IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-127

KENNETH DARCELL QUINCE,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 80-00048CFAES

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order and non-final order by the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, denying relief to the Appellant, Kenneth Darcell Quince ("Quince"). On May 17, 2016, the lower court issued a non-final order over-ruling Quince's objection to the Court applying the "clear and convincing" standard in determining intellectual disability ("ID")[1]. On December 28, 2016, the lower court issued a final order denying Defendant's renewed motion for determination of intellectual disability as bar to execution.

The original trial record on appeal of the trial proceedings consists of four volumes and one supplemental volume. The record on appeal of the first postconviction proceedings upon Quince's successive motion pursuant to the Florida Rules of Criminal Procedure 3.851 and 3.203, to bar execution due to his mental retardation consists of fourteen volumes and one supplemental volume. The record on appeal for the current lower court proceedings on Quince's renewed motion for determination of intellectual disability as bar to execution is not broken into separate volumes. It consists of a file titled "3.203 Appeal Record" Bates stamped from pages 1 to 483, and a second file titled "Addendum to 3.203 Record (This addendum record includes documents that contain information that is confidential by statute)" Bates stamped from pages 484 to 2634.

[1] Also refers to intellectually disabled.

References to the record on appeal will be cited as follows:

The original trial record on appeal concerning the trial proceedings will be referenced as "R[volume number]/[page number]." This pleading contains no references to the supplemental volume of the record on appeal concerning the trial proceedings. The first postconviction record on appeal concerning Quince's successive motion pursuant to the Florida Rules of Criminal Procedure 3.851 and 3.203 will be referenced as "P[volume number]/[page number]." The supplemental volume of the postconviction record on appeal will be referenced as "SP[volume number]/[page number]." The current postconviction record on appeal concerning Quince's renewed motion for determination of intellectual disability as bar to execution will be referenced only by the page numbers as there are no specific volumes as "M[page number]." All other references will be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Quince had been sentenced to death by the trial court. The resolution of the issues regarding Quince's ID may eventually determine whether he lives or dies. A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Quince accordingly respectfully requests that this Honorable Court permit oral argument.

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STATEMENT OF THE CASE

On August 11, 1980, Quince pled guilty to first-degree felony murder and burglary. He waived the right to a sentencing jury and, on October 21, 1980, the Court imposed a sentence of death. The convictions and death sentence were affirmed on direct appeal. *Quince v. State*, 414 So. 2d 185 (Fla. 1982), *cert. denied*, 459 U.S. 895, 103 S. Ct. 192, 74 L. Ed. 2d 155 (1982). Quince filed a motion for postconviction relief which was denied; the denial was affirmed on appeal. *Quince v. State*, 477 So. 2d 535 (Fla. 1985), *cert. denied*, 475 U.S. 1132, 106 S. Ct. 1662, 90 L. Ed. 2d 204 (1986). Quince then filed three successive motions for postconviction relief, all of which were denied and affirmed on appeal. *Quince v. State*, 592 So. 2d 669 (Fla. 1992); *Quince v. State*, 732 So. 2d 1059 (Fla. 1999); *Quince v. State*, 116 So. 3d 1262 (Fla. 2012). Quince's last successive motion for postconviction relief was filed pursuant to Florida Rule of Criminal Procedure 3.851[2] as well as Rule 3.203, which provides for determination of ID as a bar to execution. P17/901-912.

On or about November 1, 2004, Quince filed a successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203 to bar execution due to his ID.

[2] Fla. R. Crim. P. 3.851 was adopted in 1987 to provide specific procedures for seeking capital postconviction relief. *In re Florida Rules of Criminal Procedure, Rule 3.851*, 503 So. 2d 320 (Fla.1987). Prior to the Rule's adoption, capital defendants sought postconviction relief in Florida pursuant to Fla. R. Crim. P. 3.850.

P1-6/1-900. An evidentiary hearing on Quince's successive motion pursuant to Florida Rules of Criminal Procedure 3.851 and 3.203 to bar execution due to his mental retardation was conducted on May 12, May 15, May 16, and November 3, 2008. P12-6/230-889. The lower court entered a written order denying Quince relief on November 7, 2011. P4/2297-2307.

Thereafter, on May 21, 2015, Quince filed a renewed motion for determination of ID as a bar to execution under Florida Rule of Criminal Procedure 3.203 and §921.137, Florida Statutes. M63-107. This Motion is the basis of this appeal. The State filed a response and motion to dismiss on July 6, 2015. M108-136. With the lower court's permission, Quince filed a reply on February 17, 2016. M140-165. The lower court conducted a hearing on May 9, 2016, on the pleadings. M410-73. The Court issued a written non-final order on May 17, 2016, determining "that the *Hall*[3] opinion should be given retroactive effect" to Quince's case. M170 (footnote added). The lower court further held "[o]ver the Defendant's objection . . . to apply the 'clear and convincing evidence' standard pursuant to Fla. Stat. § 921.137(4) in determining whether the Defendant is intellectually disabled." M170. No evidentiary hearing was requested and both parties agreed to submit written memoranda and proposed orders to the lower court. M173-190; 193-340. In a final written order, the lower court denied Quince relief. M378-392.

[3] *Hall v. Florida*, 134 S. Ct. 1986.

STATEMENT OF THE FACTS

Part of the relevant factual history from the sentencing proceedings before the trial court was summarized by this Court in *Quince v. State*, 414 So. 2d 185 (Fla. 1982) and is as follows:

> In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.
>
> Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased.

Quince, 414 So. 2d at 186; R3/4-99.

The following section of the 'Statement of the Facts' will highlight the medical and lay witness evidence that is vital to this Court's analysis of Quince's ID diagnosis.

A. MENTAL HEALTH PROFESSIONAL EVIDENCE AT THE TRIAL

The State presented the testimony of George W. Barnard, M.D., a physician and psychiatrist. R4/102-30. Dr. Barnard was initially appointed to determine Quince's competency and sanity at the time of the offense. R4/111; R1/54[4]. Dr.

[4] The pagination for all of the experts' reports is the same for each page of the report

Barnard testified that he interviewed Quince on March 18, 1980. R4/111; R1/54. Dr. Barnard confirmed his finding that "[c]linically [Quince] is judged to be of dull normal level of intelligence." R4/128; R1/54. Dr. Barnard **did not do** any standardized Intelligence Quotient ("IQ") testing on Quince. R4/128; R1/54. However, Dr. Barnard testified that based on defense expert Dr. Ann McMillan's data, "he would say [Quince] is borderline level intelligence." R4/128; R1/54.

Thereafter, in lieu of live testimony, the State introduced the reports of Edward J. Rossario, M.D. and Frank Carrera, III, M.D. into evidence. R4/131; R1/55-56. Both Drs. Rossario and Carrera were specifically appointed by the trial court to **only** determine Quince's competency and sanity at the time of the offense. R1/55; 56. Drs. Rossario and Carrera **did not** perform any intelligence testing. R1/55; 56. Dr. Rossario examined Quince on March 25, 1980, and Dr. Carrera examined Quince on March 18, 1980. R1/55; 56. Dr. Rossario clearly wrote that Quince's "intelligence can be described as slightly below average." R1/54.

During the sentencing proceedings, Quince presented the testimonies of Drs. McMillan and Stern. R4/132-165. Dr. McMillan was the psychologist who was

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in the trial record on appeal in 1980. Dr. Barnard's report starts at page number "54" and all the pages are marked as "54." Dr. Rossario's report starts at page number "55" and all the pages are marked as "55." Dr. Carrera's report starts at page number "56" and all the pages are marked as "56." Dr. McMillan's report starts at page number "57" and all the pages are marked as "57." Dr. Stern's report starts at page number "58" and all the pages are marked as "58." The citation for these experts' reports will be in accordance with the starting page number.

appointed by the trial court to examine Quince regarding the presence of mental mitigating factors. R4/133. Dr. McMillan met with Quince on October 2, 1980, and administered the Minnesota Multiphasic Personality Test and the Wechsler Adult Intelligence Test ("WAIS") on him. R4/140. Dr. McMillan's written report was entered into evidence. R1/57. Dr. McMillan **opined that Quince suffered from borderline mental retardation**, **severe specific learning disability** and neurological impairment. R4/144; R1/57. Dr. McMillan further opined that "Quince has permanent learning and judgment disability and limited ability to perceive the consequences of his actions." R4/144; R1/57. Dr. McMillan testified that Quince had a "**low intelligence score, which is functioning on an eleven-year-old basis**." R4/145.

Dr. Stern, a physician specializing in psychiatry, was appointed by the trial court pursuant to a court order dated September 29, 1980. R1/58. Dr. Stern examined Quince on October 13, 1980. R1/58; R4/154. Dr. Stern performed **only** a mental status examination on Quince to check his mental state to see if he was psychiatrically insane or sane. R4/156. Like Dr. McMillan, Dr. Stern testified that Quince "is not a bright gentleman" and that Quince "is functioning at a borderline level of intellectual capability." R4/158; R1/58. It must be noted that Dr. Stern **did not do any clinical psychological testing**. R4/158-59.

B. MENTAL HEALTH PROFESSIONAL EVIDENCE AT THE ORIGINAL EVIDENTIARY HEARING REGARDING MENTAL RETARDATION[5]

Quince presented the expert testimony of Thomas Oakland, Ph.D., a licensed psychologist and a professor in the Department of Educational Psychology at the University of Florida. P4/440-442. During his almost forty years of work as a psychologist, Dr. Oakland has developed a renowned specialty in the area of mental retardation, as well as the area of test development. P4/442-43. Dr. Oakland's expertise with test development includes being one of the developers of the Adaptive Behavior Assessment Systems I & II ("ABAS I & II") and being on the development teams for revising numerous intelligence tests, including the WAIS-III. P4/449-53. After testimony regarding Dr. Oakland's experience, education, accolades, and professional background, he was accepted as an expert in psychology with a specialization in mental retardation and secondly as an expert on test development and use in the field of mental retardation. P4/462; 464.

Dr. Oakland opined that Quince is mentally retarded. P4/498. Dr. Oakland defined mental retardation generally "in terms of diminished intellectual ability and adaptive behavior occurring prior to the age of 18." P4/465. Dr. Oakland explained

[5] In the original litigation, the medical terminologies "mentally retarded" or "mental retardation" were used in place of "intellectually disabled" or "intellectually disability." Wherever possible, the Appellant will use the current medical terminologies "intellectually disabled" or "intellectual disability." However, for the purpose of this Appeal it is the Appellant's intention that these terms reference the exact same condition.

that the DSM-IV definition for mental retardation is a three part definition requiring "significantly subaverage intellectual functioning," "concurrent deficits or impairments in present adaptive functioning," and "this condition must be prior to the age of 18." P4/612-13. Dr. Oakland confirmed that these three diagnostic criteria must exist to diagnose mental retardation. P4/613.

Dr. Oakland testified that he was retained to assess Quince. P4/487. Dr. Oakland completed a review of Quince's records that included Quince's school records; Quince's sister, Brenda's, school records; Quince's medical records; Dr. Stern's testimony; Dr. McMillan's evaluation; Dr. Berland's report; the record on appeal of the trial proceedings; Quince's Department of Corrections records; and the testimony of a number of witnesses that included Linda Stovel, Mary Quince, Valerie Quince, Jean Smith, Clara Edwards, Phalesia Canidate, and Rosemary Bryant. P4/487-89. Dr. Oakland also relied upon a modification of the 1980 data test in part "because that was the closest to the point when – Ken at that time was 21, so it was closest to the point of trial." P4/547-48. In addition, Dr. Oakland interviewed and met with Quince's mother, Mary Quince; Mr. Gregory Quince; Quince's sisters, Phalesia Canidate, Valerie Stanton, and Monique Mobley; Quince's cousin, Tony Harold; Quince's former teachers, Dee Jarrard, Mr. Griggs, and Ms. Charles; Russell Mootry from the Department of Sociology at Bethune-Cookman College, and Ms. Paskewitz, P4/489. Dr. Oakland also met with Quince in April of 2007, for his

evaluation. P4/489. Dr. Oakland then met with Quince in April of 2008. P4/489. Dr. Oakland also met with Correctional Officer Luffman, who worked at Union Correctional Institution. P4/489-90. Dr. Oakland also relied on materials written by Dr. James Flynn, the Adaptive Behavior Assessment System, II, Clinical Use and Interpretation, the User's Guide for Mental Retardation published by the American Association on Intellectual and Developmental Disabilities, the Comprehensive Manual for the SIB-R, and the Comprehensive Manual for the Adaptive Behavior Assessment System, II. P4/497. Dr. Oakland testified that "[a]daptive behavior refers to a person's ability to independently assume responsibility for his daily activities, and as he matures, as he gets older to assume responsibility for the welfare of others." P4/471- 72. Dr. Oakland further testified that people expected individuals independently "to shower and shave, to use community resources, to use our knowledge acquired through education or other sources, to engage in leisure-time activities, to communicate, to socialize, and, later to work." P4/472. Dr. Oakland conducted evaluations of Quince's adaptive functioning on two different occasions, once in April of 2007 and once in April of 2008. In his initial testing [April 2007] of Quince's adaptive functioning, Dr. Oakland used the ABAS II, did interviews with Quince and the foregoing listed family members and teachers who knew him around 1980. P4/489-91. With regard to Quince's behavior prior to the age of eighteen, Dr. Oakland testified about the following findings:

> "There's considerable uniformity in the descriptions from the various people who describe Kenny as a follower. He minimized drawing attention to himself. He walked awkwardly. He was a loaner (sic). Perhaps he had at most one permanent friend, a fellow who lived around the corner. He would not initiate conversation. And, in fact, rarely did he engage in conversation. He generally watched TV. There was no evidence of his reading any books or newspapers. He rarely engaged in work at home, and engaged in work only under the supervision of others and at their request. He never had a bank account. Never had a credit card. Never repaired his clothing. Never used an iron. Never prepared any meals for others. Never did laundry. Never handled money very well. People were either - - he was either giving money to others or if - - in order for him to retain money, on occasion his mother would hold his money so that he didn't either spend it or give it away. Never saved money."

P4/490-91. Dr. Oakland testified that the foregoing characteristics are important because these "general characteristics allow us to characterize Kenny at that time to define some important qualities that help to define whether his everyday behaviors were normal relative to others who are 16, 17 or 18" and they "relate to items that exist on measures of adaptive functioning." P4/491.

