IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-330

OMAR BLANCO

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Omar Blanco, Defendant below, will be referred to as "Blanco" or "Appellant" and Respondent, State of Florida, will be referred to as "State". The appellate records referenced:[1]

> Direct Appeal - "ROA for Case Nos. SC60-62,371 and SC60-62,598; *Blanco v. State*, 452 So.2d 520 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985)
>
> Second Postconviction Relief Appeal and Direct Appeal for the Resentencing - "2-PCR/2PP" consolidated cases in Case No. SC60-83,829; Blanco v. State, 702 So.2d 1250 (Fla. 1997) and Direct Appeal of Resentencing in Case No. SC60-85,118; Blanco v. State, 706 So.2d 7 (Fla. 1997), cert. denied, 525 U.S. 837 (1998)
>
> Instant Postconviction Relief Appeal "4-PCR" in case SC17-330

Supplemental records will be identified with an "S" and all will be followed by the appropriate volume and page number(s).

STATEMENT OF THE CASE AND FACTS

Blanco, was convicted and sentenced to death for the first-degree murder of John Ryan and armed burglary which were affirmed on direct appeal. *Blanco v. State*, 452 So.2d 520 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985). On January 31, 1986, after a death warrant was signed, Blanco filed a motion for postconviction relief. After an evidentiary hearing, relief was denied and this Court affirmed. *Blanco v. State*, 507 So.2d 1377

[1] Other records: **First Postconviction Relief Appeal** "1-PCR" for Postconviction and State Habeas records in Case Nos. SC60-68,839 (postconviction appeal) and SC60-68,263 (state habeas corpus); *Blanco v. Wainwright*, 507 So.2d 1377 (Fla. 1987); **Postconviction Relief Appeal following Resentencing** "3-PCR" in case no. SC03-1328; *Blanco v. State*, 963 So.2d 173 (Fla. 2007)

(Fla. 1987). On February 3, 1986, Blanco filed a state habeas corpus petition, which was consolidated with the postconviction appeal, and relief was denied. *Id*.

Following a second death warrant, Appellant filed a petition for writ of habeas corpus with the federal district court, the execution was stayed, and another evidentiary hearing was held resulting in the granting of the writ in part. *Blanco v. Dugger*, 691 F.Supp 308 (S.D. Fla. 1988). On appeal, the federal circuit court affirmed finding that it was proper to deny habeas corpus relief with respect to Blanco's convictions and to grant the writ with respect to the penalty phase ineffective assistance claim. *Blanco v. Singletary*, 943 F.2d 1477, 1510 (11th Cir. 1991). The certiorari petitions were denied and the case was set for resentencing. *Blanco v. Singletary*, 504 U.S. 943 (1992); *Singletary v. Blanco*, 504 U.S. 946 (1992). During resentencing, Blanco filed a successive postconviction relief motion claiming newly discovered evidence. Relief was denied and this Court affirmed. *Blanco v. State*, 702 So.2d 1250, 1251 (Fla. 1997).

On appeal following resentencing, this Court provided:

> The facts are set out fully in our opinion on direct appeal. *See Blanco v. State*, 452 So.2d 520 (Fla. 1984). Omar Blanco broke into John Ryan's home at 11 p.m., January 14, 1982, struggled with Ryan, and shot him. As Ryan fell onto a bed, Blanco shot him six more times. Blanco was arrested a few minutes later and was identified at the scene by a neighbor. Blanco's

> wallet, driver's license, and keys were found at the scene. The next day, he was identified by Ryan's niece, Thalia, who had confronted him in her lighted bedroom for several minutes just before the shooting. (It was Thalia's bed that Ryan fell onto when he was first shot, and she was lying underneath him when he was shot six more times.)
>
> * * *
>
> At resentencing, the State presented the testimony of the victim's niece (Thalia) and that of numerous officers and forensic experts. Blanco, on the other hand, presented the testimony of ten lay witnesses, the statements of his mother and father, and the testimony of two mental health experts. The jury recommended death by a ten-to-two vote and the trial court imposed the death sentence based on two aggravating circumstances, one statutory mitigating circumstance,[FN6] and eleven nonstatutory mitigating circumstances.[FN7]
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> _____
>
> FN6 The court found impaired capacity.
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> FN7 The court found the following: *** 3) dull intelligence; *** 5) organic brain damage; ****

Blanco v. State, 706 So.2d 7, 8-9 (Fla. 1997).

