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IN THE SUPREME COURT OF FLORIDA

GARY LAWRENCE,

Appellant,

CASE NO. SC18-1172
LT. No.: 1994-CF-0397

v.

STATE OF FLORIDA,

DEATH PENALTY CASE

Appellee.
_____/

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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RESPONSE AND OBJECTION TO REQUEST FOR ORAL ARGUMENT

This Court has before it, review of the trial court's summary denial of Appellant's successive postconviction motion on an intellectual disability claim. The trial court denied the motion on the singular fact that the motion was untimely and not filed in accordance with Florida Rule of Criminal Procedure 3.851, rendering the sole issue on appeal to be one as of a matter of law. Therefore, the State objects to oral argument in this case as it is not necessary for proper disposition. Moreover, setting oral argument will only serve to further delay this capital postconviction case.

PRELIMINARY STATEMENT

Appellant/Defendant Gary Lawrence will be referred to as "Lawrence"; and Appellee/Respondent State of Florida will be referred to as "State."

Citations and references to the Record on Appeal in this brief will be designated as follows:

Lawrence's Initial Brief shall be referred to by: "IB," followed by the page number; the Record on appeal from the successive postconviction motion and order presently before the Court shall be referred to by: "SPMR," followed by the page number; the transcript of Lawrence's penalty phase shall be referred to by: "PPT," followed by volume number and page number; the Record on appeal from the initial postconviction motion and proceedings shall be referred to by: "PCR," followed by the volume and page number(s); references to the direct appeal Record shall be referred to by "R," followed by the volume and page number(s); and the Florida Rules of Criminal Procedure shall be referred to as "Rule," followed by the rule number and/or section.

STATEMENT OF THE CASE AND FACTS

In 1995, Lawrence was convicted of first-degree murder, conspiracy to commit murder, auto theft and petty theft on March 16, 1995, and was sentenced to death. R. 38. The jury recommended the death sentence in a 9 to 3 vote, with the trial court entering its sentencing order on May 5, 1995. *Id.*

The facts of this case are briefly set forth below and in this Court's opinion in *Lawrence v. State,* 698 So. 2d 1219 (Fla. 1997):

> Shortly after Gary and Brenda Lawrence were married, they separated, and another man, Michael Finken, moved in with Brenda and her two daughters, Stephanie and Kimberly Pitts, and Stephanie's friend, Rachel Matin. On the day of the murder, July 28, 1994, Gary and Michael drove Brenda to work and then drank beer at a friend's house. Later, Gary and Michael picked Brenda up and the three returned to the friend's house where they drank more beer. After the three returned to Brenda's apartment, Gary and Michael argued and Gary hit Michael when he learned that Michael had been sleeping with Brenda. Gary and Michael seemed to resolve their differences, and Michael fell asleep on the couch. Gary and Brenda conversed, and Brenda went through the house collecting weapons - including a pipe and a baseball bat. Gary and Brenda told Kimberly and Rachel that they were "going to knock off Mike." Gary told Kimberly to "stay in your room no matter what you hear."
>
> . . . the two girls heard what they described as a pounding sound. At one point, Rachel Matin stated that she heard the victim say "stop it, if you stop, I'll leave.". . . Kimberly Pitts stated she heard the victim say "please don't hit me, I'm already bleeding." The victim's pleas, however, were met with more pounding. Once the pounding stopped, the girls were required to assist in the clean up and described to the jury what they observed. Kimberly stated that much of the victim's right side of his face was missing and his chin was knocked over to

> his ear. Rachel Matin stated that there was no skin left on the victim's face and part of his nose was missing. . . . Brenda Lawrence requested that the girls obtain the assistance of Chris Wetherbee. . . Wetherbee observed the victim's head being caved in, blood all over, the victim's eyeball protruding approximately three inches and a mop handle shoved into the victim's throat. Wetherbee asked Gary Lawrence, "what's going on?" At which time [Lawrence] responded by pulling out the mop handle [from the victim's throat] and kicking the victim and making the statement, "this is what's going on."

Id. at 1220-21. The victim's body was wrapped in a shower curtain and Lawrence then drove to a secluded area, where he set the victim's body afire. Lawrence returned home with Brenda, where they danced. *Id.* at 1220. Lawrence was arrested later that evening driving the victim's car and confessed to beating the victim to death with a pipe and a baseball bat, and "thrust[ing] a mop handle into the victim's throat." *Id.* at 1220-21; and R. 43.

Penalty Phase and Direct Appeal

During the penalty phase, Lawrence presented mitigation testimony of psychologist, Dr. James Larson, one of Lawrence's siblings, and psychiatrist, Dr. Glenn Galloway. *Lawrence*, 698 So. 2d at 1221. Dr. Larson testified that he evaluated Lawrence, reviewed his school records as part of a mitigation assessment and administered the Wechsler Adult Intelligence Scale – Revised (WAIS-R). PPT, Vol. III at 468-69. According to Dr. Larson, the WAIS-R assessment produced a verbal IQ score of 75; performance IQ of 88; and full scale IQ score of

81. PPT, Vol. III at 470. Dr. Larson testified that Lawrence's I.Q. score "falls in the low average range, but it is very low in the low average range. If it got a couple of points lower, we would say it fell in the borderline range of retardation." PPT, Vol. III at 468-69.

Brief testimony of Lawrence's older brother by 17 years, Huey Albert Lawrence was presented. Huey Lawrence testified that he "wasn't around him a whole lot," but knew his childhood "had to be a little rough because daddy . . . drank all the time." PPT, Vol. III at 495. When asked, "when did Gary [Lawrence] start driving a vehicle," Huey Lawrence stated, "I can't tell you exactly when but he was pretty young." *Id.* at 496.

Psychiatrist Dr. Glenn Galloway testified during Lawrence's penalty phase. Dr. Galloway reviewed numerous documents including Dr. Larson's report and testified, generally, that Lawrence "suffers from a serious personality disorder . . . as being a so called anti-social personality disorder." PPT, Vol. III at 500-1.

The jury recommended the death sentence in a 9 to 3 vote. The trial court entered its sentencing order on May 5, 1995. The trial court found three aggravating circumstances: 1) Lawrence was under sentence of imprisonment; 2) the murder was heinous, atrocious or cruel (HAC); and 3) the murder was

committed in a cold, calculated and premeditated manner (CCP). *Lawrence*, 698 So. 2d at 1221, n.1.

The trial court declined to find statutory mitigating factors and specifically rejected that the murder was committed while Lawrence was under the influence of extreme mental or emotional distress pursuant to Section 921.141(6)(b), Florida Statutes. R. 45-46. The trial court commented,

> [a]lthough the evidence presented during the penalty phase of these proceedings showed the Defendant does in fact have a low IQ and came from a troubled family background, said evidence does not rise to the level of "extreme mental or emotional disturbance." . . . The Court recognizes that this issue must not be determined solely upon the opinion of an expert witness but must be based upon the totality of the circumstances at the time the murder was committed.

R. 45. The trial court rejected that Lawrence had diminished capacity to conform his conduct to the requirements of law stating, Lawrence was "able to recognize the necessity for driving his wife to and from work" and "able to communicate and visit his friends and even when confronted with the affair between his wife and the victim was able to control himself after an initial outburst of anger." R. 45-46. On its own accord, the trial court considered "the remaining statutory mitigating circumstances and does not find them applicable." R. 46.

The trial court found five non-statutory mitigating circumstances that Lawrence: 1) cooperated with law enforcement; 2) had a learning disability and

"low IQ is a mitigating factor";[1] 3) had a deprived childhood; 4) was under the influence of alcohol at the time of the crimes; and 5) did not have a violent history. R. 47-49. *See also Lawrence*, 698 So. 2d at 1221, fn. 2.

