 70 and some over 80.” Appendix F (p. 567-68). However, the fact that Wright’s full-scale IQ scores (without adjusting for the Flynn effect) sit at 70 or above does not preclude Wright from meeting the criteria for prong one. The DSM-V 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-V at 37 (emphasis added). The district court further points to the fact that Wright’s highest score is an 82, and that Dr. Kasper testified that it was “valid and free of any practice effect concerns.” Appendix F (p. 567) (citing *Wright II*, 213 So. 3d at 897). However, the district court fails to acknowledge Dr. Kasper’s testimony that the two scores that most reliably indicate Wright’s intelligence are his **76** (1991) and **75** (1997). *See supra* at p.15. The district court also fails to acknowledge in its analysis the testimony from Dr. Kindelan and Dr. Freid that Wright’s IQ scores place him in the range of someone who is intellectually disabled, and the district court does not explain why these experts’ testimony is not credible or should not be considered. *See supra* at p.17.

The district court further states that Wright's IQ scores are generally higher than those recently reviewed by this Court in a capital case affirming denial of relief. Appendix F (p. 567) (citing *Clemons v. Comm'r, Alabama Dep't of Corr.*, 967 F.3d 1231 (11th Cir. 2020)). The district court states that Clemons' IQ scores were reported as: 51, 58 adjusted to 66, 67 adjusted to 60, 73, 77, and 84. Appendix F (p. 567).

However, the *Clemons* case is distinguishable from Wright's, and this Court's findings in *Clemons* as to that defendant's IQ scores in no way prevent Wright from proving that he has significantly subaverage IQ. This Court has stated that

[t]he intellectual-disability determination is fact-intensive, requiring careful consideration of the petitioner's intellectual functioning, adaptive skills, and age of onset, with the assistance of qualified experts. *Cf. Hall v. Quarterman*, 534 F.3d 365, 371 (5th Cir.2008) ("The issue of [intellectual disability], defined by *Atkins* [,] ... is fact-intensive ***and rests on nuanced determinations under broadly stated concepts*** such as limitations in adaptive functioning." (quotation marks omitted)).

Conner v. GDCP Warden, 784 F.3d 752, 766 (11th Cir. 2015). The determination of whether Wright, or any other capital defendant, has significantly subaverage IQ is a nuanced, fact-intensive decision that must account for the specific circumstances of each defendant's case. At face value, the fact that Clemons had some lower scores than Wright does not conclusively mean Wright cannot prove significantly subaverage IQ. The seven IQ scores that Clemons achieved throughout his life varied widely – from 51 to 84. *Clemons*, 967 F.3d at 1248. The range of Wright's

six full-scale scores does not vary nearly as much- from 75 to 82. There was significant evidence that Clemons malingered on his lower IQ scores. Of particular note, this Court's opinion explains compelling evidence that the 51 (Clemons' lowest score) that Clemons achieved in 1992 after he had been incarcerated for murder was the product of Clemons malingered. In 1991, while incarcerated in prison on charges unrelated to his homicide case, Clemons achieved an 84 on the BETA-II intelligence test. *Id.* at 1245. Yet, Clemons somehow scored a 51 on a WAIS-R administered to him only a year later after he had been arrested for murder. The two doctors that administered the WAIS-R to Clemons "observed that it would be virtually impossible to validly score an 84 on BETA-II and one year later validly score a 51 on WAIS-R, in the absence of some intervening traumatic injury" and concluded the 51 was invalid because Clemons was malingered. *Id.* at 1245-46. While the district court states that Clemons had lower scores than Wright, the state court in Clemons' case would eventually find that only four of Clemons' seven scores could be considered valid- a 77, 84, 73, and 77. *Id.* at 1247. There is no credible evidence that Wright malingered on the six full-scale scores (76, 80, 81, 75, 82, 75) that the experts and FSC based Wright's IQ determination on. Further, as detailed above, Wright's two most reliable scores are a 76 and 75 because the other scores were rendered unreliable by either the practice effect or Wright's age when the tests were administered. This Court makes no mention of the practice effect in

the *Clemons* opinion, so it is unclear if the phenomena artificially inflated any of Clemons' scores in the same way that it inflated some of Wright's scores. Further still, this Court makes no mention of the Flynn effect in the *Clemons* opinion, so it is unclear how it affected Clemons' scores. As discussed above, Wright's two most reliable scores decrease to a **69** and **70** when accurately corrected for the Flynn effect. Finally, regardless of how Clemons' and Wright's scores compare, significantly subaverage IQ is only one of three prongs that either defendant must meet to prove intellectual disability. Wright's significant adaptive deficits, detailed below, render him intellectually disabled in addition to his significantly subaverage IQ scores.

The district court also failed to consider Wright's Flynn-corrected scores when determining whether he has significantly subaverage IQ.^{15, 16} Wright acknowledges this Court's precedent states that courts may, but are not required to,

¹⁵ The district court discusses the Flynn effect when analyzing Ground Three of Wright's habeas petition. Appendix F (p. 576-77). However, the district court makes no mention of Wright's Flynn-corrected scores when determining whether Wright can prove he is intellectually disabled, as alleged in Ground One of Wright's habeas petition.

