IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC17-127

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This case is an appeal from the denial of Appellant's renewed motion for determination of intellectual disability as a bar to execution.

Facts of the Direct Appeal Case

In Appellant's direct appeal case, this Court summarized the facts of the case 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.
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> 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 v. State, 414 So. 2d 185, 186 (Fla. 1982).

On January 17, 1980, a grand jury returned a three-count indictment against Appellant for first-degree murder, sexual battery, and burglary of a dwelling.[1] (DAR1: 1) Appellant

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[1] Cites to the record are as follows: "DAR" will designate the record on appeal in the direct appeal case and by appropriate volume, followed by any appropriate page number. "PCR" will designate the record on appeal in Appellant's first intellectual disability appeal and by appropriate volume, followed by any

subsequently entered a plea to first-degree murder and burglary of a dwelling.[2] Appellant waived a sentencing jury, and the sentencing hearing was held on October 20, 1980. (DAR2: 1-2)

Mental Health Testimony During the Sentencing Hearing

During the sentencing hearing, the State presented testimony from Dr. George Barnard, a physician and psychiatrist who had been previously appointed to conduct evaluations on persons charged with criminal offenses in Florida, in approximately fourteen hundred cases prior to Appellant's case. (DAR4: 102-04)

Dr. Barnard was appointed by the trial court to determine whether Appellant was legally competent to stand trial and whether Appellant was legally sane at the time of the offenses. Dr. Barnard conducted the interview on March 18, 1980, and concluded that, in his expert opinion, Appellant was not under the influence of an extreme mental or emotional disturbance at the time of the offenses, that Appellant appreciated the

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appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

[2] The sexual battery count was dismissed because it was the underlying felony for the murder offense. (DAR: 29)

criminality of his conduct, and that Appellant had the capacity to conform his conduct to the requirements of the law. (DAR4: 111-14)

An expert for the defense, Dr. A. Ann McMillan, testified that she specialized in school psychology and clinical psychology. (DAR4: 133) Dr. McMillan conducted an evaluation of Appellant on October 2, 1980. (DAR4: 140) As part of her evaluation, she administered two tests to Appellant, the Minnesota Multiphasic Personality Test and the Wechsler Adult Intelligence Test. (DAR4: 140) After her evaluation of Appellant, she concluded that Appellant suffered borderline mental retardation and severe specific learning disability and neurological impairment. (DAR4: 144) Dr. McMillan also concluded that Appellant had permanent learning and judgment disability, limited ability to perceive the consequences of his actions, and that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Dr. McMillan also made the assessment that neurological damage was implied, and also equated Appellant's intelligence to an eleven-year-old adolescent. (DAR4: 144-45)

Dr. McMillan also said that alcohol consumption would greatly reduce Appellant's already-impaired abilities to reason and make appropriate judgments. (DAR4: 144) However, Dr.

McMillan admitted that if Appellant had the ability to give a detailed account of the offenses, that would alter her opinion regarding the effect that alcohol had on Appellant's abilities. (DAR4: 149) Appellant told Dr. McMillan that he had a history of drinking, and before he committed the offenses, he consumed a large amount of alcohol. (DAR4: 144)

Dr. Barnard disagreed with Dr. McMillan's report. Specifically, Dr. Barnard noted that Dr. McMillan's report concluded that while Appellant had a borderline level of intelligence, Appellant was not mentally retarded. (DAR4: 119-20) Dr. Barnard also disagreed with Dr. McMillan's assessment that "neurological damage is implied in borderline level and borderline intelligence," because there was no data in Dr. McMillan's report to support her assessment. (DAR4: 121) Regarding Dr. McMillan's assessment equating Appellant with an eleven-year-old child, Dr. Barnard said that similar issues exist in highly intelligent persons that did not receive any schooling. Thus, in his opinion, it was wrong to equate Appellant to being a child, because that would lead to the conclusion that Appellant functions as a child in every area, when the law evaluates competency for specific areas and functions. (DAR4: 124-25) Dr. Barnard did not see any signs that Appellant had a neurological disorder. (DAR4: 129)

Another expert for the defense, Dr. Fernando Stern, a physician who specialized in psychiatry, also evaluated Appellant. (DAR4: 150-54) Dr. Stern said that Appellant had a good recall of the circumstances surrounding the offenses. He said that Appellant told him that he drank a little on the day of the incident, and smoked some marijuana. (DAR4: 156) Based on his evaluation of Appellant and Dr. McMillan's report, Dr. Stern concluded that Appellant was not "bright," and that Appellant functioned at a borderline level of intellectual capacity. However, he also concluded that socially, Appellant was "quite well adapted." (DAR4: 158) He also concluded that there was no evidence that would mitigate Appellant's crime. (DAR4: 158) He further concluded that individuals similarly situated with Appellant can function quite well in society. There was no evidence of neurological damage, neither was there evidence to indicate that Appellant had organic brain syndrome. (DAR4: 158-59) Dr. Stern said it was possible that Appellant's borderline intelligence impaired his ability to appreciate requirements of the law and to conform his conduct to the law. (DAR4: 161-62) However, after examining Appellant, Dr. Stern did not find a substantial amount of impairment of Appellant's mental abilities. (DAR4: 163) Specifically, Dr. Stern said, "I felt he knew what he was doing and he could conform to the law." (DAR4:

163)

Dr. Stern also did not find that Appellant was under the influence of extreme mental or emotional disturbance at the time of the offenses, and also did not find that Appellant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. (DAR4: 164-65)

Postconviction Proceedings

Appellant sought postconviction relief in the circuit court, and filed a motion for determination of intellectual disability on November 1, 2004. (PCR7: 901-12)

At the hearing for Appellant's intellectual disability determination, Jeanette Quince, Appellant's sister-in-law, testified that she had known Appellant since he was thirteen years-old. (PCR2: 248-51) She said that Appellant had always been withdrawn, shy, and did not initiate conversations with anyone. (PCR2: 255-56) Although she never saw Appellant drive a vehicle, she acknowledged that Appellant did have a driver's license. (PCR2: 275) She also acknowledged that Appellant was able to bathe himself. (PCR2: 304)

Appellant's brother, Gregory Quince, said that he and Appellant worked together in their uncle's landscaping business. (PCR2: 320-21)

Vivian Charles testified that she was a retired administrator for Volusia County schools. (PCR3: 115) She said that she remembered Appellant from Campbell Junior High School. Specifically, she recalled that Appellant was routinely late to class. She also noted that Appellant was withdrawn and introverted. (PCR3: 348, 359, 364) However, she never had to discipline Appellant. (PCR3: 369) She further stated that her observations of Appellant were limited to a single school year. (PCR3: 378)

Earl Griggs was retired from the school board of Volusia County. He knew Appellant from a physical education class they took together while in school. (PCR3: 386, 392) He described Appellant as a loner, docile, and lethargic. (PCR3: 392-93)

Fred Phillips supervised Appellant while he was on juvenile probation for an arson offense, prior to the offenses in the instant case. According to Mr. Phillips, while Appellant was a little slow, Appellant followed all the directions of his probation and was successfully discharged from his probation. (PCR3: 408-26)

The defense also presented testimony from Dr. Thomas Oakland, a psychologist at the University of Florida. (PCR4: 440-41) Dr. Oakland conducted an evaluation on Appellant, and also spoke with Appellant's family members. (PCR4: 489-90) From

Appellant's family members, Dr. Oakland learned that Appellant was a follower, and that Appellant had an awkward walk. Appellant did not initiate conversations, and rarely engaged in any conversation. (PCR4: 490) Dr. Oakland also noted that Appellant never had a bank account or credit card, never repaired his clothing, and did not handle money well. (PCR4: 491)

