NO. _____

In the Supreme Court of the United States

KENNETH DARCELL QUINCE A/K/A RASIKH ABDUL-HAKIM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTIONS PRESENTED

QUESTION ONE

Did Florida violate *Atkins v. Virginia*, *Hall v. Florida*, *Moore v. Texas*, and the Eighth and Fourteenth Amendments of the United States Constitution when it disregarded the opinion(s) of the medical community in accepting the Flynn effect as a valid correction of intelligence quotient scores formulated from outdated tests, and further disregarded the medical diagnostic framework for intellectual disability by ignoring the evidence of deficits in adaptive functioning manifested prior to the age of 18, thus finding Kenneth Darcell Quince eligible to be executed?

QUESTION TWO

Whether Florida's statutory mandate that Kenneth Darcell Quince prove all three prongs to determine intellectual disability by clear and convincing evidence creates a real danger of executing the intellectually disabled in violation of *Atkins v. Virginia, Cooper v. Oklahoma*, *Medina v. California*, and the Eighth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

All parties appear in the caption of the case.

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OPINION BELOW

The opinion of the Supreme Court of Florida was rendered on April 12, 2018, and is reported as *Quince v. State*, 241 So. 3d 58 (Fla. 2018) and is reprinted in *Appendix A*.

JURISDICTION

The Supreme Court of Florida entered its initial opinion on January 18, 2018. *See Quince v. State*, 2018 WL 458942 (Fla. 2018) (unreported); *Appendix E.* The State filed a motion for clarification to correct the Supreme Court of Florida's recitation of Quince's reported Intelligence Quotient ("IQ") scores. *Appendix D.* Quince filed a motion for rehearing which in part concurred that the Supreme Court of Florida had recited the wrong scores in its opinion, and also directed the court to additional corrections and arguments. *Appendix C.* On April 12, 2018, the Supreme Court of Florida granted the State's motion for clarification and denied Quince's motion for rehearing. *See Quince v. State*, 2018 WL 1783084 (Fla. 2018) (unreported); *Appendix B.* The Supreme Court of Florida issued a revised opinion on April 12, 2018. *See Quince*, 241 So. 3d 58; *Appendix A.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

The Fourteenth Amendment to the Constitution of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

Section 921.137, Florida Statutes Annotated, entitled "Imposition of the death sentence upon an intellectually disabled defendant prohibited."

> (1) As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

FLA. STAT. ANN. § 921.137.

STATEMENT OF THE CASE

INTRODUCTION

Kenneth Darcell Quince ("Quince") is an almost 60 year old intellectually disabled[1] man who is incarcerated in the solitary confinement of death row in Florida. In 1980, medical experts described Quince as a man of borderline or low intelligence, not bright, possessing the intelligence of a minor, and of borderline mental retardation. Lay witnesses[2] gave details as to Quince's current and prior to the age of 18 adaptive functioning deficits. Even though Quince's intellectual deficiencies have been evident since 1980 (before *Atkins*[3] and *Hall*[4] were decided), Florida has determined that Quince should be executed because IQ numbers are more important than a complete medical and psychiatric assessment of his condition. Quince presented strong and uncontroverted medical evidence on all three prongs to show that he is mildly intellectually disabled under current medical standards[5] and ineligible for execution. *See* Fla. R. Crim. P. 3.203;[6] *see* FLA. STAT. ANN. § 921.137.[7]

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[1] In earlier litigation, the terms "mentally retarded" or "mental retardation" were used in place of the terms "intellectually disabled" or "intellectually disability." Wherever possible, undersigned counsel will use "intellectually disabled" or "intellectual disability." However, for the purpose of these proceedings it is counsel's intention that these terms reference the exact same condition. *See also Hall v. Florida*, 134 S. Ct. 1986, 1990, 188 L. Ed. 2d 1007 (2014) (citing *Rosa's Law*, PL 111-256, October 5, 2010, 124 Stat. 2643; and citing Schalock et al., The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007)).

[2] Lay witness evidence presented at the *Atkins* motion hearing consisted of testimony from Quince's family, school teachers, a school psychologist and a Department of Juvenile Justice supervisor. *See infra* p.5-14.

[3] *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

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

[5] This Court recognized the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), publisher of the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), as the authorities for establishing the diagnostic criteria for intellectual disability. *See Atkins*, 536 U.S. at n. 3. The current medical standards are governed by the DSM and the manual of the American Association on Intellectual and Developmental Disabilities ("AAIDD") (renamed from AAMR).

[6] Fla. R. Crim. P. 3.203 requires that, for a showing of intellectual disability, the defendant must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

[7] Florida's statute requires that for a showing of intellectual disability, the defendant must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive

TRIAL COURT PROCEEDINGS AND INITIAL POSTCONVICTION PROCEEDINGS

On January 17, 1980, Quince was indicted in the Circuit Court of the Seventh Judicial Circuit of the State of Florida in and for Volusia County with first-degree murder, sexual battery (this count was later dismissed by the trial court), and burglary of an occupied dwelling. A mere six months and 25 days after the indictment, Quince pled guilty to first-degree felony murder and burglary on August 11, 1980. Quince waived his right to an advisory jury recommendation.[8] After a sentencing hearing, the trial court independently imposed a sentence of death on October 21, 1980. The convictions and death sentence were affirmed on direct appeal. *Quince v. State*, 414 So. 2d 185 (Fla. 1982), *cert. denied,* 459 U.S. 895, 103 S. Ct. 192, 74 L. Ed. 2d 155 (1982). Quince filed a motion for postconviction relief which was denied; the denial was affirmed on appeal. *See Quince v. State*, 477 So. 2d 535 (Fla. 1985), *cert. denied,* 475 U.S. 1132, 106 S. Ct. 1662, 90 L. Ed. 2d 204 (1986). Quince then filed two successive motions for postconviction relief, both of which were denied and affirmed on appeal. *See Quince v. State*, 592 So. 2d 669 (Fla. 1992); *see Quince v. State,* 732 So. 2d 1059 (Fla. 1999).

SUMMARY OF THE MENTAL HEALTH/EXPERT EVIDENCE PRESENTED AT THE TRIAL PROCEEDINGS

The history of Quince's mental health evaluations are pertinent for this Court's review. Prior to his plea, Quince was evaluated by George W. Barnard, M.D. (pursuant to a defense

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behavior and manifested during the period from conception to age 18." "Significantly subaverage general intellectual functioning" is defined 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" or "performance that is two or more standard deviations from the mean score on a standardized intelligence test authorized by the Department of Children and Family Services in rule 65G-4.011 of the Florida Administrative Code." "Adaptive behavior" is defined 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."

[8] Quince is currently litigating the constitutionality of his death sentence as he was sentenced under FLA. STAT. ANN. § 921.141 (1979) which has been found to unconstitutional by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See Quince v. Florida*, Supreme Court Case No. 17-9401.

motion), Edward J. Rossario, M.D. (court-appointed) and Frank Carrera, III, M.D. (court appointed). The three doctors were specifically and solely appointed to determine Quince's competency and sanity at the time of the offense. Dr. Barnard opined that "[c]linically [Quince] is judged to be of ***dull normal level of intelligence***" and of "borderline level intelligence." Similarly, Dr. Rossario opined that Quince's "intelligence can be described as ***slightly below average***." Drs. Barnard, Rossario, and Carrera ***did not do*** any standardized Intelligence Quotient (IQ) testing on Quince. Dr. Ann McMillan was the psychologist who was appointed by the trial court to examine Quince for the presence of mental mitigating factors. Dr. McMillan met with Quince on October 2, 1980, and administered the Minnesota Multiphasic Personality Test and the ***Wechsler Adult Intelligence Test*** on him. Dr. McMillan ***opined that Quince suffered from borderline mental retardation, severe specific learning disability,*** and neurological impairment. Dr. McMillan further opined that "Quince has ***permanent learning and judgment disability and limited ability to perceive the consequences of his actions***." Dr. McMillan testified that Quince had a "***low intelligence score, which is functioning on an eleven-year-old basis.***" Dr. Stern, a specialist in psychiatry, examined Quince on October 13, 1980. Dr. Stern performed only a mental status examination on Quince to check his mental state to see if he was psychiatrically insane or sane. Like Dr. McMillan, Dr. Stern testified that Quince "***is not a bright gentleman***" and that Quince "is functioning at ***a borderline level of intellectual capability***." As early as in 1980, there were obvious red flags that Quince had severe deficits in his intellectual functioning.

ATKINS – RELATED POSTCONVICTION PROCEEDINGS.