¹⁶ The FSC acknowledged that the state trial court heard evidence concerning the Flynn effect in its *Wright II* opinion, but did not specifically consider Wright's Flynn-corrected scores when finding that Wright was not intellectually disabled. *Wright II*, 213 So. 3d at 895-98. The FSC made no mention of the Flynn effect in its *Wright III* opinion. The state trial court also did not explicitly consider Wright's Flynn-corrected scores in its order denying relief, although it did state that it heard testimony on the Flynn effect. Appendix O (p. 823).

consider evidence of a defendant's Flynn-corrected scores. See *Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019); *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 615 (11th Cir. 2016). Wright also acknowledges that this Court has found that "there is no consensus about the Flynn effect among experts or among the courts." *Raulerson*, 928 F.3d at 1008. Wright respectfully submits that courts should be required to consider evidence of the Flynn effect when that evidence is presented and respectfully requests that this Court revisit the issue.

Failing to consider a capital defendant's Flynn-corrected scores "[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. *Moore*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 704). 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. 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). 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.

User's Guide at 23 (internal citation omitted) (emphasis added). 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. B12/1962-63. When adjusted for the Flynn effect, Wright's full-scale 76 drops **6 points down to a 70**. B12/1963. 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. B12/1969-70. When adjusted for the Flynn effect, Wright's full-scale 75 drops **6 points down to a 69**. B12/1970. This **70** and **69** are the most accurate and reliable indicators of Wright's true IQ. Failure to consider these scores as the true indication

of Wright's intellectual functioning places him at an unacceptable risk of being executed as an intellectually disabled person who suffers from significantly subaverage IQ.

Wright also respectfully submits that there is a general consensus in the clinical manuals that adjusting for the Flynn effect when a test with older norms is used is the best practice. The DSM-V states that the Flynn effect may cause "overly high scores due to out-of-date norms." DSM-V at 37. The AAIDD-11 and its User's Guide clearly state that an adjustment for the Flynn effect is warranted when an IQ test with older norms has been used. AAIDD-11 at 37; User's Guide at 23. Wright acknowledges that every expert in the field of intellectual disability does not hold the same opinion on the application of the Flynn effect in capital cases, although there certainly is support for it.¹⁷ However, the fact that the Flynn effect has been

¹⁷ 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

acknowledged as important in the clinical manuals proves that there is enough scientific consensus for this Court, and all other courts, to consider it as an important and necessary part of the analysis of intellectual disability claims.

Dr. Kasper, Dr. Freid, and Dr. Kindelan all testified that Wright has significantly subaverage IQ. Wright's two most reliable full-scale scores (76 and 75) fall squarely within the significantly subaverage range when corrected for the Flynn effect (70 and 69). Further, even if this Court chooses not to apply the Flynn effect, Wright's score of 75 still falls within the clinical range. Further still, any perceived

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 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 E (p. 428-537).

weakness in the evidence as to the IQ prong is counteracted by the extensive evidence of Wright's deficits in the adaptive functioning prong. *See infra* at pp. 28-36. The DSM-V explains that "a person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score." DSM-V at 37. This Court should find that the district court and state courts clearly erred when determining that Wright cannot prove by clear and convincing evidence that he suffers from significantly subaverage IQ.

2. Wright suffers from significant deficits in adaptive functioning.

The DSM-V explains that "adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical." DSM-V at 37. 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. "[T]he medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Moore*, 137 S. Ct. at 1050 (citations omitted). "Significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-11 at 47; *Moore*, 137 S. Ct. at 1050. "[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.

The district court places undue emphasis on perceived adaptive strengths, while failing to fully acknowledge the significant lay witness testimony of Wright's adaptive deficits. The district court gives great weight to the fact that Wright coherently testified at trial and at other points in the record as evidence that he is not intellectually disabled. Appendix F (p. 562-65). The district court also cites, in part, to the fact that Wright capably drove the victims' car and, in the district court's words, "managed a marijuana sales business," as evidence that Wright is not intellectually disabled. Appendix F (p. 565).

However, these perceived adaptive strengths do not refute that Wright suffers from significant adaptive deficits. While Wright's trial testimony is relevant, it is not the most clinically compatible evidence of his adaptive functioning. *See supra* at pp. 11-13. Further, any evidence of criminal activity has very little clinical value when determining if Wright has significant adaptive deficits.¹⁸ There is significant evidence of Wright's adaptive functioning before age 18 and in the context of his school, neighborhood, and employment environments, and this evidence should be

¹⁸ The User's Guide states: "Do not use past criminal behavior ... to infer [the] level of adaptive behavior ... The diagnosis of ID is not based on the person's 'street smarts', behavior in jail or prison, or 'criminal adaptive functioning.'" User's Guide at 20.

given far more weight. Further still, the fact that Wright was able to drive a car is an example of a practical skill that Wright could reasonably be expected to perform with mild intellectual disability. The User's Guide states that there are a number of incorrect stereotypes concerning intellectually disabled individuals, and one of those incorrect stereotypes is that those individuals cannot drive a car. User's Guide at 26.¹⁹

Dr. Kasper testified extensively concerning the evidence of Wright's adaptive deficits.²⁰ Wright's school records reflect that he was classified as both emotionally handicapped and specific learning disabled. B11/1924. Wright was exempt from taking standardized tests. B11/1923. Wright's records also reflect that he had Independent Education Plans ("IEPs") in school, which are used for students with disabilities to provide feedback and set specific goals. B11/1924-25. 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. B11/1911-14.