On direct appeal, Lawrence raised seven issues: 1) proportionality; 2) the trial court's finding of cold, calculated and premeditated aggravating circumstances (CCP); 3) the jury instruction on CCP; 4) the trial court's finding of heinous, atrocious and cruel aggravating circumstances (HAC); 5) the jury instruction on HAC; 6) failing to inform the jury that it could recommend a life sentence, even if the mitigating circumstances did not outweigh the aggravating circumstances; and 7) the trial court's failure to find all possible mitigation. *Lawrence*, 698 So. 2d at 1221, fn. 3. This Court affirmed Lawrence's conviction and sentence, stating, "[t]he trial court's sentencing order is sound. It shows that the trial court considered all the proposed mitigating circumstances, found some as established and others not. Competent substantial evidence supports the trial court's findings." *Id.* at 1222.

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[1] The trial court stated, "the Defendant appeared to be able to function in society and as pointed out in the penalty proceeding many people with low IQs do not commit serious criminal offenses such as this case." R. 47-48. The trial court also took into consideration Lawrence's assertion of "mental health problems," stating, "this Court is of the opinion that this factor duplicates the Defendant's learning disability factor and marginal IQ which has already been considered by this Court." Id.

Lawrence's conviction and sentence became final on January 20, 1998, when the United States Supreme Court denied certiorari review. *Lawrence v. Florida*, 522 U.S. 1080 (1998).

Postconviction Proceedings

Lawrence's Rule 3.850 motion was filed on January 19, 1999 (amended on April 22, 1999), including a claim for ineffective assistance of counsel and several sub-claims. *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002). Two of Lawrence's sub-claims asserted "inadequate presentation of Defendant's mental deficiencies" and "failure to utilize adequate expert testimony." *Id.* at 126, fn. 2. Following a *Huff*[2] hearing, three claims on ineffective assistance of counsel were subject to an evidentiary hearing. The remaining claims were summarily denied or waived, including those regarding "mental deficiencies" or "adequate expert testimony." *Id.* at 126. Following the evidentiary hearing, the trial court denied Lawrence's postconviction motion and requested relief. *Id.*

Lawrence appealed denial of the postconviction motion and filed a state habeas petition raising 13 claims of ineffective assistance of appellate counsel. *Lawrence*, 831 So. 2d at 126. This Court affirmed denial of the amended postconviction motion and denied Lawrence's amended state habeas corpus

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

petition. *Id.* at 137. A petition for writ of certiorari to the United States Supreme Court was denied on March 24, 2003. *Lawrence v. Florida*, 123 S. Ct. 1575 (2003) (Mem).

In March 2003, Lawrence filed his federal habeas corpus petition, which was dismissed as untimely and later affirmed by the Eleventh Circuit Court of Appeals. *See Lawrence v. Florida*, 2004 WL 5286227, 3:03CV97-RH (N.D. Fla. Sept. 16, 2004); and *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005). The United States Supreme Court granted review and affirmed dismissal of the federal habeas petition. *Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

On April 5, 2017, Lawrence filed his first successive Rule 3.851 motion raising a claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied Lawrence's *Hurst* claim on July 5, 2017. Following Lawrence's appeal of the denial of his claim for *Hurst* relief, this Court issued an order to show cause why *Hitchcock*[3] should not be dispositive of his claim. Upon consideration of Lawrence's response to the order to show cause, this Court determined he was not entitled to relief. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018).

[3] *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017).

Lawrence's Second/Successive Motion for Postconviction Relief Claiming Intellectual Disability.

On May 2, 2018, Lawrence filed his successive Rule 3.851 postconviction motion with the trial court, raising an intellectual disability (ID) claim, based on *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Moore v. Texas*, 137 S. Ct. 2039 (2017); and *Atkins v. Virginia*, 536 U.S. 304 (2002). R. 23-95 (including Attachments). The first issue raised was that his successive motion was timely pursuant to Rule 3.851(d), providing that postconviction motions must be filed within one year of the judgment and sentence's finality, with limited exceptions. R. 26-28. Lawrence stated his successive postconviction motion was timely under Rule 3.851(2)(B), which provides that "the fundamental constitutional right was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." Rule 3.851(2)(B).

Lawrence further stated, he was "unable to pursue a claim of intellectual disability, because Florida's pre-*Hall* standard was unconstitutionally restrictive" and *Hall* created a "newly established constitutional right," to be applied retroactively by *Walls v. State*, 213 So. 3d 340 (Fla. 2016). R. 27. As to *Walls*, Lawrence stated that the opinion "was corrected and reissued on May 4, 2017, and the decision was published on May 26, 2017." R. 27-28.

Lawrence's successive postconviction motion then turned to his claim that he is intellectually disabled, he met all three prongs to establish ID and is "ineligible for the death penalty" under the Eighth Amendment. R. 28-36. In support, Lawrence offered several affidavits of childhood friends and siblings.

Lawrence also provided a revised Declaration of Dr. Larson, dated May 1, 2018, as Attachment B to his successive postconviction motion. R. 67-76. Dr. Larson discussed Lawrence's adaptive deficits and risk factors, based upon "[w]itness statements as well as DOC and school records" and what "his family and friends thought" such as he was a "follower, was gullible, and was easily manipulated." R. 69-74.

In his 2018 Declaration, Dr. Larson went on to provide legal opinion "that Mr. Lawrence has proper evidence to present on the issue of ID and that he should be afforded a hearing on the issue." R. 68-69. Dr. Larson's legal opinion did not end there. He further stated,

> I conclude that in light of the decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Walls v. State*, 213 So. 3d 340 (Fla. 2016), describing current law. Given the current approach of the mental health professional community, Mr. Lawrence should be afforded an evidentiary hearing to determine the issue of intellectual disability.

R. 69.

The State answered the successive postconviction motion, asserting 1) the motion was untimely and 2), in the alternative, the claim was meritless as Lawrence failed to meet the requirements for a finding of ID under *Hall*. Contemporaneously, the State moved the trial court to take judicial notice of Defendant's Exhibit 2, introduced at the penalty phase of trial, which established that Lawrence obtained an IQ score of 96 when he was 16 years old.[4]

Lawrence filed a reply to the State's answer on June 5, 2018, and argued that the State "misapplied *Quince v. State* . . . [claiming] that the Flynn effect does not apply in Florida." R. 127. On June 14, 2018, after filing his Reply, Lawrence filed a Declaration from Dr. Jethro Toomer, Ph.D., who was retained by Lawrence regarding his ID claim. R. 148-55. Dr. Toomer stated he administered the Wechsler Adult Intelligence Scale, Fourth Edition instrument (WAIS-IV) to Lawrence "in June 2018." *Id.* at 150. No specific date was provided and no report was attached to his Declaration. Dr. Toomer's Declaration stated, having

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[4] The State refers to and cites information contained within Defendant's Exhibits 1 and 2, which were moved into evidence during the penalty phase of the proceedings below, on or about March 17, 1995. PPT, Vol. III at 460. There are no official appellate record citations available, but these Exhibits are believed to be included in the original record on appeal. References to these Exhibits will be cited as footnotes, including a detailed description of the document within the Exhibit. Defendant's Exhibit 2 is comprised of the Florida Department of Corrections records certified as "CORRECT COPIES OF DOCUMENTS IN THE FILE OF GARY LAWRENCE, DC #039763."

"professional confidence in the validity of the test results," Lawrence's WAIS-IV score was 75. *Id.* at 153. Echoing Dr. Larson's comments, Dr. Toomer opined and quoted the United States Supreme Court, "[a]s noted in *Hall v. Florida*, intellectual disability is a condition and not a number. I agree with the conclusions of Dr. Larson that a hearing is appropriate in Mr. Lawrence's case." *Id.* at 155.

Following a case management conference/*Huff* hearing on June 18, 2018, the trial court found Lawrence's successive postconviction motion to be untimely because it was filed more than one year after the *Walls* Mandate, citing in support, Rules 3.851(d)(2)(B) and (e)(2); *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018); and *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999). R. 161.

