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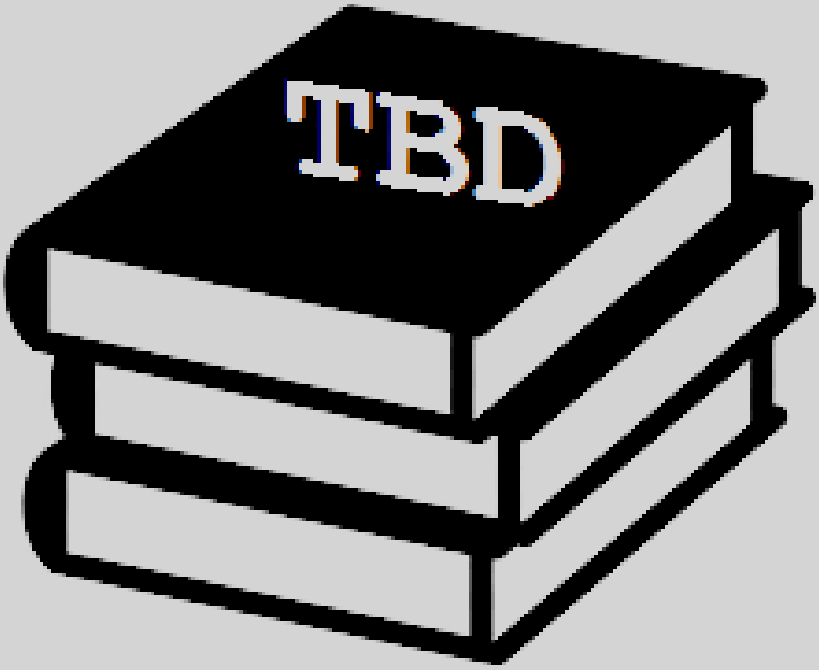

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IN THE SUPREME COURT OF FLORIDA

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

[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.*

[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

[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.

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[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
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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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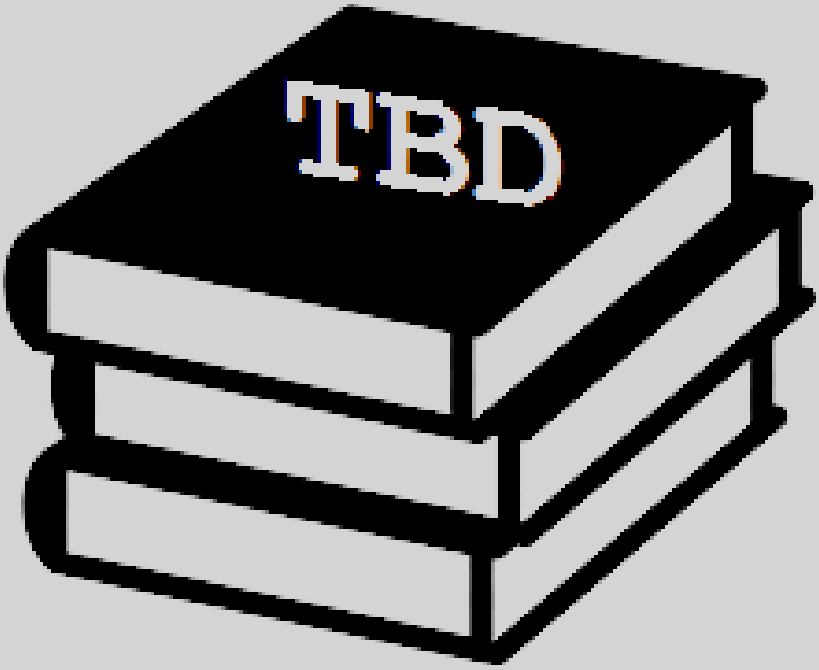

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