CASE NO. 18-5018

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH DARCELL QUINCE

Petitioner,

v.

STATE OF FLORIDA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

I. Whether This Court Should Exercise Its Certiorari Jurisdiction To Review The Florida Supreme Court's Fact-Based Decision Finding That Quince Failed To Establish A Claim Of Intellectual Disability When The Range Of His IQ Scores, Even When Factoring In The Standard Error Of Measurement, Failed To Demonstrate Significantly Subaverage Intellectual Functioning And When Quince Failed To Demonstrate Deficits In His Adaptive Behavior?

II. Whether This Court Should Exercise Its Certiorari Jurisdiction To Review The Florida Supreme Court's Application Of The Clear And Convincing Standard To A Determination Of Intellectual Disability?

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The decision of the Florida Supreme Court is reported at *Quince v. State*, 241 So.3d 58 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on January 18, 2018. (Pet. App. A). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

Facts of the Direct Appeal Case

In Petitioner's direct appeal case, the Florida Supreme Court summarized the facts of the case as follows:

> In December of 1979, the body of an eighty-two-year-old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

> Based upon a fingerprint identification, Appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased.

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

On January 17, 1980, a grand jury returned a three-count indictment against Quince for first-degree murder, sexual battery, and burglary of a dwelling. Quince subsequently entered a plea to first-degree murder and burglary of a dwelling.[1] Quince waived a sentencing jury, and the sentencing hearing was held on October 20, 1980.

Mental Health Testimony During the Sentencing Hearing

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

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

[1] The sexual battery count was dismissed because it was the underlying felony for the murder offense.

or emotional disturbance at the time of the offenses, that Quince appreciated the criminality of his conduct, and that Quince had the capacity to conform his conduct to the requirements of the law.

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

Dr. Barnard disagreed with Dr. McMillan's report. Specifically, Dr. Barnard noted that Dr. McMillan's report concluded that while Quince had a borderline level of intelligence, Quince was not intellectually disabled. Dr. Barnard also disagreed with Dr. McMillan's assessment that "neurological damage is implied in borderline level and borderline intelligence," because there was no data in Dr. McMillan's

report to support her assessment. Regarding Dr. McMillan's assessment equating Quince with an eleven-year-old child, Dr. Barnard said that similar issues exist in highly intelligent persons that did not receive any schooling. Thus, in his opinion, it was wrong to equate Quince to being a child, because that would lead to the conclusion that Quince functions as a child in every area, when the law evaluates competency for specific areas and functions. Dr. Barnard did not see any signs that Quince had a neurological disorder.

The Florida Supreme Court affirmed Petitioner's convictions and death sentence. *Quince v. State*, 414 So. 2d 185, 188-189 (Fla. 1982). Quince's sentence became final on October 4, 1982, when this Court denied Quince's Petition for writ of certiorari. *Quince v. Florida*, 459 U.S. 895 (1982).

Quince continued to seek relief from his convictions and sentence through postconviction litigation. *Quince v. State*, 477 So. 2d 535 (Fla. 1985) (affirming denial of postconviction relief); *Quince v. State*, 592 So. 2d 669 (Fla. 1992) (remanding for evidentiary hearing on claim alleging trial counsel conflict of interest); *Quince v. State*, 732 So. 2d 1059, 1060 (Fla. 1999) (affirming denial of conflict of interest claim following remand).

Petitioner filed an amended petition for writ of habeas corpus in the United States District Court which was denied and ultimately affirmed by the Eleventh Circuit Court of Appeals. *Quince v. Crosby*, 360 F.3d 1259 (11th Cir.), *cert denied*,

Quince v. Crosby, 543 U.S. 960 (2004).

2004 Postconviction Proceedings

On November 1, 2004, Quince again sought postconviction relief in the circuit court, and filed a motion for determination of intellectual disability. The circuit court held a hearing on May 12, 15-16, 2008, and November 3, 2008.

The defense presented testimony from Dr. Thomas Oakland, a psychologist at the University of Florida. In evaluating Quince, Dr. Oakland relied upon materials written by Dr. James Flynn, the Adaptive Behavior Assessment System II ("ABAS"), the user's guide for the intellectually disabled published by the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and the comprehensive manual for the Scales of Independent Behavior-Revised "SIB-R." Based on all the data provided to him, in a report dated on April 22, 2008, Dr. Oakland concluded that Quince was intellectually disabled.