On or about November 1, 2004, after this Court's decision in *Atkins*, Quince filed a third successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 as well as Rule 3.203 ("*Atkins* motion"). The *Atkins* motion court granted an evidentiary hearing

on Quince's *Atkins* motion. The hearing was conducted on May 12, 2008, May 15, 2008, May 16, 2008, and November 3, 2008. Of note, the lower circuit court conducted a full *Frye*[9] hearing and ***found that the Flynn effect*[10] *is an acceptable scientific principal for application in a court of Florida***. The *Atkins* motion court entered a written final order denying Quince relief and not finding him mentally retarded on November 7, 2011. The order denying Quince's *Atkins* motion was affirmed on appeal by the Supreme Court of Florida. *See Quince v. State*, 116 So. 3d 1262 (Fla. 2012) (Table), *cert. denied,* 134 S. Ct. 2695 (Mem) (2014). The *Atkins* motion court and the Supreme Court of Florida denied Quince relief because none of his IQ scores were below the *Cherry*[11] bright-line cutoff of 70. *See Quince*, 116 So. 3d 1262. Further, the *Atkins* motion court and the Supreme Court of Florida made this determination by subjecting Quince to a clear and convincing burden. *See id.*

SUMMARY OF THE MENTAL HEALTH/EXPERT EVIDENCE PRESENTED AT THE *ATKINS* - RELATED POSTCONVICTION PROCEEDINGS

Thomas Oakland, Ph.D., [12]a licensed psychologist and professor in the Department of Educational Psychology at the University of Florida, evaluated Quince from 2007 to 2008, and opined that Quince is mentally retarded. Forensic psychologist Robert M. Berland, Ph.D.'s 2005 report was reproduced for the court in support of Quince's *Atkins*' motion. Both Dr. Oakland and

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[9] *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923). The Supreme Court of Florida adopted the *Frye* standard for evaluating expert testimony in 1985. *See Bundy v. State*, 471 So. 2d 9, 13 (Fla. 1985) ("Under *Frye* the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that ***the results are scientifically reliable as accurate***.")

[10] The Flynn effect is a scientific correction applied to IQ scores and is found to be in the DSM-V. It will be discussed in detail below. *See infra* p.17-23.

[11] *Cherry v. State*, 959 So. 2d 702 (Fla. 2007) *abrogated by Hall v. Florida*, 134 S. Ct. 1986.

[12] During his almost forty years of work as a psychologist, Dr. Oakland has developed a renowned specialty in the area of mental retardation, as well as the area of test development. Further, Dr. Oakland's expertise with test development includes being one of the developers of the Adaptive Behavior Assessment Systems I & II (ABAS I & II) and being on the development teams for revising numerous intelligence tests, including the WAIS-III.

Dr. Berland evaluated Quince under all three prongs of the current medical diagnostic framework governed by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV") to determine Quince's intellectually disability.

In following current medical and clinical practices, Dr. Oakland correctly defined mental retardation generally "in terms of diminished intellectual ability and adaptive behavior occurring prior to the age of 18." Dr. Oakland further explained that the DSM-IV definition for mental retardation is a three part definition requiring "significantly subaverage intellectual functioning," "concurrent deficits or impairments in present adaptive functioning," and "this condition must be prior to the age of 18." Dr. Oakland confirmed that these three diagnostic criteria ***must*** exist to diagnose mental retardation. Dr. Oakland relied on clinical and medical authorities which included materials written by Dr. James Flynn; the ABAS II, Clinical Use and Interpretation; the User's Guide for Mental Retardation published by the AAIDD, the Comprehensive Manual for the Scales of Independent Behavior – Revised ("SIB-R"), and the Comprehensive Manual for the ABAS II. Dr. Oakland also reviewed Quince's historical records and interviewed family members, teachers, and a correctional officer at death row.[13]

With regard to prong one, Dr. Oakland relied upon the Flynn effect in making the determination that Quince possessed subaverage general intellectual functioning for mental retardation. Dr. Oakland testified that the Flynn effect "refers to the increasing level of intelligence

[13] Dr. Oakland completed a review of Quince's records that included Quince's school records; Quince's sister, Brenda's, school records; Quince's medical records; Dr. Stern's testimony; Dr. McMillan's evaluation; Dr. Berland's report; the record on appeal of the trial proceedings; Quince's Department of Corrections records; and the testimony of a number of witnesses that included Linda Stovel, Mary Quince, Valerie Quince, Jean Smith, Clara Edwards, Phalesia Canidate, and Rosemary Bryant. In addition, Dr. Oakland interviewed and met with Quince's mother, Mary Quince; Mr. Gregory Quince; Quince's sisters, Phalesia Canidate, Valerie Stanton, and Monique Mobley; Quince's cousin, Tony Harold; Quince's former teachers, Dee Jarrard, Mr. Griggs, and Ms. Charles; Russell Mootry from the Department of Sociology at Bethune-Cookman College, and Ms. Paskewitz,

within a population over time, particularly during the 20th century." He further explained that "[t]he general estimate is that for a population, the increase is approximately three points per a decade or .33 per year." Dr. Oakland testified that the Flynn effect is widely accepted within the profession of psychology as being valid, and that the procedures he used in applying the Flynn effect to a particular score were also considered valid in the scientific community. Dr. Oakland further explained that a psychologist may decide to use the Flynn effect when making a decision regarding an individual and apply it in a case to adjust an IQ score downward.[14] After a hearing on the Flynn effect, the *Atkins* motion postconviciton court found "that the Flynn effect is in fact a theory or methodology generally accepted in the field of psychology and the procedures followed to apply this process are also generally accepted in the relevant psychological community" and thus the court permitted "the testimony regarding the Flynn effect and the applicability of it in this particular case."

Quince has undergone intelligence testing on three separate occasions. Each intelligence assessment utilized the Wechsler Adult Intelligence Scale that was current at the time of testing. In 1980, on the 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 full scale score of 79. Dr. Oakland found that the twenty-six year gap between the WAIS norms and Quince's testing in 1980 was a relevant factor in his decision to apply the Flynn effect. Dr. Oakland testified that the original WAIS administered to Quince (IQ of 79) in 1980, was normed in 1954. The twenty-six year

[14] Dr. Oakland's testimony is directly supported by the AAIDD which states that "[t]he procedure for computing an adjustment for the Flynn effect has generally involved calculating the time between the administration of a test and the midpoint of the year(s) of norming (which is often 1 to 4 years prior to publication), multiplying that number by .3 points, and subtracting this amount from the obtained full-scale IQ test score of the test in question." Dale G. Watson, *Intelligence Testing, in* The Death Penalty and Intellectual Disability 113, 125 (Edward A. Polloway ed., 2015).

difference between the test's norming and its administration to Quince would account for an expected nine point reduction in Quince's IQ score when the Flynn effect is applied. As applied to Quince's 1980 WAIS, ***the Flynn effect would show that Quince's IQ score was actually a 70.*** Dr. Oakland explained that in applying the Flynn effect, it is important to note that it applies mainly to persons with lower intellectual abilities. Thus, when making a determination as to whether to apply the Flynn effect to an IQ score, the fact that an individual such as Quince has a lower level of intellectual ability means that a higher probability exists that it should be applied to him. Dr. Oakland further testified that his determination of mental retardation based upon the 1980 IQ test was consistent with the scores Quince received on the two subsequent IQ tests that were administered to him.

Regarding the ***1984 administration*** of the WAIS-R, Dr. Oakland testified that applying the Flynn effect correction to the ***IQ of 77*** yielded a score of approximately 76. However, the mid-year norming date for the WAIS-R is 1978. It appears from Dr. Oakland's testimony that he inadvertently used the 1981 publication date in applying the Flynn correction, coming up with a transformed score of 76. However, when the mid-year norming date of 1978 is instead applied in accordance with the procedure set forth by the AAIDD, one finds that the difference between the 1978 date and the 1984 date of administration is six years. Multiplying the six years times .3 yields a Flynn correction number of 1.8, which, when rounded up to a whole number is 2. When the two points are then subtracted from the score of 77, ***the Flynn effect-transformed score is 75.***

Finally, the WAIS-III ***IQ score of 79*** administered to Quince in 2006, would be normed in 1995. The 2006 administration of the WAIS-III occurred 11 years after the mid-year norming date of 1995. Multiplying 11 times .3 yields 3.3, which results in a ***Flynn-corrected score of 76*** on the 2006 administration. The original score was a 79. The foregoing norming of three IQ scores is

consistent with the AAIDD and Table 8.4 from the AAIDD. It is clear that Dr. Oakland took great efforts to make sure that Quince's IQ scores were as accurate as possible. *Appendix H*, *see Hall*, 134 S. Ct. at 2001 ("Courts must recognize, as does the medical community, that the IQ test is imprecise."); *see also supra* p.22.

The State's expert psychologist, Harry McClaren, acknowledged that the application of the Flynn effect to all of the results of Quince's IQ tests would result in scores ranging from 70 to 75. As applied to Quince's 1980 WAIS, Dr. McClaren agreed with Dr. Oakland that ***the score would reflect an IQ of 70 with the Flynn effect***. Dr. McClaren also testified that when the Flynn effect is applied to the two subsequent tests, ***the scores of 77 and 79 would both be reduced to 75***. Dr. McClaren conceded that the AAMR[15], in its most recent publication, discussed the use of the Flynn effect within the context of "the assessment and treatment of mental retardation."