In the April 2007, initial assessment, Quince scored a 52 on the general adaptive composite, which would put him in the lowest one percentile of all individuals. P4/502. As with intelligence testing, the ABAS II is scaled with a score of a hundred representing the median individual, and with fifteen points representing a standard deviation. P4/501; 507-08. This indicated that Quince had diminished capacity in "conceptual, social and practical skills." P4/509. Dr. Oakland opined that Quince had deficits in adaptive behavior prior to the age of eighteen. P4/516.

In April 2008, Dr. Oakland re-administered the ABAS II to Quince to measure his "current adaptive functioning." P4/516. During this testing, Dr. Oakland re-interviewed Quince, as well as Correctional Officer Luffman. P4/516. On this occasion, Dr. Oakland reported a score of 40 for Quince on the general adaptive composite. P4/516. Dr. Oakland again found Quince to have limitations in all three subject areas defined by the American Association on Mental Retardation ("AAMR") and all the areas identified by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV"). P4/517. Dr. Oakland opined that the lower scores on the second testing can be accounted for by the fact that Quince is on death row, and he is not allowed to display many normal behaviors in such a restricted environment. P4/517. Dr. Oakland testified that since adaptive behavior is the measurement of the independent display of the relevant qualities, assisted behavior of these qualities does not fulfill the requirements of such an assessment. P4/518. Dr. Oakland later testified that it is outside standard practice to look at behavior while in an incarcerated situation to try to make an accurate assessment of what an individual can do outside of an incarcerated situation. P5/706. He testified that it would not be any psychologist's preference to acquire this data on the behavior of a person incarcerated on death row. P5/706.

Notwithstanding the ABAS II results, Dr. Oakland also provided additional information to support his expert opinion that Quince had significant deficits in

adaptive behavior. He testified that he checked with the Department of Corrections and learned that there was no record of Quince, in his decades on death row, having ever checked out even one book from the prison library. P5/733. In his testimony about adaptive behavior, Dr. Oakland also discussed the fact that some issues that may be present in Quince's case do not dictate a finding that an individual such as him is not mentally retarded. For example, he discussed how the fact that someone may have a driver's license, or read a religious book such as the Quran, does not mean an individual is not mentally retarded. P5/741. Likewise, the receiving or writing of letters, without additional information as to the writers and a review of the content and sophistication of the letters themselves, lends no useful information in making a diagnosis as to whether an individual is mentally retarded. P5/ 741-42.

In making the determination that Quince possessed subaverage general intellectual functioning for mental retardation, Dr. Oakland relied upon the Flynn Effect. Dr. Oakland testified that the Flynn Effect "refers to the increasing level of intelligence within a population over time, particularly during the 20th century." P4/559. He further explained that "[t]he general estimate is that for a population, the increase is approximately three points per a decade or .33 per year." P4/559-60. Dr. Oakland testified that the Flynn Effect is widely accepted within the profession of psychology as being valid, and that the procedures he used in applying the Flynn Effect to a particular score were also considered valid in the scientific community.

P4/568. Dr. Oakland further explained that a psychologist may decide to use the Flynn Effect when making a decision regarding one individual and apply it in a case to adjust an IQ score downward. P4/572-73. After a hearing on the Flynn Effect, the lower court found "that the Flynn Effect is in fact a theory or methodology generally accepted in the field of psychology and the procedures followed to apply this process are also generally accepted in the relevant psychological community" and thus the lower court permitted "the testimony regarding the Flynn Effect and the applicability of it in this particular case." P4/586.

Dr. Oakland testified that the original WAIS administered to Quince (IQ of 79) in 1980, was normed in 1954. P4/587. The twenty-six year difference between the test's norming and its administration to Quince would account for an expected nine-point reduction in Quince's IQ score when the Flynn Effect is applied. P4/587. As applied to Quince's 1980 WAIS, the Flynn Effect would show that Quince's IQ score was actually a 70. P4/587. Dr. Oakland explained that in applying the Flynn Effect, it is important to note that it applies mainly to persons with lower intellectual abilities. P4/584. Thus, when making a determination as to whether to apply the Flynn Effect to an IQ score, the fact that an individual such as Quince has a lower level of intellectual ability means that a higher probability exists that it should be applied to him. P4/584-85. Dr. Oakland also found that the twenty-six year gap between the WAIS norms and the testing of Quince in 1980 was a relevant factor in

his decision to apply the Flynn Effect. P4/588. Dr. Oakland further testified that his diagnosis of mental retardation based upon the 1980 IQ test was not inconsistent with the scores Quince received on the two subsequent IQ tests that were administered to him. P5/686.

Harry McClaren, a psychologist, testified for the State as an expert in forensic psychology at the hearing. P6/787; 792. Dr. McClaren was retained by the State to specifically evaluate Quince for mental retardation. P6/793. At Union Correctional Institution, Dr. McClaren administered the WAIS-III, a test on malingering, the Wide Range Achievement Test 3rd Edition, and the Scaled of Independent Behavior-Revised upon Quince. P6/794. Dr. McClaren opined that Quince's IQ was 79, which he got in 2006. P6/797. Dr. McClaren's opinion that Quince is not mentally retarded was **based solely** on the 2006 IQ testing which was above the *Cherry v. State*, 959 So.2d 702 (Fla. 2007) bright-line cut off.

Dr. McClaren testified that at the time of making his diagnosis as to mental retardation, he had not spoken with any of Quince's family members; nor had he reviewed any testimony by family members, friends or teachers; nor had he made any inquiries at Union Correctional Institution about Quince's activities regarding books and the law library; and nor had he reviewed any of Dr. Oakland's work relating to adaptive behavior. P6/837-839. Dr. McClaren conceded that many of the characteristics testified to by the lay witnesses, such as his mannerism, interaction

with others, lack of reading, and problems with money and employment, could all be possible signs pointing to problems with adaptive behavior and a diagnosis of mental retardation. P6/845-52. Dr. McClaren's opinion regarding Quince's mental retardation did not look into Quince's adaptive behavior or any other evaluations of Quince and his abilities. P6/814; 837-839; 845-852. Dr. McClaren seemed to agree with Dr. Oakland's position that it is not a psychologist's preference to obtain data of adaptive functioning in an incarcerated setting. P6/807-08; P5/706. Dr. McClaren agreed that there is no current test or assessment instrument designed for use on incarcerated individuals to assess their present adaptive functioning. P6/804-05. Dr. McClaren did administer the Scales of Independent Behavior – Revised ("SIB-R"), to test for adaptive behavior deficits; however, the SIB-R was not scored because Quince received a score of 79 on the WAIS-III and Dr. McClaren concluded that the score was too high to justify assessing adaptive behavior. P13/2046, 2049; P6/814.

In his testimony, Dr. McClaren acknowledged that the application of the Flynn Effect to all of the results of IQ tests taken by Quince would result in scores ranging from 70 to 75. P6/827. As applied to Quince's 1980 WAIS, Dr. McClaren also found that the score would reflect an IQ of 70 with the Flynn Effect. P4/587; P6/826-27; P14/2304-05. Dr. McClaren also testified that when the Flynn Effect is applied to the two subsequent tests, the scores of 77 and 79 would both be reduced to 75. P6/826-27; P14/2304-05. Dr. McClaren testified that one cannot say that the

Flynn Effect applies on an individual basis, and that it is not general clinical practice to subtract the Flynn number from an attained IQ score. P6/802. He further opined that Quince's scores did not appear to be impacted by the Flynn Effect because they are fairly consistent. P6/803-804. However, Dr. McClaren conceded that the AAMR, in its most recent publication, discussed the use of the Flynn Effect within the context of "the assessment and treatment of mental retardation." P6/815. Dr. McClaren testified that in his opinion the Flynn Effect when applied to Quince's IQ scores did not produce scores indicating mental retardation. P6/867.

Dr. McClaren further testified that under the AAMR and DSM-IV definitions, which are accepted standards of mental retardation in the field of psychology, an individual with scores ranging from 70 to 75 could be diagnosed as mentally retarded. P6/833-834. Dr. McClaren also conceded that the *Cherry*[6] decision, which seems to require a hard score of 70 or below on an accepted IQ test for an individual to be diagnosed as mentally retarded, is in conflict with the definition of mental retardation as stated by the AAMR and DSM-IV, and that discounting things such as the confidence interval and standard error of measurement ("SEM") is outside the standard of care in the psychology profession. P6/835.

Robert M. Berland, Ph.D.'s report was reproduced for the lower court in support of the Defendant's Renewed Motion for Determination of Intellectual

[6] 959 So. 2d 702.

Disability as a Bar to Execution under Florida Rule of Criminal Procedure 3.203 and § 921.137, Florida Statutes, and is part of the record evidence. M1507-1511; M1294-1297; P7/925-929. He did not testify in the evidentiary hearing. Dr. Oakland relied on Dr. Berland's report from January 2005. M1507-1511; M1191-998; P4/487-489. Dr. Berland, a forensic psychologist, was originally asked by the defense to evaluate Quince for purposes of his prior Rule 3.203 motion and to determine whether Quince met the criteria for mental retardation at the time of the offense or at the time of his original trial. P7/925.

With regard to determination of Quince's intelligence, Dr. Berland looked at Dr. McMillan's testing from October 1980. P7/925. Dr. Berland in detail reported the norming of Quince's IQ score attained on the WAIS test to show a range of scores whereby Quince met the IQ requirements for retardation as follows:

> A revised version of the WAIS, the WAIS-R, was published in January 1981, three months after the WAIS was administered to this defendant by Dr. McMillan. A body of research developed, some of which was already available when the WAIS-R was published, which showed that the test scores on the WAIS were consistently higher, for the same individual, than test scores on the WAIS-R. This meant that the WAIS consistently overestimated intelligence when compared with the current norms (in 1981) for our population, represented by the WAIS-R.
>
> In fact, the manual for the WAIS-R reported consistent "IQ shifts" in which the "WAIS Verbal, Performance, and Full Scale IQs are about 7, 8, and 9 points higher, respectively, than the corresponding IQs on the WAIS-R (p.47, WAIS-R Manual, The Psychological Corp., Harcourt Brace Jovanovich, Inc. January 1981). Therefore, if someone obtained a Verbal IQ of 79, a Performance IQ of 82, and a Full Scale IQ of 79

on the WAIS, as this defendant did, that person would have been expected to obtain a Verbal IQ of 72, a Performance IQ of 74, and a Full Scale IQ of 71 on the WAIS-R.

There is another consideration in understanding this defendant's IQ values on the WAIS, an essentially out-of-date measure at the time it was given. If the same person could take the same test (WAIS or WAIS-R) many times, they would get the same IQ values each time they took the test. There would be minor, random variation in their IQ scores among each of the times they took the test. This random variation is called measurement IQs for each of the many times they took the test would fall within a range of scores determined by the "standard error of measurement." There is a theoretical "true score" which is said to fall within this range.

The standard errors of measurement for the WAIS and the WAIS-R (for the Verbal Performance, and Full Scale IQs) are very close to one another. Since we are concerned with estimates of the defendant's WAIS-R IQ scores, the standard errors of measurement for the WAIS-R will be utilized. In other words, the defendant's actual IQ values (estimated, on the WAIS-R) fall within a range of scores (because of measurement error). Any IQ score within this range could have been the defendant's score on this testing.

The WAIS-R standard errors of measurement for the Verbal, Performance, and Full Scale IQs are 2.74, 4.14, and 2.53, respectively. This means that there is a 95% chance that the defendant's "true" Verbal IQ would be found within a range of (2X2.74) 5.48 IQ points above, and 5.48 IQ points below his estimated Verbal IQ of 72. Similarly, the defendant's "true" Full Scale IQ would be found within a range of (2X2.53) 5.06 IQ points above, and 5.06 IQ points below his estimated (WAIS-R) Full Scale IQ score of 71.

For this reason, utilizing standard and legitimate procedures within psychological testing, the defendant's estimated WAIS-R Verbal IQ would include a score of 67 (rounding up from a nonexistent IQ score of 66.52). Similarly, the defendant's (estimated WAIS-R) Full Scale IQ would include a score of 66 (similarly rounding up from a nonexistent IQ score of 65.94).

> To have a 95% chance of having an individual's "true score" within the range of scores formed by measurement error, the range of scores is said to be 2 times the standard error of measurement above and below the actual, obtained IQ value. Therefore, if someone obtained a Full Scale IQ score of 71 (as this defendant's Full Scale IQ is estimated to be on the WAIS-R), this would be considered the score they happened to get by chance, on that particular testing, within the range of scores computed from the standard of error of measurement. Their "true" IQ score would be said to fall with 95% accuracy, somewhere between an IQ score of 66, and an IQ score of 76.
>
> Although this explanation may seem complicated for those not trained in psychological testing, the conclusion, based on standard psychological test procedures, is that the defendant's WAIS IQ values for his Verbal IQ of 79 and his Full Scale IQ of 79 can be translated to estimated WAIS-R IQ values as low as 67 for his Verbal IQ, and as low as 66 for his Full Scale IQ. Therefore, according to the test norms which were most accurate at the time he was tested for intelligence, he appears to have met the IQ value requirements for retardation.

P7/925-27.

Dr. Berland also evaluated Quince as to the remaining two prongs. P7/927-29. Dr. Berland noted in his report that "[t]here is another aspect to determining whether someone should truly be considered retarded besides measuring their intelligence. It must also be found out whether their abilities in key skill areas necessary for daily functioning are also at a level consistent with retarded functioning." P7/927. According to his report, Dr. Berland administered the Interview Edition of the Vineland Adaptive Behavior Scales to Quince's sister, Linda Stouffer, on November 30, 2004, by telephone. P7/927. She was asked to recall Quince's abilities at the age of 18. P7/927. Dr. Berland's report states as follows:

The Vineland Adaptive Behavior Scales have been among the most widely used of these objective measures of adaptive functioning.
…
Given the events in the family's life, the defendant's life, and Ms. Stouffer's life, she felt comfortable being able to pinpoint his functioning at that age. The three principal adaptive functioning domains for the defendant's age range on the measure were administered to Ms. Stouffer (regarding the defendant), as well as an optional portion, the Maladaptive Behavior Domain.