¹⁹ Other incorrect stereotypes include that intellectually disabled people are completely incompetent, cannot do complex tasks, cannot engage in romantic relationships, and cannot acquire vocational skills. User's Guide at 26.

²⁰ A more detailed summary of Dr. Kasper's testimony as to prong two can be found in Wright's habeas petition at Appendix B (p. 42-52).

Numerous lay witnesses also testified concerning Wright's adaptive deficits.²¹ 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. A38/278-79. Wright's mother used alcohol when she was pregnant with Wright. A38/287. Wright was "slow", and his mother received social security benefits for him because he was in "ESE" classes and had learning problems. A38/285. McClain observed Wright have difficulty as a child concentrating on one task, which affected his schoolwork and frustrated him. A38/289. Wright was a "follower," and other children picked on Wright because he was "slower" than them. A38/285-86.

Carlton Barnaby ("Carlton"), Wright's maternal first cousin, testified that he knew Wright all his life and they had a close relationship their entire lives. A39/329; B20/659. Wright and Carlton attended the same elementary, middle, and high school together. B20/663. Wright was in SLD (slow learning disability classes). B20/663. Wright's reading and writing in school were poor, and Carlton helped him with spelling, grammar, and punctuation. B20/663-64. Wright was a follower and easily influenced by other people. A39/335, 351. With the exception of one friend, Carlton did not know Wright to have friendships with other children, and Wright was picked

²¹ A more detailed summary of the lay witness testimony as to Wright's adaptive deficits can be found in Wright's habeas petition at Appendix B (p. 61-83, 89-92).

on by his peers. A39/340-41. Wright did not know how to handle peer pressure and had difficulty expressing his feelings. A39/341-42.

Carlton helped care for Wright when they were children- Carlton provided Wright with toothpaste and deodorant, coached him on proper hygiene, and combed Wright's hair. B20/660-61. Carlton also cared for Wright as they grew older. Carlton gave Wright rides because he did not have a driver's license. B20/662. 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. B20/668-70. Carlton drove Wright to and from each work shift. B20/670-71. Carlton regularly helped Wright with the time clock until Wright was able to do it on his own. B20/674-75. They stayed together and were within sight of one another during the entire shift. B20/671. 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. B20/672. Carlton and the other workers looked out for Wright and instructed him on how to do his job. B20/673-74. Wright could not have done this job without someone helping him, at least at first. B20/674. Wright did not have a bank account, so Carlton drove Wright to a store to cash his checks from the job. B20/675. Carlton helped Wright cash his checks, and he showed him where to sign his name on the checks. B20/675.

Marian Barnaby (“Marian”), Wright’s maternal aunt, testified that Wright spent almost every weekend at her house as a child. B20/635-36. Marian 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. B20/637. Wright was in slow classes at school because of his learning problems. B20/639. Wright also started walking later than Marian’s own children. B20/638. Wright’s mother received a disability check for his slow learning and disability. B20/639.

Toya Long Ford (“Ford”), Wright’s childhood friend, testified that she and Wright “pretty much grew up together.” B23/1201. Ford explained the difficulty she had communicating with Wright when they played together as children:

We never really could have a conversation where he would give an elaborate answer back. It was, like, if you wanted to talk to him, basically, you just would want to ask yes-or-no questions because it’s not like – he wasn’t there enough to hold a full conversation like that ... he would more so have trouble understanding me or what I’m trying to ask.

B23/1202-03. Ford would have to use simpler words and repeat herself when speaking to Wright. B23/1214-15. Wright would sometimes act like he understood when he really didn’t. B23/1215.

Wright and Ford went to the same middle school but did not have any mutual classes. B23/1203. Wright would tell Ford that school “was hard for him to understand and try to keep up,” and he didn’t know how to do his homework. B23/1204-05. Ford frequently helped Wright with his homework and would have to

do his homework for him at times because “[i]t was not comprehensive to him.” B23/1205, 1212. Wright’s school-work was significantly easier than Fords’ because he was in special classes, but he still didn’t seem to get it. B23/1212. Other children took advantage of Wright and picked on him because he was an easy target and would not fight back. B23/1210. Wright did not have many friends and would do “whatever they wanted him to do” to make friends with the other children. B23/1210.

Wright would often come to Ford’s house to get food. B23/1209-10. Ford’s mother would not let Wright cook because of his short attention span. B23/1214. Ford’s mother also had to remind Wright to brush his teeth, wash his face, and tie his shoes. B23/1207.