Lawrence moved for reconsideration and clarification of the June 18, 2018, order denying his successive motion as untimely. Requesting reconsideration, Lawrence claimed that Eighth Amendment claims based upon categorical prohibitions are not subject to "any sort of waiver, procedural bar or default." R. 166. He offered a supplemental Declaration of Dr. Toomer dated June 18, 2018, which states that Lawrence's IQ of 75 did not take the "Flynn effect"[5] into account. R. 170.

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[5] The "Flynn effect" refers to a theory that the population's intelligence increases over time, potentially inflating performance IQ examinations. *Quince v. State*, 241 So. 3d 58, fn. 2 (Fla. 2018).

The trial court acknowledged Dr. Toomer's "supplemental declaration" and denied the motion for reconsideration on June 25, 2018, finding that "Defendant has not presented any new facts, law, or issues that merit further consideration." R. 185. This appeal followed.

SUMMARY OF ARGUMENT

The trial court properly denied Lawrence's second successive Rule 3.851 postconviction motion as untimely. Lawrence's postconviction intellectual disability (ID) claim was successive and did not comport with the timeliness requirements of Rule 3.851. The Motion was not timely in accordance with *Atkins v. Virginia*, 536 U.S. 304 (2002), or *Hall v. Florida*, 134 S. Ct. 1986 (2014). Nor was it timely filed within one year of this Court's Mandate in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), determining retroactivity of *Hall*. This Court's original Mandate and not a subsequent administrative correction by the opinion clerk of the Florida Supreme Court controls the timeliness of Lawrence's postconviction motion. Further, under the facts of this case, equitable considerations should not excuse untimeliness, as such a position is not supported by the law. The trial court's denial of Lawrence's second successive Rule 3.851 motion as untimely, was proper and should be upheld.

No evidentiary hearing is warranted as Lawrence failed to satisfy the three-prong test for intellectual disability as proscribed by Florida Statutes § 921.137(1). Should this Court reach the merits of Lawrence's claim, the Record on Appeal below abundantly shows that even under current standards and overall consideration of the three statutory prongs required for an ID claim, Lawrence's

claim fails. Lawrence does not present significantly subaverage general intellectual functioning, as numerous IQ scores available ranged between 72 and 110 between the ages of 8 and 60. He fails to meet the second prong of concurrent deficits in adaptive behavior, as there are examples in the Record which exhibit traits of adaptive functioning. Any, deficit did not manifest prior to age 18, as evidenced by his IQ scores and examples of adaptive functioning.

ARGUMENT

ISSUE I: THE TRIAL COURT PROPERLY DENIED LAWRENCE'S SUCCESSIVE MOTION ON INTELLECTUAL DISABILITY AS UNTIMELY.

This Court has before it, Lawrence's appeal of the trial court's order dismissing his second successive Rule 3.851 motion on intellectual disability (ID), filed on May 2, 2018, based on *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Moore v. Texas*, 137 S. Ct. 2039 (2017); and *Atkins v. Virginia*, 536 U.S. 304 (2002). R. 23-95 (including Attachments). The trial court dismissed the motion solely because it was untimely and filed more than one year after this Court's January 25, 2017 Mandate in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), which established retroactivity of *Hall*. R. 161-63.[6] In support, the trial court cited Rules 3.851(d)(2)(B) and (e)(2); *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018); and *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999). *Id*. at 161.[7]

A postconviction court's decision to grant or deny an evidentiary hearing on a Rule 3.851 motion, including denial based upon untimeliness, is a pure question of law and ultimately based on written materials before the trial court. Thus, the

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[6] This Court rendered its opinion in *Walls* on October 20, 2016. However, the Mandate did not issue until January 25, 2017.

[7] The trial court also dismissed Lawrence's Motion for Rehearing and Clarification, finding "that Defendant has not presented any new facts, law, or issues that merit further consideration." R. 185.

trial court's ruling is subject to de novo review. *See Zack v. State*, 228 So. 3d 41, 46 (Fla. 2017) (*citing Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013)); and *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (holding "pure questions of law" that are discernible from the record "are subject to de novo review"). Because Lawrence's Rule 3.851 postconviction motion was untimely and no lawful exception to the time requirements applies, the trial court's denial of his motion was wholly proper and should be affirmed. *See Zack*, 228 So. 3d at 46.

Under Rule 3.851(d)(1), a motion for postconviction relief must be filed within one year of the date that the defendant's conviction and sentence become final. Exceptions to this Rule fall within three categories: 1) newly discovered evidence; 2) the fundamental constitutional right asserted was not established within the one-year period for filing a postconviction motion and the new rule has been held to apply retroactively; and 3) postconviction counsel, through neglect, failed to file the motion. Rule 3.851(d)(2).

Lawrence's intellectual disability claim is clearly time barred, as *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided more than 16 years ago. By any measure, this claim was filed well beyond the time allowed under Rule 3.851. *See Glock v. Moore*, 776 So. 2d 243, 251 (Fla. 2001) (Claims of newly discovered evidence must be brought within a year of the date the evidence was or could have

been discovered through due diligence.). The extreme and unexcused delay in filing the instant motion by itself warranted its summary denial. Under no view of the established facts can this claim be considered timely. Consequently, this claim was properly denied below.

This Court has recognized that an intellectual disability claim is time barred if not raised in a timely manner. In *Rodriguez v. State*, 250 So. 3d 616 (Mem) (Fla. 2016)this Court held:

> Rodriguez, who had never before raised an intellectual disability claim, asserted that there was "good cause" pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), did he have the basis for asserting an intellectual disability claim. The trial court rejected the motion as time barred, concluding there was no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002). The trial court further concluded that Rodriguez could not have relied on *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), which established the bright-line cut-off of 70 for IQ scores disapproved of in *Hall*, because he never raised an intellectual disability claim after *Atkins* as required by Rule 3.203.
>
> We have considered the issues raised, and affirm the trial court's denial of Rodriguez's motion as time-barred for the reasons stated by the trial court.

Id.

In *Blanco v. State*, 249 So. 3d 536 (Fla. 2018), this Court reaffirmed its application of a time-bar in Rule 3.203 litigation and its reasoning in *Rodriguez*. This Court stated:

> Omar Blanco, a prisoner under sentence of death, appeals the circuit court's orders summarily denying his fifth motion for postconviction relief, which was filed under Florida Rules of Criminal Procedure 3.851 and 3.203. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.
>
> In 1982, a jury convicted Blanco of first-degree murder and armed burglary. We affirmed Blanco's convictions and sentence of death on direct appeal. *Blanco v. State*, 452 So.2d 520 (Fla. 1984). We also upheld the denial of his initial motion for postconviction relief and denied his petition for a writ of habeas corpus. *Blanco v. Wainwright*, 507 So.2d 1377 (Fla. 1987). A federal court later vacated the death sentence based on ineffective assistance of penalty phase counsel. *Blanco v. Dugger*, 691 F.Supp. 308 (S.D. Fla. 1988), *aff'd sub nom. Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991). In 1994, following a new penalty phase on resentencing, the jury recommended a death penalty by a vote of ten to two. We affirmed Blanco's resentence of death. *Blanco v. State*, 706 So.2d 7 (Fla. 1997). We also upheld the denial of his fourth postconviction motion. *Blanco v. State*, 963 So.2d 173 (Fla. 2007).
>
> In May 2015, Blanco filed his current fifth postconviction motion under Florida Rules of Criminal Procedure 3.851 and 3.203. Within his motion, Blanco sought relief based on *Hall v. Florida*, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Blanco subsequently filed an amended postconviction motion in which he sought additional relief based on *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). In January 2017, the circuit court issued an order summarily denying Blanco's intellectual disability claim as time-barred in light of this Court's decision in *Rodriguez v. State*, No. SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016)

> (unpublished order). This appeal followed. . . . This Court also directed further briefing on the intellectual-disability-related issue.
>
> We conclude that Blanco's intellectual disability claim is foreclosed by the reasoning of this Court's decision in *Rodriguez*. In *Rodriguez*, this Court applied the time-bar contained within rule 3.203 to a defendant who sought to raise an intellectual disability claim under *Atkins* for the first time in light of *Hall*.