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

Dr. Oakland said that three intelligence tests were administered to Quince. The first WAIS test was administered to Quince in 1980, and Quince received a full scale score of 79. The second WAIS test was administered in 1984, and Quince

received a full scale score of 77. The last WAIS test was administered in 2006, and Quince received a full scale score of 79.

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

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

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

certainty.

Moreover, Dr. Oakland had no reason to believe that the 1980 WAIS test was administered improperly. He also said that if the Flynn Effect was applied to the 1984 WAIS test, Quince's revised score would be 75. Applying the Flynn Effect in 2006, Quince's revised score would also be 75.

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

Dr. Oakland also admitted that none of the four doctors who evaluated Quince in 1980 found that Quince was intellectually disabled.[2] Dr. Oakland also evaluates an individual's adaptive function irrespective of the individual's IQ score, but admitted that IQ scores of 77 and 79 are inconsistent with a diagnosis of intellectual disability.

[2] The evaluations were conducted by Dr. Bernard, Dr. Rosario, Dr. McMillan, and Dr. Carrera.

The State's expert witness, Dr. Harry McClaren, was a licensed psychologist in Florida and Alabama, who specialized in forensic psychology. Dr. McClaren evaluated Quince to determine whether Quince was intellectually disabled. After reviewing Quince's records, Dr. McClaren concluded that Quince was not intellectually disabled.

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

As to adaptive deficits, Dr. McClaren said that there is no test or assessment designed for incarcerated individuals. Thus, if an adaptive assessment is performed on an incarcerated individual, the result from the assessment would not be an accurate reflection on the individual's true adaptive abilities, given the individual's setting. As to the adaptive deficit score reflected in Dr. Oakland's report, Dr. McClaren questioned the validity of the score, and said that it was not an accurate

reflection of Quince, in light of Quince's IQ scores. Furthermore, Dr. McClaren said that there was no scientific basis to support Dr. Oakland's retrospective assessment, where Dr. Oakland interviewed Quince's family members to determine whether Quince's alleged deficits in adaptive functioning manifested prior to Quince's eighteenth birthday. He also said that such an assessment is a misuse of the instrument used in the assessment.

At the conclusion of the hearings, the trial court entered an order denying Quince's motion for determination of intellectual disability, and found that Quince did not demonstrate that he is intellectually disabled.

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

> Quince has not scored 70 or below on an IQ test. The three IQ tests taken by Quince-each the current version of the Wechsler Adult Intelligence Scale when administered-produced scores of 79 on his 1980 test, 77 on his 1984 test, and 79 on his 2006 test . . . [c]ompetent, substantial evidence supports the trial court's conclusion that Quince did not demonstrate that he is mentally retarded by clear and convincing evidence. None of the witnesses testified that they know for certain that Quince had been given an IQ test prior to 1973 or what Quince scored on that test. Therefore, Quince's argument that the trial court erred in not concluding that he had scored below 70 on an IQ test prior to 1973 based on the lay witness testimony lacks merit.

Quince v. State, 116 So. 3d 1262, 1 (Fla. 2012), *cert. denied, Quince v. Florida*, 134 S. Ct. 2695 (2014).

Renewed Motion for Determination of Intellectual Disability

On May 21, 2015, Quince filed a "Renewed Motion for Determination of Intellectual Disability as a Bar to Execution," requesting the circuit court to revisit its prior order denying his motion in light of *Hall v. Florida*, 134 S.Ct. 1986 (2014). A hearing for Quince's motion was held on May 9, 2016.

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

The trial judge acknowledged that in Quince's first motion for determination of intellectual ability, he based his denial of Quince's motion solely on Quince's IQ scores, without considering Quince's evidence regarding his adaptive deficits. The trial court believed that under *Hall*, trial courts were required to review all three prongs of the intellectual disability test, rather than deciding the issue on one particular prong. The trial court concluded that in light of *Hall*, the court would grant further review of Quince's claim that he was intellectually disabled.

On December 28, 2016, the trial court entered an order denying Quince's Renewed Motion for Determination of Intellectual Disability as a Bar to Execution. The Florida Supreme Court affirmed the lower court's denial of relief. *Quince v.*

State, 241 So. 3d 58, 62–63 (Fla. 2018) (revised opinion). (Pet. App. A).

