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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CONTENTS OF APPENDIX

INDEX TO APPENDICES

Appendix A. Revised opinion of the Supreme Court of Florida affirming the lower court's denial of relief. *Quince v. State*, Appeal No. SC17-127 (April 12, 2018).

Appendix B. Order of the Supreme Court of Florida granting the State's motion for clarification and denying Quince's motion for rehearing. *Quince v. State*, Appeal No. SC17-127 (April 12, 2018).

Appendix C. Quince's motion for rehearing filed before the Supreme Court of Florida. *Quince v. State*, Appeal No. SC17-127 (February 1, 2018).

Appendix D. State of Florida's motion for clarification filed before the Supreme Court of Florida. *Quince v. State*, Appeal No. SC17-127 (January 23, 2018).

Appendix E. Initial opinion of the Supreme Court of Florida affirming the lower court's denial of relief. *Quince v. State*, Appeal No. SC17-127 (January 18, 2018).

Appendix F. Final Order of the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, denying Quince's renewed motion for determination of intellectual disability as a bar to execution. Circuit Court Case No. 80-00048CFAES (December 28, 2016).

Appendix G. Non-final Order of the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, on Quince's renewed motion for determination of intellectual disability as a bar to execution under Florida Rule of Criminal Procedure 3.203 and §921.137, Florida Statutes. Circuit Court Case No. 80-00048CFAES (May 17, 2017).

Appendix H. Table from an excerpt of Quince's initial brief to the Supreme Court of Florida demonstrating Quince's intelligent quotient scores, his scores with the Flynn effect correction, his scores with the standard error measurement, and his scores with the Flynn effect correction and standard error of measurement. *Quince v. State*, Appeal No. SC17-127 (filed on April 12, 2017).

Appendix I. Table from an excerpt of Quince's initial brief to the Supreme Court of Florida demonstrating Quince's evidence of concurrent deficits in present adaptive functioning. *Quince v. State*, Appeal No. SC17-127 (filed on April 12, 2017).

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Appendix A.

241 So.3d 58
Supreme Court of Florida.

Kenneth Darcell QUINCE, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–127
|
[April 12, 2018]

Synopsis
Background: Prisoner under sentence of death filed a renewed motion for a determination of intellectual disability as a bar to execution. The Circuit Court, Volusia County, Joseph G. Will, J., summarily denied the motion, and prisoner appealed.

Holdings: The Supreme Court held that:

[1] competent, substantial evidence existed to support trial court's decision not to apply the "Flynn" effect to adjust IQ scores of prisoner under sentence of death downward, as required to establish the significantly subaverage general intellectual functioning prong of the intellectual disability standard, under which imposition of prisoner's death sentence would be prohibited, and

[2] trial court was not required to make any specific factual findings as to whether prisoner had established that he met either the second or third prongs of the intellectual disability standard.

Affirmed.

An Appeal from the Circuit Court in and for Volusia County, Joseph G. Will, Judge—Case No. 642017CF101850XXXADL

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Opinion

PER CURIAM.

***59** Kenneth Darcell Quince, a prisoner under sentence of death, appeals the trial court's order summarily denying his renewed motion for a determination of intellectual disability as a bar to execution, which was filed under Florida Rule of Criminal Procedure 3.203 and section 921.137, Florida Statutes (2015). We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we affirm the denial of relief.

I. BACKGROUND

In 1980, Quince pleaded guilty to first-degree felony murder and burglary of a dwelling and, after waiving his right to a penalty phase jury, was sentenced to death. We affirmed Quince's death sentence on direct appeal. *Quince v. State*, 414 So.2d 185, 189 (Fla. 1982). Quince filed an initial motion for postconviction relief, the denial of which was eventually affirmed on appeal. *See Quince v. State*, 732 So.2d 1059 (Fla. 1999); *Quince v. State*, 592 So.2d 669 (Fla. 1992); *Quince v. State*, 477 So.2d 535 (Fla. 1985). In 2004, Quince filed a successive motion for postconviction relief under Florida Rules of Criminal Procedure 3.851 and 3.203, in which he sought to vacate his death sentence on the ground that he is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and section 921.137, Florida Statutes (2003).[1] In 2008, an evidentiary hearing was held, at which the trial court heard evidence regarding all three prongs of the intellectual disability standard and thereafter denied the motion based solely on Quince's failure to meet the significantly subaverage general intellectual functioning prong. The denial of relief was affirmed on appeal. *Quince v. State*, No. SC11-2401, 2012 WL 6197458, at *1–2 (Fla. Dec. 10, 2012) (116 So.3d 1262 (table)), *cert. denied*, — U.S. ——, 134 S.Ct. 2695, 189 L.Ed.2d 743 (2014).

1 Section 921.137 requires a defendant to establish his or her intellectual disability by demonstrating the following three factors: (1) significantly subaverage

> general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. The defendant has the burden to prove that he or she is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat.

In 2014, the United States Supreme Court issued its decision in *Hall v. Florida*, —— U.S. ——, 134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007 (2014), in which it held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant as establishing a strict IQ test score cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Instead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must now take into account the standard error of measurement (SEM) of IQ tests. *See Hall*, 134 S.Ct. at 2001. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional ***60** evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.*

In the wake of *Hall*, Quince filed a renewed motion for a determination of intellectual disability as a bar to execution in 2015. Quince did not request another evidentiary hearing or seek to present any new evidence of his alleged intellectual disability but simply asked the trial court to review the record from the 2008 intellectual disability hearing in light of *Hall*. Quince also argued that although the current state of the law requires a defendant to prove his or her intellectual disability by clear and convincing evidence, the trial court should allow Quince to prove his intellectual disability by a preponderance of the evidence because, he alleged, "the 'clear and convincing evidence' requirement runs afoul of *Atkins* and the Eighth and Fourteenth Amendments to the Constitution of the United States."

At the hearing held on Quince's renewed motion, the trial court acknowledged that although it had heard evidence regarding all three prongs of the intellectual disability standard at Quince's 2008 hearing, it denied Quince's initial intellectual disability claim based solely on his failure to demonstrate that he meets the significantly subaverage general intellectual functioning prong. The trial court agreed with Quince that *Hall* should be applied retroactively to his case but disagreed that Quince should be allowed to prove his intellectual disability by a preponderance of the evidence instead of clear and convincing evidence. The trial court stated that it would review the record and evidence from Quince's 2008 intellectual disability hearing and reconsider his intellectual disability claim in light of *Hall*. After reviewing the record and considering written memoranda from both parties, the trial court concluded that Quince failed to prove that he is intellectually disabled because none of the three IQ scores he had presented —79, 77, and 79—fell within the SEM and Quince "was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits." This appeal follows.

II. ANALYSIS

[1] Quince contends that the trial court erred in failing to find that he meets the first prong of the intellectual disability standard—significantly subaverage general intellectual functioning—because it did not adjust his IQ scores to account for the Flynn effect. [2] According to Quince, because *Hall* requires courts assessing IQ to allow professional standards to inform their decisions, the trial court was required to apply the Flynn effect to adjust his IQ scores down. Although the only IQ scores Quince has presented are a 79 (obtained using the WAIS in 1980), a 77 (obtained using the WAIS–R in 1984), and a 79 (obtained using the WAIS–III in 2006), he claims that when the Flynn effect is applied and the SEM is taken into account as required by *Hall*, his 1980 IQ score of 79 becomes a range from 65–75, his 1984 IQ score of 77 becomes a range of 70–80, and his 2006 IQ score of 79 becomes a range of 71–81. He asserts that all of these "ranges contain a score on which a finding of significantly subaverage general intellectual functioning is warranted."

2 The Flynn effect refers to a theory in which the intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations. The accepted increase in scoring is approximately three points per decade or 0.33 points per year.

At the evidentiary hearing on Quince's initial intellectual disability claim in 2008, Dr. Oakland, a psychologist, testified that he relied on the Flynn effect to adjust Quince's 1980 IQ score from a 79 to a 70. But Dr.