Id. at 536-37.

The United States Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), which disapproved the bright-line IQ score of 70 announced in the 2007 decision in *Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007), does not assist Lawrence. As found in *Rodriguez* and adopted in *Blanco*, *Cherry* does not afford an excuse for defendants who had IQ scores between 70 and 75 to avoid the application of a time-bar for failing to file their *Atkins* claims before November 30, 2004. Moreover, collateral counsel could not have relied on *Cherry* to avoid raising an ID claim for another reason: his tested IQ score of 81 at trial was well above the standard error of measure that was at issue in *Hall*. That Lawrence's claim was meritless both before and after *Hall* does not excuse his failure to at least attempt to raise this claim earlier.

For the same reasons, *Walls* does not excuse Lawrence's delay in filing this claim. Here, the vast majority of his IQ scores were beyond the conceivable standard measure of error, with the exception of that obtained at age 7 and the

recent score of 75 generated in June 2018, for the expressed purpose of his untimely postconviction claim. This Court's bright-line cut-off of 70 was not an impediment to Lawrence filing his motion previously and nothing in *Walls* prohibited Lawrence from bringing an ID claim previously. In other words, Lawrence's ID claim was just as meritless before *Walls* as it is after it.

Nonetheless, applying *Walls* as the starting point for timeliness, just as the postconviction court did below, the applicable timeline for a timely postconviction motion, in relation to the *Walls* Mandate is as follows: the *Walls* Court's opinion establishing retroactivity of fundamental constitutional rights was dated October 20, 2016, and the Mandate was issued on January 25, 2017. Therefore, in accordance with Rule 3.851(d)(1)(2), any successive postconviction motion on ID in this case, given the retroactivity of *Hall*, was due on or before January 25, 2018.

Lawrence did not file his motion until May 2, 2018. Rule 3.851(e)(2) requires a trial court to dismiss a successive postconviction motion when it does not meet the time limitations exceptions provided in this subsection. This is precisely the action taken by the trial court.

Lawrence argues that his motion was timely because it was filed within one year of the May 4, 2017, *corrected* opinion in *Walls*. His reliance on the date of the *Walls* corrected opinion is merely an inventive justification to excuse his

untimeliness. The State disputes Lawrence's thin construal of when the one-year clock begins to run for purposes of compliance with Rule 3.851(d)(1) and timely filing of a postconviction motion. Moreover, Lawrence's numerous reiterations that the date of a mandate controls and governs the triggering date for postconviction motions, wholly support the State's position and the trial court's summary denial.

This Court in *Dixon* expressly concluded, "it is appropriate to utilize the date of our decision announcing retroactivity, *specifically, the date of this Court's mandate, as the beginning date for calculating the additional* [time to file a postconviction motion]." *Dixon*, 730 So. 3d at 267. (emphasis added). The plain language of this Court is clear, unambiguous and the date of the mandate controls.

Lawrence avers that the trial court committed "legal error" and "misconstrued this Court's decision in [*Dixon*]." IB 16. These opinions are unsupported and inaccurate. Further, Lawrence seeks to extend *Dixon* to,

> . . . require the *final* action that makes a decision binding is the date that starts the clock for a defendant to file a claim based on a new fundamental constitutional right. The *reissuance of the corrected opinion in Walls on May 4, 2017, was the final action of this Court* in the *Walls* decision announcing that *Hall* applies retroactively. . . Thus following the logic of *Dixon*, Mr. Lawrence's filing clock began on May 4, 2017.

IB 17-18 (emphasis added). He makes this argument without referring to *Dixon*'s specific language or other support to extend the holding to mean that an administrative correction by the Opinion Clerk constitutes this Court's "final action." Instead, he purports that it is the "spirit of *Dixon* . . . to maximize the defendant's time to file a claim under a new retroactive fundamental constitutional right" which controls. IB 17.[8]

In addition to *Dixon*, this Court unequivocally observed in *Hamilton, supra*,

> [t]he relevant time in which to file a claim based on a new fundamental constitutional right is *one year from the date of the decision announcing that the right applies retroactively*. *See* [*Dixon*, 730 So. 2d at 267] (stating that the basis for calculating a cut-off period for postconviction claims based on a fundamental constitutional right is *the date of the issuance of the mandate in the case for which this Court announces retroactivity*).

Hamilton, 236 So. 3d at 278 (emphasis added). This tenet is not in question, nor is it in dispute.

Unlike the facts in *Dixon* which gave "eligible defendant's . . . only an additional three months to bring their claim," Lawrence has been afforded basic fairness and uniformity of treatment and has had ample time within which to file

[8] Billy H. Nolas, Chief, Capital Habeas Unit, Federal Public Defender, Northern District of Florida filed an Amicus Curiae brief in this case essentially arguing 1) *Dixon* is ambiguous; and 2) "In light of *Dixon*, Mr. Lawrence's counsel reasonably believed that Mr. Lawrence had one year from the May 4, 2017, corrected opinion in *Walls* . . ." ACB at 10. Coincidently, Mr. Nolas was the individual added as counsel of record in the *Walls* corrected opinion.

his postconviction motion on ID. *See Dixon*, 730 So. 2d at 266-7. Lawrence delayed approximately *15 months after* the *Walls* Mandate, to file his postconviction motion on ID. Such a failure to bring the claim in a timely manner cannot be construed as manifest injustice.

As previously noted, this Court recently affirmed application of a time bar to intellectual disability claims in *Blanco* and *Rodriguez*, *supra*. In *Rodriguez*, the defendant "asserted there was 'good cause' pursuant to Rule 3.203(f) for his failure to assert a previous claim of intellectual disability and only after the United States Supreme Court decided *Hall* . . . did he have a basis for asserting an intellectual disability claim." *Rodriguez*, 250 So. 3d at 616. This Court adopted the trial court's reasons for denial of the postconviction motion as time-barred and stated in part, "there is no reason that Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins* . . .". *Id.*

Lawrence disregards this Court's decisions in both *Rodriguez* and *Blanco*, with no basis. IB at 13. As to *Rodriguez*, Lawrence states it does not control because he "did not have a qualifying IQ score until *Hall* was decided. To accept this rationale, a defendant can indefinitely delay filing an ID claim and initiate a new round of postconviction litigation *decades* after his trial by either ignoring a potential qualifying score at an early age or simply hiring a new expert who tests

the defendant and offers a new or qualifying IQ score. Both circumstances apply to Lawrence and are discussed in detail, *infra*.

Moreover, Lawrence boldly states that this Court "wrongly decided" *Blanco* because "Mr. Blanco, like Mr. Lawrence, could not have raised his intellectual disability claim after *Atkins*, until *Hall*; until *Hall*, he could not make out a *prima facia* case under Florida law." IB at 13. Lawrence offers no new authority or other basis to support this opinion. Hence, this rationale should be rejected, just as this Court did in *Rodriguez* and *Blanco*.

To excuse his noncompliance with Rule 3.851(d)(2), Lawrence asserts that the one-year time limit began upon the issuance of the *Walls* Corrected Opinion, and not the date of the Mandate to govern the time calculation. Lawrence describes the Corrected Opinion stating, "[t]he initial decision was withdrawn, corrected, and reissued on May 4, 2017, and published on May 26, 2017." IB 15. Indeed, this Court's opinions in *Blanco* and *Rodriguez* make clear that Lawrence's claim would be untimely, even before this Court issued its opinion and Mandate in *Walls*. Nonetheless, even using the date of the *Walls* mandate as the starting point, Lawrence's motion is still untimely.