James Blake (“Blake”), Wright’s childhood friend, testified that he met Wright in boot camp in 1997. B10/1733-34. Wright did not fit in with the other boys in boot camp. B10/1735. He adapted more slowly to boot camp than the rest of the boys, and he was not able to obey the drill instructors’ orders because he did not understand them. B10/1735. After boot camp, Blake saw Wright again on the street in Lakeland around 1998. B10/1737-38, 1741. The other children made fun of Wright by calling him slow. B10/1740. Wright did not engage in serious conversations. B10/1745. 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. B10/1743-44.

Jerry Hopkins (“Hopkins”), Wright’s childhood friend, testified that he grew up with Wright and knew Wright from the time they were both 13 to 18 years old. B11/1758-61. They attended middle school, high school, and boot camp together. B11/1760. The other children picked on Wright because he was a slow learner, and he could hardly read or spell. B11/1762. Wright also did not comprehend a lot of things people told him. B11/1762-63. Hopkins recalled that if you told Wright something only one time, he would not remember it. B11/1762. Hopkins described Wright as a follower who was easily influenced by other people. B11/1763. He did not fit in with the other children, but he would do things to try and fit in. B11/1763-64.

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. B20/710-11. During their discussions, Wright would go off on unrelated tangents. B20/711. Hileman frequently had to repeat himself multiple times because Wright did not seem to understand. B20/722. 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. B21/752-53. For a long time, Carmichael thought Wright understood him because

he would laugh, smile, and make appropriate comments or gestures. B21/752. However, Carmichael later concluded that Wright did not really understand what his attorneys were talking about. B21/753. For example, Carmichael would hear Hileman explain to Wright what was going to happen next during the trial, and Wright would nod and smile. B21/753. Carmichael would then speak with Wright in the holding cell, and Wright would not really understand. B21/753.

Wright's attorneys also testified that Wright exhibited a lack of judgment in fully understanding his circumstances. B20/714. 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. B20/712. 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." B20/712. Wright was not interested in the offer despite there being little downside since Wright already had a life sentence on other charges. B20/713. Wright was never able to provide Carmichael with a reason for rejecting the life offer. B21/761. Wright also could not actively assist Hileman with his case. B20/718. Wright did not even appear to be listening to the testimony during his trial. B20/721. He would respond when Hileman asked him a question, but then he would go back to "doodling" on a notepad that Hileman gave him. B20/722. 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. B20/715. Carmichael explained that getting Wright to behave properly and groom himself for trial was akin to dealing with a six-year-old. B21/768. Wright was eventually able to adapt himself to acceptable courtroom behavior, in part, because his attorneys got him engaged in doing activities during trial. B21/767. For example, they gave him a coloring book and coloring pencils, and he drew pictures and colored. B21/767.

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, was frequently taken advantage of by the other inmates, and had trouble constructively participating in activities with the other inmates; these activities included playing cards and a Bible study group. Appendix B (p. 65-68).

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-II²² 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

²² Adaptive Behavior Assessment System – Second Edition

(2014) functioning. B22/946-47, 955-64. 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. B22/959. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. B22/963-64. Dr. Kasper found that Wright suffers from deficits in adaptive behavior under both the statutory rule and the clinical definitions. B22/949.

The district court states that the only adaptive functioning category in dispute in Wright's case is conceptual skills, and finds it "noteworthy that even Petitioner's expert agreed that Petitioner did not have current deficits in the social and practical skills domains." Appendix F (p. 570). The district court misstates Dr. Kasper's testimony. Dr. Kasper actually testified that Wright suffered from adaptive deficits in both the conceptual **and** social categories as evidenced by his scores on the first administration of the ABAS-II corresponding with Wright's functioning at sixteen years old. B22/959. Dr. Kasper then testified that Wright showed improvement on the second administration of the ABAS-II corresponding with Wright's current functioning while imprisoned on death row- only scoring low enough in the conceptual category. B22/963-64. However, Wright is only required to prove significant adaptive deficits in one category to meet prong two.

Wright's school records and enrollment in special education classes; the testimony of numerous lay witnesses who knew Wright during the developmental period and during his trial; and Wright's scores on the ABAS-II all prove that he has significant adaptive deficits. This Court should find that the district court and state courts clearly erred when determining that Wright cannot prove by clear and convincing evidence that he suffers from significant adaptive deficits.

3. Wright's intellectual disability manifested before age 18.

The state trial court found "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." B27/1865. 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. A39/397-98. Microcephaly is a symptom of fetal alcohol syndrome. A39/397-98. Dr. Waldman opined that Wright's low intelligence is caused by his fetal alcohol syndrome.²³ A39/404.

Dr. Kasper also opined that Wright meets the criteria for prong three, as his intellectual disability began prior to 18 years old. B12/1994. Dr. Kasper testified that

²³ Dr. Waldman's report is at Appendix T.