Dr. McClaren[16] administered the WAIS-III, a test on malingering, Wide Range Achievement Test 3rd Edition, and the SIB-R upon Quince. Dr. McClaren opined that Quince's IQ was 79. Even though Dr. McClaren conceded that *Cherry*[17] is in conflict with the definition of mental retardation as stated by the AAMR and DSM-IV, he opined that Quince was not mentally retarded ***based solely*** on the 2006 IQ testing with an above the *Cherry* bright-line cut off. Dr. McClaren's opinion regarding Quince's mental retardation did not look into Quince's adaptive behavior or any other evaluations of Quince and his abilities; hence his evaluation stopped at the first prong.[18] In contrast Dr. Oakland did not opine Quince was mentally retarded simply based of

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[15] The AAMR is now called the AAIDD.

[16] Dr. McClaren did not speak with any of Quince's family members; nor had he reviewed any testimony by family members, friends or teachers; nor had he made any inquiries at Union Correctional Institution about Quince's activities regarding books and the law library; and nor had he reviewed any of Dr. Oakland's work relating to adaptive behavior.

[17] 959 So. 2d 702.

[18] Dr. McClaren did administer the SIB-R to test for adaptive behavior deficits, however, the SIB-R was not scored because Quince received a score of 79 on the WAIS-III and Dr. McClaren concluded that the

the numerical values of the IQ scores. Dr. Oakland, in accordance with medical and clinical practices, assessed the remaining two prongs before determining if Quince was mentally retarded.

In assessing prong two, Dr. Oakland conducted evaluations of Quince's adaptive functioning on two different occasions, once in April of 2007 and once in April of 2008. *Appendix H.* In his initial April 2007 testing of Quince's adaptive functioning, Dr. Oakland used the ABAS II[19] and did interviews with Quince and the family members and teachers who knew him around 1980. In the April 2007 assessment, Quince's score put him in the lowest one percentile of all individuals and indicated that Quince had diminished capacity in "conceptual, social and practical skills." In April 2008, Dr. Oakland re-administered the ABAS II to Quince to measure his "current adaptive functioning."[20] During this testing, Dr. Oakland re-interviewed Quince and a correctional officer at the facility. Dr. Oakland again found Quince to have limitations in all three subject areas defined by the AAMR and all the areas identified by the DSM-IV.[21] Finally, with respect to prong three, Dr. Oakland opined that Quince had deficits in adaptive behavior prior to the age of 18 based on his investigations and interviews.[22]

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score was too high to justify assessing adaptive behavior.

[19] ABAS assesses ten skill areas which are combined into the three domains of adaptive behavior recognized by the DSM and AAIDD.

[20] Dr. McClaren seemed to agree with Dr. Oakland's position that it is not a psychologist's preference to obtain data of adaptive functioning in an incarcerated setting. Dr. McClaren agreed that there is no current test or assessment instrument designed for use on incarcerated individuals to assess their present adaptive functioning.

[21] Dr. Oakland opined that the lower scores on the second testing can be accounted for by the fact that Quince is on death row, and he isn't allowed to display many normal behaviors in such a restricted environment. Dr. Oakland later testified that it is outside standard practice to look at behavior while in an incarcerated situation to try and make an accurate assessment of what an individual can do outside of an incarcerated situation. He testified that it would not be any psychologist's preference to acquire this data on the behavior of a person incarcerated on death row. This is supported by the AAIDD and found to be the correct practice.

[22] Dr. Oakland found the following:

> "There's considerable uniformity in the descriptions from the various people who describe Kenny as a follower. He minimized drawing attention to himself. He walked awkwardly. He was a loaner (sic). Perhaps he had at most one permanent friend, a fellow who lived around the corner. He would not initiate conversation. And, in fact, rarely did he engage in

With regard to determining Quince's intelligence, Dr. Berland looked at Dr. McMillan's testing from October 1980. Dr. Berland reported in detail the norming of Quince's IQ score attained on the WAIS test to show a range of scores where Quince met the IQ requirements for retardation. Dr. Berland also evaluated Quince as to the remaining two prongs. Dr. Berland noted in his report that "[t]here is another aspect to determining whether someone should truly be considered retarded besides measuring their intelligence. It must also be found out whether their abilities in key skill areas necessary for daily functioning are also at a level consistent with retarded functioning." According to his report, Dr. Berland administered the Interview Edition of the Vineland Adaptive Behavior Scales[23] to Quince's sister, Linda Stouffer, on November 30, 2004, by telephone. She was asked to recall Quince's abilities at the age of 18. Significantly, Dr. Berland's administration of the Vineland Adaptive Behavior Scales revealed that Quince's adaptive behavior was more than two standard deviations below the mean and ranked in the first percentile of the population, a finding consistent with Dr. Oakland's 2007 administration of the ABAS. After looking at all three prongs, Dr. Berland "reasonably concluded that this defendant appears to have functioned at a retarded level in accordance with the statutory criteria for

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> conversation. He generally watched TV. There was no evidence of his reading any books or newspapers. He rarely engaged in work at home, and engaged in work only under the supervision of others and at their request. He never had a bank account. Never had a credit card. Never repaired his clothing. Never used an iron. Never prepared any meals for others. Never did laundry. Never handled money very well. People were either - - he was either giving money to others or if - - in order for him to retain money, on occasion his mother would hold his money so that he didn't either spend it or give it away. Never saved money."

Dr. Oakland testified that the foregoing characteristics are important because these "general characteristics allow us to characterize Quince at that time to define some important qualities that help to define whether his everyday behaviors were normal relative to others who are 16, 17 or 18" and they "relate to items that exist on measures of adaptive functioning." Dr. McClaren conceded that many of the characteristics testified to by the lay witnesses, such as his mannerism, interaction with others, lack of reading, and problems with money and employment, could all be possible signs pointing to problems with adaptive behavior and a determination of mental retardation.

[23] The Vineland Adaptive Behavior Scales have been among the most widely used of these objective measures of adaptive functioning.

determining retardation."

SUMMARY OF THE LAY WITNESS EVIDENCE PRESENTED AT THE *ATKINS* - RELATED POSTCONVICTION PROCEEDINGS

Aside from the mental health expert evidence, lay witness evidence was also presented at the *Atkins* motion hearing. The lay witnesses who testified on behalf of Quince at the evidentiary hearing were Mrs. Jeanette Walker Quince (Quince's sister-in-law), Mr. Gregory Lee Quince (Quince's older brother), Ms. Vivian Charles (former high school physical education teacher)[24], Mr. Earl Griggs (former high school physical education teacher and coach)[25] , and Mr. Fred Phillips (department of corrections employee)[26]. Additionally, Ms. Doris L. Paskewitz's (former school psychologist and exceptional student education (ESC) specialist with the Volusia County school system)[27] deposition was introduced in lieu of her live testimony. Ms. Paskewitz also

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[24] Ms. Charles had the opportunity to observe Quince when he was in eighth grade at Campbell Junior High School. She testified that the special education students were screened by a psychologist and that "they used the IQ score and the California Achievement Test, and then another specific test" that she could not recall. Moreover, Ms. Charles testified that this screening was "state-mandated" in order for a child to be determined to be a special education student. Ms. Charles clearly recalled that Quince was a "special ed" student at that time. She described Quince as "really kind of withdrawn and introverted," "kind of docile, very quiet," and that he was "kind of a loaner (sic)." Ms. Charles clearly recalled that because Quince was a special education student and that he would be a target for bullies and teasing.

[25] Mr. Griggs remembered Quince from the same time as Ms. Charles, and recalled watching him at physical education classes. Mr. Griggs also described Quince as "docile," "lethargic," and "a loaner (sic)." Mr. Griggs testified that at times it just seemed that Quince did not understand "[h]is purpose for being in PE." He further described Quince as not wanting to participate in the physical education classes like other children normally do and that Quince "would go to himself" and "be to himself." Mr. Griggs testified that Quince was picked on by the other children. Like, Ms. Charles, Mr. Griggs also recalled that Quince was a student assigned to the special education classes.

[26] Mr. Phillips knew Quince from when he was employed with the Department of Juvenile Justice. Mr. Phillips recalled working with Quince when he was a juvenile. Mr. Phillips supervised Quince in 1974, for a short period of time. Mr. Phillips recounted an occasion when he interviewed Quince at a detention center after he was arrested for what "really was not a serious incident." Mr. Phillips was prepared to release Quince back home but "the Defendant felt like he needed to be punished and wanted to go to detention." Mr. Phillips testified that this incident "kind of stuck in [his] mind because it was rather unusual." Mr. Griggs also testified that he "found it hard to communicate with [Quince] in the sense that [he] just really didn't know whether [he] was getting through or not." Mr. Griggs testified that Quince "was a little bit slow" and he just had "trouble communicating with him, basically."

[27] Ms. Paskewitz was responsible for evaluating students and administering tests for the ESC program. s. Paskewitz was a school psychologist for about fifteen years and was responsible for placement of the children. Ms. Paskewitz explained that before the children were sixteen, she administered the Wechsler

looked at the same or similar prongs for determining intellectual disability. It should be noted that similar to Quince's case, attempts to locate Hall's Florida Public School records for psychological testing administered in the 1950s were unsuccessful, but "based on Hall's academic record, it is reasonable to believe that some testing must have occurred because Hall was referred to placement in Special Education classes and referred to as intellectually disabled in the school record." *Hall v. State*, 201 So. 3d 628, 633 (Fla. 2016). So, it is just as reasonable to believe that the school testing showed a score below 70 for Quince.