In evaluating Appellant, Dr. Oakland relied upon materials written by Dr. James Flynn, the Adaptive Behavior Assessment System II ("ABAS"), the user's guide for mental retardation published by the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and the comprehensive manual for the Scales of Independent Behavior-Revised "SIB-R." (PCR4: 497) Based on all the data provided to him, in a report dated on April 22, 2008, Dr. Oakland concluded that Appellant was mentally retarded. (PCR4: 498)

In Dr. Oakland's report, he noted that in relation to the general population, Appellant received a general adaptive composite score of fifty-two, which placed Appellant in the lower first percentile of the general population. (PCR4: 501) He also noted that Appellant showed diminished adaptive behavior in conceptual, social, and practical skills. (PCR4: 509)

Regarding the Diagnostic and Statistical Manual of Mental

Disorders "DSM," Dr. Oakland made the following findings as to the ten areas of adaptive scales:

	Standard Score
Self-care	4
Communication	3
Health and Safety	3
Self-direction	3
Community Use	2
Home Living	2
Leisure	2
Work	2
Social Relationships	1
Functional Academics	1

(PCR8: 1283) Dr. Oakland explained that the cutoff score for diminished adaptive behavior would be seven or below. (PCR4: 510) Thus, because all of Appellant's scores were below seven, Appellant qualified as displaying diminished adaptive behavior under the DSM. (PCR4: 511)

Additionally, after gathering further information from Appellant's family, Dr. Oakland concluded that Appellant had deficits in adaptive behavior prior to the age of eighteen. (PCR4: 516) Dr. Oakland stated that even though Appellant could

not perform some of the activities in the ABAS assessment due to his incarceration, he still gave Appellant a "zero" on the activities he could not perform, such as maintaining a bank account. (PCR4: 517-20)

In terms of intellectual functioning, Dr. Oakland stated that intelligence is measured by the Wechsler Adult Intelligence Scale ("WAIS"). Subaverage general intellectual functioning is generally defined as an intelligence score that is seventy or below. (PCR4: 545-46)

Dr. Oakland said that three intelligence tests were administered to Appellant. The first WAIS test was administered to Appellant in 1980, and Appellant received a full scale score of 79. The second WAIS test was administered in 1984, and Appellant received a full scale score of 77. The last WAIS test was administered in 2006, and Appellant received a full scale score of 79. (PCR4: 547)

Dr. Oakland described the Flynn Effect as the increasing level of intelligence within a population over time. The general estimate is that for a population, the increase in intelligence is approximately three points per decade or .33 points per year. (PCR4: 559) Dr. Oakland gave the following example of the Flynn Effect:

Let's assume that John Doe was administered the WAIS in 1980,

> and we know that the WAIS was normed[3] not in 1980, but in 1954. So there's a 26-year hiatus between when that test was normed and when it was used. If we take that 26-year period times .33, we arrive at a score of 8.58, which, if rounded, up would be nine. So then we go back to the original score that John Doe received, 79, minus nine. He then has a score of 70.

(PCR4: 565)

Applying the Flynn Effect to Appellant, Dr. Oakland used Appellant's IQ score obtained in 1980, which was a seventy-nine. The WAIS test administered to Appellant in 1980 was normed in 1954, which was a 26-year difference from the time the test was normed to when it was administered in 1980. Dr. Oakland multiplied 26 by .33, which equaled 8.58 IQ points. He rounded the 8.58 points to nine, and subtracted the 9 points from Appellant's IQ score of 79, which equaled 70. (PC4: 587)

However, Dr. Oakland admitted that the Flynn Effect does not automatically apply in every single case to adjust an IQ score. Additionally, if a longitudinal study is being conducted, the Flynn Effect is not applied to revise the IQ score. A longitudinal study is a study comprised of several intelligence tests administered to the same person over a period of time. (PCR4: 572-73) Dr. Oakland admitted that Appellant's case falls into the category of a longitudinal study. (PCR4: 611)

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[3] "Normed" refers to the population characteristics in relation to a particular census track. (PCR4: 578)

Dr. Oakland also stated that the data for the Flynn Effect comes from group data, and that none of the data is based on information from a single individual. Instead, an assumption has to be made that the data from the group would apply to a particular individual. He also acknowledged that there is no scientific validation for the assumption that the group data can be applied to any specific individual. (PCR4: 575-76) The Flynn Effect also cannot be applied to any individual with one-hundred percent certainty. (PCR4: 583)

Moreover, Dr. Oakland had no reason to believe that the 1980 WAIS test was administered improperly. (PCR4: 602) He also said that if the Flynn Effect was applied to the 1984 WAIS test, Appellant's revised score would be 75. Applying the Flynn Effect in 2006, Appellant's revised score would also be 75. (PCR4: 609-11)

On the ABAS form, Dr. Oakland admitted that he scored Appellant as being unable to complete certain activities, even though the reason why Appellant could not complete the activities was because Appellant was incarcerated on death row. For example, if Appellant was being assessed on his ability to eat at a restaurant, Appellant would score a zero, even though Appellant has the capability to eat at a restaurant, if he were not incarcerated. (PCR5: 659) Dr. Oakland also stated that the

ABAS form was not designed for use with incarcerated individuals. (PCR5: 664-65) Also, if Dr. Oakland took the assessment, he would probably receive the same score Appellant received on the ABAS form if he were incarcerated. (PCR5: 680)

Dr. Oakland also stated, "[t]he assessment of adaptive behavior in an incarcerated situation is absurd. We may be forced to do it, but it provides no information except in reference to the person's present behavior in an incarcerated situation." (PCR5: 690) Dr. Oakland also admitted that another doctor looking at the ABAS form would not know whether the individual scored zero on certain functions because the individual was actually unable to perform the activity, or because that person is not allowed to perform the activities due to incarceration. (PCR5: 693-94) He also said that the adaptive assessment performed on Appellant while incarcerated was "moot." (PCR5: 743)

Dr. Oakland also admitted that none of the four doctors who evaluated Appellant in 1980 found that Appellant was mentally retarded.[4] (PCR5: 675) Dr. Oakland also evaluates an individual's adaptive function irrespective of the individual's IQ score, but admitted that IQ scores of 77 and 79 are inconsistent with a

[4] The evaluations were conducted by Dr. Bernard, Dr. Rosario, Dr. McMillan, and Dr. Carrera. (PCR5: 666)

diagnosis of mental retardation. (PCR5: 679, 686)

Dr. Oakland admitted that he had no reason to question the validity of Dr. McClaren's report. (PCR5: 697) Appellant told him that he reads the Quran while in prison, that he had a driver's license, worked as a dishwasher before his incarceration, and sends letters to his family. (PCR5: 717-18)

The State's expert witness, Dr. Harry McClaren, was a licensed psychologist in Florida and Alabama, who specialized in forensic psychology. (PCR6: 786-87) Dr. McClaren evaluated Appellant to determine whether Appellant was mentally retarded. As part of Appellant's evaluation, Dr. McClaren reviewed Appellant's records, in addition to the reports done by Dr. Oakland and Dr. McMillan. (PCR6: 793-94)

Dr. McClaren defined mental retardation as subaverage intellectual functioning two standard deviations or more below the mean. If the mean is 100, the standard deviation is 15. Thus, 70 and below is the range for mental retardation. In addition to subaverage IQ, commensurate deficits of adaptive behavior, with an onset before the age of eighteen, must also be present. All three criteria must be present to establish mental retardation. (PCR6: 795-96)

After reviewing Appellant's records, Dr. McClaren did not find anything to indicate that Appellant's IQ scores were

invalid. At a ninety-five percent confidence interval, the range for Appellant's IQ score of seventy-nine, would be between seventy-five and eighty-three. (PCR6: 819) After reviewing Appellant's records, Dr. McClaren concluded that Appellant was not mentally retarded. (PCR6: 798-800)