Oakland admitted that there is no ***61** scientific way to determine whether or not the Flynn effect is operating on a particular person's intelligence score and that he could only say that it was "within the realm of probability" that the Flynn effect impacted Quince's 1980 IQ score. Dr. Oakland did not dispute the accuracy of Quince's unadjusted 1984 IQ score of 77 or his unadjusted 2006 IQ score of 79 and did not testify that those scores should be adjusted for the Flynn effect. At the same 2008 hearing, another psychologist, Dr. McClaren, testified that because Quince's IQ scores remained virtually the same across time and are "tightly clustered near the upper bounds of the borderline level of intellect," the Flynn effect had no impact on them. Dr. McClaren testified that the Flynn effect does not apply on an individual basis, that it is not general clinical practice to subtract the "Flynn number" from an attained IQ score, and that the most recent publication from the American Association on Mental Retardation (which has since been renamed the American Association of Intellectual and Developmental Disabilities (AAIDD)) at the time did not advise doing so. Dr. McClaren also testified that it would not only be inappropriate but would make no sense to simply add the Flynn number and the SEM together and subtract them from an IQ score because they are not totally independent of one another. After the hearing, the trial court declined to apply the Flynn effect to adjust Quince's IQ scores and concluded that Quince did not establish that he suffers from significantly subaverage general intellectual functioning.

We previously considered and rejected Quince's argument that the trial court erred in failing to apply the Flynn effect to his IQ scores when Quince appealed the denial of his initial intellectual disability claim. *See Quince*, 116 So.3d 1262 (table); Initial Brief of the Appellant at 50, *Quince v. State*, 116 So.3d 1262 (Fla. 2012) (table) (No. SC11–2401). Quince again argues that the trial court erred in failing to adjust his scores for the Flynn effect when considering his renewed intellectual disability claim. Quince now relies on a 2015 publication of the AAIDD, *The Death Penalty and Intellectual Disability* (Edward A. Polloway, ed. 2015) (DPID), which states that there is "a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn Effect, particularly in *Atkins* cases." Quince argues that under "*Hall*, courts assessing ID must allow professional standards to inform their decisions" and that "[i]t is clear that both the professional community and the legal community recommend adjusting for the Flynn Effect in the context of *Atkins* cases." He asserts that if both the Flynn effect and the SEM are applied to his IQ scores as he claims *Hall* requires, he will have established that he meets the significantly subaverage intellectual functioning prong of the intellectual disability standard.

As many courts have already recognized, *Hall* does not mention the Flynn effect and does not require its application to all IQ scores in *Atkins* cases. *E.g.*, *Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017) (noting that *Hall* does not even mention the Flynn effect and does not require that IQ scores be adjusted for it), *petition for cert. filed*, No. 17–8275 (U.S. Mar. 26, 2018); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."), *cert. denied*, — U.S. ——, 137 S.Ct. 1333, 197 L.Ed.2d 526 (2017); *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 639 (11th Cir. 2016) ("*Hall* did not mention the Flynn effect. ... There is no 'established medical practice' of reducing IQ scores ***62** pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of *Hall* wholly inapposite."), *cert. denied*, — U.S. ——, 137 S.Ct. 1432, 197 L.Ed.2d 650 (2017). Although the AAIDD's DPID publication may now advocate the adjustment of all IQ scores in *Atkins* cases that were derived from tests with outdated norms to account for the Flynn effect, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Moore v. Texas*, — U.S. ——, 137 S.Ct. 1039, 1049, 197 L.Ed.2d 416 (2017). Because Quince has 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 is not entitled to relief on this claim.

[2] Next, Quince claims that the trial court erred in failing to consider all three prongs of the intellectual disability standard in tandem before denying his renewed intellectual disability claim. At the 2016 hearing on Quince's renewed intellectual disability motion, the trial court acknowledged that it denied Quince's initial intellectual disability claim under the applicable law at the time based exclusively on its finding that Quince

failed to meet the significantly subaverage intellectual functioning prong of the intellectual disability standard, but the trial court announced that it would apply *Hall* retroactively to Quince's case, review the record of the 2008 intellectual disability hearing, and reconsider all of the evidence presented in light of *Hall*. After reviewing the record and considering written memoranda from both parties, the trial court concluded that because "none of [Quince's IQ] scores are within the tests' acknowledged and inherent margin of error, and the defendant was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits," Quince is not entitled to relief under *Hall*. We agree that Quince is not entitled to relief on this basis.

In response to a specific question asked by Quince at the 2016 hearing about the extent of the court's review of his renewed intellectual disability claim, the trial court said that it would review the record from the 2008 evidentiary hearing, re-evaluate the evidence regarding the second and third prongs, and reconsider all of the evidence in light of *Hall*. The trial court's order denying his renewed intellectual disability claim did not make any specific factual findings as to whether Quince had established that he meets either the second or third prongs of the intellectual disability standard, but under the circumstances presented, such specific findings were unnecessary. Although *Hall* requires courts to consider all three prongs of intellectual disability in tandem, we have recently reiterated that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016); *accord Williams v. State*, 226 So.3d 758, 773 (Fla. 2017), *petition for cert. filed*, No. 17–7924 (U.S. Feb. 26, 2018); *Snelgrove v. State*, 217 So.3d 992, 1002 (Fla. 2017). And while *Hall* requires a holistic hearing, "defendants must still be able to meet the first prong of [the intellectual disability standard]." *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017), *petition for cert. filed*, No. 17–8134 (U.S. Mar. 12, 2018). Thus, because Quince failed to meet the significantly subaverage intellectual functioning prong (even when the SEM is taken into account), he could not have met his burden to demonstrate that he is intellectually disabled.

***63** Finally, Quince argues that section 921.137(4), Florida Statutes, which requires that defendants prove their intellectual disability by clear and convincing evidence, is unconstitutional under *Atkins* and the Eighth and Fourteenth Amendments to the United States Constitution, and that he should have been permitted to prove his intellectual disability claim by the more lenient preponderance of the evidence standard instead. 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 Singletary v. State*, 322 So.2d 551, 552 (Fla. 1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").

III. CONCLUSION

For these reasons, we affirm the trial court's order denying Quince's renewed motion for a determination of intellectual disability as a bar to execution.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and LAWSON, JJ., concur.

QUINCE, J., dissents.

All Citations

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Appendix B.

2018 WL 1783084
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Florida.

Kenneth Darcell QUINCE, Appellant(s)
v.
STATE of Florida, Appellee(s)

CASE NO.: SC17–127

|

APRIL 12, 2018

Lower Tribunal No(s).: 642017CF101850XXXADL

Opinion

***1** Appellee's Motion for Clarification is hereby granted in light of the revised opinion dated April 12, 2018. Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

All Citations

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Appendix C.

Filing # 67387357 E-Filed 02/01/2018 02:50:48 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-127

KENNETH DARCELL QUINCE,

Appellant

v.

STATE OF FLORIDA

Appellee.

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

APPELLANT'S MOTION FOR REHEARING

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COMES NOW the Appellant, Kenneth Darcell Quince (hereinafter referred to as "Mr. Quince"), who hereby files this Motion for Rehearing pursuant to Florida Rule of Appellate Procedure 9.330 (2012) and respectfully requests that this Honorable Court reconsider its opinion dated January 18, 2018. This Court's opinion affirmed the lower court's order denying Mr. Quince's renewed motion for determination of intellectual disability as a bar to execution. In the movant's opinion this Court overlooked or misapprehended in its decision points of facts that were previously raised in his Initial Brief. No issue or claim previously raised is hereby abandoned.

THE IQ SCORES IN THE OPINION

On January 23, 2018, the Appellee filed a Motion for Clarification, before this Court. The Appellant agrees with the Appellee's rendition in its Motion regarding the errors in the IQ scores in this Court's opinion. Further, the Appellant would point to this Court that on page 5 of its opinion, it stated that "he claims that when the Flynn effect is applied and the SEM is taken into account as required by Hall, his 1980 IQ score of 79 becomes **a range from 65-70**." *Quince v. State*, 2018 WL 458942, *2 (Fla. Jan. 18, 2018). The range presented by the Appellant, and as presented on page 31 of his Initial Brief, for his 1980 IQ score was actually **from 65-75**.