At resentencing, Blanco presented multiple lay witnesses and two mental health experts. *Blanco v. State*, 706 So.2d 7, 8-9 (Fla. 1997). Following the jury's ten to two death recommendation, the court imposed a death sentence upon finding the prior violent felony aggravator and merged aggravators of pecuniary gain with felony murder (burglary) outweighed the statutory mitigatory of "impaired capacity" with eleven non-statutory mitigators. As found in the re-sentencing record on appeal in case no. 60-85118, in response to the to the prosecutor's question whether Appellant was "retarded," Dr.

Maulion, the defense psychiatrist, replied Appellant "is what we call dull normal" and the associated IQ was 75 – 80. (2-PCR/2PP.42 1834-35) The defense licensed psychologist, Dr. Bukstel, reported that Blanco fell into the category of "dull normal" now identified as the "range just above the mentally deficiency range." Continuing, Dr. Bukstel noted that considering the standard error of measurement, Blanco fell closer to the "low average range." The WAIS-R results put Blanco in the 8th or 9th percentile range. (2-PCR/2PP.43 1921-22). On direct appeal, this Court affirmed. *Blanco*, 706 So.2d 7 and on October 5, 1998, Blanco's sentence became final with denial of certiorari. *Blanco v. Florida*, 525 U.S. 837 (1998).

Next, he unsuccessfully sought collateral relief from both the state and federal courts. Of interest here, an Intellectually Disabled ("ID") was not raised. *See Blanco v. State*, 963 So.2d 173 (Fla. 2007). (affirming denial of postconviction relief motion and denying the state habeas petition); *Blanco v. Secretary, Florida Department of Corrections*, 688 F.3d 1211 (11th Cir. 2012), (affirming federal district court's denial of federal habeas corpus petition after evidentiary hearing), *cert. denied*, 133 S.Ct. 1857 (2013).

In May 2015, Appellant filed a successive postconviction motion addressed to *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 134 S.Ct. 1986 (2014) (4-PCR at 16-40).

Following the issuance of *Hurst v. Florida*, 136 S.Ct. 616 (2016), Appellant filed an amended postconviction relief motion. (4-PCR 319-35). Eventually, based on this Court's order in *Antonio Rodríguez v. State*, case no. SC15-1278 (Fla. Aug. 9, 2016), postconviction relief was denied orally and in a separate written order (4-PCR 530-31 635-43; S4-PCR 673-74). On September 22, 2017, this Court ordered limited briefing on the *Hurst* issue and later ordered briefing on the non-*Hurst* issue. The State's Answer follows.

SUMMARY OF THE ARGUMENT

Issue I – Although Blanco's postconviction relief motion following re-sentencing was not decided until July 1, 2003, well after *Atkins* was announced, Blanco did not raise his ID as an issue in state court or in the subsequent federal litigation. Blanco's ID claim is time-barred as a result. His postconviction appeal was pending at the time *Atkins* and Rule 3.203(4)(E) Fla. R. Crim. P. (2004) were issued. Blanco had until November 30, 2004 to file his ID claim, yet he chose not to. The time-bar should be upheld as was done in *Antonio Rodríguez v. State*, case no. SC15-1278 (Fla. Aug. 9, 2016).

This Court should reject Blanco's assertion that his factual allegations must be accepted as true when considering the *Hall* issue especially in light of the fact it has not been shown that his latest testing meets the prerequisites of the

statute. Moreover, prior defense experts testified that Blanco's full-scale scores were 75 and 80 and he was "dull normal." The issue before this Court is the appropriate application of a time-bar, thus, the allegations supporting his claim should not enter the analysis until the timeliness of the motion is determined.