No part of this Court's opinion and subsequent Mandate in *Walls* were "corrected." No substantive changes, additions, deletions or corrections were

made to the "decision" or opinion of the Court. This Court's May 4, 2017 Notice of Correction in *Walls* was exclusively administrative in nature and exclusively benefited the capital defendant. Specifically, the Notice of Correction states: "ATTENTION: ALL PUBLISHERS THE FOLLOWING CORRECTION HAS BEEN MADE IN THE ABOVE OPINION: On page 26, Billy H. Nolas was added as co-counsel of record for appellant." *See* Florida Supreme Court Notice of Correction, May 4, 2017, Case of: *Frank A. Walls v. State of Florida*, No. SC15-1449, opinion filed October 20, 2016.[9]

The Court's opinion language, rationale and holdings were unchanged and the "correction" did not address any substantive, factual or legal issue in the case. Any argument that such an administrative action substantively changes the timing requirements under the Florida Rules of Criminal Procedure is unsupported. There is no authority which establishes a time calculation or justification, based upon an administrative correction of an opinion. In fact, Lawrence conceded this very point stating, "[t]here are no cases that say we don't use the corrected date." R. 219, ll. 9-10.

Referring to the Record below, it appears that Lawrence's counsel was aware that the corrected opinion made no substantive change to the Mandate where

[9] According to the Court's case docket, the Corrected Opinion was published on May 26, 2017.

counsel remarked to the trial court, "the reason for the corrected opinion doesn't matter." R. 219, ll. 12-13. In so doing, Lawrence would also have this Court accept and allow purely *administrative actions* by the Clerk of the Florida Supreme Court to affect the application of well-settled rules and pronouncements regarding procedural timeliness in capital postconviction cases.

Therefore, it is entirely reasonable to project that allowing ministerial actions, initiated for the benefit of or by a defendant in a capital case, may substantially affect substantive postconviction rules and well-settled holdings related to the application of rules on timeliness. For example, it would be well within the realm of possibility that a future postconviction capital defendant utilized the loophole suggested by Lawrence to simply add defense counsel after a critical opinion and mandate have between issued, to manipulate the careful timelines set in postconviction matters.

The State is mindful of Justice Pariente's concerns that a person facing the death penalty "have a fair opportunity to show that the Constitution prohibits their execution" which is seemingly echoed by Lawrence in his appeal. *See Walls*, 213 So. 2d at 349-50 (Justice Pariente quoting the majority opinion of *Hall*). And, it is undisputed that "concerns for basic fairness and uniformity of treatment among similarly situated defendants outweigh any adverse impact that retroactivity

application of the rule might have on decisional finality." *Dixon*, 730 So. 2d at 267, referring to *State v. Callaway*, 658 So. 2d 983, 987 (Fla. 1995). However, such is not the situation before this Court and Lawrence has been afforded fair treatment.

The concepts of "fundamental fairness" and constitutional liberty interests cannot allow for a capital defendant to manipulate time frames for filing critical postconviction motions, simply by adding attorneys. Setting a precedent to allow an event unilaterally triggered by a defendant to affect well-settled procedures, such as adding defense co-counsel, may lead to disastrous consequences such as the ability to manipulate procedural rules in capital proceedings.

Lawrence only briefly challenges the trial court's finding that his postconviction motion was untimely under established rule. Instead of defending the untimeliness of his postconviction motion with persuasive legal support, Lawrence appeals to this Court with an equity argument to accept and rule on the proposed merits of his ID claim. IB 14-18. As a policy matter, Lawrence argues, his "intellectual disability renders him categorically ineligible for execution under the Eighth Amendment. No state-law waiver provision can trump this constitutional prohibition." IB at 13. Lawrence also took this approach at the June

18, 2018 *Huff* hearing on his Rule 3.851 motion. Lawrence's brief argument against the time bar is illustrative through the presumption that,

> Mr. Lawrence has an intellectual disability. Intellectual disability precludes the execution of an intellectually disabled person, and this is a categorical bar. *It's not like a legal claim to be raised by a certain date*.

R. at 218, ll. 4-8 (emphasis added).

Florida courts do not recognize equity as an excuse for procedural noncompliance. Upholding summary denial of postconviction motion regarding a constitutional right, which did not comply with the time or procedural limitations of Rule 3.851, is not foreign to this Court. *See Byrd v. State*, 118 So. 3d 807 (Table) (Fla. 2013) (prisoner's successive 3.851 motion procedurally barred where it raised a constitutional right that was not retroactive); *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013) (prisoner's claim that his mental illness was a categorical bar to execution was seeking the recognition of a new fundamental right, and was thus untimely raised per Rule 3.851(d)(2)); *Rodgers v. State*, 2017 WL 563213 (Fla. 2017) (not reported) (postconviction motion on ID "in light of *Hall,"* summarily denied by the trial court as procedurally barred. Denial upheld by this Court as "a claim of error is not controlled by *Hall* and should have been raised on direct appeal. Thus, it was properly denied by the postconviction court as procedurally barred."); *see also Mann v. State*, 112 So. 3d 1158, 1163-64 (Fla.

2013) (ineffective assistance of counsel claim rejected as an equity exception to procedural bar).

In order to overcome his time bar, Lawrence repeatedly claims that "he has not been afforded the opportunity for an evidentiary hearing or appropriate review of his intellectual disability claim at any time since the decision in *Atkins*." IB at 11. Lawrence intreats this Court to believe that only *after* the *Walls* decision, was he "finally free to raise a claim of intellectual disability based upon his lifelong condition, notwithstanding a score above the prior cutoff." IB at 12. He states that any ID claim before the *Walls* Mandate, "had no possibility of merit," were "bad faith pleading[s]," "frivolous claims" and "a waste of judicial resources." IB at 23.

In the same breath, Lawrence readily admits and acknowledges, "[a]s early as his trial, pre-*Atkins*, [he] presented evidence of his low IQ." IB at 11. The Record also establishes that in his unsuccessful 1999 motion for postconviction relief, Lawrence claimed defense counsel "did not sufficiently prepare for the guilt or penalty phase of the trial and presented inadequate evidence on [Lawrence's] mental deficiency and long standing use of intoxicants and drugs." Transcript of Record, First District Court of Appeal, Vol. I at 003.

In seeming contradiction, Lawrence adds without specific reference, that the "trial and appellate records themselves indicate that, were it not for the rigid IQ

score cutoff prior to *Hall*, Mr. Lawrence's counsel would have litigated his intellectual disability long ago." IB at 13. This apparent contradiction marginalizes his good faith argument and dilutes his claims.

Lawrence's rationale that he has been unable to bring an ID claim is unpersuasive to excuse the fact that his postconviction motion was untimely. This Court has had several cases before it where capital defendants sought postconviction relief on ID claims following *Atkins* and/or *Hall*, but *prior to* this Court's Mandate in *Walls*.

Representative cases include, but are not limited to: *Jones v. State*, 231 So. 3d 374 (Fla. 2017); *Rodgers v. State*, 2017 WL 563213 (Fla. 2017) (not reported) (postconviction motion on ID "in light of *Hall*, on May 22, 2015, was summarily denied by the trial court as procedurally barred. Postconviction motion was properly denied); *Williams v. State*, 226 So. 3d 758 (Fla. 2017); *Quince v. State*, 241 So. 3d 58 (Fla. 2018) (successive postconviction motion under Rules 3.851 and 3.203 in 2004 on ID and denied following an evidentiary hearing. Renewed motion on ID filed in 2015, in the wake of *Hall*. Defendant not entitled to relief); and *Zack v. State*, 228 So. 3d 41 (Fla. 2017) (Defendant's first postconviction motion raising an ID claim, filed at the same time *Atkins* was decided. A successive motion in 2004, following *Atkins* was summarily denied and affirmed,

based upon *Cherry v. State*, 781 So. 2d 1040 (Fla. 2000). A second successive motion on ID field on May 26, 2015, based on *Hall*. This Court affirmed summary denial taking into account, *Hall*'s retroactivity in *Walls*.).