***HALL, MOORE,* AAIDD, DSM-V, AND THE CURRENT MEDICAL STANDARDS FOR THE DIAGNOSIS OF INTELLECTUAL DISABILITY**

This Court on pages 7 to 8 of its opinion disregards the significance of the AAIDD[1] in its assessment of the medical communities' recognition of the Flynn Effect. The Court does not acknowledge the DSM-V's[2] importance along with the AAIDD, in informing the medical communities' diagnosis of intellectual disability.

This Court further goes on to state that "Quince has not demonstrated that Hall requires that his IQ scores be adjusted for the Flynn effect." *Quince*, 2018 WL 458942at *8. This Court misinterprets *Hall*'s silence on the Flynn Effect to mean that the Flynn Effect should be disregarded as it is not mandated. *Hall* did not address the Flynn effect. *Hall* and *Moore* require Quince to demonstrate that his medical diagnosis is supported by the professional community's diagnostic framework and teachings, which are governed by the DSM-V and AAIDD. *See Hall v. Florida,* 134 S. Ct. 1986, 2000, 188 L.Ed.2d 1007 (2014); *Moore v. Texas,* 137 S. Ct. 1039, 1048-1049 (2017). Mr. Quince has maintained from the beginning that he is intellectually disabled, and that current medical standards mandate that his scores adjusted for the Flynn Effect. The lower court, after a full *Frye* hearing, found "that the Flynn Effect

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[1] The AAMR has been renamed and is now called the American Association on Intellectual and Developmental Disabilities (AAIDD). *See Appellant Initial Brief* at p.36.

[2] Diagnostic and Statistical Manual of Mental Disorders (DSM).

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." P4/586. The AAIDD, an authoritative text on intellectual disability, recognizes the Flynn Effect as a valid and real phenomena that is mandated to adjust scores. *See Appellant Initial Brief* at p.45-46. The Supreme Court in *Moore* relied on the DSM-V and AAIDD as the "leading diagnostic manuals." *Moore*,[3] 137 S. Ct. at 1048. These are the same authorities that Mr. Quince correctly relied on in his argument and in accordance with *Hall*'s recognition of the importance of an informed medical opinion regarding intellectual disability.

This Court stated that "many court 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 certain Circuit Courts of Appeal decisions. *Quince v. State*, 2018 WL 458942 at *7-*8. However, in accordance with the AAIDD, there are several courts that have found the Flynn Effect to be mandated by the AAIDD and to follow the DSM-V, for this Court's review. *See United States v.*

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[3] "Even if 'the views of medical experts' do not 'dictate' a court's intellectual-disability determination, . . . **we clarified, the determination must be 'informed by the medical community's diagnostic framework**,' . . . We relied on the **most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11**. . . **Florida, we concluded, had violated the Eighth Amendment by 'disregard[ing] established medical practice.'** . . . **We further noted that Florida had parted ways with practices and trends in other States.**" *Moore*, 137 S. Ct. at 1048 (quoting *Hall v. Florida*, 134 S. Ct. at 1991, 1993-94, 1994-95, 2000-2001) (internal cites omitted).

Roland,[4] CR 12-0298 (ES), 2017 WL 6451709, at *28 (D.N.J. Dec. 18, 2017); *see People v. Superior Court*,[5] 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*,[6] 762 F.Supp.2d 849, 862-67 (E.D. La. 2010). Furthermore, the opinion in *Hardy* looked in depth into the analysis of several courts that have accepted the Flynn Effect and stated as follows:

> The Fifth Circuit has not yet ruled on the validity of the Flynn Effect. . . . While the Fifth Circuit has not definitively passed on the Flynn Effect, cases from the Fourth and the Eleventh Circuits expressly

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[4] "**The Court will nonetheless recognize the Flynn Effect as a best practice for an ID determination**. **The AAIDD mandates the application of the Flynn Effect when a clinician administers a test with outdated norms, especially in light of the retrospective diagnosis here**. *See* AAIDD–11 at 95–96; *id.* at 37 ("[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."). The DSM–5 likewise recognizes the Flynn Effect as one of the factors that may affect IQ test scores. *See* DSM–5 at 37. Moreover, Roland's experts posit that the Court should apply a Flynn adjustment." *Roland*, 2017 WL 6451709, at *28 (internal footnote omitted).

[5] The Court recognized that the Flynn Effect must be taken into consideration.

[6] "Hardy's score of 73 places him in the range of mild mental retardation after considering the standard error of measurement, and without correcting for the Flynn Effect. **Nevertheless, the Court's obligation is to ascertain the best estimate of Hardy's IQ**. In light of the substantial evidence supporting the existence of the Flynn Effect, the Court concludes that Hardy's score of 73 should be corrected to take it into account." Moroever, "[t]he Court finds that **the Flynn Effect is well established scientifically** and that Dr. Hayes' skepticism is unpersuasive. Hence, the Court will correct for the Flynn Effect in determining Hardy's IQ. The WAIS–R was normed in 1978 and Hardy took the test in 1996, eighteen years later. Applying Dr. Flynn's formula, Hardy's score of 73 is in fact a score of 67.06." *Hardy*, 762 F.Supp.2d at 862-67.

> endorse use of the Flynn Effect, sometimes even requiring it to be considered.[32] *E.g.,* ***Thomas v. Allen,* 607 F.3d 749, 753 (11th Cir. 2010)** ("An evaluator may also consider the 'Flynn effect,' a method that recognizes the fact that IQ test scores have been increasing over time.... Therefore, the IQ test scores must be recalibrated to keep all test subjects on a level playing field."); ***Holladay v. Allen,* 555 F.3d 1346, 1350 n. 4, 1358 (11th Cir. 2009)** (crediting the psychologist that concluded the IQ scores needed to be adjusted for the Flynn Effect); ***Walker v. True,* 399 F.3d 315, 322–23 (4th Cir. 2005)** (remanding for an evidentiary hearing in part because the district court "refused to consider relevant evidence, name the Flynn Effect evidence."); ***Davis,* 611 F.Supp.2d at 488**[7] ("In conclusion, the Court finds the defendant's Flynn effect evidence both relevant and persuasive, and will, as it should, consider the Flynn-adjusted scores in its evaluation of the defendant's intellectual functioning."); ***Thomas v. Allen,* 614 F.Supp.2d 1257, 1278 (N.D. Ala .2009)** ("It also is undisputed that Professor Flynn's recommendation—i.e., 'deduct 0.3 IQ points per year [three points per decade] to cover the period between the year the test was normed and the year in which the subject took the test—is a generally accepted adjustment."); ***Green v. Johnson,* 2006 WL 3746138, at *45 (E.D. Va. 2006)** ("Considering all of the case law and evidence, this Court concludes that the Flynn Effect should be considered when determining whether Green's scores fall at least two standard deviations below the mean. There is sufficient evidence in the record to show the Flynn Effect is recognized throughout the profession."); *see also United States v. Parker,* 65 M.J. 626 (N–M.Ct.Crim.App.2007).

Hardy, 762 F. Supp. 2d 849 at 862 (original footnotes omitted) (footnote added).

There is ample case law support for the Flynn correction in light of *Hall*.

This Court on page 8 of its opinion cited to *Moore* to state that "Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." *Quince v. State*, 2018 WL 458942,

[7] *U.S. v. Davis*, 611 F.Supp.2d 472, 486-88 (D. Md. 2009).