ARGUMENT

ISSUE I BLANCO'S CLAIM IS TIME-BARRED (RESTATED)

It is Blanco's claim that he is intellectually disabled, and thus, cannot be executed pursuant to *Atkins* and that this constitutional claim did not become available to him until Hall was decided and this Court made *Hall* retroactive in *Walls v. State*, 213 So.3d 340 (Fla. 2016). Contrary to Appellant's position, this Court gave capital defendant's whose cases were pending on postconviction review until November 30, 2004 to bring forward an *Atkins* claim. Subsequently, those who did not bring forth a claim before that date were time-barred from doing so thereafter. *Rodriguez*, case no. SC15-1278 (Fla. Aug. 9, 2016). *Cf. Walls*, (J. Pariente concurrence, distinguishing *Walls* and *Rodriguez*, Case No. SC15-1278 (Fla. Aug. 9, 2016). The suggestion that *Hall* with its recognition that the Standard Error of Measurement ("SEM") must be considered when determining whether a person is ID or deserving of an evidentiary hearing reopens an ID claim for a defendant who

chose not to exercise his right within the appropriate time-frame has been rejected. The time-bar found by the trial court based on *Rodriguez* should be affirmed.

A. Standard of Review - In *Hunter v. State*, 29 So.3d 256 (Fla. 2008) this Court recognized: "Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." "Because a postconviction court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Marek v. State*, 8 So.3d 1123, 1127 (Fla. 2009).

B. Trial Court's Order - Although initially an evidentiary hearing on the ID claim was granted, once this Court decided *Rodríguez*, case no. SC15-1278, the postconviction court granted the State's Motion for Rehearing and denied relief summarily. In the order, the postconviction court reasoned:

> After careful consideration, the Court finds that granting rehearing is appropriate in light of *Rodriguez*. Despite the Florida Supreme Court's recognition that *Hall v. Florida*, 134 S. Ct. 1986 (2014) is retroactive, the Court has since limited the class of Defendants who may avail themselves of this remedy. In *Rodriguez v. State*, in an unpublished order, the high Court subsequently determined that the Defendant's failure to raise an intellectual disability claim, post-*Atkins*, resulted in his claim being time-barred. The Court did not extend *Hall* to include

> defendants who had never before raised an intellectual disability claim. In following the guidance of *Rodriguez*, the Court now determines that the Defendant's claim is time-barred and dispenses with the need for an ev1dentiary hearing. *See also Walls v. State*, 41 Fla. L. Weekly S466 (Fla. Oct. 20, 2016) (concurring op., Justice Pariente).

(4-PCR.3 530-31)

C. Allegations of Intellectual Disability – Blanco asserts this Court must accept his allegations of ID as true in determining whether he is entitled to an evidentiary hearing. While that is that standard when reviewing a summary denial of relief on the merits, *Hunter*, the postconviction court did not reach the merits of the claim. Instead, it reviewed the record and determined Blanco had not carried his burden of establishing entitlement to relief on a successive postconviction relief motion where he had not raised his *Atkins* claim in a timely manner. This was a pure issue of law; one which did not address the merits. The postconviction court following this Court's order on a similar claim and determined Blanco was time-barred. As such, the State will not discuss the factual allegations Blanco has set forth in his brief unless this Court directs the State to comment on those untested allegations.[2]

[2] However, the State will remind this Court that during the resentencing, neither defense expert found ID. Dr. Maulion reported that Blanco "is what we call dull normal" with an associated IQ of 75–80. (2-PCR/2PP.42 1834-35) and Dr. Bukstel,

D. The *Atkins* Claim is Time-barred - On May 26, 2015, Blanco filed his Successive Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend where he pointed to *Atkins* and *Hall* in support if his claim of ID and ineligibility for the death penalty under Rule 3.203 Fla. R. Crim. P. (4-PCR.1 29 ¶24). On September 15, 1999, Blanco filed his motion for postconviction relief and on May 29, 2001, he filed his Amended Motion. (3-PCR.2 204-303). While still litigating his Rule 3.851 motion following resentencing, on May 20, 2002, *Atkins v. Virginia*, 536 U.S. 304 (2002) issued wherein the United States Supreme Court held that it is unconstitutional to execute an intellectually disabled person. Blanco did not seek to add an *Atkins* claim. In was not until July 1, 2003, that Blanco's postconviction relief motion was denied summarily. (3-