Quince now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

QUESTION 1

There Is No Basis For Certiorari Review Of The Florida Supreme Court's Decision Finding That Quince Failed To Meet His Burden Of Proof Of Establishing Intellectual Disability As The Court Consistently Applied This Court's Precedent To The Disputed Facts And Found That Quince Did Not Have Significantly Subaverage Intellectual Functioning And Deficits In His Adaptive Behavior.

INTRODUCTION

Quince alleges in his petition that the Florida Supreme Court disregarded this Court's pronouncements in *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), when rejecting his intellectual disability claim. Contrary to Petitioner's assertion, it is clear the Florida Supreme Court properly followed this Court's diagnostic framework when analyzing Quince's intellectual disability claim. Significantly, following this Court's decision in *Hall*, Petitioner was provided with the opportunity to present the post-conviction court with additional evidence in support of his previously rejected intellectual disability claim and he failed to present any such evidence. The state postconviction court had previously heard extensive testimony regarding Quince's intellectual scores on multiple standardized intelligence tests and assessed evidence regarding his adaptive behavior. Following this Court's decision in *Hall*, both the state postconviction court and the Florida Supreme Court agreed that

Quince failed to establish that he had significantly subaverage intellectual functioning and concurrent deficits in his adaptive behavior. There is no conflict between this Court's intellectual disability cases and the Florida Supreme Court's decision. Furthermore, there is no conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state court of last resort. As such, Quince has failed to offer any persuasive reasons for this Court to grant certiorari review.

A. The Florida Supreme Court Correctly Determined That Quince Did Not Suffer From Significantly Subaverage Intellectual Functioning Based On His Multiple Full Scale IQ Scores Of 75 Or Above

This Court left the definition of intellectual disability to state legislature and state courts in *Atkins*.[3] In *Hall*, this Court noted that Florida's statute conforms with clinical definitions of intellectual disabilities. Nonetheless, *Hall* imposed an additional requirement that courts consider the "standard error of measurement" of an IQ test in evaluating the first prong of a three- pronged test. See *Hall*, 134 S. Ct. at 1994. Neither the decision in *Hall* nor the decision in *Moore* were dictated by the holding in *Atkins*, which held only that the Eighth Amendment prohibits imposition

[3] *Atkins*, 536 U.S. at 317 (leaving to the states the "task of developing appropriate ways to enforce the constitutional restriction" as this Court had done in the area of insanity citing *Ford v. Wainwright*, 477 U.S. 399 (1986)); *Hall*, 134 S.Ct. at 1989 (noting that "*Atkins* did not give" states "unfettered discretion" to define intellectual disability); *Moore*, 137 S.Ct. at 1048 (stating that although *Atkins* and *Hall* left the definition of, and procedures for determining, intellectual disability to the states, their discretion was not "unfettered").

of the death penalty on intellectually disabled defendants and specifically refused to endorse any particular procedure for determining who, among those claiming to be intellectually disabled, were members of that class.

Under Florida's three-prong test for intellectual disability, a defendant must demonstrate "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen." *Glover v. State,* 226 So.3d 795, 808 (Fla. 2017) (citing *Salazar v. State,* 188 So.3d 799, 811 (Fla. 2016); Fla. R. Crim. P. 3.203; and § 921.137(1), Fla. Stat. (2013)). "Significantly subaverage general intellectual functioning" is defined as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." *Jones v. State,* 231 So.3d 374, 375 (Fla. 2017) (citing§ 921.137(1), (2015)).

The Florida Supreme Court has consistently interpreted subaverage general intellectual functioning as an IQ score consisting of 70 or below. *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009). Hence, an IQ score above 70, even after applying the standard error of measurement, is insufficient to establish subaverage intellectual functioning. See *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (holding that defendant whose IQ scores were above 70 after applying the standard error of measurement failed to show significant subaverage intellectual functioning). Quince's IQ scores

consisted of 79, 77, and 79. After applying the five-point standard error of measurement to each of Quince's IQ scores, all of his IQ scores are still above the 70 threshold. Thus, applying *Wright*, Quince cannot meet the first prong of showing subaverage intellectual functioning, as his IQ scores, even after applying the standard error of measurement, fall outside the range of intellectual disability.