The foregoing lay witnesses provided evidence of Quince's personality traits and characteristics, school history, and behavior that spanned from his childhood to when he was incarcerated. This testimony demonstrated Quince's limitations, adaptive behavior deficits, and the intellectual and adaptive behavior problems he displayed before he turned 18 years old.

***HALL* – RELATED POSTCONVICTION PROCEEDINGS.**

On May 27, 2014, this Court held in *Hall v. Florida*, 134 S. Ct. 1986 that Florida's bright-line rule pursuant to *Cherry* was unconstitutional. Thus, on May 21, 2015, Quince filed a renewed motion for determination of intellectual disability as a bar to execution pursuant to FLA. STAT. ANN. § 921.137 and Fla. R. Crim. P. 3.203. ("*Hall* motion"). The State filed a response and motion

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Scale of Intelligence test, the Bender Gestalt test, the Wide Range Achievement Test, test of mental ability and a California test of achievement. Ms. Paskewitz confirmed that the school system also administered an adaptive behavior test like a Vineland test. Ms. Paskewitz explained that in order to get into the ESE program the child "had to score below 70," on the WAIS test, but they preferred that the child score a little bit lower. Ms. Paskewitz clarified that the preference was that the child score be 69, but it had to be below 70 on the WAIS test. With regard to the adaptive behaviors, Ms. Paskewitz explained that they would collect as much information as possible on the child and have a history from the parents, neighbors, and classroom teachers. This was the criteria per Ms. Paskewitz that existed in 1973, to enroll a child into the program.

Ms. Paskewitz recalled Quince as a student at Campbell Junior High School, who she recalled came to a classroom to test in. Ms. Paskewitz stated that Quince as "very, very slow," and that "when he got up to go back, he was very confused about where to find his room." She remembered that she heard that Quince came from a very poor family and had siblings who "were retarded." She remembered that Quince was tested at that time, but not by her. However, Ms. Paskewitz confirmed that if Quince was placed in the E.S.E. program, he must have scored under 70 on the WAIS test.

to dismiss on July 6, 2015. With the court's permission, Quince filed a reply on February 17, 2016. The *Hall* motion court conducted a hearing on the pleadings on May 9, 2016. The *Hall* motion court issued a written non-final order on May 17, 2016, determining "that the *Hall*[28] opinion should be given retroactive effect" to Quince's case. (footnote added); *Appendix G*; *see also Walls v. State*, 213 So. 3d 340 (Fla. 2016)[29]. The *Hall* motion court further held "[o]ver the Defendant's objection . . . to apply the 'clear and convincing evidence' standard pursuant to FLA. STAT. ANN. § 921.137(4) in determining whether the Defendant is intellectually disabled." *Appendix G*. No further evidentiary development was requested by either party and the court was directed to rely on the evidence presented in the *Atkins* motion hearing in light of *Hall*. Both parties agreed to submit written memoranda and proposed orders to the court.[30] In a final written order the *Hall* motion court denied Quince relief. *Appendix F*. The order denying Quince's *Hall* motion was affirmed on appeal by the Supreme Court of Florida.[31] *See Quince*, 241 So. 3d 58; *Appendix A*. This ruling is before this Court on review.

SUMMARY OF THE EVIDENCE PRESENTED AT THE *HALL* - RELATED POSTCONVICTION PROCEEDINGS

The *Hall* motion postconviction court looked at the evidence from the *Atkins* motion hearing in light of *Hall*. *See supra* p.6-14. Quince presented two tables to clearly demonstrate that Quince suffers from significantly subaverage general intellectual functioning and that he suffered

[28] *Hall v. Florida*, 134 S. Ct. 1986.
[29] The Supreme Court of Florida held that *Hall*, 134 S. Ct. 188, is retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980).
[30] In the interim, the Supreme Court of Florida decided *Hall v. State*, 201 So. 3d 628, and held that Hall was intellectually disabled and ineligible for execution.
[31] Prior to the Supreme Court of Florida's denial in Quince's case, this Court granted a petition for writ of certiorari and remanded *Wright v. State*, 213 So. 3d 881 (Fla. 2017) for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017). *See id. cert. granted, judgment vacated sub nom. Wright v. Florida*, 138 S. Ct. 360 (Mem.) (2017). Quince filed this opinion as supplemental authority with the Supreme Court of Florida on October 18, 2017.

from cognitive deficits or impairments in present adaptive functioning. These tables from the record below are reproduced in *Appendix H* and *Appendix I*, respectively, for this Court's review. Quince provided the court with a number of scientific authorities, excerpts from the DSM-V and AAIDD, and summaries of record evidence clearly demonstrating that Quince is intellectually disabled.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

INTRODUCTION

"The death penalty is the gravest sentence our society may impose." *Hall*, 134 S. Ct. at 2001. Florida's decision in Quince's case "contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Id.* This Court has painstakingly endeavored to create Eighth Amendment safeguards to prevent the execution of the intellectually disabled. This Court in *Atkins*, *Hall*, and *Moore* created those safeguards by relying heavily on the medical community and medical authorities to determine the diagnostic framework for intellectual disability to protect capital defendant's Eighth and Fourteenth Amendments. U.S. CONST. amend. VIII; amend. XIV. Yet, despite this precedent, Florida, as it did in *Hall*[32] and *Wright*,[33] continues to disregard the comprehensive testimony of medical experts in accordance with current medical standards. Florida continues to create arbitrary numerical barriers. Specifically, in Quince's case, Florida denied relief by solely looking at IQ scores. Florida forgets that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning." *Hall*, 134 S. Ct. at 2000. Florida inexplicably fails to recognize the Flynn effect in correcting IQ scores formulated from outdated tests. The ruling in Quince flies in the face of the diagnostic controlled medical treatises and the role of the medical community and ensures the execution of an intellectually disabled 60 year old man.

Hall and *Moore* require Quince to demonstrate that his medical determination is supported by the professional community's diagnostic framework and teachings, which are governed by the

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[32] *Hall v. State*, 109 So. 3d 704 (Fla. 2012), *rev'd and remanded sub nom. Hall v. Florida*, 134 S. Ct. 1986 (2014), and *opinion withdrawn*, 201 So. 3d 628 (Fla. 2016).

[33] *Wright*, 213 So. 3d 881 *cert. granted, judgment vacated sub nom. Wright*, 138 S. Ct. 360.

DSM-V and AAIDD. *See Hall*, 134 S. Ct. at 2000; *see Moore*, 137 S. Ct. at 1048-1049. These are the authorities that Quince relied on to demonstrate his intellectual disability in accordance with *Hall*'s recognition of the importance of an informed medical opinion. This Court has unequivocally held that "[i]ntellectual disability is a *condition*, not a number." *See Hall*, 134 S. Ct. at 2001 (emphasis added) (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). Further, "[t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is ***informed by the medical community's diagnostic framework***." *Id.* at 2000 (emphasis added). This Court recognized that the AAMR[34] and the APA, the publisher of the DSM, are authorities for establishing the diagnostic criteria for intellectual disability. *See Atkins*, 536 U.S. at n. 3; *see also Hall*, 134 S. Ct. at 1048, 1053; *see also Moore*, 137 S. Ct. at 1045.

FLORIDA'S DISREGARD OF THE FLYNN EFFECT IN CORRECTING OUTDATED INTELLIGENCE TESTS

Florida has gone through great efforts to avoid finding Quince intellectually disabled, despite the lengthy history of his intellectual deficiencies. Florida denied Quince relief because he had "not demonstrated that *Hall* requires that his IQ scores be adjusted for the Flynn effect, and there is competent, substantial evidence in the record to support the trial court's decision not to apply the Flynn effect to adjust Quince's IQ scores." *Quince*, 241 So. 3d at 62. Florida ignores the scientific phenomenon of the Flynn effect simply because this Court did not mention or address the Flynn effect in its *Hall* opinion. *See Quince*, 241 So. 3d at 62. Florida limited its scope to only courts that "have already recognized, *Hall* ***does not mention*** the Flynn effect and does not require its application to all IQ scores in *Atkins* cases" and gave examples of three Circuit Courts of Appeal decisions. *Id.* (citing *Black v. Carpenter*, 866 F. 3d 734, 746 (6th Cir. 2017)); *Smith v. Duckworth*,

[34] The AAMR has been renamed and is now called AAIDD.

824 F. 3d 1233, 1246 (10th Cir. 2016); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F. 3d 600, 639 (11th Cir. 2016); *but see infra* p.21-22, n.46-47. Florida misinterprets *Hall*'s silence on the Flynn effect to mean that the Flynn effect should be disregarded because it is not mandated. *Hall* did not address the Flynn effect as it was not at issue or a factor in Hall's case. Florida knew this fact because Quince's denial stemmed from the same court that denied Hall relief at first. *See Hall*, 109 So. 3d 704 *rev'd and remanded sub nom. Hall v. Florida*, 134 S. Ct. 1986.