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reported that Blanco fell into the category of "dull normal" now identified as the "range just above the mentally deficiency range." Continuing, Dr. Bukstel noted that taking into account the SEM, Appellant fell closer to the "low average range." (2-PCR/2PP.43 1921-22). Now, Blanco alleges that the latest WAIS-III (Mexican version) yielded another 75 full scale score. It has not been shown that the latest testing meets the parameters of §921.137, Fla. Stat. However, even were this Court to accept the three scores and average them, the resulting score would be approximately a 77 falling above an ID range. Multiple IQ scores over a span of years are a more accurate indicator of actual IQ than the SEM *Hall*, 134 S.Ct. at 2011 & n.13 (Alito, J., dissenting) (noting "well-accepted view is that multiple consistent scores establish a much higher degree of confidence"). Considering all three IQ scores does not result in a valid claim of subaverage intellectual functioning. It remains the law that the failure to meet any one prong supports a summary denial. See, *Quince v. State*, 2018 WL 458942 (Fla. Jan. 18, 2018); *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017).

PCR.3 535-47). Blanco appealed and on April 12, 2007, this Court affirmed. *Blanco*, 963 So.2d at 173. On the same day, this Court decided *Cherry v. State*, 959 So.2d 702 (Fla. 2007) and set out the bright-line 70 IQ cutoff for ID claims.

Atkins, prompted promulgation of Rule 3.203 in *Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004). Rule 3.203(d)(4)(E), relevant here and as originally adopted provided Blanco the ability to raise an *Atkins* claim.[3] Again, Blanco did ***not*** avail himself of Rule 3.203.

On May 27, 2014 *Hall v. Florida*, 134 S.Ct. 1986 (2014) was decided and the United States Supreme Court held Florida's interpretation of its statute setting a bright-line cut off

[3] (E) If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded.

(F) If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004. The circuit court may reduce this time period and expedite the proceedings if the circuit court determines that such action is necessary.

for IQ when defining ID was unconstitutional and may result in a violation of *Atkins*. The essence of *Hall* is that the standard error of measurement ("SEM") for attained Wechsler Intelligence Scale for Adults ("WAIS") IQ scores must be considered. Where the attained IQ score falls between 71 and 75, the inmate should be provided an opportunity to present evidence on the remaining prongs of an ID analysis.

In *Rodriguez*, this Court pointed to Rule 3.851 and the 2004 promulgation of Rule 3.203 before concluding that a capital defendant is time-barred from raising an ID claim under *Hall* where he failed to raise a timely claim under *Atkins*. Blanco's case became final on October 5, 1998, when certiorari was denied following affirmance of his resentencing. *See Blanco v. Florida*, 525 U.S. 837 (1998). Between 1999 and 2007, Blanco litigated his resentencing Rule 3.851 motion and subsequent appeal. *See Blanco v. State*, 963 So.2d 173 (Fla. 2007), *cert. denied, Blanco v. Florida*, 552 U.S. 1117 (2008). *Atkins* was decided on June 20, 2002 while Blanco's original postconviction relief motion was pending; Blanco's Rule 3.851 motion was not decided until July 1, 2003. A postconviction claim cannot be raised in a successive Rule 3.851 motion where the basis for raising the claim was available at the time an earlier motion for postconviction relief was pending. *See Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994).

Critical to this Court's *Rodriguez* decision was the fact that the capital defendant's postconviction litigation was pending when Rule 3.203 was promulgated, yet he, like Blanco, did not file an *Atkins* claim. It was not until *Hall* was decided that Rodriguez, like Blanco, filed a successive motion. This Court affirmed the summary denial in *Rodriguez* stating:

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

Rodriguez, case no. SC15-1278 at 1-2.