Wright has been diagnosed with fetal alcohol syndrome, which is known to cause defects in intellectual capacity. B12/1995. Wright's mother also received Social Security benefits for Wright's disability when he was a child. Wright was classified as emotionally handicapped and specific learning disabled in school. Wright also achieved two full-scale scores before he was 18 years old that indicate significantly subaverage IQ: 76 (1991, age 10) and 75 (1997, age 16).

Lay witnesses McClain, Carlton, Marian, Ford, and Hopkins testified that as a child: Wright was in special classes; Wright was picked on by other children because he was slower than them; Wright had difficulty communicating with others and understanding them; Wright struggled significantly with his schoolwork; and Wright could not care for all his daily living needs (such as grooming) without assistance or coaching. *See supra* at pp. 29-33. The State offered no testimony from Dr. Gamache or any other witness to show that Wright's intellectual impairment did not manifest during the period from conception to age 18.

The district court makes no finding on whether Wright meets the criteria for prong three. This Court should find that Wright has proved by clear and convincing evidence that his intellectual disability manifested prior to age 18.

B. The FSC’s resolution of Wright’s intellectual disability claim in its *Wright II* and *Wright III* opinions was an unreasonable application of clearly established law.

The district court erred when finding that Wright was not entitled to relief under 28 U.S.C. § 2254(d)(1) and (2) because the FSC did not unreasonably apply clearly established federal law pursuant to *Hall* and *Moore* and did not make an unreasonable determination of the facts in light of the state court record when determining that Wright is not intellectually disabled in the *Wright II* and *Wright III* opinions. Appendix F (p. 570).

As to prong one, the FSC unreasonably applied *Hall* when it found that Wright does not have significantly subaverage IQ. *Hall* states that “[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.” 572 U.S. at 721. *Hall* states that “[f]or purposes of most IQ tests, the [standard error of measurement (“SEM”)] means that an individual's score is best understood as a range of scores on either side of the recorded score.” *Hall*, 572 U.S. at 713. “The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.” *Id.* *Hall* rejected Florida’s then strict IQ score cutoff of 70 as unconstitutional. *Hall*, 572 U.S. at 722.

In *Wright II*, the FSC ignored the medical diagnostic framework when it disregarded the SEM, viewed Wright’s IQ as a fixed number instead of an imprecise

range, and failed to consider the Flynn effect. The FSC acknowledged that “IQ scores are best evaluated as a range, taking into account the ... SEM and other factors.” *Wright II*, 213 So. 3d at 897 (internal citation omitted). The FSC outlined Wright’s six full-scale IQ scores (76, 80, 81, 75, 82, and 75). *Wright II*, 213 So. 3d at 897. The FSC cited Dr. Kasper’s testimony that the range of scores yielded from Wright’s first score (76) was the most accurate because it would be free from the practice effect. *Id.* Upon applying a 95% confidence interval, the range derived from this score is 69 to 82. *Id.* The FSC disregarded the SEM when it stated that “[e]ven taking the most favorable testimony concerning the application of the SEM to Wright’s scores, at its lowest point, the most favorable range derived from Wright’s scores dips just one point beneath ***the threshold of 70 required for a finding of significantly subaverage general intellectual functioning.***” *Id.* (emphasis added). However, the DSM explicitly states that individuals with intellectual disability have scores falling in the range of 65-75. DSM-V at 37. The FSC’s language makes it clear that the court is still adhering to its unconstitutional 70 IQ cutoff and accordingly failed to recognize that Wright’s scores indicate he has significantly subaverage IQ.

The FSC further gave undue weight to the 82 that Wright achieved in 2005 at the age of 24 years old. The FSC cited Dr. Gamache’s testimony that “Wright’s highest IQ score of 82 was the most accurate representation of his IQ.” *Id.* The FSC

inappropriately narrowed its analysis of Wright's IQ to a single number (82), disregarding that Wright's true score falls anywhere between 69 and 82. The FSC also disregarded the basic clinical definition of intellectual disability when it gave undue weight to a score that Wright achieved when he was **24 years old**. See DSM-V at 37; AAIDD-11 at 5. The FSC again misconstrued IQ as a single number instead of a range in its *Wright III* opinion when it still focused on Wright's score of 82 and completely failed to explicitly mention any of Wright's other scores. *Wright III*, 256 So. 3d at 772.

The FSC further disregarded the medical diagnostic framework by failing to consider how the Flynn effect affects Wright's IQ scores.²⁴ The DSM-V, AAIDD-11, and the User's Guide to the AAIDD-11 indicate that the Flynn effect should be considered when a test with "aging norms" is used. DSM-V at 37; AAIDD-11 at 37; User's Guide at 23. However, the FSC failed to explicitly consider Dr. Kasper's testimony that, because many of Wright's tests were taken several years after the tests were normed, Wright's true score on those tests is much lower than his non-corrected scores indicate. Dr. Kasper testified that Wright's full-scale 76, when

²⁴ Wright acknowledges this Court's finding that *Hall* does not require that courts apply the Flynn effect, but respectfully submits that the Flynn effect is part of the medical community's diagnostic framework and should be considered to prevent the unacceptable risk that intellectually disabled persons may be executed in violation of the Eighth Amendment and *Atkins*. *Ledford*, 818 F.3d at 639 (11th Cir. 2016); see *supra* at pp. 21-25.

adjusted for the Flynn effect, is actually **70**. B12/1963. Dr. Kasper also testified that Wright's full-scale 75, when adjusted for the Flynn effect, is actually **69**. B12/1969-70.