The views of medical experts do not ''dictate'' a court's intellectual-disability determination. 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*, 137 S. Ct. 1333 (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 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).

This Court in *Moore* struck Texas' definition of intellectual disability because it did not comport with any clinical definition. At issue in *Moore* was the state

appellate court's adherence to factors for assessing intellectual disability long abandoned by the medical community and factors which were the invention of the state court "untied to any acknowledged source." *Moore,* 137 S .Ct. at 1044. Texas' definition was, in this Court's words, "wholly nonclinical." *Moore,* 137 S. Ct. at 1053. Additionally, the *Moore* Court also noted that states retained "some flexibility" in the definition of intellectual disability and the *Hall* Court explained that the psychiatric community does not "dictate" the legal definition. *Moore,* 137 S.Ct. at 1052; *Hall,* 134 S.Ct. at 2000; *see also Hall,* 134 S.Ct. at 2006 (Alito,J., dissenting) (noting that tying Eighth Amendment law to the views of professional associations that often change would "lead to instability" and "fuel protracted litigation").

Conversely, in the instant case, the state courts were informed by experts from both parties, assessed the evaluations conducted, and made credibility findings all consistent with the accepted definition of intellectual disability found in the Diagnostic and Statistical Manual of Mental Disorders IV. This Court determined that the Texas court completely failed to inform itself of the medical community's diagnostic framework. No such failure occurred in Quince's case.

Although Quince argues that many jurisdictions have approved accounting for the Flynn Effect in assessing IQ scores and thus the Flynn Effect should be applied in an *Atkins* setting, it is important to note that Quince's own expert, Dr. Oakland, testified that the Flynn Effect should not be applied to individuals like Quince, who

have had multiple examinations over a period of time, also known as a longitudinal study. Furthermore, Dr. Oakland admitted that there is no way of knowing whether the Flynn Effect has impacted any particular individual's IQ score, and the application of the Flynn Effect is based on an expert's own assumption that it applies, instead of any actual data indicating that the Flynn Effect has impacted an individual's IQ score.

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

Furthermore, while the *Hall* decision requires trial courts to consider the standard error of measurement for IQ scores that would fall within the intellectual disability range once applied, there is nothing in the opinion to support the proposition that trial courts should first apply the Flynn Effect and then subtract the standard error of measurement from the already-adjusted IQ score. Indeed, Dr. McClaren specifically testified that it would not be standard practice to do multiple

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

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

Quince insists that there is no bright-line cut-off for intellectual functioning. But there is a bright-line. *Hall* merely adjusted the bright-line rule to include the statistical error of measurement (SEM) of five points. [4] The *Hall* Court increased the line from 70 to 75 to account for the SEM in recognition of the fact that an IQ

[4] And the *Hall* Court was being generous when it created a statistical error of measurements of± five points since most of the statistical error of measurements for the standard IQ tests are actually two to three points, not five points. For example, the SEM at 95% confidence interval for the WAIS-IV is two or three points, not five points. If the actual SEM for a particular IQ test is available, it should be used rather than the *Hall*± 5 point default SEM.

score of 75 could actually represent an IQ of 70 due to the SEM. The IQ score must be within the SEM, which is under 76, to warrant inquiry into the other prongs or an evidentiary hearing. A capital defendant who does not have a single score within the SEM range necessarily is not intellectually disabled. Not a single one of Quince's three different IQ scores was below 75. Contrary to Quince's argument, there is still a bright-line cut-off after *Hall* and *Moore*, and Quince fails to meet it. Since the Florida Supreme Court's application of *Hall* is based on adequate and independent state grounds, certiorari review should be denied.

Quince Failed To Satisfy All Three Prongs Of The Intellectual Disability Test

Although the trial court was not required to examine all three prongs of the intellectual disability test, given that Quince's IQ scores fell outside the range of intellectual disability even after the standard error of measurement is applied, the trial court did in fact examine all three prongs of the intellectual disability test, contrary to Quince's assertions. Moreover, the evidence showed that Quince failed to satisfy all three prongs of the intellectual disability test as required under the law. There is no conflict between this Court's decision in *Hall* and the Florida Supreme Court's decision in this case. Certiorari should be denied.

In *Hall*, this 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). 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, 21719 (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). This Court 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.