The Communication Domain of adaptive functioning, which includes Receptive, Expressive, and Written activities, resulted in a total raw score of 111. Consulting tables with this score and the age at which the defendant was assessed indicated that his communication skills were at a level below the first percentile when compared with national norms. This was said to be considered a "Low" Adaptive level, and to be equivalent to the functioning of someone aged 8 years and 3 months.

In the Daily Living Skills Domain, the defendant's total raw score was 153. With this score, he would be ranked in the 4th percentile when compared to people his age all over the country. This was categorized as a "Moderately Low" adaptive level, and said to be equivalent to the functioning of someone aged 12 years 6 months. Similarly, in the Socialization Domain, the defendant's total score was 123. This placed him in the 30th percentile compared with the national group, was classified as an "Adequate" adaptive level, and was said to be equivalent to the functioning of someone aged 17 years 3 months.

These domain scores were then combined into an Adaptive Behavior Composite score of 63. With this score, the defendant was ranked in the 1st (lowest) percentile compared with the national group, and was said to function at a "Low" adaptive level. His overall functioning was said to be equivalent to someone aged 12 years 10 months. Therefore, at age 18, he was able to function like a 12, or 13-year-old. The Adaptive Behavior Composite score of 63 is a "standard score" comparable to an IQ score. ***This objective measure therefore indicated that, at age 18, the defendant was functioning at a level comparable to the average person with an IQ of 63.*** This is well below 2 standard deviations below the mean for the Vineland Adaptive Behavior Scales. Therefore, the defendant's adaptive functioning was far enough below the mean

> for the overall population to place him in a range comparable to retarded functioning. This outcome, for his adaptive functioning, was comparable to the outcome from his intelligence testing.
> …
> The genuineness, or credibility, of witness reports is always of concern in a case of this magnitude. Particularly since the adaptive functioning data were obtained from the defendant's sister, the concern would be whether she appeared to have lied in her responses in an effort to help her brother. While the Vineland does not have specific scales for measuring attempts to fake responses (like the MMPI), aspects of Ms. Stouffer's responses on the Vineland, as well as the nature of the Vineland items themselves, remove most concern about whether the outcome was faked. To begin with, Ms. Stouffer did not simply acknowledge capabilities in each domain of the Vineland up to a certain point and then deny all others thereafter. Rather, there was an intermixing of acknowledgments and denials of particular abilities in the progressively more sophisticated actions listed in each domain.
> …
> Based on the data and the explanations of those data presented above, it can reasonably be concluded that this defendant appears to have functioned at a retarded level in accordance with the statutory definition for determining retardation. These data, obtained through research-based measures, are supplemented by a variety of informal observations by people who knew the defendant throughout his childhood who described the defendant as "slow." The available data thus suggest that this was the defendant's level of functioning at the time of the crime.

Significantly, Dr. Berland's administration of the Vineland Adaptive Behavior Scales revealed that Quince's adaptive behavior was not only more than two standard deviations below the mean but ranked in the first percentile of the population, a finding consistent with Dr. Oakland's 2007 administration of the ABAS. After looking at all three prongs, Dr. Berland "reasonably concluded that this defendant appears to have functioned at a retarded level in accordance with the

statutory criteria for determining retardation." P7/929.

C. LAY WITNESS EVIDENCE AT THE ORIGINAL EVIDENTIARY HEARING REGARDING MENTAL RETARDATION

The lay witnesses who testified on behalf of Quince at the evidentiary hearing were Mrs. Jeanette Walker Quince, Mr. Gregory Lee Quince, Ms. Vivian Charles, Mr. Earl Griggs, and Mr. Fred Phillips. P/2-3; 230-427. Additionally, Ms. Doris L. Paskewitz was unavailable to testify in person, and her deposition was introduced in lieu of her live testimony at the evidentiary hearing. P5/776; SP1/1-37. The foregoing lay witnesses provided evidence as to Quince's personality traits and characteristics, his school history, and his behavior, covering the time from when he was growing up until he was incarcerated. This testimony served to demonstrate Quince's limitations in general, his adaptive behavior deficits, and the intellectual and adaptive behavior problems he displayed before he turned eighteen years old.

Mrs. Jeanette Walker Quince testified that she knew Quince, as she is married to his brother, Mr. Gregory Quince. P2/250-51. Mrs. Quince has known Quince from when she and Quince were about thirteen years old. P2/22; 24. She testified that her home was close to Quince's Aunt Minnie and Uncle Moses' home in Cocoa, Florida, where Quince moved to from Daytona Beach after spending summers there. P2/252-53. Therefore, Mrs. Quince was able to observe Quince's behavior because they grew up living next door to each other, and she considered them "family." P2/257. She is a good historian as to the difficulties in adaptive functioning that Quince faced

prior to the age of eighteen.

Mrs. Quince testified that Quince seemed withdrawn and that he "[j]ust looked down" and would "never [have] much to say." P2/256-58 & p.280-81. Mrs. Quince repeatedly described Quince as always being a shy and withdrawn individual throughout his adolescence. P2/256-57; 280; 290-91. She testified that Quince would never start conversations with others, never warmed up to people, and often just would not talk to others. P2/256-57. Mrs. Quince testified that Quince would never voluntarily participate in play or sports. P2/258-60. She testified that Quince would just stand and watch his siblings play and he would try not to get involved. He had to be pushed to play with his own siblings. P2/259-60.

Mrs. Quince testified that Quince worked for his Uncle Moses in landscaping. P2/260-261. She testified that she never saw Quince load the work truck by himself. His Uncle Moses would instruct Quince as to what to do. Quince was always supervised while working. P2/261-62. Mrs. Quince never saw Quince handle any tools. P2/273-74. Mrs. Quince never even saw Quince drive the work truck, or ever drive. P2/262; 274-75. Mrs. Quince testified that Quince would get paid, but he never went anywhere to spend his money. P2/281-84. Mrs. Quince testified that Quince would give his money away if any girl or boy asked for it. P2/286-87. She testified that Quince was easily manipulated by the girls and boys he hung around with around the age of eighteen into giving them money he earned. P2/285-87.

Eventually, Quince's aunt started keeping his money. P2/287. Quince's aunt had strict rules for him and described him as a follower and not as a leader. P2/294-95.

Mrs. Quince testified to Quince's inability to prepare or warm food when he was hungry without aid. P2/269-271. Mrs. Quince testified that at the age of sixteen or seventeen, when Quince was hungry he would let her know, and she would heat something for him. P2/269-271. Quince would never attempt to turn on the stove or try to prepare anything. P2/269. The only thing Mrs. Quince saw Quince prepare was a simple "bologna and cheese sandwich." P2/271-72.

Mrs. Quince confirmed that Quince was pretty well supervised by his aunt and uncle. P2/274. It was rare for Quince and his brother to be at home alone. P2/271. Mrs. Quince did not see Quince do any chores or wash his clothes. P2/277; 304. Quince did not help with baby-sitting. P2/301-02. Mrs. Quince believed that Quince was "dependent on his Aunt Minnie and Uncle Moses." P2/303.

Quince's older brother, Mr. Gregory Quince also testified at the evidentiary hearing. P2/306-333. Mr. Gregory Quince has known his brother "all his life." P2/307. Mr. Gregory Quince described how his brother as a child would engage in harmful and self-inflicted painful behavior, such as sniffing gas out of a lawnmower, sticking forks in plugs, and lighting matches while under a bed. P2/313. Mr. Gregory Quince also recalled that Quince had trouble walking, sustained head injuries, and suffered from seizures as a child. P2/316-320. He also described his brother as being

unable to pick up and learn card games that other children played around him for years and years. P2/328-329.

Ms. Vivian Charles, a retired administrator from the Volusia County Schools, also testified on behalf of Quince. P3/345-46. Ms. Charles recalled Quince as a student at Campbell Junior High School when she was a physical education teacher there. P3/348-50. She also knew Quince and all of his family outside of the school setting. P3/350; 352-54. Therefore, Ms. Charles had the opportunity to observe Quince when he was in eighth grade at Campbell Junior High School. P3/349-50. Ms. Charles testified that the special education students were screened by a psychologist. She further testified that "they used the IQ score and the California Achievement Test, and then another specific test" that she could not recall. P3/370-71. Moreover, Ms. Charles testified that this screening was "state-mandated" in order for a child to be determined to be a special education student. P3/370-71. Ms. Charles clearly recalled that Quince was a "special ed" student at that time. P3/361-364. Ms. Charles described Quince as "really kind of withdrawn and introverted," "kind of docile, very quiet," and that he was "kind of a loaner (sic)." P3/364-65. Ms. Charles clearly recalled that because Quince was a special education student, that he would be a target for bullies and teasing. P3/364-66. Ms. Charles also testified that Quince had "some physical impairment" and that he would walk sideways. P3/362-63.

Mr. Earl Griggs, a retired employee of the School Board of Volusia County, testified at the evidentiary hearing. P3/386-87. Like Ms. Charles, Mr. Griggs also worked at Campbell Junior High School as a physical education teacher and a coach for the football, basketball, and track teams. P3/390-91. Mr. Griggs knew Ms. Charles, who was teaching at the same time. P3/391-92. Mr. Griggs also remembered Quince from the same timeframe as Ms. Charles, and recalled watching him at physical education classes. P3/390; 392. Mr. Griggs also described Quince as "docile," "lethargic," and "a loaner (sic)." P3/392-93; 400-01. Mr. Griggs testified that at times it just seemed that Quince did not understand "[h]is purpose for being in PE." P3/392. Mr. Griggs further described Quince as not wanting to participate in the physical education classes like other children normally do and that Quince "would go to himself" and "be to himself." P3/393-94. Mr. Griggs testified that Quince was picked on by the other children. P3/399. Like Ms. Charles, Mr. Griggs also recalled that Quince was a student assigned to the special education classes. P3/394-95; 400.

Mr. Fred Phillips, an employee of the Department of Corrections, testified at the evidentiary hearing. Mr. Phillips knew Quince from when he was employed with the Department of Juvenile Justice. Mr. Phillips recalled working with Quince when he was a juvenile. P3/412; 419. Mr. Phillips supervised Quince in 1974, for a short period of time before Quince went to live with his aunt in Cocoa Beach. P3/421-22.

Mr. Phillips recounted an occasion when he interviewed Quince at a detention center after he was arrested for what "really was not a serious incident." P3/424; 425. Mr. Phillips was prepared to release Quince back home but "the Defendant felt like he needed to be punished and wanted to go to detention." P3/424; 425. Mr. Phillips testified that this incident "kind of stuck in [his] mind because it was rather unusual." P3/424; 425. Mr. Griggs also testified that he "found it hard to communicate with [Quince] in the sense that [he] just really didn't know whether [he] was getting through or not." P3/425. Mr. Griggs testified that Quince "was a little bit slow" and he just had "trouble communicating with him, basically." P3/425-26.

There was evidence from the lay witness, Ms. Paskewitz, that Quince had an IQ test administered to him, prior to the age of eighteen, in which he scored below seventy. SP1/1-37. Ms. Paskewitz was employed as a school psychologist and exceptional student education ("ESE") specialist with the Volusia County school system. SP1/7. Ms. Paskewitz was employed in the Volusia County system for several decades and was given a certificate of congratulations by the City of Deland for her work as an educator and in the community. SP1/11-2. Ms. Paskewitz stated that she had completed "a lot of courses" for special education and that she was certified in about seven different areas to become a school psychologist. SP1/12-3. As part of her employment, Ms. Paskewitz was responsible for evaluating students and administering tests for the ESE program. SP1/12-3. Ms. Paskewitz administered

these tests for four years before she became the school psychologist. SP1/17. Ms. Paskewitz was a school psychologist for about fifteen years. SP1/18. Ms. Paskewitz was also responsible for placement of the children. SP1/18-9.

Ms. Paskewitz explained that before the children were sixteen, she administered the Wechsler Scale of Intelligence test, the Bender Gestalt test, the Wide Range Achievement Test, test of mental ability and a California test of achievement. SP1/13-4. Ms. Paskewitz also confirmed that the school system also administered an adaptive behavior test like a Vineland test. SP1/14. Ms. Paskewitz further explained that in order to get into the ESE program the child "had to score below 70," on the WAIS test, but they preferred that the child score a little bit lower. SP1/15. Ms. Paskewitz clarified that the preference was that the child score be 69, but it had to be below 70 on the WAIS test. SP1/15-6. With regard to the adaptive behaviors, Ms. Paskewitz explained that they would collect as much information as possible on the child and have a history from the parents, neighbors, and classroom teachers. SP1/16. Ms. Paskewitz testified that this was the criteria that existed in 1973, to enroll a child into the ESE program. SP1/16-17; 29. Ms. Paskewitz also explained that once a child is placed in the ESE program, he or she would remain until the age of sixteen, or now until the age of possibly twenty-one. SP1/27. Ms. Paskewitz also explained that the child is tested again every three years using "the complete battery all over again." SP1/28. In addition, Ms. Paskewitz stated that when

dealing with African-American students, there was a tendency to try to keep them out of special education classes because of political pressure from the state and federal government to reduce the number of African-American students who were in special education. SP1/14; 25; 28.

Ms. Paskewitz testified that she was familiar with Campbell Junior High School, which consisted of seventh and eighth grades. SP1/21-2. Ms. Paskewitz recalled Quince as a student at Campbell Junior High School, whom she recalled came to a classroom to test in. SP1/22-23. Ms. Paskewitz stated that Quince was "very, very slow" and that "when he got up to go back, he was very confused about where to find his room." SP1/23. She remembered that she heard that Quince came from a very poor family and had siblings who "were retarded." SP1/24. She remembered that Quince was tested at that time, but not by her. SP1/24-5. However, Ms. Paskewitz confirmed that if Quince was placed in the ESE program, he must have scored under 70 on the WAIS test. SP1/26; 28-9.

Finally, the lower court was provided with a number of scientific authorities[7], excerpts from the DSM-V and American Association on Intellectual and Developmental Disabilities ("AAIDD"), and summaries of record evidence clearly demonstrating that Quince suffered from ID. These were provided in the Appendix and are cited in this brief. M484-1473.