The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not have significantly subaverage IQ and relied on Dr. Gamache's non-credible testimony. There is clear and convincing evidence that Wright has significantly subaverage IQ. Dr. Kasper, Dr. Kindelan, and Dr. Freid all testified that Wright has significantly subaverage IQ. B21/897; B24/1386, 1419-20. However, the FSC improperly relied on Dr. Gamache's unreliable testimony that Wright does not have subaverage IQ and was likely malingering on all his IQ tests. The FSC relied on Dr. Gamache's unfounded testimony that Wright may have been malingering on all his IQ tests because Wright's results on the Validity Indicator Profile Test that Dr. Gamache administered to Wright in 2014 indicated Wright did not expend a full effort on the WAIS-IV Dr. Gamache administered in 2014. *Wright II*, 213 So. 3d at 899. However, Dr. Gamache failed to reasonably explain how a finding that Wright was malingering on an IQ test administered to him in 2014 after he had been on death row for several years indicates that he was also malingering on tests that he took twenty years prior under completely different circumstances and when he had no incentive to malingering.

The district court also gives undue weight to Dr. Gamache's testimony that Wright may have malingered on his IQ tests, stating that "[t]he record that Petitioner suffers no qualifying ID is strengthened by the indication in this record that Petitioner may have been malingering in some tests. The State expert expressed these concerns and the Florida Supreme Court was reasonable in considering the likelihood of malingering when reviewing this record." Appendix F (p. 568). However, Dr. Gamache's opinion that Wright was malingering on all his tests is unfounded. Drs. Kindelan and Freid testified that they had no concerns about the validity of either test, and there is no notation in Dr. Freid's 1997 report that Wright was malingering. B24/1381-82, 1412-13.

The range of scores for the 1991 test that Dr. Kindelan administered was 69 to 82, and Wright has scored within that range for all six of his full-scale scores, even when they are corrected for the Flynn effect. Dr. Kindelan testified that it would be nearly impossible for an individual to score as consistently as Wright by malingering. B24/1387.

As to prong two, the FSC unreasonably applied *Hall* and *Moore* when it found that Wright does not suffer from significant adaptive deficits. In *Moore*, SCOTUS found that the Texas Court of Criminal Appeals ("CCA") had inappropriately deviated from prevailing clinical standards in its adaptive functioning analysis by overemphasizing Moore's perceived adaptive strengths and stressing Moore's

improved behavior in prison. 137 S. Ct. at 1050. The FSC committed the same mistakes when analyzing Wright's adaptive functioning.

In *Wright II*, the FSC concluded that Wright "cannot demonstrate by even a preponderance of the evidence that he suffers from concurrent deficits in adaptive functioning, the second prong of a finding of intellectual disability." 213 So. 3d at 898. In reaching this conclusion, the FSC disregarded the medical diagnostic framework and prevailing clinical standards by: requiring that Wright prove that he has deficits in more than one adaptive category; focusing on Wright's adaptive strengths while ignoring his adaptive deficits; relying too heavily on Wright's adaptive improvements made in the controlled prison environment as proof that he is not deficient; and considering the underlying facts of Wright's alleged crime as evidence that he does not have adaptive deficits.

The FSC improperly stated that "Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong. This is insufficient for a finding of intellectual disability in the context of this case..." *Wright II*, 213 So. 3d at 898. However, Wright is only required to prove significant adaptive deficits in one category of adaptive functioning. AAIDD-11 at 43. Dr. Kasper assessed Wright's adaptive behavior by interviewing Wright, interviewing several witnesses who knew Wright as a child and adult, and administering two ABAS-II tests- one to correspond with the 1997

WAIS-R administered to Wright when he was 16 years old and one to assess his current functioning. B22/946-47; 955-64. 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. B22/959. The second administration of the ABAS-II corresponding with Wright's current functioning showed improvement- Wright only scored low in the conceptual category. B22/963-64. The FSC acknowledged that the first ABAS-II indicated that Wright showed deficits in two categories, but then relied on the second administration of the ABAS-II corresponding with Wright's current functioning to conclude that "Wright only met the statutory criteria for intellectual disability with regard to the conceptual skills sub-component of the adaptive skills prong." *Wright II*, 213 So. 3d at 900. The FSC's reliance on the results of the second ABAS-II is particularly problematic as the test corresponds with Wright's current functioning in prison, showing that the FSC inappropriately relied on Wright's improved behavior in the controlled setting of prison. See DSM-V at 38 ("Adaptive functioning may be difficult to assess in a controlled setting [such as] prisons [or] detention centers."); see also *Moore*, 137 S. Ct. at 1050.