As to the first prong, subaverage intellectual functioning, Dr. McClaren said that there is no way to tell whether the Flynn Effect influences a particular IQ score. He said that it is not standard practice to apply the Flynn Effect and subtract the number from the Flynn Effect from the IQ score. (PCR6: 801-02) As to Appellant's case, Dr. McClaren said that it did not appear that the Flynn Effect influenced Appellant's scores, given that there was no downward trajectory in Appellant's IQ scores. (PCR6: 803-04) Dr. McClaren also said that it is not standard practice within the profession to subtract both the standard error of Measurement and the Flynn Effect from an IQ score. (PCR6: 866-67) In his opinion, the Flynn Effect did not apply to Appellant's IQ scores. (PCR6: 808)

As to adaptive deficits, Dr. McClaren said that there is no test or assessment designed for incarcerated individuals. Thus, if an adaptive assessment is performed on an incarcerated individual, the result from the assessment would not be an accurate reflection on the individual's true adaptive abilities,

given the individual's setting. (PCR6: 804-07) As to the adaptive deficit score reflected in Dr. Oakland's report, Dr. McClaren questioned the validity of the score, and said that it was not an accurate reflection of Appellant, in light of Appellant's IQ scores. (PCR6: 817-17) Furthermore, Dr. McClaren said that there was no scientific basis to support Dr. Oakland's retrospective assessment, where Dr. Oakland interviewed Appellant's family members to determine whether Appellant's alleged deficits in adaptive functioning manifested prior to Appellant's eighteenth birthday. He also said that such an assessment is a misuse of the instrument used in the assessment. (PCR6: 842)

At the conclusion of the hearings, the trial court entered an order denying Appellant's motion for determination of intellectual disability, and found that Appellant did not demonstrate that he is intellectually disabled. (PCR14: 2297-2307)

Quince appealed the denial of his for determination of intellectual disability. In affirming the trial court's order denying Appellant's motion, this Court stated:

> Quince has not scored 70 or below on an IQ test. The three IQ tests taken by Quince-each the current version of the Wechsler Adult Intelligence Scale when administered-produced scores of 79 on his 1980 test, 77 on his 1984 test, and 79 on his 2006 test . . . [c]ompetent, substantial evidence supports the trial

> court's conclusion that Quince did not demonstrate that he is mentally retarded by clear and convincing evidence. None of the witnesses testified that they know for certain that Quince had been given an IQ test prior to 1973 or what Quince scored on that test. Therefore, Quince's argument that the trial court erred in not concluding that he had scored below 70 on an IQ test prior to 1973 based on the lay witness testimony lacks merit.

Quince v. State, 116 So. 3d 1262, 1 (Fla. 2012).

Renewed Motion for Determination of Intellectual Disability

On May 21, 2015, Appellant filed a "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution," requesting the circuit court to revisit its prior order denying his motion in light of *Hall v. Florida*.[5] (R1: 63-107) A hearing for Appellant's motion was held on May 9, 2016. (R1: 410)

At the hearing, defense counsel did not present any new evidence in support of Appellant's motion, and only requested the court to review the record and the evidence presented at the previous hearings in light of *Hall*. (R1: 419) Defense counsel also requested that the trial court decide Appellant's motion under the preponderance of the evidence standard, instead of the clear and convincing standard. (R1: 423-424)

The trial judge acknowledged that in Appellant's first motion for determination of intellectual ability, he based his denial of Appellant's motion solely on Appellant's IQ scores,

[5] *Hall v. Florida*, 134 S. Ct. 1986 (2014).

without considering Appellant's evidence regarding his adaptive deficits. (R1: 428-30) The trial court believed that under *Hall*, trial courts were required to review all three prongs of the intellectual disability test, rather than deciding the issue on one particular prong. (R1: 456) The trial court concluded that in light of *Hall*, the court would grant further review of Appellant's claim that he was intellectually disabled. (R1: 465)

On December 29, 2016, the trial court entered an order denying Appellant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution. (R1: 378-92) In denying Appellant's motion, the trial court made the following findings of fact and conclusions of law:

> 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 ("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 scale 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 analysis in *Hall*.
>
> Quince previously argued that it was appropriate for this Court to deduct points from his IQ scores to account for the standard error of measure. The Supreme Court of Florida specifically

> rejected this approach in *Herring*. Likewise, given the consistency in Quince's scores over time, it seems that such a deduction would be inappropriate even if it were in keeping with Florida law. Quince also suggests the deduction of points from his full scale IQ score pursuant to the Flynn Effect. [Sic] The Court conducted a *Frye* hearing and held that the Flynn Effect is an acceptable scientific principal for application in a court of this State. Having had the opportunity to thoroughly review *Herring*, however, the Court is also 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.
>
> For the foregoing reasons, Quince is not entitled to any relief under *Hall*. As the Florida Supreme Court noted, the consensus of experts was that Quince was of "dull normal or borderline intelligence but not intellectually disabled." Quince v. State, 414 So. 2d 185, 186-187 (Fla. 1982). Nothing within Quince's Renewed Motion presents this court with grounds to overturn its earlier findings.

(R1: 389-91)

Appellant filed a timely notice of appeal on January 26, 2017. (R1: 394-96)

SUMMARY OF ARGUMENT

ISSUE I: The trial court correctly denied Appellant's renewed motion for determination of intellectual disability. Although the trial court was not required to examine all three prongs of the intellectual disability test, given that Appellant's IQ scores fell outside the range of intellectual disability even after the standard error of measurement is applied, the trial court did in fact examine all three prongs of the intellectual disability test. Moreover, the evidence showed that Appellant failed to satisfy all three prongs of the intellectual disability test as required under the law. Even after the standard error of measurement is applied to Appellant's IQ scores, his IQ scores fell outside the range for intellectual disability. Also, there was no scientific basis whatsoever to apply the Flynn Effect to Appellant's IQ scores, and expert testimony established that it would be inconsistent with prevailing standards to apply both the Flynn Effect and the standard error of measurement to reduce an IQ score.

Furthermore, Appellant did not establish that he suffers from deficits in adaptive functioning, and that the deficits manifested before the age of eighteen. The adaptive assessments used on Appellant were not designed for use on incarcerated individuals, as the assessments in that setting would not

provide an accurate reflection of an incarcerated individual's true adaptive abilities. Additionally, the retrospective assessment performed by Dr. Oakland to determine the nature of Appellant's adaptive deficits during his minor years had no scientific basis and was inconsistent with prevailing standards. Accordingly, competent substantial evidence existed within the record to support the trial court's denial of Appellant's renewed motion for determination of intellectual disability, and thus Appellant is not entitled to any relief.

ISSUE II: The trial court correctly used the clear and convincing standard in deciding Appellant's intellectual disability claim. There is no language in the *Atkins v. Virginia*, 536 U.S. 304 (2002), decision to indicate that the clear and convincing standard runs afoul of the *Atkins* decision, or any constitutional provision. Instead, the Court left to the states the task of deciding how to comply with the Eighth Amendment's prohibition on the execution of intellectually disabled individuals. The Florida legislature has determined that the clear and convincing standard should be used when deciding issues of intellectual disability. Thus, the trial court correctly used the clear and convincing standard when evaluating Appellant's renewed motion for determination of intellectual disability, and therefore Appellant is not entitled

to any relief.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION UNDER *HALL V. FLORIDA*, 134 S. CT. 1986 (2014) BECAUSE THE EVIDENCE PUT FORTH BY APPELLANT DID NOT SHOW THAT HE IS INTELLECTUALLY DISABLED. (Restated)

Appellant contends that the trial court erred in denying his renewed motion for determination of intellectual disability. Specifically, Appellant contends that: 1) the trial court failed to consider the testimony of the mental health experts; 2) the trial court erred in addressing all three prongs of the intellectual disability test; 3) the trial court misconstrued the application of the standard error of measurement; 4) Appellant demonstrated that he suffers from significantly subaverage intellectual functioning; 5) Appellant suffers deficits in adaptive functioning; 6) Appellant's deficits in adaptive functioning manifested prior to eighteen; and 7) based on an analysis of all three prongs of the intellectual disability test, Appellant showed that he is intellectually disabled.