[7] M1310-1473

SUMMARY OF ARGUMENTS

In Argument I, the Appellant argues that the lower court improperly applied *Hall v. Florida*, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014) to determine whether Quince is ID by clear and convincing evidence. The lower court failed to apply the SEM and the Flynn Effect to the normed IQ scores for Quince in accordance with the AAIDD. The lower court failed to consider all three prongs of the ID test in tandem as mandated by this Court in *Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015) and *Walls v. State*, --- So. 3d ---, 2016 WL 6137287 (Fla. 2016). The record evidence and the medical literature demonstrate by clear and convincing evidence that Quince is ID and ineligible to be executed.

In Argument II, the Appellant argues that the clear and convincing standard is unconstitutional under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed.2d 335 (2002), as well as the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT AND CITATIONS OF AUTHORITIES

ARGUMENT I

A. INTRODUCTION

First and foremost, the Supreme Court of the United States in *Hall* clearly held that ID "is **a condition**, not a number." *Hall*, 134 S. Ct. at 2001 (emphasis added). Furthermore, this Court clearly held that *Hall*[8] requires courts to consider all three prongs of ID in tandem and that no single factor should be dispositive of the outcome. *See Oats v. State*, 181 So. 3d 457, 459 (Fla. 2015); *see Walls v. State*, --- So. 3d ---, 2016 WL 6137287 (Fla. 2016); *see Nixon v. State*, SC15-2309, 2017 WL 462148, at *1 (Fla. Feb. 3, 2017); *see Herring v. State*, SC15-1562, 2017 WL 1192999 at *1 (Fla. March 31, 2017). The legal determination of ID "is informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. Quince's Motion detailed the unrefuted and strong medical evidence from Dr. Oakland and in part, Dr. Berland, in support of his opinion that Quince suffered from significantly subaverage general intellectual functioning. M63-107; R21-23. The lower court, in denying Quince's original motion to determine mental retardation, was strong-armed by the strict bright line cut-off case law from *Cherry*, 959 So.2d 702, and from *State v. Herring*, 76 So. 3d 891 (Fla. 2011). P14/2306-07. Dr. Oakland and Quince were correct when they argued to the Court that it was appropriate to look at SEM and the Flynn Effect. Dr. McClaren was clearly wrong for looking at a solid IQ number to

[8] *Hall v. Florida*, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014).

determine that Quince is not mentally retarded; it conflicted with the medical practices. *See Walls*, 2016 WL at 5[9] *quoting Hall*, 134 S. St. at 1995. Moreover, *Hall* warns that consistency in scores over time in no way negates the importance of applying the SEM, as the lower Court found in its original order denying relief. *See Hall,* 134 S. Ct. at 1995-96; P14/2306-07.With these fundamental principles in hand, it is clear that the lower court failed to correctly analyze the record evidence in accordance with federal law established by *Hall v. Florida*[10] and state law established by this Court in *Hall v. State*¸ 201 So. 3d 628 (Fla. 2016) and its progeny. *See Oats,* 181 So. 3d 457; *see Herring*, 2017 WL 1192999.

The following tables provide a snapshot of evidence that Quince is mildly ID.

Quince suffers from significantly subaverage general intellectual functioning.

YEAR	INSTRUMENT	SCORE	WITH FLYNN	WITH SEM RANGE	WITH FLYNN AND SEM
1980	WAIS	79	70	74-84	65-75
1984	WAIS-R	77	75	72-82	70-80
2006	WAIS-III	79	76	74-84	71-81[11]

[9] This Court found that the **mandatory IQ cutoff of 70 violated established medical practices in two ways**: first, by taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and second, by relying on a "purportedly scientific measurement of the defendant's abilities"- his IQ score - without recognizing that the measurement itself has an inherent margin of error, resulting in a ranged score rather than a single numerical value.

[10] 134 S. Ct. 1986.

[11] The WAIS-III also had an error in the normative sample leading to scores 2.34 points too high even at the time of norming. This would lead to a range of 69-79 if taken into account, which is in line with the scores reported on the other WAIS

Quince suffers concurrent deficits or impairments in present adaptive functioning[12]

	Source & Description of Deficits
CONCEPTUAL	
Reading	Dr. Oakland: No evidence of reading books or newspapers. P4/490. Dr. McClaren: Measured reading at 4th grade level. P13/2048.
Writing	Dr. McClaren: Measured spelling skills at 4th grade level. P13/2048.
Arithmetic	Dr. Carrera: Poor in arithmetic. P7/946. Dr. McClaren: Measured arithmetic skills at the 6th grade level. P13/2048
Time	NONE FOUND IN RECORD.
Money	Quince would get paid, but he never went anywhere to spend his money. P2/281-84. Quince was easily manipulated into giving others money he earned. P2/285-87. Quince's aunt kept his money. P2/287.
Abstract Thinking	Fred Phillips: "Maybe he was a little bit slow." P425-426. Dr. Barnard: Difficulty abstracting. P7/938. Dr. Carrera: Could only abstract one out of five proverbs. P7/946. Dr. McMillan: Impaired reasoning. P7/949.
Executive Function (i.e., planning, strategizing, priority setting, and cognitive flexibility	Gregory Quince: Not able to play spades on the same level as other children his age. P2/328-329. Dr. Rossario: Unable to function as a responsible person. Judgment markedly impaired. P7/943. Dr. McMillan: Impaired judgment. P7/949.
Short-term memory	Dr. Barnard: Deficits in recent memory. P7/938.
SOCIAL	
Difficulty in accurately perceiving peers' social cues	Jeannette Quince: Watched other children play without joining in. P2/255-259. Saw him in a club once and he just kept his head down, despite others trying to get him to interact with them. P2/288-291. Dr. Barnard: Poor eye contact. P7/938. Dr. Rossario: Insight completely lacking. P7/942. Dr. McClaren: Slight eye contact. P13/2047.

instruments.

[12] This Table was reproduced for the lower court in the Appendix. M1464-1468.

Communication more concrete or immature than expected for age	Fred Phillips: Difficult to communicate with; felt like not getting through. P3/425.
Conversation more concrete or immature than expected for age	Jeannette Quince: Was polite, but never made conversation. P2/281. Dr. Oakland: Did not initiate conversation and rarely engaged in it. P4/409. Dr. Barnard: Looked at the floor, did not talk spontaneously, and answered with a soft voice. P7/938. Dr. McClaren: Gazed down; speech not spontaneous. P13/2047.
Language more concrete or immature than expected for age	NONE FOUND IN RECORD.
Difficulties regulating emotion and behavior in age-appropriate fashion; noticed by peers in social situations	Jeannette Quince: Saw him in a club once and he just kept his head down, despite others trying to get him to interact with them. P2/288-291.
Limited understanding of risk in social situations	Dr. Rossario: Insight completely lacking. P7/942
Social judgment immature for age	Dr. Carrera: Intellectual social judgment marginal. P7/946.
Risk of being manipulated by others (gullibility)	Jeannette Quince: Would give people his money if they just asked him for it. His aunt started keeping his money for him to prevent this. P285-287.
PRACTICAL	
Needs help with grocery shopping	NONE FOUND IN RECORD.
Needs help with transportation	Jeannette Quince: Never saw him drive. P2/262.
Needs help with home and child-care organizing	Jeannette Quince: Never saw him do chores or repair anything. P2/277. Aunt did laundry for him. P2/304. Dr. Oakland: Rarely engaged in work at home, and if he did, he was supervised by others and the work was done at their request. P4/490-491. Never repaired clothing, did laundry, or used an iron. P4/491.
Needs help with nutritious food preparation	Jeannette Quince: Never knew him to cook food. P2/272. Aunt cooked for him. P2/304. Dr. Oakland: Never prepared meals for others. P4/491.

Needs help with banking and money management	Jeannette Quince: Would give people his money if they just asked him for it. His aunt started keeping his money for him to prevent this. P285-287. Dr. Oakland: Mother held money so he did not give it away. P4/491.
Needs help with judgment related to well-being and organization around recreation	Jeannette Quince: Watched other children play without joining in. P2/255-259.
Employable only in jobs that do not emphasize conceptual skills	Jeannette Quince: Helped uncle with landscaping but never worked by himself. P2/260-262. Dr. Barnard: Worked as a dishwasher and in landscaping. P7/937. Dr. Carerra: Worked as a dishwasher and in landscaping. P7/945.
Needs help with health care and legal decisions	NONE FOUND IN RECORD.
Needs help to learn a skilled vocation	Jeannette Quince: Helped uncle with landscaping but never worked by himself. P2/260-262.
Needs help to raise a family	NONE FOUND IN RECORD.
Reduced success in obtaining markers of independent economics (e.g., employment, credit cards, checking accounts, driver's license)	Jeannette Quince: Never saw him drive. P2/262. Did not have a savings or checking account. P2/287. Dr. Oakland: Never had a bank account or a credit card. P4/491. Dr. Barnard: Entered the Job Corps at age 19, but lost privileges after eight months due to arguments with teachers. Longest job held was 5 months. P7/937. Dr. Carrera: Longest job lasted 6 months. P7/945. Dr. Rossario: Unable to function as a responsible person. P7/943
Low rate of employment	Dr. Barnard: Entered the Job Corps at age 19, but lost his privileges after eight months due to arguments with teachers. P7/937. Dr. Carrera: Longest job lasted 6 months. P7/945. Dr. Rossario: "Unable to sustain any consistent work." P7/943
Low hours, benefits, skill demands	Jeannette Quince: Helped uncle with landscaping but never worked by himself. P2/260-262. Dr. Barnard: Worked as a dishwasher and in landscaping. P7/937. Dr. Carrera: Worked as a dishwasher and in landscaping. P7/945.

Low career success	Dr. Barnard: Entered the Job Corps at age 19, but lost his privileges after eight months due to arguments with teachers. Longest job held was 5 months. P7/937. Dr. Carrera: Longest job lasted 6 months. P7/945. Dr. Rossario: "Unable to sustain any consistent work." P7/943
Reduced ability to form and sustain mutually beneficial friendships without assistance	Jeannette Quince: "Shy and withdrawn." Did not talk much and just looked down. Watched other children play without joining in. P2/255-259. Vivian Charles: Withdrawn and introverted; shunned by other children to the point where he only had one friend. P3/364. Dr. Oakland: Did not initiate conversation and rarely engaged in it. P4/409.
High rate of loneliness	Jeannette Quince: Watched other children play without joining in. P2/255-259. Saw him in a club once and he just kept his head down. P2/288-291. Vivian Charles: Only had one friend. P3/364. Earl Griggs: Loner. P3/392-393. Dr. Oakland: A loner who only had one friend. P4/490.
Higher risk of behavior problems if behavioral supports not provided	Gregory Quince: At age 5-6, would strike matches under the bed; caught a curtain on fire. At age 9-10, sniffed gas and spit water into light bulbs and sockets; stuck forks into sockets. P2/310-313. Fred Phillips: On probation when charged with arson for setting gasoline on fire in the street. P3/412-412, 423-424. Dr. Carrera: Set fires and was reportedly cruel to animals as a child. P7/946.
Gullibility when others mislead or harm them	Jeannette Quince: A follower. P2/294. Dr. Oakland: A follower. P4/490.
Naïveté or suggestibility	Jeannette Quince: Would give people his money if they just asked him for it. His aunt started keeping his money for him to prevent this. P285-287. Dr. Oakland: Mother held money so he did not give it away. P4/491.
Societal stigma	Vivian Charles: Shunned by other children to the point where he only had one friend. P3/364. Bullied and picked on. P3/366.

B. THE LOWER COURT FAILED TO CONSIDER THE INFORMED ASSESSMENTS OF THE MENTAL HEALTH PROFESSIONALS

First, the lower court's Order denying relief failed to look to the evidence and testimony from mental health professionals as to all three prongs necessary to determine ID. The lower court just looked at Quince's three full-scale IQ scores and disregarded all of the evidence from mental health professionals in its findings of facts and conclusions of law. M389-91. The importance of the role played by mental health professionals in determining whether an individual meets the medical definition of ID is vital for this Court's determination. The former bright-line cutoff IQ score of 70 established in *Cherry* required that courts ignore the established medical practice of relaying IQ scores in terms of a range, taking into account the SEM, when determining whether an individual suffers from "significantly subaverage general intellectual functioning."[13]

In *Atkins*, the Supreme Court of the United States recognized the AAMR and the American Psychiatric Association, publisher of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), as the authorities for establishing the diagnostic criteria for ID.[14] The AAMR has been renamed and is now called the AAIDD.[15] According to the AAIDD, ID originates before age 18 and is

[13] 959 So. 2d 702, 713.
[14] 536 U.S. at n.3.
[15] ROBERT L. SCHALOCK, ET AL., INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS xiii (11th ed., American Association

characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.[16] The DSM-V defines ID as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, practical, and social domains."[17] The AAIDD and DSM-V definitions are consistent with Florida's statutory definition as set forth by § 921.137, Florida Statutes, and Rule 3.203.

According to *Hall*, courts must consider the professional community's diagnostic framework and teachings when assessing ID, because "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning."[18] This Court in *Hall v. State* clearly held as follows:

> In sum, the United States Supreme Court has made clear that when determining whether an individual meets the criteria to be considered intellectually disabled, **the definition that matters most is the one used by mental health professionals in making this determination in all contexts, including those "far beyond the confines of the death penalty.**" *Hall v. Florida*, 134 S. Ct. at 1993. **As such, courts cannot disregard the informed assessments of experts**. *Id.* at 2000. Here, the record evidence amassed over nearly thirty-seven years, and the unrefuted testimony at the 2009 evidentiary hearing is that Hall meets the medical definition of intellectually disabled.

201 So. 3d at 637 (Fla. 2016). Even, prior to their opinion in *Hall v. State*, this Court

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for Intellectual and Developmental Disabilities 2010).

[16] *Id.* at 1.

[17] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013).