Further support for the denial of relief comes from Justice Pariente's concurrence distinguishing *Walls* and *Rodriguez* and reiterating: "As this Court determined in an unpublished Order in the case of Rodriguez v. State, those defendants who did not timely raise a claim under *Atkins v. Virginia*, 536 U.S. 304, 122

S.Ct. 2242, 153 L.Ed.2d 335 (2002), and pursuant to Florida Rule of Criminal Procedure 3.203, should not be entitled to relief under *Hall*. *Rodriguez*, No. SC15–1278, 2016 WL 4194776 (Fla. Aug. 9, 2016)." *Walls v. State*, 213 So.3d 340, 348 (Fla. 2016), *reh'g denied*, SC15-1449, 2017 WL 74847 (Fla. Jan. 9, 2017), and *cert. denied sub nom. Florida v. Walls*, 138 S. Ct. 165 (2017). Walls had been denied relief initially because his IQ was a 72, above the *Cherry* bright line cutoff score. As a result, Walls was entitled to relief after *Hall*. Blanco, like Rodriguez, did not pursue relief under *Atkins* or Rule 3.203 in a timely manner, thus, like Rodriguez, Blanco, "should not be entitled to relief under *Hall*." *Walls*, 213 So.3d at 348 (Pariente, J. concurring).

As noted above, Blanco's resentencing Rule 3.851 motion was denied on or about July 1, 2003, and his appeal to this Court was pending on October 1, 2004 when Rule 3.203 when into effect. See *Blanco*, 963 So.2d at 173. As a result, Blanco had until November 30, 2004 to file the necessary pleadings to raise an ID claim under *Atkins* and Rule 3.203, however, he did not file a claim at that time. Instead, Blanco ***ignored*** Rule 3.203, waiting eleven years, until 2015, to file an ID claim. Under *Rodriguez*, Blanco is time-barred and he has no excuse under the law to lift the time bar. Rodriguez was applied properly here.

Blanco suggests *Rodriguez* was decided wrongly and that given the *Atkins* claim is an Eighth Amendment issue, he may not

be time-barred. However, such is not well taken as it was Blanco's inaction which caused him to be time-barred here. Blanco has not offered a case where a defendant is permitted to sit on his constitutional claim and raise it irrespective of time limits. In deciding *Rodriguez*, this Court rejected the suggestion that *Hall* was an avenue to raise an *Atkins* claim or a stand-alone claim under *Hall*. *Rodriguez,* slip at 1-2. *Hall* is nothing more than a refinement of the constitutional right established in *Atkins*. The pith of *Rodriguez* is that *Hall* does not breathe life into an ID claim not raised in a timely manner, and thus, does ***not*** provide Blanco a pathway for a successive postconviction motion under Rule 3.851(d)(2)(B) or Rule 3.203.

Again, this Court in *Rodriguez*, as part of its exclusive appellate jurisdiction of capital cases, determined that those capital defendants whose postconviction cases were pending on October 1, 2004, but failed to raise an *Atkins* claim within sixty (60) days of that date, are time-barred from raising such claims even in light of *Hall* and irrespective of *Cherry*. Blanco is similarly situated to Rodriguez; Blanco's postconviction case was pending on October 1, 2004, but he did not file a motion claiming he was ID under *Atkins*. *Rodriguez* was followed in denying relief and this Court should affirm.

E. The Time Bar Does Not Violate the Eighth Amendment – Blanco asserts he is ID, thus, imposing the time bar would

violate the Eighth Amendment. He equates his ID claim with the bar against executing those who committed murder before age eighteen and asserts he cannot waive the prohibition on executing the intellectually disabled. Blanco's claim is circular. He would have this Court assume he in ID, find he cannot be executed, thus, he cannot be time-barred from proving he is ID. Blanco's suggestion that his Eighth Amendment claim may never be waived is not the law. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (finding defendant's choice of execution by lethal gas after such execution method was found unconstitutional resulted in a waiver of his constitutional claim; rejecting suggestion that "Eighth Amendment protections cannot be waived in the capital context"). The relief Blanco seeks, excusing his failure to raise an ID claim within the time-frame provided in 2004 under Rule 3.203, would allow defendants to sit on their claims, undermine the finality of cases, and eviscerate completely the notion timely litigation.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the denial of postconviction relief sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal filing system to: Ira W. Still, III, Esq., at ira@istilldefendliberty.com this 11th day of April 2018.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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