The State will address each of Appellant's claims and show that the trial court's ruling was not in error, and that Appellant is not entitled to relief.

First, "[i]n reviewing determinations of [intellectual disability], this Court examines the record for whether

competent, substantial evidence supports the determination of the trial court." *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011). Thus, this Court "does not reweigh the evidence or second-guess the circuit court's findings as to the credibility of witnesses." *Brown v. State*, 959 So. 2d 146, 149 (Fla. 2007).

Second, "Florida law includes a three-prong test for intellectual disability as a bar to imposition of the death penalty." *Snelgrove v. State*, 107 So. 3d 242, 252 (Fla. 2012). "A defendant must establish intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016). Additionally, for a defendant to be exempt from the death penalty based on a claim of mental retardation, the defendant bears the burden of establishing "all three criteria of the three-prong standard." *Herring*, 76 So. 3d at 895. Thus, "if the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Salazar*, 188 So. 3d at 812. Furthermore, the defendant must prove each of the three elements by clear and convincing evidence. § 921.137(4), Fla. Stat.

1. The trial court did not disregard the testimony of the

mental health experts.

Appellant first contends that the trial court disregarded the testimony of the mental health experts in denying his motion, and only focused on Appellant's IQ scores. (IB: 36) However, Appellant is incorrect. A review of the record clearly indicates that after denying Appellant's motion initially, the trial court granted further review of Appellant's motion in light of the *Hall* decision.

Appellant initially filed a motion for determination of intellectual disability as a bar to execution on November 1, 2004. After two days of hearings involving lay witnesses and expert testimony, the trial court denied Appellant's motion, because Appellant did not establish that he suffers from significantly subaverage intellectual functioning. The trial court found that Appellant's IQ scores fell outside the range of scores for intellectual disability, and denied Appellant's motion solely on that ground.

On May 15, 2015, Appellant filed a renewed motion for determination of intellectual disability. In support of Appellant's motion, Appellant argued the previous testimony of the lay witnesses, and also argued the testimony of the mental health experts to establish that he is intellectually disabled.

At the hearing on Appellant's renewed motion, the trial

judge specifically stated that when he initially denied Appellant's motion for determination of intellectual disability, he based his decision on Appellant's IQ scores, and did not take into consideration the evidence relating to Appellant's alleged deficits in adaptive functioning. The trial judge also specifically stated that he believed *Hall* required courts to consider all three prongs of the intellectual disability test when deciding issues relating to intellectual disability. Thus, the trial judge ruled that he would grant a second review of Appellant's motion to consider the evidence relating to all three prongs of the intellectual disability test. Appellant elected not to put on any new evidence, and stated that he would rely on the testimony and evidence presented at the previous hearing.

On December 16, 2016, the trial court entered its order denying Appellant's renewed motion for determination of intellectual disability. In denying Appellant's motion, the trial court specifically stated that under *Hall*, there was nothing in Appellant's renewed motion to overturn the court's previous order which found that Appellant is not intellectually disabled.

Thus, based on the aforementioned facts, Appellant's argument that the trial court did not consider the testimony of

the mental health experts is refuted by the record. In arguing that the trial court failed to consider the testimony of the mental health experts, Appellant completely disregards and ignores the procedural history of the case. Indeed, the record shows that the trial court did exactly what Appellant requested, which is to review the evidence and consider all three prongs of the intellectual disability test, which the trial judge believed was required under *Hall*. Thus, as the record shows that the trial court did conduct a further review of all three prongs of the intellectual disability test in light of *Hall*, Appellant's argument is entirely meritless.

Furthermore, Appellant's argument that the testimony by his experts below went unrefuted, and that the evidence overwhelmingly supports his contention that he is intellectually disabled, is not entirely accurate. First, Appellant's IQ scores fell outside the range of scores for intellectually disability. Second, although the State did not put on witnesses to refute Appellant's contention that he suffers from deficits in adaptive functioning and that the deficits manifested before the age of eighteen, the State did not need to put on witnesses to refute Appellant's claims, as the evidence showed that the testimony by Appellant's own witnesses rebutted his claims of deficits in adaptive functioning. Specifically, Dr. Oakland testified that

the very assessments he used to evaluate Appellant should not be used on incarcerated individuals, and if used on incarcerated individuals, the results from the assessments are "moot." Dr. Oakland also admitted that Appellant's IQ scores are inconsistent with a diagnosis of intellectual disability. Hence, Appellant's argument that the testimony from his experts went unrefuted is misguided, given that the testimony from Appellant's own expert essentially rebutted itself.

In sum, Appellant's contention that the trial court disregarded the testimony of the medical experts is false, given that the trial court granted a second review of Appellant's case to specifically examine all three prongs of the intellectual disability test, and after reviewing the record and the arguments in Appellant's motion, the trial court concluded that there was no evidence to overturn its previous order. Furthermore, Appellant's claim that the testimony by the experts was not refuted by the State is baseless, as the testimony by Appellant's own expert Dr. Oakland, rebutted itself. Accordingly, Appellant is not entitled to relief.

2. Even if the trial court was required to address all three prongs of intellectual disability irrespective of Appellant's IQ scores, Appellant's claim that the trial court failed to consider the three prongs of the intellectual disability test is refuted by the record.

Appellant argues that the trial court failed to address all

three prongs of the intellectual disability test in deciding Appellant's renewed motion for determination of intellectual disability, as required under *Hall v. Florida*, 134 S. Ct. 1986 (2014). However, Appellant is incorrect. The United States Supreme Court did not hold that courts are to consider all three prongs of the intellectual disability test in tandem irrespective of an individual's IQ score, and even if courts were required to consider all three prongs, the trial court did consider all three prongs in denying Appellant's motion and thus Appellant is not entitled to relief.

As previously stated, on May 15, 2015, Appellant filed a "Renewed Motion for determination of Intellectual disability as a Bar to Execution." In the motion, Appellant argued that after deducting the standard error of measurement and the Flynn Effect from Appellant's IQ scores, the evidence would show that he suffers from subaverage intellectual functioning. (R1: 73-84) Appellant also argued the previous testimony of various family members and friends of Appellant, to support his contention that he possessed deficits in adaptive behavior, and that the deficits manifested before he turned eighteen years-old. (R1: 84-105)

At the hearing for Appellant's renewed motion, defense counsel advised that they would not present any new evidence in

support of Appellant's motion, and instead requested the trial court to review Appellant's previous testimony in light of *Hall*. Defense counsel argued that *Hall* required the trial court to consider all three prongs of the intellectual disability test, rather than focusing on one prong.