[18] *Hall*, 134 S. Ct. at 2000 (internal citations omitted).

in *Oats* held that *Hall* required that courts "be guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability." *Oats v. State*, 181 So. 3d 457, 457 (Fla. 2015) *citing Hall*, 134 S. Ct. at 1993. The critical role of the mental health professional in determining ID as established by *Hall v. Florida* was re-emphasized again by the Supreme Court of the United States in *Moore v. Texas*, --- S. Ct. ---, 2017 WL 1136278, *9 (March 28, 2017) where the Court stated as follows:

> Although *Atkins* and *Hall* left to the States "the task of developing appropriate ways to enforce" the restriction on executing the intellectually disabled, 572 U.S., at ——, 134 S.Ct., at 1998 (quoting *Atkins*, 536 U.S., at 317, 122 S.Ct. 2242), States' discretion, we cautioned, is not "unfettered," 572 U.S., at ——, 134 S.Ct., at 1998. Even if "the views of medical experts" do not "dictate" a court's intellectual-disability determination, *id.*, at ——, 134 S. Ct., at 2000, **we clarified, the determination must be "informed by the medical community's diagnostic framework**," *id.*, at —— – ——, 134 S.Ct., at 2000. We relied on the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11. *Id.*, at —— , ——, —— – ——, —— – ——, 134 S. Ct., at 1991, 1993–1994, 1994–1995, 2000–2001. **Florida, we concluded, had violated the Eighth Amendment by "disregard[ing] established medical practice."** *Id.*, at ——, 134 S. Ct., at 1995. We further noted that Florida had parted ways with practices and trends in other States. *Id.*, at —— – ——, 134 S. Ct., at 1995–1998. *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.

In this case, it is clear that both Drs. Oakland and Berland opined in their written reports that Quince is mentally retarded. Dr. Oakland's testimony clearly

demonstrated just how informed his assessment was in coming to his opinion. M12-14; 17-19; 23-34; 38; Both Drs. Oakland and Berland correctly looked at all three prongs of mental retardation in tandem to determine that Quince met the requisite criteria under the medical definition. These doctors did not abandon the medical definition of mental retardation/ID for the unconstitutional bright-line cut off set forth in *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007). Specifically, Dr. Oakland testified that the DSM-IV definition for mental retardation is a three part definition requiring "significantly subaverage intellectual functioning," "concurrent deficits or impairments in present adaptive functioning," and "this condition must be prior to the age of 18." P4/612-613. Dr. Oakland also confirmed that these three diagnostic criteria must exist in order to diagnose mental retardation. P4/613.

In contrast, Dr. McClaren, who did not look at all three prongs in tandem, opined that Quince was not mentally retarded. M1209-21; P13/2046-2050. Dr. McClaren, upon attaining a full scale IQ of 79 from his evaluation, did not score the assessment of Quince's adaptive behavior via the SIB-R[19]. M1209-21; P6/797; P13/2048. Dr. McClaren concluded that the score of 79 was too high to justify assessing adaptive behavior. P13/2046; 2049; P6/814. Therefore, Drs. Oakland and Berland are the only mental health professionals who made a full determination as

[19] Dr. McClaren's assessment was criticized by **this Court** in *Oats* and was described as "impacted by a misreading of [this Court's] prior opinion in *Cherry*. 181 So. 3d at 464-70.

to ID, who assessed all three prongs in accordance with the DSM[20] and AAIDD[21] and who unequivocally found Quince to be mentally retarded.

In *Hall*, Dr. Prichard's testimony was unrefuted and this Court specifically noted:

> The State argues that it has not had a chance to have a full adversarial proceeding to challenge Hall's claim that he is intellectually disabled. Notably, this argument was not raised in the State's initial supplemental brief, where it merely asked this Court to affirm the lower court's order based on Hall's failure to establish deficits in adaptive functioning, but only in its supplemental reply brief. Additionally, at the evidentiary hearing, the State did not attempt to rebut the testimony of the experts, but instead stated that "a clinician's approach to mental retardation ... is not relevant to this proceeding." Furthermore, the State's assertion is not supported by the record. As previously noted in Justice Pariente's concurring opinion after Hall's most recent postconviction motion, the State came into this proceeding forewarned for twenty years of Hall's claim of intellectual disability and was afforded the opportunity of a full adversarial proceeding under *Atkins*. *Hall IX*, 109 So. 3d at 712–14 (Pariente, J., concurring) (noting that "in 2010, there was a true adversarial testing of whether Hall was [intellectually disabled] under Florida's statutory definition."). The fact that the State has chosen not to avail itself of prior opportunities is not a sufficient reason to expend further resources to continue to litigate this issue.
>
> The United States Supreme Court was clear that this state is not free "to define intellectual disability as [it] wishe[s]," ***and the unrefuted evidence in this case has consistently demonstrated that Hall meets the clinical and statutory definition of intellectual disability.***

Hall, 201 So. 3d at 637-8. As in *Hall*, the State in this case had the opportunity to specifically rebut Drs. Oakland and Berland's opinions as to each prong and as to

[20] The AAMR and the American Psychiatric Association, publisher of the DSM are the authorities for establishing the diagnostic criteria for ID. *See supra* at 36.
[21] The AAMR has been renamed and is now called AAIDD. *See supra* at 36.

their assessment of all of the three prongs in finding Quince mentally retarded. They failed to do so. This Court is left with essentially unrefuted informed medical opinions by Drs. Oakland and Berland and overwhelming supporting evidence as to all three prongs that Quince has been ID his entire life like Hall.

C. THE LOWER COURT FAILED TO FOLLOW THIS COURT'S MANDATE THAT A CIRCUIT COURT MUST ADDRESS ALL THREE PRONGS OF THE INTELLECTUAL DISABILITY TEST IN TANDEM.

This Court in *Oats v. State*¸181 So. 3d 457 (Fla. 2015), *Hall v. State*, 201 So. 3d 628, and *Walls*, 2016 WL 6137287 mandate that courts consider all three prongs of the ID test in tandem and that the conjunctive and interrelated nature of the test requires that no single factor be considered dispositive because these factors are interdependent. If one of the prongs is relatively less strong, a finding of ID may still be warranted based on the strength of the other prongs. *See Walls*, 2016 WL at 7 *quoting Oats*, 181 So. 3d 457 at 467-68. This Court also highlighted the importance of the courts to be "guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an ID." *Oats v. State*, 181 So. 3d 457, 457 (Fla. 2015) *citing Hall*, 134 S. Ct. at 1993; *Hall*, 201 So. 3d at 637 ("the United States Supreme Court has made clear that when determining whether an individual meets the criteria to be considered ID, the definition that matters most is the one used by mental health professionals in making this determination in all contexts, including those 'far

beyond the confines of the death penalty.' *Hall v. Florida*, 134 S. Ct. at 1993. As such, courts cannot disregard the informed assessments of experts. *Id.* at 2000.").

Quince's case has great similarities to Hall's case when this Court looks at all of the interrelated prongs to determine ID. This Court held that

> [i]n applying *Hall* to Florida, we have recognized ***the Supreme Court's mandate that all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive***. *Oats*, 181 So. 3d at 459, 467 (citing *Hall*, 134 S. Ct. at 2001; *Brumfield v. Cain*, ––– U.S. ––––, 135 S. Ct. 2269, 2278–82, 192 L. Ed. 2d 356 (2015)). Reviewing this case, it is clear that although Walls has had an earlier evidentiary hearing as to intellectual disability and was allowed to present evidence of all three prongs of the test, ***he did not receive the type of holistic review to which he is now entitled***. Also, Walls' prior hearing was conducted under standards he could not meet because he did not have an IQ score below 70 - a fact which may have affected his presentation of evidence at the hearing. Because Walls' prior evidentiary hearing was directed toward satisfying the former definition of intellectual disability and was reviewed by the circuit court with the former IQ score cutoff rule in mind, we remand for the circuit court to conduct a new evidentiary hearing as to Walls' claim of intellectual disability.

Walls, 2016 WL at 6; *see Oats v. State*[22], 181 So. 3d 457, 459 (Fla. 2015). Justice

[22] Our decision to reverse is based on three reasons. First, in light of the United States Supreme Court's decision in *Hall*, **the circuit court's order should have addressed all three prongs of the intellectual disability test, rather than denying the claim solely because Oats allegedly did not present sufficient evidence to establish that his intellectual disability manifested before the age of 18**. As the United States Supreme Court has stated, "**[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment.**" *Hall*, 134 S. Ct. at 2001. The United States Supreme Court's most recent decision regarding intellectual disability **reaffirms Hall and provides further authority that all three prongs generally must be considered in tandem**. *See Brumfield v. Cain*, --- U.S. ---, 135 S. Ct. 2269, 2278–82, 192 L.Ed.2d 356 (2015).

Pariente in *Walls*, reminded us that

> Moreover, as this Court explained in *Oats v. State*, *Hall* changed the manner in which evidence of intellectual disability must be considered, stating: "[C]ourts ***must*** consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... because ***these factors are interdependent***, ***if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs***."

2016 WL at 7 *quoting Oats*, 181 So. 3d 457 at 467-68. Recently, this Court reiterated this mandate in *Nixon v. State*[23], SC15-2309, 2017 WL 462148, at *1 (Fla. Feb. 3, 2017) and *Herring v. State*, SC15-1562, 2017 WL 1192999 at *1 (Fla. March 31, 2017)[24].

Quince's case is similar to Hall's because both presented evidence to the court concerning all three prongs of the ID determination and both were denied relief on the basis of *Cherry*. Only Drs. Oakland and Berland assessed all three interdependent prongs prior to coming to their fully informed diagnosis that Quince is ID. Since the lower court failed to do so, it is now incumbent upon this Court to look at **all three prongs** in tandem in light of the evidence presented at the original evidentiary

[23] Nixon had a range of six IQ scores as follows: a score of 88 in 1974 at 13 years of age, 88 in 1980 at 19 years of age, 73 in 1985 at 24 years of age, 72 and 68 in 1993 at 32 years of age, and 80 in 2006 at 45 years of age. *Nixon*, SC15-2309, 2017 WL 462148, at *1, fn.2.

[24] Herring scored a full scale score of 83 on the WISC in 1972. He received a full scale score of 81 on the WISC in 1974. A WISC–Revised administered in 1976 resulted in a score of 72. Herring's most recent IQ test, the WAIS-III, was administered in 2004 and yielded a full scale score of 74. *See State v. Herring*, 76 So. 3d 891, 893 (Fla. 2011).

hearing which was conducted on May 12, 2008, May 15, 2008, May 16, 2008, and November 3, 2008, and the current and prior medical literature support provided at the original and the instant proceedings. P2-7/230-889; M1310-1473.

D. THE LOWER COURT MISCONSTRUED THE APPLICATION OF THE STANDARD OF ERROR IN DETERMINING INTELLECTUAL DISABILITY

The lower court in its Order denying relief clearly misconstrued the function of the standard measurement of error in determining whether Quince suffered deficits in general intellectual functioning. The lower court in analyzing *Hall* made the following blanket determination:

> As a result, a defendant with a full scale score between 70 and 75 must be permitted the opportunity, and have considered, evidence concerning the second two factors in the intellectual disability analysis, namely, concurrent deficiency in adaptive behavior and manifestation of the condition before age eighteen.

M389. The lower court using this limited analysis of the application of *Hall* held as follows in Quince's case:

> Quince has undergone intelligence testing on three separate occasions. Each intelligence assessment utilized the version of the Wechsler Adult Intelligence Scale that was current at the time of testing. In 1980, on the Wechsler Adult Intelligence Scale that was current at the time of testing. In 1980, on the Wechsler Adult Intelligence Scale ("WAIS") Quince obtained a full scale score of 79. In 1984, on the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") he obtained a full scale score of 77. In 2006, on the Wechsler Adult Intelligence Scale-III ("WAIS-III") he attained a full score of 79. The Court finds that none of these scores are within the tests' acknowledged and inherent margin of error, and the defendant was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits. Accordingly, Quince's evidence is not consistent with a finding of intellectual disability. *See Hall v. Florida*, 134 S. Ct. at

> 2001. Quince, unlike Hall, **has consistent IQ scores above the 70 to 75 point-range central to the in *Hall***.

M390.

This lower court's analysis is erroneous as *Hall* did not create an arbitrary cut-off range of 70 to 75. Simply stated, under this flawed analysis no individual with a full scale score above 75 can ever be diagnosed ID. This is certainly not what *Hall* held and further, is contrary to the DSM[25]. In order to show that one is intellectual disabled pursuant to § 921.137, Florida Statutes, and Rule 3.203, one must first demonstrate "significantly subaverage general intellectual functioning."[26] This is defined as performance that is two or more standard deviations below the mean score on a standardized intelligence test, such as the WAIS. Performance two or more standard deviations below the mean on this test is defined as a score of approximately 70 or below, and pursuant to *Hall*, that number is a range rather than a solid score. *See Hall*, 134 S. Ct. at 2000-01. The range encompasses the SEM, which adds approximately 5 points to each side of the score, such that a measured score of 70 represents an IQ score that is between 65 and 75. *See id.* at 1993-96. Moreover, the Supreme Court of the United States recently held that

> *Hall* invalidated Florida's strict IQ cutoff because the cutoff took "an IQ score as final and conclusive evidence of a defendant's intellectual

[25] Diagnostic and Statistical Manual for Mental Disorders is recognized as authority for establishing the criteria for ID by the AAMR and the American Psychiatric Association. *See Atkins v. Virginia*, 536 U.S. 304, at n.3, 122 S. Ct. 2242, 153 L. Ed.2d 335 (2002).

[26] Fla. Stat. § 921.137(1); Fla. R. Crim. P. 3.203(b).

> capacity, when experts in the field would consider other evidence." 572 U.S., at ——, 134 S. Ct., at 1995. Here, by contrast, **we do not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score**. Rather, in line with *Hall*, we **require** that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, **adjusted for the test's standard error**, falls within the clinically established range for intellectual-functioning deficits.

Moore, 2017 WL 1136278 at *11. The lower court's foregoing cut-off range analysis is reminiscent of Florida's bright-line rule as set forth in *Cherry*[27] requiring an IQ score of 70 or below before a court may consider other evidence of ID. It was unconstitutional in *Cherry* and it is unconstitutional here.