Further, Florida misconstrues this Court's opinion in *Moore* by only partially quoting that "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Quince*, 214 So. 3d at 62 (quoting *Moore*, 137 S. Ct at 1049). Florida failed to read the foregoing statement in context of the surrounding statements. The complete quote is as follows:

> We further noted that Florida had parted ways with practices and trends in other States. *Id.*, at ——— – ———, 134 S. Ct., at 1995–1998. *Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. ***But neither does our precedent license disregard of current medical standards.***

Moore, 137 S. Ct. at 1049; *see Hall*, 134 S. Ct. at 2000 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002)). In context, this Court is clarifying to the state courts that they do not have to follow everything stated in the latest medical guide, however, the Court reminds the lower courts that they cannot disregard current medical standards. To ignore the authority of these current and recognized "leading medical manuals" would led to an Eighth Amendment unfettered abuse of the analysis of intellectual disability, where there is no informed medical diagnostic framework. *Moore*, 137 S. Ct. at 1048-1049. Quince's intellectual disability determination is clearly supported by current medical standards and must be upheld by this Court in accordance with *Moore* and *Hall.*

Quince has maintained from the beginning that he is intellectually disabled, and that current medical standards mandate that his scores be adjusted for the Flynn effect. The AAIDD,[35] an authoritative text on intellectual disability, recognizes the Flynn effect as a valid and real phenomena that is mandated to adjust scores. Professionals who determine IQ scores apply a correction based upon the "Flynn effect."[36] The Flynn effect is named for James R. Flynn, an intelligence researcher who documented it.[37] Also known as norm obsolescence, the Flynn effect describes the false inflation of IQ scores that occurs when an individual's performance on an IQ test is compared with outdated test norms.[3839] The DSM recognizes "(f)actors that may affect test scores include practice effect and the 'Flynn effect' (i.e., overly high scores due to out-of-date test norms.").[40] In addition, according to the AAIDD,

> [n]ot only is there a scientific consensus that the Flynn effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ tests scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases.[41]

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

> adjusting for the Flynn effect reflects a practice consistent with both *Atkins* and the known world of IQ measurements. While a freakish strike of lightning is difficult to avoid, the potentially deadly and unconstitutional consequences of refusing to account for the Flynn effect are wholly preventable. Thus, for the intelligent and just enforcement of *Atkins*, courts and juries should adjust IQ scores from outdated tests for the Flynn effect.[42]

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[35] This Court in *Moore* relied on the DSM-V and AAIDD as the "leading diagnostic manuals." *Moore*, 137 S. Ct. at 1048.

[36] Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect, in* The Death Penalty and Intellectual Disability 155, 160 (Edward A. Polloway ed., 2015).

[37] *Id.* at 157.

[38] *Id.* at 155.

[39] Dale G. Watson, *Intelligence Testing, in* The Death Penalty and Intellectual Disability 113, 124-25 (Edward A. Polloway ed., 2015).

[40] DSM-V at p.37

[41] Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect, in* The Death Penalty and Intellectual Disability 155, 160.

[42] Geraldine W. Young, *A more intelligent and just* Atkins*: Adjusting for the Flynn Effect in capital*

Notably, the *Atkins* motion postconviction court, after a comprehensive *Frye*[43] hearing on the Flynn effect, found "that the Flynn Effect is in fact a theory or methodology generally accepted in the field of psychology and the procedures followed to apply this process are also generally accepted in the relevant psychological community" and thus the court permitted "the testimony regarding the Flynn effect and the applicability of it" in Quince's case. Yet, Florida inexplicably disregards the lower court's findings and continues to refuse to accept this thoroughly vetted clinical principle. Many jurisdictions have approved accounting for the Flynn effect when assessing IQ scores for purposes of determining intellectual disability.[44] In addition, in accordance with the AAIDD, there are several courts[45] that have found the Flynn effect to be mandated by the

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determinations of mental retardation or intellectual disability. 65 VANDERBILT L. REV. 615, 663 (2012), *quoted in* McGrew, n. 45.

[43] *Frye v. U.S.*, 293 F. 1013.

[44] *See Chase v. State*, 171 So. 3d 463, 480 (Miss. 2015) (holding that the trial court did not err in finding the defendant proved subaverage intellectual functioning where the Flynn effect was applied to his IQ score); *Sasser v. Hobbs*, 735 F. 3d 833, 847 (8th Cir. 2013) (holding that it was error for the district court to refuse to consider testimony regarding the Flynn effect in determining whether the defendant suffered from significantly subaverage intellectual functioning); *Burgess v. Comm'r., Ala. Dept. of Corr.*, 723 F. 3d 1308, 1321-22 (11th Cir. 2013) (remanding the case to the district court for purposes of an evidentiary hearing including testimony on the Flynn effect); *United States v. Smith*, 790 F. Supp. 2d 482, 491 & n.43 (E.D. La. 2011) (finding that the Flynn effect should be applied to the defendant's WAIS-III scores); *United States v. Hardy*, 762 F. Supp. 2d 849, 866-68 (E.D. La. 2010) (holding that applying the Flynn effect is best practice); *Coleman v. State*, 341 S.W. 3d 221, 224, 242 n.55 (Tenn. 2011) (allowing for testimony regarding the Flynn effect); *Black v. Bell*, 664 F. 3d 81, 96 (6th Cir. 2011) (holding that Flynn effect evidence must be considered); *Smith v. State*, 357 S.W. 3d 322, 353-54 (Tenn. 2011) (remanding for consideration of evidence of the defendant's functional IQ, including evidence regarding the Flynn effect); *United States v. Lewis*, 2010 WL 5418901 at *11 (N.D. Ohio 2010) (finding that applying the Flynn effect is best practice); *Thomas v. Allen,* 607 F. 3d 749, 757 (11th Cir. 2010) (finding no error in the district court's decision to adjust for the Flynn effect); *United States v. Davis*, 611 F. Supp. 2d 472, 488 (D. Md. 2009) (finding Flynn effect evidence relevant and persuasive); *Wiley v. Epps*, 668 F. Supp. 2d 848, 897-98 (N.D. Miss. 2009) (taking the Flynn effect into account); *United States v. Parker*, 65 M.J. 626, 629-30 (Navy-Marine Crim. App. 2007) (adopting the AAMR standard for evaluating IQ scores, including the process of accounting for the Flynn effect); *Green v. Johnson,* 431 F. Supp. 2d 601, 615-16 (E.D. Va. May 4, 2006) (granting evidentiary hearing allowing for testimony concerning the Flynn effect); *Walker v. True*, 399 F. 3d 315, 318, 320 (4th Cir. 2005) (remanding with instructions to consider the persuasiveness of Flynn effect evidence).

[45] *See United States v. Roland,*[45] 281 F. Supp. 3d 470, 502-3 (D.N.J. 2017); *see People v. Superior Court,*[45] 28 Cal. Rptr. 3d 529, 558-59 (Cal. Ct. App. 2005), *overruled on other grounds by* 40 Cal. 4th 999, 56 Cal. Rptr. 3d 851, 155 P. 3d 259 (2007); *see U.S. v. Hardy,*[45] 762 F. Supp. 2d 849, 862-67 (E.D. La. 2010). Furthermore, the opinion in *Hardy* looked in depth into the analysis of other courts that have

AAIDD and to follow the DSM-V. There is ample evidence from the medical community, medical authorities, and case law to support the Flynn correction in light of *Hall*. Florida continues to be one of the outliers. It bears repeating that this Court warned states about the imprecise nature of IQ scores. *See Hall*, 134 S. Ct. at 2001. Specifically, this Court held as follows:

> Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as he medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, ***a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.***

Id. Without this correction, there is a great and real danger of executing the intellectually disabled, especially in older cases. Florida is "[a] State that ignores the inherent imprecision of these tests [and] risks executing a person who suffers from intellectual disability." *Hall*, 134 S. Ct. at 2001. Further, Florida's holding in Quince's case is again "in direct opposition to the views of those who design, administer, and interpret the IQ test." *Id.* at 2001.

Finally, the Supreme Court of Florida recognized but did not address the application of the SEM and Flynn effect to Quince's IQ scores. The court denied relief based on the failure of Quince to demonstrate that *Hall* requires that Quince' IQ scores be corrected for the Flynn effect. *See Quince*, 241 So. 3d at 62. When the SEM is applied to Quince's 1980 Flynn-corrected score of 70, the range is 65-75, which is well within the criteria for such a finding. When the SEM is applied to the 1984 Flynn-corrected score of 75, the range is 70-80. When the SEM is applied to the third Flynn-corrected 2006 score of 76, the range is 71-81. All of these ranges contain a score on which a finding of significantly subaverage general intellectual functioning is warranted. Applying the

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accepted the Flynn effect. *See Hardy*, 762 F. Supp. 2d 849 at 862 (citing *Thomas v. Allen,* 607 F. 3d at 753); *Holladay v. Allen,* 555 F. 3d 1346, 1350 n. 4, 1358 (11th Cir. 2009); *Walker,* 399 F. 3d at 322–23; *Davis,* 611 F. Supp. 2d at 486-88; *Thomas v. Allen,* 614 F. Supp. 2d 1257, 1278 (N.D. Ala. 2009); *Green v. Johnson,* 2006 WL 3746138, at *45 (E.D. Va. December 15, 2006); *Parker,* 65 M.J. 626.