The trial judge stated that when he first denied Appellant's motion, he only considered Appellant's IQ scores, and did not take into consideration the testimony of Appellant's family members and friends, nor did the trial judge examine the other two prongs for the intellectual disability test. The trial judge stated that he believed that *Hall* required courts to consider and examine all three prongs of the intellectual disability test, rather than focusing solely on an individual's IQ scores. Thus, the trial court agreed to review Appellant's motion and previous testimony given at the hearing for Appellant's initial motion for determination of intellectual disability. The trial court later entered an order denying Appellant's renewed motion. Specifically, the trial court stated:

> 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 ("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 scale 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 analysis in *Hall*.
>
> Quince previously argued that it was appropriate for this Court to deduct points from his IQ scores to account for the standard error of measure. The Supreme Court of Florida specifically rejected this approach in *Herring*. Likewise, given the consistency in Quince's scores over time, it seems that such a deduction would be inappropriate even if it were in keeping with Florida law. Quince also suggests the deduction of points from his full scale IQ score pursuant to the Flynn Effect. The Court conducted a *Frye* hearing and held that the Flynn Effect is an acceptable scientific principal for application in a court of this State. Having had the opportunity to thoroughly review *Herring*, however, the Court is also 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.
>
> For the foregoing reasons, Quince is not entitled to any relief under *Hall*. As the Florida Supreme Court noted, the consensus of experts was that Quince was of "dull normal or borderline intelligence but not intellectually disabled." *Quince v. State*, 414 So. 2d 185, 186-187 (Fla. 1982). **Nothing within Quince's Renewed Motion presents this court with grounds to overturn its earlier findings.**

(R1: 389-91)(emphasis added).

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the execution of a intellectually disabled individual violates the Eighth Amendment's prohibition of cruel and unusual punishment. *Id.* at 321. In *Hall v. Florida*,

the United States Supreme Court revisited the issue of intellectual disability, and concluded that Section 921.137, Florida Statutes, was unconstitutional under the Eighth Amendment, because of Florida's strict and rigid rule of defining intellectual disability as requiring an IQ test score of 70 or less. *Id.* at 1994. Specifically, the Court found that Florida's statute was unconstitutional for failing to consider the standard error of measurement in a defendant's IQ score. *See id.* at 2000 ("[b]y failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus.'") Thus, to comply with the Eighth Amendment, the Court stated that "**when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error**, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. (Emphasis added)

However, in *Walls v. State*, 213 So. 2d 340 (Fla. 2016), this Court held that "the *Hall* decision requires courts to consider all prongs of the test in tandem." *Id.* at 346. This Court also stated that "the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive." *Id.* at 346-47; *see also Oats v. State*, 181 So. 3d

457, 467 (Fla. 2015) ("the Supreme Court has now stated that courts must consider all three prongs in determining an intellectual disability, as opposed to relying on just one factor as dispositive.")

Respectfully, however, a review of the *Hall* decision leads to the conclusion that this Court's holding in *Walls* and *Oats* is irreconcilable with *Hall*. In *Hall*, the Court merely held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. The Court did not, however, require trial courts to conduct a "holistic" review of all three prongs when deciding the issue of intellectual disability, irrespective of the defendant's IQ score. Such an interpretation is irreconcilable with *Hall*, because the Supreme Court specifically limited its rule to instances where a defendant's IQ score is between 70 and 75. *See id.* at 2000 (citations omitted) ("an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.")

To further illustrate this point, the Supreme Court again addressed *Hall* and the issue of intellectual disability in *Moore*

v. Texas, 137 S. Ct. 1039 (2017). There, the Court stated, "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability **where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits**." *Id.* at 1050. (Emphasis added).

Thus, respectfully, it is the State's contention that this Court's expansive interpretation of *Hall* is incorrect, as the Supreme Court did not hold that courts are required to conduct a holistic view of the three-prong test for intellectual disability, irrespective of the defendant's IQ score. Instead, the Court's holding was limited to cases where an IQ score falls within the established range for intellectual disability after the standard error of measurement is applied. In such cases, the Court held that courts should consider other evidence of adaptive deficits. However, in cases such as the instant case, *Hall* does not require a holistic review of the three prongs for establishing intellectual disability. Therefore, the State respectfully requests that this Court revisit its holding in light of aforementioned legal authorities.

Nevertheless, even if *Hall* required trial courts to conduct a holistic review of a defendant's intellectual disability claim by considering all three prongs of the test irrespective of the

fact that Appellant's scores did not fall within the margin of error, Appellant would still not be entitled to relief, because the trial court conducted a holistic review as required by this Court in *Walls* and *Oats*.

As previously argued, at the hearing for Appellant's renewed motion for determination of intellectual disability, defense counsel requested the trial court to review the record and previous testimony in light of *Hall*. The trial judge specifically stated that when he decided Appellant's first motion for determination of intellectual disability, he only considered Appellant's IQ scores and disregarded the testimony of Appellant's family members and friends. The trial judge also specifically stated that he believed *Hall* required courts to examine all three prongs of the intellectual disability test. Thus, the trial judge granted further review of Appellant's case in light of *Hall*, to consider the other two prongs of the intellectual disability test. In denying Appellant's renewed motion, the trial court stated that there was no evidence in Appellant's renewed motion, which argued the testimony of Appellant's family members and expert witnesses, to overturn the court's previous order.

Thus, even if *Hall* required courts to examine all three prongs of the intellectual disability test in tandem, Appellant

would still not be entitled to relief. Appellant's argument that the trial court did not consider all three prongs of the test is, respectfully, false and refuted by the record, as Appellant's argument completely disregards the procedural posture and history of the case. The trial court agreed with defense counsel that courts should examine all three prongs of the test, and the trial court specifically granted further review to consider all three prongs of the test. After reviewing Appellant's motion, the record, and previous testimony, the trial court concluded that there was no basis to overturn the court's previous order denying Appellant's intellectual disability claim. Hence, even if *Hall* required courts to examine all three prongs of the intellectual disability test, because the record clearly indicates that the trial court granted further review to examine all three prongs of the test, Appellant's argument is meritless and he is not entitled to relief.

Furthermore, Appellant's claim that the facts of his case are similar to those in *Hall* is misguided. In relying on *Hall*, Appellant misstates the facts of this case by wrongly asserting that like *Hall*, he was denied relief under *Cherry*.[6] However, a

[6] *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007) (held that for

review of the trial court's order clearly shows that Appellant's renewed motion was denied under *Hall*, not *Cherry*. (R1: 391) Also, in *Hall*, after applying the standard error of measurement, some of Hall's IQ scores fell within the range of intellectual disability. *See Hall*, 134 S. Ct. at 1992 (noting that Hall had IQ scores between 71 and 80). Thus, the Court concluded that because some of Hall's scored fell within the range of intellectual disability after the standard error of measurement was applied, Hall should have been allowed to present evidence to show deficits in adaptive functioning. *Id*. at 2000. However, in Appellant's case, even after applying the standard error of measurement, none of Appellant's scores fell within the range of intellectual disability, and unlike *Hall*, Appellant was allowed to present evidence concerning his alleged deficits in adaptive functioning, and the trial court considered the evidence in denying his renewed motion. Thus, *Hall* is completely distinguishable from the facts of the instant case and does not apply.

Likewise, Appellant's reliance on *Walls* is also misplaced. In *Walls*, although the defendant was allowed to present evidence as to all three prongs of the intellectual disability test in a

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an individual to establish intellectual disability, he or she had to have an IQ score of 70 or below).

prior hearing, the trial court did not afford the defendant a new review of the evidence in light of the "holistic review" requirement this Court discerned in *Hall*. *Walls*, 213 So. 3d 340, 345 (Fla. 2016). Thus, this Court concluded that the defendant was entitled to a new evidentiary hearing. *Id*. at 347. Here, unlike *Walls*, not only did the trial court afford Appellant with a new review in light of *Hall*, but the trial court considered the evidence in line with this Court's interpretation that *Hall* requires a holistic review of all three prongs of the intellectual disability test. Accordingly, *Walls* is clearly distinguishable, and because the trial court afforded Appellant with the holistic review that this Court says that *Hall* requires, Appellant is not entitled to any relief.