E. PRONG ONE: QUINCE CLEARLY DEMONSTRATED THAT HE SUFFERS FROM SIGNIFICANTLY SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING.

i. THE FLYNN EFFECT IS A VALID AND REAL PHENOMENON RECOGNIZED BY THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES

According to *Hall*, courts must consider professional standards when determining whether an individual is ID.[28] Professionals who determine IQ scores apply a correction based upon the "Flynn Effect."[29] The Flynn Effect is named for James R. Flynn, an intelligence researcher who documented it.[30] Also known as norm obsolescence, the Flynn Effect describes the false inflation of IQ scores that

[27] 959 So. 2d 702, 713.
[28] 134 S.Ct. at 2000-01.
[29] Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect, in* The Death Penalty and Intellectual Disability 155, 160 (Edward A. Polloway ed., 2015). M1317-24.
[30] *Id.* at 157. M1320.

occurs when an individual's performance on an IQ test is compared with outdated test norms.[31,32] M1317-24; M1389-90. According to the AAIDD,

> [n]ot only is there a scientific consensus that the Flynn Effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ tests scores derived from tests with outdated norms must be adjusted to account for the Flynn Effect, particularly in *Atkins* cases.[33]

After a comprehensive *Frye* hearing on the Flynn Effect during Quince's original ID motion proceedings, even the lower court found "that the Flynn Effect is in fact a theory or methodology generally accepted in the field of psychology and the procedures followed to apply this process are also generally accepted in the relevant psychological community" and thus the court permitted "the testimony regarding the Flynn Effect and the applicability of it" in Quince's case. P4/586. However, even though the lower court held that the Flynn Effect was an "acceptable scientific principal for application in a court of this state," the Court declined to apply the Flynn Effect relying on this Court's ruling in *Herring*[34], holding:

> Having had the opportunity to thoroughly review *Herring*, however, the court is convinced that it would be clear error to apply the Flynn Effect to adjust an IQ score in an *Atkins* setting. It is worthy of repetition that Quince would not be entitled to relief even if the Flynn Effect were applied in his case.

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[31] *Id.* at 155. M1318.
[32] Dale G. Watson, *Intelligence Testing, in* The Death Penalty and Intellectual Disability 113, 124-25 (Edward A. Polloway ed., 2015). M1387-91.
[33] Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect, in* The Death Penalty and Intellectual Disability 155, 160. M1321.
[34] *State v. Herring*, 76 So. 3d 891 (Fla. 2011).

P14/2307. In *Herring*,[35] this Court made only the following comment with regard to the Flynn Effect:

> We make no judgment as to the efficacy of adjusting for the Flynn Effect because it is not relevant in this case. Even when Herring's IQ scores are adjusted, the scores do not fall below 70.[36,37]

Therefore, this Court did not rule on the relevance of the Flynn Effect in an *Atkins* setting, but only ruled that it was not relevant in Herring's case because of *Cherry*'s bright line cut-off.

Many jurisdictions have approved accounting for the Flynn Effect when assessing IQ scores for purposes of determining ID.[38] Furthermore, legal scholars

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[35] *State v. Herring*, 76 So. 3d 891 (Fla. 2011).

[36] This Court's interpretation of § 921.137, Florida Statutes, and Rule 3.203 before *Hall* did not require an IQ score "below 70," but rather one that was "70 or below." *Cherry*, 959 So. 2d at 715, *quoting Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005).

[37] 76 So. 3d at n.4.

[38] *See Chase v. State*, No. 2013–CA–01089–SCT (Miss. Apr. 23, 2015) (holding that the trial court did not err in finding the defendant proved subaverage intellectual functioning where the Flynn Effect was applied to his IQ score); *Sasser v. Hobbs*, 735 F. 3d 833, 847 (8th Cir. 2013) (holding that it was error for the district court to refuse to consider testimony regarding the Flynn Effect in determining whether the defendant suffered from significantly subaverage intellectual functioning); *Burgess v. Comm'r., Ala. Dept. of Corr.*, 723 F. 3d 1308, 1321-22 (11th Cir. 2013) (remanding the case to the district court for purposes of an evidentiary hearing including testimony on the Flynn Effect); *United States v. Smith*, 790 F. Supp. 2d 482, 491 & n.43 (E.D. La. 2011) (finding that the Flynn Effect should be applied to the defendant's WAIS-III scores); *United States v. Hardy*, 762 F. Supp. 2d 849, 866-68 (E.D. La. 2010) (holding that applying the Flynn Effect is best practice); *Coleman v. State*, 341 S.W.3d 221, 224, 242 n.55 (Tenn. 2011) (allowing for testimony regarding the Flynn Effect); *Black v. Bell*, 664 F.3d 81, 96 (6th Cir. 2011) (holding that Flynn Effect evidence must be considered); *Smith v. State*, 357 S.W.3d 322, 353-54 (Tenn. 2011) (remanding for consideration of evidence of the defendant's

have adopted the position that the Flynn correction should be applied in *Atkins* cases. One scholar concluded that

> adjusting for the Flynn Effect reflects a practice consistent with both *Atkins* and the known world of IQ measurements. While a freakish strike of lightning is difficult to avoid, the potentially deadly and unconstitutional consequences of refusing to account for the Flynn Effect are wholly preventable. Thus, for the intelligent and just enforcement of *Atkins*, courts and juries should adjust IQ scores from outdated tests for the Flynn Effect.[39]

Looking to the mental health professionals, Dr. Oakland testified that the Flynn Effect "refers to the increasing level of intelligence within a population over time, particularly during the 20th century." P4/559. He further explained that "[t]he general estimate is that for a population, the increase is approximately three points per a decade or .33 per year." P4/559-60. Dr. Oakland testified that the Flynn Effect

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functional IQ, including evidence regarding the Flynn Effect); *United States v. Lewis*, No. 1:08 CR 404, 2010 WL 5418901, slip op. at 11 (N.D. Ohio 2010) (finding that applying the Flynn Effect is best practice); *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010) (finding no error in the district court's decision to adjust for the Flynn Effect); *United States v. Davis*, 611 F.Supp.2d 472, 488 (D. Md. 2009) (finding Flynn Effect evidence relevant and persuasive); *Wiley v. Epps*, 668 F.Supp.2d 848, 897-98 (N.D. Miss. 2009) (taking the Flynn Effect into account); *United States v. Parker*, 65 M.J. 626, 629-30 (Navy-Marine Crim. App. 2007) (adopting the AAMR standard for evaluating IQ scores, including the process of accounting for the Flynn Effect); *Green v. Johnson*, 431 F.Supp.2d 601, 615-16 (E.D. Va. 2006) (granting evidentiary hearing allowing for testimony concerning the Flynn Effect); *Walker v. True*, 399 F.3d 315, 318, 320 (4th Cir. 2005) (remanding with instructions to consider the persuasiveness of Flynn Effect evidence).

[39] Geraldine W. Young, *A more intelligent and just* Atkins*: Adjusting for the Flynn Effect in capital determinations of mental retardation or intellectual disability*. 65 VANDERBILT L. REV 615, 663 (2012), *quoted in* McGrew, n. 45, M1374.

is widely accepted within the profession of psychology as being valid, and that the procedures he used in applying the Flynn Effect to a particular score were also considered valid in the scientific community. P4/568. Dr. Oakland further explained that a psychologist may decide to use the Flynn Effect when making a decision regarding one individual and apply it in a case to adjust an IQ score downward. P4/572-73. Dr. Oakland's testimony is directly supported by the AAIDD, which states as follows:

> [t]he procedure for computing an adjustment for the Flynn Effect has generally involved calculating the time between the administration of a test and the midpoint of the year(s) of norming (which is often 1 to 4 years prior to publication), multiplying that number by .3 points, and subtracting this amount from the obtained full-scale IQ test score of the test in question.[40]

M1390.

The midyear norming dates for several IQ tests, including the WAIS, Wechsler Adult Intelligence Scale-Revised ("WAIS-R"), and Wechsler Adult Intelligence Scale-III ("WAIS-III") are available from the AAIDD as Table 8.4 of its publication, *The Death Penalty and Intellectual Disability*.[41] M1391; M1392-93. This table was provided to the lower court to show the norming of the scores. Even, Dr. McClaren conceded that the AAMR, in its most recent publication, discussed the use of the Flynn Effect within the context of "the assessment and treatment of

[40] Dale G. Watson, *Intelligence Testing, in* The Death Penalty and Intellectual Disability 113, 125. M1387-91.
[41] *Id.* at 126. M1391.

mental retardation." P6/815.

Pursuant to *Hall*, courts assessing ID must allow professional standards to inform their decisions.[42] *See Moore*, 2017 WL 1136278 at *9. It is clear that both the professional community and the legal community recommend adjusting for the Flynn Effect in the context of *Atkins* cases. Furthermore, the Flynn Effect has been given due consideration in many courts throughout the nation, and this was the case even before the Supreme Court of the United States issued its decision in *Hall*. According to the AAIDD, "[a]ny repeat administration of an IQ test should be interpreted with the practice effect in mind.[43] The "practice effect" refers to an increase in scores due to learning as a result of multiple administrations of an IQ test.[44] Accordingly, the medically (AAIDD) recognized the Flynn correction should be applied to Quince's IQ scores.

ii. THE APPLICATION OF THE FLYNN EFFECT AS RECOGNIZED BY THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES TO QUINCE'S FULL-SCALE IQ SCORES

Quince has undergone intelligence testing on three separate occasions. Each intelligence assessment utilized the WAIS that was current at the time of testing. In

[42] 134 S.Ct. at 2000-01.
[43] Stephen Greenspan & J. Gregory Olley, *Variability of IQ Test Scores, in* The Death Penalty and Intellectual Disability 141, 142 (Edward A. Polloway ed., 2015), *citing* Alan S. Kaufman, *Practice Effects, in* Encyclopedia of Intelligence, Vol. 2, 828-833 (Robert J.Sternberg ed., 1994). M1394-1398.
[44] *Id.*

1980, on the WAIS, Quince obtained a full scale score of 79. In 1984, on the WAIS-R he obtained a full scale score of 77. In 2006, on the WAIS-III he attained a full scale score of 79. This Court recently upheld the finding of an expert that an IQ score of 76 is characterized as significantly subaverage intelligence. *See Phillips v. State*, 207 So. 3d 212 (Fla. 2016)[45]. It should be noted that similar to Quince's case[46], attempts to locate Hall's Florida public school records for psychological testing administered in the 1950s were unsuccessful, but "based on Hall's academic record, it is reasonable to believe that some testing must have occurred because Hall was referred to placement in Special Education classes and referred to as intellectually disabled in the school record." *Hall*, 201 So. 3d at 633. Therefore, it is just as reasonable to believe that the school testing showed a score below 70 for Quince.

Dr. Oakland explained that in applying the Flynn Effect, it is important to note

[45] "During the penalty phase, Dr. D'Errico testified that Phillips, who was eighteen years old at the time of the murders, has significantly subaverage intelligence. During his evaluation of Phillips, Dr. D'Errico administered a standardized IQ test, on which Phillips scored a 76. Phillips's score falls within the borderline range of intellectual functioning and places him in the bottom 5% of the population. While in school, Phillips received special services to address a learning disability, and he received therapy for a lifelong speech impediment that affected his ability to communicate with others. Dr. D'Errico testified that as a result of Phillips's intellectual limitations, his behavior would be guided by his desire to fit in and be normal, and Phillips would be easily influenced by his peers." *Phillips*, 207 So. 3d at 221.

[46] Doris Paskewitz, the school psychologist, testified that, although the records had been purged, if the Defendant was in special education, he would have had an IQ score that indicated that he was mentally retarded, a score below 70. SR1/15-17.

that it applies mainly to persons with lower intellectual abilities. P4/584. Thus, when making a determination as to whether to apply the Flynn Effect to an IQ score, the fact that an individual such as Quince has a lower level of intellectual ability means that a higher probability exists that it should be applied to him. P4/584-85. Dr. Oakland also found that the twenty-six year gap between the WAIS norms and the testing of Quince in 1980 was a relevant factor in his decision to apply the Flynn Effect. P4/588. Dr. Oakland further testified that his diagnosis of mental retardation based upon the 1980 IQ test was not inconsistent with the scores Quince received on the two subsequent IQ tests that were administered to him. P5/686.

Dr. Oakland testified that he relied upon the 1980 WAIS administration because it was the closest in time to Quince's trial. P4/548. Dr. Oakland, after applying the Flynn Effect, testified that the original WAIS administered to Quince (**IQ of 79**) in 1980, **was normed in 1954**. P4/587. The twenty-six year difference between the test's norming and its administration to Quince would account for an expected nine-point reduction in Quince's IQ score when the Flynn Effect is applied. P4/587. As applied to Quince's 1980 WAIS, the Flynn Effect would show that Quince's IQ score was **actually a 70**. P4/587; *see* Dale G. Watson, *Intelligence Testing*, *in* The Death Penalty and Intellectual Disability 113, 125. M1387-91. This number is consistent with Dr. Berland's normed score of 71. When the Flynn correction is applied to Quince's IQ scores, the 1980 score of 79 becomes 70, which

is a score entitling Quince to a finding that he suffers from significantly subaverage general intellectual functioning, even without the benefit of taking into account the SEM. P4/587.

Regarding the 1984 administration of the WAIS-R, Dr. Oakland testified that applying the Flynn correction to the **IQ of 77** yielded a score of approximately 76. P4/606; *see* Dale G. Watson, *Intelligence Testing*, *in* The Death Penalty and Intellectual Disability 113, 125. M1387-91. However, the mid-year norming date for the WAIS-R is 1978. M1393. It appears from Dr. Oakland's testimony at the evidentiary hearing held on Quince's original motion that he inadvertently used the 1981 publication date in applying the Flynn correction, coming up with a transformed score of 76. P4/606. However, when the mid-year **norming date of 1978** is instead applied, in accordance with the procedure set forth by the AAIDD, one finds that the difference between the 1978 date and the 1984 date of administration is six years. Multiplying the six years times .3 yields a Flynn correction number of 1.8, which, when rounded up to a whole number is two. When the two points are then subtracted from the score of 77, **the Flynn Effect-transformed score is 75**.

Finally, the WAIS-III **IQ score of 79** administered to Quince in 2006 was **normed in 1995**. P4/610-611; M1391; 1393; *see* Dale G. Watson, *Intelligence Testing*, *in* The Death Penalty and Intellectual Disability 113, 125. The 2006

administration of the WAIS-III occurred 11 years after the mid-year norming date of 1995. M1393. Multiplying 11 times .3 yields 3.3, which results in a **Flynn-corrected score of 76** on the 2006 administration, the original score on which was a 79. P4/610-11; *see* Dale G. Watson, *Intelligence Testing*, *in* The Death Penalty and Intellectual Disability 113, 125; M1387-91. This Flynn-corrected score is in line with Dr. Oakland's testimony, even though he testified that the WAIS-III was normed in 1996. P4/610-611.The foregoing norming of three IQ scores is consistent with the AAIDD and Table 8.4 from the AAIDD. M1390-91; M1393; *see supra* at 50.