*8. It is clear that Mr. Quince is a case where the Flynn Effect was accepted by the lower court and his scores required the correction and also the SEM adjustment. The expert testimony by the defense supports it and so does the diagnostic manuals. *See Moore*, 137 S. Ct. at 1048. However, the Court must read this statement in context of the surrounding statements by the Supreme Court of the United States. *See Appellant Initial Brief* at p.37-38. 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. In context, the Supreme Court of the United States is clarifying to the lower 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. The current medical standards for diagnosis of intellectual disability 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. Mr. Quince's intellectual disability diagnosis is clearly supported by current medical standards and must be upheld by this Court in accordance with *Moore* and *Hall*

Mr. Quince has clearly demonstrated through expert testimony and former

and current medical treatise that the Flynn effect if valid and must be applied to Mr. Quince's older edition scores. This is the medical support that *Hall* and *Moore* require of Mr. Quince. 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[8]; it is a medical diagnosis 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 Appellant Initial Brief* at p.40-43. Drs. Oakland and Berland are the only mental health professionals who made a full determination as to ID, who assessed all three prongs in accordance with the DSM[9] and AAIDD[10] and who unequivocally found Quince to be mentally retarded. *See Hall v. State*, 201 So. 3d 637 (Fla. 2016). This Court cannot undermine the strength of the medical support for all three prongs for Mr. Quince's diagnosis.

WHEREFORE, because Mr. Quince respectfully requests that this Honorable Court review the evidence presented at the post-conviction proceedings and the record on appeal and grant Mr. Quince a rehearing or relief that it deems appropriate.

---

[8] *See Quince v. State*, 2018 WL 458942, *9-*10.

[9] The AAMR and the American Psychiatric Association, publisher of the DSM are the authorities for establishing the diagnostic criteria for ID. *See Appellant Initial Brief* at p.36.

[10] The AAMR has been renamed and is now called AAIDD. *See Appellant Initial Brief* at p.36.

CERTIFICATE OF COMPLIANCE

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

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 1st day of February, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been served through the Florida Courts E-Filing Portal to **Doris Meacham**, Assistant Attorney General, Office of the Attorney General, on this 1st day of February, 2018.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Kenneth Quince**, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 1st day of February, 2018.

/s/ Raheela Ahmed
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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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix D.

Filing # 66904335 E-Filed 01/23/2018 01:51:02 PM

IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,

Appellant,

v. **Case No. SC17-127**

STATE OF FLORIDA,

Appellee.

_______________________________/

APPELLEE'S MOTION FOR CLARIFICATION

COMES NOW, APPELLEE, the State of Florida, by and through the undersigned counsel, and pursuant to Rule 9.330 Florida Rules of Appellate Procedure moves this Honorable Court for Clarification of the decision in the above-styled case, rendered on January 18, 2017, and as grounds states as follows:

In the January 18, 2017, opinion, this Court affirmed the trial court's order denying Appellant's renewed motion for a determination of intellectual disability as a bar to execution. This Court concluded that the Appellant had not demonstrated that *Hall v. Florida*, 134 S. Ct. 1986 (2014) required his IQ scores be adjusted for the Flynn effect, and that there was competent, substantial evidence in the record to support the trial court's decision not to apply the Flynn effect to adjust the Appellant's IQ scores.

The record shows that there were three intelligence tests that had been administered to the Appellant. The first WAIS test was administered to Appellant in

1980, and Appellant received a full scale score of 79. The second WAIS test was administered in 1984, and Appellant received a full scale score of 77. The last WAIS test was administered in 2006, and Appellant received a full scale score of 79. (PCR4: 547).

In rendering its opinion, this Court referred back to the three tests that had been administered to the Appellant, and correctly set forth the IQ scores: "Although the only IQ scores Quince has presented are **a 79 (obtained using the WAIS in 1980), a 77 (obtained using the WAIS-R in 1984), and a 79 (obtained using the WAIS-III in 2006 ...)"** *Quince v. State*, 2018 WL 458942, *2 (Fla. Jan. 18, 2018) (*emphasis added*).

However, later on in the continuation of the above sentence, this Court referred to the 1984 IQ test with a score of 76, rather than the actual score of 77. This Court wrote: "... he claims that when the Flynn effect is applied and the SEM is taken into account as required by Hall, his 1980 IQ score of 79 becomes a range from 65-70, his **1984 IQ score of 76** becomes a range of 70-80, and his 2006 IQ score of 79 becomes a range of 71-81." *Quince v. State*, 2018 WL 458942, *2 (Fla. Jan. 18, 2018) (*emphasis added*).

This Court again referred to the Appellant's IQ scores applying a score of 76 to the 1984 IQ score, rather than the actual score of 77, writing, "Dr. Oakland did not dispute the accuracy of Quince's **unadjusted 1984 IQ score of 76** or his unadjusted 2006 IQ score of 79 and did not testify that those scores should be adjusted for the

Flynn effect." *Quince v, State,* 2018 WL 458942, *2 (Fla. Jan. 18, 2018) (*emphasis added*).

This Court also referred to the Appellant's IQ scores in the "Background" section of the opinion. In this section, the scores were written as 77, 79, and 77, rather than the actual scores of 79, 77, and 79. This Court wrote, "After reviewing the record and considering written memoranda from both parties, the trial court concluded that Quince failed to prove that he is intellectually disabled because none of the **three IQ scores he had presented-77, 79, and 77** fell within the SEM and Quince "was not precluded from presenting additional evidence of intellectual ability, including testimony regarding adaptive deficits." *Quince v, State*, 2018 WL 458942, *2 (Fla. Jan. 18, 2018) (*emphasis added*).

This Court correctly set forth Appellant's various IQ scores of **79 (obtained using the WAIS in 1980), a 77 (obtained using the WAIS-R in 1984), and a 79 (obtained using the WAIS-III in 2006**) in its opinion, but subsequent recitations of his various IQ scores were incorrect, as noted herein.

As the issue presented in this opinion is currently being litigated in this Court, the opinion needs to be clear and correct for future reference.

WHEREFORE, the undersigned respectfully moves this Honorable Court for a Clarification of the decision in the above-styled case.

Respectfully submitted,

PAMELA JO BONDI
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 23, 2018, I filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Raheela Ahmed, Assistant CCRC-Middle, ahmed@ccmr.state.fl.us; Maria Perinetti, Assistant CCRC-Middle; perinetti@ccmr.state.fl.us; and Lisa Bort-Assistant CCRC-Middle, bort@ccmr.state.fl.us and support@ccmr.state.fl.us; CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33619, the Attorneys for Appellant.

s/ DORIS MEACHAM
DORIS MEACHAM
ASSISTANT ATTORNEY GENERAL

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix E.

2018 WL 458942
Supreme Court of Florida.

Kenneth Darcell QUINCE, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–127
|
[January 18, 2018]

Synopsis

Editor's Note: Opinion decommissioned. Replaced by 2018 WL 1755470.

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Supreme Court of Florida

No. SC17-127

KENNETH DARCELL QUINCE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[January 18, 2018]

PER CURIAM.

Kenneth Darcell Quince, a prisoner under sentence of death, appeals the trial court's order summarily denying his renewed motion for a determination of intellectual disability as a bar to execution, which was filed under Florida Rule of Criminal Procedure 3.203 and section 921.137, Florida Statutes (2015). We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we affirm the denial of relief.

I. BACKGROUND

In 1980, Quince pleaded guilty to first-degree felony murder and burglary of a dwelling and, after waiving his right to a penalty phase jury, was sentenced to

death. We affirmed Quince's death sentence on direct appeal. Quince v. State, 414 So. 2d 185, 189 (Fla. 1982). Quince filed an initial motion for postconviction relief, the denial of which was eventually affirmed on appeal. See Quince v. State, 732 So. 2d 1059 (Fla. 1999); Quince v. State, 592 So. 2d 669 (Fla. 1992); Quince v. State, 477 So. 2d 535 (Fla. 1985). In 2004, Quince filed a successive motion for postconviction relief under Florida Rules of Criminal Procedure 3.851 and 3.203, in which he sought to vacate his death sentence on the ground that he is intellectually disabled and therefore ineligible for the death penalty under Atkins v. Virginia, 536 U.S. 304 (2002), and section 921.137, Florida Statutes (2003).[1] In 2008, an evidentiary hearing was held, at which the trial court heard evidence regarding all three prongs of the intellectual disability standard and thereafter denied the motion based solely on Quince's failure to meet the significantly subaverage general intellectual functioning prong. The denial of relief was affirmed on appeal. Quince v. State, No. SC11-2401, 2012 WL 6197458, at *1-2 (Fla. Dec. 10, 2012) (116 So. 3d 1262 (table)).