3. Appellant wrongly asserts that the trial court misconstrued the application of the standard error in determining intellectual disability.

Appellant asserts that the trial court "clearly misconstrued the function of the standard measurement of error in determining whether Quince suffered deficits in general intellectual functioning." (IB: 44) However, the State disagrees. A careful reading of *Hall* leads to the conclusion that the trial court correctly applied the standard error of measurement, and that Appellant misinterprets the *Hall* decision in support of his position.

In denying Appellant's renewed motion, the trial court made the following remarks:

> In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the United States Supreme Court determined that Florida's interpretation of its statute defining intellectual disability was unconstitutional and might result in a violation of *Atkins v. Virginia*, 536 U.S. 304(2002) where the standard error of measurement ("SEM') is not taken into consideration for IQ scores - most commonly from the Wechsler Adult Intelligence Scale (WAIS). In *Hall*, the United States Supreme Court explained why and when the SEM should be considered when evaluating a capital defendant's intellectual disability claim:
>
> > The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. See APA Brief 23 ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range"). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).... [T]his involves a score of 65–75 (70 ± 5)"); APA Brief 23 ("For example, the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error)"). Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a

> complicated endeavor. See Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment 286, 289–291, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013). In addition, 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 functioning.
>
> *Hall v. Florida*, 134 S. Ct. 1986, 1995-96, 188 L. Ed. 2d 1007 (2014).
>
> As a result, a defendant with a full scale score between 70 and 75 must be permitted the opportunity to present, 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.

(R: 388-89).

In *Hall*, the United States Supreme Court specifically stated,

> By failing to take into account the SEM and setting a strict cutoff at 70, Florida "goes against the unanimous professional consensus." APA Brief 15. Neither Florida nor its *amici* point to a single medical professional who supports this cutoff. The DSM–5 repudiates it: "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM–5, at 37. **This statement well captures the Court's independent assessment that an individual with an IQ test score "between 70 and 75 or lower," . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.**

Hall, 134 S. Ct. at 2000. (Emphasis added).

Thus, based on the plain language of *Hall*, the trial court did not misconstrue the Court's holding in *Hall*. The Supreme

Court clearly limited its holding that courts are to consider the other two prongs of the intellectual disability test to cases where the IQ scores fall within the range of intellectual disability, after the standard error of measurement is applied to the IQ scores, which was directly in line with the trial court's interpretation of the standard error of measurement in *Hall*. Accordingly, as the trial court correctly interpreted *Hall* based on a plain reading of the Court's decision, Appellant's argument is without merit.

Furthermore, Appellant's claim that the trial court's interpretation is similar to the cut-off range in *Cherry* which was deemed unconstitutional in *Hall* is also without merit. The reason why the Court limited its holding to individuals with IQ scores between 70 and 75, is because after the standard error of measurement is applied, IQ scores between 70 and 75 would then fall within the range of intellectual disability. For that reason, the Court held that those individuals may show intellectual disability by putting forth additional evidence of adaptive deficits. Accordingly, as the trial court did not misconstrue the application of the standard error of measurement, Appellant is not entitled to relief.

4. Appellant did not show that he suffers from significantly subaverage intellectual functioning.

Appellant argues that he suffers from significantly subaverage intellectual functioning. The State disagrees. The evidence produced at the motion hearing shows that Appellant does not suffer from subaverage intellectual functioning.

First, Section 921.137(1) defines subaverage general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." Along with medical experts, this Court has consistently interpreted this definition as an IQ score consisting of 70 or below. *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009). Hence, an IQ score above 70, even after applying the standard error of measurement, is insufficient to establish subaverage intellectual functioning. *See Wright v. State*, 213 So. 3d 881 (Fla. 2017) (holding that defendant whose IQ scores were above 70 after applying the standard error of measurement failed to show significant subaverage intellectual functioning).

Here, Appellant's IQ scores consisted of 79, 77, and 79. After applying the five-point standard error of measurement to each of Appellant's IQ scores, all of Appellant's IQ scores are still above 70 threshold. Thus, applying *Wright*, Appellant cannot meet the first prong of showing subaverage intellectual

functioning, as his IQ scores, even after applying the standard error of measurement, fall outside the range of intellectual disability.

The State acknowledges that the trial court found that the Flynn Effect was an acceptable scientific principal. However, although Appellant argues that many jurisdictions have approved accounting for the Flynn Effect in assessing IQ scores and thus the Flynn Effect should be applied in an *Atkins* setting, it is important to note that Appellant's own expert, Dr. Oakland, testified that the Flynn Effect should not be applied to individuals like Appellant, who have had multiple examinations over a period of time, also known as a longitudinal study. Furthermore, Dr. Oakland admitted that there is no way of knowing whether the Flynn Effect has impacted any particular individual's IQ score, and the application of the Flynn Effect is based on an expert's own assumption that it applies, instead of any actual data indicating that the Flynn Effect has impacted an individual's IQ score.

Additionally, although Appellant references *Phillips v. State*, 207 So. 3d 212 (Fla. 2016), for the proposition that this Court held that the defendant's IQ score of 76 demonstrated significantly subaverage intelligence, what this Court actually said in reference to the defendant's IQ score, was that the

"score [fell] within the borderline range of intellectual functioning . . . ." *Id.* at 222. However, this Court did not hold that the defendant's IQ score in and of itself constituted significant subaverage intellectual functioning.

Moreover, although Dr. Oakland testified that his decision to apply the Flynn Effect was based on Appellant's low IQ score, Dr. Oakland still testified that the Flynn Effect does not apply to any particular case automatically, and more importantly, as previously stated, Dr. Oakland admitted that the Flynn Effect is based on group data that cannot be applied to any particular individual. He also admitted that there is no way of knowing whether the Flynn Effect has impacted an individual's IQ score. Thus, as Appellant did not show why the Flynn Effect applied in his case, and there was no actual data to demonstrate that the Flynn Effect impacted his IQ score, the trial court correctly rejected the Flynn Effect's application in Appellant's case.

Furthermore, while the *Hall* decision requires trial courts to consider the standard error of measurement for IQ scores that would fall within the intellectual disability range once applied, there is nothing in the opinion to support the proposition that trial courts should first apply the Flynn Effect and then subtract the standard error of measurement from the already-adjusted IQ score. Indeed, Dr. McClaren specifically

testified that it would not be standard practice to do multiple subtractions as Appellant suggests, as that is considered "double-dipping," and not in line with prevailing standards. Accordingly, there is no basis whatsoever to support Appellant's mathematical formula of subtracting both the Flynn Effect and standard error of measurement from his IQ scores, and thus Appellant did not show subaverage intellectual functioning.

Accordingly, as Appellant's IQ scores fell outside the range for intellectual disability even after the standard error of measurement is applied, Appellant did not show that he suffers from significantly subaverage intellectual functioning. Furthermore, there is no basis whatsoever to show that the Flynn Effect impacted Appellant's IQ scores, or that Appellant is entitled to deduct both the standard error of measurement and the Flynn Effect from his IQ scores, as the double deduction would not have been in accordance with prevailing standards. Thus, he is not entitled to relief.

5. Appellant did not show that he suffers from deficits in adaptive functioning.

Appellant argues that the evidence showed that Appellant suffers from deficits in adaptive functioning. The State respectfully disagrees.