Moreover, Dr. Berland gave a detailed explanation as to why Quince's true IQ score was in the range of 66 and 76. P7/925-27. Dr. Berland detailed in his report the norming procedure of the 1980 WAIS test, which consistently overestimated intelligence when compared to the current norms in 1981. P7/925-27 (Both Drs. Oakland and Berland normed the 1980 WAIS test to obtain a true IQ score for Quince). Moreover, after the aging norm, Dr. Berland found Quince's full scale IQ to be 71 on the WAIS-R. Thereafter, Dr. Berland applied the SEM to this normed score and applied a 95% confidence interval (chance of having an individual's "true score" within a range of scores formed by the standard of measure). Thus, Dr. Berland found Quince's full scale IQ to be in the range between 66 and 76. Dr. Berland opined this range met the IQ requirements for mental retardation. P7/925-

27. Dr. Berland's assessment in determining SEM and the range for Quince's IQ is verified by the *Hall* opinion. P7/925-27; *see Hall*, 134 S.Ct. at 2000-01 (held that the SEM of approximately plus or minus 5 points must be taken into account by a court determining whether a defendant suffers from significantly subaverage general intellectual functioning). In spite of the *Cherry* bright-line cut-off, only Drs. Berland and Oakland had the wherewithal to consult the medical diagnostic standards current at the time of their evaluations.

Even, Dr. McClaren acknowledged that the application of the Flynn Effect to all of the results of IQ tests taken by Quince would result in scores ranging from 70 to 75. P6/827. **As applied to Quince's 1980 WAIS, Dr. McClaren also found that the score would reflect an IQ of 70 with the Flynn Effect**. P4/587; P6/826-27; P14/2304-05. **Dr. McClaren also testified that when the Flynn Effect is applied to the two subsequent tests, the scores of 77 and 79 would both be reduced to 75**. P6/826-27; P14/2304-05. The Flynn corrections of the scores are consistent among the three experts. Dr. McClaren acknowledged that with the application of the Flynn Effect to all of the results of IQ tests taken by Quince would result in scores ranging from 70 to 75. P6/827.

Dr. McClaren further testified that under the AAMR and DSM-IV definitions, which are accepted standards of mental retardation in the field of psychology, an individual with scores ranging from 70 to 75 could be diagnosed as mentally retarded

or ID. P6/833-834. Dr. McClaren conceded that the *Cherry*[47] decision, which seems to require a hard score of 70 or below on an accepted IQ test for an individual to be diagnosed as mentally retarded, is in conflict with the definition of mental retardation as stated by the AAMR and DSM-IV, and that discounting things such as the confidence interval and SEM is outside the standard of care in the psychology profession. P6/835.

Hall clearly rejected the notion that consistency in scores over time negates the importance of applying the SEM. *See Hall,* 134 S. Ct. at 1995-96; P14/2306-07. The opinions in *Hall v. Florida*, *Oats*, *Hall v. State*, and *Walls* have made it clear that this Court must look at IQ as a range and not a fixed number. The aforementioned testimony of Dr. Oakland and report of Dr. Berland are the only mental health professional assessments that looked at Quince's IQ score as a range and not a fixed number. Dr. McClaren looked only at the fixed IQ score of 79 to come to the decision that Quince was not retarded. P13/2046, 2049; P6/797; 814. This assessment has been specifically rejected by *Hall*. Dr. McClaren's prior conclusion conflicts with *Hall*, where the Supreme Court of the United States determined that "because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual

[47] 959 So. 2d 702.

functioning." *See Hall*, 134 S. Ct. at 1995-96. The Flynn Effect represents exactly such a flaw in IQ tests, where the age of the test contributes to the error in scoring. Therefore, Quince's Flynn-corrected scores range from 70 to 75, which are strongly indicative of significantly subaverage general intellectual functioning, even before the assessment of the SEM. Therefore, the lower court should have looked to the other two prongs in concert with this prong.

iii. THE APPLICATION OF THE STANDARD ERROR OF MEASUREMENT TO QUINCE'S FULL SCALE IQ SCORES

The Supreme Court of the United States in *Hall* specifically held that the SEM of approximately plus or minus 5 points must be taken into account by a court determining whether a defendant suffers from significantly subaverage general intellectual functioning. 134 S.Ct. at 2000-01. When the SEM is applied to Quince's 1980 Flynn -corrected score of 70, the range is 65-75, which is well within the criteria for such a finding. When the SEM is applied to the 1984 Flynn-corrected score of 75, the range is 70-80. When the SEM is applied to the third Flynn -corrected 2006 score of 76, the range is 71-81. All of these ranges contain a score on which a finding of significantly subaverage general intellectual functioning is warranted.

In denying Quince's prior Rule 3.203 motion, the Court found that "the standard error of measure (of approximately 5 points) is not automatically subtracted from an IQ score." P14/2305. The Court reasoned that "[u]nder controlling law, a

range of scores is not considered. However, even if a range of scores is considered, it does not change the outcome in the present case." P14/2305. *Hall* has made clear that the SEM must be applied.

Experts have consistently found Quince to be of subaverage intelligence. It should also be noted that Dr. McMillan opined that Quince suffered from borderline mental retardation, severe specific learning disability and neurological impairment. R4/144; R1/57. Dr. McMillan testified that Quince had a "low intelligence score, which is functioning on an eleven-year-old basis." R4/145. Dr. Barnard confirmed his finding that "[c]linically [Quince] is judged to be of dull normal level of intelligence." R4/128; R1/54. Dr. Rossario's report indicated that Quince's "intelligence can be described as slightly below average." R1/55-56. Dr. Stern testified that Quince "is not a bright gentleman" and "is functioning at a borderline level of intellectual capability." R4/158; R1/58.

Of note, is the lower court's reliance that this Court noted that "the consensus of experts was that Quince was of 'dull normal or borderline intelligence but not intellectually disabled'" M391 *citing Quince*, 414 So. 2d at 186; M387. This finding is not correct and is not supported by the record. As discussed above, Dr. Barnard **did not do** any standardized IQ testing; Dr. McMillan conducted the WAIS test and opined that Quince **suffered from borderline mental retardation**, **severe specific**

learning disability and neurological impairment; Drs. Rossario[48] and Carrera **did not** perform any intelligence testing; and Dr. Stern performed **only** a mental status examination to check Quince's mental state to see if he was psychiatrically insane or sane and no IQ testing. R4/156. R1/55; 56; R4/144; R1/57; R4/128; R1/54; R4/158-59. The determination of the first prong requires specific IQ testing(s) that render a range to determine ID. Moreover, Table 8.4 from the AAIDD shows the several IQ testing instruments of its publication, *The Death Penalty and Intellectual Disability*.[49] M1391-92. Even Dr. McClaren performed IQ testing and looked to the 1980 and 1984 IQ testings in determining ID. In evaluating all three prongs, where there is no intelligence testing there is no valid assessment of ID. *See Walls*, 2016 WL at *6; *see Oats*, 181 So. 3d at 467-68.

Applying the Flynn correction and the SEM, as informed by standard clinical practice and required by *Hall*, it is clear that Quince's 1980 and 1984 IQ scores show he suffers from "significantly subaverage general intellectual functioning" under § 921.137, Florida Statutes, and Rule 3.203. If the norming error of the WAIS-III is also considered, all three of Quince's known IQ scores entitle him to a finding of significantly subaverage general intellectual functioning. Quince submits that he has

[48] Dr. Rossario stated that Quince's behavior was not due to "severe mental retardation," but rather a level of intellectual disability that would best be described as "mild," but which still meets the statutory criteria for a bar on execution. P7/943. However, it is clear Dr Rossario did not do IQ testing.

[49] *Id.* at 126. M1391.

clearly and convincingly made this showing and, when this Court considers his adaptive behavior deficits and the age of onset of his condition, as discussed below, it will find that he is ID.

F. PRONG TWO: QUINCE CLEARLY PRESENTED UNREFUTED EVIDENCE THAT HE SUFFERS FROM SEVERE DEFICITS IN ADAPTIVE FUNCTIONING.

The lower court made no findings regarding Quince's adaptive functioning deficits under prong two. M389-391. To show ID under § 921.137, Florida Statutes, and Rule 3.203, in addition to demonstrating significantly subaverage general intellectual functioning and age of onset prior to age 18, one must also prove deficits in adaptive behavior.[50] According to the statute and Rule, "adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.[51] Neither the statute nor the Rule provide guidance as to recommended means of measuring adaptive behavior. However, Florida courts use the standard set forth in *Atkins.*[52] According to *Atkins,* deficits in adaptive behavior are "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction,

[50] Fla. Stat. § 921.137(1); Fla. R. Crim. P. 3.203(b).
[51] *Id.*
[52] *Dufour*, 69 So. 3d at 257 (Fla. 2011) (Pariente, J., concurring in part and dissenting in part), *citing Nixon v. State*, 2 So. 3d 137, 143 (Fla.2009); *Phillips v. State*, 984 So. 2d 503, 511 (Fla.2008); *Jones v. State*, 966 So. 2d 319, 326–27 (Fla.2007).

health and safety, functional academics, leisure, and work."[53]

Like Dr. Gregory Prichard in *Hall*, Dr. Oakland made his full determination based on his personal evaluation of Quince, interviews of several familial and school witnesses, school records, medical records, previous psychological and psychiatric reports and prior testimony with regard to Quince's mental status. P4/487-490; M26-27; *see Hall*, 201 So. 3d at 636-38. In contrast, Dr. McClaren, who did not score his SIB-R, only interviewed Quince and a death row correctional guard. M1304-09; P6/797; P13/2048. Dr. McClaren testified that he had not talked to any of Quince's family members; nor had he reviewed any testimony by family members, friends or teachers; nor had he made any inquiries at Union Correctional Institution about Quince's activities regarding books and the law library; and nor had he reviewed any of Dr. Oakland's work relating to adaptive behavior. P7/837-839. This Court specifically rejected the argument that "mental health experts may only evaluate a prisoner's adaptive functioning during his or her incarceration." *Hall*, 201 So. 3d at 636. Moreover, **this Court** recognized Dr. Oakland's explanation as to the difficulty that is involved in determining the adaptive functioning of a prison population. *Hall*, 201 So. 3d at 636. This Court specifically stated as follows:

> Section 921.137(1) of the Florida Statutes defines "adaptive behavior" as "the effectiveness or degree with which an individual meets the

[53] *Id.*, *quoting Atkins*, 536 U.S. at 308 n. 3 (*quoting* Am. Ass'n on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992)).

> standards of personal independence and social responsibility expected of his or her age, cultural group, and community." § 921.137(1), Fla. Stat. (2016). Evaluating the adaptive behavior of an individual who has spent much of his adult life incarcerated can be difficult. In another case before this Court, *Williams v. State*, No. SC13–1472, Dr. Thomas Oakland explained that the Adaptive Behavior Assessment System II (ABAS) scale is not normed on prison populations because:
>
> > prison represents clearly the antithesis of the environment in which adaptive behavior can be displayed. The assumption in the assessment of adaptive behavior is that a person has considerable degrees of freedom and opportunity to decide what he or she will do with his or her time and how they will progress. And within a prison setting the people of course are highly restricted as to the behaviors that they can display, and ***therefore we are not going to get an accurate assessment of adaptive behavior by ... acquiring information on prison related behaviors.***
>
> Transcript of Evidentiary Hearing, Record on Appeal Vol. 48 at 4681, *State v. Williams*, No. 93–003005CF10A (Fla. 17th Cir.Ct. Sept. 21, 2012). ***This difficulty has also been acknowledged by the American Association on Intellectual and Developmental Disabilities***. *See Dufour v. State*, 69 So. 3d 235, 258 (Fla.2011) (Pariente, J., concurring in part and dissenting in part) ("***much of the clinical definition of adaptive behavior is much less relevant in prisons***"). Accordingly, we reject the trial court's narrow reading of *Phillips* and the State's argument that mental health experts may only evaluate a prisoner's adaptive functioning during his or her incarceration.

Hall, 201 So. 3d at 636. Dr. McClaren did not assess Quince's adaptive behavior or consider any other evaluations of Quince and his abilities. P6/814; 837-839; 845-852. Dr. McClaren had no opinion as to Quince's adaptive functioning and his sole reliance on evidence at the time of incarceration has been specifically rejected. P13/2046; 2049; P6/814; *Hall*, 201 So. 3d at 636.

This Court has the unrebutted fully informed opinions of Drs. Oakland and Berland that Quince suffered severe deficits in adaptive functioning. At the

evidentiary hearing held on Quince's original Rule 3.203 motion and as summarized above, several lay witnesses testified as to Quince's adaptive functioning prior to and around the time he was arrested and charged in this case. P2-3/249-427. Dr. Oakland developed the Adaptive Behavior Assessment System ("ABAS") and the Adaptive Behavior Assessment System II ("ABAS-II") tests, which are widely used in assessing adaptive functioning. P4/449-456. He testified that the ABAS tests are the only tests designed to be consistent with the DSM and AAIDD definitions of ID. P4/450. The ABAS is co-normed with the Wechsler Intelligence Scale for Children ("WISC") and normed on a population with ages ranging from 5 to 89. P4/450, 456. It has established reliability and validity. P4/456. The Court accepted Dr. Oakland as an expert in the field of psychology with a specialization in test development and use in the field of mental retardation. P4/463-464.

Dr. Oakland testified that he reviewed Quince's records; including the record of the plea proceedings in this case, school records, medical records, previous psychological and psychiatric reports, and prior testimony regarding Quince's mental status. P4/487-490. He testified that he included in his review: Dr. McMillan's report from October 1980, Dr. Berland's report from January 2005, a psychological screening done by R.F. Moore when Quince was 21 years old, Dr. Stearns' report from 1980 as well as his testimony, and state expert Dr. McClaren's deposition testimony from September 2006 and April 2008. P4/487-488. He testified

that the ABAS assesses ten skill areas, which are combined into the three domains of adaptive behavior recognized by the DSM and AAIDD.[54] P4/480, 485. The ABAS combines the three domains into a total, or composite score. P4/485.