---

1. Section 921.137 requires a defendant to establish his or her intellectual disability by demonstrating the following three factors: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. The defendant has the burden to prove that he or she is intellectually disabled by clear and convincing evidence. § 921.137(4), Fla. Stat.

In 2014, the United States Supreme Court issued its decision in Hall v. Florida, 134 S. Ct. 1986, 1990 (2014), in which it held that Florida's interpretation of its statute prohibiting the imposition of the death sentence upon an intellectually disabled defendant as establishing a strict IQ test score cutoff of 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Instead of applying the strict cutoff when assessing the subaverage intellectual functioning prong of the intellectual disability standard, courts must now take into account the standard error of measurement (SEM) of IQ tests. See Hall, 134 S. Ct. at 2001. And "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." Id.

In the wake of Hall, Quince filed a renewed motion for a determination of intellectual disability as a bar to execution in 2015. Quince did not request another evidentiary hearing or seek to present any new evidence of his alleged intellectual disability but simply asked the trial court to review the record from the 2008 intellectual disability hearing in light of Hall. Quince also argued that although the current state of the law requires a defendant to prove his or her intellectual disability by clear and convincing evidence, the trial court should allow Quince to prove his intellectual disability by a preponderance of the evidence because, he

alleged, "the 'clear and convincing evidence' requirement runs afoul of Atkins and the Eighth and Fourteenth Amendments to the Constitution of the United States."

At the hearing held on Quince's renewed motion, the trial court acknowledged that although it had heard evidence regarding all three prongs of the intellectual disability standard at Quince's 2008 hearing, it denied Quince's initial intellectual disability claim based solely on his failure to demonstrate that he meets the significantly subaverage general intellectual functioning prong. The trial court agreed with Quince that Hall should be applied retroactively to his case but disagreed that Quince should be allowed to prove his intellectual disability by a preponderance of the evidence instead of clear and convincing evidence. The trial court stated that it would review the record and evidence from Quince's 2008 intellectual disability hearing and reconsider his intellectual disability claim in light of Hall. After reviewing the record and considering written memoranda from both parties, the trial court concluded that Quince failed to prove that he is intellectually disabled because none of the three IQ scores he had presented—77, 79, and 77—fell within the SEM and Quince "was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits." This appeal follows.

II. ANALYSIS

Quince contends that the trial court erred in failing to find that he meets the first prong of the intellectual disability standard—significantly subaverage general intellectual functioning—because it did not adjust his IQ scores to account for the Flynn effect.[2] According to Quince, because Hall requires courts assessing IQ to allow professional standards to inform their decisions, the trial court was required to apply the Flynn effect to adjust his IQ scores down. Although the only IQ scores Quince has presented are a 79 (obtained using the WAIS in 1980), a 77 (obtained using the WAIS-R in 1984), and a 79 (obtained using the WAIS-III in 2006), he claims that when the Flynn effect is applied and the SEM is taken into account as required by Hall, his 1980 IQ score of 79 becomes a range from 65-70, his 1984 IQ score of 76 becomes a range of 70-80, and his 2006 IQ score of 79 becomes a range of 71-81. He asserts that all of these "ranges contain a score on which a finding of significantly subaverage general intellectual functioning is warranted."

At the evidentiary hearing on Quince's initial intellectual disability claim in 2008, Dr. Oakland, a psychologist, testified that he relied on the Flynn effect to adjust Quince's 1980 IQ score from a 79 to a 70. But Dr. Oakland admitted that

---

2. The Flynn effect refers to a theory in which the intelligence of a population increases over time, thereby potentially inflating performance on IQ examinations. The accepted increase in scoring is approximately three points per decade or 0.33 points per year.

there is no scientific way to determine whether or not the Flynn effect is operating on a particular person's intelligence score and that he could only say that it was "within the realm of probability" that the Flynn effect impacted Quince's 1980 IQ score. Dr. Oakland did not dispute the accuracy of Quince's unadjusted 1984 IQ score of 76 or his unadjusted 2006 IQ score of 79 and did not testify that those scores should be adjusted for the Flynn effect. At the same 2008 hearing, another psychologist, Dr. McClaren, testified that because Quince's IQ scores remained virtually the same across time and are "tightly clustered near the upper bounds of the borderline level of intellect," the Flynn effect had no impact on them. Dr. McClaren testified that the Flynn effect does not apply on an individual basis, that it is not general clinical practice to subtract the "Flynn number" from an attained IQ score, and that the most recent publication from the American Association on Mental Retardation (which has since been renamed the American Association of Intellectual and Developmental Disabilities (AAIDD)) at the time did not advise doing so. Dr. McClaren also testified that it would not only be inappropriate but would make no sense to simply add the Flynn number and the SEM together and subtract them from an IQ score because they are not totally independent of one another. After the hearing, the trial court declined to apply the Flynn effect to adjust Quince's IQ scores and concluded that Quince did not establish that he suffers from significantly subaverage general intellectual functioning.

We previously considered and rejected Quince's argument that the trial court erred in failing to apply the Flynn effect to his IQ scores when Quince appealed the denial of his initial intellectual disability claim. See Quince, 116 So. 3d 1262 (table); Initial Brief of the Appellant at 50, Quince v. State, 116 So. 3d 1262 (Fla. 2012) (table) (No. SC11-2401). Quince again argues that the trial court erred in failing to adjust his scores for the Flynn effect when considering his renewed intellectual disability claim. Quince now relies on a 2015 publication of the AAIDD, The Death Penalty and Intellectual Disability (Edward A. Polloway, ed. 2015) (DPID), which states that there is "a consensus that individually obtained IQ test scores derived from tests with outdated norms must be adjusted to account for the Flynn Effect, particularly in Atkins cases." Quince argues that under "Hall, courts assessing ID must allow professional standards to inform their decisions" and that "[i]t is clear that both the professional community and the legal community recommend adjusting for the Flynn Effect in the context of Atkins cases." He asserts that if both the Flynn effect and the SEM are applied to his IQ scores as he claims Hall requires, he will have established that he meets the significantly subaverage intellectual functioning prong of the intellectual disability standard.

As many courts have already recognized, Hall does not mention the Flynn effect and does not require its application to all IQ scores in Atkins cases. E.g.,

Black v. Carpenter, 866 F.3d 734, 746 (6th Cir. 2017) (noting that Hall does not even mention the Flynn effect and does not require that IQ scores be adjusted for it); Smith v. Duckworth, 824 F.3d 1233, 1246 (10th Cir. 2016) ("Hall says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."), cert. denied, 137 S. Ct. 1333 (2017); Ledford v. Warden, Georgia Diagnostic & Classification Prison, 818 F.3d 600, 639 (11th Cir. 2016) ("Hall did not mention the Flynn effect. . . . There is no 'established medical practice' of reducing IQ scores pursuant to the Flynn effect. The Flynn effect remains disputed by medical experts, which renders the rationale of Hall wholly inapposite."), cert. denied, 137 S. Ct. 1432 (2017). Although the AAIDD's DPID publication may now advocate the adjustment of all IQ scores in Atkins cases that were derived from tests with outdated norms to account for the Flynn effect, "Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide." Moore v. Texas, 137 S. Ct. 1039, 1049 (2017). Because Quince has 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 is not entitled to relief on this claim.

Next, Quince claims that the trial court erred in failing to consider all three prongs of the intellectual disability standard in tandem before denying his renewed intellectual disability claim. At the 2016 hearing on Quince's renewed intellectual disability motion, the trial court acknowledged that it denied Quince's initial intellectual disability claim under the applicable law at the time based exclusively on its finding that Quince failed to meet the significantly subaverage intellectual functioning prong of the intellectual disability standard, but the trial court announced that it would apply Hall retroactively to Quince's case, review the record of the 2008 intellectual disability hearing, and reconsider all of the evidence presented in light of Hall. After reviewing the record and considering written memoranda from both parties, the trial court concluded that because "none of [Quince's IQ] scores are within the tests' acknowledged and inherent margin of error, and the defendant was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits," Quince is not entitled to relief under Hall. We agree that Quince is not entitled to relief on this basis.