Florida Rule of Criminal Procedure 3.203(1) defines

adaptive behavior as "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." This Court has interpreted rule 3.203(1) to mean that the adaptive deficits must exist concurrently with the subaverage intellectual functioning. *Dufour v. State*, 69 So. 3d 235, 248 (Fla. 2011). Furthermore, in reviewing alleged deficits in adaptive behavior, courts determine whether a defendant has deficits in adaptive behavior by examining evidence of a defendant's limitations, in addition to evidence that may rebut those limitations. *Id.* at 250. "If evidence of a strength rebuts evidence of a perceived limitation, that limitation may not serve as justification for finding a deficit in adaptive behavior." *Id.*

At the motion hearing, Dr. Oakland testified that there were no standard assessments for incarcerated individuals like Appellant, and that the assessments he used for Appellant were not appropriate for Appellant, given his incarceration status. Further, Dr. Oakland admitted that he scored Appellant at "zero" on activities that Appellant could have completed, such as eating out at a restaurant, if Appellant were not incarcerated. He also admitted that use of the assessments on Appellant essentially rendered the results as "moot," and that he would

receive the same result as Appellant if he took the assessment.

Moreover, five doctors, Dr. Stern, Dr. Bernard, Dr. Rosario, Dr. McMillan, and Dr. Carrera, all found that Appellant was not intellectually disabled. Furthermore, the evidence also showed that Appellant was able to give a full recount of the circumstances surrounding his incarceration to Dr. Stern, and that prior to incarceration, Appellant had a job as a dishwasher and obtained a driver's license. After Appellant's incarceration, Appellant read the Quran and sent letters home to his family. Appellant's own expert at the penalty phase, Dr. Stern, testified that individuals like Appellant could function quite well in society, and that there was no reason to believe that Appellant was mentally retarded. Accordingly, Appellant failed to show that he suffers from deficits in adaptive functioning. *See Wright*, 213 So. 3d at 881 (holding that Wright failed to show that he suffers from deficits in adaptive functioning, where he was able to give a recount of the events surrounding the offenses, had a job, sent letters to his family, and knew how to drive a car.)

6. Appellant did not establish that his alleged deficits in adaptive functioning manifested before the age of eighteen.

Appellant contends that his deficits in adaptive functioning manifested before the age of eighteen. (IB: 67) The

state respectfully disagrees. Appellant did not meet his burden of proof in showing that his alleged deficits in adaptive functioning manifested before the age of eighteen.

Dr. McClaren said that there was no scientific basis for the retrospective assessment conducted by Dr. Oakland, whereby Dr. Oakland interviewed Appellant's family members to form an opinion as to whether Appellant's alleged adaptive deficits manifested while he was a minor. Moreover, the evidence also showed that while growing up, Appellant worked in his uncle's landscaping business, and also successfully completed juvenile probation for an arson offense. Thus, Appellant did not establish that his alleged adaptive deficits manifested while he was a minor, and therefore he is not entitled to relief.

Although there was testimony from Ms. Paskewitz that Appellant was referred to as intellectually disabled and took special education classes, no records were produced to show that Appellant did in fact take special education courses. Neither was there any documentation showing that Appellant took an intelligence test. Thus, there was no evidence to support Ms. Paskewitz's testimony, and the testimony was based on Ms. Paskewitz's own memory.

Also, although Appellant received a fifty-two on the general adaptive composite assessment, Dr. McClaren questioned

the accuracy of that score, because an individual with a score that low should also have a low IQ score in the range of intellectual disability, which Appellant did not. Thus, the trial court who served as the factfinder weighed the credibility of the witnesses and their testimony, and ultimately concluded that Appellant did not establish this prong of the test. *See Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (stating that the trial court's role is to evaluate the credibility of the witnesses and their testimony, and that appellate courts should not reweigh the trial court's findings on the credibility of witnesses and their testimony). Accordingly, Appellant did not show that his alleged deficits in adaptive functioning manifested before the age of eighteen, and Appellant is not entitled to relief.

7. Even examining all three prongs of the intellectual disability test, Appellant did not show that he is intellectually disabled.

Appellant contends that under an analysis of all three prongs of the intellectual disability test, that he is ineligible for execution. (IB: 70) However, Appellant is incorrect. Even after examining all three prongs of the intellectual disability test, Appellant has failed to meet his burden of showing that he is intellectually disabled under either the clear and convincing standard or the preponderance of

the evidence standard.

As previously argued, *Hall* does not stand for the proposition that trial courts are required to conduct a "holistic" review of all three prongs when deciding the issue of intellectual disability, irrespective of the defendant's IQ score. Instead the holding of *Hall* consists of the following: "in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability **where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.**" *Moore*, 137 S. Ct at 1050. (Emphasis added).

Moreover, as previously argued, for a defendant to be exempt from the death penalty based on a claim of intellectual disability, the defendant bears the burden of establishing "all three criteria of the three-prong standard." *Herring*, 76 So. 3d at 895. Thus, "if the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Salazar*, 188 So. 3d at 812.

As to the first prong, Appellant failed to show that he suffers from subaverage intellectual functioning. The evidence clearly showed that all of Appellant's IQ scores fell outside of the range for intellectual disability, even after the standard

error of measurement was applied.

Furthermore, there was no evidence to suggest that the Flynn Effect had any impact on Appellant's IQ scores. Appellant's own expert, Dr. Oakland, testified that there is no way to tell whether the Flynn Effect has impacted an IQ score. Dr. Oakland also testified that the Flynn Effect should not be applied in cases such as Appellant's, where multiple IQ exams are given over a period of time. Accordingly, Appellant has failed to establish the first prong of the test, which necessarily defeats his entire claim, as he cannot establish all three prongs of the test.

Nevertheless, as to the second prong, concurrent deficits in adaptive behavior, the State submits that Appellant failed to meet this prong as well. Again, Appellant's own expert witness, Dr. Oakland, admitted that there are no standard assessments for use on incarcerated individuals such as Appellant. Dr. Oakland also admitted that the assessments he used to evaluate Appellant were not supposed to be used on incarcerated individuals, and any such use on incarcerated individuals renders the results of the assessment as "moot." Furthermore, the evidence showed that Appellant obtained a driver's license, read the Quran while in prison, and worked as a dishwasher. Accordingly, the State submits that Appellant failed to establish that he suffers from

concurrent deficits in adaptive behavior.

As to the last prong, the State submits that Appellant did not establish that the manifestation of the alleged condition occurred before he turned eighteen-years-old. The evidence showed that there was no scientific basis to support Dr. Oakland's retrospective adaptive assessment, where he interviewed family members to form an opinion about Appellant's alleged adaptive deficits as a minor. Accordingly, the State submits that Appellant failed to establish this prong of the intellectual disability test.

Therefore, competent substantial evidence existed in the record to support the trial's court's denial of Appellant's renewed motion for intellectual disability, and thus, he is not entitled to relief. *See Hampton v. State*, 2017 WL 1739237 at *14 (Fla. May 4, 2017) (holding that competent substantial evidence supported the trial court's conclusion that the defendant was not intellectually disabled, where defendant failed to show subaverage intellectual functioning, concurrent deficits in adaptive functioning, and onset before the age of eighteen.)

II. THE TRIAL COURT CORRECTLY APPLIED THE CLEAR AND CONVINCING STANDARD FOR THE DETERMIANTION OF INTELLECTUAL DISABILITY. (Restated)

At the hearing for Appellant's renewed motion for determination of intellectual disability, Appellant requested that the trial court review his motion using the preponderance of the evidence standard, and argued that the clear and convincing standard violated the Eighth Amendment. The trial judge declined Appellant's request, and ruled that he would decide Appellant's renewed motion using the clear and convincing standard according to Florida statutes.

Appellant asserts that the statute requiring courts to apply the clear and convincing standard is unconstitutional under the Eighth Amendment. The State respectfully disagrees. The clear and convincing standard does not violate the Eighth Amendment, and the trial court correctly applied the standard in deciding Appellant's renewed motion for determination of intellectual disability.