Arguably, Lawrence would have this Court look on these cases as invalid and accept that postconviction motions on ID brought after *Atkins* or *Hall*, but before *Walls* were in "bad faith" and a "a waste of judicial resources," excusing his untimeliness. IB at 23. Simply, if Lawrence had a valid and supported claim for ID, he has had ample time to bring it. The trial court acknowledged his failure to comply with entrenched postconviction rules and the holdings of this Court and the order of dismissal should be affirmed.

ISSUE II: LAWRENCE'S CLAIM OF INTELLECTUAL DISABILITY DOES NOT WARRANT AN EVIDENTIARY HEARING.

The trial court correctly denied Lawrence's successive postconviction motion as untimely and the order should be upheld. This is the sole issue on appeal to be addressed and decided by this Court. However, Lawrence *predominantly* focuses on and steers this Court to the merits of an intellectual disability (ID) claim and seeks this Court to remand for an evidentiary hearing. He does so, although the purpose of an appellate brief is to present arguments in support of the points on appeal. *See Peterson v. State*, 221 So. 3d 571, 580, fn. 2 (Fla. 2017). In the event this Court considers the merits of Lawrence's ID claims presented, the State responds in kind.

It is a seminal tenet of a capital defendant's constitutional protections and fairness that the Eighth Amendment prohibits execution of a person with an intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The State agrees that the Eighth Amendment requires a look to the "evolving standards of decency that mark progress in a maturing society." *Id*. at 312. However, preserving this protection must be accomplished within current legal structure.

To prevail on an ID claim, Lawrence must establish three elements in accordance with Florida Statutes § 921.137, which defines ID as: 1) significantly

subaverage general intellectual functioning; 2) existing concurrently with deficits in adaptive behavior; and 3) manifesting prior to age 18. *See also Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014); *Zack v. State*, 228 So. 3d 41, 46 (Fla. 2017); and Rule 3.203. A successful ID claim must be proved by clear and convincing evidence. Florida Statutes § 921.137(4) (2018).

Under *Hall*, ID cases in Florida must include comprehensive analysis of all three prongs. *See Rodriguez v. State*, 219 So. 3d 751, 758 (Fla. 2017), *citing Oats v. State*, 181 So. 3d 457 (Fla. 2015). *Hall* stated, "an intellectual disability destination is a 'conjunctive and interrelated assessment' such that no single factor can be considered dispositive." *Hall*, 134 S. Ct. at 2001.

However, where Lawrence fails "to prove any one of these components, [he] will not be found to be intellectually disabled." *See Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018), *accord Williams v. State*, 226 So. 3d 758, 768 (Fla. 2017), *citing Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); *State v. Morrison*, 236 So. 3d 204, 225 (Fla. 2017), *quoting Snelgrove v. State*, 217 So. 3d 992, 1002 (Fla. 2017); *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016) (*see also* Justice Lawson specially concurred that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled" *Wright v. State*, ___ So. 3d ___, 2018 WL 46566661 11 (Fla. 2018)).

According to Lawrence, he "proffered evidence at the *Huff* hearing that satisfies all three prongs finding intellectual disability; he suffers from significant subaverage intellectual functioning; he suffers deficits in adaptive functioning; and the onset of his disability occurred prior to the age of 18." IB at 12-13 (footnote omitted). The State challenges the proffer, *infra,* and notes that these claims are refuted by the Record. Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

The State understands that even where one of the three prongs discussed below may be less strong and an ID claim may be sustained on the strength of the other two, this is not the case here. *See Glover v. State*, 226 So. 3d 795, 810 (Fla. 2017). A holistic examination of the undisputed facts, evidenced by the complete Record below, will show that Lawrence fails to meet the three prongs required under Florida Statues § 921.137(1) and in accordance with *Hall*. Hence, Lawrence's ID claim is meritless and no evidentiary hearing is warranted.

Lawrence does not establish significantly subaverage general intellectual functioning.

Florida Statutes § 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *See also Jones v. State,* 231 So. 3d 374,

375 (Fla. 2017). As discussed *infra*, the standard error of measurement must be taken into account when reviewing ID claims and where a defendant's IQ score is 75 or below, an opportunity must be given to present evidence. *See Hampton v. State*, 219 So. 3d 760, 777 (Fla. 2017). The Record clearly shows that Lawrence fails to satisfy this prong of the ID test.

The United States Supreme Court's 2014 holding in *Hall* regarding significantly subaverage general intellectual functioning, rejected the use of a strict 70-point ID score and cutoff by Florida courts. *Hall* "held that the five-point standard error of measurement [SEM] must be taken into account when assessing the subaverage intellectual functioning prong of the test for an intellectual disability." *Snelgrove*, 217 So. 3d at 1003. More recently, this Court observed in *Wright v. State*, ___ So. 3d ___, 2018 WL 46566661 (Fla. 2018), that "the medical approximation of significant subaverage intellectual functioning is an IQ score of 70, plus or minus. . . .There is a [SEM] that affects each IQ score, which results in a range approximately 5 points above and below the raw IQ score." *Wright v. State*, 2018 WL 46566661 at *3 (*citing Hall*, 134 S. Ct. at 2000); s*ee also Quince*, So. 3d at 59 ("[i]nstead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must now take into account the [SEM] of IQ tests"). Because *Hall* recognized that IQ

scores may vary because of the SEM, "rather than interpreting IQ scores as a single, fixed number," IQ scores are read as a range. *See Wright*, 2018 WL 46566661 at 3.

Lawrence argues that his "qualifying IQ scores are in the 71-75 range." IB at 21. This is not an accurate picture, as the range of IQ scores documented in the Record in fact range from 72 to 110, between the ages of 7 and 60. A summary of IQ tests and scores generated between 1965 and 2018 is offered for the Court's convenience and reference: 1) At age 7 years, 8 months, IQ score – 72 via the "California Mental Maturity" test;[10] 2) at age 8 years, 8 months, IQ score – 87 via the "Calif." test;[11] 3) at age 16, IQ score of 96 via the "Beta" test;[12] 4) at age 19, IQ score – 110 via "Beta" test;[13] 5) at age 38 (time of trial), IQ score – 81, via the WAIS-R. IB 12 and 31; and 6) at age 60 (postconviction), IQ score – 75. R. 153.

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[10] See Defendant's Exhibit 1. IQ scores are reported on the school record, section titled "SCHOLASTIC ABILITY" (bottom left corner of the document).

[11] See Defendant's Exhibit 1. IQ scores are reported on the school record, section titled "SCHOLASTIC ABILITY" (bottom left corner of the document).

[12] Defendant's Exhibit 2 is comprised of the Florida Department of Corrections records certified as "CORRECT COPIES OF DOCUMENTS IN THE FILE OF GARY LAWRENCE, DC #039763." IQ score is reported on the document entitled "PSYCHOLOGICAL SCREENING REPORT".

[13] Defendant's Exhibit 20 is comprised of the Florida Department of Corrections records certified as "CORRECT COPIES OF DOCUMENTS IN THE FILE OF GARY LAWRENCE, DC #039763." "PSYCHOLOGICAL SCREENING

Lawrence has six available IQ scores, the lowest of which is a 72 and the highest is 110. Of the six, four are *well above* 75 and outside of the range considered for compliance with the first prong, in accordance with *Hall* and *Wright*. The two scores within the range are 72 at age 7; and 75 generated recently for purposes of his postconviction proceedings. These two scores are aberrations, when viewing all of Lawrence's IQ scores as a whole. Lawrence's demonstrated ability over time to score above the generally accepted cut-off for intellectual disability establishes that there is no good faith reason to believe that Lawrence is intellectually disabled. *See Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018) (because the defendant "failed to meet the significantly subaverage intellectual functioning prong (even when SEM is taken into account), he could not have met his burden to demonstrate that he is intellectually disabled").