Flynn correction and the SEM, as informed by standard clinical practice and required by *Hall*, it is clear that Quince's 1980 and 1984 IQ scores show he suffers from "significantly subaverage general intellectual functioning." If the norming error of the WAIS-III is also considered, all three of Quince's known IQ scores entitle him to a finding of significantly subaverage general intellectual functioning. Unlike, Dr. McClaren, who just stopped at the *Cherry* line, Dr. Oakland and Dr. Berland looked at the remaining two prongs before forming an opinion.

FLORIDA'S FAILURE TO ASSESS ALL THREE PRONGS IN TANDEM IN DETERMINING INTELLECTUAL DISABILITY

This Court held that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Hall*, 134 S. Ct. at 2001 (quoting DSM-5, at 37) ("[A] person with IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to the individuals with a lower IQ score."). Even though Florida recognized that "*Hall* ***requires*** courts to consider all three prongs of intellectual disability in tandem" it inexplicably proceeded to deny Quince relief because he failed to "meet the significantly subaverage functioning prong." *Quince*, 241 So. 3d at 62 (emphasis added). Florida gave no consideration to the abundant testimony presented in support of the other two prongs. *See id.* (citing *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017)) ("while *Hall* ***requires*** a holistic hearing, 'defendants must still be able to meet the first prong of [the intellectual disability standard].'")(emphasis added). Recently the Supreme Court of Kentucky, in light of *Hall* and *Moore*, held that "any rule of law that states that a criminal defendant automatically cannot be ruled intellectually disabled and precluded from execution simply because he or she has an IQ of 71 or above, even after adjustment for statistical error, is unconstitutional." *Woodall v. Commonwealth*, - - - S.W. 3d - - -, 2018 WL 2979581 at *4 (Ky. June 14, 2018). What Florida continues to ignore and Kentucky clearly understands is that "the prevailing tone of [this] Court's

examination of this issue suggests that a determination based solely on IQ score, even after proper statistical-error adjustments have been made, is highly suspect; and 2) prevailing medical standards should be the basis for a determination as to a defendant's intellectual disability to preclude the imposition of the death penalty." *Id.* at *3. The current medical standards for diagnosis of intellectual disability nationally are governed by the DSM-V and the AAIDD. To ignore the authority of these current and recognized "leading medical manuals" would led to an Eight Amendment unfettered abuse of the analysis of intellectual disability, where there is no informed medical diagnostic framework. *Moore*, 137 S. Ct. at 1048-1049; *see Woodall*, 2018 WL 2979581 at *4.[46] Florida failed to follow a mandate established by this Court in *Hall* and repeated in *Moore* that requires the assessment of all three prongs under the current medical standards in determining intellectual disability.

Florida's holding in Quince's case is inexplicable in light of its own precedent that considers all three prongs of the intellectual disability test in tandem and explains that the conjunctive and interrelated nature of the test requires that no single factor be considered dispositive because these factors are interdependent. *See, e.g., Oats v. State*,181 So. 3d 457 (Fla. 2015); *Hall v. State*, 201 So. 3d 628; *Walls v. State*, 213 So. 3d 340. Further, Florida even held that "if one of the prongs is relatively less strong, a finding of intellectual disability may still be warranted based on the strength of the other prongs." *See Walls*, 213 So. 3d at 346 (quoting *Oats,* 181 So. 3d 457 at 467-68). Florida is clearly wrong in limiting the medical assessment of Quince's intellectual disability to prong one. *See Quince*, 241 So. 3d at 62. Intellectual disability is not a cut-off number; it is not a cut-off range; it is not a bright-line assessment of only one prong[47]; it is

[46] "Because prevailing medical standards change as new medical discoveries are made, routine application of a bright-line test alone to determine death-penalty-disqualifying intellectual disability is an exercise in futility."

[47] *See Quince*, 241 So. 3d at 62.

a medical condition based on the DSM-V and AAIDD and the evaluation of all three prongs in tandem. *See Hall,* 134 S. Ct. at 2001; *see Brumfield v. Cain,* - - - U.S. - - -, 135 S. Ct. 2269, 2278-82, 192 L. Ed. 2d 356 (2015); *see Chase v. State,* 873 So. 2d 1013, 1028, n18 (Miss. 2004).[48] Dr. Oakland and Dr. Berland are the only mental health professionals who made a full determination as to intellectual disability, assessed all three prongs in accordance with the DSM and AAIDD, and unequivocally found Quince to be mentally retarded. *See Hall v. State,* 201 So. 3d 637. This Court cannot overlook the strength of the medical support for all three prongs for Quince's intellectual disability.

Florida made no findings regarding Quince's adaptive functioning deficits under prong two or three.[49] Both Drs. Oakland and Berland opined that Quince's significantly subaverage general intellectual functioning and concurrent deficits in adaptive behavior manifested before the age of 18. According to Florida, "adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.[50] Neither the statute nor the Rule provide guidance as to recommended means of measuring adaptive behavior. However, Florida courts use the standard set forth in *Atkins.* According to *Atkins,* deficits in adaptive behavior are "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." 536 U.S. at 308 n. 3 (quoting Am. Ass'n on Mental Retardation, Mental Retardation:

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[48] "IQ, ***alone***, does not determine mental retardation. According to the DSM-IV, 'it is possible to diagnose Mental Retardation in individuals with IQ's between 70 and 75 who exhibit significant deficits in adaptive behavior.' Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning." All three prongs must be assessed.

[49] FLA. STAT. ANN. § 921.137(1); Fla. R. Crim. P. 3.203(b).

[50] *Id.*

Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

This Court has the unrebutted and fully informed opinions of Drs. Oakland and Berland that Quince suffered severe deficits in adaptive functioning. Like Dr. Gregory Prichard in *Hall*, Dr. Oakland made his full determination based on his personal evaluation of Quince, interviews of several familial and school witnesses, school records, medical records, previous psychological and psychiatric reports and prior testimony with regard to Quince's mental status.[51] *See Hall*, 201 So. 3d at 636-38. At the evidentiary hearing held on Quince's *Atkins* motion, several lay witnesses testified as to Quince's adaptive functioning prior to and around the time he was arrested and charged in this case. *See supra* p.13-14. Dr. Oakland administered the ABAS by questioning a total of twelve individuals, including Quince and several family members, teachers, and a school psychologist. The focus of this administration was Quince's adaptive behavior just prior to the age of 18. Dr. Oakland concluded that Quince was a follower who minimized drawing attention to himself. P4/490. He walked awkwardly. He was a loner who had only one friend. He did not initiate conversation and rarely engaged in it. There was no evidence of reading books or newspapers. He rarely engaged in work at home, and if he did, he was supervised by others and the work was done at their request. He never had a bank account or a credit card. He never repaired his clothing or did laundry, used an iron, or prepared meals for others. His mother held his money so that he did not give it away. Dr. Oakland testified that these observations were helpful to understanding whether Quince's behaviors were normal relative to others at the same age at the

[51] In contrast, Dr. McClaren had not talked to any of Quince's family members; nor had he reviewed any testimony by family members, friends or teachers; nor had he made any inquiries at Union Correctional Institution about Quince's activities regarding books and the law library; and nor had he reviewed any of Dr. Oakland's work relating to adaptive behavior. Dr. McClaren did not asses Quince's adaptive behavior or consider any other evaluations of Quince and his abilities. He had no opinion as to Quince's adaptive functioning and his sole reliance on evidence at the time of incarceration has been rejected. *See Hall*, 201 So. 3d at 636.

time and also relate to items that exist on measures of adaptive behavior.

Dr. Berland administered the Interview Edition of the Vineland Adaptive Behavior Scales to Quince's sister, Linda Stouffer. She was asked to recall Quince's abilities at the age of 18. Dr. Berland's administration of the Vineland Adaptive Behavior Scales revealed that Quince's adaptive behavior was not only more than two standard deviations below the mean but ranked in the first percentile of the population, a finding consistent with Dr. Oakland's 2007 administration of the ABAS. Other evidence of severe deficits in adaptive functioning included: Dr. Bernard, who testified that Quince entered the Job Corps at age 19, but lost his privileges after eight months due to arguments with teachers, that Quince had worked as a dishwasher and in landscaping, but that the longest he ever held a job was approximately five months, that Quince looked at the floor, did not talk spontaneously, had poor eye contact, answered with a soft voice, and had deficits in recent and remote memory; Dr. Carrera, who mentioned that Quince was in the Job Corps and worked as landscaper and dishwasher, with his longest job lasting 6 months, that Quince could not control his bladder until adolescence, that he was poor in arithmetic and that he could abstract only one out of five proverbs, and that his intellectual social judgment was marginal; Dr. Rossario noted that the Defendant's insight was "completely lacking," that his judgment was "markedly impaired," that he was "unable to sustain any consistent work" and lacked the "ability to function as a responsible person"; Dr. Louis Legum, a clinical psychologist, who administered the WAIS-R in 1984, reported that Quince was unable to control his urine until age 16; and even Dr. McClaren also noted Quince's slight eye contact, non-spontaneous speech, that he only answered direct questions, and that he reported he copied work from other inmates. The foregoing mental health evaluations, taken together with the testimony described above from the lay witnesses, clearly indicate that Quince had significant adaptive functioning deficits.