"The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review." *Kasischke v. State*, 991 So. 2d 803, 807 (Fla. 2008) (citations omitted). "There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute's validity must be resolved in favor of

constitutionality." *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012). Accordingly, because statutes are presumed to be constitutional, "the challenging party has the burden to establish the statute's invalidity beyond a reasonable doubt." *Kasischke*, 991 So. 2d at 807.

1. *Atkins* left to the states the task of developing the ways to enforce the constitutional restrictions in capital cases.

It is undisputed that the Court in *Atkins* stated that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution." *Atkins*, 536 U.S. at 321. However, there is no language in the *Atkins* opinion to lead to the conclusion that the clear and convincing standard is contrary to the Court's opinion. In fact, Appellant has not identified any specific language in the *Atkins* opinion to support this contention, nor has Appellant identified any specific language in *Atkins* to support the argument that the clear and convincing standard offends the United States Constitution.

Instead, the Court in *Atkins* stated, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317. (Citations omitted). Accordingly, Section 921.137(4), Florida Statutes provides, "[i]f the court finds, by clear and convincing evidence, that the defendant has an

intellectual disability . . . the court may not impose a sentence of death . . . .” Thus, the standard to be applied in Florida for intellectual disability issues is the clear and convincing standard. Although Appellant argues that other states use the preponderance of the evidence standard, that argument does not mean that the clear and convincing standard is unconstitutional. Indeed, Appellant’s argument has no bearing whatsoever on the constitutionality of the clear and convincing standard. This very point was stated by the United States Supreme Court in *Leland v. Oregon*, 343 U.S. 790 (1952), where the Court held that the beyond a reasonable doubt standard for a defendant’s insanity claim did not violate the constitution. The Court stated:

> Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof . . . **The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process . . . .**

Id. at 798. (Emphasis added). Notably, Georgia’s “beyond a reasonable doubt” standard has not been held to violate *Atkins* or any constitutional provision. *Hill v. Humphrey,* 662 F.3d 1335

(11th Cir. 2011). Accordingly, if the "beyond a reasonable doubt" standard does not violate *Atkins* or any constitutional provisions, Florida's lower standard of clear and convincing evidence likewise does not violate *Atkins*.

2. This court has not classified the clear and convincing standard as a high standard, and even under the preponderance of the evidence standard, the standard would not prevent the execution of an intellectually disabled individual.

Although Appellant classifies the clear and convincing standard as a high standard, this court has not classified the clear and convincing standard as a high standard. In fact, this Court has stated the opposite. This Court has stated that the clear and convincing standard is an "intermediate level of proof [that] entails both a qualitative and quantitative standard." *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995) (citations omitted). This Court has also stated that "[t]he middle level burden of proof of clear and convincing evidence 'strikes a fair balance between the rights of the individual and the legitimate concerns of the state.'" *Westerheide v. State*, 831 So. 2d 93, 109 (Fla. 2002).

Moreover, even if it is true as Appellant contends, that individuals with mild intellectual disability are harder to identify, that argument still without merit. A similar argument made by Appellant was raised and rejected in *Hill*. In responding

to Hill's contention that Georgia's beyond a reasonable doubt standard would result in the execution of intellectually individuals, the Court reasoned that Hill ignored the fact that "*Atkins* disavowed any intent to establish a nationwide procedural or substantive standard for determining mental retardation." *Hill*, 662 F.3d at 1354. The Court also reasoned that Hill's argument exists with any burden of proof. *Id*. at 1355. Specifically, the Court stated:

> [e]very standard of proof allocates some risk of an erroneous factual determination to the defendant and therefore presents some risk that mentally retarded offenders will be executed in violation of *Atkins* . . . Consequently, under Hill's reasoning, even a preponderance of the evidence standard will result in the execution of those offenders that Atkins was designed to protect because it does not eliminate the risk that the trier of fact will conclude that the offender is not mentally retarded when, in fact, he is.

Id.

Similarly, here, Appellant's contention that individuals with mild intellectual disability are harder to identify, does not lead to the conclusion that the clear and convincing standard violates *Atkins*. Indeed, Appellant's argument is based on the science identifying the intellectually disabled individual, not the standard. As recognized by the Court in *Hill*, changing the standard would not change the fact that an individual with mild intellectual disability is harder to identify, nor would it eliminate the risk of executing an

intellectually disabled individual. Accordingly, Appellant's argument that the clear and convincing standard is a high standard, and that it creates a risk that intellectually disabled individuals would be executed is without merit.

3. Other jurisdictions have found that the clear and convincing standard does not violate the Eighth Amendment.

Although this court has yet to address the constitutionality of the clear and convincing standard, a review of other jurisdictions that have addressed the constitutionality of the clear and convincing standard is instructive. In *State v. Grell*, 135 P.3d 696 (Ariz. 2006), one issue before the Court was the constitutionality of the clear and convincing standard. *Id.* at 701. Arizona, like Florida, requires a defendant to prove by clear and convincing evidence that he or she is mentally retarded.[7]

In concluding that the clear and convincing standard does not violate the Eighth Amendment, the Court began its analysis by first noting that the *Atkins* Court declined to specify what procedures should be used identify intellectually disabled individuals. *Id.* The Court noted that the Supreme court based its decision to decline to specify what procedures should be

[7] Arizona uses the term "mental retardation" instead of the term "intellectual disability." A.R.S. § 13-703.02(G).

used due to the lack of consensus regarding which individuals are, in fact, intellectually disabled. *Id*.

The Court further reasoned that Arizona's sentencing scheme permitted a defendant to have a pretrial hearing to determine his or her mental retardation, and if the defendant does not prevail at the pretrial hearing, the defendant may still present the evidence in mitigation of his or her sentence under a lower standard. *Id*. at 704. Thus, the Court concluded that given the procedural protections afforded to capital defendants, the clear and convincing standard did not violate the Eighth Amendment. *Id*. at 705. *See also Hill*, 662 F.3d at 1353 (noting Georgia's procedural protections for capital defendants include the right to a unanimous verdict for a death sentence, the right to a pretrial determination of mental retardation, and the right to present witnesses, cross-examine witnesses).

Applying *Grell*, Florida's clear and convincing standard does not violate the Eighth Amendment. Florida has the same procedural safeguards built into its death sentencing scheme as Arizona. Pursuant to Florida Rule of Criminal Procedure 3.203, a defendant may file a pretrial motion for determination of intellectual disability as a bar to execution. Florida's scheme also permits for the defendant to present expert testimony in support of his or her claim, and also gives the defendant the

right to cross-examine the State's experts. Moreover, a defendant can still present evidence relating to his or her mental state in mitigation under the preponderance of the evidence standard. Hence, applying *Grell*, the clear and convincing standard does not violate the Eighth Amendment.

In sum, the clear and convincing standard does not violate *Atkins* or any constitutional provision. Appellant has not identified any language in the *Atkins* opinion to support the contention that the clear and convincing standard is contrary to *Atkins* or any constitutional provision. The Supreme Court has left to the states the task of determining compliance with *Atkins* and the Eighth Amendment. The Florida legislature has determined that the clear and convincing standard is to be used when deciding issues related to intellectual disability, and there is no legal basis to suggest that the standard permits the execution of intellectually disabled individuals. Accordingly, the trial court correctly used the clear and convincing standard in deciding the merits of Appellant's motion, and thus Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the denial of Appellant's renewed motion for determination of intellectual disability.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2017, a true and correct copy of the foregoing was furnished by electronic mail to Raheela Ahmed, Esq., ahmed@ccmr.state.fl.us; Maria Perinetti, Esq., perinetti@ccmr.state.fl.us; and Lisa Marie Bort, Esq., bort@ccmr.state.fl.us and support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Appellant.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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