As mentioned previously, Drs. Larson and Galloway testified during Lawrence's penalty phase. At that time, Dr. Larson evaluated Lawrence, reviewed his school records as part of a mitigation assessment and administered the Wechsler Adult Intelligence Scale – Revised (WAIS-R). PPT, Vol. III at 468-9. According to Dr. Larson, the WAIS-R assessment produced verbal IQ score of 75; performance IQ of 88; and full scale I.Q. score of 81. PPT, Vol. III at 470. Dr.

REPORT" dated September 3, 1976; and EDUCATIONAL AND VOCATIONAL COUNSELOR'S REPORT dated October 6, 1976.

Larson testified that Lawrence's IQ score "falls in the low average range, but it is very low in the low average range. If it got a couple of points lower, we would say it fell in the borderline range of retardation." *Id.* However, Lawrence's IQ score of 81 was not "a couple of points lower" and was not a qualifying score between 70 and 75.

On cross-examination, regarding Lawrence's "low average IQ," Dr. Larson specifically testified:

> Q. Now, Gary Lawrence you had indicated has a low particular IQ or academic level to put it bluntly. Is that correct?
>
> A. To be real specific it is in the low average range for ability. The academic skills are a little bit lower than that.
>
> Q. And the low average. There are people in there far lower Gary Lawrence? [sic]
>
> A. That's a very important point. *He is not retarded. And there are a lot of people who function lower than he does in society* and are able to make some kind of marginal adjustment to society.
>
> Q. And that is true. And the fact that there are people at his level that function in society?
>
> A. That is correct.
>
> Q. Without any type of problems?
>
> A. That's correct.

PPT, Vol. III at 486, ll. 12-25 and 486, ll. 1-3 (emphasis added).

Dr. Galloway then testified that he evaluated and diagnosed Lawrence for purposes of the penalty phase, concluded that he suffered from a "serious personality disorder" and observed that his "intelligence is low." PPT, Vol. III at 499-502. Nothing in Dr. Galloway's testimony supported a finding of subaverage general intellectual functioning.

In postconviction, Lawrence promotes the June 2018 IQ test administered by Dr. Toomer, yielding a full scale score of 75, in order to meet the first prong of the ID test. Dr. Toomer stated, "[m]y IQ testing of Mr. Lawrence yielded a score of 75. This places him within the significantly subaverage intelligence range under current Florida law." R. 153. He also argues that "[a]lthough [he] scored an 81 on the WAIS-R at the time of trial, the professional norms related to diagnosing intellectual disability changed, and the clinically appropriate test is no longer the WAIS-R but the WAIS-IV." IB at 12.

In his recent amended May 2018 Declaration and referring to Lawrence's IQ tests prior to the age of 18, Dr. Larson commented that the IQ tests previously administered to Lawrence "are obsolete and not recognized as valid measures for diagnosing intellectual disability." R. 74. Contrary to his most recent Declaration, on direct examination during the penalty phase, Dr. Larson testified that he had no reason to doubt the validity of the test results. Specifically, Dr. Larson testified:

Q. Now, Doctor, do you have any reason to doubt the validity of these tests results that you performed on Mr. Lawrence?

A. No, I don't have any reason to doubt them.

* * *

Q. And were those scores consistent with his school records?

A. Yes, if I had to predict his school records just looking at his scores that's what I would have predicted.

PPT, Vol. III at 474, ll. 6-9, ll. 24-5; and at 475, ll. 1-3. Dr. Larson also observed as to IQ scores and testing, "[i]f they are faking it. And you cannot fake doing better than you really can on an intelligence test, but you can fake doing worse than your abilities." PPT, Vol. III at 474, ll. 15-18.

The State does not lose sight of the fact that IQ testing tools and measures have advanced over the past 50 years. While the prior tests administered to Lawrence to obtain IQ scores are clearly not used today, nothing in the Record or before this Court invalidates the tests, testing procedure or resulting scores obtained. The tests used to assess Lawrence were current and the available tools for measurement at the time.

However, this Court "has never held that the defendant must have been given a specific IQ test prior to the age of 18 in order to find intellectual disability." *Morrison*, 236 So. 3d at 225, quoting *Oats*, 181 So. 3d at 469. If a specific test is not required to establish intellectual disability, it reasonably and

logically follows that a specific test should not be disregarded. Moreover, the Record is devoid of any challenge to the validity of the prior testing or test results.

Lawrence does not establish deficits in adaptive functioning.

Lawrence fails to show subaverage general intellectual functioning in order to meet the first prong of the ID test and consideration should go no further in accordance with *Quince, Williams, Morrison, Snelgrove* and *Nixon, supra*. In the event the Court does consider the adaptive functioning prong, remand for an evidentiary hearing is still unwarranted, as this prong fails as well.

The State does not dispute Lawrence's difficult up-bringing, his very poor educational performance and most notably, his low intelligence level. However, the Record presents other aspects to Lawrence's life through the murder of Michael Finkin, which sufficiently refute his claims of adaptive functioning deficits. This Court in *Glover* observed,

> [t]he [adaptive functioning] deficits "must be directly related to the intellectual impairments" associated with the first prong; namely, "reasoning, problem solving, planning, abstract thinking, judgement, learning from instruction and experience, and practical understanding" (quoting American Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, 37-38 (5th ed. 2013).

Glover, 226 So. 3d at 810. Examples of Lawrence's adaptive functioning, related to reasoning, planning and problem solving are seen throughout the Record, including defense exhibits offered during the penalty phase. Specifically, factual

examples, as well as commentary by various counselors during Lawrence's younger ages serve to refute many of his claims of deficits in his adaptive functioning. Representative samples are provided below.

Over several years, various counselors within the Florida Department of Corrections and Department of Offender Rehabilitation made observations regarding Lawrence's capabilities. In 1973, it was observed that Lawrence's "[t]est results indicate average learning ability with limited formal education. Should be encouraged to obtain GED as well as vocational training."[14] The same Report indicates that he ". . . *corresponds with his girlfriend* and has worked as a plumber's helper and would like to learn auto mechanics." Id. (emphasis added).

Although Lawrence offers opinion of low level functioning, one counselor observed, "[t]he subject stated that he enjoys sitting around, *reading* and talking with other inmates during his previous period of incarceration." (emphasis added).[15] Department of Corrections Counselor comments under the

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[14] See Defendant's Exhibit 2, "EDUCATIONAL AND VOCATIONAL COUNSELOR'S REPORT", signed by "G.G. Wrenshall" and "P.E. Phillips"; and SOCIAL HISTORY, Page 7, Section B. PERSONAL HISTORY: Education and Page 10, Section F. TEAM DECISIONS AND RECOMMENDATIONS: ACADEMIC.

[15] See Defendant's Exhibit 2, Department of Offender Rehabilitation Reclassification and Progress Report, Reception and Medical Center – Lake Butler, Florida, Prepared September 14, 1976, Page 8, Section XI, OTHER PROGRAMS.

"EDUCATIONAL AND VOCATIONAL, COUNSELOR'S REPORT," "EDUCATIONAL RECOMMENDATION" section dated October 6, 1976, states "youthful offender appears to have *higher than average learning aptitude with poor educational achievement*. Would consider him for both academic and vocational training." (emphasis added).[16]

In 1976, the Department of Offender Rehabilitation Reclassification and Progress Report noted,

> [Lawrence] was involved in the academic programs at ACI [sic] prior to his release back in to society. He was tested at RMC [Reception and Medical Center] *to possess an IQ test score of 110* and literacy reading level of 4.5. *The team feels he is capable of acquiring a GED* and should be encouraged to participate in such programs at his designated institution.[17]

(emphasis added). Three years later in 1979, Psychologist C. Willis Jackson, observed that Lawrence's "[t]est results are essentially within normal limits with the exception of MMPI which is considered Invalid due to low reading level. He

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[16] See Defendant's Exhibit 2, Department of Corrections Reception and Medical Center EDUCATIONAL AND VOCATIONAL COUNSELOR'S REPORT, EDCUATIONAL RECOMMENDATION, dated October 6, 1976, signed by J. F. Mowbray.