Florida's test for intellectual disability is a conjunctive test. *Glover v. State*, 226 So.3d 795, 808 (Fla. 2017) (explaining Florida's three-prong test for intellectual disability requires a defendant to demonstrate: "(1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; ***and*** (3) manifestation of the condition before age eighteen" citing § 921.137(1), Fla. Stat. (2013)) (emphasis added). If the defendant fails to prove anyone prong of the three

prongs, the defendant will not be found to be intellectually disabled. *Quince v. State, 241 So.3d 58 (Fla. 2018)* (citing *Salazar v. State,* 188 So.3d 799, 812 (Fla. 2016)).

As with any other conjunctive multi- prong legal test, the failure to meet any one of the prongs means the claim fails. For example, in the multi-prong test for ineffective assistance of counsel established by this Court in *Strickland v. Washington,* 466 U.S. 668 (1984), a petitioner must establish both prongs. *Id.* at 700 (stating that the failure "to make the required showing of ***either*** deficient performance or sufficient prejudice" defeats the ineffectiveness claim) (emphasis added). Courts are not required to address both prongs of the *Strickland* test. *Id.* at 697 (stating that there is no reason for a court deciding an ineffective assistance claim to "address both components of the inquiry if the defendant makes an insufficient showing on one"). Likewise, there is no reason for a court to address all three components of intellectual disability, if the defendant makes an insufficient showing on one of the components.

The *Hall* Court stated that this "Court agrees with the medical experts that when a defendant's IQ test score falls ***within*** the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall,* 134 S.Ct. at 2001 (emphasis added). The *Hall* Court observed that "when a defendant's **IQ** test score falls ***within*** the test's acknowledged and inherent margin of error, the

defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001 (emphasis added). If the defendant's "IQ score is ***75 or below*** the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." *Id.* at 1996 (emphasis added). The *Hall* Court concluded that "an individual with an **IQ** test score ***between 70 and 75*** **or** ***lower,*** may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Id.* at 2000 (emphasis added).

If there was any doubt about the reach of *Hall,* this Court clarified it in *Moore v. Texas,* 137 S. Ct. 1039 (2017). The *Moore* Court wrote that *"Hall* instructs that, where an IQ score is ***close to,*** but above, 70, courts must account for the test's standard error of measurement." *Id.* at 1049 (emphasis added). This Court in *Moore* explained that "in line with *Hall,* we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls ***within*** the clinically established range for intellectual-functioning deficits" *Id.* at 1050 (emphasis added). The *Moore* majority explained that ***"because*** the lower end of Moore's score range falls at or below 70," the Texas courts ***"had*** to move on to consider Moore's adaptive functioning." *Id.* at 1049 (emphasis added).

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 ("WAISIII") he attained a full scale score of 79.

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*.

Quince's argument that the testimony by his experts below went unrefuted, and that the evidence overwhelmingly supports his contention that he is intellectually disabled, is not entirely accurate. First, Quince's IQ scores fell outside the range of scores for intellectually disability. Second, although the State did not put on witnesses to refute Quince's contention that he suffers from deficits in

adaptive functioning and that the deficits manifested before the age of eighteen, the State did not need to put on witnesses to refute his claims, as the evidence showed that the testimony by Quince's own witnesses rebutted his claims of deficits in adaptive functioning.

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

At the motion hearing, Dr. Oakland testified that there were no standard assessments for incarcerated individuals like Quince, and that the assessments he used for Quince were not appropriate for him, given his incarceration status. Moreover, five doctors, Dr. Stern, Dr. Bernard, Dr. Rosario, Dr. McMillan, and Dr. Carrera, all found that Quince was not intellectually disabled. In fact, Quince's own

expert at the penalty phase, Dr. Stern, testified that individuals like Quince could function quite well in society, and that there was no reason to believe that Quince was mentally retarded.

The evidence showed that there was no scientific basis to support Dr. Oakland's retrospective adaptive assessment, where he interviewed family members to form an opinion about Quince's alleged adaptive deficits as a minor. The trial court who served as the factfinder weighed the credibility of the witnesses and their testimony, and ultimately concluded that Quince did not establish this prong of the test. See *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981) (stating that the trial court's role is to evaluate the credibility of the witnesses and their testimony, and that appellate courts should not reweigh the trial court's findings on the credibility of witnesses and their testimony).