The final showing Quince must make in order for a court to deem him intellectually disabled is that his deficits in intellectual functioning and adaptive behavior manifested before the age of 18. Quince presented strong and unrefuted evidence from school professionals and family members that he suffered deficits in intellectual and adaptive functioning concurrently and prior to the age of 18. Ms. Paskewitz testified in her deposition that in order to be placed into special education, a child at Quince's school would have had to score below 70 on an IQ test. Both Vivian Charles and Earl Griggs testified that Quince was in special education classes. Quince also suffered from concurrent deficits in adaptive behavior prior to the age of 18. Jeanette Quince, Gregory Quince, Vivian Charles, Earl Griggs, and Fred Phillips all testified as to Quince's behavior prior to age 18. Moreover, only Drs. Oakland and Berland assessed this prong and found conclusively that Quince's deficits in intellectual functioning and adaptive behavior occurred concurrently and prior to the age of 18, evident from the testing and lay witness testimony. Only after conducting a comprehensive assessment as to all three prongs, Drs. Oakland and Berland opined Quince is mentally retarded.

In light of *Atkins, Hall* and *Moore* it is clear that Quince suffers from significantly subaverage general intellectual functioning, that coexists with deficits in adaptive behavior, and the deficits in intellectual functioning and adaptive behavior manifested before the age of 18. These conclusions are evident from the face of the record, which contains extensive expert findings and testimony regarding each of the three prongs demonstrating that Quince is intellectually disabled.

CONCLUSION

Florida clearly recognizes the importance of courts to be "guided by established medical practice and psychiatric and professional studies that elaborate on the purpose and meaning of each of the three prongs for determining an intellectual disability." *Oats*, 181 So. 3d at 457 (citing *Hall*,

134 S. Ct. at 1993).[52] Yet, Florida denies Quince his Eight and Fourteenth Amendment constitutional rights by disregarding the well-accepted correction pursuant to the Flynn effect, and also disregarding the well-accepted clinical determination of intellectual disability based on all three prongs of the DSM and AAIDD. This Court must intervene in Florida's blatant disregard of this Court's and the medical communities opinions and grant Quince relief. Otherwise, an intellectually disabled man will be wrongfully executed.

[52] This Court "has made clear that when determining whether an individual meets the criteria to be considered intellectual disability, the definition that matters most is the one used by mental health professionals in making this determination in all contexts, including those 'far beyond the confines of the death penalty.' As such, courts cannot disregard the informed assessments of experts." *Hall*. 134 S. Ct. at 2000-01 (internal citations omitted).

QUESTION TWO

Florida requires an individual to prove intellectual disability by clear and convincing evidence.[53] Florida's heightened standard is unconstitutional under *Atkins*, *Cooper v. Oklahoma*,[54] *Medina v. California*,[55] and the Eighth and the Fourteenth Amendments to the United States Constitution.[56] *See* U.S. CONST. amend. VIII; amend. XIV. This Court, in *Atkins*, emphasized the fact that an intellectually disabled individual, because he is unable to assist in his own defense, has a constitutionally unacceptable risk of wrongful execution.[57] To require an individual who is intellectually disabled to prove his disability by such an inordinately high standard as "clear and convincing" therefore unconstitutionally increases the risk of wrongful execution. In Quince's case, Florida continues to not address the constitutionality of its burden. *See Quince* 241 So. 3d at 63 ("Because we conclude that Quince's intellectual disability claim would have failed even under the preponderance of the evidence standard, we need not address the constitutionality of the clear and convincing evidence standard of section 921.137(4), Florida Statutes."); *see e.g.*, *Dufour v. State*, 69 So. 3d 235, 253 (Fla. 2011); *see Phillips*, 984 So. 2d 503, 509, n.11 (Fla. 2008); *see Trotter v. State*, 932 So. 2d 1045, 1049, n.5 (Fla. 2006); *see Jones v. State*, 966 So. 2d 319, 329 (Fla. 2007); *see Burns v. State*, 944 So. 2d 234, 249, n.13 (Fla. 2006); *see generally Wright*, 213 So. 3d at 896, n.3. The constitutionality of the burden Florida requires to prove a condemned

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[53] FLA. STAT. ANN. § 921.137(4).

[54] 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996) (This Court held that Oklahoma's requirement that a defendant prove his incompetence to stand trial by clear and convincing evidence was unconstitutional).

[55] 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) (This Court rendered a historical analysis on the fundamental fairness of mandating the burden on the defendant to prove incompetence. This Court thoroughly discussed the burden of preponderance of evidence as one that does not offend the conscience and traditions of the people and fundamental fairness.)

[56] It is Quince's position that he proved his intellectual disability by clear and convincing evidence under a proper *Hall* and *Moore* analysis.

[57] 536 U.S. at 320-21.

person is intellectually disabled is of great importance for this Court's review.

The execution of an intellectually disabled individual is constitutionally impermissible under the Eighth and Fourteenth Amendments pursuant to *Atkins*.[58] *See* U.S. CONST. amend. VIII; amend. XIV. In *Atkins*, this Court ruled that executing an intellectually disabled individual could serve neither deterrence nor retribution, the two social purposes served by the death penalty.[59] The death penalty cannot act as a deterrent for the intellectually disabled because of their diminished ability to process the potential punishment and make choices accordingly.[60] It also does not serve the purpose of retribution because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," and the culpability of even the average murderer is not enough to justify the death penalty.[61] Because an intellectually disabled offender is less culpable due to his or her diminished capacity, the interest of retribution is not served.[62] Therefore, imposing the death penalty on such a person constitutes "purposeless and needless imposition of pain and suffering"; hence, it is unconstitutional.[63] This Court further held that the intellectually disabled are less capable of assisting in their own defense, more likely to give false confessions, and more susceptible to false findings of lack of remorse.[64] There is an unacceptable risk of wrongful execution because of these factors.[65]

Under this Court's decision in *Cooper* and *Medina*, in light of *Atkins*, Florida's burden

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[58] 536 U.S. at 321.
[59] *Id.* at 318-19 (citing *Gregg v. Georgia,* 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859, (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).
[60] *Id.* at 320.
[61] *Id.* at 319.
[62] *Id.*
[63] *Id.* (citing *Enmund v. Florida,* 458 U.S. 782, 798, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)).
[64] *Id.* at 320-21 (internal citations omitted).
[65] *Id.* This burden is defined as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of evidence . . . but less than evidence beyond a reasonable doubt." *Clear and convincing evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

cannot be deemed constitutional. Indiana[66] provided a comprehensive roadmap as to why such a heightened burden[67] to determine intellectual disability is unconstitutional. *See Pruitt v. State*, 834 N.E. 2d 90 (Ind. 2005) (abrogating *Rogers v. State*, 698 N.E. 2d 1172 (Ind. 1998)).[68] *Pruitt* found that this Court "[a]fter reviewing historical practice and finding that proof by a preponderance of the evidence is the standard in the great majority of United States jurisdictions," had "concluded that 'the heightened standard [of clear and convincing evidence] offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people'"" under the Due Process Clause. *Id.* (quoting *Medina*, 505 U.S. at 438). Further, New Jersey looked to *Pruitt* to uphold its preponderance of evidence burden of proof and to explain how the higher burdens could create a substantial risk of wrongfully executing the intellectually disabled. *See State v. Jimenez*, 188 N.J. 390, 399-403, 908 A. 2d181 (2006), *opinion clarified*, 191 N.J. 453, 924 A. 2d 513 (2007) (quoting *Pruitt*, 834 N.E. 2d at 102-03).[69] Texas also recognized that "[t]he issue of mental retardation is similar to affirmative defenses such as insanity, incompetency to stand trial, or incompetency to be executed, for which the Texas Legislature has allocated the burden of proof upon a defendant

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[66] Even though in 2005, *Pruitt* held that the clear and convincing standard is unconstitutional, the Indiana legislature inexplicably amended the law in 2007, and continued to require that the defendant must prove his intellectual disability by clear and convincing evidence. *See* IND. CODE ANN. § 35-36-9-4 (West).

[67] Currently Florida, Arizona, Colorado, Indiana, and North Carolina currently apply this unconstitutional and heavy burden. *See* ARIZ. REV. STAT. ANN. § 13-753(G) (2011); *see* COLO. REV. STAT. § 18-1.3-1102 (2012); *see* N.C. GEN. STAT. § 15A-2005(c) (2015). Delaware also has the clear and convincing standard, but its death penalty sentencing statute is in flux. *See* DEL. CODE ANN. tit. 11, § 4209 (West) *held unconstitutional by Rauf v. Delaware*, 145 A. 2d 460 (Del. 2016). This handful of states have created a great risk for the intellectually disabled to be executed. Georgia is an outlier with a beyond a reasonable doubt burden of proof. *See Hill v. Humphrey*, 662 F. 3d 1335, 1360 (11th Cir. 2011).