The FSC further over-emphasized expert and lay-witness testimony of Wright's perceived adaptive strengths while practically disregarding the extensive evidence of Wright's deficits in all three categories of adaptive behavior. The FSC

exacerbated its error by relying too heavily on Wright's prison behavior in its analysis. *See Moore*, 137 S. Ct. at 1050. The FSC based its ruling in *Wright II* on a litany of adaptive strengths that Dr. Gamache testified to after primarily basing his opinion on a single interview with Wright while he was imprisoned. *See Wright II*, 213 So. 3d at 899-900. However, the AAIDD-11 explains that "[w]ithin an individual, limitations often coexist with strengths ... [and] significant limitations in conceptual, social, or practical adaptive skills is not outweighed by the potential strengths in some adaptive skills." AAIDD-11 at 7, 47 (emphasis added). The AAIDD-11 and its User's Guide also caution against relying only on information obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User's Guide at 20. The DSM-V states that "[a]daptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained." DSM-V at 38.

Despite the clinical community's clear guidance, the FSC still impermissibly relied on Wright's adaptive strengths and behavior in prison to determine that he does not have significant adaptive deficits. The FSC acknowledged that Dr. Gamache testified Wright had "some deficits in reading and writing skills...and some deficits in self-direction and the ability to formulate goals or objectives" in the conceptual skills category. *Wright I*, 213 So. 3d at 899. However, the FSC failed to

explicitly consider numerous adaptive deficits such as the fact that Wright was exempt from taking standardized tests and was classified as learning disabled, had several independent education plans in his school records, could not complete his schoolwork even though he was in special classes, could not constructively participate in a Bible study group in jail, had difficulty communicating with childhood friends, and was unable to effectively communicate with his attorneys or understand what they told him. *See supra* at pp. 29-35. The FSC improperly relied on Dr. Gamache's testimony that Wright exhibited **sixteen** strengths in conceptual skills, many of them developed in prison. The FSC found, in part, that Wright "fully communicates with other prisoners and prison staff;" "knows the allocated time for prison activities;" "manages his prison canteen fund and pays attention to his monthly statements;" and "knows the difference between legal mail and regular mail in the prison system." *Id.*

Further, the FSC failed to sufficiently consider evidence of Wright's social deficits, ignoring evidence that Wright lacked friends as a child and was bullied throughout school for being "slow", was excluded from team sports as a child because he could not understand the rules, and was manipulated by other jail inmates because he was a follower and wanted to fit in. *See supra* at pp. 29-35. The FSC instead relied on Dr. Gamache's testimony that Wright exhibited **six** social strengths, including testimony that Wright "has counseled [prison] pen pals on how to deal

with difficult situations” and “appears to have adapted well to life on death row, as exhibited by his lack of disciplinary write-ups and ability to ask correctional staff for help.” *Id.*

With regard to practical skills, the FSC conceded that Wright “did not have a driver’s license because he could not pass the written portion” of the exam. *Id.* at 900. However, the FSC offset this deficit by explaining that Wright knew how to drive a car. *Id.* The FSC further relied on Dr. Gamache’s testimony of **three** adaptive strengths in practical skills, including that Wright “cares for his health [in prison] by showering and grooming daily, as well as by engaging in self-care and health-oriented activities.” Finally, the FSC listed **ten** perceived adaptive strengths that Wright’s family members testified to, including that Wright wrote his cousin birthday cards from prison and was always clean when his aunt saw him. *Id.* at 901.

In *Wright III*, the FSC stated that it did not “overemphasize Wright’s adaptive strengths to an extent that ran afoul of *Moore*” because it did not engage in the “arbitrary offsetting of deficits against unconnected strengths in which the CCA engaged.” *Wright III*, 256 So. 3d at 776 (citing *Moore*, 137 S. Ct at 1050). The FSC concluded that “the overemphasis issue, as identified by the Supreme Court in *Moore*, is not present here because [the FSC] did not arbitrarily offset deficits with unconnected strengths; instead, [the FSC] simply relied on expert testimony with regard to connected adaptive deficits and the postconviction court’s credibility

determinations.” *Wright III*, 256 So. 3d at 777 (internal citation omitted). The FSC further concluded that it “did not detrimentally rely on strengths that Wright developed in prison ... [t]he only portion of [*Wright II*] that touched on prison conduct was [the] recitation of Dr. Gamache’s findings.” *Id.* As an initial matter, the FSC cannot say that it relied on the post-conviction court’s credibility findings concerning witness testimony because ***the post-conviction court did not make any explicit credibility findings in its order denying Wright’s claim.*** Further, while SCOTUS did explain in *Moore* that the CCA engaged in an “arbitrary offsetting of deficits against unconnected strengths” in Moore’s case, *Moore*’s prohibition against overemphasis on adaptive strengths should not be narrowly interpreted to only situations where deficits are offset in such a way. *Moore*, 137 S. Ct. at 1050. In finding that the CCA had overemphasized Moore’s perceived adaptive strengths, SCOTUS explained:

Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, [b]ut the medical community focuses the adaptive-functioning inquiry on adaptive deficits.