The views of medical experts do not ''dictate'' a court's intellectual-disability determination. ''Psychiatry is not … an exact science.'' *Ake v. Oklahoma*, 470 U.S. 68, 81, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). ''[B]ecause there often is no single, accurate psychiatric conclusion,'' we have emphasized the importance of allowing the ''primary factfinder[ ]'' to ''resolve differences in opinion …on the basis of the evidence offered by each party.'' *Id*. Because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability

and continue to fuel protracted litigation. *Hall v. Florida*, 134 S. Ct. 1986, 2006 (2014).

Quince insists that *Hall* requires States to conform the legal definition of intellectually disabled to the views of the medical community. However, this assertion is contrary to the express language in *Hall* itself. This Court specifically stated that the work of the medical community "do[es] not dictate the Court's decision," and that the "legal determination of intellectual disability is distinct from a medical diagnosis." *Hall*, 134 S. Ct. at 2000. Instead, it merely stated that it was appropriate for legal authorities to "consult" and be "informed" by the views of the medical community. *Id.* at 1993.

This Court clarified that "*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, 1048 (2017). These clinical guides are ''designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning.'' DSM–5,[5] at 25. They do not seek to dictate or describe who is morally culpable—indeed, the DSM–5 cautions its readers about ''the imperfect fit between the questions of ultimate concern to the law and the information contained'' within its pages. *Id.*

[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th Ed. 2013) ("DSM-5").

In the instant case, trial court granted a second review of Quince's case to specifically examine all three prongs of the intellectual disability test. Following the evidentiary hearing, the postconviction court found that *Quince* had failed to establish significantly subaverage intellectual functioning and deficits in his adaptive behavior, and the Florida Supreme Court properly affirmed that ruling on appeal. *Quince v. State*, 241 So.3d 58 (Fla. 2018). Respondent submits that the Florida Supreme Court correctly followed this Court's precedent and the relevant clinical standards when analyzing Quince's claim, and as such, certiorari review of this factual dispute is inappropriate.

The Florida Supreme Court's analysis of Quince's intellectual disability claim was the result of a fact-specific review and credibility determinations which were decided adversely to Quince and which were consistent with this Court's precedent and prevailing clinical standards. The correctness of the state court's ruling on this claim is a factual determination with no implications beyond the parties involved in this case, mandating the denial of certiorari review. See *generally United States v. Johnston*, 268 U.S. 220, 227 (1925) (noting that the Court does "not grant a certiorari to review evidence and discuss specific facts"). This Court is "consistent in not granting certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." *Rice v. Sioux City Mem'l Park Cemetery, Inc*., 349 U.S. 70, 79 (1955).

QUESTION 2

There Is No Basis For Certiorari Review Of The Florida Supreme Court's Application Of The Clear And Convincing Standard To Quince's Intellectual Disability Claim As The State Court Resolution Was Not Contrary To *Atkins, Cooker, Medina* or violate the Eighth or Fourteenth Amendments.

Quince argues that the clear and convincing standard used by Florida in determining intellectual disability is in violation of the Eight and Fourteenth Amendments. In *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), this Court held that the Eighth Amendment's prohibition against cruel and unusual punishment bars the execution of an intellectually disabled defendant, but this Court left to the States "the task of developing appropriate ways" to identify intellectually disabled defendants and to enforce this constitutional protection. As this Court noted in *Bobby v. Bies,* 556 U.S. 825,831 (2009), the *Atkins* decision "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled. The determination of the standard of proof to be applied for the intellectual disability determination is a question this Court has left to the states and is primarily a matter of state law. Consequently, certiorari review should be denied. See *Florida v. Powell*, 559 U.S. 50, 57 (2010)(If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision."); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (emphasizing that "it is not the

province of a federal habeas court to reexamine state-court determinations on state-law questions[] . . .” and that “a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”) (citing 28 U.S.C. § 2241; and *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (*per curiam*)).