In response to a specific question asked by Quince at the 2016 hearing about the extent of the court's review of his renewed intellectual disability claim, the trial court said that it would review the record from the 2008 evidentiary hearing, re-evaluate the evidence regarding the second and third prongs, and reconsider all of

the evidence in light of Hall. The trial court's order denying his renewed intellectual disability claim did not make any specific factual findings as to whether Quince had established that he meets either the second or third prongs of the intellectual disability standard, but under the circumstances presented, such specific findings were unnecessary. Although Hall requires courts to consider all three prongs of intellectual disability in tandem, we have recently reiterated that "[i]f the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." Salazar v. State, 188 So. 3d 799, 812 (Fla. 2016); accord Williams v. State, 226 So. 3d 758, 773 (Fla. 2017); Snelgrove v. State, 217 So. 3d 992, 1002 (Fla. 2017). And while Hall requires a holistic hearing, "defendants must still be able to meet the first prong of [the intellectual disability standard]." Zack v. State, 228 So. 3d 41, 47 (Fla. 2017). Thus, because Quince failed to meet the significantly subaverage intellectual functioning prong (even when the SEM is taken into account), he could not have met his burden to demonstrate that he is intellectually disabled.

Finally, Quince argues that section 921.137(4), Florida Statutes, which requires that defendants prove their intellectual disability by clear and convincing evidence, is unconstitutional under Atkins and the Eighth and Fourteenth Amendments to the United States Constitution, and that he should have been permitted to prove his intellectual disability claim by the more lenient

preponderance of the evidence standard instead. 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 Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds.").

III. CONCLUSION

For these reasons, we affirm the trial court's order denying Quince's renewed motion for a determination of intellectual disability as a bar to execution.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and LAWSON, JJ., concur.
QUINCE, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Volusia County,
Joseph G. Will, Judge - Case No. 642017CF101850XXXADL

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Raheela Ahmed, Maria Christine Perinetti, Lisa Marie Bort, and Reuben Andrew Neff, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Doris Meacham, Assistant Attorney General, Daytona Beach, Florida,

for Appellee

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
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APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix F.

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

STATE OF FLORIDA,
Plaintiff,

CASE NO. 80-00048-CFAES

v.

KENNETH DARCELL QUINCE,
Defendant.
_______________________________________/

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR DETEMINATION OF INTELLECTUAL DISABILITY AS BAR TO EXECUTION

THIS CAUSE came before the court on Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution ("Renewed Motion"), alleging that Quince is ineligible for execution because he is intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304 (2002), or *Hall v. Florida*, 134 S.Ct. 1986 (2014), and Florida law. This court finds that Quince has not established that he is intellectually disabled and is thereby not entitled to relief of any sort.

HISTORY OF THE CASE

On direct appeal, the Florida Supreme Court summarized Quince's offense:

> In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive,

but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.[FN1]

> FN1. The sexual battery charge was later dismissed because it was the underlying felony to the felony-murder offense.

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

We address first appellant's most forceful argument, in which he asserts that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law.[FN2] The trial judge noted in his sentencing order, and the record supports, that although the experts agreed that Quince was not of normal intelligence, the exact degree of mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another.

> The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.
>
> FN2. § 921.141(6)(f), Fla.Stat. (1979).

Quince v. State, 414 So. 2d185, 186-7 (Fla. 1982).

In 2004, the Eleventh Circuit summarized the procedural history of this case to that point as follows:

> In the early 1980's, Kenneth Quince, *a.k.a.* Rasikh Abdul-Hakim ("appellant"), pled guilty to first-degree felony murder and burglary following the sexual battery and strangulation death of an 82-year old woman in her home, whereupon appellant was sentenced to death by the trial court. His conviction and sentence were affirmed on direct appeal. *Quince v. State,* 414 So. 2d 185 (Fla. 1982). Subsequently, there was extensive collateral litigation in state court. *See Quince v. State,* 732 So. 2d 1059 (Fla. 1999); *Quince v. State, 592* So. 2d 669 (Fla. 1992); *Quince v. State,* 477 So. 2d 535 (Fla. 1985). [FN1]
>
> [FN1] In the interim, appellant had sought relief in federal district court. However, those proceedings were administratively closed on October 26, 1990, pending further exhaustion of his state remedies. *Quince v. Dugger,* No. 86-685-CIV-ORL (M.D. Fla. Oct. 26, 1990).
>
> As noted, see note *1, supra,* appellant had filed a petition for habeas corpus relief before fully exhausting his state court remedies. After exhausting those remedies, appellant returned to federal court, amending his original petition and presenting the newly exhausted claims. In an opinion entered on May 10, 2002, the district. . court entered final judgment, having rejected all of appellant's numerous claims...

Quince v. Crosby, 360 F.3d 1259, 1260-1261 (1lth Cir. 2004). Quince's petition for writ of certiorari to the United States Supreme Court was denied on November 1, 2004. *Quince v. Florida*, 534 U.S. 960 (2004).

Also on November 1, 2004, Quince filed a successive motion for postconviction relief under *Fla. R. Crim. P.* 3.851 and 3.203. The case was litigated in this court for the next eleven (11) years. Subsequent to an evidentiary hearing, and the parties' filings of memorandum of law, in its November 7, 2011 order, this court detailed those proceedings as follows:

RENEWED INTELLECUTAL DISABILTY CLAIM

> On or about November 1, 2004, Quince filed a successive motion for post-conviction relief pursuant to *Florida Rules of Criminal Procedure* 3.851 and 3.203. This court conducted an evidentiary hearing on May 12, May 15, May 16, and November 3, 2008. The significant evidence from that hearing is summarized below.
>
> Dr. Thomas Oakland, Ph.D., is a psychologist and a professor at the University of Florida. (V3, R211-12). He specializes in 1) mental retardation, 2) test development and use, and 3) the clinical practice of psychology. (V3, R214).
>
> Dr. Oakland explained that adaptive behavior "refers to a person's ability to independently assume responsibility for his daily activities, and as he matures, as he gets older to assume responsibility for the welfare of others." (V3, R242-43). Further, he explained that the "DSM"[2] and the "AAMR"[3] define adaptive behaviors differently.
>
>> [FN2] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000. (V3, R236-37).
>>
>> [FN3] American Association on Mental Retardation, AAMR Definition Classifications and System Support, 10th Edition. 2002. (V3, R237).

Dr. Oakland testified that *a* person with "a general adaptive composite [score on an assessment instrument] that is 70 or below generally is an indication of one prong of mental retardation." (V3, R245).

Dr. Oakland administered the ABAS[4] to Quince in April of 2007 and April of 2008.

> [FN4] Dr. Oakland is a co-author of this assessment instrument, the full name of which is the Adaptive Behavior Assessment System. (V3, R220).

In addition he interviewed various family members, former teachers, and a jail guard. (V3, R260-61). Family members (who also responded to the ABAS in a group setting) described Quince as a follower prior to age 18. He did not draw attention to himself, walked awkwardly, and was a loner. He did not initiate conversation, did not read books or newspapers, and worked under supervision. He did not handle money well and did not engage in activities such as ironing, laundry, or cooking. (V2, R261-62).

In assessing Quince, Dr. Oakland relied upon articles written by Dr. James Flynn; the ABAS II, Clinical Use and Interpretation; the User's Guide for Mental Retardation; the Comprehensive Manual for SIB-R;[5] and the Comprehensive Manual for the ABAS II. (V3, R268, 292). He also relied upon 1980 intelligence testing. (V3, R319-20).[6]

> [FN5] Scales of Independent Behavior-Revised (V3, R299).

> [FN6] As discussed *infra, Dr.* Oakland did not rely on the subsequent intelligence testing conducted on Quince.

Dr. Oakland prepared a report dated April 24, 2007, with corrections made April 22, 2008. (V3, R269-70, Def. Exh. 3). He concluded Quince is mentally retarded. (V3, R269).