Moore, 137 S. Ct. at 1050 (internal citations omitted). Instead of focusing its analysis on Wright’s adaptive deficits in each category, as directed by clinical standards, the FSC focused on Wright’s adaptive strengths, and used them to offset his significant adaptive deficits. The AAIDD-11 explains that intellectually disabled individuals may exhibit strengths in “one aspect of an adaptive skill in which they otherwise

show an overall limitation.” AAIDD-11 at 7. The FSC need not offset Wright’s adaptive deficits with unrelated adaptive strengths to deviate from prevailing clinical standards. The FSC deviated from prevailing clinical standards when it listed **thirty-five** alleged adaptive strengths in *Wright II* while practically ignoring Wright’s substantial evidence of adaptive deficits. 213 So. 3d at 899-901. Further, the FSC cannot claim that it did not detrimentally rely on Wright’s adaptive strengths exhibited in prison when it listed at least **nine** examples of prison behavior that Dr. Gamache testified to and failed to sufficiently analyze the lay-witness testimony of Wright’s adaptive deficits prior to incarceration. *Wright II*, 213 So. 3d at 899-900.

Some of the strengths the FSC cited to are also indisputably things that a mildly intellectually disabled person, like Wright, may be capable of doing by themselves or with the assistance of others. The FSC cited to the fact that Wright “knew how to use public transportation in his community,” was employed at a grocery store, and has the capacity to learn. *Wright I*, 213 So. 3d at 900-01. However, Dr. Kasper testified that intellectually disabled individuals can have jobs, have romantic relationships, have children, buy things at the store, take public transportation, and even have driver’s licenses. B22/940-42. Some individuals are able to work with the help of job coaches who provide the supports needed to continue employment. B22/952-54. Wright’s cousin, Carlton, provided support for Wright for his job at the Albertson’s Warehouse that was virtually identical to what

a job coach would do. B22/954-55; *see supra* pp. 29-30.

In *Wright II*, the FSC further deviated from prevailing clinical standards when it relied on the facts of Wright's alleged crimes and Wright's statements during a custodial interview to refute deficits in adaptive functioning. *Wright II*, 213 So. 3d at 901. Evidence of one's past criminal behavior, however, is not indicative of adaptive behavior. User's Guide at 20.

The FSC further made an unreasonable determination of the facts in light of the evidence when it found that Wright does not suffer from significant adaptive deficits and relied on non-credible expert and lay witness testimony. Clear and convincing evidence proves that Wright suffered from adaptive deficits prior to age 18 **and** after his incarceration. Wright's scores on both ABAS-II tests indicate he has significant adaptive deficits. Further, Wright's family and childhood friends, jail inmates he was incarcerated with while awaiting trial, and his trial attorneys testified to the profound evidence of his adaptive deficits. *See supra* at pp. 29-35. Instead of adequately considering this relevant and reliable evidence, the FSC relied on Dr. Gamache's non-credible testimony and the testimony of lay witnesses who testified that they barely knew Wright. Dr. Gamache testified that he based his assessment of Wright's adaptive functioning on an interview with Wright and summaries of lay-witness interviews conducted by the State Attorney's Office. B25/1521-24; 1596-97. The AAIDD-11 and its User's Guide caution against relying only on information

obtained from the individual being evaluated when assessing adaptive behavior. AAIDD-11 at 52; User's Guide at 20. Dr. Gamache also inappropriately emphasized Wright's behavioral improvements made in prison. *See supra* at pp. 47-48.

The FSC also stated that lay-witnesses Sandra Allen, Darletha Jones, and Vontrese Anderson testified that they did not have trouble communicating with Wright. *Wright II*, 213 So. 3d at 901. However, these three witnesses also testified that they did not know Wright very well and did not have frequent personal interactions with him. *See* B23/1153-55, 1161, 1175, 1182. Attorneys Hileman and Carmichael testified that they spent hundreds of hours conversing with Wright face-to-face, and they struggled to effectively communicate with him. *See* B20/708-12; B21/750-54, 64, 88-90. Toya Ford grew up with Wright, spent time with him frequently, and testified to the difficulty she had communicating with him. B23/1201-05.

The district court erred when finding that the FSC did not unreasonably apply *Hall* and *Moore* when determining that Wright is not intellectually disabled and further erred when finding that the FSC did not make an unreasonable determination of the facts in light of the state court record. This Court should find that the FSC unreasonably applied clearly established federal law when determining that Wright is not intellectually disabled.

CONCLUSION

Wright requests that this Honorable Court reverse and remand his case with directions to grant the Petition or to afford any relief this Court deems necessary and proper.

Respectfully submitted,

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Dated: March 15, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2021, a true copy of the foregoing has been filed electronically with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Stephen D. Ake, Senior Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, at stephen.ake@myfloridalegal.com and at capapp@myfloridalegal.com.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing was mailed to Tavares J. Wright, DOC# H10118, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, a non-CM/ECF participant, on this 15th day of March, 2021.

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