It is undisputed that this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002) stated that “[m]entally retarded defendants in the aggregate face a special risk of wrongful execution.” *Atkins*, 536 U.S. at 321. However, there is no language in the *Atkins* decision to indicate that the clear and convincing standard runs afoul of the *Atkins* decision, or any constitutional provision. Instead, this Court left to the states the task of deciding how to comply with the Eighth Amendment’s prohibition on the execution of intellectually disabled individuals. Accordingly, Section 921.137(4), Florida Statutes provides, “[i]f the court finds, by clear and convincing evidence, that the defendant has an intellectual disability . . . the court may not impose a sentence of death . . . .” Thus, the Florida legislature has determined that the clear and convincing standard should be used when deciding issues of intellectual disability.

Although Quince classifies the clear and convincing standard as a high standard, this is also how this Court has defined the clear and convincing standard. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). Although Quince argues that other states use the preponderance of the evidence

standard, that argument does not mean that the clear and convincing standard is unconstitutional. Indeed, Quince's argument has no bearing whatsoever on the constitutionality of the clear and convincing standard. This very point was stated in *Leland v. Oregon*, 343 U.S. 790 (1952), where this Court held that the beyond a reasonable doubt standard for a defendant's insanity claim did not violate the constitution. The Court stated:

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

Id. at 798. (Emphasis added). Notably, Georgia's "beyond a reasonable doubt" standard has not been held to violate *Atkins* or any constitutional provision. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011). Accordingly, if the "beyond a reasonable doubt" standard does not violate *Atkins* or any constitutional provisions, Florida's lower standard of clear and convincing evidence likewise does not violate *Atkins*.

Arizona, like Florida, requires a defendant to prove by clear and convincing evidence that he or she is mentally retarded. [6] In *State v. Grell*, 135 P.3d 696 (Ariz. 2006), *cert denied*, *Grell v. Arizona* 127 S. Ct. 2246 (2007), one issue before the court was the constitutionality of the clear and convincing standard. *Id.* at 701. In concluding that the clear and convincing standard does not violate the Eighth Amendment, the Arizona court began its analysis by first noting that the *Atkins* Court declined to specify what procedures should be used identify intellectually disabled individuals. *Id*. The Arizona court noted that this Court based its decision to decline to specify what procedures should be used due to the lack of consensus regarding which individuals are, in fact, intellectually disabled. *Id.*

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

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

for a death sentence, the right to a pretrial determination of mental retardation, and the right to present witnesses, cross-examine witnesses).

Florida's clear and convincing standard does not violate the Eighth Amendment. Florida has the same procedural safeguards built into its death sentencing scheme as Arizona. Pursuant to Florida Rule of Criminal Procedure 3.203, a defendant may file a pretrial motion for determination of intellectual disability as a bar to execution. Florida's scheme also permits for the defendant to present expert testimony in support of his or her claim, and also gives the defendant the right to cross-examine the State's experts. Moreover, a defendant can still present evidence relating to his or her mental state in mitigation under the preponderance of the evidence standard. Hence, clear and convincing standard does not violate the Eighth Amendment.

Finally, Quince's contention that individuals with mild intellectual disability are harder to identify, does not lead to the conclusion that the clear and convincing standard violates *Atkins*. Moreover, even if it is true as Quince contends, that individuals with mild intellectual disability are harder to identify, that argument is still insufficient to warrant consideration to grant review. A similar argument made by Quince was raised and rejected in *Hill*.

In responding to Hill's contention that Georgia's beyond a reasonable doubt standard would result in the execution of intellectually disabled individuals, the

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

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

Id.

Indeed, Quince's argument is based on the science identifying the intellectually disabled individual, not the standard. As recognized by the court in *Hill*, changing the standard would not change the fact that an individual with mild intellectual disability is harder to identify, nor would it eliminate the risk of executing an intellectually disabled individual.

In sum, the underlying question presented by Petitioner on the standard chosen by the State of Florida for the intellectual disability determination is a matter of state law.

The Florida Supreme court decision does not conflict with any of this Court's precedent or present this Court with an important or unsettled question of constitutional law. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and

state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). States are free, within constitutional parameters set by this Court, to establish the burden of proof for an intellectual disability determination. The Constitution does not require uniformity among the states. Nothing in the petition justifies the exercise of this Court's certiorari jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny the request for certiorari review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 30th day of July, 2018, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by email and U.S. mail to: Raheela Ahmed, ahmed@ccmr.state.fl.us, Maria Christine Perinetti, Perinetti@ccmr.state.fl.us, Lisa Marie Bort, bort@ccmr.state.fl.us, Capital Collateral Regional Counsel, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907.

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