On the ABAS, which has a mean score of 100 and a standard deviation of 15, Quince scored a 52 on the general adaptive

composite, which falls in the 1st percentile. (V3, R272, 278-79). Dr. Oakland further explained that 99 of 100 people would have scored higher than Quince. (V3, R272). Quince showed diminished adaptive behavior in conceptual, practical, and social skills. (V3, R280). In each of the ten adaptive areas of the DSM, a different scale is used. This scale uses a mean score of 10 with a standard deviation of 3. By using 2 standard deviations, a score of 4 or below would indicate diminished adaptive behavior. Quince scored a 4 or below in all ten areas. (V3, R281-82). Based on the information gathered, Dr. Oakland said Quince had deficits in adaptive behavior prior to age 18. (V3, R287). Although Quince's original adaptive behavior composite score was 52, Dr. Oakland said his new score, after the corrections were made in April of 2008, was now 40. His conceptual skills score was a 49; social skills, 54; and practical skills, 43. (V 3, R287; V4, R471). Quince's scores are low because "he's in an environment [death row] that doesn't allow him to display normal behavior." (V3, R288).

Dr. Oakland said the DSM definition of mental retardation is a three-part definition: I) significantly sub-average intellectual functioning; 2) concurrent deficits or impairments in present adaptive functioning; and 3) onset of the condition prior to age 18. (V3, R383-84; V4, R449-50). The DSM defines sub-average intellectual functioning as being an intelligence quotient that is 70 or below, which is two standard deviations below the mean of 100. (V3, R317-18; V4, R449-50). Typically, the Wechsler Adult Intelligence Scale ("WAIS") measures a person's intelligence. Quince was administered this test three times. In 1980, his full scale IQ score on the WAIS was 79; in 1984, his score on the WAIS-R was 77; and in 2006 his score on the WAIS-III was 79. (V3, R318, 372, 373, 380). These scores are not consistent with mental retardation. (V4. R457) He did not detect any validity problems with the 2006 WAIS-III testing. (V4, R468). Dr. Oakland said that using the version of the WAIS that was current in 1980 would be inappropriate in an evaluation conducted after a newer version of that instrument was available. (V3, R353).

Dr. Oakland explained how the Flynn Effect[7] can result in an increase in the measured level of intelligence over time.

[FN7] Dr. Flynn is a professor of political science at a university in New Zealand. (V3, R342).

The accepted increase in scoring is approximately three points per decade. (V3, R330, 356-57). The WAIS test given to Quince in 1980[8] was normed in 1956.

[FN8] Quince was 21 years old in 1980. (V3, R363).

Therefore, Dr. Oakland adjusted Quince's score by 9 points (26 years x .33 = 8.58 points, rounded up to 9), which then yielded a score of 70. (V3, R358), According to Dr. Oakland, this score was consistent with the information he had about Quince's adaptive behavior. (V3, R35859, 362). There is no way to tell if the Flynn Effect actually affected Quince's 1980 IQ score. (V4, R457). And, if there is no IQ score available for a person under the age of 18, "one cannot make a judgment of mental retardation." (V3, R365). By using the Flynn Effect, Quince's 1980 IQ score can be adjusted by using a retrospective application. (V3, R365-66).

The WAIS-R (the second intelligence test administered to Quince) was normed in 1980. (V3, R376-77, 379). Therefore, by applying the Flynn Effect to Quince's 1984 score of 77, his new score would be a 76. (V3, R377, 379). Under this instrument Quince would not meet the criteria for a diagnosis of mental retardation. (V3, R377). The WAIS-III (the most recent intelligence test administered to Quince) was normed in 1996. (V3, R381-82). By applying the Flynn Effect to Quince's 2006 score of 79, his adjusted score would be 76. (V3, R382). He testified that the differences among Quince's three scores are statistically insignificant. (V3, R383).

Dr. Oakland testified that the Flynn Effect is a sound theory in the scientific community and accepted in the psychology profession. (V3, R333, 339). However, the Flynn Effect is not applied to every case to adjust an IQ score. (V3, R343). For example, a revision would not be made to an IQ score in a "longitudinal study" - a study where several intelligence tests are administered to the same person over time. (V3, R344; V4, R453). Quince's IQ tests, according to Oakland, were not longitudinal.[9] (V4, R511).

[FN9] Dr. Oakland was not asked and did not explain why the three intelligence tests administered to Quince over

time are not at least the equivalent of a longitudinal study. (V4, R455-57).

Further, the data used for the Flynn Effect is based on group data and cannot be applied to a specific individual. (V3, R346-47). Specifically, Dr. Oakland said, "we cannot with a hundred percent certainty apply it to an individual." (V3, R354; V4, R452, 456). He said it applies mainly to persons with lower intellectual abilities and has the opposite effect with persons within the gifted range. (V3, R355).

Quince was evaluated by four mental health professionals at the time of his trial: Dr. Barnard, Dr. Rosario, D. McMillan, and Dr. Carrera.[10]

[FN10] Drs. Barnard, Rosario, and Carrera are psychiatrists, Dr. McMillan is a psychologist. (V4, R494-95).

None of these doctors reported that Quince is mentally retarded. (V4, R437-38, 446-47). Dr. Oakland said that unless a person's IQ score was 100 or higher, he would assess the individual's adaptive behavior as part of his evaluation. (V4, R449, 510, 527-28). But, "measures of adaptive behavior shouldn't be administered to persons who are incarcerated." (V4, R464, 467, 478, 508, 513).[11]

[FN 11] On cross-examination. Dr. McClaren testified that the "retrospective adaptive assessment" done by Dr. Oakland is a non-standard use of the assessment instrument. (VS, R613-16).

Dr. Oakland interviewed Delores Jarrard, an employee of the Tri-treatment Rehabilitation Center, regarding Quince's behavior when he was sent there by the court system. Jarrard said Quince had a short fuse and she was afraid of him. (V4, R485, 486).

Quince told Dr. Oakland he reads the Quran in prison. He held a driver's license prior to imprisonment. He worked briefly as a dishwasher and for his uncle, (V4, R488-89). Dr. Oakland said the four experts who evaluated Quince at the time of trial would have had a better perspective on his mental state. (V4, R489-90). Dr. Oakland agreed mental retardation is not a lifelong condition for everyone. (V4,

R544). Under the DSM mental retardation criteria, if the IQ score falls outside the range of mental retardation, the IQ score prior to age 18 is irrelevant. (V4, R545).

The State's psychologist witness, Dr. Harry McClaren, administered the WAIS-III to Quince.[12] (V5, R558, 565).

> [FN12] Dr. McClaren also administered the WRAT, 3rd edition, and the SIB-R. (V5, R565). The WAIS-III was, at the time it was administered to Quince, the current version of that assessment instrument.

He testified that the criteria for mental retardation would be an IQ score of 70 or below according to the DSM-IV-TR. (V5, R566). Quince's IQ scores on previous tests were 79 in 1980 and 77 in 1987. In 2006 Dr. McClaren administered the WAIS-III which resulted in an IQ score of 79. (V5, R568). There were no factors which indicated inflated scores. (V5, R569-70). Dr. McClaren concluded Quince is not mentally retarded. (V5, R571).

Dr. McClaren said the Flynn Effect had no impact upon Quince's IQ scores since they stayed virtually the same across time. (V5, R574, 575, 587). And, even if the Flynn Effect was applied to Quince's IQ scores, he would still not meet the criteria for mental retardation. (V5, R585-86, 592, 654).

Dr. McClaren said that an adaptive behavior assessment instrument would not reflect accurate scores due to Quince's incarceration and the set of rules governing death row inmates. (V5, R578, 607). He said, "we would probably get low scores because we would not be [seeing him] doing items that are queried by these instruments." (V5, R578-79).