Dr. Oakland administered the ABAS in April 2007 and 2008 in connection with Quince's case. P4/489. In 2007, he administered the ABAS by questioning Quince as well as several family members, teachers, and a school psychologist, for a total of twelve individuals. P4/489. The focus of this administration was Quince's adaptive behavior just prior to the age of 18. P4/490. Dr. Oakland concluded that Quince was a follower who minimized drawing attention to himself. P4/490. He walked awkwardly. P4/490. He was a loner who had only one friend. P4/490. He did not initiate conversation and rarely engaged in it. P4/490. There was no evidence of reading books or newspapers. P4/490. He rarely engaged in work at home, and if he did, he was supervised by others and the work was done at their request. P4/490-491. He never had a bank account or a credit card. P4/491. He never repaired his clothing, did laundry, used an iron, or prepared meals for others. P4/491. His mother held his money so that he did not give it away. P4/491. Dr. Oakland testified that these observations were helpful to understanding whether Quince's behaviors were normal relative to others at the same age at the time and also relate to items that exist on measures of adaptive behavior. P4/491. Dr. Oakland found Quince to be mentally

[54] Conceptual, social, and practical skills.

retarded. P4/498.

Dr. Berland administered the Interview Edition of the Vineland Adaptive Behavior Scales to Quince's sister, Linda Stouffer, on November 30, 2004 by telephone. P7/927. She was asked to recall Quince's abilities at the age of 18. P7/927. Dr. Berland's administration of the Vineland Adaptive Behavior Scales revealed that Quince's adaptive behavior was not only more than two standard deviations below the mean but ranked in the first percentile of the population, a finding consistent with Dr. Oakland's 2007 administration of the ABAS.

Other evidence of severe deficits in adaptive functioning included Dr. Bernard, who testified that Quince entered the Job Corps at age 19, but lost his privileges after eight months due to arguments with teachers, that Quince had worked as a dishwasher and in landscaping, but that the longest he ever held a job was approximately five months, that Quince looked at the floor, did not talk spontaneously, had poor eye contact, answered with a soft voice, and had deficits in recent and remote memory (P7/937-38); Dr. Carrera, who mentioned that Quince was in the Job Corps and worked as landscaper and dishwasher, with his longest job lasting 6 months, that Quince could not control his bladder until adolescence, that he was poor in arithmetic and that he could abstract only one out of five proverbs, and that his intellectual social judgment was marginal (P7/945-6); Dr. Rossario noted that the Defendant's insight was "completely lacking," that his judgment was

"markedly impaired," that he was "unable to sustain any consistent work" and lacked the "ability to function as a responsible person" (P7/943); Dr. Louis Legum, a clinical psychologist, who administered the WAIS-R in 1984, reported that Quince was unable to control his urine until age 16 (P11/1757); and even Dr. McClaren also noted Quince's slight eye contact, non-spontaneous speech, that he only answered direct questions, and that he reported he copied work from other inmates. P12/2049.

The mental health evaluations discussed thus far, taken together with the testimony described above from the lay witnesses and Dr. Oakland, clearly indicate that Quince had significant adaptive behavior deficits, as did Hall in similar areas of adaptive functioning.

G. PRONG THREE: QUINCE CLEARLY PRESENTED UNREFUTED EVIDENCE THAT HIS CONCURRENT DEFICITS IN INTELLECTUAL FUNCTIONING AND ADAPTIVE BEHAVIOR MANIFESTED BEFORE THE AGE OF 18.

The final showing Quince must make in order for a court to deem him ID is that the deficits in intellectual functioning and adaptive behavior manifested before the age of 18. This prong is argued in length in Quince's Motion individually and in concert with the other prongs. M99-105. The lower court also made no findings regarding this prong whatsoever. M389-91. Quince needs to demonstrate that his ID manifested prior to the age of eighteen and not that he was diagnosed or had a proper IQ test prior to the age of 18. *See Oats*, 181 So. 3d at 469; *see Hall*, 201 So. 3d at

636-37. Specifically, the FSC recognized the following:

> The State's argument that a proper IQ test prior to the age of 18 is the only valid evidence to establish this prong is unjustifiable and ***would effectively preclude a finding of intellectual disability in most people born prior to a certain era***. This Court has never held that in order to find an intellectual disability, the defendant must have been given a specific IQ test prior to the age of 18. ***Such an inflexible view would not be supported by Hall v. Florida, which recognized that, based on a consensus within the medical community, this prong simply requires the "onset of these deficits during the developmental period."*** *Id*. at 1994. Further, this argument was raised and rejected in *Oats v. State*, 181 So. 3d 457, 469 (Fla.2015) (holding that section 921.137(1), Florida Statutes, requires only that intellectual disability be demonstrated to have manifested prior to age eighteen, not that it be diagnosed).

Hall, 201 So. 3d at 637 (footnote added). Quince presented strong and unrefuted evidence from school professionals and family members that he suffered deficits in intellectual and adaptive functioning concurrently and prior to the age of 18.

It should be noted that similar to Quince's case[55], attempts to locate Hall's Florida public school records for psychological testing administered in the 1950s were unsuccessful, but "based on Hall's academic record, it is reasonable to believe that some testing must have occurred because Hall was referred to placement in Special Education classes and referred to as intellectually disabled in the school record." *Hall*, 201 So. 3d at 633. Ms. Paskewitz testified in her deposition that in order to be placed into special education, a child at Quince's school would have had

[55] Ms. Paskewitz testified that, although the records had been purged, if Quince was in special education, he would have had an IQ score that indicated that he was mentally retarded (below 70). SR1/15-7.

to score below 70 on an IQ test. SP1/15-17. She testified that the school used the WISC. SP1/13. Both Vivian Charles and Earl Griggs testified that Quince was in special education classes. P3/348, 361-362, 364; P3/394, 400. Quince also suffered from concurrent deficits in adaptive behavior prior to the age of 18. Jeanette Quince, Gregory Quince, Vivian Charles, Earl Griggs, and Fred Phillips all testified as to Quince's behavior prior to age 18, as discussed above.

Only Drs. Oakland and Berland assessed this prong and found conclusively that Quince's deficits in intellectual functioning and adaptive behavior occurred concurrently and prior to the age of 18, evident from the testing and lay witness testimony. M1294-1303. In the April 2007 initial assessment, Quince scored a 52 on the general adaptive composite, which would put him in the lowest one percentile of all individuals. P4/502. As with intelligence testing, the ABAS II is scaled with a score of a hundred representing the median individual, and with fifteen points representing a standard deviation. P4/501; 507-08. This indicated that Quince had diminished capacity in "conceptual, social and practical skills." P4/509. Dr. Oakland opined that Quince had deficits in adaptive behavior prior to the age of eighteen. P4/516. Dr. Berland administered the Vineland Adaptive Behavior Scales assessment to Quince's sister, Linda Stouffer, focusing on Quince's abilities at age 18. P7/927. Again, both Drs. Oakland and Berland opined that Quince's significantly subaverage general intellectual functioning and concurrent deficits in adaptive

behavior manifested before the age of 18.

H. ANALYSIS OF ALL THREE PRONGS IN TANDEM FOR INTELLECTUAL DISABILITY IN QUINCE'S CASE CLEARLY AND CONVINCINGLY DEMONSTRATED THAT HISTORICALLY AND CURRENTLY QUINCE WAS AND IS INTELLECTUALLY DISABLED AND INELIGIBLE TO BE EXECUTED.

This Court must not forget, as the lower court clearly did, its holding that "courts ***must*** consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive ... because **these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs.**" *Oats*, 181 So.3d 457 at 467-68. Therefore, this Court must look to the three prongs and their differing strengths in Quince's case and not ignore its mandate as the lower court did. Moreover, Quince's case is similar to Hall's because both presented evidence to the court concerning all three prongs of the ID determination and both were denied relief on the basis of *Cherry*.

This Court recognized that *Atkins*, 536 U.S. at 321 warns against executing an ID individual because it can never serve neither deterrence nor retribution, the two social purposes served by the death penalty. *Id.* at 318-19, *citing Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L.Ed.2d 859, (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The death penalty cannot act as a deterrent for the ID because of their diminished ability to process the potential punishment and make choices accordingly. *Id.* at 320. It also does not serve the purpose of retribution

because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," and the culpability of even the average murderer is not enough to justify the death penalty. *Id.* at 320. Because an ID offender is less culpable due to his or her diminished capacity, the interest of retribution is not served. *Id.* at 320. Therefore, imposing the death penalty on such a person constitutes "purposeless and needless imposition of pain and suffering"; hence, it is unconstitutional. *Id.*, *citing Enmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The *Atkins* Court further held that people with ID are less capable of assisting in their own defense, more likely to give false confessions, and more susceptible to false findings of lack of remorse. *Id.* at 320-21 (internal citations omitted). Because of these factors, there is an unacceptable risk of wrongful execution that the Court appreciates. *Id.*

This Court has made it clear that courts cannot disregard the informed assessments of experts. *Hall*, 201 So. 3d at 636-37; *see Oats*, 181 So. 3d at 457 *citing Hall*, 134 S. Ct. at 1993. Further, this Court mandates that courts consider all three prongs of the ID test in tandem and "that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Walls*, 2016 WL at 6; *see Oats*, 181 So. 3d at 459. Moreover, "these factors are interdependent, if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs." *Walls*, 2016 WL at 7 *quoting*

Oats, 181 So. 3d 457 at 467-68.

Only Dr. Oakland and Dr. Berland assessed Quince as to all three prongs of ID in tandem. The State did not have any expert or medical professional that looked at all three prongs in accordance with *Hall*. Both doctors found that Quince met the three prong criteria for mental retardation. Dr. Oakland and Dr. Berland's assessments were informed and supported by their own testing, documented collateral records, other experts' reports and testing, and collateral interviews with Quince's family, school officials, and correctional personnel. The lower court was also provided with supporting governing scientific articles and excerpts from the DSM and AAIDD with regard to the assessment of ID. A great amount of information was amassed as to Quince's intellectual functioning and adaptive functioning. All of this evidence is uncontroverted, credible, clear and convincing, when all three prongs are looked at in tandem. All three prongs need not be strong, but in looking at all three prongs throughout Quince's life and the experts' informed assessments, Quince has met his clear and convincing burden that he is ID. To execute Quince would be a travesty of justice.

ARGUMENT II

THE LOWER COURT ERRED IN APPLYING A CLEAR AND CONVINCING BURDEN OF PROOF FOR DETERMINATION OF INTELLECTUAL DISABILITY

The lower court, over the Appellant's objection, applied the clear and convincing standard pursuant to Fla. Stat. § 921.137(4) to determine whether Quince is ID. The AAIDD and DSM-V definitions are consistent with Florida's statutory definition as set forth by § 921.137, Florida Statutes, and Rule 3.203. Florida requires an individual to prove ID by clear and convincing evidence. *See* Fla. Stat. § 921.137(4). Although it is Quince's position that he is able to prove his ID by clear and convincing evidence, he submits that the standard is unconstitutional under *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States, in *Atkins*, emphasized the fact that an ID individual, because he is unable to assist in his own defense, has a constitutionally unacceptable risk of wrongful execution. *See* 536 U.S. at 320-21. To require an individual who is ID to prove his disability by such an inordinately high standard as "clear and convincing" therefore unconstitutionally increases the risk of wrongful execution.

Individuals with mild ID are more difficult to identify than those with moderate or severe forms of the disorder. *See* Gary N. Siperstein & Melissa A. Collins, *Intellectual Disability, in* The Death Penalty and Intellectual Disability 21, 26 (Edward A. Polloway ed., 2015). M1310-12. Their deficits are often subtle and

not readily observable. *See id*. They engage in many activities common to those who are not ID, but have deficits in socializing and conceptualizing; these deficits cause them to be easily led and to fail to understand the consequences of their actions. *See id*. These deficits represent one main reason that the *Atkins* Court found that the death penalty was inappropriate for the ID; they lack the same culpability as non-intellectually disabled individuals. *See* 536 U.S. at 319. Furthermore, and likely for this reason, most jurisdictions require only that intellectual disability be proven by a preponderance of the evidence.[56] Therefore, should this Court should find that Quince is able to prove he is ID by a preponderance of the evidence only, it should grant relief because the "clear and convincing evidence" requirement runs afoul of *Atkins* and the Eighth and Fourteenth Amendments to the Constitution of the United States.[57]

[56] John H. Blume & Karen L. Salekin, *Analysis of* Atkins *Cases, in* The Death Penalty and Intellectual Disability 37, 41 (Edward A. Polloway ed., 2015). M1313-16.

[57] The constitutionality of the clear and convincing evidence standard as it relates to intellectual disability determinations in capital cases has yet to be decided by this Court. *See, e.g., Dufour*, 69 So. 3d 235, 253 (Fla. 2011) (declining to reach the constitutional challenge to Florida's "clear and convincing evidence" standard because Dufour had not proven ID by a preponderance of the evidence or by clear and convincing evidence).

CONCLUSION

This Court was previously reversed because they interpreted Florida Statute section 921.137 "so narrowly that it precluded sentencing courts from considering substantial evidence that is accepted by the medical community to be probative of intellectual disability." *Hall*, 2016 WL at 1. This Court, with the benefit of the recent case law and the unrefuted medical testimony as to all the inter-related three prongs, must find that Quince is ID. This Court has clear and convincing evidence that Quince is ID. The lower court's analysis is not in accordance with federal and state law and must be reversed. Quince must be granted a life sentence because he is ID and ineligible to be executed.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

s/ Raheela Ahmed
Raheela Ahmed
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 12th day of May, 2017.

I HEREBY CERTIFY that a copy of the foregoing has been through the Florida Courts E-Filing Portal to **Tayo Popoola**, Assistant Attorney General, Office of the Attorney General, at tayo.popoola@myfloridalegal.com and CapApp@myfloridalegal.com on this 12th day of May, 2017.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Kenneth Quince**, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on or about this 12th day of May, 2017.

/s/ Raheela Ahmed
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