[17] See Defendant's Exhibit 2, Department of Offender Rehabilitation Reclassification and Progress Report, Reception and Medical Center – Lake Butler, Florida, "Prepared" September 14, 1976, Page 9, TEAM DECISIONS AND RECOMMENDATIONS, ACADEMIC.

has previously been tested as Above Average in intelligence but has not participated adequately in Academic programs to achieve up to his potential."[18]

In February 1994, prior to the murder, Lawrence consulted his probation officer for permission to marry, which reflected an understanding of his responsibilities under his terms of probation. PPT, Vol. III. at 458. ll. 14-19. Lawrence was able to drive and did so at a young age as evidenced by testimony from his brother during the penalty phase. Id. at 496, ll. 5-11. In fact, Lawrence was "able to recognize the necessity for driving his wife to and from work" as noted in the trial court's sentencing order. R. 46. Even though the trial court found Lawrence to have a low IQ, he "appeared to be able to function in society." R. 47-48.

Lawrence relies almost exclusively on the 2018 postconviction assessments, commentary and opinions of Drs. Toomer and Larson. However, Lawrence's historical assessments and corresponding commentary of the psychologists and counselors at the time are relevant and persuasive to refute current opinion. *C.f. Wright v. State*, ___ So. 3d ___, 2018 WL 46566661 (Fla. 2018).

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[18] See Defendant's Exhibit 2, Department of Corrections Psychological Evaluation Report, dated April 26, 1979, signed by C. Willis Jackson, Psychologist.

The fact that testing, observations, determinations and comments cited above, were obtained by the Florida Department of Corrections and contained in reports while Lawrence was incarcerated, does not render them invalid. This Court has previously addressed such an issue and rejected dismissal of similar records. *See Jones*, 231 So. 3d at 376 (referring to *Jones v. State*, 966 So. 2d 319, 327-8 (Fla. 2007)). If consideration of this prong is reached, the same should apply in this case and the reports should retain their merit.

Lawrence does not establish that deficits manifested before the age of 18.

Lawrence clearly fails to establish that significantly subaverage general intellectual functioning manifested prior to the age of 18. As indicated in the Record and discussed, *supra*, Lawrence obtained three IQ scores prior to age 18. These scores were 72 (age 7), 87 (age 8) and 96 (age 16).

During his testimony during the trial's penalty phase, Dr. Larson stated he reviewed Lawrence's school records and noted, Lawrence's scores obtained for mitigation were consistent with those contained within his school records. *See* PPT, Vol. III at 468. However, the IQ scores within Lawrence's school records and as detailed above paint a somewhat different picture. With the exception of the score of 72, Lawrence's IQ scores are not in range and do not satisfy the third prong.

As with the recent 2018 IQ score of 75, Lawrence's score of 72 at age 7 is an aberration, when viewed with the other two scores. This is especially true where Lawrence obtained an IQ score of 87, merely *one year later* and achieved a 96 less than ten years later.

Of special note, Lawrence omits discussion or reference to his full-scale I.Q. score of 96, obtained at age 16. Neither Dr. Larson, nor Dr. Toomer acknowledged this score existed, despite their collective opinions in recent months that any deficit in sub-average intellectual functioning existed, based in part upon their review of Lawrence's records. The 96 IQ score is repeatedly evidenced in Defendant's Exhibit 2 which was introduced during the penalty phase and referred to, *supra*. Based upon this score alone, Lawrence could not and cannot establish that he met the third prong of the ID test.

Although Lawrence's score of 72 at age 8 is within the range of sub-average intellectual function, the scores obtained through the age of 16, increased to 96. This is substantially similar to *State v. Morrison*, 236 So. 3d 204, 225 (Fla. 2017), where "the only score that satisfies the third prong of intellectual disability – onset before the age of eighteen – is [his] score in 1976 when he was eight-years old." *Morrison*, 236 So. 3d at 225. Hence, after "considering all three prongs in tandem" the trial court in *Morrison* found that the defendant was not entitled to

relief for failing to meet the third prong. This Court affirmed. *Id.*[19] Hence, this Court need not consider Lawrence's ancillary issues on appeal.

The "Flynn effect" is not applicable to adjust Lawrence's scores.

On appeal, Lawrence makes issue of the application of the "Flynn effect," to his IQ scores. The "Flynn effect" refers to a "theory in which intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations." *Quince v. State*, 241 So. 3d 58, fn. 2 (Fla. 2018). Lawrence argues that the IQ scores utilized were "unadjusted" and the "Flynn Effect was not applied to Mr. Lawrence's WAIS-IV score." IB at 9, fn 2. Simply, the Flynn effect is not applicable.

This Court's recent discussion of the Flynn effect in *Quince* is dispositive. As in Lawrence's case before this Court, Quince was convicted of first-degree murder and sentenced to death, affirmed on direct appeal in 1982. In 2004, Quince filed his successive motion for postconviction relief under Rules 3.851 and 3.203, asserting intellectual disability, thereby being ineligible for the death penalty under *Atkins*. Following an evidentiary hearing, Quince's successive postconviction

[19] Like Lawrence, Morrison offered lay witness commentary regarding his childhood, trouble with simple tasks, he "wasn't up to speed"; his teachers noted his "concerning performance," his academic failure and the fact that he dropped out of school, only reaching the seventh grade. *Morrison*, 236 So. 3d at 227.

motion was denied based "solely on Quince's failure to meet the significantly subaverage general intellectual functioning prong." *Quince,* 241 So. 3d at 59.

Two years after this Court affirmed the trial court's denial of Quince's postconviction motion in 2012, the United States Supreme Court issued its decision in *Hall* in 2014. In 2015, Quince filed a renewed postconviction motion on intellectual disability as a bar to the imposition of the death penalty. The trial court agreed that *Hall* should be applied retroactively to his case and reviewed the record and evidence from Quince's 2008 intellectual disability hearing and reconsider his intellectual disability claim in light of *Hall.*" *Quince*, 241 So. 3d at 60. The trial court again denied relief and "concluded that Quince failed to prove that he is intellectually disabled because none of the three IQ scores he presented 79, 77 and 79– fell within the SEM and Quince 'was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits.'" *Id.*

On appeal, Quince argued that the trial court erred by finding he failed to meet the first prong of the intellectual disability standard (significantly subaverage general intellectual functioning), where the IQ scores were not adjusted to account for the Flynn effect, and that *Hall* requires such adjustment. *Quince*, 241 So. 3d at

60. However, this Court observed, "*Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases." *Id.* at 61.

The State acknowledges that the key distinction between *Quince* and this case is that an evidentiary hearing was held in *Quince* and Lawrence appeals the denial of his requested relief. Nonetheless, the Flynn effect is inapposite to Lawrence's appeal.

The Flynn effect is essentially a stop gap to account for higher IQ scores as one ages and develops. Clearly, this is not the case for Lawrence. From the IQ score of 110 at age 19, Lawrence's scores declined to 81 at the time of trial, to 75 less than six months ago. This decline in IQ score does not comport with the Flynn effect theory or application.

Dr. Larson's testimony during the penalty phase summed up the circumstances and whose opinion may apply today, ". . . there are certain patterns that people get that are statistically improbable. If they are faking it. And you cannot fake doing better than you really can on an intelligence test, but you can fake doing worse than your abilities." PPT, Vol. III at 474, ll. 13-18. Therefore, based upon *Quince*, coupled with the obvious pattern of declining IQ scores into Lawrence's adulthood, application of the Flynn effect to his scores is not material.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the trial court's denial of Lawrence's Successive Postconviction Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Courts E-Filing Portal and electronic mail to Stacy Biggart, Assistant Capital Collateral Regional Counsel, Stacy.Biggart@ccrc-north.org; and Matletha Bennette, Assistant Capital Collateral Regional Counsel, Matletha.Bennette@ccrc-north.org, this ____ day of October, 2018.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ *Janine D. Robinson*
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