Dr. McClaren said if the Flynn Effect was applied to the three IQ tests given to Quince, the scores would reflect the following: 1980 score - 70 (plus a few decimals); 1987 score - 75; 2006 score - 75. (V5, R597-98). At a 95% confidence interval Quince's IQ, based on the 2006 testing, falls within a range of 75-83. (V5, R590-91)[13]

> [FN13] Under controlling law, a range of scores is not considered. However, even if a range of scores is considered, it does not change the outcome in the present case

> Moreover, the standard error of measure (of approximately 5 points) is not automatically subtracted from an IQ score. (V5, R634-35, 641), In applying the Flynn Effect to Quince's IQ Scores, Dr. McClaren concluded that it did not produce scores within the range of mental retardation. (V5, R639).

(V14, R2299-2305).

Quince appealed to the Florida Supreme Court which affirmed this court's denial of relief in an unpublished opinion issued on December 10, 2012. *Quince v. State,* 116 So. 3d 1262 (Fla. 2012) (Table).

Importantly, the Florida Supreme Court observed in affirming Quince's conviction on direct appeal:

> Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another. The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.

Quince v. State, 414 So. 2d 185, 186 (Fla. 1982)

GOVERNING CASE LAW

In *Hall v. Florida*, 134 S.Ct. 1986 (2014), the United States Supreme Court determined that Florida's interpretation of its statute defining intellectual disability was unconstitutional and might result in a violation of *Atkins v. Virginia*, 536 U.S. 304 (2002) where the standard error of measurement ("SEM") is not taken into consideration for IQ scores - most commonly from the Wechsler Adult Intelligence Scale (WAIS). In *Hall*, the United States Supreme Court explained why and when the SEM should be considered when evaluating a capital defendant's intellectual disability claim:

> The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. *See APA Brief 23* ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range"). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. *See DSM–5*, at 37 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).... [T]his involves a score of 65–75 (70 ± 5)"); APA Brief 23 ("For example, the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error)"). Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores

> jointly is a complicated endeavor. *See Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment* 286, 289–291, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013). In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Hall v. Florida, 134 S. Ct. 1986, 1995–96, 188 L. Ed. 2d 1007 (2014).

As a result, a defendant with a full scale score between 70 and 75 must be permitted the opportunity to present, and have considered, evidence concerning the second two factors in the intellectual disability analysis, namely, concurrent deficiency in adaptive behavior and manifestation of the condition before age eighteen. *See Hurst v. State*, 147 So. 3d 435, 441 (Fla. 2014) (emphasis added); *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); §921.137, Fla. Stat. (2012); *In re Henry*, 757 F.3d 1151, 1158, 1161 (11th Cir. 2014); *see also Mays v. Stephens*, 757 F.3d 211, 217-19 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 951 (2015) (rejecting claim that *Hall* required states to define adaptive functioning deficits in any particular manner). The Supreme Court ultimately held that Florida should not have precluded Hall from presenting other evidence of his intellectual disability based solely on a full scale score of 71.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Quince has undergone intelligence testing on three separate occasions. Each intelligence assessment utilized the version of the Wechsler Adult Intelligence

Scale that was current at the time of testing. In 1980, on the Wechsler Adult Intelligence Scale ("WAIS") Quince obtained a full scale score of 79. In 1984, on the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") he obtained a full scale score of 77. In 2006, on the Wechsler Adult Intelligence Scale-III ("WAIS-III") he attained a full scale score of 79. The Court finds that none of these scores are within the tests' acknowledged and inherent margin of error, and the defendant was not precluded from presenting additional evidence of intellectual disability, including testimony regarding adaptive deficits. Accordingly, Quince's evidence is not consistent with a finding of intellectual disability. *See Hall v. Florida*, 134 S. Ct. at 2001. Quince, unlike Hall, has consistent IQ scores above the 70 to 75 point-range central to the analysis in *Hall.*

Quince previously argued that it was appropriate for this Court to deduct points from his IQ scores to account for the standard error of measure. The Supreme Court of Florida specifically rejected this approach in *Herring*. Likewise, given the consistency in Quince's scores over time, it seems that such a deduction would be inappropriate even if it were in keeping with Florida law. Quince also suggests the deduction of points from his full scale IQ score pursuant to the Flynn Effect. The Court conducted a *Frye* hearing and held that the Flynn Effect is an acceptable scientific principal for application in a court of this State. Having had the opportunity to thoroughly review *Herring*, however, the Court is also

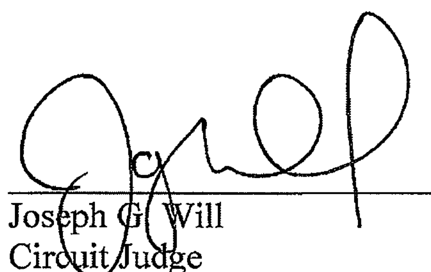
convinced that it would be clear error to apply the Flynn Effect to adjust an IQ score in an *Atkins* setting. It is worthy of repetition that Quince would not be entitled to relief even if the Flynn Effect were applied in his case.

For the foregoing reasons, Quince is not entitled to any relief under *Hall*. As the Florida Supreme Court noted, the consensus of experts was that Quince was of "dull normal or borderline intelligence but not intellectually disabled." *Quince v. State,* 414 So. 2d 185, 186-187 (Fla. 1982). Nothing within Quince's Renewed Motion presents this court with grounds to overturn its earlier findings.

Quince's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution is hereby denied.

The Defendant is notified that he has 30 days from the entry of this order in which to perfect any appeal.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 28th day of December, 2016.



Joseph G. Will
Circuit Judge

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J. Whited 12/28/16
Judicial Assistant

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

Appendix G.

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

STATE OF FLORIDA,
Plaintiff,

v.

CASE NO. 80-00048CFAES
Capital Postconviction Death Penalty Case

KENNETH DARCELL QUINCE,
Defendant.
_______________________________/

ORDER FOLLOWING MAY 9, 2016 HEARING

THIS CAUSE came before the Court on the Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203 and § 921.137, Florida Statutes and the State's Motion to Dismiss Renewed Motion for Determination of Intellectual Disability as a Bar to Execution. The Court held a hearing on May 9, 2016. Having heard argument from the parties, the Court finds as follows:

The Defendant previously filed a motion to bar execution due to intellectual disability, on which the Court held an evidentiary hearing. The Court issued a final order denying the Defendant's previous motion on November 7, 2011. On May 21, 2015, the Defendant filed his Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203 and § 921.137, Florida Statutes, in light of *Hall v. Florida*, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014). The State filed a response and Motion to Dismiss on July 6, 2015. The Defendant filed a reply on February 17, 2016.

After hearing argument from the parties at the hearing held May 9, 2016, this Court determined that the *Hall* opinion should be given retroactive effect. The Court will hear further argument from the parties on To Be Determined, 2016, based upon the record evidence, on

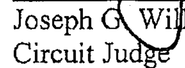
the Defendant's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203 and § 921.137, Florida Statutes. Over the Defendant's objection, this Court will apply the "clear and convincing evidence" standard, pursuant to Fla. Stat. § 921.137(4), in determining whether the Defendant is intellectually disabled.

Accordingly, it is:

ORDERED AND ADJUDGED that the State's Motion to Dismiss Renewed Motion for Determination of Intellectual Disability as a Bar to Execution is hereby DENIED.

IT IS FURTHER ORDERED that the parties will present further argument to the Court on To Be Determined 2016.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 17th day of May, 2016.



Joseph G. Will
Circuit Judge

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Appendix H.

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

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

Quince suffers from significantly subaverage general intellectual functioning.

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

[9] This Court found that the **mandatory IQ cutoff of 70 violated established medical practices in two ways**: first, by taking "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence," and second, by relying on a "purportedly scientific measurement of the defendant's abilities"- his IQ score - without recognizing that the measurement itself has an inherent margin of error, resulting in a ranged score rather than a single numerical value.
[10] 134 S. Ct. 1986.
[11] The WAIS-III also had an error in the normative sample leading to scores 2.34 points too high even at the time of norming. This would lead to a range of 69-79 if taken into account, which is in line with the scores reported on the other WAIS

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DEATH PENALTY CASE

Appendix I.

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

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

instruments.

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

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

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

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