[68] *Pruitt* held that Indiana's statute requiring a clear and convincing burden of proof to prove mental retardation was unconstitutional and violated the defendant's right to due process. *But see* IND. CODE ANN. § 35-36-9-4.

[69] "By way of example, the Indiana Supreme Court rejected the imposition of a higher burden of proof on the defendant, explaining that a clear and convincing standard 'would result in execution of some persons who are mentally retarded' and that 'the defendant's right not to be executed if mentally retarded outweighs the state's interest' in imposing the death penalty. In this respect, the [Indiana] court expressed a concern that mentally retarded defendants face a heightened risk of wrongful execution because of their diminished ability to assist in their own defense." (internal citations omitted).

to establish by a preponderance of the evidence." *Ex parte Briseno*, 135 S.W. 3d 1, 12 (Tex. Crim. App. 2004), *abrogated by Moore v. Texas*, 137 S. Ct. 1039, *abrogated by Ex parte Moore*, - - - S.W. 3d - - -, 2018 WL 2714680 (Tex. Crim. App. June 6, 2018)[70]; *see Neal v. State*, 256 S.W. 3d 264, 273 (Tex. Crim. App. 2008); *see Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E. 2d 604 (2003); *see State v. Lott*, 97 Ohio St. 3d 303, 307, 779 N.E. 2d 1011 (2002).

The ability of different states to apply different burdens to prove whether an individual is intellectually burden can only lead to detrimental outcomes. *See supra* p.32, n.69. Alabama,[71] Arkansas,[72] California,[73] Idaho,[74] Louisiana,[75] Missouri,[76] Mississippi,[77] Nebraska,[78] Nevada,[79] Ohio,[80] Oklahoma,[81] Oregon,[82] Pennsylvania,[83] South Carolina,[84] South Dakota,[85] Tennessee,[86]

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[70] This Court held in *Moore* that the *Briseno* factors adopted by the Texas Court of Criminal Appeals created an unacceptable risk that the intellectually disabled would be executed in violation of the Eighth Amendment. The opinion did not address the preponderance of evidence burden of proof.

[71] *See Morrow v. State*, 928 So. 2d 315, 322-23 (Al. Crim. App. 2004); *see* Ala. R. Crim. P. 32.

[72] *See* ARK. CODE ANN. § 5-4-618 (a)(2)(c) (West).

[73] *See* Cal. Penal Code § 1376(b)(3) (West 2013).

[74] *See* IDAHO CODE ANN. § 19-2515A (3) (West).

[75] *See* La. Code Crim. Proc. Ann. art. 905.5.1 (2015).

[76] *See* MO. ANN. STAT. § 565.030 (4)(1) (West 2016).

[77] *See Chase*, 873 So. 2d at 1028-29.

[78] *See* NEB. REV. STAT. ANN. § 28-105.01 (4) (2018).

[79] *See* NEV. REV. STAT. ANN. § 174.098 (West 2015).

[80] *See Lott*, 97 Ohio St. 3d 303.

[81] *See Pickens v. State*, 126 P. 3d 612, 614 (Okla. Crim. App. 2005).

[82] "[I]n the years since the Supreme Court decided *Atkins*, the Oregon legislature has not adopted any procedure for determining whether a person accused of aggravated murder has an intellectual disability and, therefore, ineligible for the death penalty. Nor has the issue been addressed by the Oregon appellate courts before today. Lacking such guidance, the trial court in this case invited suggestions from the parties about how to proceed and ultimately concluded that it would conduct a pretrial hearing, which we refer to as an *Atkins* hearing, during which both sides would present evidence on defendant's mental health and abilities as well as on the prevailing standards for making the determination of intellectual disability. For defendant to be found intellectually disabled and, therefore, ineligible for the death penalty, the trial court ruled, defendant would have to establish that he was intellectually disabled by a preponderance of the evidence." *State v. Agee*, 358 Or. 325, 340-41, 364 P.3d 971 (2015) (footnote omitted).

[83] *See* Pa. R. Crim. P. 843 (citing *Commonwealth v. Sanchez*, 614 Pa. 1, 36 A. 3d 24 (2011)).

[84] *See Franklin*, 356 S.C. at 279.

[85] *See* S.D. CODIFIED LAWS § 23A-27A-26.3 (West) *amended by* SD LEGIS 148 (2018), 2018 SOUTH DAKOTA LAWS Ch. 148 (HB 1077).

[86] *See* TENN. CODE ANN. § 39-13-203 (2014).

Utah,[87] Virginia,[88] Washington,[89] and Texas[90] require, by case law, statute, or rule, proof by a preponderance of the evidence to determine intellectual disability.[91] Kentucky and Kansas do not have defined burdens of proof.[92] Furthermore, the Federal Death Penalty Act places the burden on the defendant to prove he in intellectually disabled by a preponderance of the evidence.[93] There is certainly a trend across the country in favor of the burden of preponderance of evidence to prevent states from the grave mistake of executing the intellectually disabled. In short, similarly situated intellectually disabled individuals can live in one state but be eligible to be executed in another, simply because of what burden they face. This fundamentally unfair and unconstitutional practice must be corrected by this Court.

Following *Cooper* and *Medina*, it is clear that this Court recognizes the preponderance of evidence burden of proof as one that is fundamentally fair, that does not violate the Due Process Clause of the Fourteenth Amendment, and protects the intellectually disabled from being executed in violation of the Eighth Amendment and *Atkins*. *See* U.S. CONST. amend. VIII; amend. XIV. This protection is especially important in cases where individuals with mild intellectual disability are more difficult to identify than those with moderate or severe forms of the disorder.[94] Their deficits

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[87] *See* UTAH CODE ANN. § 77-15a-104 (12); (13) (West) *amended by* 2018 UTAH LAWS Ch. 281 (S.B. 116).
[88] *See* VA. CODE ANN. § 19.2-264.3:1.1 (C) (West 2017).
[89] *See* WASH. REV. CODE ANN. § 10.95.030 (2) (West 2015) *held unconstitutional on other grounds.*
[90] *See Ex parte Briseno*, 135 S.W. 3d at 7, 12, nn.24-27.
[91] Prior to the abolition of the death penalty, Maryland and New Mexico also required proof by the preponderance of evidence. *See* MD. CODE ANN., Crim. Law § 2-202 (West) *repealed by* Acts 2013, c. 156, § 3 (eff. Oct. 1, 2013); *see* N.M. STAT. ANN. § 31-20A-2.1 *repealed by* L. 2009, Ch. 11, § 5 (eff. July 1, 2009).
[92] *See* KAN. STAT. ANN. § 21-6622 (West 2017); *see* KY. REV. STAT. ANN. § 532.135 (West 2012) *found unconstitutional by Woodall*, 2018 WL 2979581 (*see supra* p.23-24).
[93] *See e.g.*, *Thomas*, 614 F. Supp. 2d at 1260; *Smith*, 790 F. Supp. 2d at 484 (E.D. La. 2011); *United States v. Bourgeois*, 2011 WL 1930684, at *46 (S.D. Tex. 2011); *Hooks v. Workman*, 689 F. 3d 1148, 1166 (10th Cir. 2012); *United States v. Northington*, 2012 WL 4024944, at *3 (E.D. Pa. 2012); *United States v. Salad*, 959 F. Supp. 2d 865, 868 (E.D. Va. 2013); *United States v. Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016).
[94] Gary N. Siperstein & Melissa A. Collins, *Intellectual Disability, in* The Death Penalty and Intellectual Disability 21, 26 (Edward A. Polloway ed., 2015).

are often subtle and not readily observable.[95] They engage in many activities common to those who are not intellectually disabled, but have deficits in socializing and conceptualizing; these deficits cause them to be easily led and to fail to understand the consequences of their actions.[96] These deficits represent one main reason that the *Atkins* Court found that the death penalty was inappropriate for the intellectually disabled - they lack the same culpability as non-intellectually disabled individuals.[97] Furthermore, and likely for this reason, most jurisdictions and the Federal Death Penalty Act require only that intellectual disability be proven by a preponderance of the evidence.[98] *See supra* p.33, n.74. The "clear and convincing evidence" requirement is an impossibility, particularly in cases of mild and moderate intellectual disability, and runs afoul of *Atkins*, *Cooper*, *Medina* and the Eighth and Fourteenth Amendments to the Constitution of the United States. Florida continues to be in the minority with its burdensome statutory scheme which will only serve to execute the intellectually disabled.

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[95] *Id.*
[96] *Id.*
[97] 536 U.S. at 319.
[98] John H. Blume & Karen L. Salekin, *Analysis of* Atkins *Cases, in* The Death Penalty and Intellectual Disability 37, 41 (Edward A. Polloway ed., 2015).

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for writ of certiorari and order further briefing in Mr. Quince's case.

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